

## RESTRUCTURING HYBRID COURTS: LOCAL EMPOWERMENT AND NATIONAL CRIMINAL JUSTICE REFORM

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### I. INTRODUCTION

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. For this reason, it is unlikely that an ad hoc international tribunal will be created again. So where do we go from here? What will fill the void in the field of post-atrocity justice?<sup>2</sup> Freelance prosecutions<sup>3</sup> like the Pinochet prosecution by Spanish Judge

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1. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *The Rule of Law Report*]. This 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 [fifteen] 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.

*Id.* at para. 42.

2. The term "post-atrocity justice" is used here to reference issues of legal and moral accountability that arise in the wake of political contexts involving severe systematic violations of international human rights and humanitarian law. In this article, the term is used interchangeably with other similar terms, particularly "transitional justice" and "post-conflict justice."

3. I use the term "freelance prosecutions" to describe individual cases that are isolated from larger transitional justice processes. Examples of such cases include, most notably, the Pinochet and Habré prosecutions.

Garzon remain a peripheral phenomenon despite their vital contributions.<sup>4</sup> Some national courts have become increasingly proactive in prosecuting war crimes and crimes against humanity, using their inquisitorial powers across the globe and gaining substantial media attention, but most domestic judiciaries in post-atrocity states face severe challenges.<sup>5</sup> Nevertheless, dwelling on the serious limitations of international ad hoc tribunals and domestic courts quickly becomes unproductive. We must find cost-efficient, high-impact alternatives. Hybrid mechanisms that blend international and domestic elements promise to deliver improved justice especially where they link local judicial reform to a serious commitment to legal accountability for war crimes and crimes against humanity in post-atrocity states.

The International Criminal Court (ICC) is often presented as the most appropriate alternative to international ad hoc tribunals. However, the ICC was not designed to accomplish all the goals that can be achieved through hybrids and

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4. Daniel Rothenberg, "Let Justice Judge:" *An Interview with Judge Baltasar Garzón and Analysis of His Ideas*, 24 *Hum. Rts. Q.* 924 (2002); see also Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 *Hum. Rts. Q.* 927 (1999).

5. For a description of a fairly representative post-conflict domestic legal system, see Amnesty International's review of the local court system in Sierra Leone. *Sierra Leone: Ending Impunity – An Opportunity not to be Missed*, AMNESTY INT'L, July 31, 2000, <http://web.amnesty.org/library/Index/ENGAFR510642000?open&of=ENG-SLE> [hereinafter, *Ending Impunity*]. The report notes that in Sierra Leone, "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." *Id.* Amnesty International (AI) raised serious doubts about "the judicial system's ability to guarantee independence and impartiality, and also about the threats posed by continuing insecurity and hostilities." *Id.* AI argued that "Under such circumstances . . . the Sierra Leone judicial system" was "not in a position to try those alleged to be responsible for human rights abuses in trials which meet minimum international standards, without considerable international expert assistance." *Id.* See also *Sierra Leone: Priorities for the International Community*, HUM. RTS. WATCH, June 20, 2000, <http://www.hrw.org/press/2000/06/secmem0620.htm> [hereinafter *Priorities for the International Community*]. Human Rights Watch argued that:

[I]n the case of Sierra Leone . . . the justice system has been so destroyed by a decade of war that we do not believe that trials would be able to meet fundamental guarantees of justice and fairness without substantial international assistance and involvement. Even with international assistance, the Sierra Leonean judiciary may not be capable of offering the fairness and transparency necessary to conduct trials of this sensitivity and complexity. The system is characterized by poorly trained and low-paid judicial staff and lack of resources, as well as the effects of the continuing instability and lack of security in the country.

*Id.*

provides only a partial solution to impunity. In fact, the success of the ICC can be bolstered by establishing complementary hybrids. First, many crimes cannot be tried by the ICC. Past conflicts which occurred before the Rome Statute went into effect and 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, and perhaps most importantly as regards a more comprehensive understanding of the value of hybrid courts, the ICC's binary approach of either providing wholly international justice or leaving the conflict to local post-atrocity courts limits its ability to provide genuine accountability. Wholly local courts suffer a myriad of problems ranging from severe logistical or financial limitations to high levels of corruption and politicization, while wholly international courts have proven disconnected with local realities and may even be considered imperialistic. The widely held binary view of either international or domestic that the ICC embodies 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.<sup>6</sup>

This paper explores the theoretical advantages and disadvantages of hybrid courts, reviews existing hybrids, and outlines international ad hoc tribunals' flaws that hybrids can remedy. The paper's central thesis is that hybrids draw upon both 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 of international institutions, which 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 domestic expertise, connect with local populations, and rebuild national judicial systems, creating 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.

