UNIT 12 WHAT ARE THE OTHER DIFFERENT KINDS OF HYBRID/MIXED COURTS?

Structure

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12.1 INTRODUCTION

International Law is constantly evolving and so are systems, mechanisms and bodies under it. Like we have seen in the earlier Units (9, 10 and 11) the courts and judicial set up is largely responsible for the application of law as well as for ensuring that victims receive compensation and justice. The types of courts that exist today at the international level have also undergone a huge change. Even though the international community always desired a permanent criminal body, the road towards achieving that goal was not only long drawn but also interspersed with various other mechanisms that emerged along the way.

Often it is the judicial system that is expected to play an important role in ensuring peace, harmony and justice after wars and conflicts wherein tremendous human rights violations have occurred. The judicial system is supposed to conduct trials and prosecutions and punish those who were responsible for committing crimes in the wars/conflicts. The judicial structures are also expected deliver justice to the victims in a host of ways—compensation for victims, punishing the offender, rehabilitating the victims and their families etc. It is the judicial system that bears the responsibility of putting the country on the track of peace, prosperity and harmony.

What we also need to keep in mind is that often after a conflict or a war there are no structures, systems, mechanisms left in a country. Post conflict situation is generally very pathetic as the war would have completely destroyed and devastated the whole country. Wars and conflicts necessarily result in huge losses of human lives as well as human property. Against such a background it is extremely unrealistic to expect that the judicial system would be functioning in a post-war country.
How is IHL Applied at the International Level?

This is almost next to impossible as post-conflict national judiciaries may be non-existent, defunct or even inactive. Several reasons for this can be stated. Firstly there might not be enough judges, lawyers, staff, para-legal personnel etc. as people may have been killed during the war or they might have fled to neighbouring States for shelter and protection. It would be difficult for these people to return immediately after the war ends as they might be fearful or suspicious. Still further there might be no institutional buildings like court halls etc. as they might have been destroyed during the conflict. Moreover, people might also believe that initiating trials and prosecutions might hamper the peace process and violence might restart again.

Moreover the existing judicial system might also be corrupt and illegitimate or may even have members or personnel that have been supporters of the previous government that had unleashed the wave of atrocities against the people and thus the local population might have no confidence in it. It is also possible that international support may also not be forthcoming. For example, the UN might refuse to set up any further ad hoc tribunals like the ICTY and ICTR like it did in conflict ridden countries of Yugoslavia and Rwanda. The neighbouring States might also be unwilling to participate and support the new government in a post conflict situation.

The ICC might also not be of much help as many of the conflicts may not come under jurisdiction of the ICC. Please recollect that the Rome Statute came into effect on July 1st 2002 and the ICC will have jurisdiction to try crimes that have occurred after this time period. Even if the ICC has jurisdiction it will not be in a position to try all criminals- and thus can only focus on some criminals who occupied higher posts in the civilian and military set up. What about the other middle level as well as low ranking offenders? Even they have to be held accountable.

Thus the need is to find an alternative to Ad hoc courts and the permanent court-ICC and yet ensure that justice is done to the victims and their families. And Hybrid Tribunals/Mixed Courts have emerged as an ideal solution to all this.

12.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the concept of Hybrid Courts;
- describe the functioning and features of Hybrid Courts;
- have an overview of the currently existing Hybrid Courts;
- differentiate between Hybrid Courts and the ad hoc criminal courts and ICC; and
- identify problems and failures with this category of courts?

12.3 WHAT ARE HYBRID COURTS? WHAT ARE THEIR DISTINCTIVE FEATURES?

The international community witnessed the gradual evolution, growth and proliferation of criminal courts. The Hybrid Courts emerged some time after the two ad hoc courts – International Criminal Tribunal For Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and some time before the
permanent court—the International Criminal Court (ICC). The Hybrid Courts occupy a unique position and status in international criminal law. Hybrid Courts have been established in two specific contexts—one where no international courts exist or one where an international court exists but is unable to address all crimes as the number of crimes as well as when the number of offenders/perpetrators are too many.

