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# Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform

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**Restructuring Hybrid Courts:**  
**Local Empowerment and National Criminal Justice Reform**

Runaway costs, management flaws, and communication failures in the ad hoc tribunals in Rwanda and the former Yugoslavia have generated fatal donor fatigue<sup>1</sup> and called into question the efficacy of international criminal justice. It is unlikely that an ad hoc tribunal will be created again. So where do we go from here? What will fill the void in the field of post-atrocity justice? Freelance prosecutions like the Pinochet prosecution by Spanish Judge Garzon remain a peripheral phenomenon despite their vital contributions. Domestic judiciaries in post-atrocity states are often devastated, and sometimes corrupt and illegitimate. However, dwelling on condemnations of ad hocs or national courts soon becomes unproductive. We must find cost-efficient, high-impact alternatives to international ad hoc criminal courts. Hybrid mechanisms that blend international and domestic laws, structures, and personnel promise to deliver justice for war crimes and crimes against humanity in post-atrocity states, especially where they are able to foster local justice reform.

The ICC is often touted as the alternative to international ad hocs, but it only provides a partial solution. A patchwork of hybrids would be a vital complement to the International Criminal Court (ICC). First, many past conflicts, as well as present conflicts in non-signatory nations, lie beyond the jurisdiction of the ICC. Second, even when the ICC has jurisdiction over a set of crimes, it will never be able to try more than a handful of senior figures involved in any conflict. Third, the ICC's binary approach of either providing wholly international justice or

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<sup>1</sup> The recent Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616\* (Aug. 23, 2004) ('The rule of law report') summarizes these costs: "The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization's total regular budget. Although trying complex legal cases of this nature would be expensive for any legal system and the tribunals' impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions." (At para. 42.)

Ethel Higonnet

Hybrids: the Future of International Accountability and Criminal Prosecutions

leaving the conflict to local post-atrocity courts limits its ambitions to provide genuine accountability. Wholly local courts are frequently corrupt and politicized; while wholly international courts have proven disconnected with local realities and even considered imperialist. The ICC's binary view ought to be broadened to consider the possibility of a third, hybrid option. Hybrids are compatible with the ICC, and their development should be read into the Rome Statute.

This paper explores the structural and theoretical advantages and disadvantages of hybrid courts, existing hybrids, and outlines international ad hoc's flaws that hybrids can remedy. In theory at least, hybrids can draw upon the strengths of international justice and the benefits of local prosecutions. On one hand, hybrids can harness the credibility of international law and the legitimacy particular to international institutions, whose participation can lend hybrid courts a degree of authority as a fair mechanism for holding perpetrators accountable. On the other hand, hybrids can be structured to tap into local expertise, connect with local populations, and rebuild local judicial systems as a training ground for rule of law values. They also avoid the staggering costs of purely international courts. By integrating local norms, hybrid courts can bring culturally adapted justice to the people that international courts purport to serve but cannot reach; they can bridge the divide between remote, wealthy international jurists and third world victims of war crimes. If they are embedded into local justice systems, and their mandates are broadened to focus on local justice reform/rebuilding, hybrids have the potential to anchor justice mechanisms into local culture, genuinely altering cycles of impunity by changing local judicial institutions in a sustainable way. The hybrid model can thus move beyond retributive justice and foster a culture of accountability.

This paper is divided into six sections. The first sketches a definition of hybrid courts. The second delineates how hybrids can respond to an imperative for local empowerment and the need to transform local judicial culture in post-atrocity situations. The third briefly describes extant hybrids, evaluating successes and failures. The fourth discusses flaws inherent to the hybrid model as such. The fifth examines ad hoc tribunals' flaws which hybrids could potentially solve. Sixth, the paper explores the possibility of symbiotic juxtaposition of hybrids and the ICC.

This paper does not necessarily endorse existing hybrid tribunals. Rather, it is the *model* of hybrid tribunals which is presented as a promising model; an alternative theoretical framework to strictly international or strictly national tribunals. This paper endeavors to push forward the dialogue about how to better structure such courts in order to impact the populations hybrids purport to serve. Despite the burgeoning literature on transitional justice, semi-internationalized or hybrid courts have received far less attention than ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).<sup>2</sup> Without sufficient analysis of their structures, strengths and weaknesses, hybrids courts will remain flawed, makeshift configurations, highly vulnerable to avoidable failures.

## 1. INTRODUCTION TO HYBRID COURTS

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

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<sup>2</sup> The limited scholarly interest in hybrids can be largely attributed to their newness. However, some very impressive scholars have made critical contributions and their work deserves recognition. First and foremost, Laura Dickinson has begun addressing the promise of hybrid courts within an overarching theoretical framework, in numerous articles. Moreover, a few pioneering scholars such as Abdul Tejan Cole and Suzanne Katzenstein have written insightful, comprehensive articles on specific hybrids. This number is dwarfed by the plethora of law journal articles on the International Criminal Court (over 2000 found in searches on Westlaw and Lexis) and the numerous articles directly concentrated on the ad-hoc tribunals (over 600 found in searches on Westlaw and Lexis). A large number of law journal articles cursorily touch upon to hybrids, but without enough deliberation to be mentioned here.

the second generation of ad hoc tribunals with the ICTY and ICTR. These third generation courts have been called “hybrid” criminal bodies. Blending the international and the local, existing hybrids are products of judicial accountability-sharing between the states in which they function and the United Nations.

The structure of the handful of existing hybrid tribunals does not by any means set in stone the limits for all conceivable forms of hybrids. However, without endorsing particular existing hybrid courts, or using them to limit the hybrid model to a particular framework, examining them can improve our understanding of the hybrid model’s possibilities and limitations.

Currently, the term “hybrid” is used to indicate three jurisdictions created between 1999 and 2001 in East Timor (the Serious Crimes Panels of the District Court of Dili),<sup>3</sup> Kosovo (“Regulation 64” Panels in the Courts of Kosovo)<sup>4</sup> and Sierra Leone (the Special Court for Sierra Leone).<sup>5</sup> A fourth hybrid Court to address crimes committed by the Khmer Rouge in Cambodia (the Extraordinary Chambers in the Courts of Cambodia),<sup>6</sup> has been negotiated between the UN

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<sup>3</sup> See *On the Organization of Courts in East Timor*, United Nations Transitional Administration in East Timor (UNTAET) Reg. 2000/11, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000). For more information on the East Timor hybrid, see the Judicial System Monitoring Programme website at <http://www.jsmp.minihub.org/> (one of the most comprehensive on the matter, containing in one place all basic materials about East Timor Serious Crimes panels, as well as current news about the trials, including those in Indonesia); and [http://www.pict-pecti.org/courts/eastimor\\_basic\\_doc.html](http://www.pict-pecti.org/courts/eastimor_basic_doc.html)

<sup>4</sup> See *On the Appointment and Removal from Office of International Judges and International Prosecutors*, United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation 2000/6, U.N. Doc. UNMIK/REG/2000/6 (Jan. 12, 2001), available at <http://www.un.org/peace/kosovo/pages/regulations/reg06.html>. For more information on the Kosovo hybrid, see the Security Council Resolution 1244 (1999) authorizing UNMIK at [http://www.pict-pecti.org/courts/pdf/kosovo/Re1999\\_1.htm](http://www.pict-pecti.org/courts/pdf/kosovo/Re1999_1.htm)

<sup>5</sup> For information on the Sierra Leone hybrid, see the Special Court for Sierra Leone homepage at <http://www.sc-sl.org/>; or the very informative site developed by the NGO No Peace Without Justice at <http://www.specialcourt.org/>

<sup>6</sup> For information on the Extraordinary Chambers, see the website of the Task Force for Cooperation with Foreign Legal Experts for the Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders at <http://www.cambodia.gov.kh/krt/english/>, and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea at [http://www.pict-pecti.org/courts/pdf/Cambodia/Cambodia\\_052203.pdf](http://www.pict-pecti.org/courts/pdf/Cambodia/Cambodia_052203.pdf). See also His Excellency Sok An, Presentation and Comments to the National Assembly on the Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Dec.

and the Cambodian government, and ratified by the Cambodian National Assembly.<sup>7</sup> The Iraq Special Tribunal might come to be described as a hybrid although its future remains uncertain, and the international side of the IST has thus far been restricted primarily to American rather than multi-national involvement.<sup>8</sup>

Hybrid courts have emerged in post-conflict situations when insufficient local capacity existed to deal with mass atrocity,<sup>9</sup> reflecting the reality that fully functioning national courts whose overall credibility cannot be impugned mitigate the need for outside help.<sup>10</sup> However, international tribunals do not render hybrids superfluous. Although the East Timor and Sierra Leone hybrids arose in the absence of any international justice mechanism, the Kosovo hybrid complemented the ICTY which could not cope with the sheer number of cases.

The UN has assumed responsibility for helping hybrid courts obtain funding, resources, judges, and prosecutors through “voluntary” contributions from other national donors.<sup>11</sup> Where the Security Council dominated the ICTY and ICTR, the Office of Legal Affairs has handled Cambodia and the respective SRSGs have had control in Kosovo and East Timor. However, in

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29, 2000 & Jan. 2, 2001) (outlining the details of the law and describing it as consisting of “new formulas, new concepts, and new and significant principles”), available at <http://www.camnet.com.kh/ocm/government60.htm>.

<sup>7</sup> Opposition parties in Cambodia (royalist Funcinpec and opposition Sam Rainsy Party) boycotted Parliament for a year, with the inevitable effect that no legislation could be passed, and no treaties ratified.

<sup>8</sup> National Public Radio All Things Considered, *Debate over whether the Iraqi Special Tribunal could deliver fair verdicts in the upcoming trials of former members of Saddam Hussein's regime*, interviewing Tom Parker: “Although the British government tried to persuade the Iraqis that the death penalty will make life very difficult for them; it will make it almost impossible for the international community--certainly for the European Union and for NGOs--to assist them, the Iraqis insisted on going forward with it.”

<sup>9</sup> While it is critical for international jurists not to denigrate local courts overall, it is undeniable that following mass atrocity, local judiciaries are often devastated. See e.g. Hansjörg Strohmeier, *Making Multilateral Interventions Work: The U.N. And The Creation Of Transitional Justice Systems In Kosovo And East Timor*, 25-SUM Fletcher F. World Aff. 107: “The exodus from Kosovo and East Timor of virtually all lawyers, judges, and prosecutors who had previously served in the judiciary, as well as of many law clerks and secretaries, left a huge void in experienced legal personnel. In fact, under Indonesian rule, no East Timorese lawyers had been appointed to judicial or prosecutorial office. As a result, there were no jurists in East Timor with any relevant experience in the administration of justice or the practical application of law. The situation in Kosovo was comparable.”

<sup>10</sup> For instance, no one has ever proposed an international tribunal for French trials of WWII-era war criminals.

<sup>11</sup> For an impressive overview of the range and variation in UN involvement in international(ized) tribunals, see Philippa Webb, *Six Degrees of Separation: Relationships between the United Nations and Internationalized Courts and Tribunals*, Spring 2004 (unpublished paper, on file with author)

hybrid courts, national governments can also undertake part of the costs, provide various resources, and appoint some of the judges, prosecutors, personnel (as was the case in Sierra Leone and as is planned in Cambodia).

While the UN established and managed hybrids in Kosovo and East Timor independently of decisions by local governments, the Sierra Leonean and Cambodian hybrid structures resulted from negotiations between the United Nations and the sovereign state concerned. It remains to be seen if the term “hybrid” will become a catch-all for any institution between an international tribunal and national court, or if it will crystallize at a point along that spectrum. A hybrid court could theoretically be even more separate from the UN – it could be established with several states acting in concert and without any UN involvement at all. According to this definition, the Iraq Special Tribunal would be a hybrid in spite of the absence of non-American advisors to the IST. Alternatively, although the Security Council has not yet created any hybrids, it might be possible for the Security Council to do so independently of national authorities in failed states.

Given the recent nature of the hybrid phenomenon, its precise definition is still evolving. Indeed, the definitional challenges reveal a troubling confusion about which blueprints ought to be implemented, and point to the dangers of creating institutions without enough serious scholarly or practitioner debate on best and worst practices. However, despite ambiguities in definitions of hybrid courts, some baseline characteristics emerge. Hybrids blend the international and the domestic with legal and organizational innovations that constitute important divergences from international ad hoc tribunals. In some cases they coexist with the local judiciary, operating in parallel, while in others, they have been grafted onto the local judicial system. But in all cases their nature is mixed: composed of international and local staff, they apply a compound of international and national substantive and procedural law. Foreign judges

sit alongside their domestic counterparts to try cases prosecuted and defended by teams of both local and foreign lawyers. Occasionally domestic law – reformed to include international standards – is applied alongside international law. Ultimately, hybrid criminal bodies form a family of their own, apart from other judicial entities.

## **2. THE NEED FOR LOCAL EMPOWERMENT AND THE LONG-TERM IMPORTANCE OF IMPACTING LOCAL CULTURE**

Before exploring existing hybrids or the international ad hocs they provide an alternative to, we must consider their *raison d'être*, and perhaps even re-conceptualize the theoretical value of local input in trying war crimes. This process entails a philosophical defense of local empowerment in post-atrocity justice mechanisms and lays out some of the ways in which the hybrid model draws strength from its ability to incorporate and influence local culture.

### **2a. A philosophical defense of local empowerment in post-atrocity justice mechanisms: the importance of merging local and international elements**

Studying hybrids involves criticizing the notion that the only effective justice is wholly international (United Nations-sponsored). This view, so popular within the international human rights community, conflates an acknowledgment that local courts are tainted/inadequate with an unconditional endorsement of purely international courts.<sup>12</sup>

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<sup>12</sup> See Laura A. Dickinson, *The ICTY at Ten: a Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG.L. REV. 1059 (Summer 2003). [hereinafter *The Case of Kosovo*]: “many of those who favor international justice appear to see hybrid tribunals as mere second-best alternatives to international courts.... Perhaps one reason for the resistance on this front is the concern that such courts might be supported as an alternative to, and perhaps as a means to undermine, international justice.” See, e.g., *U.N. Action on Sierra Leone Court Welcomed But "Mixed" Tribunal Has Shortcomings*, Human Rights Watch (Aug. 14, 2000); Statement by France at the Security Council, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 27, U.N. Doc. S/PV.3175 (1993); Statement by the United States at the Security Council, U.N. SCOR, 48th Sess., 3217th mtg. at 12-17, U.N. Doc. S/PV.3217 (1993). For similar lists of goals, Some attacks on hybrids center on valid concerns, but reasonable critiques are frequently overshadowed by more extreme positions that “even when national authorities demonstrate a willingness to try perpetrators fairly, international fora more readily fulfill victims' expectations for the ‘highest form of justice.’” See Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 Conn. J.



Local courts in most post-conflict contexts are too flawed to cope alone with massive war crimes trials, although many domestic prosecutions of international crimes have taken place since 1995, especially in more developed countries where decades of peace have permitted some rebuilding and reform of local judiciaries.<sup>13</sup> In the immediate aftermath of conflict, the inability of many post-atrocity local courts to cope with war crimes trials is often due at the most basic level to crippling damage sustained by physical infrastructure. In addition, key personnel may have fled abroad, been killed, or been compromised by association with a prior regime which failed to prosecute or convict murderers, torturers, or ethnic cleansers. In some other cases, a new regime may have replaced the old personnel almost completely, resulting in an enormous skills and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes.<sup>14</sup>

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Int'l L. 227, 239 (1997). See also Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 Eur. J. Int'l L. 2, 7 (1998), at 9. See also Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997); Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 Eur. J. Int'l L. 18, 31 (1998). According to Jose Alvarez, Cassese and Goldstone have been most influential in putting forth this kind of position, and their rationales "are repeated, almost as a mantra, by other advocates of modern international war crimes prosecutions." See Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365-70 (1999) [hereinafter *Crimes of States*].

<sup>13</sup> Austria, Belgium, Bolivia, Bosnia-Herzegovina, Brazil, Canada, Chile, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Germany, Guatemala, Haiti, Indonesia, Israel, Italy, Japan, Latvia, Lithuania, the Netherlands, Romania, Russia, Rwanda, Sweden, Switzerland and the United Kingdom. See Prevent Genocide International, <http://www.preventgenocide.org/punish/domestic> (last updated Jul. 21, 2003), cited by Mark S. Ellis, *Coming To Terms With Its Past--Serbia's New Court For The Prosecution of War Crimes*, 22 Berkeley J. Int'l L. 165, [hereinafter *Serbia's New Court*].

<sup>14</sup> Arguments on the flaws of purely national prosecutions are too numerous to fit within the scope of this paper, and many sufficiently self-evident to make a discussion thereof superfluous. The examples of Sierra Leone, East Timor, and Rwanda will suffice. Amnesty International's description of the incapacity of local courts in Sierra Leone is representative of responsible observers' perspective on most post-atrocity local court systems. See e.g. Amnesty international, "Collapse of the Sierra Leone Judicial System: Ending impunity - an opportunity not to be missed," 31 July 2000, available at <http://web.amnesty.org/library/Index/ENGAFR510642000?open&of=ENG-SLE>: "As a result of the conflict, the judicial and legal systems have virtually collapsed and institutions for the administration of justice, both civil and criminal, are barely functional." See also Human Rights Watch, "Sierra Leone: Priorities for the International Community, Prosecutions in Sierra Leone" June 20, 2000, <http://www.hrw.org/press/2000/06/secmem0620.html>. In East Timor, the justice system was completely destroyed by retreating Indonesian forces, see Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AJIL 46, 50-51 (2001). In Rwanda, "because the Rwandan judicial system was in ruins after the 1994 conflict, it did not have the human, physical, or financial resources to deal with massive numbers of alleged perpetrators." Christina M. Carroll, *An Assessment of the Role and Effectiveness of*

However, this does not imply that international courts are the only alternative. Local realities may be troubling, murky, and dangerous, but bypassing local input is even more problematic than including it. Local culture plays an indispensable part in any long term solution to post-atrocity rebuilding. If donor countries or the UN are to succeed in changing a country for the better, they “cannot display an elitist, paternalistic attitude” toward local war crimes victims and judiciaries, “i.e., viewing local participation as inherently biased, tribal, inexperienced, and inept.”<sup>15</sup> Doing so jeopardizes the goal of local reform and empowerment, leaving us with the alternative of perpetual international oversight – at once unsustainable in practical terms, and dubious in moral terms, given its inherent imperialism.

***The importance of having a long-term impact and strengthening local judiciaries***

Any assessment of a war crimes tribunal should focus not only on immediate post-judgment compliance, but also on the enduring influence of the tribunal on a given country. Even a time-limited transitional justice mechanism acquires greater credibility where it is able to impact a justice system in the long run. A war crimes tribunal must strive to go beyond concocting an exit strategy that allows it to leave a country without any cases pending or staff unpaid.

A war crimes tribunal ought to set an example for the local judiciary, which assumes de facto responsibility for whatever high-ranking war criminals the international tribunal could not process (ad hocs try only a very limited number of those most responsible for the crimes within the court’s jurisdiction, thereby letting most perpetrators, even high-ranking ones, go free). The old adage, “Don’t just give people fish – teach them how to fish,” springs to mind. Long-term

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*the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. Int’l L.J. 163.

