

International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals

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Abstract

This contribution will focus on the facet of International Criminal Justice where the influence of global law is the most apparent, namely the hybrid or internationalized criminal tribunals. Since many of these tribunals have closed their doors or are in the advanced stage of the proceedings, the time is ripe for a preliminary evaluation. Furthermore, the future necessity and viability of hybrid tribunals will be assessed, both for crimes that fall within and without the jurisdictional regime established by the International Criminal Court (ICC).

Keywords

hybrid tribunals; International Criminal Court; domestic tribunals; complementarity; impunity gap; fairness

1. Introduction

In our view, global law is an approach to law that encompasses not just international law. Instead, global law is more hybrid in nature, taking into account domestic laws of different countries and aiming to understand domestic regimes within the broader context of international laws, instruments and institutions. In a sense, the whole project of International Criminal Justice can be seen as a legal hybrid. International criminal procedure, for example, does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems,

obtained in common-law countries and the system prevailing in countries of civil-law.¹

During the late 1990s and 2000s a ‘third-generation’ of international criminal tribunals emerged, drawing on the heritage of the first generation tribunals at Nuremberg and Tokyo and the second generation of *ad hoc* tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These third generation tribunals, alternatively called ‘hybrid’² or ‘internationalized’³ tribunals, blend the international and the domestic as a product of judicial accountability-sharing between the states in which they function and international entities.⁴ As such, hybrid tribunals are the most apparent manifestations of the influence of the concept of global law on the field of International Criminal Justice.

The Oxford Companion on International Criminal Justice, considered as a kind of encyclopedia of International Criminal Justice,⁵ classifies the following tribunals under the category of hybrid tribunals: the Special Court for Sierra Leone (hereinafter: SCSL), the Serious Crimes Panels in the District Court of Dili in East Timor (hereinafter: the East Timor Panels), the Regulation 64 Panels in the courts of Kosovo (hereinafter: the Regulation 64 Panels), the Extraordinary Chambers in the courts of Cambodia (hereinafter: the ECCC) and the Special Tribunal for Lebanon (hereinafter: the STL).⁶ In other publications, the Bosnian War Crimes Chamber is also discussed as being part of the family of hybrid tribunals.⁷

¹ ICTY, Appeals Chamber, *The Prosecutor v. Drazen Erdemovic*, Separate and dissenting opinion of Judge Cassese, 7 October 1997, I. A. 4; See also: Frédéric Mégret, ‘International Criminal Law: A New Legal Hybrid?’ (2003) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269382> accessed 3 July 2012; Roelof Haveman, Olga Kavran and Julian Nichols (trans), *Supranational Criminal Law: A System Sui Generis* (Intersentia 2003) 5.

² See for example Sarah Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006), 2(2) *Utrecht Law Review* 190–214, <<http://www.utrechtlawreview.org/publish/articles/000033/article.pdf>> accessed 2 July 2012.

³ See for example Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (trans), *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004).

⁴ Etelle R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2005) 23 *Ariz. J. Int’l & Comp. L.* 352.

⁵ William A. Schabas, *Unimaginable Atrocities* (OUP 2012) 27.

⁶ Dafna Schraga, ‘Mixed or Internationalized Courts’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 424–426.

⁷ Nadia Bernaz and Remi Prouvèze, ‘International and Domestic Prosecutions’ in C. Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice. Volume 1* (Intersentia 2010) 312.

Hybrid tribunals are presented as integrating the best that both international and domestic justice have to offer. They are deemed to offer legitimacy by providing ownership without affecting independence and impartiality; to prosecute more perpetrators in less time and at lower costs while also building domestic capacity; to do domestic justice while upholding international law and complying with international fair trial standards, and thus also doing international justice.⁸ Furthermore, hybrid tribunals can have the following impact on local institutions: building capacity; rebuilding judicial systems and promoting international human rights standards throughout the local community.⁹

It seems impossible to give a comprehensive definition of hybrid tribunals. Indeed, their most prominent feature is that they are all *sui generis*. The characteristics of hybrid tribunals are generally deduced from the elements which the tribunals have in common. In all cases, the tribunals are composed of international and domestic judges, prosecutor(s) and support staff. They also apply a compound of international and national substantive and procedural law.¹⁰

In this article, it will first be assessed if hybrid tribunals have so far managed to fulfill their initial expectations. Subsequently, the future necessity of hybrid tribunals will be considered, given the existence of the ICC as a permanent international criminal court. It will be argued that establishing hybrid courts in the future will remain indispensable, to fill the possible impunity gaps under the jurisdictional framework of the ICC, for reasons of limited capacity of both domestic courts and the ICC, and as a guarantee for fairness.