We need to understand that though the world has witnessed from the 1990s and 2000s the presence of hybrid courts in a wide range of countries like East Timor, Sierra Leone, Kosovo, Lebanon, Cambodia etc., yet no two hybrid tribunals would be similar. Each has its own distinctive features. A tribunal may be categorised as hybrid depending on a wide host of factors—mandate, legal basis, location, function, law applied, staff profile, etc. The whole idea of a hybrid tribunal is to have the best of both the worlds—international as well as domestic. Hybrid courts are often called the third generation courts. The first generation being the ad hoc courts—ICTY and ICTR, followed by the second generation permanent court—the ICC.

Firstly, hybrid courts don’t have a single name. They are addressed by different names like-mixed courts, hybrid courts, mixed domestic-international criminal courts, hybrid domestic international courts, semi-internationalised criminal courts etc. These hybrid/mixed courts are composed of national and international elements and the accountability that emerges is a product of sharing between the Governments of States in which they operate and the UN. These courts are referred to as hybrid or internationalised as the institutional structure as well as the law applied in these courts combine both national and international components and thus result in mixed justice. These courts command the combined efforts of both the international community as well as the States in which the crimes have occurred and thus result in shared responsibility.

One of the most important features of the hybrid courts is that it involves an ideal combination of both national as well as international elements. This unique combination permeates the hybrid tribunals in all quarters. Also, the Hybrid tribunals encourage effective national proceedings and help the national courts to don a more proactive role and thus be able demolish the perception that hybrid courts do not assist domestic system in capacity building etc. Thus they assist in the long run in the strengthening the domestic systems and structures.

Another important trait of the hybrid courts is that its location in the place of conflict or where these grave crimes have been committed makes the job of investigation and evidence collection easier. Witnesses and victims would also be comparatively easier to find and be more accessible. Nearness to the place of crimes would also mean that transportation costs in transferring evidence from the place of crime to the courts would be saved. Time and undue delays or evidence getting lost, misplaced in transit can also be avoided.

The location of the hybrid tribunal at the scene of crimes would also entail the opportunity to tap local personnel for the tribunal’s work. Often local legal persons have a better grasp of local history, customs, language, laws etc. and of the intricacies of the conflict and crimes committed and thus can be of immense use and help to the hybrid tribunal. The international actors would be bereft of this specialized knowledge and awareness and the lack of the participation of local actors can adversely affect the functioning of the tribunal. This kind of work will also build and strengthen relationships between international and local actors.
The presence and involvement of the local actors would garner greater acceptability of these tribunals. Often the local population might be suspicious of a purely international court as the presence of non-locals might result in non-cooperation with the court. The local population may question the presence of foreign judges, lawyers and might mistakenly also believe these persons would have no knowledge of the local conflict and thus would not be able to render justice. Moreover, the presence of local people in the Court’s functioning would seem attractive to the local population as they would also believe that the entire process and systems would be in their benefit and they may actively support and encourage the working of the court.

The mixed composition of the hybrid tribunals is extremely beneficial. The local actors can ensure that their foreign counterparts are familiarised with the nuances of the conflicts as well as the legal system. In turn, the foreign lawyers, judges and prosecutors can share their knowledge and expertise with their local colleagues and thus train them and these new skills acquired would be beneficial in the long run for the war torn country. This would result in capacity building of local personnel who can contribute immensely and for a longer duration especially after the international support and presence has been withdrawn or come to an end. This institutional and personnel skill strengthening would be an invaluable contribution towards ensuring a sustainable and effective legal system in the country.

The Hybrid Courts are also important as they ease the work of the International Criminal Court. The complementary principle of the ICC envisages that the national courts take initiatives to conduct trials and prosecutions of those responsible for the grave crimes. By doing so, the hybrid courts share the burden of the ICC of ensuring an end to impunity and demanding accountability. Once the local courts with ample assistance from the international community are able to build its legal capacity to conduct national trials, that are fair and at par with minimum international standards, the hybrid tribunals would emerge as effective mechanisms in the array of international courts. Thus their potential and contribution is immense and they would complement the working of the ICC.