<sup>15</sup> See Ivana Nizich, *International Tribunals and their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J INT’L & COMPL 353 [hereinafter *Lessons from the Yugoslav Tribunal*].

improvement of the national justice system helps create a culture of justice and accountability and ensures that whatever solutions offered by the war crimes tribunal will not vanish when it closes shop. Given the time and money expended on post-conflict mechanisms, a failure to catalyze meaningful long-term change detracts from their credibility and value. When establishing the SCSL, even the UN Security Council recognized the need to adopt a model that could leave a strong ‘legacy’ in Sierra Leone, including improved infrastructure, respect for the rule of law and trust in public institutions, and improved professional standards, and the SC referred specifically to “the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone...”<sup>16</sup>

*Adjusting to local perceptions of justice: key to fostering rule of law<sup>17</sup> and deterrence*

An oft-quoted justification for war crimes tribunals hinges on the concept of creating a culture of accountability and fostering the rule of law.<sup>18</sup> While success in achieving these goals is hard to quantify, it is safe to say that it requires widespread acceptance of certain norms (concerning human rights, peaceful conflict resolution, good governance, etc.). By extension, having a positive impact on political discourse, popular opinion, and cultural dynamics on the ground in post-atrocity states is critical. For such changes to apply, the bulk of the concerned population must accept the court or at a minimum, refrain from actively undermining it. Any post-conflict transitional mechanism’s impact on the ground hinges on the institution’s ability to effect some change in the hearts and minds of local populations.

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<sup>16</sup> UN Security Council Resolution 1315 (2000), Preambular Paragraph 10 (August 14, 2000), cited by James Cockayne, *The fraying shoestring: rethinking hybrid war crimes tribunals*, (unpublished paper, on file with author, soon to be published in 28(2) Fordham ILJ (2005)). [hereinafter *The fraying shoestring*]

<sup>17</sup> For the purposes of this paper, I reject a retributivist position and simply assume that war crimes tribunals ought to be structured so as to have a positive impact of the rule of law and a culture of impunity.

<sup>18</sup> For the importance of peace-building as one of the major goals for international criminal bodies, See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 A.J.I.L. 7.; Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163.

Justice wears many faces and appears in numerous incarnations around the world. It is foolish to presume that western norms will be intuitively understood and accepted by everyone everywhere. This truism must be underscored, and leads to the unconventional conclusion that few international jurists have been willing to contemplate: for post-atrocity justice mechanisms to be perceived as effective by non-Western populations, they must be couched in non-Western terms that local populations can relate to. They must incorporate elements of local justice and culture or at the very least be sensitive to local realities and norms.<sup>19</sup> In order for the conviction to take root that past wrongdoings have been appropriately dealt with, people must in some small measure understand the justice mechanism in place. Ultimately, it is essential to persuade them that appropriate punishments have been meted out, and to respect the courts' decisions.

The issue here is not to redefine "justice" – but rather to contend that post-atrocity populations' *perceptions* of justice mechanisms are important. Thus, popular support for and understanding of the institution should figure prominently in constructing and assessing hybrid and international criminal bodies. Post-conflict transitional criminal bodies must be able to touch the people they purport to serve.

Moreover, war crimes courts ought to deter potential future perpetrators where possible. The justification for spending millions of dollars on each conviction lies not only in a belief that retributive justice for war crimes is crucial, but also in the hope that vast expenditures will be worthwhile if the trial's symbolic value dissuades future potential perpetrators. For deterrence to apply, local military and political powers must understand, and internalize the court's decisions to some extent. In the alternative, they must come to fear the local justice system's sanctions.

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<sup>19</sup> A useful parallel to draw here might be the near universal consensus in development philosophy that local involvement is critical to sustainable long-term development. Articulated most notably by standard-bearers like the prominent Jules Pretty, "participation" has become a buzzword of development practice. For a short list of publications by Pretty, *see* <http://www2.essex.ac.uk/ces/CES/JPpage.htm>

If local elites misunderstand and resent the court as an outside imposition whose decisions they passionately object to and believe are illegitimate, they are hardly likely to adapt their behavior to its directives. This crisis will become all the more dangerous if the local justice and law enforcement systems have not been strengthened enough to contain such elites.

## **2b. Hybrids' potential to incorporate and impact local culture**

### *Capacity-building*

When juxtaposed with the ad hoc tribunals in terms of their potential to incorporate and impact local culture, hybrid courts emerge as an encouraging alternative. They can be structured to influence local jurisprudence and national justice systems, and impact the local judiciary in ways that international tribunals do not.

On the most basic level their staffing procedures do a tremendous amount. Because a large part of hybrids' staffs are drawn from pools of local talent, hybrids create an invaluable opportunity for the best local litigators and judges to acquire international expertise and to absorb fundamental international human rights values. "Hybrid process offers advantages in the arena of capacity-building... The side-by-side working arrangements allow for on-the job training that may prove more effective than abstract classroom discussions of formal legal rules and principles."<sup>20</sup> Without hands-on experience, there is "little opportunity for domestic legal professionals to absorb, apply, interpret, critique, and develop the international norms in question, let alone for the broader public to do so."<sup>21</sup>

Local staff in hybrids are not the only members of the local judiciary to benefit from their experience. Local staff typically maintain much closer personal connections with members of the local judiciary than internationals do, simply by virtue of pre-existing collegial friendships and

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<sup>20</sup> See Dickinson *The Case of Kosovo*, supra note 12. See also Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1157-59 (2001).

<sup>21</sup> See Dickinson, *The Promise of Hybrid Courts*, 97 A.J.I.L. 295. [hereinafter *The Promise of Hybrid Courts*]

business relationships that arise in any legal community. Even when the local staff of hybrids are removed from the local judiciary (e.g. during the hybrids' tenure),<sup>22</sup> they maintain bonds with other members of the local judiciary and the broader community. When hybrids close shop, the local staff primarily is reabsorbed into the local system, infusing it with the skills and knowledge obtained at the hybrid (although there is always a risk of some attrition into the UN system, international NGOs, and international litigation). This is critical in light of the dire need for local capacity building in most post-conflict situations, and also given that purely domestic and purely international institutions rarely promote large-scale local capacity-building. "Even when local courts are authorized under domestic law to apply international humanitarian law, there is often such a limited base of familiarity with the norms in question that such authority is meaningless. In short, the mere existence of an international court does not create a channel for its jurisprudence to be used and developed, or even merely respected and understood, on a local level."<sup>23</sup>

With this in mind, one must note that just throwing international staff together with locals into a building will not provide a magic panacea to the problem of capacity building. "As a recent report by the UNDP and the International Center for Transitional Justice entitled *The "Legacy" of the Special Court for Sierra Leone*<sup>24</sup> pointed out, a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced."<sup>25</sup> Katzenstein points out in

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<sup>22</sup> Duration of the tribunal, infusion of local talent to the hybrid tribunal may impose short term costs to the national court system, with the best and brightest temporarily drained away from their regular jobs.

<sup>23</sup> See Dickinson, *The Promise of Hybrid Courts*, *supra* note 21.

<sup>24</sup> See the International Center for Transitional Justice and UNDP, *The "Legacy" of the Special Court for Sierra Leone* (Sept. 29, 2003), available at <http://www.ictj.org/downloads/LegacyReport.pdf>, at 5, 12.

<sup>25</sup> See Cockayne, *The fraying shoestring*, *supra* note 16, which summarizes the report as advocating, "three key legacy projects, all of which might have positive impacts for rule of law concerns: substantive reform of Sierra Leonean law; a strategic professional development program; and raising awareness of the Court as a rule of law exemplar. The expected results of these interlocking projects were named as: updated and improved laws; availability of skills training and development opportunities for judges, lawyers, investigators, court administrators

her article on the East Timor hybrid, that it is a mistake to assume that just by virtue of being there, “international judges on the Special Panels can serve as ‘on-site mentors’ to their local counterparts... On-site mentors often become distracted by or entirely take over the tasks at hand, such as writing opinions, defeating the purpose of the mentoring.” Especially when staff is deluged by work, operating under time pressure, and lacking the necessary pedagogical/mentoring experience,<sup>26</sup> the capacity-building facet of mixed tribunals flounders. Disastrous mismanagement can sabotage even the best planned structures.

While outlining possible capacity-building programs lies beyond the scope of this paper, some broad brush-strokes can be suggested to improve blueprints for future hybrids, extending their mandates to ensure that hybrids serve as a catalyst for local justice reform. In order to strengthen the local judiciary, hybrid courts need to better address actual power dynamics within the hybrids themselves, focusing on coequality between local and international staff and incorporating training for members of the local judiciary within the mandate of the court. Substantive partnership, advisory, and mentoring programs must consistently be reinforced. Good leadership and management remain key to success. Institution-building could be fostered on one hand by giving senior international personnel mostly local deputies, and on the other hand by providing local counterparts with an equal percentage of international employees. In the first instance, by following their mentors, receiving regular feedback and constructive criticism, local employees working under international staff can be exposed to norms and methods that will

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and prison guards; and an increased public awareness and dialogue about criminal processes and the role they fulfill in post-conflict societies.”

<sup>26</sup> See Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245 [hereinafter *Justice in East Timor*] Katzenstein’s discussion of East Timor capacity-building programs is worth noting: “Some critical errors were made. One of the most notorious involves the selection of mentors and trainers for the Public Defenders’ Office. The UNDP funded two positions for mentors beginning in the spring of 2001. Both proved to be catastrophes. The first mentor had no experience as a criminal defense lawyer, and had never litigated a case. He was a lecturer in commercial law. The other mentor had practiced as a defense lawyer but could not speak any of the court’s four languages. Communication between mentor and mentee was all but impossible.”

improve their work as judges, prosecutors and public defenders later on.<sup>27</sup> In the second scenario, international employees of senior local judges and lawyers can help serve as a cultural and linguistic bridge for their superiors, and bring to bear some of their administrative and legal know-how in their work. The same suppositions hold true in reverse, with international staff learning valuable lessons from their local mentors and deputies. Such exchanges would result in cross-fertilization, capacity-building, and mutual education, so long as foreign staff is well-versed in the jurisprudence of the international tribunals and good court management practices generally (an assumption which has not always been borne out in extant hybrids). Additionally, cross-fertilization can be enhanced by mandating regular joint strategy meetings and informational presentations, where local and international counterparts can be required to explain their work to each other and give each other feedback, advice and support.

Hybrids' structures should incorporate providing continuing legal education (CLE) to judges, prosecutors, defense attorneys, and court personnel.<sup>28</sup> The CLE Training component could be continuous, mixing academic and practical training, flexibly designed and, when appropriate, implemented jointly with other international training programs to provide additional training assistance in domestic trials.<sup>29</sup> If hybrids are linked to entities like the UNDP that focus on legal reform and institution-building, they can stimulate local reform even beyond their staff.

Trial observer programs could also be incorporated that entitle local trial observers to attend and observe all judicial proceedings, or even require them to review, assess and evaluate hybrid war crimes trials. The programs could arrange for periodic inspections of case papers relating to proceedings. The trial observer program could also envisage a partnership where

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<sup>27</sup> *Ibid.*; See also see Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*. 25 MELB. U. L. REV. 122. [Hereinafter *Rising from the Ashes*], at 134.

<sup>28</sup> See Ellis, *Serbia's New Court*, *supra* note 13. Mark S. Ellis is the Executive Director of the International Bar Association in London, England.

<sup>29</sup> *Ibid.*



program staff would each be linked with some domestic judicial personnel, to review, assess and evaluate domestic court proceedings on the basis of efficiency, due process, competency and appropriateness. At the conclusion of each trial, the program staff trial observers could privately meet with the relevant domestic judicial personnel to review the trial and make recommendations for improvement.<sup>30</sup> Along the same line, an internship program specifically targeted at local law students could be envisaged, along with regular delegations of different groups to observe proceedings (Paramount Chiefs, imams, Buddhist monks, amputees, widows' associations, ex-combatants, school-children, etc).

### ***Turnover of infrastructure***

The infrastructure erected for hybrid courts, be it large-scale construction projects for courts and detention facilities or small changes such as stocks of tape recorders and microphones, are fed back into the local justice system at the conclusion of the hybrid court's term. Infrastructure creation for hybrids is also useful for the local judiciary insofar as it can serve as a model, and its development for the hybrid can train service providers, such that they will be better able to serve the local justice system down the line. In countries where justice system's infrastructures were devastated by war, and were not particularly professional to begin with, this is not a negligible factor. A caveat to this argument is that some infrastructure created by hybrids is a poisoned gift for judiciaries too poor to maintain buildings or other legacies appropriately.

### ***Cultural accessibility***

For obvious cultural reasons, local investigators, litigators, judges, administrators, and communications officials have a much easier time interpreting local populations' criticisms and

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<sup>30</sup> *Ibid.*

responding strategically. Where an American in Sierra Leone may not suspect that a statement will appear offensive or that a gesture may come off as confusing, a Sierra Leonean will know it and act accordingly.

Since locals, unlike internationals, are inextricably tied to their country, their stake in communicating effectively and convincing indigenous populations of their perspectives may be greater than their international counterparts. It would be difficult to imagine a Bosnian saying, as Richard Goldstone did, that it was not financially worthwhile for the ICTY to translate documents into Bosnian, Serb, and Croat, because there were too many local languages.<sup>31</sup> Likewise, local might have noted that the selection of French and English as working languages in the ICTY is consistent with UN practice, but perverse, since French has a negligible audience in the former Yugoslavia. Great expense was incurred in translating materials into French, while materials in the local languages of the former Yugoslavia remain largely unavailable.

Farther removed (emotionally and culturally<sup>32</sup> as well as physically) from the location of the genocide or atrocities that they work on, international tribunal staff have an easier time privileging the idea of “establishing important precedent” over helping people on the ground.

In hybrid courts, “International actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice at the same time that local actors can learn from international actors.”<sup>33</sup>

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<sup>31</sup> Author’s interview with Richard Goldstone, former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda at Yale (April 23, 2003).

<sup>32</sup> Having a hybrid court ensures that at least part of the staff will be genuinely invested in the country, unlike some international technocrats. See e.g., Andrew England, *UN Tribunal Struggles to Be Model of International Justice in Remote African Town*, ASSOCIATED PRESS, May 4, 2002, [hereinafter *UN Tribunal Struggles to Be Model of International Justice*] available at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2002/0504remote.html> England found that in the ICTR, “Tribunal officials... complain about the difficulties of recruiting people and working in a small African town which has few amenities and intermittent water and electricity. ‘It’s not easy to stay and live here,’ Hague-based chief prosecutor Carla Del Ponte said. ‘I could not stay one year working in Arusha. ... If it is like that for me, can you imagine what it is like for others? That is also a reason you cannot have the best people to work here.’”

As a caveat to these reflections, a brief examination of communications failures in various existing hybrids clearly indicates that hybridity is not a surefire answer. Gross mismanagement can trump the model's potential to facilitate and improve outreach. In Kosovo and East Timor for instance, politicking, lack of will and professionalism, and material problems (such as the frequent absence of court reporters, translators, stenographers, web technicians, and public liaison officers) have often prevented the courts from connecting with local populations.<sup>34</sup> Good management practices remain indispensable in all models of justice.

***Physical accessibility***

“Even if a country truly cannot try its own or participate in that process, the people of that country should at the very least be consulted and kept informed of what the international ad hoc or permanent tribunals are doing, ostensibly on their behalf.”<sup>35</sup> Physical location is critical to accessibility. For impoverished victims of atrocities in third world countries who wish to observe perpetrators being tried, or who just want to see how the tribunal works, physical distance between the locus of atrocities and the place where trials are conducted presents an insurmountable barrier. Victims' family and friends, or even ordinary (but impecunious) citizens, are more likely to attend proceedings if what is involved is a short bus ride, and not an international odyssey. For instance,

to many surviving family members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they can understand, subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty. Given a choice between local justice and justice once removed (as in a trial in Tanzania under unfamiliar processes and judges), it should hardly be a surprise if most survivors of the Rwanda genocide, and not merely Rwandan government

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<sup>33</sup> See Dickinson *The Case of Kosovo*, *supra* note 12.

<sup>34</sup> See Human Rights Watch, *Justice Denied for East Timor*. Dec. 20, 2002, available at <http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm> [hereinafter Human Rights Watch, *Justice Denied for East Timor*].

<sup>35</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15.

officials, prefer local trials or local plea bargains, especially where it appears that national venues may produce quicker results than prolonged international processes.<sup>36</sup>

For witnesses testifying in international tribunals, the already formidable psychological barriers (fear of reprisals for being involved, anxiety about reliving past traumas, shame, etc)<sup>37</sup> are supplemented by logistical hurdles they face with international courts. These include difficulties in paying for transportation and lodging, impossibility of acquiring visas, and trouble taking too much time off work.

### *Linguistic accessibility*

Trials held locally in local languages are inherently more accessible to local populations: easier for journalists, observers, and general audiences to understand, report on, gossip about, and ultimately, identify with.

Trials that have to be conducted, as are those in the ICTR, through the aid of interpreters and without the knowledge of local culture and manners are bound to lead to misunderstandings at all levels. Thus, as the Akayesu judgment itself acknowledges, the ICTR judges in that case had to wrestle with subtleties in the way Rwandans express themselves that made it difficult to tell whether witnesses had actually witnessed acts that they were reporting or reporting what others had seen and told them. It is difficult to know whether the judges came to the correct conclusions concerning such culturally sensitive questions.<sup>38</sup>

Where purely international war crimes tribunals may graft on translators in a subordinate function, hybrid courts' very structure can underscore an understanding of and valuing of local languages and cultures. In hybrids, translation and cultural mediation become an integral part of the tribunal rather than an afterthought or a bureaucratic detail.

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<sup>36</sup> See Alvarez, *Crimes of States*, *supra* note 12.

<sup>37</sup> For a general perception among Rwandan witnesses that the ICTR mistreated them, see Wanda E. Hall, "Go Home" *Rwandans Tell Del Ponte and Dieng*, INTERNEWS, 27 June 2002 "An estimated 3500 demonstrators, organized by genocide survivor organizations IBUKA and AVEGA, surrounded the prosecutor's headquarters of the International Criminal Tribunal for Rwanda (ICTR) this morning, to protest alleged harassment of witnesses." For more discussion on criticism from Rwandan women's organizations of the ICTR, see also Madre, *Demanding Justice: Rape and Reconciliation in Rwanda*, at [http://www.madre.org/country\\_rwan\\_demand.html](http://www.madre.org/country_rwan_demand.html)

<sup>38</sup> See Alvarez, *Crimes of States*, *supra* note 12.

To further hybrids' potential in this regard, a few management tools offer potential. Registrars/administrators of hybrids could mandate a one month crash course in local language for lower-level international staff upon arrival, prior to beginning work, and offer free intensive language tutoring to all staff upon request. Moreover, recruitment on the basis of language as well as talent – affirmative action for polyglots – could help break down language barriers.

