The Special Tribunal for Lebanon: the colourful Rubik's Cube of International Criminal Justice

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On 14 February 2005, the international community got struck by the murder of the former Lebanese Prime Minister Rafiq Hariri. Facing the incapacity of Lebanon to deal with an inquiry which already appeared to be long and complex, and influenced by the United States of America and France, the United Nations used the opportunity of this event to spread its pacifying action in the Near-East. For the first time in this region it was suggesting the creation of special tribunal to judge the murderers, put an end to the amnesty policy, and bring back peaceful relations within the Lebanese population. With this program, both precise and ambitious on the national and regional level, a strong impulse was to impose the first conventional tribunal capable of leading transitional justice in the Arab world.

Nine years later, the Special Tribunal for Lebanon seems doomed to failure before mastering its work of art. National and international observers can't help but point out from the clumsy approach in the accusation of the murderers to the pathetic theatre of all the judicial masquerades.

Moscow had initiated the tradition of pre-made trials, and the lesson has been learned since. The high number of scandals and rumours has weakened the credibility of the entire mechanism of justice.[1] The trust from the Lebanese population is missing, even within the Rafiq Hariri's Sunnite community.[2]

Very few commentators still dare to support a trial which decision is already predicted. The reputation is set of a tribunal, not made to lead an inquiry on an attack, but to target Syria and the Hezbollah at any cost. The former French ambassador in Lebanon, Gérard Emié, was even speaking of "an intuitive responsibility" of Syria.[3] Hence, each element must find its place in the predetermined objective: the STL, like a Rubik's Cube, is twisting and turning every colour according to its fashion, with more or less delicateness. But the goal is not easy, and each of the six faces has spots which must be washed off.

I. A shabby constitution

1 NABA René, « TSL : Une justice sous influence », http://www.renenaba.com/le-tribunal-special-sur-le-liban-une-justice-sous-influence/

2 http://www.al-akhbar.com/node/208008

3 NABA René, « Lettre ouverte aux djihadistes de tous les pays », http://www.renenaba.com/lettre-ouverte-aux-djihadistes-de-tous-les-pays/

Since the beginning of its creation, the tribunal has shown its singularity by avoiding all the judgements of international criminal law up to now, and all the similar acts taken by Arab states in a context of regional military conflicts.

Even in its source, the STL goes against legal logic. The UN has responded to the call for help from Lebanon, to be able to sentence murderers, considering that the Lebanese judicial system was unable to deal with such an inquiry while protecting the witnesses, the accused and the judges. But in the creation process, two major obstacles have appeared.

The first one came from the impossibility for the UN Security Council to intervene directly on an individual attack. The Council had to convince that it was not a simple attack but a crime against humanity. But the gap between the two notions could not be filled so easily.

After several tries, the Security Council adopted another strategy, and decided to justify its intervention and base the prosecution on the definition of terrorism provided by the Lebanese Criminal Code.[4] It seemed a rather secure move, as there is no harmonious definition of terrorism in International Criminal Law. By the clever use of national texts, the UN was allowing itself to directly intervene in a sovereign country, according to Chapter VII of the UN Charter.

Then came the second obstacle: such an intervention requires that the agreement between the UN and the State would get the approval of the parliament, prior to ratification by the President. The strong opposition to the creation of the tribunal, and the fact that President Emile Lahoud still had strong links with Syria made it clear that following the process would be a serious risk to see the international tribunal project delayed or even cancelled. So why not have a simple consultation instead? A simple petition, signed by a majority of members of parliament, was sent to the Security Council, which declared it sufficient to establish the resolution 1757 creating the STL.[5]

Facing the criticism of a forced ratification, obtained by pressures on many political figures, the answer was that these pressures would have been useless, as neither the

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4 Rapport du Secrétaire général sur la création d'un tribunal spécial pour le Liban S/2006/893 du 15 Novembre 2006, Article 25

5 FASSBENDER Bardo, (2007), "Reflections on the International Legality of the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, Volume 5, Issue 5, page 1103

President nor members of Parliament alone could obtain the approval and ratification.[6] But in this case, and if no force could seriously jeopardize the creation of the STL, nothing could justify such a deviance from the ratification process.

