

Review of Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert, *The Special Tribunal for Lebanon, Law and Practice*, Oxford: Oxford University Press, 2014, 316 pp. xxi.

In the ever-expanding universe of international criminal justice, it is not uncommon to describe a category of institutions known as ‘hybrid tribunals’. Frequently the Special Tribunal for Lebanon would be placed within this rubric. Presumably hybrid tribunals sit somewhere between genuinely ‘national’ and genuinely ‘international’ courts. That is because they have legal features drawn from both national and international law. It is also explained by the presence of Lebanese nationals and so-called ‘internationals’ as judges, prosecutors and defense counsel.

The ‘hybrid’ classification has a whiff of intellectual laziness to it. When in doubt about how to describe something, the simple way out is to call it a ‘hybrid’, a ‘mixture’, a ‘mongrel’. A simple litmus test is to consider how the tribunal can be shut down. If this can be done by national law alone, as in the case of the Extraordinary Chambers in the Courts of Cambodia, then the institution is national in nature. If its future is determined by international treaty or agreement, then it must be international. That is certainly the case of the Special Tribunal for Lebanon, which will continue to operate whether or not the government of Lebanon remains supportive. Its proper classification, then, is as one of four temporary or *ad hoc* institutions established through the medium of the United Nations. The other three, of course, are the international criminal tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone.

Nevertheless, the Special Tribunal for Lebanon has some unique and unusual features. Rather than be labelled ‘hybrid’ it might be more appropriate to speak of it as ‘idiosyncratic’. Its subject-matter jurisdiction is, by its Statute, quite deliberately turned away from the international definitions, although that hardly discouraged its innovative Appeals Chamber from importing international law in order to define terrorism under Lebanese law. Its jurisdiction *ratione personae* is about as close as international criminal law comes to the *ad hominem*. Dealing with a part of the world where terrible atrocities abound, on a scale that greatly exceed the February 2005 assassination of Rafiq Hariri by several orders of magnitude, the establishment of the Lebanon Tribunal seems to highlight the profoundly political determinations involved in the selection of situations for international prosecution. This nourishes the critiques

of the international justice project for pursuing the agendas of ‘the victors’ and ignoring those that challenge their sensitivities.

Yet this odd institution is extraordinarily well-funded and extremely efficient. It has attracted some of the finest minds and the most expert practitioners in the discipline. Three of them, Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert, are the editors of this fine, authoritative collection of essays about the Tribunal. They have assembled a roster of well-regarded specialists to explore the various features of the institution. Without claiming to be comprehensive in scope, the volume has nevertheless covered the subject matter quite thoroughly, making it an invaluable reference on the subject. About the only thing missing is the preface that the late Antonio Cassese would surely have contributed had he not so tragically left his work at the Tribunal unfinished.

One of the contributors, Nicolas Michel, who was the legal advisor at the United Nations Secretariat when the Tribunal came into being, provides a blow-by-blow description of its establishment. This is the insider account *par excellence*. The birth of each one of the temporary or *ad hoc* tribunals has had some complex features but it is likely that more controversy surrounded the Special Tribunal than any other. This was due not only to the intrigues of Lebanese politics but also to the broader global environment, involving Lebanon’s neighbours and their great power benefactors. Professor Michel’s authoritative description of the process fills many of the gaps in our knowledge. A few details may still be missing, perhaps because of his own discretion. Notably, he explains describes the curious note that was appended when the text of the Statute was endorsed by the Security Council dealing with the relationship between crimes against humanity and terrorism. This unusual document was actually formulated by Professor Michel himself, a rare event in the United Nations.¹ As he explains in his chapter, his statement was provoked by the fact that ‘one member of the Security Council considered these sentences to be confusing’. He doesn’t provide further identification although the word on the street is that the troublemaker was a permanent member of the Security Council with important strategic interests in the region (that describes four out of five). And a military base in Syria.

¹ Statement by Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006, UN Doc. S/2006/893/Add.1.

One of the very controversial features of the Tribunal is trial in the absence of the accused. The precedent of Martin Börmann is held out to defend the possibility of *in absentia* proceedings by international tribunals. It is a lonely example, however, and the modern generation of international criminal justice institutions had entirely forsaken the idea. The statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda skirted the issue somewhat, whereas the Rome Statute of the International Criminal Court quite simply prohibits a trial in the absence of the accused. Recent case law has held presence at trial to be not only a right of the accused but an obligation. Until the Lebanon Tribunal began its activities, the only contemporary institutions to apply international criminal justice in the absence of any real defendants were the moot courts so beloved of post-graduate international law students.