2. Did the Hybrid Tribunals Live upto their Expectations? A Concise Appraisal

Already two hybrid tribunals have closed their doors: the East Timor Panels and the Regulation 64 Panels, in 2006¹¹ and 2008¹² respectively. The SCSL

⁸ Nouwen (n 2) 191.

⁹ Parinaz Kermani Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?' (2009) 20 *Crim. L.F.* 75.

¹⁰ Bernaz and Prouvèze (n 7) 294.

¹¹ Suzannah Linton, 'East Timor Special Panels' in Cassese (n 6) 307.

¹² The Kosovo Assembly substituted the Regulation 64 Panels with a law under which an EU presence, 'EULEX' operates, either separately or in mixed composition within the

will conclude after its Appeals Chamber has decided on the appeal of Charles Taylor for his conviction and 50-year sentence. While both the ECCC and the STL still have to fulfill an important portion of their respective mandates, the tribunals have been operating now for several years, which allow them to be assessed on a preliminary basis.

Since all the hybrid tribunals are, above all, *sui generis*, the results they produce will be too. For this reason, the following hybrid tribunals will briefly be assessed on an individual basis: the East Timor Panels; the Regulation 64 Panels; the SCSL; the ECCC and the STL. However, because of the communalities that these tribunals share, a general assessment will be given, in order to understand the hybrid model's strengths and weaknesses.¹³

2.1. *The Regulation 64 Panels*

The Regulation 64 Panels can be evaluated positively in terms of building the capacity of the Kosovar judicial system. Local judges and prosecutors have learned skills and knowledge in working within the hybrid system. Furthermore, the fact that the panels were integrated in the domestic system has allowed for cross-fertilization between the tribunal and the local system.

However, for most observers, the Regulation 64 Panels have failed to live up to their promises. Because of its hasty creation with little advance planning, there was no time for local consultation before and during the operation of the Panels and no premeditated plans for legacy were arranged.¹⁴

2.2. *The East Timor Panels*

Like Kosovo, the hybrid tribunal in East Timor is usually portrayed a story of missed opportunities. The close proximity to victims had the potential to promote justice and create benefits to the country's legal system. However, throughout the Panels' process, there was only minimal public consultation and inadequate capacity building efforts have reduced the positive impact which the tribunal could have had. The biggest problems the Panels were facing arose from the lack of cooperation from Indonesia. East Timorese

national system. See for more details Robert Cryer, Hakan Friman, Darryl Robinson, Elisabeth Wilmshurst (trans), *An Introduction to International Criminal Law and Procedure* Cambridge (2th edn CUP 2010) 190.

¹³ Higonet (n 4) 353.

¹⁴ Mendez (n 9) 78.

officials were striving for good relations with Indonesia, and Indonesia bluntly refused to cooperate with the Panels. Following this experience, one may question the appropriateness of the hybrid model for international conflicts where foreign state cooperation is essential for the effective functioning of the tribunal. A more international, neutral tribunal with legally binding cooperation obligations would probably have been a better model.¹⁵

2.3. *The SCSL*

The SCSL is often taken as the example to demonstrate that hybrid tribunals can have positive results, as being the most effective and efficient hybrid tribunal to date. Although the SCSL has a very narrow mandate and has only prosecuted a few individuals, which is criticized by some as being merely a form of imperfect or symbolic justice,¹⁶ the Court has had an impact in promoting the rule of law and in training professional and administrative staff. The SCSL outreach activities have helped to build civil society and foster some sense of participation of the local population in the judicial system. The focus on a few trials has made SCSL a relatively cheap enterprise in comparison with the *ad hoc* tribunals. This limited amount of trials was at least partly compensated by the coexisting Truth and Reconciliation Commission.¹⁷

2.4. *The ECCC*

Although the ECCC has only finished one trial, the concerns are growing that it will not be able to provide substantive justice. The main problem of the ECCC is ensuring impartiality. Because the high corrupt nature of the Cambodian court system and its submissiveness towards the Cambodian government, international judges have insufficient power to ensure impartiality. The lack of a majority of international judges has prevented the ECCC from opening new investigations and conducting fair trials, given the government's manipulation of Cambodian judges.¹⁸ Because of this, many international judges have already resigned from their positions.¹⁹

¹⁵ *ibid* 85.