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6. For the statute which created the court, see Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter ICC Statute]. For a description of the court and its work see the ICC's official website, <http://www.icc-cpi.int/>. For authoritative works analyzing the ICC, see LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2d ed. 2004); *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (M. Cherif Bassiouni, ed., 1998). For an excellent list of articles, books, and other materials on the ICC, see <http://www.lib.uchicago.edu/~llou/icc.html>.

If hybrids are embedded into local justice systems and their mandates are broadened to focus on local justice reform, they have the potential to anchor international standards of justice 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 existing hybrids, evaluating successes and failures. The fourth discusses flaws inherent to the hybrid model. The fifth examines ad hoc tribunals' flaws, which hybrids could potentially solve. The sixth section 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 framework; an alternative 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 semi-internationalized or hybrid courts,<sup>7</sup> these tribunals have received far less attention than ad hoc tribunals such

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7. 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 touched on the promise of hybrid courts in numerous articles. See Laura Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 *NEW ENG. L. REV.* 1059 (2003) [hereinafter Dickinson, *The Case of Kosovo*]; Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 *S. CAL. L. REV.* 1407 (2002); Laura Dickinson, *The Promise of Hybrid Courts*, 97 *AM. J. INT'L L.* 295 (2003) [hereinafter Dickinson, *The Promise of Hybrid Courts*]; Laura Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 *DENV. J. INT'L L. & POL'Y* 23 (2002); Laura Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in *AVENUES TO ACCOUNTABILITY: NATIONAL AND INTERNATIONAL RESPONSES TO ATROCITIES* (Jane Stromseth ed., 2003). Moreover, pioneering scholars such as Abdul Tejan-Cole and Suzanne Katzenstein have written insightful, comprehensive articles on specific hybrids. Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 *YALE HUM. RTS. & DEV. L.J.* 139 (2003); Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 *HARV. HUM. RTS. J.* 245 (2003) [hereinafter Katzenstein, *Searching for Justice*]. See also Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 *PEPP. L. REV.* 167 (2001); Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 *ILSA J. INT'L & COMP. L.* 237 (2001); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes*

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under International Law: Extraordinary Advances, Enduring Obstacles, 21 BERKELEY J. INT'L L. 288 (2003); Stephanie H. Bald, Note & Comment, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?*, 18 AM. U. INT'L L. REV. 537 (2002); Mann Bunyanunda, Note, *The Khmer Rouge on Trial: Whither the Defense?*, 74 S. CAL. L. REV. 1581 (2001); William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729 (2003); John Cerone, *The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice*, 8 ILSA J. INT'L & COMP. L. 379 (2002); David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, ASIAPACIFIC ISSUES, Aug. 2002, available at [http://www.jsmp.minihub.org/News/News/15\\_11-n02.pdf](http://www.jsmp.minihub.org/News/News/15_11-n02.pdf) [hereinafter Cohen, *Seeking Justice on the Cheap*]; Brian Concannon, *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000); Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH. J. HUM. RTS. 337 (2002); Mark Ellis, *Coming to Terms with its Past – Serbia's New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT'L L. 165 (2004); Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730 (2004); Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L & COMP. L. 507 (2000); Laura R. Hall & Nahal Kazemi, *Recent Development, Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287 (2003); 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*, 30 DENV. J. INT'L L. & POL'Y 325 (2002); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002); Chante Lasco, *News from the International Criminal Tribunals*, 10 HUM. RTS. BR. 26 (2002), available at <http://www.wcl.american.edu/hrbrief/10/1ict.cfm>; Suzannah Linton, *Rising From The Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122 (2001) [hereinafter Linton, *Rising from the Ashes*]; Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT'L REV. RED CROSS 93, 111 (Mar. 2002), available at <http://www.jsmp.minihub.org/Resources.htm#ARTICLES> [hereinafter Linton, *New Approaches*]; Scott Luftglass, Note, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893 (2004); Daniel J. Macaluso, Note, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT'L L. 347 (2001); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337 (2001); Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934 (2001); Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948 (1999); 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, 50-51 (2001) [hereinafter Strohmeyer, *Collapse and Reconstruction*]; Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55 (2003); Bruce Sagaris, *Law of War B. Iraq Governing Council Establish*

