

Steven D. Roper and Lilian A. Barria, DESIGNING CRIMINAL TRIBUNALS – SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS (Ashgate, 2006, *xii+189pp*) ISBN 0754642690 (10).

What does it take to create an international criminal tribunal? It is certainly more than the building in which the tribunal sits; it is about how it is set up, the people that work for it and, most importantly, the laws and standards it applies. These may be some of the aspects of designing criminal tribunals one may expect to read when seeing the title of the discussed book. But Roper and Barria give us more than that: they examine the criminal tribunals by putting them into the right context and historical background, explaining how they work, showing their strengths and weaknesses and comparing the different types of tribunals – international, hybrid, and domestic – with each other to give readers a tool to evaluate for themselves which system, if any, is preferable.

The book, which according to its authors is ‘the only book available that covers the breadth of cases and places [of] these institutions within the general development of international humanitarian law,’ is evenly divided into seven chapters dealing with questions related to international and internationalised criminal tribunals.

Chapter 1, entitled ‘From Impunity to Imprisonment: Individual Accountability under International Law’, serves as a general and useful introduction to the topic. The authors explain the rationale of the field of international criminal law, make the – important – distinction between international humanitarian and human rights law, and show the historical development of international humanitarian law from the pre-World War II to the post-Cold War period, the latter being identified as the era of international criminal tribunals.

Chapters 2 to 4 provide case studies of the existing international as well as internationalised criminal tribunals, i.e. the International Criminal Tribunals for the former Yugoslavia and for Rwanda (Chapter 2), the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia (Chapter 3) and the Serious Crimes Panel for East Timor as well as the Indonesian Human Rights Court (Chapter 4).

Chapter 2 is divided into several parts: it first gives a short, but insightful overview of the history of the conflicts in the former Yugoslavia and Rwanda, respectively, before turning to the creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The next part is devoted to a look at the structure and work of the tribunals, pointing out in particular some of the difficulties they had to deal with at the start of their mandates. The authors conclude this chapter by stating that although the tribunals may well be and have in fact been criticised for certain shortcomings, they are an historic achievement and have greatly contributed to the development of international law.

Chapter 3 deals with hybrid tribunals – the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers for Cambodia. This new form of ‘internationalised’ or ‘mixed’ tribunal draws its special character from several features distinguishing it from the *ad hoc* tribunals, which the authors explain by reference to the drafting history and the structure of these tribunals. A particular feature of hybrid courts is the mixture of international and national components, i.e. by having both domestic and international judges sit on the bench, and drawing on both the international as well as national legal system. The chapter commences with an account of the conflicts that led to the deaths of hundreds of thousands of people and eventually brought about the establishment of criminal tribunals to deal with the atrocities. Unlike the ICTY and ICTR, the SCSL and the Extraordinary Chambers were not established on the basis of Security Council Resolutions under Chapter VII of the UN Charter, but instead based on agreements between the United Kingdom and the Sierra Leonean and Cambodia governments respectively. The authors go on to describe the negotiating process to establish these tribunals, in particular the difficulties encountered during this process. To

name but a few, contentious issues during the establishment of the SCSL included the possible prosecution of juveniles between the age of 15 and 18 as well as the temporal jurisdiction of the Court. The temporal jurisdiction of the Extraordinary Chambers for Cambodia also proved controversial. The next part of this chapter gives a short description of the structure of the SCSL and the Extraordinary Chambers before concluding by taking a look at the current status: while the SCSL began its work rapidly, the Extraordinary Chambers took longer to establish; also, financial difficulties are a concern to both institutions, while the problem of amnesties and gaining public support haunts the Cambodian Chambers in particular.