¹⁶ Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (Routledge 2005) 102–103.

¹⁷ Mendez (n 9) 81.

¹⁸ *ibid* 85–86.

¹⁹ See Kevin Jon Heller, 'Disarray at ECCC' (*Opinio Iuris*, 1 April 2012) <<http://opiniojuris.org/2012/04/01/disarray-at-the-eccc/>> accessed 9 July 2012.

2.5. *The STL*

The STL, competent to prosecute and try those responsible for the murderous attack on Rafik Hariri and some connected attacks on other senior Lebanese political figures, has yet to start its first trial. Because of the inability of the Lebanese enforcement institutions to arrest four indicted members of Hezbollah, these trials will most probably be held *in absentia*. While trials *in absentia* are not impermissible *per se* under international law, an empty dock creates a sense of failure and toothlessness, both for the STL specifically, as for the project of International Criminal Justice in general.²⁰ The Tribunals legitimacy is also fragile because of the extremely limited (and thus selective) mandate of the STL. Many atrocities have been committed during the last three decades in Lebanon, including acts that can be qualified as war crimes and crimes against humanity. There has been impunity for all these crimes.²¹ By definition, the justice rendered by the STL will be selective in nature vis-à-vis these crimes. This will probably further complicate the role of the STL in comparison with other international(ized) tribunals, which are significantly legitimized by their ability to represent and act in the interests of large numbers of victims.²²

2.6. *A General Appraisal of the Hybrid Tribunals*

This concise overview of the operation of the hybrid tribunals to date demonstrates that these institutions have not entirely lived up to their promises. Local communities have probably a greater awareness and connection that they have proceedings conducted by purely international tribunals. In some cases, public outreach initiatives have been positive and the employment of local staff within the court system resulted in some hands-on learning. Lastly, according to locals, hybrid tribunals have helped to promote human rights and the rule of law.²³

²⁰ Lynn Maalouf, 'Empty dock: a sense of failure?' (*International Justice Tribune*, 5 February 2012) <<http://www.rnw.nl/international-justice/article/empty-dock-a-sense-failure>> accessed 8 July 2012.

²¹ Marieke Wierda, Habib Nassar and Lynn Maalouf, 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5(5) JICJ 1067.

²² *ibid* 1072.

²³ Mendez (n 9) 87.

The hybrid model may have had some positive outcomes, but there is still a lot of room for improvement. We see three main concerns that should be remedied if the hybrid model wants to retain its legitimacy.

Firstly, when future hybrid tribunals are established, it is of utmost importance to find the correct balance between domestic and international elements.²⁴ As the case of the ECCC shows, the presence of a few international judges and prosecutors may be insufficient to ensure a tribunal is impartial and free from government manipulation. Creating a sense of local ownership can be attained through other means, for example by locating the tribunal on the territory where the crimes have been committed or by adding crimes under the national criminal laws of the country involved in the statute of the tribunal.

Another thorny issue concerns the appropriate mandate of hybrid tribunals. It is true that one of the justifications behind establishing hybrid tribunals was to create more cost-effective institutions than the *ad hoc* tribunals. One way by which this cost-effectiveness seems to have been realized is by narrowing down the jurisdiction *ratione personae*, *ratione materiae*, *ratione loci* and *ratione temporis* of the different hybrid tribunals. A jurisdictional framework that is too narrow however undermines the legitimacy of a specific institution and creates a sense of selectivity, exemplified by the case of the STL. This narrow jurisdiction can be compensated by the establishment of a coexisting Truth and Reconciliation Commission and/or by the capacity- building of the national judicial system, which could prosecute crimes that fall out of the jurisdictional ambit of the hybrid tribunal.

Finally, the issue of securing cooperation with local authorities or foreign states has also been of serious concern. Without cooperation, securing the presence of alleged perpetrators or witnesses, conducting investigations, and collecting evidence can be difficult if not impossible, as was shown by the non-cooperation of Indonesia with the East Timor Panels.²⁵ Creating a robust cooperation mechanism, akin to the framework that was set up by the Security Council for the *ad hoc* tribunals, is thus imperative for the future success of hybrid tribunals.

²⁴ *ibid.*

²⁵ Lindsey Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *N.Y.U. J. Int'l L. & Pol.* 1045.

