
Introduction

The emergence of a system of international criminal justice is a relatively new development largely dating from the 1990s onwards. International criminal law imposes criminal responsibility directly on an individual.¹ In contrast, public international law has traditionally focused on the international responsibility of states, and has been dominated by state-centric or Westphalian perceptions of international law. Criminal law imposes individual criminal responsibility, but is implemented through the mechanism of the state – domestic law and courts – rather than by using international law and international mechanisms. Criminal jurisdiction and the ability to impose penal sanctions on individuals committing crimes within the territory of a state, or who are nationals of that state, is closely linked to the sovereignty of a state, part of the power of the state to control its territory. Thus, criminal jurisdiction is advanced as an essential attribute of sovereignty, and the right to determine criminal offences and to punish violations thereof is closely guarded by states. States, and not international institutions, have long held the primary, if not the sole, responsibility to try individuals accused of violating criminal laws. Consequently, where a state fails to criminalise conduct or to punish violations, there has often been little prospect of securing accountability.

In recent years, states and the wider international community have endorsed the principle of non-impunity, which asserts that individuals should be held accountable for the commission of international crimes. The former Secretary-General of the United Nations has remarked that there must be ‘an end to the global culture of impunity – the culture in which it is easier to bring someone to justice for killing one person than for killing 100,000’.² Support for the principle of non-impunity is based on two factors: the nature of international crimes and the benefits to be gained from trials. The first basis for non-impunity is that ‘[I]nternational Justice is built on the notion that heinous international crimes, such as genocide and crimes against humanity, harm all of us. Therefore, we all have an obligation to prevent such crimes and to punish those responsible for

¹ R Cryer, H Friman and E Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge, Cambridge University Press, 2010) 3.

² United Nations General Assembly (UNGA), ‘Report of the Secretary-General on the Work of the Organization 53/1’ (1998) UN Doc A/53/1, para 180. See also UNGA Res 60/147, ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (21 March 2006) UN Doc A/RES/60/147.

them'.³ International criminal law now recognises that certain crimes rise above the national interests of states, such that all members of the international community have an interest in their prevention and, where they have been committed, their investigation, trial and punishment, and in ending impunity for the commission of such crimes. These crimes are elevated to the international level either due to their close connection with international peace and security or their ability to shock the conscience of mankind.⁴ These core crimes incur individual criminal responsibility as a matter of international law, regardless of the criminal nature of the conduct under relevant national laws. Moreover, such crimes may be subject to prosecution before international mechanisms as well as through national courts. While there is not universal agreement as to the crimes that constitute core crimes, the list includes, as a minimum, genocide, crimes against humanity, and certain serious violations of international humanitarian law, as well as potentially piracy, slavery and aggression. Core crimes can be distinguished from transnational crimes in that they are created and may be enforced directly by international law.

The prohibition of certain conduct that may constitute an international crime is also considered to have the status of a *jus cogens* norm; that is, peremptory norms of international law, from which there can be no derogation.⁵ For example, the prohibition against genocide and the prohibition on the use of force are considered *jus cogens* norms.⁶ Additionally, such obligations may also give rise to obligations *erga omnes*, described as 'the obligations of a State towards the international community as a whole' and in which 'all States can be held to have a legal interest in their protection'.⁷ International law imposes an obligation on states not to engage in certain conduct, while international criminal law imposes individual responsibility on those committing or ordering violations of the international law rule. International crimes therefore serve as a limit on the sovereignty of the state, 'marking the point at which sovereignty gives way to the prerogatives of the international community'.⁸ Yet there remains an inherent tension between the system of international criminal justice, the interest in securing international peace and security and the principle of state sovereignty. In particular, as criminal law is by its nature coercive, it imposes responsibilities directly on individuals and

³ T Gurd, 'Arresting the "Big Fish": Lessons on State Cooperation for the International Criminal Court' in Aegis Trust, *The Enforcement of International Criminal Law*, Report (2009) 28.

⁴ B Broomhall, *International Justice and the International Criminal Court: Beyond Sovereignty and the Rule of Law* (Oxford, Oxford University Press, 2003) 44–49.

⁵ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331, art 53.