As the last institutions discussed, Chapter 4 deals with the Serious Crimes Panel for East Timor and the Indonesian Human Rights Court. These two institutions, albeit different in their make-up – the Serious Crimes Panel being hybrid, the Court domestic in nature –, deal with cases coming from the same actions and violations of international law. The chapter starts off with a look at the history of the conflict in East Timor which culminated in the deaths of about 2,000 persons and 250,000 persons fleeing the country in the aftermath of a 1999 referendum in which a majority had voted in favour of independence of East Timor. The differing process of establishing these institutions at basically the same time as well as their structure and jurisdiction are depicted in the following part of this chapter, which reflects their different background. The Serious Crimes Panel was established by a regulation of the UN Transitional Administration in East Timor, whereas the Indonesian Human Rights Court was created as part of the Indonesian court system. The problems the two institutions are facing form the next part of this chapter. The biggest problems identified for the Serious Crimes Panel include the lack of qualified legal personnel as well as the fact that of the total 391 indictees most were out of reach in Indonesia. According to Roper and Barria, the Indonesian Human Rights Court was particularly flawed due to the minimal number of convictions. The authors conclude this chapter by stating that the two institutions have not achieved their aim of bringing justice to the victims and that an international process similar to the *ad hoc* tribunals would most likely have done a better job. Nevertheless, they also praise the Serious Crimes Panel and the Indonesian Human Rights Court, among others, for having trained the legal profession in these countries. Finally, they point out the establishment of a truth and reconciliation commission which, although not a judicial process, will hopefully at least be able to establish an historic account of the events in East Timor.

Chapter 5, entitled ‘Financial Considerations in the Maintenance of International Tribunals’, deals with the question of what leads states to make donations to international tribunals, in particular even to those tribunals, as the ICTR and ICTY, that already receive guaranteed funding. In answer to this question the authors examine voluntary donations to international tribunals within the broader context of foreign assistance. While in the wide sense of the term, voluntary contributions to international tribunals could be viewed as foreign assistance, the authors found in their analysis of donor countries that there is only a small relationship between the reasons usually stated for foreign assistance and the reasons why states contribute to the tribunals. They found, for example, that there is a connection between the amount donated and the holding of a Security Council seat of the donor country, the size of its economy as well as a former colonial relationship. Illustrating some of the findings, this chapter contains two tables showing how much funding the ICTY, the ICTR, the SCSL and the Extraordinary Chambers for Cambodia receive as well as the amount that several states have contributed.

Returning to the *ad hoc* tribunals, Chapter 6 discusses the completion strategies of the ICTY and the ICTR. The authors critically evaluate the ability of national courts to take over cases from the *ad hoc* tribunals in order to help them finish their work by the end of 2010 as

outlined in Security Council Resolution 1503 (2003).¹ Such referrals are possible on the basis of Rule 11 *bis* of the Rules of Procedure and Evidence, and the ICTY has already made use of this procedure in several cases. Whereas, for instance, the War Crimes Chamber in Bosnia and Herzegovina was established to deal with these and other cases on the national level, the authors are doubtful as to the national courts' ability to handle the number of cases. This holds true even more with regard to the completion strategy of the ICTR. Tens of thousands of persons had been imprisoned after the genocide and because the Rwandan national court system was not able to deal with the amount of cases, Rwanda turned to the traditional *gacaca* court system which is currently dealing with the indictees on the community level. The most pressing problem in transferring cases from the ICTR to Rwanda, however, is the fact that Rwandan courts may impose the death sentence. Therefore it would be preferable to have the ICTR transfer cases to countries that do not impose the death sentence.² Overall, the authors welcome the support national judiciaries receive along with the transferral of cases. They question, however, whether these judiciaries will be able to handle these complex cases.

In the final chapter of the book, Roper and Barria evaluate the effectiveness of the tribunals discussed in the previous chapters. They pose the question by which standards the tribunals' effectiveness ought to be judged: the success or failure of the ICTY and the ICTR are evaluated on the basis of their mandates as spelled out in the establishing Security Council resolutions. One of the reasons for establishing the *ad hoc* tribunals was the maintenance of peace. On the international level, as opposed to the national one, judicial institutions have been viewed as institutions for the maintenance of peace. However, by pointing to the massacres of Srebrenica and the continued violence in the African Great Lakes region even after 1994, the authors argue that the tribunals have not done a great job at maintaining or restoring the peace. Next, the authors turn to the tribunals' initial difficulties in apprehending indictees, which, however, changed at the beginning of this century, and they have since been quite successful at apprehending even high-ranking officials. Another point is whether the accused before the *ad hoc* tribunals have been tried without delay to guarantee their rights. In this respect the authors note that trials at the international level have not been the fastest, but the completion strategies are seen as a way of speeding up the trials.