as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), or the International Criminal Court (ICC).<sup>8</sup> Without sufficient analysis of their structures, strengths and weaknesses, hybrid courts will remain flawed, makeshift configurations, highly vulnerable to avoidable failures.

## II. DEFINITION OF 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 on the second generation of ad hoc international tribunals with the ICTY and ICTR. These third generation courts have been called “hybrid” criminal bodies.<sup>9</sup> Blending the international and the local, existing hybrids are products of judicial accountability-sharing between the states in which they function and international entities, particularly the U.N.

The structure of the handful of existing hybrid tribunals does not by any means set in stone limits for all conceivable forms of hybrids. However, without

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*Special Tribunal and Saddam Hussein is Arrested*, 20 INT’L ENFORCEMENT L. REP. 76 (2004).

A particularly excellent (albeit slightly outdated) book on hybrids collects an assortment of twenty-one short papers on various hybrids: CESARE ROMANO ET AL., *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* (2004). Contributors include Daphna Shrager, John Cerone, Clive Baldwin, Jean-Christian Cady, Nicholas Booth, Sylvia de Bertodano, Beth S. Lyon, Alison Smith, Phakiso Mochochoko, Giorgia Tortora, William A. Schabas, Craig Etcheson, Ernestine E. Meijer, Thordis Ingadottir, Bert Swart, Hakan Friman, Jann K. Kleffner, Andre Nollkaemper, Goran Sluiter, Markus Benzing, Morten Bergsmo, Maria Carmen Colitti, Luigi Condorelli, Theo Boutruche, and Alain Pellet, many of whom are practitioners with a thorough knowledge of hybrid courts and international criminal law.

The best NGO/IGO work on hybrids has come from the International Center for Transitional Justice, Human Rights Watch, Amnesty International, the International Crisis Group, and the Organization for Security and Co-operation in Europe, although their reports tend to focus on critiques, advocacy, and recommendations to policy makers. The number of works exploring hybrids in any depth is dwarfed by the plethora of law journal articles on the International Criminal Court (over 2,000 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).

8. The number of works exploring hybrids in any depth is dwarfed by the plethora of law journal articles on the ICC (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).

9. Because the modern phenomenon of hybrids is quite different from prior entities, I call hybrids “third generation tribunals” even though I recognize the value of the special mixed tribunals created in the nineteenth century for the suppression of the African slave trade.

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 describe six jurisdictions created between 1999 and 2001: East Timor (the Serious Crimes Panels of the District Court of Dili),<sup>10</sup> Kosovo ("Regulation 64" Panels in the Courts of Kosovo),<sup>11</sup> and Sierra Leone (the Special Court for Sierra Leone).<sup>12</sup> A fourth hybrid court to address crimes committed by the Khmer Rouge in Cambodia (the Extraordinary Chambers in the Courts of Cambodia),<sup>13</sup> has been negotiated between the U.N. and the Cambodian government and ratified by the Cambodian National Assembly.<sup>14</sup> A fifth tribunal, the Iraq Special Tribunal (subsequently renamed Supreme Iraqi Criminal Tribunal) might be described as a partial hybrid or an internationalized, domestic tribunal although the international side of the IST has

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10. See U.N. Transitional Administration in East Timor (UNTAET), *Organization of Courts in East Timor*, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/Reg11e.pdf>. For more information on the East Timor hybrid, see the Judicial System Monitoring Programme website, <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 the Project on International Courts and Tribunals website, [http://www.pict-pecti.org/courts/eastimor\\_basic\\_doc.html](http://www.pict-pecti.org/courts/eastimor_basic_doc.html).

