"Statute? What Statute?" – Norm hierarchy and judicial law-making in international criminal law at the example of the Special Tribunal for Lebanon

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Introduction

Since 1945, international criminal justice has been one continuous construction site, an expression of the attitude of international stakeholders and policy-makers that favours temporary solutions to contemporary problems. Even with the creation of the ICC that has not really changed. The history of international criminal procedure until the advent of the ICC has substantially been one of cobbling together building blocks from different traditions in order to create a new *sui generis* system based on extrapolations from Article 38(1) of the Statute of the ICJ and the history of Nuremberg, Tokyo and the other post-war military tribunals. This eclectic approach has unfortunately been combined with a plethora of regulatory lacunae left to the judges of the tribunals by the international (for want of a better word:) law-making bodies, a criticism that applies to the ICC as well, albeit clearly to a lesser degree. The 'sui generis' system seems nonetheless to have had mainly adversarial overtones.[1] Even in cases where the statute of a tribunal, such as the Special Tribunal for Lebanon (STL), provides for the adaptation of a civil law model,[2] the court's judges in their rule-making power have, as will be shown below, blindsided the drafters of the Statute and introduced a way for the court to revert to what is in essence an adversarial model. Interesting as the developments in international criminal law may appear if viewed as a 'legal laboratory", the fact remains that courts, which deal with putting people away for many years for horrendous crimes, must first of all strive for legal certainty. This paper will argue that the current unprincipled state of affairs is unsatisfactory, and that a

[1] See, for example, the admission by Judge O-Gon Kwon of the ICTY in a speech in 2011, in Göran Sluiter et al. (eds.), International Criminal Procedure – Principles and Rules, OUP, 2013 at 1417.

[2] The Cambodian Court, the ECCC, has a judge-led trial model as far as questioning of witnesses is concerned that is similar to that of the Lebanese law – see Sluiter, ibid., at 703 and the text below.

move to a system is necessary which protects the defence and keeps the prosecution in check by, among other things, ensuring sanctions for premature assurances[3] of trial-readiness – an issue brought into sharp relief at the STL in the controversy about joining the case of a fifth accused at the eleventh hour to that of the four fist accused when the trial was weeks away, when their case had been developing for far over a year and the identity of the fifth accused had been known all along as well.

The temporary nature of the present system which mainly uses adversarial models is based to a large extent on an unprincipled reliance on supposedly "ready-made" and "tried and tested" solutions from as well as the experience of staff employed at previous tribunals. The use of the adversarial model is thus not based on a principled evaluation of its usefulness and effectiveness in the international context but on a default attitude of the lawyers creating and populating international tribunals, and possibly the diplomatic community in the wider sense. As will be shown at the example of the Lebanon Tribunal, sometimes the opposing intentions of the drafters of a Statute are undermined by adversarially-minded judges. The author does not advance the suggestion that the adversarial model as such lacks capacity for permanence, and if the international justice system had used the inquisitorial approach in the same manner as it has the adversarial one, the same comments would apply *mutatis mutandis*. Yet, as things stand at the moment, the temporary quality is *factually* tied to the adversarial model.

A case in point – the STL

To clarify the point made about the STL and temporariness, it bears remembering that this tribunal was not meant to address international offences such as war crimes, crimes against humanity or genocide, but a simple if major terrorist attack in Lebanon and that it should apply substantive Lebanese law. The international involvement was merely due to the inability of the Lebanese judicial system to deal with this kind of violence itself. That did not stop the STL Appeals Chamber with its former President Cassese as reporting judge from trying to

[3] There may, however, also be different understandings of what the function of an indictment is. In the ICTY it seemed that it had almost the effect that an authorisation by the ICC Pre-Trial Chamber for the initiation of an investigation has; in civil law countries such as Germany, for example, the indictment is the final product of the investigations.

internationalise the domestic law on terrorism in its (in)famous Rule 176*bis* decision[4] and from muddying the waters by introducing international concepts of participation and multiple charging when the need for that was not entirely clear from looking at the domestic law. The procedural part was left in a mixed state but especially on the conduct of the trial proceedings there was an interesting reference in the STL Statute, namely Article 20(2):

> Unless otherwise decided by the Trial Chamber *in the interests of justice*, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.[5]

This mode of questioning is clearly reminiscent of the judge-driven civil law model which applies in Lebanese law, unless the interests of justice require something else. The Rules of Procedure and Evidence (RPE) drafted by the judges provide for a means of avoiding the statutory approach, and it is the reasoning that is interesting.