A further issue examined is the effort of the tribunals to help in the process of national reconciliation. The authors base their assessment of effectiveness in promoting national reconciliation on the number of refugees that have been able to return to their homes. Both former Yugoslavia and Rwanda have seen a lot of refugees return, while a large number still refuse to return. But even in the case of Rwanda, where the return and re-integration of both Hutu and Tutsi refugees has been quite successful, the authors refrain from ascribing this effect to the work of the ICTR.

Given the initial examination of the effectiveness of the ICTY and the ICTR, the authors then ask whether the discussed hybrid or domestic tribunals have been more successful in achieving their goals; and whether they are in fact 'a better option for the delivery of justice'. They argue that these institutions do have some advantages over the *ad hoc* tribunals including, for example the fact that the SCSL has provided faster trials, and the location as well as the composition of these tribunals do not distance them from the people they were created to bring justice to. On the other hand, these institutions have most of all suffered from a lack of funding compared to the *ad hoc* tribunals where it is guaranteed. Even truth and reconciliation commissions, which the authors touch upon briefly at the end, are not seen as perfect institutions for bringing justice, reconciliation and solutions to other problems

¹ SC Res. 28 August 2003, S/Res/1503 (2003).

² However, the first application by the ICTR Prosecutor to have a case – *Bagaragaza* – transferred under Rule 11 *bis* to Norway was recently turned down, a decision obviously not available to Roper and Barria at the time of writing. Compare also Marong, 'The ICTR Appeals Chamber Dismisses the Prosecutor's Appeal to Transfer Michel Bagaragaza for Trial to Norway', available at: <http://www.asil.org/insights/2006/10/insights061003.html>.

post-conflict societies are struggling with. Ultimately, Roper and Barria express their hope that enough lessons will be learnt from the existing tribunals that the International Criminal Court will do a better job at achieving the goals criminal tribunals are designed for

Following the substantive part of the book, there are a number of very useful appendices. Appendix A is a table that shows the structure, jurisdiction and composition of the tribunals discussed in the book. Appendices B – F contain resolutions relating to the respective tribunals. These texts can certainly be found elsewhere, but it is helpful to have them compiled at the end of this book for direct reference.

This book is a useful piece of work for anyone interested in the development and scope of international criminal law as expressed through the existence and work of criminal tribunals. There are a few minor points that might confuse the reader: for example, in their overview of the conflict in Rwanda, the authors repeatedly refer to the Hutus and Tutsis as ‘tribes’ – would the terms ‘national groups’ or simply ‘groups’ not have been more to the point? One is also missing a reference to the Iraqi High Tribunal, another example of a hybrid court.³ Moreover, a number of spelling mistakes are at times annoying to the attentive reader.

Nevertheless, overall the discussed book gives a systematic and comprehensive overview not found elsewhere in this form. It highlights the existing tribunals dealing with violations of international law more than a decade after the first of them – the ICTY and the ICTR – were established and at an appropriate time before the completion of their mandates. The book’s focus on the financial aspect of setting up the tribunals is also interesting – whereas according to Roper and Barria financial considerations can be seen as one of the decisive factors in the international community’s change from international to hybrid to domestic tribunals, this aspect is generally not as highly reflected in the existing literature. The authors also show that different types of situations call for different tribunals as the solution. However, with more and more states ratifying the Rome Statute, temporary tribunals, be they international, hybrid or domestic, are most likely to become a thing of the past and at best present. The future belongs to the International Criminal Court.

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³ For an evaluation of the Iraqi High Tribunal see, for example, Heller, ‘A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal’, (2007) 39 *Case Western Reserve Journal of International Law* (forthcoming 2007).