

INTERNATIONALIZED  
CRIMINAL COURTS  
AND TRIBUNALS

Sierra Leone, East Timor, Kosovo,  
and Cambodia

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## Internationalized Courts: Better Than Nothing . . .

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This post-face is an expression of remorse. Circumstances beyond my control have deprived me of the opportunity to participate in the fascinating conference held in Amsterdam in 2002 which has resulted in the present book. The organizers have nevertheless been kind enough to ask me to offer some views on the general topic of the conference. An imprudent proposal, however, for at least two reasons: first, contrary to most of the participants in the conference, I am a ‘general international lawyer’, not a specialist of criminal (not even international criminal) law; secondly, the present chapter has been written very late in time which means that I have had the good/bad fortune to read Antonio Cassese’s Introduction and Luigi Condorelli and Théo Boutruche’s general Conclusion: good since they are excellent and stimulating pieces which offer a thoughtful overview of the topic; bad in that I do not see what is left to be said at a general level. Moreover, I would hesitate to disagree with them on a topic they master infinitely better than I do. And yet, I am not sure that I am in 100 per cent agreement with them since, in particular, I am probably less persuaded than they are that internationalized courts are globally to be praised. I will try to explain why.

### A. THE REASONS FOR INTERNATIONALIZATION OF NATIONAL COURTS

In some respects, it can be maintained that internationalized or ‘hybrid’ criminal tribunals combine all the advantages and disadvantages of both national and international criminal courts. However, this would probably not give a true picture.

First, as rightly underlined at length in this book, even though limited to four particular ‘animals’ the general ‘species’ of internationalized tribunals is highly heterogeneous; the circumstances of their creation are extremely different; their degree of ‘internationalization’ is far from uniform; the scope of their jurisdiction is varied; their modes of functioning are hardly comparable.

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Secondly, their common characteristics, mainly their 'ad hocism' and their semi-internationalization, raise specific issues compared with national courts as well as with truly international judicial bodies (in particular the *permanent* International Criminal Court).

It seems to be largely accepted that one of their main advantages over truly international bodies is their 'proximity'—proximity to the place where the crime has been committed, proximity to the evidence, proximity to the population more directly concerned. On the other hand, proximity must not amount to partiality and it can be argued that trials rendered 'on the spot' in a post-trauma context are more open to criticism and to the dangers of revenge than expatriated trials in remote countries where the heat can be more easily taken out of the situation.

Moreover, and more important, it must be kept in mind that only crimes which 'deeply shock the conscience of humanity' can justify an internationalization of their prosecution, which involves a far-reaching blow to the competence of domestic courts on an issue which otherwise would come under 'matters which are essentially within the domestic jurisdiction of States'. However, when such serious crimes are at stake they are 'of concern to the international community as a whole', as stated in the Preamble to the Rome Statute of the ICC, and it is then important that they not be 'confiscated' by any particular state, including the one in which the crime has been committed or of which the victims or the authors are nationals.

#### B. THE CONDITIONS FOR AN ACCEPTABLE PARTIAL INTERNATIONALIZATION

Mixed tribunals can indeed be a balanced solution, preserving both the special interests of a given country and the common interest of the international community as a whole in the prosecution of international crimes. But several conditions must be met to that end:

- (1) the relevant tribunal must concentrate on the prosecution of the most serious crimes which, alone, are of concern to the still poorly integrated international community; in this respect, the Cambodia and Sierra Leone precedents are more convincing than the Kosovo and East Timor cases where the jurisdiction of the internationalized judicial bodies covers the whole range of criminal justice and answers other needs than the uncertain need for truly *international* justice; this is particularly blatant in the case of Kosovo where ICTY may (and probably should) demand that the authors of the most serious crimes be transferred to The Hague;
- (2) the decision must, at the end of the day, belong to the judges representing the international community; but for example in the cases of Cambodia or Kosovo foreign judges are a minority, and in several cases, the voting

- rules do not guarantee that the international judges can make or block the final decision and, when they can, a deadlock is not excluded;
- (3) finally, the applicable law must be in full conformity with *international* criminal law both procedurally and substantively; this is not the case when the 'mixture' of national and international law leans to the former as seems to be the case at least in Cambodia.