11. See U.N. Interim Administration Mission in Kosovo, *Appointment and Removal from Office of International Judges and International Prosecutors*, 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 S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), authorizing UNMIK, available at [http://www.pict-pecti.org/courts/pdf/kosovo/Re1999\\_1.htm](http://www.pict-pecti.org/courts/pdf/kosovo/Re1999_1.htm).

12. For information on the Sierra Leone hybrid, see the Special Court for Sierra Leone website, <http://www.sc-sl.org/>, and the very informative website developed by No Peace Without Justice, <http://www.specialcourt.org/>.

13. 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 Sok An, Senior Minister, Presentation and Comments 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. 29, 2000) (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> [hereinafter Courts of Cambodia].

14. 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.

been restricted primarily to American, rather than multi-national, involvement.<sup>15</sup> The sixth and last hybrid tribunal is the War Crimes Chamber of the State Court of Bosnia and Herzegovina.

Hybrid courts have emerged in post-conflict situations when there is insufficient local capacity to deal with mass atrocity,<sup>16</sup> since fully functioning national courts whose overall credibility cannot be impugned, mitigate the need for outside help.<sup>17</sup> However, while good domestic courts may eliminate the need for hybrids, the presence of international tribunals does not render hybrids superfluous. The Kosovo and Bosnia hybrids complement the ICTY which cannot cope with the sheer number of cases before it.

The U.N. has assumed some responsibility for helping hybrid courts obtain funding, resources, judges, and prosecutors through “voluntary” contributions from other national donors.<sup>18</sup> Where the Security Council dominated the ICTY and the ICTR, the Office of Legal Affairs has handled the

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15. Tom Parker, a British lawyer and former official with the Coalition Provisional Authority in charge of investigating crimes against humanity, stated during an interview on National Public Radio (NPR) that “[a]lthough 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.” Interview with Tom Parker, *All Things Considered: Iraqis Look Ahead to Trials of Saddam’s Regime* (National Public Radio Broadcast, Mar. 7, 2005), available at [www.npr.org/templates/story/story.php?storyId=452802](http://www.npr.org/templates/story/story.php?storyId=452802) [hereinafter Interview with Tom Parker].

16. 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 United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25:2 FLETCHER FOR. WORLD AFF. 107 (2001) [hereinafter Strohmeier, *Making Multilateral Interventions Work*].

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.

*Id.* at 113.

17. For instance, no one has ever proposed an international tribunal for French trials of WWII-era war criminals.

18. For an impressive overview of the range and variation in U.N. 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).



Cambodia court, and the respective Special Representatives of the Secretary General (SRSGs) have exercised control in Kosovo and East Timor. However, in hybrid courts, national governments can also undertake part of the costs, provide various resources, and appoint some of the judges, prosecutors, and personnel (as is the case in Sierra Leone and Cambodia).

While the U.N. established and managed hybrids in Kosovo and East Timor independently of local governments, the Sierra Leonean and Cambodian hybrid structures resulted from negotiations between the U.N. 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 gain a more precise definition. In fact, a hybrid court might be constituted in a number of different ways that link domestic and international organizations and the law. For example, a hybrid court could theoretically be even more separate from the U.N.—it could be established with several states or international coalitions acting in concert and without any U.N. involvement at all, especially since there are many places where the U.N. has a negative reputation and its imprimatur could actually harm the perception of a court’s legitimacy.<sup>19</sup> Alternatively, although the Security Council has not yet created any hybrids, it

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19. *UN Continues to Get Positive, Though Lower, Ratings with World Public*, WORLD PUBLIC OPINION.ORG, Jan. 24, 2006, <http://www.worldpublicopinion.org/pipa/articles/btunitednationsra/163.php?nid=&id=&pnt=163>.

Publics in most countries continue to view the UN as having a positive influence in the world, according to a new BBC World Service poll of [thirty-two] nations. However, ratings are a bit lower than they were a year ago . . . The poll of 37,572 people was conducted for the BBC World Service by the international polling firm GlobeScan together with the Program on International Policy Attitudes (PIPA) at the University of Maryland. The [thirty-two]-nation fieldwork was coordinated by GlobeScan and completed between October 2005 and January 2006. In thirty of the [thirty-two] countries polled, a majority ([twenty-three] countries) or a plurality ([seven]) rated the United Nations as having a positive influence. On average [fifty-nine] percent rated the United Nations as having a positive influence, while just [sixteen] percent rated it as having a negative influence. However, among the nineteen countries that were polled in fall 2004 and again in the current poll, the percentage giving the UN a positive rating is down an average of ten points.