This book contains two chapters that address the *in absentia* issue, both of them by academics who are known for their critical insight. The first, authored by Dov Jacobs, reflects on the dynamics of a tribunal with no defendants. He questions whether ‘the current defence teams, which have been chosen, hired, and are remunerated by the STL through the Defence Office, rather than by the accused, have developed a loyalty to the institution’ (p. 117). At the other international criminal tribunals, in addition to contending with combative prosecution lawyers and severe judges, the defence lawyers have to manage their sometimes difficult and demanding clients. If there is ever any hint institutional loyalty at the expense of the perceived interests of the accused, the latter will give defense counsel a poke in the ribs, or worse. There is no danger of such solicitor-client tension at the Special Tribunal for Lebanon.

The other chapter on *in absentia* proceedings is by Professor Paola Gaeta. She reviews the history of the debate on the subject, going back to the beginnings of the International Criminal Tribunal for the former Yugoslavia. There was some unhappiness in 1993 and 1994, essentially from continental jurists, that the Statute of the International Criminal Tribunal appeared to exclude any possibility of *in absentia* trials. Eventually, a poor and rather ephemeral substitute emerged in the form of *ex parte* hearings to confirm an indictment pursuant to Rule 61 of the Rules of Procedure and Evidence. Paola Gaeta, a protégée of Antonio Cassese, has her own insider knowledge about this debate that is reflected in her comments on the Lebanon Tribunal. She reports on discussions in the plenary of judges, citing a ‘Memorandum

on trials by default' that President Cassese submitted to his colleagues. The footnote cites 'Personal Notes on Debates' of Judge Cassese, with the indication that these are 'on file with author'.

Because its procedural regime is much more closely aligned with the Romano-Germanic model than that of the other *ad hoc* tribunals, the Special Tribunal for Lebanon accords a large place for the participation of victims. This is entirely missing in the statutes of the other institutions, with the notable exception of the International Criminal Court. The chapter on victim participation is written by Emma Pountney together with Howard Morrison, who continues to serve simultaneously as a judge at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court.

Amal Alamuddin and Anna Bonini write about the United Nations investigation of the Hariri assassination that eventually led to the establishment of the Special Tribunal for Lebanon. John Jones and Misa Sgonec-Rozej discuss the rights of suspects and the accused, as well as the role of the defence. John Jones is counsel for one of the defendants at the Tribunal. There is a stimulating introductory chapter by David Tolbert, a greatly experienced professional of international criminal law who now directs the International Centre for Transitional Justice.

The concluding chapter, on the legacy of the Tribunal, is authored by Professor Harmen van der Wilt. He speaks to the 'legal legacy' of the Tribunal, finding this in its definition of terrorism. Although the Statute confines the Tribunal to Lebanese law, in reality it has become the international criminal tribunal for the crime of terrorism. Perhaps the test of its effectiveness will be whether legal development at the Special Tribunal for Lebanon can contribute to an enlargement of the list of core crimes at the International Criminal Court. Terrorism made the short list at the Rome Conference but did not find its way into the final version of the Statute. A revived attempt prior to the 2010 Kampala Conference had to be abandoned in the absence of sufficient consensus.

But Professor van der Wilt is also concerned about the broader historical and social context in which the Special Tribunal for Lebanon operates. He invokes some of the celebrated writers who have reflected upon the impact of international justice like Hannah Arendt and, much more recently, Lawrence Douglas. Here, the greatest threat to the Tribunal's legacy is the changing reality in the region itself. Viewed a decade after the Hariri assassination, Lebanon seems to be in a very different place.

Even if Lebanon remains relatively stable, it is surrounded by frightening uncertainty. Even if the Special Tribunal for Lebanon had the potential to make a contribution to peace when it was first conceived, and in its early years, what the map of the region will look like when it finally renders its judgments is anyone's guess. That moment in time is still several years away, given the lethargic pace of international justice and the virtually inevitability that appeals of the trial judgment will be filed by both the Prosecutor and the phantom defendants.

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