It can, of course, be objected that it is the essence of hybrid courts to be half-way between purely national tribunals on the one hand and purely international tribunals on the other hand. But it is precisely on this point that I have doubts: if the very concept of 'concern to the international community as a whole' is to be taken seriously, there is no reason why this concern should be subordinated in any respect to national concerns or interests, whatever they may be.

### C. INTERNATIONAL CRIMES DEMAND TRULY INTERNATIONAL JUSTICE

For this same reason, I am among those who think that, in cases of international crimes, national courts are not the appropriate fora to judge the perpetrators. With the exception of war crimes (which should probably be defined more tightly than they are in Article 8 of the ICC Statute to cover international crimes comparable with genocide, aggression, or crimes against humanity), international crimes are few; they are destabilizing for the international community as a whole and this community alone is—or should be—entitled to render international justice as far as they are concerned.

In this respect, the creation of the ICC is progress—but a very imperfect and incomplete one:

- (a) it has been created by a treaty whereas, as the criminal tribunal of the international community as a whole, it should have been an emanation of this community as represented by the General Assembly of the United Nations; moreover, the treaty has, up to now, been ratified only by half of the existing states;
- (b) States Parties have reserved an important degree of control as regards the jurisdiction and the activities of the Court; and
- (c) it is endowed only with 'complementary' jurisdiction, with national courts retaining their primary competence in international criminal matters.

In a way, internationalized criminal courts present the same features. They are stamped with both the recent (limited) progress of worldwide common values and the persistency and resistance of national sovereignties. According to personal disposition, the bottle will be seen as 'half full' or 'half empty'.

But one thing is certain: internationalized criminal courts cloud the issues. They are an expression of the international community's concerns but, at the same time, they are part of the reconstruction enterprise of a new judicial system in countries where the entire administration had been destroyed by civil wars (Kosovo, East Timor) or they facilitate acceptance of accountability to justice of former national rulers (Cambodia and, in some respects, Sierra Leone) in view of a purely national process of reconciliation. They bear witness to the will of the international community to have its own peremptory norms respected and to fight impunity but, at the same time, they will generally answer a national need and, at least to some extent, fulfil national purposes. They are supposed to make the search for evidence and the arrest of authors of crimes easier than when performed by international tribunals, but at the same time they face enormous problems of judicial cooperation, the most illustrative case being the Special Court for Sierra Leone, which is not part of a UN mission (and, as such, cannot call on UN support) nor of the national judiciary, and, as such, cannot issue orders to the national authorities nor benefit from judicial cooperation agreements with other states; similarly, in East Timor, it has become clear that Indonesia is reluctant, to say the least, to cooperate with the Serious Crimes Panels of the District Court of Dili, while it is crystal clear that such cooperation is crucial for the efficient work of the Panels.

However, there is no question that, when crimes against the peace and security of mankind are at stake, mixed criminal tribunals are better than purely national courts. Their 'semi-internationalization' enhances their legitimacy and at least shows that prosecution of such crimes is not a purely national concern. It can also be acknowledged that they are a lesser evil than purely national justice in the absence of a truly international competent tribunal; in this respect, the creation of the ICC and the generalization of the acceptance of its jurisdiction should, hopefully, make the question of the creation of new internationalized tribunals moot.

#### D. DOUBLE STANDARDS

But there is another connected issue. If you take the (for the time being short) list of the existing internationalized criminal tribunals, it will be apparent that they are functioning either in small, weak, and very poor countries (Cambodia, East Timor, Sierra Leone) or in a 'province' under de facto UN trusteeship following the weakening of the central state (Kosovo). This shows at least two different things.