**Self Assessment Question**

1) Describe any two reasons why Hybrid Courts are important.

Another great feature of these hybrid courts is that they involve the local actors at all levels. This implies that local systems and mechanisms get an opportunity to be rebuilt and with the assistance of international actors, there is a great possibility they will be influenced by international norms, standards and practices that go a long way in strengthening the local systems and mechanism. It will eventually result in international and global standards and regulations being implemented at the domestic level. Thus, even after the international support is withdrawn the local machinery and systems can sustain themselves and function independently thereafter.
Another great strength of the hybrid tribunals are their flexibility and the country-specific models which can be made. The hybrid tribunals do not necessarily follow a standard format or pattern and there is ample scope of designing a hybrid tribunal to suit the specific demands of a given country. This element of flexibility is yet another stronghold of a hybrid tribunal. It also implies that the international community and the governments can learn from the areas of challenges and shortcomings of existing hybrid tribunals and design hybrid tribunals for the future wherein the same omissions or mistakes are not replicated. This element of discretion that vests in the international community can ensure that the country specific tribunals are designed appropriately and for greater effectiveness and success.

Finally, the local community and population can also identify with a hybrid court greatly than either a purely international or national court. The presence of international actors can ensure maybe greater neutrality and hope that justice would be done. At the same time the involvement and participation of local elements would restore the faith of community in the court as well as an element of ownership is felt with the local population. The presence of local actors might result in a greater deal of confidence in the working of the court by the local population.

12.4 DESCRIBE SOME OF THE HYBRID COURTS

The Hybrid Courts that have been created as of March 2010 are- The Regulation 64 Panels in Kosovo; the Bosnian War Crimes Chamber in Bosnia, the Special Panels for Serious Crimes (SPSC) in Dili, East Timor; the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh; the Special Court for Sierra Leone (SCSL) in Freetown; and most recently the Special Tribunal for Lebanon (STL) in The Hague, The Netherlands.

The Regulation 64 Panels in Kosovo – The Ad hoc court International criminal Tribunal for Former Yugoslavia (ICTY) has been established in former Yugoslavia by the United Nations to try individuals who had perpetrated the most heinous crimes like-ethnic cleansing, rapes, etc. In 1999, the UN set up the United Nations Interim Administration in Kosovo (UNMIK) which realized that the ICTY had limited resources and thus could try only a handful of offenders.

Thus the UNMIK decided to set up a hybrid court and so the Regulation 64 panels was born. The court used international criminal law and human rights law. However, it faced severe financial crisis and was unable to develop the capacity of the local courts. The presence of international judges ensured the impartiality of the tribunal. The tribunal did try several perpetrators that were not under the ICTY.

