

Introduction

This book is a study of the formation and operation of the “hybrid,” “internationalized,” or “mixed” tribunals that have come into existence over the past two decades and have operated (and in some cases continue to operate) in several different countries around the globe. It is intended as an introduction to these tribunals for scholars interested in the subject or for students trying to grasp their nature and function for an educational purpose. In this study, I do not expect much specialized knowledge of either the circumstances surrounding the creation of the tribunals, nor do I expect readers to be fluent in the legal issues underlying these institutions. Rather, I expect only a moderate understanding of global affairs as well as a minimal understanding of international law. My hope is that this approach will allow students and scholars, as well as other interested readers, access to a subject that spans decades of international politics and involves discussions of the thorny and dense subjects of international law, as well as some of the deeper moral dilemmas of international justice.

The hybrid courts represent a unique development in the history of international law and international criminal justice. While the border between “international” and “domestic” law has always been somewhat porous, and in many fields outright illusory, nowhere have the international and the domestic been so closely integrated in an institutional form as in these courts. Consisting of the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Serious Crimes Panel, Dili (SCPD), the Bosnia War Crimes Chamber (BWCC), the UNMIK Court in Kosovo, and the Special Tribunal for Lebanon (STL), these hybrid courts have sought to integrate foreign laws and personnel with domestic ones to different degrees and to different extents. Most directly this is done by having a portion of the judicial bench, that is, a number of the judges, come from outside the country in question, while the remaining judges are recruited from the domestic legal community. In addition, foreign prosecutors have played a key role in determining who is an appropriate target for prosecution in the tribunals and shaping what I describe as the “prosecutorial strategy”—the ways that prosecutors shape historical narratives about mass violence. Further, although the different bodies have been structured in different ways, each of them has also integrated some

set of international legal norms with their domestic counterparts in ways that are intended to be synergistic. This integration of international laws and personnel with domestic ones is what gives the hybrid courts their unique place in international justice.

Hybrid courts have largely been created as a sort of compromise position in response to a number of different concerns about the prevailing forms of international and domestic criminal justice. In particular, the hybrid courts must be seen in relation to the more properly international courts currently in existence: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), collectively known as the *ad hoc* international criminal tribunals, as well as in relation to the permanent International Criminal Court (ICC). These courts were created by recognized methods of international law, either through the Security Council using its Chapter VII powers to maintain international peace and security or through an international treaty such as the Rome Statute. They are staffed by international personnel who apply an unmediated form of international criminal law. These three courts are legally and institutionally distinct from the states under their jurisdiction and are in no ways creatures of domestic law.

In many ways it is precisely their international nature that made these larger courts not sought after responses to the conflicts we are focusing on here. While the “purely” international courts have been successful in their own way—they have at least prosecuted some of the major offenders in the various conflicts for which they were created—they nonetheless have displayed some significant weaknesses over the course of their existence. They have been extremely expensive endeavors, requiring large numbers of highly paid legal personnel as well as support staff, logistical expenses, and facilities. In addition to being massively over budget, the two *ad hoc* courts which were envisioned as short-term institutions have long outlived their expected life-spans, continuing to consume the donations given by their international backers as they lumber toward their terminus. While in each of the cases we look at in this text, courts akin to the *ad hoc* tribunals were proposed by interested parties but were invariably rejected. Clearly the international community’s experience with the *ad hoc* courts left many with a great reluctance to return to such a high-profile and high-cost approach.

Nonetheless, in each of the cases studied here, using a conventional domestic court was not a viable option either. The defendants in these cases were not ordinary criminals accused of minor crimes. More often than not, they were high-profile individuals who played a central role in mass atrocities: They were politically powerful when they were engaged in their alleged criminal activities and often had legions of followers who remained loyal to them even after they had been defeated. Some, such as those responsible for the violence in East Timor, had backers from a much larger and more powerful government situated nearby. Still others were themselves former heads of state. All of them were accused of the worst crimes in the world: genocide, war crimes, and crimes against humanity. Clearly the attempt to prosecute and punish such individuals creates unique political and institutional challenges, challenges that many states are unable to meet.

In all of the situations that we look at here, the states involved in these tribunals were uniquely bad candidates for conducting domestic trials for those who perpetrated mass violence. Most of these states remained too weak, economically and politically, to carry out the complex and far reaching procedures necessary for such high-profile offenders, having had their societies torn apart by intense conflicts that in most cases lasted several years. Many of the countries, such as Sierra Leone and Bosnia, had been ravaged by years of war and lacked the fiscal and intellectual resources to effectively run a criminal trial. Finally, in cases like Kosovo and East Timor, there was no state in existence at the time the trials were being considered, and the territories were under the governance of a UN authority. This means that, although an international trial was not supported by the broader international community, a purely domestic trial was similarly impossible. Yet there remained a strong need to find some measure of accountability for those responsible for the terrors that these countries had faced.