*Id.* See also *A Year After Iraq War: Mistrust of America in Europe Ever Higher, Muslim Anger Persists*, PEW RESEARCH CENTER, Mar. 16, 2004, <http://peoplepress.org/reports/display.php3?ReportID=206>. “The United Nations itself engenders varied reactions around the world. Just [fifty-five percent] of Americans have a favorable opinion of the world body. This is the lowest rating the U.N. has achieved in [fourteen] years of Pew Research Center surveys.” *Id.*

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. Usually, they are composed of international and local staff with foreign judges sitting alongside their domestic counterparts to try cases prosecuted and defended by teams of both local and foreign lawyers. Domestic law—reformed to include international standards—is typically applied alongside international law. Ultimately, hybrid criminal bodies form a family of their own, apart from other judicial entities.

Before exploring existing hybrids or the international ad hoc tribunals 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 support for the necessity of local empowerment through the implementation of 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.

#### **A. A Philosophical Defense of Local Empowerment in Post-Atrocity Justice Mechanisms: The Importance of Merging Local and International Elements**

Studying hybrids involves questioning the notion that the most effective justice is wholly international and UN-sponsored. This view, popular within the international human rights community, conflates an acknowledgment that local courts are tainted or inadequate with an unconditional endorsement of purely international courts.<sup>20</sup>

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20. See Dickinson, *The Case of Kosovo*, *supra* note 7.

[M]any 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.

It is undeniable that local courts and governance structures in most post-conflict contexts are too flawed and face too many financial and logistical limitations to cope effectively with massive war crimes trials. 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 by bombing, shelling, arson, looting, or neglect. 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 skill and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes.<sup>21</sup>

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*Id.* at 1059-60. See, e.g., Human Rights Watch, *U.N. Action on Sierra Leone Court Welcomed* (Aug. 14, 2000), available at [http://hrw.org/english/docs/2000/08/14/sierra743\\_txt.htm](http://hrw.org/english/docs/2000/08/14/sierra743_txt.htm); U.N. SCOR, 48th Sess., 3175th mtg. at 8, 27, U.N. Doc. S/PV.3175 (1993) (statement by France); U.N. SCOR, 48th Sess., 3217th mtg. at 12-17, U.N. Doc. S/PV.3217 (1993) (statement by the United States). 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.’” Richard Goldstone, *The United Nations’ War Crimes Tribunals: An Assessment*, 12 CONN. J. 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, 9 (1998); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (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.” Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 365-70 (1999) [hereinafter Alvarez, *Crimes of States*]. At a panel on hybrid courts that was part of the 2002 International Law Association Annual Conference, David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, and Hansjorg Strohmeyer, Director of the Office of Humanitarian Affairs at the U.N., both rejected the notion that such courts might be touted as a model for the future despite the fact that Scheffer had helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia, and Strohmeyer had worked to establish hybrid courts in Kosovo and East Timor (as the acting principal legal adviser to the U.N. Transitional Administration in East Timor (UNTAET), and as legal adviser to the Special Representative of the Secretary-General in Kosovo (UNMIK)).

21. 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

However, this does not imply that international courts are the only alternative. Despite the dangers of integrating local elements with international justice, and of hybrids diverging in their interpretation of international law, the benefits of abandoning a cookie-cutter, one-size-fits-all, international approach to trying war crimes outweigh the disadvantages.

Domestic courts and realities on the ground 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 U.N. are to succeed in changing a country for the better, they “cannot display an elitist, paternalistic attitude” toward war crimes victims and national judiciaries, “i.e., viewing local participation as inherently biased, tribal, inexperienced, and inept.”<sup>22</sup> Doing so jeopardizes the goal of indigenous 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.

Moreover, it is important to recognize that many domestic prosecutions of international crimes have taken place, especially in countries where decades of peace have permitted some rebuilding and reform of local judiciaries.<sup>23</sup>

### 1. 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

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systems. *See, e.g., Ending Impunity, supra* note 5 (“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 Priorities for the International Community, supra* note 5. 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 AM. J. INT’L L. 46 (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 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, 172 (2000).