*Accessibility to local media*

Local news reporters, often facing the tight budget of a tiny newspaper or radio station, cannot afford taking regular international trips. Cutting the local press out of the loop has tremendous implications on the wider population, which typically relies primarily on local media for obvious linguistic reasons. Even if elites are able to understand and tune into the international press, TV, and radio that travel to The Hague or elsewhere, most people in the world rely on local news. Indeed, vulnerable populations who suffer disproportionately during wars are typically the least educated and hence the least likely to comprehend or benefit from international media attention to war crimes trials. Conducting trials on-site in the countries where atrocities took place thus removes mundane financial and logistical hurdles that reporters face, making it easier for them to cover trials and help the trials mesh into the fabric of local people's lives in more diffuse ways.

Beyond a recognition that the media can serve as a positive outlet for information dissemination, a darker rationale for involvement of local media must be considered as well. The role of local radio, newspapers, and television in fomenting conflict or broadcasting inflammatory, ethnically divisive propaganda has been well documented in numerous instances.

While Radio Mille Collines<sup>39</sup> remains the most notorious, local press in the Former Yugoslavia also provides an instance of local media inciting violence and dangerously exacerbating tensions.<sup>40</sup> Rabble-rousing, provocative, irresponsible journalism remains a reality in numerous post-atrocity countries. This makes it all the more important to incorporate media outreach in war crimes tribunals, educate journalists, and to provide intelligible, easily accessible information for local media representatives, which is harder to distort.

It is not enough to merely hope that hybrids will do better local media outreach by virtue of being culturally closer. Hybrids should have outreach departments primarily focused on local press, radio, and TV.

***Fostering a sense of local ownership***

Insofar as popular sympathy typically flows in some part from a sense of ownership and familiarity, local populations relate more easily to post-conflict criminal bodies that can be understood in familiar terms. Hybrid courts with local staff have special potential for creating a sense of legitimacy by mobilizing popular support. Studies suggest that among the things observers of any judicial process value is the sense that fellow community members have been treated fairly by someone who understands their arguments.<sup>41</sup> This partially explains “why some

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<sup>39</sup> For a brief but balanced summary of Radio Mille Collines’ role in the Rwandan genocide, see *RNW Hate Radio Rwanda*, available at <http://www.rnw.nl/realradio/dossiers/html/rwanda-h.html> “RTLM is the most widely reported symbol of hate radio throughout the world. Its broadcasts, disseminating hate propaganda and inciting to murder Tutsis and opponents to the regime, began on 8 July 1993, and greatly contributed to the 1994 genocide of hundreds of thousands. RTLM, aided by the staff and facilities of Radio Rwanda, the government-owned station, called on the Hutu majority to destroy the Tutsi minority. The programmes were relayed to all parts of the country via a network of transmitters owned and operated by Radio Rwanda. After Rwandan Patriotic Front troops drove the government forces out of Kigali in July 1994, RTLM used mobile FM transmitters to broadcast disinformation from inside the French-controlled zone on the border between Rwanda and Zaire, causing millions of Hutus to flee toward refugee camps where they could be regrouped and recruited as future fighters.”

<sup>40</sup> For instance, “In a damning report on the conduct of Albanian broadcast journalists during March’s riots in Kosovo, the OSCE has accused major broadcasting outlets of whipping up ethnic tension in the territory and contributing to a mood of vengeful persecution through sloppy, tendentious and biased reporting” IWPR Balkan Crisis Report, No. 494, April 30, 2004, <http://www.medienhilfe.ch/News/2004/Kos/IWPR494.htm>

<sup>41</sup> Excellent studies on the US criminal justice system by scholars like Tyler demonstrate that the law’s legitimacy in the US with minority groups does not depend much on the racial make-up of law enforcement/judiciary. Rather,

international adjudicative processes, including institutionalized forms of arbitration and the International Court of Justice (ICJ), provide mechanisms for party-appointed arbitrators and judges.”<sup>42</sup> Having local judges may help shape the local perceptions about war crimes trials, and hence their legitimacy.

***Rebuilding the credibility/ legitimacy of the local legal system and government***

For many in post-conflict states, seeing the local judicial system at least partially involved in important trials may be critical to rebuilding a sense of faith in the courts. Besides restoring the legitimacy of devastated legal systems, local connections with well-run, high-profile trials may benefit transitional governments’ credibility. A hybrid trial, even extensively influenced by international elements, demonstrates to local populations that local members of the judiciary can mete out justice. By contrast, marginalizing local institutions and actors undermines their authority and casts aspersions on their capabilities (in some cases rightfully so). This matters because “on a day-to-day basis, more people rely on the protection and viability of their own local law and institutions than on international law or the U.N.” For instance, “the Rwandan people have a greater interest and stake in empowering their own local courts” and improving them “than in protecting the credibility of the Security Council.”<sup>43</sup>

**2c. Recognition of the importance of local empowerment by key decision-makers**

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they find that it is tied to perceptions of procedural fairness and the question of whether people sensed that they were respected. *See, e.g.,* Tom R. Tyler, *Why People Obey the Law* (1990) If this parallel holds true, then the ethnic makeup of a war crimes tribunal (purely international or partly local), might matter far less than the mode of operation and perceived efficiency/respectfulness of staff. However, to mitigate this critique of the necessity for local staff in war crimes tribunals, one can counter that international staff have a harder time engaging with local populations in ways that are culturally sensitive and perceived as respectful.

<sup>42</sup> *See* Alvarez, *Crimes of States*, *supra* note 12. Cf. Statute of the International Court of Justice, art. 31, June 26, 1945 (permitting party-appointed ad hoc judges); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 37, available at <http://www.internationaladr.com/tc11.htr> (permitting party-appointed arbitrators). The international precedents where this tradition has not been followed, as with respect to the U.N.'s El Salvador Truth Commission, have usually emerged when state parties have themselves agreed to "denationalization" or to forego appointing ad hoc adjudicators. *See, e.g.,* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 503 (1994). It is also true, of course, that the El Salvador process did not involve criminal prosecutions.

<sup>43</sup> *See* Alvarez, *Crimes of States*, *supra* note 12.

While arguments for local empowerment in war crimes tribunals may seem questionable, many voices within the international human rights and legal community have expressed reservations about the internationalization of war crimes trials, or at least recognize the value of connecting with local populations. Indeed, some have gone so far as to argue for trials held locally whenever possible. Even the president of the ICTY, Judge Theodor Meron, noted that “war crimes trials in the area where crimes have been committed have the greatest resonance because they would then take place close to the victims, close to the people, and not thousands of miles away.”<sup>44</sup> Likewise, the former lead prosecutor in the Rwanda tribunal’s first case, Pierre-Richard Prosper, now U.S. ambassador-at-large for war crimes issues, said experience has shown the ICTs were too far from where the crimes were committed.<sup>45</sup> Even prominent human rights organizations considered hardliners because of their tenacious support for international courts acknowledge the value of local ownership and participation in post-conflict justice mechanisms. For instance, Human Rights Watch declared that “where fundamental guarantees of justice and fairness can be met, it is the primary responsibility of national courts to prosecute human rights crimes.”<sup>46</sup>

Likewise, local decision-makers/elites in post-atrocity countries often endorse local input. For instance, “incoming Sierra Leonean President Ahmed Tejan Kabbah opposed a full-fledged international tribunal because he thought some Sierra Leonean participation in and ownership of the trial process was important.”<sup>47</sup> Similarly, the post-genocide Rwandan government was keen

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<sup>44</sup> See the interview of the president of the ICTY, Judge Theodor Meron during his visit to Belgrade, by B92's Ljubica Gojic, at <http://www.b92.net/intervju/eng/2003/meron.php>

<sup>45</sup> See England, *UN Tribunal Struggles to Be Model of International Justice*, *supra* note 32.

<sup>46</sup> See Human Rights Watch, *Sierra Leone: Priorities for the International Community*, June 20, 2000, at <http://www.hrw.org/press/2000/06/secmem0620.html>

<sup>47</sup> See Dickinson, *The Promise of Hybrid Courts*, *supra* note 21.



to receive international financial aid and training to rebuild its devastated judiciary, and was reluctant to accept a purely international tribunal to prosecute the génocidaires.

### **3. EXAMPLES OF HYBRID COURTS:**

Moving away from a more theoretical, aspirational description of the hybrid model's potential, this section will describe extant hybrids, often exploring their shortcomings. First it will outline the earliest hybrid in East Timor, noting that the Timorese hybrid suffered greatly from under-funding and political problems. Beset by tribulations ranging from irresponsible transfers of authority by UN and failure of capacity-building programs, to inexperienced East Timorese officials, it did not live up to its full potential. Next this section will summarize the evolution of the Regulation 64 Panels in the Courts of Kosovo, briefly exploring how Kosovo improved on the hybrid model, integrating international staff into the local judicial system and speeding up and improving the quality of local decisions. The third part of this section will look at the Special Court for Sierra Leone, and argue that it has achieved yet higher standards of efficacy. Fourth, this section describes the Extraordinary Chambers in Cambodia although this hybrid has not yet come into being. In conclusion, this section will briefly touch on the Iraq Special Tribunal.

#### **3a. East Timor's Serious Crimes Unit: Special Panels for Serious Crimes within the District Court in Dili**

In the aftermath of horrific human rights violations which the Indonesian army orchestrated to intimidate independence activists during the 1999 independence referendum in East Timor, the international community's outrage eventually pressured the reluctant Indonesian government into holding trials. With the UN largely in control of East Timor but loath to confront Indonesia, the UN relied on Indonesian promises that suspects would be tried in Jakarta.

At the same time, the UN established a partly internationalized institution in East Timor's capital, Dili.<sup>48</sup> Acting under the jurisdiction of the District Court of Dili, the hybrid applied both international law and the hybrid laws of UNTAET-administered East Timor with national and international judges. Special Panels were created at the District Court of Dili to exercise jurisdiction over cases of Serious Crimes.<sup>49</sup>

Unfortunately, as the first criminal body of its kind, operating in a devastated island dangerously near an unrepentant colonizer, the East Timor tribunal was particularly vulnerable. Neither the Jakarta trials<sup>50</sup> nor UN-sponsored trials in the District Court of Dili established the long-awaited accountability promised to East Timorese victims. Severely under-funded<sup>51</sup> and

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<sup>48</sup> See, e.g., UNTAET Regulation 1999/1, On the Authority of the Transitional Administration in East Timor (Nov. 27, 1999); UNTAET Regulation 1999/3, On the Establishment of a Transitional Judicial Service Commission (Dec. 3, 1999), as amended by UNTAET Regulation 2000/25 (Aug. 3, 2000); UNTAET Regulation 2000/11 (providing for a mixed panel of national and international judges in the special panels in East Timor), On the Organization of Courts in East Timor (Mar. 6, 2000), as amended by UNTAET Regulation 2000/14 (May 10, 2000); UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (June 6, 2000); UNTAET Regulation 2000/16, On the Organization of the Public Prosecution Service in East Timor (June 6, 2000). All UNTAET regulations are available at <http://www.un.org/peace/etimor/untaetR/UntaetR.htm>

<sup>49</sup> See Linton, *Rising from the Ashes*, *supra* note 27.

<sup>50</sup> Facing intense international pressure, Indonesian authorities reluctantly charged political and military leaders in Jakarta with failing to prevent the violence, although most observers, including the Indonesian Human Rights Commission, acknowledged that the defendants had *orchestrated* the violence. The court is patently biased in favor of the defence. By August 2004, it had acquitted or overturned the convictions of all Indonesians indicted for crimes against humanity in East Timor, and cut in half the 10-year sentence of Eurico Guterres, the former leader of the notorious Aitarak militia in East Timor. For an informed commentary, see David Cohen (UC Berkeley War Crimes Studies Center and International Center for Transitional Justice), *Intended to Fail: The Trials before the ad hoc Human Rights Court in Jakarta*, <http://ist-socrates.berkeley.edu/~warcrime/IntendedtoFail.pdf> or Human Rights Watch, *Indonesia: Courts Sanction Impunity for East Timor Abuses*, August 7, 2004, <http://hrw.org/english/docs/2004/08/06/indone9205.htm>

<sup>51</sup> The Serious Crimes Unit inability to function adequately because of under-funding has been widely publicized by NGOs and in the media. See e.g. Ms. Shantha Rau, Information Services Coordinator, NGO Coalition for the International Criminal Court, 777 UN Plaza 12th Floor, New York, New York 10017, <http://www.iccnw.org>. "Appointments to key positions in the judiciary were left vacant, paralyzing the court"; Joanna Jolly, "Investigators Struggle with Criminal Lack of Resources," *South China Morning Post* (Hong Kong, China), 14 November 2000, 18; "UN Pledges More Resources to East Timor's Chief Investigator," *Agence France-Presse* (Jakarta, Indonesia), 20 November 2000: "The UN chief investigator for serious crimes in East Timor has agreed not to resign after last minute pledges by the body's administrators to supply his unit with desperately needed resources .... Two-thirds of the 56 people arrested on suspicion of serious crimes in the province have been released because the Special Crimes Unit lacked the resources to continue their investigations; East Timor's Non Government Organisations (NGOs) Forum declared in a report that "The Serious Crimes Unit has only been allocated the resources to investigate a very small proportion of the alleged war crimes...It is grossly understaffed, and lacking anything like sufficient basic necessities as interpreters, transport and computers."

inefficient, the Serious Crimes Unit suffered from a premature UN transfer of control to inexperienced East Timorese judiciary, the failure of capacity-building programs, and domestic politicking.<sup>52</sup> Many of the SCU's failings can also be attributed to the UN's "persistent failure to consult in a genuine and meaningful way with the East Timorese," its "bureaucratic and inflexible institutional nature,"<sup>53</sup> and contradictions in the role of the UN, whose staff was often overstretched, inexperienced,<sup>54</sup> and disorganized.<sup>55</sup> The court's impact on local populations was jeopardized by its failure to value local participation, and its jurisprudence was laid open to criticism by its failure to uphold due process standards. "The slow pace and questionable quality of [UNTAET's investigations]... has resulted in a loss of confidence among the East Timorese in UNTAET's ability or will to bring perpetrators to justice." Indeed, "key organizations are now unwilling to cooperate with the Serious Crimes Unit."<sup>56</sup>

However, some argue that the accomplishments of the court must be understood in the context of its mission and the situation it confronted. Suzannah Linton argues that the challenges

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<sup>52</sup> See Katzenstein, *Justice in East Timor*, *supra* note 26: "The East Timorese government...has played a significant role in undermining the training-mentoring programs, contributing to the tribunal's continual lack of resources, and stalling judicial appointments to the Special Panels. Officials in the Ministry of Justice have rejected numerous substantial offers for funding for the tribunal and capacity-building programs. It is reported, but unconfirmed, that in the summer of 2002, USAID donated U.S. \$ 8.2 million to civil society organizations after its offers to the judiciary 'basically to write a blank check' were declined...One employee of an NGO funding organization in Australia expressed deep frustration that its offers to unconditionally fund numerous positions for international staff in the Public Defenders' Office were also rejected... The Ministry's repeated rejection of offers for funds and international staff can be attributed to a deeply held political agenda in which the installing of Portuguese as the official and working language of the courts has been given primacy over all else. Language politics have been a volatile subject between the East Timorese government and the UN administration."

<sup>53</sup> See Linton, *Rising from the Ashes*, *supra* note 27.

<sup>54</sup> Institution-building in East Timor should have focused on bringing in international expertise for a transitional period, with multiple East Timorese counterparts appointed as deputies on probation with each international to receive appropriate training. They could gradually be empowered and ultimately assume full responsibility as judges, prosecutors and public defenders.

<sup>55</sup> See Katzenstein, *Justice in East Timor*, *supra* note 26.

<sup>56</sup> Amnesty International, *East Timor: Justice past, present and future*, 27 July 2001, ASA 57/001/2001. pt 3.4: 'While recognising the size and complexity of its work, Amnesty International is concerned by the slow pace at which UNTAET investigations are proceeding .... A number of suspects have already spent more than ten months in detention without indictment'.

faced “cannot be overstated”<sup>57</sup> and that UNTAET’s justice initiatives must be situated against the background of its mandate “to build a nation from scratch.” She emphasizes that UNTAET “became custodian of a traumatized and ravaged land with barely a building left intact from the maelstrom of violence in 1999.”<sup>58</sup> The UN “created a judicial system where before there had been none. Within this fragile system, it carved out a special mechanism for dealing with the most unspeakable atrocities.”<sup>59</sup> Although the tribunal still faces tremendous challenges arising from the physical devastation of the 1999 campaign, the exodus of many qualified East Timorese, and resources shortages, “the tribunal continues to improve. The SCU, in particular, has responded to criticism effectively and has undergone substantial restructuring and vast improvement over the past year.”<sup>60</sup> UNTAET has responded positively to critiques of “its early tendency towards benevolent paternalism, which sidelined the East Timorese” and now “‘Timorisation’ has become a key objective of the mission, with East Timorese gradually being

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<sup>57</sup> See Linton, *Rising from the Ashes*, *supra* note 27.

<sup>58</sup> *Ibid.*

<sup>59</sup> See Human Rights Watch, *Justice Denied for East Timor*, *supra* note 34.

<sup>60</sup> *Ibid.*: The SCU “improved management and recruitment problems, strengthened its training and mentoring programs, and enhanced its public education and outreach efforts.” See Katzenstein, *Justice in East Timor*, *supra* note 26: Katzenstein interview with Eric MacDonald, Prosecutor, Serious Crimes Unit, in Dili, East Timor (July 23, 2002).

moved into leadership positions.” In spite of the qualitative inadequacy of some of the trials,<sup>61</sup> these and other positive developments<sup>62</sup> must inform critiques of the SCU’s work.

### **3b. Regulation “64” Panels in the Courts of Kosovo**

In June of 1999, after a NATO-led bombing campaign helped put a stop to mass atrocities in Kosovo committed primarily by Serb forces against ethnic Albanians, the United Nations Security Council issued a resolution establishing the United Nations Mission in Kosovo (UNMIK).<sup>63</sup> Charged with restoring some measure of law and order in a zone devastated by war and decades of discrimination against ethnic Albanians, UNMIK’s mandate included trying those responsible for past atrocities. With a local judicial system in shambles, physical infrastructure terribly damaged, prisoners languishing in jails, and the ICTY only prepared to try those who committed the worst atrocities on the widest scale,<sup>64</sup> UNMIK made “an effort to address what was rapidly becoming an accountability and justice crisis.”<sup>65</sup> The taint of the former oppressive

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<sup>61</sup> *Ibid.*, reference to Siphosami Malunga & Shyamala Alegendra, *Prosecuting Serious Crimes in East Timor: An Analysis of the Justice System*, Aug. 2002 (unpublished paper, on file with Katzenstein.); David Cohen, *Seeking Justice on the Cheap: is the East Timor Tribunal Really a Model for the Future?*, East-West Center, AsiaPacific Issues No. 61, August 2002, [hereinafter *Seeking Justice on the Cheap*] available at <http://www.jsmp.minihub.org/Resources.htm>., noting that through 2003, the accused were routinely detained beyond the seventy-two-hour limit and before their preliminary hearings. Some of the accused have been left in prisons for months or even years while awaiting trial. Cases have been repeatedly delayed for lack of translators or judges; Judicial System Monitoring Programme Press Release, *East Timor Special Panels for Serious Crimes: More Postponements than Hearings*, Oct. 11, 2002, at [http://www.jsmp.minihub.org/News/12N\\_10\\_02.htm](http://www.jsmp.minihub.org/News/12N_10_02.htm).; Judicial System Monitoring Programme Press Release, *East Timor Urgently Needs Court of Appeal to Guarantee Fundamental Human Rights*, Oct. 14, 2002, at [http://www.jsmp.minihub.org/News/14N\\_10\\_02.htm](http://www.jsmp.minihub.org/News/14N_10_02.htm)., noting that in the cases that have been prosecuted and especially in the earlier ones, the judges neglected to apply international law or applied it incorrectly, and handed down harsh sentences for low-level perpetrators.