In some of the cases we look at, there was little confidence in the ability of the local government to conduct fair, impartial trials for defendants in such high-profile cases. Bitter ethnic fighting in Bosnia and Kosovo left a deep distrust in domestic justice institutions that were associated with “the other side” of the conflict. The conflicts ran too deep and touched too many lives for observers to believe that impartial procedures would be followed and a fair ruling would be proffered by an ordinary domestic court. Equally important, the international community (by this I mean the UN and foreign, mostly Western, governments) with vast political, military, and financial resources usually did not trust the local governments to deal with these accused individuals in a way that they deemed appropriate. These fragile governments crave international legitimacy and need international financial support to function, and inadequate trials that failed to live up to international standards of due process would clearly not help their cause. In some of these states, Bosnia in particular, international justice officials “stepped in” in response to what were perceived as abuses of due process by domestic courts. Weak governments that lack the resources for handling politically charged cases cannot always be expected to be “honest brokers” in criminal trials without some external check on how cases are prosecuted and adjudicated—or at least so much of the international community believed.

Along with these practical motivations for having a mixed tribunal is a very important, albeit, symbolic reason: Unlike a purely international court, a tribunal that is at least in part a domestic court can aspire to a form of legitimacy that foreign courts cannot provide. A court that is recognizably local, being conducted in indigenous languages and including significant numbers of local personnel, could have a better chance of being recognized as legitimate by the local populations who observe it. We might call this a matter of “ownership.” Rapoza describes ownership as:

The degree to which the national and international components “buy in” to the process [of criminal justice]. Ultimately, the degree to which each accepts and acknowledges its share of ownership in the tribunal will affect the allocation of responsibility, and thus accountability, within and for the criminal process. (Rapoza, 2006, p. 526)

Including a strong domestic presence in international cases allows local residents to claim ownership over these proceedings and their outcomes in a way that they do not in international proceedings. Further, these local personnel receive vital training and skills that would help them establish the rule of law in nations that were in desperate need of stability and development. At the same time, the international presence in the court helps to ensure skeptics that the court will function in a fair, impartial manner.

Practical and the normative considerations overlap in the international tribunals in a number of different ways, but clearly the point where they intersect most dramatically is in their financing. Throughout this book we see that funding issues have played a crucial role in the structure and operation of these tribunals. As many of the tribunals have had to rely on the contributions of states or on a cash-strapped UN to function, their work has often been shaped by financial concerns in ways that can be at once both understandable and problematic. States can withhold funds if they are unsatisfied with the directions the tribunals are taking. As a result, prosecutors have had to shape their strategies in response to financial concerns and skeptics have charged that the tribunals are either underfunded or are operating at the behest of their financial backers. While they are clearly cheaper than the more conventional international tribunals, they are not cheap and funding has proven to be a crucial influence over the lives of the various hybrid tribunals.

It follows from this that these institutions should first and foremost be understood as *political* institutions. While, as I have argued elsewhere the distinction between politics and law is largely an illusory one, these institutions were created largely to serve a number of different goals which are, for the most part, political in nature. (Fichtelberg, 2008) For some of the tribunals supporters, the tribunals were created to place the blame for a conflict clearly on the shoulders of one group and accrue the resulting political benefits. Others saw the tribunals as crucial for political stability—as a tool for transitional justice. Still others, such as much of the Cambodian leadership, saw the tribunal as part of a campaign to get into the good graces of the international community and help clear the way for international financial support. As we see, few of the actors behind these tribunals saw them primarily in terms of the traditional goals of criminal justice (such as deterrence, reform, or incapacitation) when they advocated for their creation.

Along with financial considerations, tribunals are also hamstrung by their reliance on the cooperation of states. None of these tribunals have extraterritorial enforcement powers and therefore cannot locate witnesses abroad conduct investigations or arrest an accused person living abroad.¹ Due to the nature of the conflicts, many defendants have fled in order to find shelter in a sympathetic state to live more or less openly under the protection of this state's government. As a result, the tribunals must convince a state to extradite a suspect or convince third party states to pressure the residing state to transfer the accused to the tribunal for prosecution. This is particularly challenging given the fact that many of these conflicts took place in poor, remote corners of the world and gained little public attention or con-

¹ See for example Peskin (2008).

cern in the richer, more powerful nations of the developed world. As we see, this means that, among other things, prosecutors must be especially clever in how they gain custody over defendants who are abroad.