⁶ See: *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application) (Judgment) [2006] ICJ Rep 6, para 64 (genocide); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 190 (use of force).

⁷ *The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) (Judgment) [1970] ICJ Rep 3, 33. See also: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; M Ragazzi, *The Concept of International Obligations Erga Omnes* (New York, Oxford University Press, 1997).

⁸ Broomhall, n 4, 42–43.

punishes violations through the imposition of sanctions.⁹ Enforcement of criminal law necessitates the power to arrest and detain suspects, to investigate alleged violations, to obtain the testimony of witnesses and victims and to protect witnesses, judges and staff of the tribunal and to punish those found guilty. International criminal courts do not have such coercive powers and must rely on the support and cooperation of states. The willingness to cooperate and the effectiveness of such cooperation will be significant factors in whether an international tribunal can successfully fulfil its mandate. Thus, until a viable enforcement mechanism for the punishment of international crimes can be established, international criminal law, like much of international law, continues to rely upon the support of states to enforce its provisions.

The second basis for the prosecution of international crimes trials is the important effect that such trials may have in deterring perpetrators – or future perpetrators – of such crimes. The international condemnation associated with a trial for international crimes may have the effect of marginalising or delegitimising perpetrators.¹⁰ Of course, a successful trial, conviction and imprisonment will physically remove and isolate the perpetrator. However, the principle of non-impunity is to an extent an idealised notion; politics and other factors will determine those individuals to be held accountable for which crimes and those who will remain immune from prosecution, as well as the forum used to secure accountability. The system of international criminal justice is inherently selective, from the situations in which it is engaged, to the individuals it tries and the conduct for which it seeks accountability.¹¹

This study traces the tension between state sovereignty and accountability that is evident in the development of the current system of international criminal justice. It reveals that the current system is largely a decentralised model, one that relies primarily on states and preserves the link between regulating criminal behaviour and the sovereignty of the state. There is, however, increasing recognition of the need to move away from the traditional reliance on states and the preservation of state sovereignty so as to recognise the community interest in ending impunity for core crimes. Developments in international criminal law, including the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), and the reliance by states on the principle of universal jurisdiction, have been motivated by the desire to avoid impunity for international crimes.¹² One way of achieving criminal accountability is through

⁹ Cryer et al, n 1.

¹⁰ C Flintoft and N Grono, 'The Politics of Ending Impunity' in Aegis Trust, *The Enforcement of International Criminal Law*, Report (2009) 19. See also M Lattimer and P Sands, 'Introduction' in M Lattimer and P Sands (eds), *Justice for Crimes Against Humanity* (Oxford, Hart Publishing, 2003) 1–27.

¹¹ R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, Cambridge University Press, 2005).

¹² See, eg, the preamble to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 3 (Rome Statute): 'Determined to put an end to impunity for the perpetrators of these crimes'.

trials before the domestic courts of the territorial state, which are generally considered to be the most suitable forum for accountability. The important role of trials before domestic courts is also reflected in the principle of complementarity found in the Rome Statute.¹³ However, national proceedings may be restricted through the operation of legal principles such as statutes of limitation, amnesties, immunity and insufficient or inadequate provision for such crimes in domestic law. Trials may also encounter a lack of political support, particularly where those accused of committing crimes remain in power or are protected by the current regime. Inadequate and insufficient resources may also be a considerable barrier to domestic trials, especially where a state is in or emerging from armed conflict or a situation characterised by serious human rights violations.

Another mechanism to ensure accountability is the establishment of international criminal tribunals by the United Nations Security Council. This model has the benefit of legal coercion and universality of application by virtue of the near-universal membership of the United Nations. However, this method is also hostage to the priorities and the political dynamics of the Security Council. The five permanent members can veto any decision to establish a tribunal that may affect their own national interests, or the interests of states or individuals closely associated with that state. This means that it is unlikely that individuals within those states, or their allies, will face trials for their actions before an international tribunal. Even amongst states that do not fall within this protected category, the limited attention and resources of the Security Council and the United Nations means that international mechanisms are not established for the majority of situations in which international crimes have allegedly been committed. Similarly, the ICC seeks to achieve universality, without coercive power, based on participation in the Rome Statute, an international agreement. Its ability to investigate situations and to try offenders is restricted both by its jurisdictional provisions, the limited number of parties to the Rome Statute and the finite resources of the ICC. It also depends on sufficient domestic implementation in the legal systems of states parties.