3. The Future Necessity of Hybrid Tribunals and Their Relationship With the ICC

The establishment of hybrid tribunals was deemed necessary to fill the impunity gap left by the *interregnum*, the period between the adoption of the Rome Statute establishing the ICC in 1998 and the coming into force of the Court in 2002. One might be tempted to think then that hybrid tribunals will become irrelevant in the future, given the fact the ICC is now fully operational. This view would be both short-sighted and simplistic, however. In the following sections, it will be argued that hybrid tribunals will need to be established in the future, both for crimes that fall out of the Court's realm, as for crimes committed within the ICC's jurisdictional reach.

3.1. *The Future Necessity of Hybrid Tribunals When the ICC Has No Jurisdiction Ratione Temporis*

The ICC has no retroactive jurisdiction and it is only allowed to prosecute crimes committed after July 1, 2002. The crimes for which the ECCC has jurisdiction could hence not have been brought under the jurisdiction of the ICC. The case of Syria can serve as an example. If, hypothetically, the situation in Syria is referred to the ICC one day, the Court will only be competent to prosecute and try the crimes committed by the Assad regime after July 1, 2002. If the Syrians themselves are unable to deliver post-conflict justice, a hybrid tribunal could then be established to fill this impunity gap. For example, the individuals responsible for the Hama massacre, which occurred in February 1982, when the Syrian army under the orders of Hafez al-Assad conducted a scorched earth operation in the town of Hama causing the death of several thousands, could be prosecuted before a hybrid tribunal.

3.2. *The Future Necessity of Hybrid Tribunals When the ICC Has No Jurisdiction Ratione Loci*

Potentially, the ICC has worldwide jurisdiction, since the Security Council can refer a situation to the Court under 13(b) of the Rome Statute.²⁶

²⁶ As in the situation in Darfur, Sudan, referred to the Court by Security Council resolution 1593 (2005) and in the situation in Libya, referred to the Court by Security Council resolution 1970 (2010).

Likewise, article 12(3) allows a State, not party, to declare that it accepts the jurisdiction of the Court with respect to the crime in question.²⁷ However, because of geopolitical considerations of one of its five permanent members—and especially the United States, Russia and China—the Security Council has already refrained to use its referral power.²⁸ The most recent example is the refusal by Russia to support any kind of resolution that would refer the situation in Syria where crimes against humanity are being committed to the ICC, despite the numerous calls by UN High Commissioner for Human Rights Navi Pillay.²⁹ Likewise, a State will only lodge an *ad hoc* declaration, under Article 12(3) of the Statute, if it is in its political interest to do so.

In order to fill this impunity gap, a hybrid tribunal could be established, for example by regional organizations such as the African Union or the Arab League. In this perspective, there have been calls to establish a tribunal under the auspices of the Arab League with competence over the crimes committed in Syria.³⁰

3.3. *The Future Necessity of Hybrid Tribunals When the ICC Has No Jurisdiction Ratione Materiae*

The ICC currently only has jurisdiction over three core international crimes, namely genocide, crimes against humanity, war crimes. There have been unsuccessful proposals to include so-called ‘transnational crimes’, like drug trafficking³¹ and terrorism³² in the jurisdiction of the ICC. These

²⁷ Cryer, Friman, Robinson and Wilmshurst (n 12) 166.

²⁸ See for a fierce critique of the position of the Security Council towards the ICC: Richard Dicker, ‘A Flawed Court in Need of Credibility’ *New York Times* (New York, 1 May 2012).

²⁹ See for example ‘Militarization of Syrian conflict must be stopped’, says UN human rights chief Navi Pillay <<http://www.ohchr.org/EN/NewsEvents/Pages/HCSecurityCouncil.aspx>> accessed 4 July 2012.

³⁰ Aryeh Neier, ‘An Arab War-Crimes Court for Syria’ *New York Times* (New York, 4 April 2012).

³¹ Trinidad and Tobago and Belize proposed to include the crime of international drug trafficking in the jurisdiction of the Statute, see ‘Proposal for the inclusion of the Crime of International Drug Trafficking in the Rome Statute of the International Criminal Court’, <<http://www.icc-cpi.int/NR/rdonlyres/03DAF164-78C7-4129-A0BD-91534F80BF81/0/TrinidadTobagoCN737EN.pdf>> accessed 4 July 2012.