First, this confirms that those tribunals are created much more with a view to strengthening the local judiciary than to rendering *international* justice and punishing the perpetrators of *international* crimes as such.

Secondly, it shows that they can exist when, and only when, the international community is willing to impose their creation, which appears as an illustration of the double standards applied by the United Nations.

It can hardly be denied that, in the absence of a competent international court, there is a need for internationalized tribunals in a great variety of situations. I have doubts that they would be appropriate in the case of the Palestinian conflict where both sides commit international crimes (even though I am convinced that they are state crimes on the Israeli side and 'private' crimes on the Palestinian side); if a mixed court were created in this context it could only be 'tripartite' and it is not realistically foreseeable to have Israeli and Palestinian judges sitting in the same judicial organ. Nor do I share Antonio Cassese's opinion that there is a case for having Hissène Habré, the former Chadean dictator, judged by a mixed tribunal—or that this should be done for all other deposed dictators; in the future, the ICC can deal with such a situation and, in cases where it has no jurisdiction, national courts will do so.

On the other hand, given the circumstances, mixed criminal courts would appear to be clearly appropriate for judging eg:

- (a) terrorists acting on a large scale as so dreadfully illustrated by the attacks of 11 September 2001;
- (b) Afghani (and US?) combatants who committed war crimes during the fight against the Taliban in Afghanistan;
- (c) the former leaders of Saddam Hussein's regime in Iraq (since the ICC has no jurisdiction—the case is different from that of 'usual' former dictators since the Iraq question itself has been internationalized since 1990);
- (d) the members of the armed forces of the 'Coalition' who might have committed war crimes during the recent invasion of Iraq and the Iraqis who have committed terrorist crimes after the invasion.

These probably are the most obvious examples. However, it is striking that, in all four cases, the United States is deeply involved and it is certainly not open to seeking ways of 'internationalizing' prosecutions and trials—even less so since in at least two of them (Afghanistan and the Coalition invasion of Iraq) it would clearly be unthinkable not to allow for the possibility of prosecution of US citizens accused of war crimes, even if, at the end of the day, no prosecution occurs (as happened for NATO leaders before ICTY in respect of the bombing directed against the former Yugoslavia).

#### E. NATIONALIZING INTERNATIONAL TRIBUNALS?

Now, the question can also be put the other way: instead of internationalizing national courts, is there a case for 'nationalizing' international tribunals?—a

result which is not far from that obtained with the Special Court of Sierra Leone which, as rightly noted by Luigi Condorelli and Théo Boutruche, comes close to a truly international criminal tribunal but with an important nuance: it is statutorily, and then symbolically, a national court.

I have in mind in this respect another example given by Antonio Cassese, that of Colombia. There is some doubt whether drug trafficking as such can qualify as a crime against humanity but there is no doubt that it is a crime of international concern. Moreover, Colombian drug traffickers also commit other serious violations of international law in parallel with their traffic and it is clear that national judges rightly fear for their lives when they judge these criminals. It would therefore be appropriate to create an international tribunal having competence to deal with drug trafficking and related crimes. However, it could be valuable to appoint one or two judges from the relevant country to the Bench, even though this does not entirely solve the question of their personal security; and this also raises the question of the place of the hearings.

A subsidiary question in this respect is the way of establishing such a mixed international tribunal. Even though drug trafficking may be seen as destabilizing the international community as a whole and threatening peace and international security, it seems unorthodox to have such a tribunal created by a resolution of the UN Security Council in spite of the recent trend of this body to 'legislate', as was so strikingly the case with Resolution 1373 (2001) in the case of terrorism. A treaty is, of course, possible; however, it would have the same inconveniences as the Rome Statute of the ICC: while the whole international community is concerned by drug trafficking on a large scale, the tribunal would have jurisdiction only vis-à-vis states becoming parties. It would seem more appropriate that the Statute of this new mixed tribunal be adopted by the General Assembly of the United Nations. Indeed, this would not radically change the picture, since the General Assembly in principle cannot adopt decisions binding upon states, which would still have to accept the Statute expressly; but thus created the International Tribunal for Drug Traffic would at least be an emanation of the least imperfect representative of the international community (of states) as a whole. This would also facilitate the links with the Security Council and make less questionable the possibility of it seizing the tribunal than in the case of the ICC.