The Bosnian War Crimes Chamber in Bosnia – Since the ICTY was unable to focus on all levels of offenders, it was decided that middle and low level rank suspects would be transferred to domestic courts in Bosnia. A specially created tribunal seemed the best solution to judge the local war criminals. This resulted in the Bosnian War Chambers being established in 2005. Unlike other hybrid courts, this is independent of the UN and is totally integrated into the Bosnian criminal justice system though it also boasts of international staff and the application of international and local laws. This specialized tribunal tries not only offenders who are transferred from the ICTY but also most sensitive cases of war criminals at the national or local level. The court has been extremely active.
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The Special Panels for Serious Crimes (SPSC) in Dili, East Timor – After Suharto’s rule in Indonesia collapsed, East Timor voted with an overwhelming majority of independence from Indonesia. The disagreement between the pro-independence and the pro-Indonesia supporters led to massive violence wherein hundreds were killed, 80% of building destroyed and several others fled to neighbouring States. The UN set up the United Nations Transitional Administration in East Timor (UNTAET) which decided that a court would be created to achieve peace and accountability in the region. The Court was called the Special Panels for Serious Crimes (SPSC) and had the power to try offences like war crimes, crimes against humanity, sexual violence etc. The court has so far convicted 84 individuals.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh – From 1975-1979 Khmer Rouge ruled Cambodia and during the four year rule 20-25% of the population was killed and other massive atrocities like murder, forced labour etc., had occurred. In 1997 the Government of Cambodia requested the UN to establish a court to try those responsible for all these crimes. Later disagreements between the UN and the Government of Cambodia resulted in an undue delay in the commencement of the tribunal and its proceedings. The tribunal began hearing cases as of 2009 only. The ECCC will prosecute the senior leaders of the Khmer Rouge. However, the ECCC’s working has attracted severe criticism with the recent judgment in the case of Kaing Guek Eav Alias Duch attracting serious scrutiny. Duch, the first person to stand trial before the ECCC, was sentenced on June 26, 2010 by the ECCC in a decision by the Trial Chamber which is being appealed by the Prosecutor on three grounds- i. the duration of the term of imprisonment; ii. The Trial Chamber’s decision not to convict Duch “cumulatively for the crimes against humanity of enslavement, imprisonment, torture, rape, extermination...and, other inhumane acts”; and iii. the alleged misapplication of the law pertaining to the crime of enslavement by the Trial Chamber.

The Special Court for Sierra Leone (SCSL) in Freetown – After a brutal civil war that lasted 10 long years, in the year 2002, the Sierra Leone Government placed a request before the UN to set up a court for ensuring accountability and justice. In the civil war thousands of civilians were tortured, sexually abused, mutilated and killed. A treaty was negotiated between the UN and the Sierra Leone Government and the court was became operational from 20002 onwards.

The Special Tribunal for Lebanon (STL) in The Hague, The Netherlands – The Special Tribunal was set up in 2007 to try individuals who had assassinated major political and media personalities/figures from 2004 onwards and to ensure accountability for these crimes and to hold the perpetrators accountable. This hybrid court is special as it is the first international criminal mechanism to prosecute the crime of terrorism. It will also exclusively focus on the assassination of the former Prime Minister of Lebanon Mr. Hariri. It is situated in The Hague due to security reasons. It is also the first international tribunal to try exclusively domestic crimes like terrorism. The tribunal began work in 2009.

The Hybrid tribunals have also, on account of funding, been varied in several ways. The Kosovo regulation 64 panels and the SPSC were funded through their respective UN mission budgets and, in the case of Kosovo, the Kosovo consolidated budget. The extraordinary chambers, special court for Sierra Leone, and special tribunal for Lebanon were funded by contributions from both the
national government and the international community, either voluntarily or from the UN budget.

All the above brief descriptions should give us an idea on how different each of the hybrid tribunals is. The difference has hinged mostly on three important factors—UN involvement, cooperation of the concerned Government, and the sources and quantum of funding.

12.5 HOW ARE THE HYBRID COURTS DIFFERENT FROM THE AD HOC COURTS AND THE ICC?

Like we saw in the preceding paragraphs, hybrid courts are one of a kind. They are quite different from both the Ad hoc courts and the ICC. One major distinction is on the grounds on which the hybrid courts are funded. Since the Ad hoc courts ICTY and ICTR were established by the United Nations Security Council, they receive their financial resources from the UNO. Half of the funding comes from the peace keeping budget of the UN and the rest from UN members States.

The ICC was created independent of the UNO and thus it receives funding from the States who are parties to the Rome Statute plus from voluntary contributions from States, individuals, corporations and other entities. The UNO can also contribute to it if the General Assembly approves and if the matter that the ICC is hearing has been referred by the UNO Security Council. For the hybrid courts, funding has come in through diverse ways. The Kosovo 64 panels and SPSC were funded through the UN mission budget whereas the Extraordinary Chambers as well as Special Court for Sierra Leone and Lebanon were funded either by the national governments or by the international community or the UN.

