Chapter Eighteen

Internationalized Tribunals: A Search for Their Legal Bases

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Introduction

In recent years a number of criminal tribunals have been established to investigate, prosecute and try individuals accused of serious violations of international human rights and international humanitarian law. These tribunals have been described as ‘hybrid’ or ‘internationalized’ courts as ‘both the institutional apparatus and the applicable law consist of a blend of the international and the domestic’.

Six such tribunals are operational: the Special Court for Sierra Leone (SCSL); ‘Regulation 64’ panels in Kosovo; the Extraordinary Chambers in the Courts of Cambodia (ECCC); the War Crimes Chamber for Bosnia and Herzegovina (WCC); the Iraqi High Tribunal (IHT) and the Special Tribunal for Lebanon. The Special Panels for Serious Crimes in Timor–Leste (SPSC) suspended operations in May 2005.

Suggestions have been made that this model of tribunal would also be appropriate for prosecution of atrocities committed in, among others, Burundi.

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2 Until independence in May 2002, the territory was known as East Timor. For convenience, all references will be to Timor–Leste.

3 The Council has previously considered proposals for a Special Chamber to be located within the national court system of Burundi. These proposals, which appeared to have stagnated, may now be revisited following a recent Council statement and as part of the work of the Peacebuilding Commission: see Presidential Statement, 30 May 2007, S/PRST/2007/16.
Afghanistan, Palestine and the Occupied Territories and Liberia, and for drug related crimes in other States.

Although there is currently no accepted definition of an internationalized tribunal, there is some agreement as to their core features. In particular, the tribunal must exercise a criminal judicial function; there must be a mix of international and national elements, operating at many levels; and the tribunal must have been created as an ad hoc and temporary response to a specific situation. However, it has been observed that, while common characteristics may be identified, ‘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’. This degree of ‘ad-hocism’ makes it difficult to identify any normative framework within which to assess existing and future internationalized tribunals.

Given the growing number of such tribunals, it is now necessary to examine further the features of these tribunals so as to identify more specific categories, or sub-species. To utilise the generic term ‘internationalized’ or ‘hybrid’ potentially masks a number of significant differences between such tribunals. For instance, the tribunals may apply, and be governed by, different legal regimes. Some may have the power to compel compliance with court orders by third States and international organisations, including the power to secure the surrender of suspects, while others are restricted to requesting international cooperation utilising existing domestic arrangements as to extradition and mutual legal assistance. Tribunals may have varying relationships with the domestic legal regime. Certain tribunals may be able to override domestic and international immunities, whilst others may not. It is submitted here that the most relevant criterion upon which to base any categorization of such tribunals is the

5 Cassese (note 4), p. 11.
6 In May 2007, the Blue Ribbon Experts Group was created to establish a Liberia War Crimes Tribunal. The group, which comprises academics and practitioners, intends to develop a list of possible suspects and charges, together with a proposed statute and rules of procedure and evidence. See: ‘Case hosts Blue Ribbon Experts Group to establish Liberia War Crimes Tribunal’, at http://www.law.case.edu.
7 Cassese (note 4) p. 10 (Columbia).