<sup>62</sup> “The high number of indictments filed and cases adjudicated might suggest that the tribunal has been [partially] successful in fulfilling its mandate,” at least in some respects. See Katzenstein, *Justice in East Timor*, *supra* note 26, “Since hearing its first trial in January 2001, the SCU has investigated and filed 45 indictments for serious crimes against 140 individuals. These indictments resulted in trials and convictions for thirty-one individuals, spanning all levels of the Indonesian military and East Timorese militia command structure. As of January 2003, there were twenty cases pending before the Special Panels in which the accused were present in East Timor, although some were still in the pre-trial stage.

<sup>63</sup> UNMIK Regulation 1999/1, On the Authority of the Interim Administration in Kosovo (July 25, 1999), available online at <http://www.un.org/peace/kosovo/pages/kosovo1.shtml>

<sup>64</sup> See Carla Del Ponte, Prosecutor of the ICTY, Statement on the Investigation and Prosecution of Crimes Committed in Kosovo, (Sept. 29, 1999), available at <http://www.un.org/icty/latest/index.htm> .

<sup>65</sup> See Dickinson, *The Case of Kosovo*, *supra* note 12.

regime undermined public confidence in the justice system, which had systematically excluded ethnic Albanians and had been run by Serbians perceived as oppressors.

The courts also lacked experienced personnel after the UNMIK takeover of Kosovo, since “only a few Serb judges were willing to serve, and even those who were appointed subsequently stepped down, in response to pressure from Belgrade.”<sup>66</sup> The lack of Serb representation within the judiciary threw into doubt the legitimacy and independence of courts among the local Serbian population. Some rulings by Albanian judges against Serb defendants were considered so dubious that they were later thrown out by mixed panels with international and local judges. Such problems were exacerbated by local resentment at the UN’s early failure to consult with locals when making decisions about the judiciary, a failure exacerbated by the post-war lack of elected officials or a functional civil society.<sup>67</sup>

After much debate over the creation of a special court, to be called the Kosovo War and Ethnic Crimes Court,<sup>68</sup> under-funding and political obstacles led to an impasse and the court was abandoned.<sup>69</sup> In response to this breakdown, “U.N. authorities issued a series of regulations allowing foreign judges<sup>70</sup> to sit alongside domestic judges on existing local Kosovar courts, and

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> The court was to have concurrent jurisdiction with the ICTY, but would focus on the less high-profile offenders that the ICTY did not have the capacity to try.

<sup>69</sup> For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT’L L. 371 (2001) at 381; Hansjorg Strohmeyer, *Making Multilateral Interventions Work: the United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25:2 FLETCHER FOR. WORLD AFF. 107 (2001); Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT’L L. 46 (2001).

<sup>70</sup> International judges had minimal impact initially, as they did not comprise a majority on the trial panels. See, OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo’s War Crimes Trials: A Review*, at 12 (Sept. 2002), at <http://www.osce.org/kosovo/documents/reports/justice/> [hereinafter *Kosovo’s War Crimes Trials*]. A new UNMIK regulation enacted in December 2000 sought to rectify this problem, See UNMIK Regulation 2000/64, (Dec. 15, 2000) available at <http://www.unmikonline.org>. After that date, all war crimes cases have been held in front of courts composed of a majority of international judges, with international prosecutors primarily in charge of prosecutions.

allowing foreign lawyers to team up with domestic lawyers to prosecute and defend the cases.”<sup>71</sup>

These UN regulations led to the creation of the “Regulation 64 panels” in the courts of Kosovo, applying a blend of international and domestic law.<sup>72</sup> “The hope was that the infusion of foreign experts would jumpstart the judicial process, providing badly needed capacity and independence.”<sup>73</sup>

The Regulation 64 Panels in the Courts of Kosovo experienced numerous problems,<sup>74</sup> especially in finding funding and hiring qualified international personnel. Some of the international judges brought in proved to be culturally insensitive, inadequately skilled and/or versed in international law, or had deficient English skills.<sup>75</sup> There was “no mechanism for the mentoring of local judges and, in Pristina, international and local judges even have offices in different buildings.”<sup>76</sup> As a result, some commentators like Sylvia de Bertodano have declared the Regulation 64 Panels to be a disappointment.<sup>77</sup>

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<sup>71</sup> *Ibid.*; See e.g., UNMIK Regulation 1999/5, *On the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor* (Sept. 4, 1999); UNMIK Regulation 1999/6, *On Recommendations for Structure and Administration of the Judiciary and Prosecution Service* (Sept. 7, 1999); UNMIK Regulation 2000/15, *On the Establishment of the Administrative Department of Justice* (June 6, 2000).

<sup>72</sup> See Dickinson, *The Case of Kosovo*, *supra* note 13: “Initially, with little consultation with the local population, UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia (FRY)/Serbian law, modified to conform to international human rights standards. This decision outraged many ethnic Albanian Kosovars, who identified FRY/Serbian law as the law of the oppressive Serb regime. Kosovar Albanian judges refused to apply the law, resulting in widespread confusion. In response, UNMIK issued new resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989. But like the initial decision, the applicable law was to be a hybrid of pre-existing local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms”.

<sup>73</sup> See also Organization for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, *Report 9 - On the Administration of Justice*, Mar. 2002, at 5-6, available at <http://www.osce.org/kosovo/documents/reports/justice/Report9<uscore>eng.pdf>

<sup>74</sup> See OSCE, *Kosovo's War Crimes Trials*, *supra* note 70.

<sup>75</sup> International Crisis Group, *Finding the Balance: The Scales of Justice in Kosovo* 5-6 (ICG Balkans Report 134, 2002), available at <http://www.reliefweb.int>.

<sup>76</sup> *Ibid.*

<sup>77</sup> Sylvia de Bertodano, *Current Developments in Internationalized Courts*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1,1 OXFORD UNIVERSITY PRESS, 2003: “Many Serb defendants have...escaped from custody [since 1999]. Further arrests of ethnic Serbs are unlikely as suspects are no longer resident within the jurisdiction...The use of internationalized panels in Kosovo has not to date made significant progress towards ending impunity for international crimes in the region...The resources that have been applied to the task in both East Timor and Kosovo have proved insufficient.”

Despite these flaws, and although the influx of international judges did not by any means solve all of the local courts' problems, "the appointment of international judges [and prosecutors] to the local courts in...highly sensitive cases [involving serious human rights abuses] helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population." Most importantly, "the verdicts of the hybrid tribunals have alleviated some impartiality concerns, even among Serbs."<sup>78</sup> The Kosovar courts ultimately held effective trials of alleged perpetrators<sup>79</sup> and alleviated a massive legitimacy crisis. "At least one report, though critical of the tribunals in many respects, suggests that the presence of international actors has improved the quality of justice delivered in these cases."<sup>80</sup> Clint Williamson, Justice Department Director of Kosovo from October 2001 to November 2002 assessed the 64 panels as a mixed success. He pointed out that despite some inadequately qualified international judges and prosecutors, some intimidation of local staff by perpetrators on the ground, and occasional local abdication of responsibility to internationals in high-risk trials, the 64 panels proved a very valuable tool in Kosovo. While he encountered widespread resentment against the ICTY as an imposition by outsiders, he believed that local and international staff maintained very collegial relations within the hybrid structure, which received

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<sup>78</sup> See Dickinson, *The Case of Kosovo*, *supra* note 12, noting that in Kosovo, previous attempts at domestic justice had failed to win support among Serbs. Indeed, Serbian judges had refused to cooperate in the administration of justice. Verdicts in the cases tried by ethnic Albanians were regarded as tainted by the ethnic Serbian population. Serbs now approve more.

<sup>79</sup> As of June 2002, Kosovo courts had held trials in seventeen war crimes cases. For example, as of December, 2000, there were ten international judges and three international prosecutors serving in the five regions of Kosovo. They completed a total of 35 trials and investigations. See United Nations Interim Administration Mission in Kosovo, *Report of the Secretary-General*, U.N. Doc. S/2000/1196 (2000); see also, OSCE, Department of Human Rights and the Rule of Law, *Kosovo: A Review of the Criminal Justice Division*, Sept. 1, 2000 to Feb. 28, 2001, at <http://www.osce.org/kosovo/documents/reports/justice/criminal<uscore>justice2.pdf>; and OSCE, Report, Feb. 2000 to July 2000, at <http://www.osce.org/kosovo/documents/reports/justice/criminal<uscore>justice.pdf>

<sup>80</sup> See Dickinson, *The Case of Kosovo*, *supra* note 12; see also The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 127-36 (2000) [hereinafter Joint Study].



more local buy in.<sup>81</sup> An OSCE report endorsed the Kosovo hybrid experiment overall, lending credence to arguments that despite significant flaws, Kosovo represents an improvement on the hybrid model over the East Timor process.<sup>82</sup>

### 3c. Special Court for Sierra Leone<sup>83</sup>

In the aftermath of a horrific civil war in Sierra Leone, which claimed the lives of an estimated 75,000 individuals and displaced a third of the population,<sup>84</sup> the Sierra Leonean government and the UN set up a Special Court<sup>85</sup> to try those who “bear the greatest responsibility for the commission of crimes against humanity, war crimes, and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996.”<sup>86</sup> A treaty between the UN and the Sierra Leone government, the Statute for the Special Court for Sierra Leone, established the court in 2002. While the ICTY and ICTR were established under Security Council resolutions pursuant to Chapter VII of the UN Charter and only have jurisdiction over international crimes, the Special Court for Sierra Leone is a “treaty-based sui generis court of mixed jurisdiction and composition.”<sup>87</sup> Rather than being a subsidiary organ of the UN, or directly administered by the

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<sup>81</sup> Author’s telephone interview with Clint Williamson, Justice Department director of Kosovo from October 2001 to November 2002, on Tuesday, December 07, 2004

<sup>82</sup> See OSCE, *Kosovo's War Crimes Trials*, *supra* note 70.

<sup>83</sup> The Sierra Leone Special Court’s website is <http://www.sc-sl.org>; The NGO No Peace Without Justice has also established a special Web site concerning the Sierra Leone Special Court that includes a consolidated version of the Sierra Leone Statute and the Sierra Leone Special Court Agreement, <http://www.specialcourt.org>

<sup>84</sup> See Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT’L & COMP. L. 237.

<sup>85</sup> *Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council*, UN Doc. S/2000/786 (2000). Attached to this letter was an annex containing the letter of the president of Sierra Leone and the “Framework for the special court for Sierra Leone”; See also Nicole Fritz and Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT’L L.J. 391, 400 (2001).

<sup>86</sup> *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (2000), at <http://www.un.org/Docs/sc/reports/2000/915e.pdf> [hereinafter Secretary-General’s Sierra Leone Report]. The annex contains the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Sierra Leone Special Court Agreement] and the enclosure contains the draft Statute for the Special Court for Sierra Leone [hereinafter Sierra Leone Statute].

<sup>87</sup> *Ibid.*

UN, the Special Court for Sierra Leone is independent from the UN and from the Sierra Leone government and court system.<sup>88</sup> This sets the Special Court for Sierra Leone apart from other international and hybrid tribunals, which were not products of local decision-makers reaching an agreement with the UN.<sup>89</sup>

The novel structure of the Special Court for Sierra Leone cannot be said to be a conscious imitation of the Kosovar or Timorese hybrids<sup>90</sup> or of ad hoc tribunals. It represents an innovative attempt by the United Nations to establish a more efficient and effective international criminal body, more open to local participation and influence. The Sierra Leone Special Court diverges from the Kosovar model insofar as it is not grafted into the Sierra Leonean justice system, but rather hovers outside the national court system, having concurrent jurisdiction with and primacy over the domestic courts of Sierra Leone.<sup>91</sup> Nonetheless, it shares key similarities with other hybrids: hiring local and international staff (with a majority of international judges in each trial chamber)<sup>92</sup> and applying law that blends international humanitarian law and domestic Sierra Leonean law,<sup>93</sup> although thus far the indictments have referred only to international law. The court will be “ ‘guided by’ both the decisions of the ICTY and ICTR (with respect to the interpretation of international humanitarian law) and the decisions of the Supreme Court of Sierra Leone (with respect to the interpretation of Sierra Leonean law).”<sup>94</sup>

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<sup>88</sup> The tribunal employs its own staff and receives its funds directly from donor governments and private donors.

<sup>89</sup> See <http://www.sc-sl.org>

<sup>90</sup> There are no references to Kosovar or Timorese models in any of the Sierra Leone Special Court statutes or other papers relating to its establishment. Likewise, the prior hybrids are conspicuously absent in the Court’s website and in the literature it produces.

<sup>91</sup> See Sierra Leone Statute, *supra* note 86, Art. 8

<sup>92</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Jan. 16, 2002, Appendix II, U.N. Doc. S/2002/246.

<sup>93</sup> *Statute of the Special Court for Sierra Leone*, Appendix II, Attachment, U.N. Doc. S/2002/246, at art. 1.

<sup>94</sup> See Dickinson, *The Promise of Hybrid Courts*, *supra* note 21.

The Special Court for Sierra Leone, like the other hybrids, had to cope with underfunding<sup>95</sup> and insecurity due to local conditions. It has suffered major blows, with the death of two prominent indictees (Foday Sankoh and Sam Bockarie),<sup>96</sup> the disappearance of a third indictee, Johnny Paul Koroma,<sup>97</sup> and the fact that a fourth indictee, Charles Taylor, is dodging arrest in Nigeria, which took him in with the full knowledge and support of most world leaders.<sup>98</sup>

Thus far, however, the Special Court for Sierra Leone is arguably proving to be more efficient,<sup>99</sup> less costly,<sup>100</sup> more accessible to local populations,<sup>101</sup> and less politically inflammatory with groups of former low-level perpetrators<sup>102</sup> than either ad hoc tribunal or the

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<sup>95</sup> For a discussion of the Sierra Leone Special Court's lack of funding, see Avril McDonald, *Sierra Leone's shoestring Special Court*, at <http://www.icrc.org/>

<sup>96</sup> For an article on Foday Sankoh's death, see Amnesty International, *Sierra Leone: Foday Sankoh's death will not diminish the Special Court's role in ending impunity*, 30 July 2003, available at <http://web.amnesty.org/library/Index/ENGAFR510082003?open&of=ENG-SLE>; for an article on Sam Bockarie's death, see Africa Online Freetown, *Sierra Leonean president confirms death of rebel*, 9 May 2003, <http://www.africaonline.com/site/Articles/1,3,52949.jsp>

<sup>97</sup> For an article on Johnny Paul Koroma's reported death, see Africa Online Liberia, *Sierra Leone war crime suspect dead after shootout*, 7 May 2003, available at <http://www.africaonline.com/site/Articles/1,3,52916.jsp>.

<sup>98</sup> For an article on Taylor presence in Nigeria, urging Nigeria to cooperate fully with the Special Court by surrendering Taylor, see Amnesty International, *Sierra Leone: Commitments to the Special Court must remain firm and not falter*, 16 January 2004, available at <http://web.amnesty.org/library/Index/ENGAFR510022004>

<sup>99</sup> As of January 2004, top leaders associated with all of the country's former warring factions stand indicted: Charles Ghankay Taylor, Foday Sankoh, Johnny Paul Koroma, Sam Bockarie, Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Sam Hinga Norman, Augustine Gbao, Brima Bazzy Kamara, Moinina Fofana, Allieu Kondewa, Santigie Borbor Kanu. The SCSL has also seen a trend towards rapid and efficient trials, with the 27 January 2004 Trial Chamber joinder decision that the accused will be tried in three groups at <http://www.sc-sl.org/index.html>

<sup>100</sup> See Cockayne, *The fraying shoestring*, *supra* note 16, "The 2003 Audit of the Court, carried out by a national-level auditor operating to international accounting standards, indicated that the Court's operations had to that point been carried out in accordance with relevant international financial and management standards." See also Shauket A. Fakie, *Report of the Auditor for the year ended 30 June 2003* [submitted to the Management Committee for the Special Court for Sierra Leone], available at <http://www.sc-sl.org/documents.html>. The Report was conducted in accordance with the common auditing standards of the Panel of External Auditors of the UN, the specialized agencies and the International Atomic Energy Agency: *id.*, at para. 1. See also the report on the operations of the Special Court of the UN Office of Internal Oversight Services, U.N. Doc. AP 2003/61/1(OBS-7) (May 6, 2003).

<sup>101</sup> The Special Court for Sierra Leone is the international/hybrid first tribunal to comprise a specialized Outreach department, whose purpose is to engage with the local population. This department is separate from the Press and Public Relations department, and focuses on reaching out to Sierra Leoneans from all walks of life.

<sup>102</sup> During the summer of 2003, when this author worked in the Sierra Leone Special Court Outreach Department, the Department was solicited to give presentations on the Court's work by all members of Parliament, most of the Paramount Chiefs, some of the country's most important tribal leaders, several Police Chiefs, and the Army's Chief of Staff. These and numerous civil society organizations responded positively to Outreach's presentations, and nearly all ultimately requested continued dialogue and collaboration. There has been very little negative press on the Court in local newspapers, with the exception of various accusations leveled at the Court by the Truth Commission during an internal scandal of the Commission.

other two hybrids. It has also garnered more endorsements from local elites and civil society<sup>103</sup> and has been more successful in promoting local justice reform.<sup>104</sup>

The formal agreement establishing the Court came only in mid-January 2002. By the end of August 2004 a remarkable number of complex administrative and litigation processes had been completed or were well under way: the investigation of crimes to international standards; the location and arrest of suspects; the establishment of adequate detention facilities; the construction of a court-house and compound after an international design competition; the acquisition of 1.6 MW of electrical power for the Court; the establishment of a medical clinic; installation of microwave communications links; establishment of security capacities and protocols; creation of a website; a large and diverse outreach program; the employment and training of hundreds of local and international staff in jobs ranging from translation to transport; the disposal of more than a hundred and fifty pre-trial motions; and the commencement of two joint trials. These are all significant achievements of which the Special Court should be proud.<sup>105</sup>

The International Center for Transitional Justice (ICTJ)'s thoughtful and detailed analysis of the work of the Special Court for Sierra Leone<sup>106</sup> stands out as one of the best evaluations of the court's formative period. While the report outlines "the tremendous challenges it faces in the coming months," it notes that "after 18 months of operations, the Special Court for Sierra Leone has shown a clear understanding of its mandate, and its management seems relatively efficient." The report adds that "to date, the Court has avoided the huge and incremental growth of the ad hoc tribunals, and its time and budget constraints have kept it under healthy pressure."<sup>107</sup> In large part thanks to the exceptional leadership of Robin Vincent, David Crane, and the Management Committee, the Special Court for Sierra Leone seems to be an improvement on the hybrid model,

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<sup>103</sup> In particular, President Kabbah has come to visit the Court several times and publicly endorsed it.