There therefore exists a lacuna in the system of international criminal law enforcement, where national courts cannot or will not act, and where international mechanisms lack jurisdiction or sufficient resources to act. To fill this gap, the international community has turned to a new model of international criminal justice; the hybrid or internationalised criminal tribunal. Such tribunals have been described as ‘hybrid’ or ‘internationalised’ courts, as ‘both the institutional apparatus and the applicable law consist of a blend of the international and the domestic’.¹⁴ Cassese describes the term ‘internationalised’ tribunals:¹⁵

¹³ Rome Statute, art 17. For discussion see J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, Oxford University Press, 2008).

¹⁴ L Dickinson, ‘The Promise of Hybrid Courts’ (2003) 97 *American Journal of International Law* 295, 295.

¹⁵ A Cassese, *International Criminal Law*, 2nd edn (Oxford, Oxford University Press, 2008) 333.

This notion encompasses judicial bodies that have a *mixed composition*. There may be two versions of these courts and tribunals. First, they may be organs of the relevant state, being part of its judiciary . . . Alternatively, the courts may be international in nature: they may be set up under an international agreement and not be part of the national judiciary.

A number of hybrid or internationalised tribunals have been established in recent years to investigate, prosecute and try individuals accused of serious violations of international criminal law. These tribunals are said to offer the advantages of both national and international prosecutions.¹⁶ Thus, hybrid or internationalised tribunals have been developed as a pragmatic solution to the failure of the international community to achieve, at least in part, the utopian ideal of non-impunity. The role of such institutions was, at least initially, perceived as to fill the gap between domestic courts, tribunals established by the Security Council and the limited jurisdiction of the ICC. However, hybrid and internationalised tribunals are themselves not a perfect solution to this lacuna; their creation requires sufficient political will within the community of states, the support of the state(s) most affected and in some cases the backing of the Security Council. Their establishment is on an ad hoc basis, meaning that certain situations will still continue to evade accountability. As Brownlie noted, '[p]olitical considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not'.¹⁷ Even where the political will is present both internationally and domestically, some impunity will persist as, due to their limited mandates and resources, the hybrid or internationalised tribunals will be unable to try all offenders for all crimes. However, the imperfect and ad hoc nature of such tribunals should not undermine their potential utility in achieving non-impunity. The system of international criminal justice, which is still developing, is far from perfect.

This study examines in part the role of the hybrid and internationalised tribunals in the quest to achieve the goal of non-impunity. These tribunals raise many complex and interesting issues, some of which are relevant to all such bodies, while others are linked to specific national circumstances. Such issues include: the fairness of proceedings before such institutions and the procedures adopted; the independence and impartiality of the tribunal and its key personnel; allegations of corruption; issues of capacity; the selection and qualifications of personnel, in particular judges; the participation of victims in proceedings; and the question of the legacy and effectiveness of such tribunals. All these issues are worthy of

¹⁶ A number of commentators and non-governmental organisations have reviewed the success or otherwise of the hybrid and internationalised tribunals, as well as their jurisprudence. See, eg, P Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?' (2009) 20 *Criminal Law Forum* 53; Dickinson, n 14; E Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23 *Arizona Journal of International and Comparative Law* 347.

¹⁷ I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, Oxford University Press, 2008) 604. See also R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (n 11).

detailed study and many have been discussed elsewhere. However, this study adopts a more focused approach to these tribunals, and concentrates on six main issues.

First, what is the current practice regarding the creation of institutions considered to fall within the category of hybrid and internationalised tribunals? In which circumstances have states established hybrid or internationalised tribunals? For which situations have such tribunals been proposed? How has the background to establishment, particularly the political and legal context, influenced the selection of a hybrid or internationalised tribunal as the desired option for accountability? To what extent have these circumstances influenced the key features in the design of the tribunal? By examining the practice of states, the United Nations, and other actors in designing and establishing such tribunals, this study assesses the factors that have led to and are driving the current reliance on such tribunals and draws guidelines for the circumstances in which such tribunals may – or should – be established in the future. It finds that, given the weakness of some domestic legal systems and the jurisdictional and resource constraints of the ICC and other international tribunals, there will continue to be a demand for the creation of hybrid or internationalised tribunals.