However, whatever the aims of their supporters, the tribunals themselves are not designed to produce “political” outcomes. Criminal tribunals are created to determine the liability of specific people for specific actions and to give these defendants adequate opportunities to defend themselves against the charges. The legal process generally is not good at the proportionate distribution of blame: It focuses on violations rather than root cause and tribunals are bad at politics. For example, they are not good at developing broader historical narratives that may aid in transitional justice or at tailoring their outcomes to serve the interests of the political elites that support them. Many of these tribunals, such as the tribunal in East Timor saw its political support evaporate when it pursued cases that were politically inconvenient. In Sierra Leone, the prosecutor’s efforts to be evenhanded in prosecuting all sides of the conflict there led to a false equivalence: the crimes of the Revolutionary United Front (RUF) were much greater than those of the government forces and their allies, but both were prosecuted in equal numbers by the SCSL. Courts in general, and international courts in particular, are clumsy actors in the political realm. This tension between the political goals of their backers and the traditional goals of many of those working in the institutions is a predominant theme running through each of these institutions.

The Outlier: The Special Tribunal for Lebanon

All of the hybrid tribunals are designed to prosecute individuals responsible for large scale atrocities committed against a broad population base. All of these, that is, save one. The Special Tribunal for Lebanon is unique insofar as it was essentially created to prosecute the perpetrators of one crime: the assassination of former Lebanese Prime Minister Rafik Hariri in February 2005. This tribunal is unique not only in its limited subject matter jurisdiction but in addition, it is set amidst an elaborate and ongoing political drama for which the term “Byzantine” is an understatement. As of this writing, one major player in the Lebanese drama, Syria, is in the throes of a dramatic civil war and its leader (and one of the prime movers in the events surrounding Hariri’s murder [Blanford, 2006]) is threatened with political extinction and stands accused of using chemical weapons against his own people. Further, the STL has issued indictments against four Hezbollah figures but has not conducted any trials for these individuals, leaving any study of the tribunal incomplete. This makes the STL a unique case that is difficult to integrate into a broader analysis of the hybrid courts. The fact that the Lebanon court has such a strikingly limited jurisdiction indicates that this case and the tribunal are unique and should probably be the subject of an independent analysis.² All of this means that it is somewhat difficult to place this tribunal within the narrative and analytical framework that is been used here. Given its unique status it will largely be left aside.

² For an in-depth study of various aspects of the STL see Alamuddin et al. (2014)

A Note on Nomenclature

Each of these tribunals is independent from the others—there are no hard institutional links between them (though personnel sometimes go back and forth between them). As a result, each tribunal uses its own terminology to describe itself and its own set of names for the different bodies that make up their hybrid system. Thus, the ECCC refers to its judicial bodies as the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court. The United Nations Interim Administration Mission in Kosovo (UNMIK) court in Kosovo refers to the trial courts, and the special panel for serious crimes refers to panels. Other times, terms such as “tribunal,” “court,” and “chamber” are used more or less interchangeably. As these terminological differences mean very little in terms of the functioning of the various courts, I have not stuck faithfully to the appropriate titles for the different judicial bodies. Trial chambers are generally referred to as such (though sometimes more technical terms are used) and appellate chambers are generally referred to as such, regardless of their exact titles. In sum, the terms “courts,” “panels,” “tribunals,” and “chambers” will be used more or less interchangeably. Given that we are comparing a number of different bodies, if we stuck by the precise terminology used by the different courts, readers would likely be more confused than enlightened.

A Further Comment Regarding Dates

This book was largely written in 2013 and 2014. Many of the tribunals covered are still in operations and constitute “moving targets” of sorts. In particular, the ECCC has undergone a great number of changes over the course of writing this. Further, by the time this book is published, more changes will have undoubtedly taken place. I have done my best to keep this work as up-to-date as possible, but I encourage readers to investigate recent activities in this tribunal.³

As if to underline this point, as this book was going into production Khieu Samphan and Nuon Chea, the remaining defendants in Case 002 before the ECCC were convicted of crimes against humanity in one of the “mini-trials” into which their much larger charges divided. (Crothers and Naren, 2004) Further the prosecutors have charged several defendants in Cases 003 and 004 - a promising development. (UN-backed court charges, 27 March 2015)

³ The website for the ECCC is <http://www.eccc.gov.kh/en>. It is largely up to date, but further information can be gathered from the Cambodia Tribunal Monitor (<http://www.cambodiatribunal.org/>).



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