> Rule 145 Questioning of Witnesses
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> (A) Where the Trial Chamber *considers that the file submitted by the Pre-Trial Judge enables it to adopt the mode of proceeding outlined in Article 20(2) of the Statute*, after the opening statements of the Parties and of any victim participating in the proceedings, each witness shall first be questioned by the Presiding Judge and any other member of the Chamber, then by the Party that has called the witness, and subsequently cross-examined by the other Party, if the other Party elects to exercise its right of cross-examination. The witness may also subsequently be re-examined by the calling Party.
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> (B) Where the Trial Chamber considers that the file submitted by the Pre-Trial Judge *is not such as to enable it to adopt the mode of proceeding envisaged in Article 20(2) of the Statute*, after the opening statements of the Parties and of any victim participating in the proceedings, the witnesses called before the Trial Chamber shall first be examined by the Party that called them, then cross-examined by the other Party, if the other Party elects to exercise its right of cross-examination.

[4] *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism. Conspiracy, Homicide, Perpetration, Cumulative Charging of 16 February 2011 – online at http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis – but see *Prosecutor v. Ayyash et al.*, Case No. STL-ll-01IPT/ACIR176bis, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, of 18 July 2012, para. 37, where the Appeals Chamber – this time without Judge Cassese – already adopted a more flexible approach.

[5] Emphasis added.

> The witness may also subsequently be re- examined by the calling Party. The Presiding Judge and other members of the Trial Chamber may at any time ask questions.
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> (C) The Trial Chamber *may decide to depart from the modes of proceeding provided for in paragraphs (A) and (B) wherever it considers that this is required by the interests of justice*.[6]

Note that Article 20(2) talks about the interests of justice as the only criterion for deviating from the normal order of things. Rule 145(A) introduces a new concept, namely the question whether in effect the prosecution dossier submitted by the pre-trial judge as the 'case file' is sufficient for the trial chamber judges to run the trial themselves. It already deviates without any apparent justification from the clear order established in Article 20(2): Court – prosecution – defence; the Statute does not refer to who called the party. It is in substance identical with the rules under Lebanese criminal procedure, namely Articles 180 and 181 of the 2001 Code of Criminal Procedure (CCP) for proceedings before the single judge and Articles 255 – 260 CPP for trial before the full criminal court; Article 260 CPP even restricts the right of the parties to ask questions of witnesses in that they have to be made through the presiding judge. The CPP is available on the STL's website and, indeed, one of the Lebanese appellate judges was responsible for its publication at the time the CPP was passed.

Rule 145(B) then takes the bold step to say that if the case file is not sufficient for the judges to proceed as under Article 20(2), the chamber may revert to adversarial mode. In other words, if the file does not provide a sound basis to the standard required to follow the procedure as foreseen in the hiearchically superior Statute, another procedure can be followed which divests the trial chamber of the control of the presentation of the evidence and shifts control to the prosecution. This is in substance nothing else but allowing the prosecution – via the pre-trial judge – to declare trial readiness when it is in fact not ready, because if it were, then the file would contain all the material the trial chamber would need to proceed as ordered by Article 20(2). How this can be in the interests of justice is unclear, to say the least. It might in extreme cases also mean that even though the case file was as complete as possible at the time, the judges could revert to adversarial mode if none of them was comfortable with or experienced in running

[6] Emphasis added.

a pro-actively judge-led trial.[7] Given the systemic or professional provenance of many international judges in general that would not seem to be an unreasonable inference.