It also goes without saying that such a new judicial body would be a permanent structure, not an ad hoc creation such as ICTY or ICTR or the existing mixed tribunals. It would thus escape criticisms founded on the accidental creation of the latter.

Such an international mixed criminal tribunal could also be envisaged for the crime of terrorism, even though it can be argued that the ICC could have jurisdiction for those crimes, at least where committed on a large scale.

However, the *travaux préparatoires* of the Rome Statute deny it. Moreover, given the absolute hostility of the United States towards the ICC it might be a better idea to envisage a new body to this end, and the inclusion of 'national judges' in the primarily international tribunal could be reassuring for the United States—not the actual internationally obtuse one, but a future US Administration more open to international community concerns.

Internationalized national tribunals or international tribunals with national judges, what is the difference? Quite big in my mind: in the first case, the international component is, so to speak, secondary, incidental; those tribunals (including their mixed nature) answer primarily national concerns; in the second scenario, the concerns of the international community as a whole become predominant while at the same time, the special interests of one or some given States would be taken into consideration. And when Serbia and Montenegro have been reintegrated into the bosom of 'civilized nations', it could not be a bad idea to partially 'nationalize' the ICTY in order to achieve such a result.

It must however be noted in this respect that the same result is achieved in a way with the plan to transfer some (or many) of the accused to their respective States in order to be tried there. But, here, it is not the Tribunal which is 'nationalized' or 'internationalized' but the whole prosecution process which is shared—and this in turn raises enormous problems as shown by the Rwanda case.

#### F. UNIVERSAL JURISDICTION

Of course, the creation of international or mixed tribunals is not the only means of indicating the concerns of the international community as a whole. Promoting universal jurisdiction and reinforcing the application of the principle *aut dedere aut judicare*—which is but a consequence of the former—also point at this direction.

This direction certainly is more in line with the structure of the international community and of international law where national courts are the usual means to apply international law.

However, this *dédoulement fonctionnel* (functional division) is not without inconveniences. First, as underlined by Luigi Condorelli and Théo Bouterche, there is a danger that international standards be denatured and, in any case, applied in diverse ways by the various internationalized tribunals; this is even more true for purely national courts where no input from abroad limits the risk of arbitrary or *pro domo* interpretations. Secondly, it is averred that States do not usually take universal jurisdiction seriously; and when they do, like in Belgium or Spain, they interpret it with excessive zeal: States can only act at the international level when they can invoke a title (based in most

cases on territory or nationality); absent such a title they have no jurisdiction; for having forgotten this wise and basic principle, Belgium has put itself in a very uncomfortable position.

But there is more. 'Universal' jurisdiction is fundamentally *national* jurisdiction. This shows the limits of the breakthrough of international concerns in criminal matters. Indeed, through universal jurisdiction, all States are made sensitive to the international dimension of the most grave crimes, the perpetration of which endangers the international peace and security. However, it remains part of the 'classical' international law when only States had 'executive powers' in the international sphere. At the dawn of the twenty-first century, when the existence of peremptory norms of international law is no longer challenged (even by France) and the notion of 'State crimes' is generally accepted—without the name: but 'serious violations of peremptory norms' as embodied in the ILC articles on State Responsibility have the same effect—the absence of a generally accepted international criminal court with automatic jurisdiction for judging the authors of grave crimes which 'threaten the peace, security and well-being of the world' is a matter of perplexity and, to tell the truth, of scandal.

In this context, the creation of the ICC was indeed a step forward; but it remains hesitant and partial. And the multiplication of internationalized tribunals is only a stopgap solution—better than nothing; but also an illustration of the present incapacity of the international community to take over its responsibility to protect the common interests of mankind.