In terms of the cost factor and expense, the hybrid courts are less expensive compared to the Ad hoc courts and the ICC. This is an advantage as well as a shortcoming. The Ad hoc courts spend huge amounts on activities like translation and defense costs yet these are denied to the hybrid courts though this is what is needed by them as a priority. The salaries of international judges are higher if they are employed in Ad hoc courts or the ICC whereas they are quite low in the hybrid courts. This has resulted in short term contracts, monetary dissatisfaction among employed judges and difficulty in finding suitable judges and competent professionals for the meagre salaries offered.

Hybrid courts are located in the territory/country where the conflict has taken place. The Ad hoc court of Rwanda was located in the neighbouring State of Tanzania due to safety and security issues in Rwanda. The ICTY is located in The Hague. The ICC is located in The Hague but if the need arises, it can shift to the country where the gross human rights violations have occurred and are being investigated by the ICC. Thus the local population is denied participations involvement and accessibility in other courts whereas in Hybrid tribunals there is ample scope for that.

The consent of the country wherein the hybrid courts are established is another feature which distinguishes it from other courts. The Government of Rwanda initially requested the UN to establish the Ad hoc court ICTR to try the individuals who were responsible for the human rights offences that had occurred. Later on, the Government of Rwanda protested against the UN involvement as it was not
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happy with certain terms and conditions of the court, it also voted against the
decision of such a court, yet the UN went ahead and established it. It did not take
into consideration the Rwandan Government's wishes.

Similarly in the ICC, the Sudanese Government refuses to recognise the ICC’s
directives. They argue that the ICC has no jurisdiction over Sudan as Sudan has
not ratified the Rome Statute and are thus refusing to cooperate with the ICC.
In the case of hybrid courts, all governments have cooperated with the UN for
the creation of such courts. Even though there have been some protests here and
there (for example, by the Cambodian government), in most of the hybrid tribunals
the governments have welcomed the move to establish the hybrid tribunal.

Self Assessment Question

2) Describe any two differences between the Hybrid courts and the other
international courts.

It is also argued that financial resources available have a huge impact on the
success or failure of the court in question. The ad hoc courts with the total UN’s
involvement made it easier for the courts to have more funds at its disposal. In
contrast, funding was scarce for hybrid tribunals due to partial involvement of the
UN and the financial responsibility had to be shared between the UN and the
government where these courts were operating.

We should also accept the fact that the establishment of Ad hoc courts require
more financial resources- they also comparatively incur more expenditure. Hence,
higher the degree of UN involvement, the more money would be required by the
court. Hybrid courts on the other hand are less expensive to maintain and
comparatively incur lesser costs especially in the light of the fact that the host
government meets part of the expenses and costs.

Another great advantage of the hybrid tribunals its accessibility to evidence,
witnesses and the victims. Since these courts are located within the country where
the horrible crimes have occurred, witnesses and victims and the local population
can take a keen interest in the functioning of the Court and this support by the
local community can boost the court’s success and impact.

It is also feared at some levels that the International Criminal Court will not
be able to attract many cases for itself in the face of stiff resistance from big
countries like the USA, India etc. Thus the hybrid courts may prove to be a far
better solution as they are not perceived to be such a huge threat. Moreover,
because the role of the government is stronger in the hybrid tribunals
as compared to the ad hoc criminal tribunals or the ICC their participation may
also be greater and thus they may be keener to set up a hybrid courts rather than
submit its case to the ICC. Since these hybrid courts are also Ad hoc and
temporary, that may also work in their favour as compared to the ICC which is
a permanent institution.
It is also asserted that hybrid courts offer and result in a far more superior form of justice—this especially in the context of the Ad hoc tribunals being country and conflict specific and with a limited existence and the ICC being unable to investigate into all conflict across the world. Thus as compared to an exclusively national or purely international court, hybrid courts are an appropriate option and their role and contribution to ensuring accountability should be recognised.

Moreover these tribunals have inherent time limits that go a long way in avoiding delay and incurring massive expenditure and also facilitate efficiency.