<sup>104</sup> A widely cited legacy of the Court is rule of law reform. See e.g. Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone. Accomplishments, Shortcomings and Needed Support.*, HUMAN RIGHTS WATCH, Vol. 16, no. 8(A) (Sept. 2004), at 32. This point is emphasized in the Special Court for Sierra Leone, *First Annual Report of the President of the Special Court for Sierra Leone* (March 31, 2004), available at <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf>, at 3, 28.

<sup>105</sup> For a succinct overview, see Cockayne, *The fraying shoestring*, *supra* note 16. A more comprehensive account is provided by the Special Court for Sierra Leone, *First Annual Report of the President of the Special Court for Sierra Leone* (March 31, 2004), available at <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf>.

<sup>106</sup> Thierry Cruvellier and Marieke Wierda, *The Special Court for Sierra Leone: The First Eighteen Months*, March 2004, available at [http://www.ictj.org/downloads/SC\\_SL\\_Case\\_Study\\_designed.pdf](http://www.ictj.org/downloads/SC_SL_Case_Study_designed.pdf).

<sup>107</sup> *Ibid.*

although it is too early to qualify it definitively as a success in comparison with other courts<sup>108</sup> - or to stake claims that it will succeed in shaping the rule of law in a country which still suffers from lack of trust in public institutions, corruption, inflation, discontent among ex-combatants, lack of economic opportunity, and UNAMSIL's downsizing.

### **3d. Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea**

During the rule of the Khmer Rouge in Cambodia, between April 1975 and January 1979, an estimated 1.7 million Cambodians were executed or died of starvation and disease – approximately one fourth of the population.<sup>109</sup> As Khmer Rouge leaders endeavored to transform Cambodia into a completely agrarian communist state, they carefully planned and executed policies of extermination and horrific human suffering. A Vietnamese intervention overthrew the Khmer Rouge and installed a new Cambodian government.<sup>110</sup> The defeated Khmer Rouge retreated to strongholds along the Thai border, where, aided by China, Thailand, and the US, it rearmed and continued to perpetrate crimes against humanity, staging attacks on Cambodia as a guerilla force.<sup>111</sup> The Khmer Rouge crumbled in 1996, when the Cambodian government gave amnesties in return for mass defections from the Khmer Rouge, and disintegrated further yet

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<sup>108</sup> For general commentary on the Special Court, see Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTS. L.J. 107 (2001); Robert Cryer, *A 'Special Court' for Sierra Leone*, 50 INT'L & COMP. L.Q. 435 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436; Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, DENV. J. INT'L L. & POL'Y 325.

<sup>109</sup> David Chandler, *A History of Cambodia*, 3d ed., Westview Press, 2000; Chandler, *The Tragedy of Cambodian history: Politics, War, and Revolution Since 1945*, Yale University Press, 1991, Chandler, *Brother Number One: A Political Biography of Pol Pot*, 2d ed., Westview Press, 2000 [hereinafter *Brother Number One*]; Ben Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge*, Yale University Press, 1996

<sup>110</sup> After overthrowing the Khmer Rouge, Vietnam and the post-Khmer Rouge Cambodian government tried Pol Pot and Ieng Sary in 1979 and amassed an enormous collection of valuable evidence of Khmer Rouge atrocities. However, the defendants guilt was treated as a foregone conclusion, and the prosecution has been decried by many commentators as a show trial.

<sup>111</sup> Chandler, *Brother Number One*, pp. 158-178; Evan Gottesman, *Cambodia After the Khmer Rouge; Inside the Politics of Nation-building*, Silkworm Books 2003.

with the death of Pol Pot in April 1998. In June 1997, the then co-Prime Ministers of Cambodia, Hun Sen and Norodom Ranariddh, requested the UN's assistance in bringing to justice individuals responsible for crimes against humanity and genocide. Difficult negotiations dragged on for 6 years between the UN and the Cambodian government.<sup>112</sup>

Ultimately, a Memorandum of Understanding (MOU) was negotiated between the UN and the Cambodian government, adopted by UN General Assembly on March 17, 2003,<sup>113</sup> formally accepted by the Royal Government of Cambodia and the United Nations on June 6, 2003,<sup>114</sup> and unanimously ratified by the Cambodian parliament on October 4, 2004.<sup>115</sup> It creates a framework for the first hybrid criminal court to apply civil law, and leading to the passing of "The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea" (EC Law). The EC Law provides for co-investigating judges to conduct the investigations and co-prosecutors to prepare indictments against suspects (one international and one Cambodian in each case).<sup>116</sup> The Tribunal will also have hybrid subject matter jurisdiction over crimes set forth

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<sup>112</sup> For an excellent historical overview on the delays in creating the EC, see Tom Fawthrop and Helen Jarvis, *Getting away with genocide? : elusive justice and the Khmer Rouge Tribunal*, Sydney UNSW Press, 2005. The General Assembly commissioned a Group of Experts, who endorsed a plan for trials of former Khmer Rouge officials. Hun Sen welcomed the UN proposal but rejected some of its key elements, and established his own special task-force, advocating for a domestic trial process with limited international involvement. In turn, the Legal Office of the UN issued a confidential "non-paper," which suggested increasing the tribunal's independence from the government and rejected the amnesty Hun Sen had granted to Ieng Sary. Overall, Cambodia worried that if it could not retain sufficient control over the process, the tribunal might exacerbate the continuing process of peace and reconciliation, and that an insensitive and zealous approach could generate panic and reignite guerilla warfare. On the contrary, the UN feared that Cambodia's judiciary would be too inexperienced and politically aligned, not impartial or independent enough; that the rights of the accused/access to counsel would not be respected; and that Hun Sen had amnestied former Khmer Rouge officials suspected of committing atrocities.

<sup>113</sup> Memorandum of Understanding between the United Nations and the Cambodian government, adopted by UN General Assembly on March 17, 2003 [hereinafter Memorandum of Understanding]

<sup>114</sup> Memorandum of Understanding accepted by the Royal Government of Cambodia and the United Nations on June 6, 2003.

<sup>115</sup> Memorandum of Understanding unanimously ratified by the Cambodian parliament on October 4, 2004

<sup>116</sup> See The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [hereinafter EC Law], Arts. 12 and 7. <http://www.cambodia.gov.kh/krt/english/>

both in Cambodian law<sup>117</sup> and international law.<sup>118</sup> The Tribunal is to be located in Phnom Penh<sup>119</sup> and the official working language shall be Khmer, with translations into English and French.<sup>120</sup> The Cambodian government and the UN will share the financial burden of the court, with Cambodian authorities paying for Cambodian staff expenses and the UN responsible for international staff salaries.<sup>121</sup>

Various critics of the Extraordinary Chambers (EC) refer to fears of an inadequately rigorous defense of the Khmer Rouge,<sup>122</sup> a “lack of competent judges and established judicial infrastructure,”<sup>123</sup> the possibility that Cambodian judges will be controlled by the government, and fears that certain well-connected potential defendants will escape prosecution.<sup>124</sup> Secretary-General Annan stated “There still remains doubt... regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia.”<sup>125</sup> He reflected the opinion of the Group of Experts and others who voiced concerns regarding the lack of a stable, established judicial system.<sup>126</sup> Other critiques center on the lack of a culture of respect for the

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<sup>117</sup> See the 1956 Penal Code of Cambodia

<sup>118</sup> See the four 1949 Geneva Conventions; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.

<sup>119</sup> See EC Law, *supra* note 116, Art. 43.

<sup>120</sup> *Ibid.*, Art. 45.

<sup>121</sup> *Ibid.*, at Art. 17. The Extraordinary Chambers may receive voluntary assistance from foreign governments, international institutions, NGOs, and other persons.

<sup>122</sup> Mann (Mac) Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense?* SOUTHERN CALIFORNIA LAW REVIEW, SEPTEMBER, 2001, NOTE.

<sup>123</sup> Scott Luftglass, *Crossroads in Cambodia: The United Nations' Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893

<sup>124</sup> It is almost assured that if an international tribunal were convened, it would try the remaining members of the Standing Committee of the PDK and the top leaders who held government posts. A recent report by the War Crimes Research Office ("WCRO") at American University and the Coalition for International Justice identifies seven possible candidates for prosecution. See Stephen Heder with Brian D. Titemore, War Crimes research Office, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (2001). The report identifies: Nuon Chea, Communist Party Deputy Secretary; Ieng Sary, Deputy Prime Minister for Foreign Affairs; Khieu Samphan, State Presidium Chairman; Ta Mok, Central Committee Member; Kae Pok, Central Committee Member; Sou Met and Meah Mut, both Military Division Chairmen.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Group of Experts Report*, para. 129; letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the UN Secretary-General, annexed to UN Doc. A/1997/488 of 24 June 1997. See also the

judicial system and the rule of law in Cambodia,<sup>127</sup> or concerns that Cambodian law is “confused, inconsistent, internally contradictory and full of important omissions”.<sup>128</sup>

While some commentators have a bleak prognostic, others remain hopeful that the EC will mete out impartial justice, and bolster and reform the local Cambodian judiciary in so doing.<sup>129</sup> They point to numerous safeguards within the law that ensure international staff will not be railroaded by Cambodian counterparts, including the supermajority formula which safeguards the international judges’ decisions, and resolution mechanisms for disagreements between co-prosecutors and co-investigating judges.<sup>130</sup> Beyond such arguments about the likely fairness of the process, supporters of the EC point to the importance of national participation and involvement in the trials while at the same time ensuring international standards and participation, and underscore the value of holding the trials in Cambodia, in Khmer, that are reported on local media and accessible to Cambodian people.

### 3d. The Iraq Special Tribunal

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reports of the Special Representative of the Secretary-General for Human Rights in Cambodia, in particular UN docs E/CN.4/1999/101 of 26 February 1999 and E/CN.4/2001/103 of 24 January 2001, and the *Secretary-General’s Report to the General Assembly A/54/353* of 20 September 1999.

<sup>127</sup> See Press Release by Amnesty International and Human Rights Watch, *Cambodia: Judiciary on Trial*, New York/London, 20 June 2001.

<sup>128</sup> Human Rights Watch, *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, 6 (2003), available at <http://hrw.org/asia/cambodia.php>

<sup>129</sup> Author’s interviews with members of the Royal Government of Cambodia Khmer Rouge Trial Task Force, July 18, 2004. Moreover, the Open Society Justice Initiative, and the Cambodia Working Group that it supports, are engaged in work to strengthen the Tribunal that is anchored in the notion that the Tribunal can contribute productively justice and the development of a culture of accountability in Cambodia. Members of the International Working Group are associated with the following institutions: American University, Washington College of Law, Center for American Progress, Genocide Watch, Coalition for International Justice, Global Rights, and the ICTY. [http://www.justiceinitiative.org/activities/ij/cambodia\\_working\\_group](http://www.justiceinitiative.org/activities/ij/cambodia_working_group)

<sup>130</sup> If the co-prosecutors cannot resolve disagreements as to whether to take the case to trial or not, then five judges will meet to make a decision whether or not to take the case to trial. Neither the Cambodian nor the international judges, co-prosecutors or investigating judges can alone block a case from going to trial.



Although the Bush administration has tentatively allowed for hybrid courts as viable alternatives to the ICC in theory,<sup>131</sup> administration officials have rebuffed international involvement in efforts to establish hybrid courts in Afghanistan and Iraq, advocating domestic legal processes instead. “It is possible that the Bush administration ruled out hybrid trials of Saddam Hussein and other Iraqi leaders not because of any anti-hybrid position per se, but rather because such trials might produce embarrassing reminders of past American support for his government and damaging evidence against Western leaders.”<sup>132</sup> It is also possible that the Bush administration responded to local desires for Iraqi trials.<sup>133</sup> For whatever reason, in crafting a position on trials in Iraq, the Bush administration staunchly opposed involvement by the UN or any other international body as such.<sup>134</sup> The Bush administration rejected proposals by State Department representatives,<sup>135</sup> and by academics and international law practitioners who advocated a hybrid court for Iraq and who drafted models for a mixed tribunal, which would

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<sup>131</sup> Fact Sheet, Office of War Crimes Issues, May 6, 2002, <http://www.state.gov/s/wci/fs/2002/9978.htm> (“hybrid courts consisting of international participants and the affected state participants can be authorized, such as in the case of Sierra Leone.”)

<sup>132</sup> For a discussion about US resistance to a hybrid in Iraq, *See* Mark Matthews, Sun National, December 17, 2003, <http://www.sunspot.net/news/nationworld/iraq/bal-te.trial17dec17,0,3097763.story?coll=bal-home-headlines>

<sup>133</sup> Author’s October 2003 interviews with Tom Parker, a former officer for M.I.5 (the British intelligence agency) who was the head of the Coalition Provisional Authority’s crimes against humanity investigations unit, and who taught at Yale *See also* Tom Parker, Judgment at Baghdad, New York Times, July 7, 2004, available at <http://www.nytimes.com/2004/07/07/opinion/07PARK.html?ex=1090250826&ei=1&en=a50f7dca15be3f71> *See also* the study conducted in Iraq by the International Center for Transitional Justice and the Human Rights Center at the University of California, Berkeley, in July and August 2003 with 395 Iraqi men and women from a variety of ethnic, religious and social backgrounds exploring popular perceptions of post-Sadam justice initiatives. The study, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, ICTJ and the Human Rights Center, ICTJ Occasional Paper Series, University of California, Berkeley, available at <http://www.ictj.org/downloads/IraqDesigned.pdf>, asked respondents if they preferred local or hybrid tribunals. The overwhelming response was in favor of local trials.

<sup>134</sup> *See* Frank J. Murray, *U.S. Will Prosecute Iraqis for War Crimes*, WASH. TIMES, Apr. 9, 2003. (“On April 8, 2003, U.S. Ambassador for War Crimes Pierre Prosper and W. Hays Parks, Special Assistant to the Army’s Judge Advocate General, announced plans for crimes against humanity trials in special Iraqi courts in what Mr. Prosper called ‘an Iraqi-led process that will bring justice for the years of abuses.’”)

<sup>135</sup> The Department of State included the establishment of an ad hoc tribunal as a component of its “Future of Iraq” project. This enormous project included a “‘Working Group on Transitional Justice’ consisting of 41 Iraqi expatriate jurists and a number of US experts. *See* Cherif Bassiouni, *Post-Conflict Justice In Iraq: An Appraisal Of The “Iraq Special Tribunal”*. (unpublished paper on file with author), at 11

have applied domestic and international law, with Iraqi judges and international judges drawn from Arab countries.<sup>136</sup>

In September 2003, the idea of an Iraqi national Tribunal bolstered by international support was being actively pursued by DoD, DoS, and DoJ, and it was coordinated by the National Security Council (NSC). Ultimately supported by the GC and the CPA, the initiative led to the drafting of the statute for the Iraq Special Tribunal, September to December 2003.<sup>137</sup>

In the end, the Iraqi Special Tribunal statute<sup>138</sup> allows for non-Iraqi participation chosen by Iraqis,<sup>139</sup> but it does not mandate that non-Iraqi participation be structured or linked with any kind of institution like the UN. “Pursuant to Article 6(b) of the Statute, the President of the IST is required to appoint non-Iraqi nationals ‘to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber.’ Article 7(n) and Article 8(j) provide for similar appointments with respect to Investigative Judges and Prosecutors.”<sup>140</sup> While this may be perceived as offensive, and hence amended, it does provide a guarantee for international participation of some sort. However, given the tribunal’s enforcement of the death penalty, few countries with reputable judiciaries aside from the US are likely to be involved, let alone send staff.<sup>141</sup> Indeed, thus far, “international” participation has been more of a euphemism for US involvement than anything else.

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<sup>136</sup> For a discussion on drawing on judges from Arab countries with distinguished judiciaries to enhance the legitimacy of the proposed Iraqi court, See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729 [hereinafter *Regionalization of International Criminal Law*]. For a summary of a plan developed by Cherif Bassiouni for a mixed tribunal similar to the Special Court for Sierra Leone, “that employs Iraqi judges along with experienced jurors from other Arab nations.” see Susan Dominus, *Their Day in Court*, N.Y. TIMES MAG., Mar. 30, 2003, at 33.; See also Anne-Marie Slaughter & William Burke-White, *The UN Must Help Bring Justice to Iraq*, FIN. TIMES, Apr. 9, 2003.

<sup>137</sup> See Bassiouni, *Post-Conflict Justice In Iraq*, *supra* note 135.

<sup>138</sup> See The Iraqi Special Tribunal Statute, available at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm)

<sup>139</sup> *Ibid.*, Article 6(b) of the Statute provides that “the President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber.”

<sup>140</sup> See Bassiouni, *Post-Conflict Justice In Iraq*, *supra* note 135, at 36.

<sup>141</sup> TOM PARKER (Lawyer): Although the British government tried to persuade the Iraqis that the death penalty will make life very difficult for them; it will make it almost impossible for the international community--certainly for the European Union and for NGOs--to assist them, the Iraqis insisted on going forward with it” National Public Radio Show, All Things Considered, March 7, 2005 Monday. For a comprehensive list of those countries that apply

The initial steps of the court were very much marked by US involvement, as for instance in the case of the choreographed arraignment of Saddam Hussein on July 1, 2004. Although the Iraqi judges, investigative judges, and prosecutors of the IST have gradually taken ownership of the process, the American influence is quite visible in the supportive role of the RCLO, which exercises much greater influence than a mere technical support group, and is very engaged in almost every aspect of the tribunal's work, from evidence gathering to establishing the infrastructure.<sup>142</sup>

The IST's future remains uncertain at this writing, with massive political change in Iraq raising the question of what Iraq's future governments will decide to do about the IST and how much they will challenge American ownership of the trials. Setting aside the problem of the United States violation of international occupation law and the fundamentally problematic nature of the TAL,<sup>143</sup> the tribunal would still have to cope with the conflicts inherent in mingling an American-style adversarial system with an Iraqi inquisitorial one. In addition, linguistic problems<sup>144</sup> appear set to plague the IST.

#### 4. CRITIQUES OF HYBRIDS

All of the existing hybrids have provoked their fair share of criticisms, many of them justified. However, in order to improve our understanding of the structural hybrid model, it is critical to analyze the hybrid model's intrinsic flaws *separately* from existing hybrids' failures on the ground, and to explore possible solutions to these problems.

##### **4a. Differentiating between inherent flaws of the hybrid model and the problems of extant hybrids**

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the death penalty and those that do not, *see* can be found on the Death Penalty Information Center website, available at <http://www.deathpenaltyinfo.org/article.php?scid=30&did=140>

<sup>142</sup> See Bassiouni, *Post-Conflict Justice In Iraq*, *supra* note 135.

<sup>143</sup> These problems could be partially remedied if a legitimate national legislative authority re-promulgated an amended law establishing a specialized criminal Tribunal in conformity with the Iraqi legal system on the basis of continuity of the IST. *See* Human Rights Workshop with Greg Fox, Wayne State University Law School, "The Occupation of Iraq." Yale Law School, Friday, March 4, 2005; and *The Occupation of Iraq*, (forthcoming, Georgetown Journal of International Law, March 2005).