22. Ivana Nizich, *International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT’L & COMP. L. 353, 364 (2001).

23. *See* Prevent Genocide International, *Genocide and International Crime in Domestic Courts*, July 23, 2003, <http://www.preventgenocide.org/punish/domestic>.

run. Harold Koh defined “transnational legal process” as “the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems.”<sup>24</sup>

In this respect, hybrid courts can be seen as one of the most potentially effective forms of transnational legal process in the post-atrocity context. A war crimes tribunal must strive to go beyond concocting an exit strategy that allows the tribunal to leave a country without any cases pending or staff unpaid. The old adage, “Don’t just give people fish, teach them how to fish,” springs to mind. Long-term 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 Special Court for Sierra Leone (SCSL), even the U.N. 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, trust in public institutions, and improved professional standards. Indeed, the Security Council referred specifically to “the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone . . . .”<sup>25</sup> In fact, this point is true for virtually every post-atrocity context where the domestic system faces numerous pressing needs and long-term justice concerns would benefit from linking international funding, expertise, and support to local institutional strengthening.

## 2. Adjusting to Local Perceptions of Justice: Key to Fostering Rule of Law<sup>26</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>27</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

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24. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997).

25. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crime Tribunals*, 28 FORDHAM INT’L L.J. 616, 659 (2005) [hereinafter Cockayne, *The Fraying Shoestring*] (citing U.N. Doc. S/RES/1315, ¶ 10, (Aug. 14, 2000)).

26. 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.

27. 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 AM. J. INT’L L. 7, 25 (2001); Carroll, *supra* note 21.

impact on political discourse, popular opinion and cultural dynamics 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 its ability to effect some change in the hearts and minds of local populations.

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, since it leads to the unconventional conclusion that few international jurists have been willing to embrace: for post-atrocity justice mechanisms to be perceived as effective by non-Western populations, they must be couched in terms that local populations accept and understand. Integrating state practices with local concerns is the cornerstone of legitimacy. However technically appropriate it is, a legal practice cannot serve the judicial needs of an affected population if it cannot be understood locally. Post-atrocity legal structures must incorporate elements of local justice and culture or, at the very least, be sensitive to realities and norms on the ground. A useful parallel to draw here is 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 Petty, "participation" has become a buzzword of development practice.<sup>28</sup>

In order for the conviction to take root that past wrongdoings have been appropriately dealt with, people must 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 should lie 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.

Scholars like Sorpong Peou posit that moral norms (like those articulated by international justice institutions) break down during periods of widespread

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28. For a short list of publications by Jules Petty, see <http://www2.essex.ac.uk/ces/CES/JPpage.htm>.

atrocities, that structural breakdown leads to short-term thinking about survival and that perpetrators cease to consider legal implications in the future.<sup>29</sup> However, even scholars like Peou argue in favor of strengthening institutions like local judicial systems as a powerful deterrent to perpetrators—arguments which militate in favor of hybrid tribunals as this paper envisages them.

If large local groups 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 malcontents.

## **B. Hybrids' Potential to Incorporate and Impact Local Culture**

### **1. Fostering Local Ownership and Rebuilding the Credibility of the Local Legal System**

Insofar as popular sympathy 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. Studies suggest that observers of judicial processes value the sense that fellow community members have been treated fairly by someone who understands their arguments.<sup>30</sup> This partially explains “why some international adjudicative processes, including institutionalized forms of arbitration and the International Court of Justice (ICJ), provide mechanisms for party-appointed arbitrators and judges.”<sup>31</sup> Having local

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29. Sorpong Peou, *The Promises and Limits of International Criminal Justice: The “Extraordinary Chambers” in Cambodia* (Feb. 3, 2006), <http://www.iar.ubc.ca/centres/csear/PDF2/present-peou.pdf>.

30. Excellent studies on the U.S. criminal justice system by scholars like Tyler demonstrate that the law’s legitimacy in the United States with minority groups does not depend much on the racial make-up of law enforcement/judiciary. Rather, 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* (Yale University 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.

