

## **Designing Criminal Tribunals — Sovereignty and International Concerns in the Protection of Human Rights**

**by Steven D Roper and Lilian A Barria**

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One of the most significant features of the system of international criminal justice that has thus far evolved is the range of different mechanisms that are being established to address international crimes and promote and protect fundamental human rights. These take the form of both judicial and non-judicial institutions. The current judicial processes range from 'local' justice mechanisms, such as the *gacaca* communal courts operating in Rwanda on the one hand, all the way through to the permanent International Criminal Court in The Hague on the other.

Within this spectrum, there exist various other forms of international criminal tribunals. These include the *ad hoc* tribunals — the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), which were established in the early 1990s by the United Nations Security Council pursuant to its Chapter VII powers under the United Nations Charter. In addition, there are a number of 'hybrid' or 'internationalised' criminal tribunals, such as those that operate or have operated in East Timor, Sierra Leone and Cambodia.

There are also regional systems of judicial regulation — albeit operating more as human rights courts than as criminal courts — and a broad range of domestic national courts, such as the Indonesian Human Rights Court and the Supreme Iraqi Criminal Tribunal, the latter of which has been recently in the limelight following the conviction and execution of Saddam Hussein following the Dujail trial and the ongoing genocide trial relating to the Anfal campaign directed against the Kurds by the Saddam regime in the late 1980s. As part of the national judicial response to the gross violations of human rights, we have also seen cases such as those initiated by Spain against Augusto Pinochet, the former President of Chile.

To complete the picture of international justice, there are, of course, several non-judicial mechanisms, such as Truth and Reconciliation Commissions, which also complement the process of criminal justice designed to address crimes that represent a gross violation of human rights.

This book, as the title suggests, is intended to deal with one form of mechanism within this mix — the international criminal tribunal. Specifically, it provides an overview of the historical development of this form of judicial mechanism, beginning with the Nuremberg and Tokyo tribunals of the 1940s (Chapter 1). It then proceeds to discuss the two ad hoc tribunals (Chapter 2), the Sierra Leone and Cambodian tribunals (Chapter 3) and the East Timor tribunal and Indonesian Human Rights Court (Chapter 4).

The authors then seek to deal with three important aspects of the operation of these tribunals — ‘issues of finance, termination and justice’. Specifically, they explore the ‘financing of international justice’ (Chapter 5) and the completion strategies of the ad hoc tribunals (Chapter 6), and then complete the discussion with their assessment of the effectiveness of the tribunals ‘in providing justice’ (Chapter 7). The book also contains a number of the important ‘source documents’ relevant to the establishment of the various tribunals.

The relatively brief discussion contained in the seven substantive chapters of the book (which only amount to 97 pages in total) means that the analysis, while well written and researched, can by necessity only be somewhat superficial. This is even more so since the authors include not only a description of the major features of the relevant tribunal(s), but also the historical background of the particular situation or conflict to which each of them relates, as well as a description of the negotiations leading to their establishment. Each of these factors is, in reality, extremely complex, sometimes involving deep and longstanding historical and social considerations. It is therefore difficult to accept, for example, that the factors giving rise to the conflicts in the Balkans and in Rwanda and the international negotiations leading to the establishment of the ad hoc tribunals, as well as their particular structure and operation, can be adequately dealt with in anything like the seven pages of the book in which these are discussed by the authors — although, to be fair, they are also canvassed further in a later chapter dealing with their respective completion strategies.

This brevity of discussion automatically limits the potential of this book for those scholars, academics and others who are interested in a more detailed exploration of the very complex issues associated with these important developments in international criminal justice. The authors frequently make reference in general terms to the wide number of issues they have canvassed in researching and writing this book, but they do not provide any particular level of detail in order to allow the reader to reach an informed view as to the merit of the conclusions they make. Partly as a result of this, a reader may adopt the view that the conclusions of the authors are based on what might perhaps be regarded as an overly simplistic analysis of all of

the relevant considerations.

Both authors are 'political scientists and not legal scholars', with the result that there is no detailed analysis of the legal structure — and it must be said legal shortcomings — inherent in each of the mechanisms considered, as well as the broader evolution of a system of international criminal justice. Instead, the authors take the viewpoint that the various tribunals, although being legal institutions, are essentially 'political in nature'. They argue that the political environment in which each tribunal operates — and which fashioned its design, establishment, mandate and jurisdiction — has a limiting effect of the overall effectiveness of the tribunal itself.

These are, of course, extremely relevant and important observations. There is no doubt that the evolution of international criminal justice has been and continues to be dependent upon the political will and determination of governments, as well as the broader international community, to truly work towards what many commentators see as the ultimate goal — 'to put an end to impunity for the perpetrators' of gross violations of human rights.<sup>1</sup> Even though this noble goal may ultimately be unattainable, it is still something towards which international law and politics must strive. The experience of some of the tribunals discussed in the book makes it clear that without this resolve, these mechanisms may not be effective in meeting both (or either of) the expectations of victims and the general aims leading to their establishment, which might include issues of retribution, deterrence, reconciliation, compensation and rehabilitation.