In the context of the STL there would have been enough experienced Lebanese judges who could have used the Lebanese system effortlessly. The presiding judge did not have to be an international one. No-one suggests that the Lebanese judges would be biased merely *qua* being Lebanese – otherwise they should not be on the bench under the criteria of Article 9(1) of the Statute. Yet, the Lebanese judges would have been uncomfortable with and lacked experience in the largely adversarial set-up brought about by the RPE. Why this was done when Article 28(2) of the Statute states that in drafting the RPE

> the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial

remains open to question. Why not simply adopt the relevant sections of the CPP and make sure they comply with the afore-mentioned standards? Maybe because that would have made the ubiquitous 'tribunal-hopping' of staff and prosecutors from other tribunals more difficult? Maybe because the first President in charge of the STL had already had the experience of drafting a set of RPE at another international tribunal and it seemed less burdensome to adapt these to the STL's environment – with the innovation of a separate pre-trial (but not investigating) judge already having been secured in the Statute? But then the one major controversial item in the STL and CPP arsenal of procedural tools from a human rights standards

[7] In this context, it is not uncommon to hear the question "How does this affect justice?". This question seems to proceed from an undefined and almost nebulously philosophical idea of justice that is distinct and uncoupled from any of its real-world incarnations within a particular procedural framework and is akin to asking whether the trial would not be "fair" otherwise. The answer to that is, firstly, that, as we have accepted, both adversarial and inquisitorial models can achieve comparable levels of fairness but as we shall argue, they do not reach the same degree of efficiency. Secondly, and more to the theoretical point, it is the procedural model as set out in a statute etc. that defines the ambit of the powers of the prosecution and the judges, as well as the rights of the defence and the victims. It is dangerous to tamper with a balanced system based on whims arising from perceived individual injustices, as this tends to upset the balance and lead to inroads into a party's legal positions, and more often than not those of the defence. Finally, although positivism does no longer have a very favourable press these days when the famous Radbruch Formula about unjust law is trotted out regularly, it bears reminding oneself that to rely on a notion as abstract as that of "natural justice" for use – in an individual case – as a substantive corrective criterion to procedural rules laid down by (a written) law is at the end of the day nothing short of allowing judges to discard such laws if they deem them unfair or unwieldy, beyond the reach of the method of accepted teleological interpretation. Substance without form is arbitrariness.

point of view, namely the trial *in absentia*, had also already been anchored in Article 22 of the Statute – for obvious reasons, because no-one at the time really anticipated that any of the suspects would ever attend trial, not least since Hezbollah had always made that clear. The Statute itself is thus somewhat contradictory with respect to what it regards as the 'highest standards of international criminal procedure', when all other international courts and tribunals, including the European Court of Human Rights, have always shied away from the procedure *in absentia* like, as it were, the Devil from holy water. Finally, what the exact content of Rule 145(C) RPE is, remains equally uncertain: neither judge-led nor adversarial but …? The judges of the STL's Trial Chamber in the case of *Ayyash et al.* predictably reverted to the adversarial mode when the trial began on 16 January 2014[8].

Conclusion

This brief excursion into the law of just one tribunal has hopefully shown what effects the 'draft-as-you-go' approach as an expression of temporariness can entail. It opens the building of the administration of justice up to intruders with separate agendas and to political negotiations that would appear to fit and fix the temporary emergency and to fill the temporary gaps in the law needed for the fixing. A proper and detailed Code of International Criminal Procedure applicable to any and all international criminal courts and tribunals – and this author in the final analysis argues for nothing less – would mean a big step away from these constant uncertainties. After all, no-one would want to be faced with a justice system as it currently exists on the international level, were they to face trial at home even on lesser charges than genocide. In this context, the highest international justice standards must not fall below their highest national counterparts – and legal certainty is a fundamental one among their number.

[8] See *Prosecutor v. Ayyash et al*., Case No. STL-11-01/T/TC, Directions on the Conduct of the Proceedings, of 16 January 2014, online at www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/trial-chamber/f1326.