³² The Netherlands has submitted a proposal for the inclusion of terrorism in the subject matter jurisdiction of the ICC. See Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18–26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III 65–66. However, it was decided not to consider this proposal at the Review Conference held in Kampala in 2010.

crimes can have a huge impact on people throughout the world and on global economic development.³³ Normally, transnational crimes can be adequately addressed by national judicial authorities, if necessary with the cooperation of other governments and other law enforcement agencies.³⁴ There may be instances however, despite the availability of international cooperation mechanisms, where the need still exists to establish a tribunal with international assistance and participation, like in cases where the State that would usually exercise jurisdiction is unable or unwilling to do so.

The establishment of the STL is the obvious example in this perspective. Because the Lebanese judiciary system present at the time of the murderous attack on Rafik Hariri and the other connected attacks was in a debatable state of inability to prosecute and unwillingness to seriously handle such crimes, an international solution was required.³⁵ Before the establishment of the Tribunal, a referral of the situation in Lebanon to the ICC was considered. The UN Secretary-General's report on establishing the STL considered and briefly presented a *prima facie* case that the assassination of Hariri and the other connected attacks arose to the level of a crime against humanity.³⁶ A debate in the Security Council resulted, however, in the exclusion of the label of crimes against humanity for the crimes committed in Lebanon.³⁷ This decision might be criticized,³⁸ but it closed the door to a possible referral of the situation to the ICC and thus necessitated the establishment of a hybrid tribunal.

3.4. *The Future Necessity of Hybrid Tribunals When the ICC Has Jurisdiction. The Relationship With the Complementarity Regime of the ICC*

As is widely known, the concept of complementarity is fundamental to the design of the ICC. If in a case or situation under the jurisdiction of the ICC

³³ See Res. 56/120 the UN General Assembly expressed deep concern over 'the impact of transnational organized crime on the political, social and economic stability and development of societies'. UN Doc. A/RES/56/210 (2002).

³⁴ Neil Boister, 'Transnational Criminal Law?' (2003) 14 *EJIL* 967–977.

³⁵ Issam Kayssi and Weam Alawar, 'The Special Tribunal for Lebanon: International justice or international intervention?' <http://www.aub.edu.lb/sao/activities/outlook/archive/volume_44/issue_9/campus_news/Pages/4.aspx> accessed 7 July 2012.

³⁶ Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc. S/2006/893 (2006) para. 24.

³⁷ *ibid* para. 25.

³⁸ See for a fierce critique: Matt Halling, 'Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' (2010) 23 *LJIL* 843–844.

a *bona fide* examination of the alleged crime was undertaken and disposed of by the national judicial system of a state party to the Court, the matter will not be admissible before the ICC pursuant to Article 17 of the Statute.³⁹ What is the position of hybrid mechanisms within this dichotomous system? May a hybrid tribunal count as a national court? The ambiguous text of the Statute does not exclude such a scenario. Some national involvement should suffice, and a teleological interpretation in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties supports the conclusion that hybrid tribunals may be included under the term national, since one of the primary aims behind the creation of the ICC was to end impunity.⁴⁰

One important argument to be put forward for choosing in favor of hybrid tribunals over purely national tribunals is the argument of capacity, both from the perspective of the state parties to the ICC and the ICC itself. From the perspective of state parties, a country may be so devastated by war or a conflict with intense violence that its judicial capacity is too poor to deliver meaningful post-conflict justice. The creation of a hybrid tribunal may be indispensable then and, furthermore, it can be beneficial to a state's future judicial development and capacity-building.⁴¹ For example, this 'capacity' argument is one of the most important rationales behind the plans to hybrid courts in the Democratic Republic of the Congo (DRC) to try international crimes committed between March 1993 and June 2003.⁴² Because of budget constraints, the ICC itself will only be able to judge a very small fraction of human rights abusers in any given situation.

Furthermore, in its most recent prosecutorial strategy, the Office of the Prosecutor of the ICC consolidated its policy to investigate and prosecute those who bear the greatest responsibility for the most serious crimes.⁴³ In this respect, hybrid mechanisms should be seen as a useful complement to the ICC.⁴⁴

³⁹ Jonathan I. Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) *AJIL* 95 120.

⁴⁰ Markus Benzing and Morten Bergsmo, 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court' in Romano, Nollkaemper and Kleffner (eds) (n 3) 412.

⁴¹ *ibid* 416.

⁴² See Pascale Kambale, 'Plans for Hybrid Courts in Congo' <<http://www.osisa.org/openspace/drc/plans-hybrid-court-congo-pascale-kambale>> accessed 2 July 2012.

⁴³ ICC, The Office of the Prosecutor, Prosecutorial Strategy 2009–2012 para 14.

⁴⁴ Higonnet (n 4) 43; Padraig McAuliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *JILIR* 63.