Although it is true that the surrounding political framework impacts significantly upon the effectiveness of a criminal tribunal, there are sufficient real-life examples to suggest that the tribunals have themselves generated a momentum which also shapes and directs decision making at the governmental level. It is a two-way street. As an example, the authors noted quite correctly that the arrest of Charles Taylor following his indictment by the Special Court of Sierra Leone was 'a political issue which was beyond the scope and jurisdiction' of that tribunal. Yet it should also be noted that the establishment and operation of that tribunal and the concomitant pressure for accountability that its existence brought to bear were important factors in the decision of Nigeria to end Taylor's 'safe haven' status within its borders, leading to his eventual arrest and forthcoming trial.

The authors also highlight the significance of funding and resources in relation to the operation of the various mechanisms of international justice. They characterise the

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1 Preambular paragraph 5, Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 3.

funding of tribunals 'as a form of foreign assistance', although having done that they are unable to fully explain the underlying reasons why countries make voluntary contributions towards the operations of international tribunals. The authors refer to the estimated US\$4.5 billion that the ICTY and ICTR have received through the United Nations to finance their work. As they note, there is no doubt that the high cost associated with these ad hoc tribunals was an important factor leading to the development of their respective completion strategies, which involve the completion of investigations by the end of 2004, of all trial activities at first instance by the end of 2008 and of all of the work of each tribunal in 2010, with the focus of their remaining work to be the 'prosecution and trial of the most senior leaders suspected of being most responsible' for the crimes within the jurisdiction of the Tribunal.<sup>2</sup>

Indeed, the issue of finance remains a vital element in the operation of the International Criminal Court, which is required to submit a budget proposal each year to the Assembly of States Parties (ASP) for consideration and approval. Within the overall context in which the ICC is to operate, that court has adopted a 'strategic plan', which was presented to the Committee on Budget and Finance of the ASP. As a part of this process, the court has developed a 'court capacity model', essentially to align current and projected resources to future needs and capabilities. Some commentators have noted the significance of finance and resources to the operation of the ICC and have raised a simple question: How much international justice are we prepared to pay for? These concerns are equally applicable to the experience of the other tribunals discussed in the book.

The authors also raise another equally important question: How do we measure the effectiveness of the various models of criminal tribunal that have been established? As is pointed out, the answer to this question really depends upon those 'performance indicators' that are considered as important in the context of the particular tribunal concerned. Undoubtedly, it is important to determine the most appropriate 'success' criteria by which the 'worth' of a particular tribunal can be analysed. In addition, it might in any event be difficult to reach definitive conclusions while a tribunal is still operating, particularly if the relevant conflict is ongoing. Yet, as the criminal tribunals reach the 'shelf-life date' of their judicial activities — as, for example, the Special Panels for Serious Crimes did in 2005 — it will become easier to consider their impact within a broader context.

In the end, the authors conclude that 'the creation of legal institutions is not a *panacea*'. They assert that the legacy of these tribunals will be determined by the

2 See United Nations Security Council Resolution 1503 (2003), 28 August 2003, UN Doc S/Res/1503 (2003).

degree to which states assert their sovereignty, which they have traditionally done 'to deny justice to individuals'. The authors offer the final thought that 'perhaps the notion of sovereignty will ... develop to include more consideration for the rights of individuals'. Alas, they do not provide the reader with any concrete ways in which this might be done — for example, whether it can be achieved, at least partially, through the utilisation of current (and perhaps future) mechanisms of international criminal justice.

Indeed, the authors assert that perhaps the 'greatest legacy' of these tribunals 'is the fact that we may never again witness the creation of *ad hoc* justice', particularly following the establishment of the International Criminal Court. Yet, this appears to over-exaggerate the demise of the *ad hoc* tribunal, with the Lebanese government just having approved draft United Nations plans to establish a tribunal to investigate the assassination of former Prime Minister Rafik Hariri in early 2005.<sup>3</sup>

Overall, this book raises some interesting questions but does not really provide many significant answers. It perhaps attempts to do too many things in far too few words. Much of the underlying detail and subtleties associated with this relatively new form of justice have not been adequately canvassed in the book. No doubt the authors have themselves undertaken significant research; however, one gets the impression that the reader is asked to assume that this has been done and to take the conclusions that are reached as definitive, without the benefit of allowing for more independent assessment.

The book provides a broad-brush overview of the mechanisms of international criminal justice and in this regard may be a useful reference for people commencing their research in this area. However, to gauge a more informed understanding of the many complex and controversial legal, societal, political and historical variables that all impact upon the ongoing evolution of international criminal justice, it will be necessary for the reader to move on to more detailed publications. ●

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3 See BBC News 'Lebanon backs UN Hariri tribunal' *BBC News Online* 13 November 2006, available at <<http://news.bbc.co.uk>> (accessed 14 November 2006). It is currently anticipated that this tribunal will sit in Cyprus and will involve both Lebanese and international judges, as well as Lebanese and international law. See also United Nations Security Council Resolution 1644 (2005), 15 December 2005, UN Doc S/Res/1644 (2005), which confirms that the then Lebanese Prime Minister had 'requested the establishment of a tribunal of an international character to try all of those responsible' for the assassination.