II. The window-dressing of trials in absentia

If the possibility of in absentia trials in International Criminal Justice has appeared at the end of the Second World War, with famous trials like these of Martin Bormann, Heinrich Boere, or the massacre of Oradour-sur-Glane, it has been strongly rejected since.

European texts, like the European Convention on Human Rights in 1950 or the International Covenant on Civil and Political Rights in 1966, have all imposed the presence of the accused at the trial. It expressed the desire to consider the presence of the accused as a requirement to a fair trial. The Special Tribunals for Former Yugoslavia and for Rwanda has the same vision: only an absence of the accused during the debates was allowed, if he or she was disturbing the trial, and if he or she could see the trial on a screen in another room. The article 63 of the Rome Status chose the same orientation for the International Criminal Court, and stressed the fact that the accused had to be present at least at the beginning and at the end of the trial.

In the Lebanese Code of Criminal Procedure, the trial in absentia is a heritage from French law, presented in the articles 282 to 294. The absence is defined as the situation in which the accused has been informed by any means of the occurrence of a trial against him, but refuses to appear in the courtroom. He can be declared fugitive and tried in absentia.[7] This vision is closer to this of the Nuremberg trials, or to the one still available in French law, than to this of International Criminal Law.

The STL chose in its status three main points of Lebanese law: the accused can be judged in absence if he waived his right to be present or can not be apprehended by national authorities, and all the means have been taken to inform him of the accusations against him.

Even in this case, he still has the ability to choose his defence and council.[8] If he doesn't, and if he doesn't accept the judgement given in absentia, he can be retried by the same tribunal. Other articles from Lebanese law, for example on the confiscation of the

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6 KNUDSEN Are., (2012), *Lebanon After the Cedar Revolution*, Are Knudsen and Michael Kerr, Londres, page 226

7 Article 283 from the Lebanese Code of Criminal Procedure

8 Article 22 of the status of the Special Tribunal for Lebanon

property of the accused during the trial, or the possibility for his family to ask for an amount of money during the instruction, have not been selected.

The STL does not precise why only certain specific articles have been picked up. In an arbitrary way, the general idea of an in absentia trial has been maintained, despite all the technical and procedural rules around it.

The arbitrary becomes suspicious when the highest international authorities justify the necessity to apply national law by the desire to maintain a link between international criminal justice and the transitional justice in the country. The argument is clumsy, as in absentia trials are virtually never applied in national law. As most of the countries having this possibility in their corpus of law, Lebanese justice considers in absentia trials as an ultimate option which should be avoided as often as possible.

The notion of in absentia trials remains the image of a fake trial, unable to bring the psychological value of justice. Practically, the choice to delay the trial will be preferred, as it is the case for the trial of the former minister Michel Samaha, accused of organizing the transport of explosives from Syria to Lebanon for political assassinations, and whose co-accused is still at large.

The in absentia trial is clearly not part of a tradition of law in Lebanon, which could not be ignored or avoided by the UN. On the contrary, the STL imposes it despite all the legal habits of the country. In this case, four persons are accused at various levels of participating in the assassination of Rafiq Hariri: Salim Ayyash, Hussein Oneissi, Assad Sabra, Moustapha Badreddine. This latter is an iconic figure, as he is militarily in charge of the Hezbollah.[9]

Having never been apprehended by the Lebanese authorities, their trial will be held in absentia, according to the decision of the STL.[10] An unused possibility of national law is hence instrumented to impose a trial in absentia, unanimously rejected by all the other international tribunals for the past decades. For example, the status of the International Criminal Tribunal for Former Yugoslavia rejected this possibility, as been incompatible with the developments of Human Rights.