Second, does the existing practice reveal a definition of a hybrid or internationalised tribunal? If not, does the absence of such a definition matter? Having comprehensively examined the practice surrounding existing and proposed hybrid and internationalised tribunals, this study finds that there is no standard definition of a hybrid or internationalised tribunal. There are, however, a limited number of key features that may render a tribunal hybrid or internationalised in nature, in particular the participation of both national and international judges and a mixed substantive jurisdiction. Moreover, the practice reveals two distinct sub-categories within this category of institution: hybrid and internationalised tribunals. It is suggested that these are not interchangeable terms, but reflect two fundamentally different types of tribunals. Hybrid tribunals, which are established either by treaty or by a resolution of the Security Council acting under Chapter VII of the United Nations Charter, operate separately from and independently of the domestic court system of the territorial state. As such, their legal basis lies in international law and they more closely approximate ‘purely’ international criminal tribunals such as the ICTY, the ICTR and the ICC. In contrast, internationalised tribunals are based within the domestic legal system of – normally – the territorial state, although they may be ‘special’ or stand-alone institutions within that system. They are established by and operate in accordance with domestic law and, it is suggested, are best considered to be domestic tribunals with international aspects.

Third, what is the legal and jurisdictional basis of such institutions? Having determined that there is no accepted definition of a hybrid or internationalised tribunal, the book then turns to whether the absence of a definition matters. It is suggested that, while such tribunals are often called upon to determine their ‘nature’, namely whether they are ‘international’ or ‘domestic’ in character, such

analysis is potentially misleading and has led in the past to inconsistent decisions as to the nature of a particular institution. Instead, what is relevant is a determination as to the legal and jurisdictional basis of a tribunal, and a thorough study of its constituent instruments. The analysis determines that, despite vast differences in the circumstances leading to their establishment, there are, to date, three legal bases for hybrid and internationalised tribunals: courts effectively operating as domestic institutions of the affected state (internationalised tribunals); courts established by treaty (hybrid); and courts established by the Security Council acting under its powers pursuant to Chapter VII of the Charter (hybrid). It is submitted that the majority of future hybrid or internationalised tribunals, if not all such tribunals, will rely on one of these legal bases.

Fourth, building on the previous analysis, the study examines the jurisdictional basis for the existing tribunals, that is, the source of a tribunal's powers. It considers four possible bases: the exercise of territorial (and other) jurisdiction of the affected state (internationalised tribunals); delegated jurisdiction from a state to the tribunal (hybrid tribunals established by treaty); the power of the United Nations Security Council under Chapter VII of the Charter (hybrid tribunals established pursuant to a Security Council resolution); and 'floating' universal jurisdiction (tribunals exercising jurisdiction based on the nature of the crimes alone). The study, however, rejects the notion of universal jurisdiction as a basis for such an internationalised or hybrid tribunal. While universal jurisdiction may, of itself, form a basis for the jurisdiction of an international or internationalised tribunal in the future (and is incorporated as part of recent proposals for a piracy tribunal), it is submitted that international law does not support the notion of a 'floating' universal jurisdiction for international crimes. Jurisdiction for such a tribunal is sourced either in a conferral of authority from the Security Council or in the consent of the state(s) concerned, combined with the delegation of jurisdiction from that state(s). The conclusions reached do not preclude further options, including universal jurisdiction, developing over time. Nor do they preclude a role for other entities, such as the General Assembly or other international organisations, from participating in the establishment of future tribunals. However, current concepts of jurisdiction, which remain linked to the notion of state sovereignty, have restricted examples to the three jurisdictional bases discussed.