12.6 WHAT ARE THE SHORTCOMINGS OF THE HYBRID COURTS?

The hybrid courts are a mixed bundle of success and failures. For a hybrid court to be truly and really successful two factors are extremely important. The first and the foremost is the competency of the national courts. It remains non-negotiable that the domestic justice system should be in a workable condition and should be a reliable partner in this effort of national and international collaboration. Secondly, the nationalistic demands of the local population must be high. This implies that the national government must be favourably inclined in a justice dispensation mechanism in a post conflict situation and must actively encourage and implement this idea.

There is a possibility of some friction between international personnel and staff and their national colleagues. Often, achieving mutual respect and understanding might be a difficult task. The international personnel, staff and professionals (lawyers, judges, etc.), might have a patronising attitude towards their national counterparts. On the other hand, the national actors might feel diffident and threatened by the presence of these international elements. A smooth and cordial working relationship might foster greater team spirit and thus contribute to the better functioning of the court. However, it often takes time for this kind of constructive and smooth relationship to emerge.

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At times it is also very difficult to receive steadfast support and cooperation from local actors, institutions and authorities. In a post conflict situation, emotions of hatred, suspicion, mistrust and hostility runs high. In such a charged atmosphere people might be too frightened to assist the tribunal staff. Still further, the trauma and sufferings of war might still be too raw and the society might be in the process of coming to grips with reality or trying to recover from it and thus in no mood to cooperate with the tribunal and relive the horrors of war. If local support is
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Though hybrid tribunals are considered to be cost effective, this is not always an advantage. Lack of surplus financial resources might imply that experienced and qualified judges and lawyers might not want to seek employment in the tribunals on account of law salaries. The absence of professional and competent personnel and staff can have a terrible effect on the working of the court. Still further, insufficient funding might result in further violations of human rights as the court cannot ask for the grant of compensation, give interim relief or legal assistance to needy victims and this would result in basic international standards being flouted.

Inadequate or insufficient resources would also mean that the Court infrastructure might not be up to the mark and thus impact the quality of trials as well as causing undue delays as a result of shortage of equipments, stationery etc.

The hybrid courts despite the abovementioned shortcomings can be an effective tool in combating impunity and engaging in accountability of grave human rights violations.

12.7 SUMMARY

- In this unit, we discussed the meaning of hybrid courts. We also assessed the basic features of these courts. We completed a brief overview of why hybrid courts are important as well.
- We also analyzed the different factual situations of the 6 odd countries where these hybrid courts have been established.
- Further we elaborated upon the salient features of these courts and how they are distinct from both the Ad hoc courts and well as the ICC.

12.8 TERMINAL QUESTIONS

1) What are Hybrid Courts?
2) Are they same as the ICC or Ad hoc courts?
3) What are the weakness of the hybrid courts?

12.9 ANSWERS AND HINTS

Self Assessment Questions

1) Refer for Section 12.3
2) Refer for Section 12.4
3) Refer for Section 12.5

Terminal Questions

1) They are a mix of international and national elements. This combination is used at all levels- for the laws applied, for the staff and judges/prosecutors etc hired, for the funding etc. They are called internationalised as both national
and international elements share the responsibility. They strengthen domestic systems and processes. They are more sustainable. There is ample local participation as well as identification with the entire process.

2) They have the active involvement of both national as well as UN. They give equal importance to national laws. The government of the State has an important role to play. It also involves active participation by the locals. They are called third generation courts. They are Ad hoc and temporary and can be tailor made to suit the needs and requirements of the specific conflict and country.

The ICC is permanent. It emphasises on international laws. Its staff and personnel are drawn from across the world so mostly international. It can address all crimes that have occurred after 1st July 2002. It has a wider mandate and boasts of greater number of States as its members.

3) Combination of international and national element might cause friction and hostility. The international staff and personnel might be insensitive to the specific nuances of the conflict while the national elements might not accept international laws that are in conflict with domestic laws. There could be lack of mutual respect. The language barrier could also be a big hurdle.

12.10 REFERENCES AND SUGGESTED READINGS