III. The masquerade of judicial justifications.

9 http://english.al-akhbar.com/content/hariri-tribunal-threatens-raise-un-complaint-against-lebanon
10 http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0112

The use of in absentia trials required unavoidable justifications. Apart from the surprising necessity to apply national law at any cost, a strong basis could secure the integration of such rules in a tribunal issued by the UN Security Council.

In his first report on the creation of a special tribunal for Lebanon, the General Secretary of the Security Council explains that by authorising trials in absentia, the STL is taking into account the jurisprudence of the European Court of Human Rights.[11] He is referring mostly to the affair Krombach contre France,[12] from 13 February 2001. But such a reference has no legal basis in this case. The STL is the creation of the UN Security Council, which is not bound to European law whatever its source is.

The other actor to the convention is the State of Lebanon, a non-European State which does not have to apply European jurisprudence. The fact that the STL is hosted by the Netherlands is not a good argument, as chronologically, the General Secretary made this comment in 2006, a long time before The Hague was chosen to host the tribunal.

In the core of what constituted the STL, the doubt remains within the mind of the employees, and the mistake becomes a fault. In a decision on the quality of the protection and the security of the victims and witnesses, the judge Sir David Baragwanath explained that articles 12(4) and 17 would insure this protection, provided it was not contrary to the rights of defence and the requirements of a fair trial. But he also explained that the article 22 allowed the possibility to have a judgement in absentia "in the interest of the victims or the public".[13]

But this sentence, he is referring directly to the concept of international law, which consists in excluding the accused only if he disturbs the trial. But this affirmation gives a sense that the law does not provide, as article 22 never gives this possibility. Furthermore, it maintains the permanent doubt on the real content of this article and its understanding by the highest authorities of the tribunal, as it is clear that the judge Baragwanath have here a mistaken vision of the status of the STL.

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11 Report of the General Secretary on the creation of a special tribunal for Lebanon, S/2006/893 from 15 November 2006, Articles 7 and 9

12 Affaire Krombach contre France n°29731/96 rendu par la troisième section de la Cour Européenne des Droits de l'Homme, le 13 Février 2001

13 http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.stl-tsl.org%2Findex.php%3Foption%3Dcom_k2%26Itemid%3D350%26id%3D2216_b8e3c191c74c572164184a9a458e3c8b%26lang%3Den%26task%3Ddownload%26view%3Ditem&ei=yCTmU43cLcbG0QXapoCwAQ&usg=AFQjCNHEC-3OapFNXaGTk0Iiz4P6zBccGA&bvm=bv.72676100,d.d2k

IV. The "flou artistique" of a potential new judgement

The principle of a new trial in case the accused were later apprehended is simple. But the conditions for this new trial have never been clarified, for example in the situation where the accused has waived his right to be present, but did not manage to designate a defence council. Paola Gaeta already pointed out the uncertainty of the article 5(1) of the status, which forbids any national court to judge a person for acts for which he or she would have already been judged by the STL, and questions the efficiency of such a text in the matter of in absentia trials.[14]

The value of such a decision in a situation of transitional justice is questionable, as this trial has no practical application, but still blocks any national procedure in the meantime. Considering the social and political situation in Lebanon, such an approximation could be a great danger on the judicial and social level. Furthermore, it has a very limited significance in the long run, as the STL won't be operating for ever, and beyond its mandate, new judgements would be impossible if the accused were apprehended. Should we conclude that the possibility of being retried is not seriously offered, and nothing is made to apply it?

V. The paralysis of the national judicial system

The article 2 of the STL declares its superiority over Lebanese law, even though the detail of this hierarchy remains unexplained. No amnesty should be given for a crime under the jurisdiction of the tribunal. Such a measure is surprising as these acts are criminalised only under Lebanese law, and only Lebanese authorities can determine if the amnesty can be given.

In this fight against impunity, the article 5(2) authorises an exception to the principle *non bis in idem*. A person who would be already judged by a national court can be judged again for the same facts by the STL, if the latter considers that the independence or the impartiality of national authorities are not guaranteed. There is a total supremacy of an international tribunal on national tribunal: it can block any national decision, and ever cancel decisions already applied.