<sup>144</sup> The official language of the IST is set to be Arabic, but the official, controlling version of the Statute is in English. Moreover, "Pursuant to Article 4 (d) of the Statute, the GC and successor may appoint foreign judges to the IST provided that they fulfill certain criteria which do not include familiarity with the Arabic language or the Iraqi legal system." (P. 35). Bassiouni, *Post-Conflict Justice In Iraq*, *supra* note 135.

Intrinsic shortcomings in the hybrid model as such should be separated out from predicaments that have plagued the Kosovar and East Timorese experiments. The under-funding and politicization in existing hybrids, and the ensuing disorganization and outreach failures, are tragic. However, these flaws arose from particular political circumstances<sup>145</sup> - they hinge on *implementation*. They speak more to the specific difficulties faced by the courts in Dili and Kosovo than to flaws inherent in the hybrid model. Most of these hybrid courts' problems stemmed from ad hoc development and under-funding in problematic circumstances rather than from institutional design. International donors' reluctance to stay the course plagues all transitional justice drives, causing them to dilute their brand of international justice and work less effectively, slashing the outreach efforts so necessary to affect the local "culture of justice." Not even the best strategic plan can overcome donor apathy. Had either of these hybrids received a fraction of the international funding and attention given to the ICTR or ICTY, the consequent amelioration in their work would reveal that many of their original shortcomings were not built-in to the hybrid model per se. In this respect, the SCSL's logistical, organizational, and financial success relative to the Kosovar and East Timorese models<sup>146</sup> is revelatory.

#### **4b. Flaws inherent in the hybrid model**

One of the hybrid model's worst flaws is that instead of incorporating the best of the international and local judicial systems, it may reflect the worst of both. Ideally, hybrids' value lies in their fluidity and ability to adapt to local culture, language, and law while maintaining

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<sup>145</sup> There is no guarantee that these problems will be avoided in the new hybrid emerging in Cambodia. See Seth Mydans' critique of plans for a Cambodian hybrid, noting that the local "judiciary is weak, corrupt, and politically docile," and this "means Prime Minister Hun Sen will be the master of ceremonies, with results that are predictable only to him." Seth Mydans, *Flawed Khmer Rouge Trial Better Than None*. N.Y. TIMES LETTER FROM ASIA, April 16, 2003.

<sup>146</sup> The Special Court for Sierra Leone experienced temporary financial difficulties with donor countries simply not paying promised assessments, but has succeeded in resolving this problem and obtaining the promised funds. David Crane, Chief Prosecutor for the Special Court for Sierra Leone, "*Dancing with the Devil: Prosecuting West Africa's Warlords*," speech at Yale Law School, April 7, 2004.

core values of international criminal law (which anchor them, imparting credibility and a measure of impartiality). However, their very capacity to adjust to local realities in an effort to better serve indigenous populations could be manipulated and their flexibility could morph into volatility and confusion. The further hybrids deviate from an international tribunal prototype, the more they risk being manipulated by ethnic, military, or political factions. Hybrids can still become kangaroo courts.

Just as hybrids can drift too far towards the Scylla of flawed local justice, they can also stray towards the Charybdis of disconnected international justice. Too great a reliance on international structures and visions can create a chasm between the court and local populations, a brand of justice that smacks of imperialism and is not anchored in local culture. A promising model which overcomes some inherent flaws of international and local courts does not necessarily provide answers to all problems. Like any judicial institution, hybrids need leadership, independence, and funding.

### *Dangers of violence and intimidation*

Hybrids share many of the problems experienced by their siblings, national courts. It can frequently be dangerous for war crimes trials to take place ‘in-theater’ – local and hybrid courts run the risk of being influenced by the very agents that perpetrated or ordered the crimes in question. Trying heads of state, or powerful army/paramilitary/police leaders in their former fiefdoms when they retain significant support bases can be enormously dangerous.<sup>147</sup> Even incarcerating perpetrators might “not be feasible if their supporters retain significant military or paramilitary power to force their release.”

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<sup>147</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15.

With trials held locally, witness protection becomes harder to ensure, sensitive witnesses may well be too terrified to give testimony, and both local and international staff are vulnerable to attacks.<sup>148</sup> The very real dangers of intimidation are acknowledged in the US legal system's change of venue laws<sup>149</sup> – although U.S. courts' reluctance to countenance changes of venue without good reason suggests that trials can be undermined by distances between their venue and the location of witnesses or evidence.

In response to the greater dangers of witness/staff intimidation in situ, hybrids can and should be structured to create strict firewalls between the witness protection unit and every other department; certain hearings can be held in camera; every precaution should be taken in hiring personnel with access to sensitive information, including detailed background checks; and adequate sums should be disbursed for the best available security technology. In extreme circumstances, a portion of the trials can be held outside the country.

*The potential for political manipulation of trials*

Hybrids may also flounder if the crimes they adjudicate were committed or endorsed by elites who were not truly ousted by the post-conflict change in regime.<sup>150</sup> Local participation in hybrid tribunals can thus open the door to “sham trials by insincere regimes implicated in the

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<sup>148</sup> David Crane (the Chief Prosecutor for the Special Court for Sierra Leone) and Robin Vincent (the Registrar for the Special Court for Sierra Leone) have received numerous death threats and appear in public only with armed bodyguards.

<sup>149</sup> 28 U.S.C. 1404 (1988). Rule 21 of the Federal Rules of Criminal Procedure provides that upon motion by the defendant, the court shall transfer the case to a different district if the court is satisfied that the defendant cannot obtain a fair and impartial trial in the district where the prosecution is pending due to prejudicial publicity. Fed. R. Crim. P. 21. See also *Breches v. Oklahoma*, 485 U.S. 909, 911-12 (1988) (Marshall, J., dissenting) (stating that states have taken divergent paths when granting motions for venue change). Cases where juries were sequestered for security reasons include trials of mafia bosses like *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir. 1985), *United States v. Scarfo*, 850 F.2d at 1015, 1023 (3d Cir. 1988), *United States v. Locascio*, 6 F.3d 924, 929 (1993); *United States v. Vario*, 943 F.2d 236, 238 (2d Cir. 1991); *United States v. Persico*, 1994 WL 150837 (E.D.N.Y. 1994). A case where nation-wide racial tensions raised such security issues that jurors were sequestered is the 1993 federal trial of the police officers accused of beating Rodney King, see Stephanie Simon & Ralph Frammolino, *Despite Perks, Sequestration is a Gilded Cage, Jurors Say*, *L.A. Times*, Jan. 15, 1995, at A1.

<sup>150</sup> See Madeline H. Morris, *Universal Jurisdiction: Myths, Realities, and Prospects: Universal Jurisdiction in a Divided World*, 35 *NEW ENG.L. REV.* 337 (Symposium)

very atrocities adjudicated.” On the opposite extreme of the spectrum, local input can also create a space for “political show trials by successor regimes bent on vengeance instead of justice” such that the trials “are not likely to advance the rule of law at either the national or international levels.”<sup>151</sup> With severe ethnic, tribal, and political divisions among the local population, a hybrid court can fan flames of local strife, raising perceptions of bias or favoritism if members of one group are appointed over others.

Wherever possible, constraints on local political manipulation should be implemented. For instance, the supermajority structure of the EC provides a reassuring bulwark/safeguard by ensuring that at least one international judge must join local judges in opinions regarding indictments, acquittals, or condemnations.

In dire circumstances where threats of local political manipulation appear insurmountable, trials should be removed abroad, preferably to a neighboring country. However, the court should remain a hybrid court to whatever extent possible, by incorporating as much local staff as possible, maintaining local languages as primary languages, taking local cultural practices into account, and engaging intensively in outreach with affected populations.

***Logistical and personnel difficulties and the danger of corruption***

Hybrid courts face many of the logistical and training difficulties of local trials. Given that they hire locals and use local infrastructure, their work can be constrained by damaged infrastructure or a lack of experienced lawyers, judges, investigators, analysts, etc. in the country. These hurdles may seem daunting, but they lie at the very root of the need for hybrids. They speak to the desperate need to rebuild local justice systems in the wake of atrocities. Indeed, for hybrids to have a significant long-term impact on indigenous justice, they should be

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<sup>151</sup> See Alvarez, *Crimes of States*, *supra* note 12.

designed with an eye to training local staff and repairing local infrastructure as much as possible. The more reflection on legacy-building goes into the development of hybrids, the better. Opening the doors to extensive local influence can crack open the floodgates of nepotism and corruption where local culture is riddled with such practices, as is the case in much of the world. Creating compensatory mechanisms, strict operating guidelines, transparency and information-sharing systems, and external audits can stem excesses.

*Possible contradictory rulings in different hybrid courts and the ensuing fragmentation of international criminal law*

Another “possible dire consequence of a patchwork of hybrid courts would be a fragmentation of international criminal law, whereby different substantive rules emerge in different regions.”<sup>152</sup> With independent hybrid tribunals adjudicating similar legal issues, but without any hierarchy, review procedures, principle of stare decisis, or even court-to-court-comity, a crisis could loom with multiplying variations in the substance of international law. Whereas potentially dangerous splits in U.S. circuit courts of appeals on key legal issues are resolved by the United States Supreme Court’s writ of certiorari, which promotes uniformity, “the emergent system of international criminal law has neither a high court of review nor a requirement of stare decisis.”<sup>153</sup> Jonathan Charney explains the danger: “Significant variations in general international law... could undermine the perceived uniformity and universality of international law.” The net result could be that “the increased multiplicity of international dispute

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<sup>152</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136.

<sup>153</sup> Likewise, disagreements between the French Council d’État (the high court for administrative matters), the Cour de Cassation (the high court of general jurisdiction), and the Conseil Constitutionnel (which has, among other duties, the right of constitutional review of some laws) have proved challenging with respect to the direct application of European Community law in France. *See, e.g.*, N.M. Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT’L L.J. 57, 65-66 (1994); *see* See Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals*, 271 RECUEIL DES COURS 105, 125 (1998), [hereinafter *Is International Law Threatened*] at 357.



settlement forums may present particular difficulties for the international legal system.”<sup>154</sup> Variations in substantive rules of international criminal law might create havoc<sup>155</sup> for several reasons. “First, international crimes that are supposedly universal in nature would lose their sense of universality and global condemnation as they come to have regional variation.<sup>156</sup> Second, loopholes might be created whereby perpetrators of international crimes could avoid conviction by relying on regional variation in the definitions of crimes. Third, judges in certain regions could possibly reshape international criminal law to allow particular individuals to avoid conviction.”<sup>157</sup> Ultimately, under the “pressure of divergent norm enunciation by different hybrid courts, international criminal law’s legitimacy could crumble, given the fragile nature of the nascent body of law.”<sup>158</sup> Even assuming that all hybrid courts adopted a serious policy of court-to-court comity, Charney’s concerns remain significant. This realization holds equally true for purely international ad hoc courts. Thomas Buergenthal, a judge on the International Court of Justice, notes that “the proliferation of international tribunals can... have adverse consequences.”<sup>159</sup>

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<sup>154</sup> See Charney, *Is International Law Threatened*, *supra* note 153, at 134.

<sup>155</sup> See Thomas Buergenthal, a judge on the International Court of Justice, observing that “the proliferation of international tribunals can ... have adverse consequences.” Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT’L L. 267, 272 (2001).[hereinafter *Proliferation of International Courts*]

<sup>156</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136: “Even a slight variation in substantive rules of international criminal law could prove extremely damaging. Take, for example, the law of crimes against humanity. The standard definition of crimes against humanity, as articulated by the ICTR, is any of a series of enumerated acts including murder conducted against a civilian population as part of a wide-spread and systematic attack [See Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 240 (2002). Mettraux notes that the core elements of the crime are (1) a widespread and systematic attack on (2) a civilian population.] Burke-White cautions that if a regional court redefined “widespread” or “systematic” even slightly, great variation in what constitutes a crime against humanity could ensue. A system might emerge in which crimes against humanity in Africa require a nexus to an international conflict – thereby excluding from the definition many crimes against humanity committed in internal conflicts, frequent in Africa.”

<sup>157</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136.

<sup>158</sup> See Charney, *Is International Law Threatened*, *supra* note 153, at 134.

<sup>159</sup> See Buergenthal, *Proliferation of International Courts*, *supra* note 155, at 272.

The issue of fragmentation of international criminal law is sufficiently important to be addressed and at least partially rebutted. While the threat should not be dismissed, “evidence from the proliferation of general international law tribunals and the nature of international criminal law itself suggest that serious fragmentation of substantive international criminal law is highly unlikely.”<sup>160</sup> The question is not whether the proliferation of international criminal courts will lead to some variation in jurisprudence but rather whether tribunals are “engaged in the same dialectic” and “render decisions that are relatively compatible,” despite minor differences.<sup>161</sup>

Jonathan Charney’s exhaustive study to determine the impact of the proliferation of international tribunals<sup>162</sup> allayed fears that these courts have undermined the legitimacy of the international legal system. Scrutinizing the jurisprudence of more than ten international tribunals<sup>163</sup> across eight substantive areas,<sup>164</sup> Charney found that the various tribunals “share a coherent understanding of that law,”<sup>165</sup> and differ remarkably little in substantive international law. Charney concludes that “the variations among tribunals deciding questions of international law are not so significant that they challenge its coherence and legitimacy as a system of law.”<sup>166</sup>

Based on his interviews with actors in various international tribunals,<sup>167</sup> Burke-White finds that other courts’ “deference to the ICTY has effectively created a system whereby ICTY

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<sup>160</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136.

<sup>161</sup> See Charney, *Is International Law Threatened*, *supra* note 153, at 137.

<sup>162</sup> For instance, the ICTY, ICTR, ICC, ICJ, WTO, ECJ, numerous international arbitral bodies, and hybrid courts in Kosovo, East Timor and Sierra Leone.

<sup>163</sup> These include, among others, the Iran-U.S. Claims Tribunal, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of Justice of the European Communities, the ICJ, the GATT/WTO Tribunals, and various arbitral bodies. See generally See Charney, *Is International Law Threatened*, *supra* note 153.

<sup>164</sup> *Ibid.*, These include sources of law, the law of state responsibility, and the law of exhaustion of domestic remedies.

<sup>165</sup> *Ibid.*, at 347.

<sup>166</sup> *Ibid.*, at 371.

<sup>167</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136. Burke-White Interview with Sylvester Ntukamazina, Judge, in Dili, East Timor (Jan. 19, 2002): Judge Sylvester Ntukamazina in the UNTAET Special

decisions have a quasi-stare decisis effect, thus helping to ensure uniformity of the international legal system.” He believes that similarly, “a great deal of deference... to the decisions of the ICC can be expected.”<sup>168</sup>

Indeed, minor variation in jurisprudence will not threaten coherence and compatibility, and may in fact allow for experimentation that will help develop the best international law. This idea is reminiscent of Michael Dorf and Charles Sabel's argument for “democratic experimentalism.”<sup>169</sup>

Moreover, the proliferation of hybrid criminal courts may be a means of preventing the dangers of substantive fragmentation of international criminal law that would ensue if countless national courts developed separate jurisprudence. In his analysis of international tribunals' jurisprudence on crimes against humanity, Guenaël Mettraux observes: “Whereas national courts sometimes relied upon distinctively domestic definitions of [crimes against humanity,]” international tribunals provide “a welcome degree of jurisprudential uniformity.”<sup>170</sup>

Ultimately, we live in an imperfect world, a world of second bests. Hybrids will never be perfect instruments of justice, but their flaws can be mitigated and they can provide desperately needed solutions to crises on the ground.

## **5. WHY HYBRIDS AND NOT INTERNATIONAL AD HOC TRIBUNALS:**

In considering hybrid courts as a potential replacement for international ad-hoc tribunals, we must explore the flaws of a model of purely international justice. This entails examining the major shortcomings of existing ad-hocs with a focus on defects that hybrids can remedy.

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Crimes Unit, in Dili, East Timor frequently relies on the ICTY and ICTR. *See also* Burke-White Interview with Stuart Alford, UNTAET Special Crimes Unit Prosecutor, in Dili, East Timor (Jan. 14, 2002); Stuart Alford also consults the Rome Statute, the ICC Preparatory Commission materials, and ICTY and ICTR judgments.

<sup>168</sup> *Ibid.*

<sup>169</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 323 (1998).

<sup>170</sup> *See* Mettraux, *The Jurisprudence of the International Criminal Tribunals*, *supra* note 156, at 238.

### 5a. Shortcomings of the International Criminal Tribunal for Rwanda

Established in 1994 in the wake of the Rwandan genocide,<sup>171</sup> the ICTR has suffered from major operational problems, low morale, administrative incompetence and mishandling of funds. “Regrettably, the ICTR’s beginnings were fraught with mismanagement and minor corruption. Because of the ‘closed society’ mentality of the UN system and its aversion to admit error, the cover-up lasted for almost two years, until the Inspector General produced a scathing report.”<sup>172</sup> Indeed, “allegations of incompetence” have continually “dogged the Rwanda court.”<sup>173</sup> Linguistic difficulties abounded, since translations were often haphazard and occasionally non-existent. Moreover, the ICTR has “been tainted by charges of racism...and the revelation that four genocide suspects were working on defense teams.”<sup>174</sup> Critics also argue the court is too slow.<sup>175</sup>

Partly because of its inefficiency, corruption, and costliness, but also due to its culturally and physically inaccessible nature, the ICTR has massively failed in its outreach and public relations to Rwandans. Those genocide survivors ICTR purports to serve have generally felt the court to be alien, unsupportive, or even offensive. Rwanda scholar and Human Rights Watch Rwanda researcher Alison Des Forges who worked extensively with the ICTR told journalists

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<sup>171</sup> Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

<sup>172</sup> In February 1997, a U.N. investigative panel released a report concluding that the ICTR had been plagued with bureaucratic waste and mismanagement since its establishment in 1994. *See e.g.* Report of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda, annexed to Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, U.N. Doc. A/51/789 (1997) ; *see also* Cherif Bassiouni, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL'Y 35.

<sup>173</sup> *See* England, *UN Tribunal Struggles to Be Model of International Justice*, *supra* note 32.

