

Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*
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This work looks at seven so-called ‘hybrid’ or ‘internationalised’ tribunals established in recent times in order to combat impunity in cases where the most serious international crimes are alleged to have taken place. I say ‘so-called’ because the search for a precise definition of hybrid and internationalised tribunals occupies a significant part of the book¹ and requires intricate and delicate analysis. The author considers in detail the Special Court for Sierra Leone (‘SCSL’), the Special Tribunal for Lebanon (‘STL’), the International Judges and Prosecutors Programme in Kosovo, the Special Panels for Serious Crimes in East Timor, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia. These are the tribunals considered to fall within the category of hybrid and internationalised tribunals. The exclusion of a number of notable tribunals including, inter alia, the Nuremberg and Tokyo Tribunals, the Serbian War Crimes Chamber and the Lockerbie Court is a carefully considered choice. These latter tribunals are not considered to be ‘mixed tribunals’, notwithstanding the fact that they have both international and national elements. They are, however, discussed in order to use their differences from the hybrid and internationalised tribunals as a way of shedding light on the significant characteristics of the tribunals which are the focus of the study.

Prior to discussing the selected tribunals, the author spends significant time discussing the emergence of the international criminal justice system, from the prosecution of international crimes in domestic courts through the post-war period and the ad hoc tribunals to the International Criminal Court (‘ICC’).² While this is a testament to the author’s thoroughness, it is somewhat unnecessary. It is hard to believe that a reader searching for the level of detail provided on hybrid and internationalised tribunals in this work would not be aware of this historical background.

Having set out this background, the work describes the existing practice of each of the tribunals.³ This includes a helpfully concise introduction to the context of the conflict and the politics which led to the establishment of each tribunal and a discussion of their key features and jurisdiction. The varying contexts of their establishment, particularly the legal

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¹ Sarah Williams *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart, 2012) ch 4.

² Ibid ch 1.

³ Ibid ch 2.

and political aspects of the process, have led to divergent features and jurisdiction for each of the tribunals. This range supports the argument that there is no standard definition or model for a hybrid or internationalised tribunal. Indeed, the author goes so far as to state that 'there are probably more differences than similarities' between the tribunals studied.⁴ So, while each of the tribunals is different in character to one another, they are comfortably categorised as 'hybrid' or 'internationalised' when in fact there is no generally accepted definition of what such a tribunal is. Most studies, the author concludes, 'tend to refer to this category of tribunals without providing a definition, or alternatively suggest a definition based on the similarities between existing models that have been established'.⁵

To try to establish what such a definition might look like, the author considers not only the seven tribunals set out above, but also the characteristics of a number of tribunals which are not considered to be hybrid or internationalised. The work also considers a range of situations where the international community's involvement in a criminal tribunal is being mooted. These jurisdictions, including Sudan, Kenya and Liberia, have proposed hybrid and internationalised tribunals as a mechanism for dealing with the aftermath of their conflicts.⁶ Even after the establishment of the ICC, there remains an appetite for hybrid and internationalised tribunals to supplement its work in situations where a full referral to the Court is either impossible or undesirable. This may be for reasons of jurisdiction, delay, cost or political will. Proposed tribunals, as much as operational tribunals, provide scholarly opportunities for the analysis of the definition of such tribunals.

As part of the search for a definition, the work looks at the excluded tribunals to divine what are the definitive features used to exclude them. It also looks at the emerging practice from the proposals for new tribunals. The author looks at several possible defining criteria. These include the duration, location, funding, legal basis and capacity, jurisdiction, criminal judicial function and the involvement of the international community and international personnel.⁷ The study concludes that there is no definition of a hybrid or internationalised criminal tribunal but that practice does demonstrate there are some common features such as criminal judicial function and an ad hoc or temporary basis. The author suggests that the factors making these tribunals distinct from national and international mechanisms are twofold. The first is the presence, or possibility of the presence, of international judges sitting alongside judges from the affected state. The second common factor is that the applicable law of the tribunal is mixed. It consists of criminal activity of international significance and crimes under municipal law.⁸ The author goes on to conclude that 'it is possible to categorise the various international and national mechanisms for international criminal justice on a sliding scale by looking at the extent and degree of international involvement'.⁹ At one end of the spectrum is the 'true' international criminal tribunal (such as those for Rwanda and the former Yugoslavia). At the other end are trials of

⁴ Ibid 133.

⁵ Ibid 201.

⁶ Ibid ch 3.III.

⁷ Ibid ch 4.

⁸ Ibid 412.

⁹ Ibid 249–50.

internationally significant crimes in national courts without international assistance. The 'hybrid' tribunal envisaged in this work is closer to the former end of the spectrum and would be expected to operate directly on the basis of international criminal law. In this study only the SCSL and STL would fall into the hybrid category. Further along the scale would be the 'internationalised' tribunal. These are essentially domestic institutions but with significant participation from other states or from international organisations such as the United Nations. The remaining five tribunals that are the focus of this study fall into this category, as do all but two of the proposed future tribunals discussed.¹⁰ The fourth category, falling between an internationalised and a national tribunal, is one where there is provision of 'assistance' by other states which does not come under the definition of 'significant participation'.¹¹

Having considered these defining features and the spectrum of international criminal justice mechanisms, the book discusses the legal and jurisdictional bases¹² of hybrid and internationalised tribunals before considering the legal barriers to the exercise of jurisdiction.¹³

The classification of an institution as either a hybrid or internationalised tribunal does not allow it to resolve the complex legal questions which inevitably arise relating to jurisdiction. These include the applicability of immunities, the principle of legality and various issues around cooperation and enforcement. To resolve these issues it is important to understand the jurisdictional basis of the individual tribunal.¹⁴ To that end, the author spends considerable time discussing the mechanisms by which such jurisdictions are defined. She concludes that hybrid tribunals may be established by the UN Security Council acting under ch VII of the *Charter of the United Nations* or by treaty between a state and the UN. On the other hand, the internationalised tribunal will generally be established pursuant to national law while maintaining significant international elements.¹⁵ The reason these conclusions are of significance is perhaps best set out in ch 6, which deals with the 'Legal Barriers to the Exercise of Jurisdiction'. It looks at these different barriers to jurisdiction¹⁶ and discusses how the tribunals would respond to each. It is clear from the author's analysis that the mechanism by which a tribunal's jurisdiction is established will have serious implications for how it deals with each of these individual barriers. The methods by which these problems were dealt with in each court will be of great use to practitioners making arguments on jurisdiction in the future. This chapter allows the reader to understand clearly the relationship between the original founding jurisdiction and the methods by which barriers to jurisdiction can be overcome (or indeed not).

¹⁰ Ibid 250.

¹¹ Ibid 251.

¹² Ibid 5.

¹³ Ibid ch 6.

¹⁴ Ibid ch 5.

¹⁵ Ibid 254.

¹⁶ These barriers to jurisdiction are: the principle of legality, immunity, analyses, securing the custody of the accused, statutes of limitation, double jeopardy, relationships with other courts and tribunals and the relationship between hybrid internationalised tribunals and the ICC.

These technical and often thorny legal issues have real practical significance to all who appear before international criminal tribunals. The author discusses them with her characteristically thorough analysis and rigorously methodical research. This book will be of interest to all those who appear before extant and future tribunals regardless of the process by which they came to be established. It is also a significant contribution to the academic analysis of the struggle against impunity.