31. Alvarez, *Crimes of States*, *supra* note 20, at 416; Statute of the International Court of Justice art. 31, June 26, 1945, 59 Stat. 1055, 1058-59 (permitting party-appointed ad hoc judges). 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 Buergethal, *The United Nations Truth Commission for El*

judges may help shape the local perceptions about war crimes trials, and hence their legitimacy. Hybrid courts with local staff thus have special potential for creating a sense of legitimacy by mobilizing popular support.

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. 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."<sup>32</sup> A hybrid trial 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.

## 2. Accessibility: Cultural, Physical, Linguistic

For obvious cultural reasons, local investigators, litigators, judges, administrators, and communications officials have a much easier time than their foreign counterparts understanding local culture, interpreting domestic populations' criticisms and responding strategically. For example, where a foreigner in Sierra Leone, Cambodia, Bosnia, or any other nation may neither suspect nor understand that a particular statement or gesture is offensive or confusing, a local will know and act accordingly.

Farther removed emotionally and culturally,<sup>33</sup> as well as physically, from the location of the genocide or atrocities that they work on, international tribunal

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*Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 503-04 (1994). It is also true, of course, that the El Salvador process did not involve criminal prosecutions.

32. Alvarez, *Crimes of States*, *supra* note 20, at 403. For instance, "the Rwandan people have a greater interest and stake in empowering their local courts," and improving them, "than in protecting the credibility of the Security Council. *Id.*

33. 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, available at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2002/0504remote.htm>. 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."



staff have an easier time privileging the idea of “establishing important precedent” over helping people on the ground. Local staff are far more likely to have suffered personally—or vicariously through friends and family—as a result of the atrocities being tried in the hybrid, and are hence more apt to feel an intense personal commitment to the victims.

In hybrid courts, through collegial interaction, “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>34</sup>

As a caveat to these reflections, a brief examination of communication 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 cultural sensitivity and 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>35</sup> Good management practices remain indispensable in all models of justice.

If cultural accessibility is key, so is physical proximity. “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>36</sup> For impoverished victims of atrocities in developing countries who wish to observe perpetrators being tried, or who just want to see how the tribunal functions, physical distance from the place where trials are conducted presents an insurmountable barrier. Victims’ families and friends, or even ordinary lower-income citizens, are more likely to attend proceedings if what is involved is a short bus ride away rather than an international odyssey. Additionally,

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

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*Id.*

34. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1070.

35. See Human Rights Watch, *Justice Denied for East Timor* (Dec. 20, 2002), available at <http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm>.

36. Nizich, *supra* note 22, at 364-65.

and judges), it should hardly be a surprise if most survivors of the Rwanda genocide, and not merely Rwandan government officials, prefer local trials or local plea bargains, especially where it appears that national venues may produce quicker results than prolonged international processes.<sup>37</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>38</sup> are supplemented by the logistical hurdles they face with international courts. These include difficulties in paying for transportation and lodging, acquiring visas, and taking substantial time off from work and family responsibilities.

Naturally, locating a tribunal in theatre is not enough. Logistical considerations must be worked out sensitively, to maximize the number of people and the groups who can benefit from the didactic function of perpetrator trials. Security considerations must not trump the tribunals' accessibility, and thoughtful organization of space and spectatorship. For instance, it may be crucial for court staff to be protected by bullet-proof/RPG-proof glass barriers, but it is also critical for judges, prosecutors, and defense attorneys to be able to hear the courtroom and vice versa.

Perhaps even more important than physical approachability is the issue of linguistic accessibility. The importance of this issue is demonstrated by the fact that trying someone in a language they do not understand can be described as a classic human rights violation. Trials held locally in local languages are inherently more accessible to local populations. They are easier for local journalists, observers, and general audiences to understand, to report on, to gossip about, and ultimately, to 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

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37. Alvarez, *Crimes of States*, *supra* note 20, at 403-04.

38. 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, June 27, 2002. "An estimated 3,500 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." *Id.* For more discussion on criticism from Rwandan women's organizations of the ICTR, see Madre, *Demanding Justice: Rape and Reconciliation in Rwanda*, [http://www.madre.org/country\\_rwan\\_demand.html](http://www.madre.org/country_rwan_demand.html).

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>39</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 can be an integral part of the tribunal rather than an afterthought or a bureaucratic detail.