<sup>174</sup> *Ibid.*

<sup>175</sup> Despite the fact that most of the key suspected architects of the genocide are in custody, the ICTR has only delivered 15 judgements involving 21 accused people, convicting 18 of them and acquitting three others, leaving dozens of detainees on or awaiting trial. (The ICTR's 2001 report to the Security Council projected 136 new accused by 2005, which would have kept the court trying cases for more than 150 years at its rate of completion). *See* Europaworld 9/4/2004, *Commemorating The Rwanda Genocide: What Have We Learned?* <http://www.europaworld.org/week172/commemorating9404.htm>

that the ICTR is still out of touch with the average person in Rwanda. “Most Rwandans know very little about the tribunal,” she said, noting “that the tribunal’s information center in the capital Kigali - complete with computers - can provide little help to most victims and surviving families.” She pointed out that “some 90 percent of Rwanda’s 8.5 million people are peasants, most of whom live without electricity.”<sup>176</sup> Pernille Ironside, a specialist on the gacaca system,<sup>177</sup> also concluded that most Rwandans “know little of trials in Arusha except that the ICTR...is a foreign and removed body alien in procedure, whose slow pace of trials is proof of UN inefficiency, or worse, indifference to Rwandan needs.” She found in her research that “skepticism has evolved into anger with the hypocrisy that those most culpable are subjected to the best and most fair processes,” which culminate in their serving their “terms in ‘luxurious’ Western prisons and, in any event, to avoiding the death penalty.”<sup>178</sup> The International Crisis Group concurs that that “the survivors of the genocide find the tribunal distant and indifferent to their lot.” Indeed, many “witnesses refused to testify after a genocide survivors’ group known as IBUKA criticized the tribunal and suspended cooperation with it.”<sup>179</sup> Moreover, “the victims of the crimes of the RPF denounce it as an instrument of the Kigali regime, seeing the ICTR as a symbol of victor’s justice.”<sup>180</sup>

The Rwandan government – perhaps the ICTR’s most powerful potential partner in breaking Rwanda’s culture of impunity, reestablishing the rule of law, and engaging in mass education – has been alienated and even enraged by the tribunal, much like the aforementioned

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<sup>176</sup> See England, *UN Tribunal Struggles to Be Model of International Justice*, *supra* note 32.

<sup>177</sup> Gacaca courts are a civil dispute resolution process, based on a traditional form or Rwandan justice, meaning literally “judgment on the grass,” whereby elders in traditional Rwandan society used to bring together victims and accused of a given crime to try and achieve reconciliation. Patrick Fullerton, *Trying Genocide Through Gacaca*, [http://www.gjp.ubc.ca/\\_media/srch/030613genocide\\_through\\_gacaca.pdf](http://www.gjp.ubc.ca/_media/srch/030613genocide_through_gacaca.pdf)

<sup>178</sup> See Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation* 15 N.Y. INT’L L. REV. 31. [hereinafter *Rwandan Gacaca*]

<sup>179</sup> *Ibid.*

<sup>180</sup> Kathy Marks, *The Rwanda Tribunal: Justice Delayed*, International Crisis Group, June 7, 2001, <http://www.globalpolicy.org/intljustice/tribunals/2001/0607icg.htm>

genocide survivors. From the moment the UN drafted the ICTR statute, the Rwandan government protested<sup>181</sup> and expressed its reservations.<sup>182</sup> Irate that the seat of the ICTR was to be in Arusha, Tanzania, the Rwandan government argued that it ought to be located in Rwanda in order for the tribunal to better achieve accountability and national reconciliation.<sup>183</sup> During a brief period in November 1999, relations with the ICTR deteriorated to the point where “Rwanda severed diplomatic relations with the ICTR, after the appeals chamber ordered the release of Jean-Bosco Barayagwiza, a director in the Foreign Ministry and the head of the radio station responsible for hate propaganda, because of procedural violations.”<sup>184</sup> Although the severance of diplomatic relations between the ICTR and Rwanda was later formally repaired, very little cooperation exists in fact.

Both the Rwandan government’s support for gacaca and its decision to pass the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990,<sup>185</sup> signal just how little the ICTR

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<sup>181</sup> For information on the joint tribunal on Rwandan soil originally sought by Rwanda's post-genocide government, *See Alvarez, Crimes of States, supra* note 12. *See also* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. Int'l L.J. 163.

<sup>182</sup> For information on the Rwandan government’s position, *see See Alvarez, Crimes of States, supra* note 12; *see also* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc S/RES/955 (1994) (citing S/1994/1115 (1994)) *Situation Concerning Rwanda*. In mid-1994 the new Rwandan government that came to power in the wake of the 1994 genocide (then a non-permanent member of the U.N. Security Council) sought international assistance in prosecuting the perpetrators of the 1994 genocide. It proposed establishment of an international tribunal. However, the Rwandan government wanted the tribunal’s jurisdiction to extend to the full range of offenses committed by the prior Hutu regime, including acts of incitement that preceded the great wave of killings from April -July 1994. This was rejected since broader jurisdiction for the ICTR could have led to inquiries that would have embarrassed either the U.N. and particular permanent members of the Security Council. The Rwandan government also wanted to limit the jurisdiction to offenses committed through mid-July 1994 – namely, prior to the new government's assuming power. In addition, it hoped that international assistance would take the form of joint trials and investigations, or at least international proceedings within Rwanda. The Rwandan government thus cast the sole vote within the Security Council against establishing the ICTR.

<sup>183</sup> *See Situation Concerning Rwanda, supra* note 182 (statement of Manzi Bakuramutsa, representative of Rwanda).

<sup>184</sup> *See* J. Coll Metcalfe, *Rwanda Normalizes Relations with UN Tribunal*, INTERNEWS, Feb. 10, 2000, available at <http://www.internews.org/PROJECTS/ICTSnewsFeb00.html#feb17>

<sup>185</sup> This law was enacted on September 1, 1996 by the Rwandan government to deal with the approximately 90,000 detainees then awaiting trial in Rwandan prisons.

has been able to improve law-making and judicial institutions on the ground in Rwanda.<sup>186</sup> With over 800 employees and a budget of around 90 million US dollars, the ICTR diverted enormous resources that could have been used to rebuild parts of Rwanda's shattered judiciary.

Rwanda has been burdened with 130 000 prisoners in its jails, and the domestic genocide trials cleared an estimated 5,000 cases from their dockets between 1996 and 2002,<sup>187</sup> a speed that was achieved at the expense of due process guarantees to the accused. Recognizing that "even if this pace were maintained, it would still take upwards of 120 years to prosecute the estimated 110,000 to 130,000 alleged génocidaires...held in overcrowded prisons."<sup>188</sup> Rwanda has now turned to gacaca, a model of justice even further from international standards. The desperation motivating the Rwandan government's justice initiatives contrasts with the ICTR's snail's pace,<sup>189</sup> which fails even to give victims the satisfaction of swift, impartial justice being meted out to top perpetrators.

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<sup>186</sup> For a representative example of international lawyers' emphasis on the shortcomings of Rwanda's administration of the Organic Law, *See, e.g.*, Steven R. Ratner & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law* 190-201 (2d ed. 2001), at 154-56; *see also* Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda III* (1997) available at <http://www.lchr.org/pubs/rwanda.htm>, at VIII.

<sup>187</sup> *See* Ironside, *Rwandan Gacaca*, *supra* note 178; *See also* Human Rights Watch, *Rwanda: Elections May Speed Genocide Trials*, available at <http://www.hrw.org/press/2001/10/rwanda1004.htm>; UN Integrated Regional Information Network (IRIN) *Rwanda: September Returns Bring Year's Tally to 17,000*, AFR. NEWS, Oct. 23, 2000; *see also* Susan Cook & George Chigas, *Putting the Khmer Rouge on Trial*, BANGKOK POST, Oct. 31, 1999, at 1 (illustrating the lack of a legal infrastructure in the Rwandan courts).

<sup>188</sup> *See* Ironside, *Rwandan Gacaca*, *supra* note 178; *See also* Human Rights Watch, *Report on Rwanda: Justice and Responsibility* (1999) at 11, 15-16, available at [www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm](http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm); Dana Harman, *Rwanda Turns to its Past for Justice*, CHRISTIAN SCI. MONITOR, Jan. 30, 2002, at 9 (opining that it will take 200 years to try some 135,000 suspects in custody); *see also* Ed O'Laughlin, *Worn Down by Horrors of War, the Children of Rwanda's Exodus Head Home to Face New Peril: No Turning Back for Red Cross Orphans*, INDEPENDENT (London), Mar. 27, 1997, at 19 (adding that thousands of children are also being held in the overcrowded Rwandan jails).

<sup>189</sup> *See* Marks, *Justice Delayed*, *supra* note 180. "Seven years after its establishment immediately following the genocide in Rwanda, and more than four years since the beginning of the first trial, the...ICTR...[had]...handed down verdicts on only nine individuals...Between July 1999 and October 2000, the only substantial case heard was the trial of a single accused, Ignace Bagilishema... Five judges out of nine have spent more than a year and a half without hearing a substantial case and one of them had managed by last March to attain a record 28 months without hearing a substantial matter..."

In sum, the ICTR's inability to connect to local populations or with the local judicial system has major consequences for its ability to fulfill its broader moral mandates of fostering the rule of law and cultivating accountability.<sup>190</sup>

### **5b. Shortcomings of the International Criminal Tribunal for the former Yugoslavia**

Most commentators agree that the ICTY suffered from few of the ICTR's problems relating to corruption and racism, despite some instances of slowness, mismanagement and incompetence.<sup>191</sup> However, many of the ICTR's difficulties arising from remoteness – cultural, linguistic, and physical – surface in the ICTY.

Some observers believe that the ICTY's actions are actually counterproductive because the indictments have hardened Serbs' opposition to the peace treaty. Most Bosnian Serbs complain that the tribunal is biased because it has selectively prosecuted more Serbs than Croats or Moslems, even though atrocities were committed by all sides... Many Moslems, meanwhile, argue that indictments of Moslems have been undertaken simply to counter Serbs' bias charges. Regardless of the reasons, both Serbs and Moslems have so far been reluctant to hand over indicted suspects.<sup>192</sup>

The work of the court has often been misunderstood within all ethnic groups, but Serb populations across all of the former Yugoslavia have been particularly unsupportive, typically

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<sup>190</sup> *Ibid*, It has done even less to promote national reconciliation or establish a neutral historical record about various aspects of the genocide. “[S]even years on, it has still not been able to shed light on the design, mechanisms, chronology, organisation and financing of the genocide, nor has it answered the key question: who committed the genocide?... The symbolic existence of the tribunal has also not... dissuaded the perpetrators of the 1994 genocide and the war between the former Rwandan government of Habyarimana and the Rwandan Patriotic Front (RPF). The perpetrators of the genocide have rearmed with complete impunity in the refugee camps of eastern Congo, leading to the resumption of the war by the RPF in 1996 and again 1998 on the territory of the Democratic Republic of Congo, where war crimes and crimes against humanity continue to be committed by both sides. It is certainly not the responsibility of the judges of the ICTR to write history. But their failure to complete the central tasks of delivering justice and establishing a record of events also prevents them from contributing to another mandate set by the Security Council: national reconciliation between the Hutu and Tutsi communities.”

<sup>191</sup> See David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 865 (Symposium “The ICTY At Ten: A Critical Assessment Of The Major Rulings Of The International Criminal Tribunal Over The Past Decade”). Mr. Tolbert's article offers a unique insider's perspective on (1) problems relating to the choice and qualifications of counsel; (2) the severe lack of training of defense counsel; (3) serious concerns arising from the payment of counsel, including so-called “fee-splitting”; (4) questions relating to discipline; and (5) the establishment of an effective bar association for defense counsel. Mr. Tolbert cautions that “real and serious issues relating to defense counsel remain.” See also., Lucas W. Andrews, *Sailing Around the Flat Earth: The International Criminal Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471 (1997).

<sup>192</sup> Facts On File News Services, *War Crimes Tribunals: An In-Depth Analysis* (1997), available at <http://www.facts.com/icof/critic.html>



considering the ICTY a Western imposition and hence tainted by imperialism.<sup>193</sup> The ICTY's failure to publicize its work within Bosnia, particularly within the legal community, and the absence of local actors, even as observers, makes the ICTY's already unfamiliar common-law approach to criminal justice even more alien to the local legal profession. A recent empirical study elucidates perceptions of lawyers and judges from all ethnic groups within Bosnia/Herzegovina. The study indicates that most were ill-informed about the ICTY and often suspicious of its motives and its results.<sup>194</sup>

According to Bogdan Ivanisevic of Human Rights Watch, "Untruthful and inaccurate reporting about the ICTY's work" largely lies behind "the prevailing negative attitude of the Serbian public toward the Hague tribunal." Influential "reporters and analysts in Serbia who strongly dislike the Tribunal present flagrant untruths about factual and legal aspects of its work...in the most prominent media in Serbia," with a disastrous and "decisive impact on public opinion." The media thus "cements the widely-shared hostility against the ICTY among Serbian society."<sup>195</sup> Unfortunately, the fact that biased reporting fuels local distrust and resentment only compounds the fact that the tribunal has not conducted successful outreach.

Serbs are not alone in their opposition to the ICTY. "Even a cursory reading of newspapers and policy journals in Croatia reveals growing antagonism felt for the International Criminal Tribunal for the former Yugoslavia at The Hague (ICTY) by Croatia's public opinion."<sup>196</sup> Beyond such impressionistic data, "an August 2000 survey in Croatia...found a high percentage of Croatians believed that The Hague is biased, while fifty-two percent 'believed that

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<sup>193</sup> See The Berkeley Human Rights Center and the International Human Rights Law Clinic, *Joint Study*, *supra* note 80.

<sup>194</sup> *Ibid.*

<sup>195</sup> Bogdan Ivanisevic, *The Grapes of Wrath*, DANAS, May 7 2004, available at <http://hrw.org/english/docs/2004/05/07/serbia8573.htm>

<sup>196</sup> Croatian Mission to the United Nations, Communiqué, May 6, 1997, available at <http://www.un.int/croatia/press/97communiq/050697.html>

'The Hague wants to criminalize the Homeland War.' Not surprisingly seventy-eight percent felt that Croatia should not 'extradite its citizens if the Hague Tribunal requests it.'"<sup>197</sup>

Ivana Nizich of Human Rights Watch argues that "few in the former Yugoslavia believe that the ICTY is going to prosecute those that deserve prosecution, that it will establish the truth of what happened during the war, or that it will serve as a vehicle or impetus for reconciliation among the various peoples of the former Yugoslavia." Nizich adds that "even proponents of the ICTY in the former Yugoslavia are disillusioned by its performance," and more worrisome, "the people of the former Yugoslavia view the ICTY as an amorphous body in the Hague that was created by the international community to ameliorate [sic] its own guilt...it is 'someone else's' tribunal...Its inability to act as a vehicle for reconciliation or to be respected in the Balkans is due, in large part, to its lack of outreach to the peoples of the region."<sup>198</sup>

The Registrar's Office staffs someone to engage in outreach in one or two locations in the Balkans (in Zagreb or parts of Bosnia), but they usually limit themselves to "disseminating general information about the Tribunal." The Rules of the Road program was the only effort made to share the tribunal's expertise with domestic authorities in the former Yugoslavia, and remained an unsystematic contribution.<sup>199</sup>

More importantly, "the Office of the Prosecutor has made little effort to communicate with the public of the former Yugoslav countries despite the fact that one of its primary goals is

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<sup>197</sup> Burke-White, *Regionalization of International Criminal Law*, *supra* note 136, citing *Survey Shows 'Anti-Hague Atmosphere' Increasing In Croatia*, FBIS Doc. EUP20000823000244 (Aug. 19, 2000) (trans. of Jutarnji List (Zagreb), at 31)).

<sup>198</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15.

<sup>199</sup> For assessments of the Rules of the Road program, see *High Representative develops strategy for 'Rules of the Road' Court proceedings*, Office of the High Representative and EU Special Representative, Thursday, November 08, 2001, [http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content\\_id=6292](http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=6292); and OSCE Mission to Bosnia and Herzegovina Rule of Law Report, *Supporting a strong, independent judiciary* [http://www.oscebih.org/human\\_rights/rule\\_of\\_law.asp?d=1](http://www.oscebih.org/human_rights/rule_of_law.asp?d=1)

to provide justice to the victims of the region.”<sup>200</sup> Indeed, a survey conducted with a representative sample of Bosnian judges and prosecutors with primary or appellate jurisdiction for national war crimes trials found that even these critical actors in the local justice system had limited or no access to legal publications from or about the ICTY.<sup>201</sup> This sense of being marginalized or ignored by distant foreigners led local legal professionals to perceive the court negatively. “A universal criticism of the ICTY by legal professionals was that they perceived their sporadic contact with the Tribunal as a sign of disrespect.”<sup>202</sup> Most participants believed that it was precisely the international nature of the ICTY which gave rise to certain problems, and commented “that international representatives frequently were unfamiliar with the Bosnian legal system and acted arbitrarily to impose external rule on the country and its legal institutions.” Average citizens with less legal expertise and fewer resources at their disposal are even less likely to be well-informed about the ICTY and its activities or to feel that they are part of a consultative, respectful process (though this may in part be a commentary on the inherently perpetrator-centric nature of legal trials, as opposed to victim-centric processes like Truth and Reconciliation Commissions).

The failure to impact key populations on the ground in post-conflict former Yugoslavia is more troubling than the ICTY’s weak enforcement powers or its slow progress in starting trials. The ICTY’s inability to foster a culture of accountability and justice can largely be ascribed to its limited impact on local populations.

In an effort to “assess its potential legacy” David Tolbert, now Executive Director of ABA-CEELI and former Chef de Cabinet to the President of the ICTY and Senior Legal Adviser

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<sup>200</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15.

<sup>201</sup> See The Berkeley Human Rights Center and the International Human Rights Law Clinic, *Joint Study*, *supra* note 80.

<sup>202</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15.

to the Registrar of the Tribunal, argues that the ICTY did not “serv[e] as an important tool of [local] legal development and as a catalyst for local war crime prosecutions.”<sup>203</sup> He points out that “the tribunal will apparently fold its operations without contributing much to either the justice systems in the region or the prosecution of war crimes” although “those who created the ICTY Statute ...should have foreseen ...that the bulk of war crimes prosecutions would occur in local courts.”<sup>204</sup> These observations are critical, for they highlight the difference between accountability for perpetrators of past abuses, and the creation of a culture of justice: although the ICTY prosecuted war criminals, it has not noticeably fostered the rule of law or respect for international human rights law in the former Yugoslavia.

The ICTY had neither the mandate nor the resources to actively assist in improving the domestic justice systems or assisting in local war crimes prosecutions. These design failures mean that the tribunal’s long-term impact on justice systems in the former Yugoslavia has been minimal, even in cases dealing with the prosecution of war crimes and crimes against humanity – the pillars of its subject matter jurisdiction. Sadly, despite millions of dollars spent on building a judicial infrastructure in The Hague, there is little effective enforcement of these important laws in the region's domestic courts, which remain ill-equipped to provide fair, impartial trials for all ethnic groups, especially in the explosive war crimes context.<sup>205</sup> This lack of accountability can only detract from efforts to rebuild peace, security, and the rule of law in the region. The failure to bolster local courts for war crimes prosecutions is all the more troubling given the millions

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<sup>203</sup> David Tolbert, *The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7.

<sup>204</sup> *Ibid.* Tolbert also points out “It is only fair to note that most of the responsibility for these shortcomings lies not with tribunal officials” but with those who drafted the ICTY statute. Tribunal officials “could hardly be expected to take on these tasks as they are outside the tribunal's mandate.”

<sup>205</sup> The UN has only just advanced a plan to establish a court that will actually be located in Bosnia and will employ local people. This is the Sarajevo War Crimes Chamber and was announced in a Statement made by Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council on Oct. 9, 2003, available at [http://www.pict-pecti.org/news\\_archive/03/03Oct/ICTY\\_101003b.htm](http://www.pict-pecti.org/news_archive/03/03Oct/ICTY_101003b.htm). For a thoughtful critique of the SWCC, see Ellis, *Serbia’s New Court*, *supra* note 13

that have been pumped into the ICTY, and the relatively low cost of training local prosecutors/judges, monitoring court proceedings involving war crimes issues, and contributing technical expertise.