This choice of international criminal justice goes against all the initiatives that have been taken before. In a context of transitional justice, international authorities are traditionally

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14 GAETA Paola, (2007), "To Be (Present) Or Not To Be (Present), Trials in Absentia before the Special Tribunal for Lebanon", *Journal of International Criminal Justice,* N°5, page 1169

trying to encourage the involvement of national authorities in the transition process. Far from paralysing the global process, it is in fact helping the spreading of the judicial phenomenon.

It has been the case in particular for the Gacaca trials in Rwanda, which constituted another layer of justice complementary to this provided by the International Criminal Tribunal for Rwanda.

In the case of Lebanon, the STL is going in the opposite direction in controlling the entire process, in a wider perimeter than this of the case itself.

VI. The silence of International Criminal Law

The first report from the General Secretary was stressed out the use of the "highest norms of international criminal procedure". Apart from the articles targeting trials in absentia, the STP is applying certain articles of the Lebanese Criminal Code on the repression of terrorists acts, crimes against the life and the physical integrity of people, and illicit associations and non-revelation of crimes, and the articles 6 and 7 of the Lebanese law from 11 January 1958 on the sanctions for sedition, civil war and confessional conflict.

But what is the place of International Criminal Law in this judicial system? The most similar case is this of the Special Tribunal for Sierra Leone, which had the same juridical nature as it was also made by a convention between the State and the UN. In this case, the status of the tribunal was dividing crimes in two categories: the International Criminal Law was sanctioning certain crimes, which were followed by other crimes forbidden by national law, like the abduction of little girls for immoral purposes.[15]

If International Criminal Law was remaining paramount, national law could be used as long as it was not contrary. The coexistence of the two sources of law was real. In the case of the STL, national law is used quasi exclusively, and International Criminal Law is virtually absent from the process. Yet, the STL keeps the power to exclude certain aspects of national law, and stresses in its article 22 that if applicable law is the Lebanese law, its application is restricted to crimes defined in the article 2 of the status. Hence, it can exclude certain sentences like death penalty or force labour, authorised by Lebanese law.

15 Status of the Special Tribunal for Sierra Leone, from the 16 January 2002, article 5

We are here in front of a corpus of law with no cohesion, made sometimes by an authoritative STL, other times by a weak tribunal barely blinking in front of its own contradictions.

VII. Conclusion

Since its creation, the STL has had one main rule: never wasting time. Mediocre excuse if needing any, it allows to do everything in a hurry, even the clumsiest manipulations. Painting the Rubik's Cube in the chosen colour to get the chosen effect raises no problem of consciousness any more. Muhamad Mugraby was pointing out the "one-time exception"[16], which seems to multiply infinitely.

Every time the tribunal meets an obstacle, the most basic rules on international law are evicted. Of course, it makes it easier to handle, but the lost credibility will probably leave scars on the transitional justice in Lebanon, and in the regional tensions as a whole.

In front of a Lebanon purposely made childish and unable to insure a quality trial, only a universal and spotless justice could be imposed. The intervention of the international community could have had a positive echo only if it had done better than the national authorities themselves. But it is the rule of selectivity which is now overwhelming, and as international justice is unable to do better, it is becoming ridiculous.

The pressure on this trial is such that it can not lead to anything else than a symbolic execution. The announced verdict imposes the total forbidding of the slightest nuance in the decision taken, and in front of this torn justice, there will be no half-measure.

If the accused are acquitted, it will exonerate the Hezbollah and Syria, and will tarnish the reputation of the tribunal. To escape this humiliation, the hand of justice is not holding the sword of equity any more, but the string of a guillotine.

16 MUGRABY Muhamad, (Juillet 2008), "The Syndrome of One-Time Exceptions and the Drive to Establish the Proposed Hariri Court", *Mediterranean Politics*, Volume 1, Number 2, pages 171-193