Fifth, how does the legal and jurisdictional basis of a particular tribunal impact upon the operation of the tribunal in question, in particular its response to key jurisdictional issues? The legal and jurisdictional basis of a tribunal will have important consequences for how the tribunal should approach issues concerning the exercise of its jurisdiction. The study identifies several significant jurisdictional issues that have arisen before the tribunals, such as the applicability of immunities under international law, the binding effect of national amnesties or statutes of limitation, and the obligations of states, organisations and individuals to cooperate with the tribunal's orders or requests. It then examines the practice to determine how the tribunals have approached such issues having regard to the legal and jurisdictional basis identified for each tribunal. It demonstrates that the

hybrid and internationalised tribunals have not always adopted a correct, or even consistent, approach to their findings concerning legal basis, and consequently their decisions on jurisdictional issues have at times been questionable.

Finally, the study will show that, while the blending of international and national elements into a single institution is a relatively new concept, the legal and conceptual framework within which such tribunals operate is not. These tribunals operate within the existing international legal framework, which includes areas such as the notion of jurisdiction in international law, the role and powers of the Security Council in the areas of international peace and security, and the notion of state sovereignty. Related concepts such as the rules governing the immunity of state officials and the need for a legal basis for state cooperation are also well-established. This study aims to assist those designing such tribunals in the future, and the judges and personnel appointed to them, to consider these issues more carefully and to draw on previous decisions and practice so as to minimise the likelihood of jurisdictional issues arising and, when they do, to ensure clear and consistent decision-making. It is suggested that the legal basis and its consequences for such issues should be taken into account when designing and establishing tribunals in future: not to do so risks rendering the tribunal at best ineffective, at worst, contrary to international standards.

The study adopts the following approach. In chapter one, the available options for ensuring criminal trials are examined, including trials before national courts, trials before the courts of other state(s) under the principle of universal jurisdiction, and trials before the international criminal tribunals, namely the ad hoc tribunals and the ICC. The strengths and weaknesses of each model will be assessed. This chapter also outlines the twin concerns of the international criminal justice system – accountability and state sovereignty – and traces the shift in the preference of the international community for trials before international institutions to the recognition that trials should, wherever possible, take place before the courts of the affected state. Chapter two turns to the increasing reliance on the hybrid or internationalised tribunal, and the potential advantages offered by such institutions. It outlines the background and establishment of the tribunals considered to fall within the category of hybrid and internationalised tribunals: the Special Court for Sierra Leone (SCSL); the Special Tribunal for Lebanon (STL); the International Judges and Prosecutors Programme in Kosovo (IJPP); the Special Panels for Serious Crimes in East Timor (SPSC); the War Crimes Chamber in the State Court of Bosnia and Herzegovina (WCC); the Iraqi High Tribunal (IHT); and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Chapter three considers institutions that have an international element, but which are not considered to be a hybrid or internationalised tribunal, including the Lockerbie Court and the Serbian War Crimes Chamber (SWCC). This chapter also outlines proposals for other institutions that may be established in the future that may fall within the category of hybrid and internationalised tribunals, for example, the proposed Special Tribunal for Burundi and the Special Tribunal for Kenya (STK). It then concludes by outlining the factors that are driving the creation of such

institutions. Chapter four builds upon the study of state practice by assessing the practice against suggested definitional features of hybrid and internationalised tribunals. It attempts to determine whether there is a comprehensive definition of a hybrid or internationalised tribunal, and the significance of a definition. It also details how the different circumstances within which each tribunal was established have impacted upon the mandate and jurisdictional reach of the institutions studied. Chapter five then identifies the legal bases of the tribunal studied and also assesses the source of the jurisdictional basis for each tribunal. Chapter six considers selected legal barriers to the exercise of jurisdiction: the principle of legality; immunity; amnesties; the ability to secure custody of the accused; statutes of limitation; the principle of *ne bis in idem*; and the relationship with other courts and tribunals, in particular the ICC. Building upon the discussion in chapters four and five, this chapter suggests that the tribunals studied have not always adopted the correct approach to whether these barriers to the exercise of jurisdiction apply. It is argued that, when determining such issues, the tribunals need to consider the nature of their establishment, their legal basis and the nature and source of the jurisdiction that they are to exercise. The final section offers some concluding remarks.