In conclusion, ad hoc's inability to improve domestic legal systems and their unpopularity in Rwanda and the former Yugoslavia raises questions as to whether their primary purpose is in fact to bolster the rule of law on the ground and create a sense of justice being done, or instead to create international legal precedent, establish a historical record, letting the international community to expiate its guilt.

### **5c. Financial burden of wholly international tribunals**

Some commentators have noted higher degrees of UN involvement in an internationalized court make it easier to secure a sustainable source of funds.<sup>206</sup> This refers specifically to courts like the ICTY and ICTR, with budgets derived from assessed contributions from member states. While it is undeniably harder to obtain funding for a court that depends on voluntary contributions, as is the case with the Sierra Leone court, hybrid courts (which are more distant from the UN and often rely on voluntary contributions) are also substantially less expensive than wholly international courts. The higher the degree of UN involvement in an internationalized court, the more money the court will need.<sup>207</sup>

Expenditures for the ICTR from 1995-2003 totaled approximately \$410 million, “which computes to \$8 million per indictment and \$45.5 million per conviction.” The budget for the ICTY in the same period reached approximately \$471 million, “an average of \$5.5 million per

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<sup>206</sup> Webb, *Six Degrees of Separation*, *supra* note 11.

<sup>207</sup> Even judges at the ICTY and ICTR have been criticized the high costs of such tribunals. Patricia Wald, the former U.S. judge at the ICTY has observed that the “United Nations is understandably anxious to bring to closure the ICTY and the tribunal for Rwanda (ICTR), which together consume almost ten percent of the total UN budget.” See Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 536 (2001).

indictment and \$22.5 million per conviction.”<sup>208</sup> Comparing these expenditures to the \$2 million average cost per capital case in the United States, “it is thus twenty times more expensive to prosecute (but not incarcerate) a genocidal perpetrator in the ICTR, and ten times more expensive in the ICTY, than it is to convict and execute a murderer in the United States.”<sup>209</sup> Ultimately, in the past eight years, the U.N. Security Council “has paid some \$1.6 billion... to operate International Criminal Tribunals in Yugoslavia and Rwanda.”<sup>210</sup>

Most professional staff at the ICTY and ICTR are at the P-2, P-3 and P-4 levels, while judges are at the D-1 level. Individuals in the P-3 or P-4 bracket earn in the U.S.\$60-80,000 range.<sup>211</sup> A hybrid court might need to pay some salaries in the \$60-100,000 range to attract some necessary international staff, but most salaries could be far lower. If calculated to reflect local costs of living, salaries could still provide substantial advantages for local employees over the domestic job market, thus reducing what is usually a court’s largest single cost.

The costs of UN tribunals are also largely inflated by the need for multiple translations. For instance, a substantial portion of the ICTY budget covers translation costs, with more than 170 employees in the Language Services Section.<sup>212</sup> Hybrid courts can be structured to achieve significant savings by minimizing the working languages of the court, thus reducing the number of translators needed.

The cost of collection and production of evidence in hybrid courts can be reduced as well, through lower travel costs and potentially greater cooperation with national authorities.

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<sup>208</sup> *Ibid*, Annex IX., The estimated appropriation for the ICTY for 2002-2003 is just over U.S.\$256 million.

<sup>209</sup> George Yacoubian, S., Jr., *Evaluating the efficacy of the international criminal tribunals for Rwanda and the former Yugoslavia: implications for criminology and international criminal law*. WORLD AFFAIRS, WNTR, 2003. [hereinafter *Evaluating the efficacy of the international criminal tribunals*]

<sup>210</sup> See Cohen, *Seeking Justice on the Cheap*, *supra* note 61.

<sup>211</sup> See United Nations Salaries, Allowances, Benefits and Job Classification, available at [http://www.un.org/Depts/OHRM/salaries\\_allowances/salary.htm](http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm)

<sup>212</sup> See Yacoubian, *Evaluating the efficacy of the international criminal tribunals*, *supra* note 209.

The lower costs of regional criminal justice become particularly apparent when comparing international tribunals such as the ICTY and ICTR with hybrids. The Sierra Leone hybrid was substantially cheaper than the ICTs, with its \$19 million first-year budget roughly equal to one-fifth of the ICTR's current annual budget. Its total budget for three years is estimated to be around \$75 million.<sup>213</sup> Admittedly, the inadequate sum spent on the East Timor hybrid led to numerous failings (The 2001 budget of the East Timor hybrid was a mere U.S.\$6.3 million, with approximately U.S.\$6 million spent on prosecution and U.S.\$300,000 dedicated to the operation of the court itself).<sup>214</sup> However, the striking difference in cost between a supranational enforcement mechanism such as the ICTY and the Sierra Leone Special Court is strong evidence of the financial savings which may be offered by regional international criminal law enforcement without compromising the quality of the court. Such savings could easily translate into greater political willingness of states to support international criminal law, as the oft-stated fears of unchecked expenses are allayed.

Financial problems contribute significantly to ad hoc tribunals' obstacles in establishing local legitimacy. Their cost compounds the problems of the Rwanda and Yugoslavia tribunals' un-popularity with the very populations they purport to serve,<sup>215</sup> and their failure to strengthen a local culture of justice.

These critiques of the ad hoc tribunals are by no means intended as blanket condemnations of the institutions as such – volumes would be required to adequately explore all

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<sup>213</sup> Richard Dowden, *Justice Goes on Trial in Sierra Leone*, GUARDIAN (London), Oct. 3, 2002.

<sup>214</sup> See Cohen, *Seeking Justice on the Cheap*, *supra* note 61, at 5.

<sup>215</sup> See Marks, *Justice Delayed*, *supra* note 180, "For the majority of Rwandans, the ICTR is a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the RPF." See also Ironside, *Rwandan Gacaca*, *supra* note 178: "The ICTR was hastily established under Chapter VII of the United Nations Charter in the autumn of 1994, at least in part, to assuage the guilt felt by Western leaders for not having intervened to stop the genocide and to avoid appearing as favoring the former Yugoslavia, for whom an International Criminal Tribunal (ICTY) had just been created in the wake of its genocide."

the nuances and arguments on both sides of the debate. Indeed, the ICTY and ICTR's jurisprudence contributes markedly to the important development and expansion of international humanitarian law, setting valuable precedent. The ICTY and ICTR must be admired for serving a norm-enunciating function and bolstering international legal and human rights discourse worldwide. This paper cannot address such critical issues in detail, and limits its focus to the ad hoc tribunals' ability, or lack thereof, to communicate with and positively impact local populations and local institutions.

Hypothetically, ad hoc tribunals could improve their outreach efforts to the point where they were able to mobilize significant popular support and reinforce local judiciaries. An empirical study which surveyed local perceptions of how the ICTY could foster justice, accountability and reconstruction in the former Yugoslavia advocates that the ICTY "pursue the option of conducting ICTY trials on the territory of BiH supported by a rigorous protection program for witnesses, judges and legal professionals" and "amplify the ICTY outreach program."<sup>216</sup> Enhancing ad hoc tribunals' public relations departments could obviate some of the most important justifications for hybrids. However, international tribunals would hardly be able to engage in meaningful, sweeping outreach and work with domestic judiciaries without significant local input, or without embracing some fusion of local and international influences, and hence edging towards a more hybrid structure.

## **6. HOW HYBRID COURTS AND THE INTERNATIONAL CRIMINAL COURT CAN COEXIST**

The ICC's establishment has already had a significant impact on the world of international justice. However, it cannot cope with more than a small fraction of the world's war

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<sup>216</sup> *Ibid.*



crimes cases. This is where hybrid courts come in. Indeed, the potential for ICC-hybrid symbiosis speaks to the heart of hybrids' importance. Hybrids will neither undermine the ICC nor be rendered superfluous by the ICC.

#### **6a. The ICC does not render hybrids superfluous**

The establishment of the ICC by no means lessens the need for hybrid courts.<sup>217</sup> Even those who would wish to see the ICC supplant other international criminal tribunals eventually must admit, however grudgingly, that they are necessary in the short run because of the ICC's statutory limitations. Pursuant to Article 11 of the ICC Statute, the ICC will have jurisdiction only with respect to crimes committed after the treaty comes into force. Consequently, the world faces a judicial vacuum over violations of international humanitarian law in the period prior to the ICC's establishment, or in countries that are not signatories.

The ICC's very statute<sup>218</sup> recognizes the value of local prosecutions, since the ICC gives preference to bona fide domestic procedures. The Statute recognizes the primacy of national courts, as is evidenced by the stated principles that the ICC shall be complementary to national criminal jurisdictions.<sup>219</sup> "The concept of complementarity is fundamental to the design of the ICC Statute: if in a case otherwise eligible for consideration by the ICC a bona fide examination

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<sup>217</sup> Hybrid courts would not strip the ICC of jurisdiction because of the complementarity regime and so would not endanger the effective deployment of the ICC. (1) First, the existence of hybrid panels might render the domestic court system capable of handling some cases but not others (lower level subordinates, but not leaders most responsible for mass atrocities). The Kosovo hybrid is a likely model of coexistence with international tribunals. (2) Second, a state that does not wish to prosecute a given case and would prefer ICC involvement might well be deemed "unwilling" to prosecute, and could choose to leave some cases for the international forum to resolve, even if a hybrid court existed. (3) Third, the ICC jurisdictional test could be applied based on the capacity of the domestic court system prior to international involvement. Even if a hybrid court had been established, the ICC could still inquire as to whether the domestic court system (not the hybrid court) was willing and able to prosecute.

<sup>218</sup> See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court*, July 17, 1998, UN Doc. A/CONF.183/9\*, corrected Nov. 10, 1998, and July 12, 1999, available at <http://www.un.org/law/icc/index.html>, reprinted in 37 ILM 999 (1998) (uncorrected version) [hereinafter ICC Statute].

<sup>219</sup> See Brian Concannon, Jr., *Beyond Complementarity: the International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUMAN RIGHTS L. REV. 201. [hereinafter *Beyond Complementarity*]

of the alleged crime was undertaken and disposed of by a state (whether or not it is a party to the ICC Statute), the matter will not be admissible before the ICC.”<sup>220</sup>

Despite their seductively high profile, prosecutions at the ICC are only one option in the accountability arsenal, and must be considered in light of other courts’ capacity to handle a greater caseload. Even in the best of all possible worlds, the ICC will only be able to judge an infinitesimal fraction of human rights abusers in any given situation. The ICC’s particular ability to handle explosive trials of top perpetrators begs the question of what forum other, lower-profile cases can be litigated in. In this respect, hybrid mechanisms should be seen as a useful *complement* to ICC. Brian Concannon of the Bureau des Avocats Internationaux (International Lawyers’ Office) in Port-au-Prince, Haiti, argues that “in fact, it is highly likely that in any circumstance in which the ICC assumes jurisdiction, the number of cases crying out for some form of international adjudication...will vastly exceed the ICC’s capacity. Yet it is precisely in these circumstances that huge numbers of cases cannot be adequately resolved by local courts... Complementarity and the Statute’s provisions for assistance to local judiciaries are not enough.”<sup>221</sup> If prosecution of those responsible for large scale human rights abuses is to be the rule rather than the exception, then international assistance must be systematically integrated with local judiciaries to form some type of hybrid mechanism.<sup>222</sup>

The non-conflictual relationship between the Kosovo hybrid courts and the ICTY demonstrates that hybrids need not replace international justice (or local justice, for that matter).

### **6b. Hybrids do not mitigate the need for the ICC**

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<sup>220</sup> See Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 A.J.I.L. 120.

<sup>221</sup> *Ibid.*

<sup>222</sup> For a discussion on Haiti’s experience in coming to terms with the human rights violations of its 1991-94 dictatorship as a point of departure for discussing why the Court should support local prosecutions and how it could do so, see Concannon, *Beyond Complementarity*, supra note 219.

From a pure legalistic perspective, hybrid courts will not strip the ICC of jurisdiction because of the complementarity regime. More broadly speaking, hybrid courts would not undermine the ICC's utility even if they successfully tried high-ranking war criminals.

First, in response to the ICC's complementarity principle, which deprives the court of jurisdiction unless domestic courts are "unwilling" or "unable" to prosecute a given case, a hybrid court is not truly part of the domestic court system. By definition, it is a mixed domestic/international court. Second, the existence of hybrid panels might enable the domestic court system to handle some cases but not others (trials of lower level subordinates, but not top leaders). Third, a state that does not wish to prosecute a given case and would prefer ICC involvement could choose to leave a case for the international forum to resolve, despite the existence of a hybrid court.

Beyond potential coexistence of ICC and hybrids in related cases involving the same set of mass atrocities, situations might emerge where donors would not step up to the plate and finance a hybrid tribunal. In this context, the ICC stands as an insurance policy against fickle, arbitrary world politics which give Rwanda and the former Yugoslavia their own dedicated tribunals, but leave states further down the political priorities totem pole like the Sudan or Chechnya suffering atrocities without the hope of any international justice. To some extent, the ICC can provide an effective, independent and universal process for critical cases in situations where the UN lacks political will to establish a hybrid, or where local actors oppose the creation of a hybrid.

Even in situations where post-conflict states and influential superpowers converge in their willingness to prosecute top perpetrators for ordering or endorsing atrocities, the dangers prosecuting the most powerful war criminals can sometimes make it irresponsible to call for

local/hybrid prosecution. The ICC will be in a position to prosecute high profile, politically explosive cases in a way that local or even hybrid courts could not, given the unbearable pressures they might face.

### **6c. Problematic ICC connection with local populations creates a need for hybrids**

The ICC will face linguistic and cultural obstacles in reaching out to local audiences, and may well rely on symbioses with entities better able to connect better to local populations. The ICC Statute places an emphasis on outreach, for instance in its provision for the possibility of the Court sitting regionally. Although the ICC's seat is in The Hague, Article 3 of the Rome Statute allows for the ICC to move to another seat in certain circumstances – presumably to the country or region where the atrocities took place.<sup>223</sup> However, even if decision-makers within the ICC have learned a lesson about the importance of outreach from the failures of ad hoc tribunals, all fears cannot be laid to rest. From the perspective of most people in post-atrocity countries, the ICC will probably remain mysterious: staffed by foreigners, working in a distant land, in languages that few understand, applying previously unheard-of laws. Notwithstanding provisions in the ICC Statute on stronger victim participation and Prosecutor Ocampo's stated commitment to communicate with concerned populations,<sup>224</sup> the ICC could appear even more like a *deus ex machina* than the ad hoc tribunals, yet further removed from local realities.<sup>225</sup>

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<sup>223</sup> Pursuant to Article 3, “[t]he seat of the Court shall be established at The Hague in the Netherlands,” but “[t]he Court may sit elsewhere, whenever it considers it desirable.” ICC Statute, *supra* note 218, arts. 3(1), 3(3).

<sup>224</sup> See Luis Moreno Ocampo, Prosecutor International Criminal Court, address at Yale Law School, March 26, 2004.

<sup>225</sup> See Nizich, *Lessons from the Yugoslav Tribunal*, *supra* note 15. “In most places around the world, the United Nations...internationals who are sent to an area to help the local population, are perceived as arrogant, ignorant and imperialist. In many instances these perceptions are unjustified or instigated by governments or quasi-governmental entities or rebel groups in a given area. However, it is also a sad fact that many internationals are disdainful or ignorant of the culture, history and sufferings of the local population they are supposedly there to protect or for whom they are purportedly working to provide justice.”

Given the importance of reaching out broadly in post-atrocity states in order to create a culture of accountability and respect for human rights, the ICC can only be a part of a puzzle – we cannot expect it to provide an entire solution.

## CONCLUSION

Ad hoc tribunals' days appear to be numbered. The ICTY and ICTR's inherent weaknesses and donor fatigue make it too late for them to reform and demonstrate a capacity for improved communication with local populations. The ICTY and ICTR are being forced to speed up in anticipation of closing shop in 2008,<sup>226</sup> with the Bush administration "seeking a firm timetable for shutting down United Nations war-crimes tribunals, saying they have been marred by instances of mismanagement and abuse that 'challenge the integrity of the process.'"<sup>227</sup> The clock is thus ticking all the more urgently to find viable alternatives to ad hoc tribunals.

With ad hoc tribunals fading from the scene, many national courts unable to cope alone with serious large-scale atrocities, and the ICC limited in its resources. In this context, hybrid courts must seriously be considered as a promising new form of transitional justice, especially when successfully linked to broader justice reform initiatives.

Despite the dangers of integrating local elements with international justice, and of divergences between hybrids in their interpretation of international law, the benefits of abandoning a cookie-cutter/one-size-fits-all approach to trying war crimes outweigh the disadvantages. If the hybrid model can be implemented with adequate funding and management, with a mandate broadened to include spurring on local justice reform via CLE, mentoring, or trial observer programs, to name but a few mechanisms, it can contribute to an effective and

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<sup>226</sup> See Jan Repa, *US wants no permanent tribunals*. BBC NEWS. Friday, 1 March, 2002. "The American ambassador-at-large for war crimes issues, Pierre-Richard Prosper told a congressional hearing that The Hague tribunals for former Yugoslavia and Rwanda should be wound up by 2008. Mr. Prosper... suggested that in many cases war-crimes suspects could be tried by local courts." <http://news.bbc.co.uk/1/hi/world/americas/1849094.stm>

<sup>227</sup> See Jess Bravin, *Bush Presses for Closing of Tribunals*. WALL ST. JOURNAL, February 28, 2002

integrated international justice system and hold perpetrators of gross violations accountable for their crimes. Equipping national justice systems to investigate and prosecute war crimes, crimes against humanity and genocide can establish a global system for accountability, strengthening the capacity of local legal systems to deliver justice.

Justice resides not only in material acts, such as holding specific perpetrators accountable, but also in perceptions, and in creating the rule of law. In order for international justice to flourish and endure, accountability must be accepted by local populations in post atrocity areas and integrated into local consciousness and culture. In establishing a culture of justice, communication with victims, perpetrators, and onlookers is paramount. While hybrid courts do not automatically ensure good communication with local populations, their very structure helps to reach out to locals. Hybrid courts offer a potentially powerful blend of international legitimacy and local understanding – a learning process for national and international lawyers working in them, and all the people they come into contact with, in ever widening ripples of interactions.

International legal scholars increasingly endorse values of local ownership in transitional justice processes, and questions about courts which blend international and national elements should thus be moving to the forefront of academic and practitioner debates. Academics and practitioners advocating accountability for war criminals must strive harder to understand and adapt to the idiosyncratic conditions of each different post-atrocity country. “International law and fora should mediate, but not dictate, the forms of criminal accountability.”<sup>228</sup> In our search for mechanisms to break cycles of impunity and provide victims with a sense that justice has been done, we should focus on the promise of hybrids. Only when they responsibly articulate

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<sup>228</sup> See Alvarez, *Crimes of States*, *supra* note 12.

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detailed and sensitive studies of hybrid courts can these war crimes tribunals live up to their full potential.