3.5. Fairness as an Argument in Favor of the Future Establishment of Hybrid Tribunals Both When the ICC Has or Has No Jurisdiction

Fairness is often put forward as one of the most important features and justifications for the project of International Criminal Justice⁴⁵ and of hybrid tribunals more specifically.⁴⁶ Admittedly, at a practical level, there seem to be great benefits to addressing mass atrocities at the domestic level. The proximity to the evidence and witnesses certainly facilitates expeditious trials. From the perspective of state cooperation, domestic prosecutions are easier because states are not asked to surrender jurisdiction to try their nationals, often seen as a critical aspect of state sovereignty. However, national tribunals face various drawbacks.

Given the fact that international crimes are often crimes committed with the support of the state, domestic mechanisms will often be unreliable and partial. Moreover, the danger of show trials and victor's justice exists where governments have been replaced after a conflict. This danger of partial trials and victor's justice is shown by the track record of two domestic tribunals specifically set up to try international crimes that fall out of the jurisdictional ambit of the ICC: the Iraqi High Tribunal (IHT) and the International Crimes Tribunal in Bangladesh (ICTB). Both tribunals are largely seen as illegitimate for its failure to deliver fair trials.

In the case of the IHT, the proceedings were marred by the assassination of defense counsel, the resignation of a presiding judge, the boycott of defense teams, disruptive conduct of defendants and by botched executions that were universally condemned.⁴⁷ As regards the ICTB, it has been labeled as a 'travesty of justice'⁴⁸ because of its failure to uphold the most fair trial rights and guarantees for impartiality. The list of reproaches is long, but the ICTB is criticized for, *inter alia*, conducting interrogations in secret; preventing foreign counsel from entering the country; the ill treatment of detainees and the subjection of defense lawyers and witnesses to threats of false arrest and intimidation.⁴⁹ In both instances, a hybrid

⁴⁵ See Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) 25 *LJIL* 266–270.

⁴⁶ Nouwen (n 2) 191.

⁴⁷ Michael P. Scharf, 'The Iraqi High Tribunal. A Viable Experiment in International Justice?' (2007) 5 *JICJ* 259.

⁴⁸ Tom Felix Joehnk, "A War Crimes Court and a Travesty of Justice" *New York Times* (New York, 29 November 2011).

⁴⁹ Toby Cadman, "The International Crimes Tribunal Bangladesh: A Journey In Search Of Fairness" <<http://www.internationallawbureau.com/blog/wp-content/uploads/2011/11/Toby-Cadman-Bangladesh-In-Search-Of-Fairness-copy.pdf>> accessed 8 July 2012.

tribunal would have been a better option. The addition of a sufficient amount of international jurists, with experience in complex prosecutions and scrupulously respecting international fair trial standards, could ensure future similar tribunals are impartial and free from government manipulation.⁵⁰

Concerning the crimes committed in situations that fall within the jurisdictional realm of the ICC, the establishment of hybrid tribunals for reasons of fairness could also be argued for. By allowing the internationalization of its domestic justice system, a state could create a genuine domestic proceeding to preclude admissibility of a case or situation before the ICC under Article 17 of the Statute.⁵¹ An explicit requirement of fairness is contained in the chapeau of Article 17(2). The Court is mandated to determine admissibility with 'regard to the principles of due process recognized by international law'.⁵²

4. Conclusion

Hybrid tribunals are the most obvious manifestations of a more global, pluralistic and holistic approach towards International Criminal Justice. Hybrid tribunals transcend the traditional dichotomy between the 'international' and the 'domestic', often presented as the only two legal orders where justice for the major international crimes could take place, by offering a more tailor-made, flexible and, at times, more desirable option. It is a necessary option sometimes too, to fill impunity gaps left by purely international tribunals, for reasons of limited capacity of both domestic courts and the ICC, and to uphold fairness that is lacking at the domestic level.

Although we still believe in the hybrid model's added value, one cannot stay blind to the flaws of hybrid tribunals. First and foremost, the inadequacies that the hybrid model has demonstrated up to date should be taken into consideration and remedied before the establishment of new hybrid tribunals is considered.

⁵⁰ Sylvia de Bertodano, 'Where There More Acceptable Alternatives to the Iraqi High Tribunal?' (2007) 5 JICJ 297; Mendez (n 9) 87.

⁵¹ McAuliffe (n 44) 63.

⁵² See for more details: Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility' (2012) 25 JICJ 345.