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 had not been financially worthwhile for the ICTY to translate a wide range of documents into local languages because there were so many of them and it would be too complex.<sup>40</sup> Likewise, locals might have noted that the selection of French and English as working languages in the ICTY is consistent with U.N. 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 often remain unavailable.

To further hybrids' potential with regard to linguistic accessibility, a few management tools offer potential. Registrars and 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.

Hybrids' cultural, physical, and linguistic affinities to local norms have feedback effects, most importantly because they make the hybrid tribunal more comprehensible to local media. Local news reporters, often facing the tight budget of a tiny newspaper or radio station, cannot afford to take regular international trips. Cutting the local press out of the loop has tremendous implications on the wider population that relies primarily on local media for obvious linguistic reasons. Even if elites are able to understand and tune into the international press, television, 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,

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39. Alvarez, *Crimes of States*, *supra* note 20, at 404.

40. 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).

the least likely to comprehend or benefit from international media attention to war crimes trials.<sup>41</sup>

Conducting trials in the countries where atrocities took place 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>42</sup> remains the most notorious, local press in the Former Yugoslavia also provides an example of local media inciting violence and dangerously exacerbating tensions.<sup>43</sup> Rabble-rousing, provocative, irresponsible journalism remains a reality in

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41. For an official U.N. recognition of the fact that women (and other populations which are poor and marginalized) tend to be disproportionately vulnerable in times of war, see Press Release, Security Council, Women Suffer Disproportionately During and After War, Security Council Told During Day-Long Debate on Women, Peace and Security, U.N. Doc. SC/7908 (Oct. 29, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7908.doc.htm>.

42. For a brief but balanced summary of Radio Mille Collines' role in the Rwandan genocide, see *Hate Radio Rwanda*, RADIO NETHERLANDS (Apr. 2, 2004), 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.

*Id.*

43. 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." *Media "Inflamed" Riots*, BALKAN CRISIS REP., April 30, 2004, [http://www.iwpr.net/?p=bcr&s=f&o=157330&apc\\_state=henibcr2004](http://www.iwpr.net/?p=bcr&s=f&o=157330&apc_state=henibcr2004).

numerous post-atrocity countries. This makes it all the more important to incorporate media outreach in war crimes tribunals, to educate journalists, and provide local media representatives with intelligible and easily accessible information that is harder to distort.

Naturally, it is not enough to merely hope that hybrids will provide better local media outreach by virtue of being culturally closer. Hybrids may have an advantage over international tribunals when it comes to communicating with local press, but they still need sound management practices. They should have outreach departments primarily focused on local press, radio, and TV.

### 3. Capacity-Building and Turnover of Infrastructure

When juxtaposed with the ad hoc international 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 hybrids' staffing procedures can have a tremendous influence on local justice reform. 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>44</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>45</sup>

Local staff in hybrids are not the only members of the local judiciary to benefit from their experience. They typically maintain much closer personal connections with members of the local judiciary than international staff, simply by virtue of pre-existing collegial friendships and 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>46</sup> they maintain bonds with other members of the local judiciary and the broader community. When hybrids close

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44. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1070; *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).

45. Dickinson, *The Promise of Hybrid Courts*, *supra* note 7, at 305.

46. During the tribunal, local talent may gravitate towards the hybrid tribunal. This can impose short term costs to the national court system if the best and brightest are temporarily drained away from their regular jobs.

shop, the local staff is primarily 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 U.N. 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>47</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>48</sup> noted, a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced.”<sup>49</sup> In her article on the East Timor hybrid Suzanne Katzenstein pointed out the mistake of assuming 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.”<sup>50</sup> Especially when staff is deluged by

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47. Dickinson, *The Promise of Hybrid Courts*, *supra* note 7, at 305.

48. INT’L CTR. FOR TRANSITIONAL JUSTICE, U.N. DEV. PROGRAMME, *THE “LEGACY” OF THE SPECIAL COURT FOR SIERRA LEONE* 5, 12 (Sept. 29, 2003).

49. See Cockayne, *The Fraying Shoestring*, *supra* note 25, 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 and prison guards; and an increased public awareness and dialogue about criminal processes and the role they fulfill in post-conflict societies.

50. Katzenstein, *Searching for Justice*, *supra* note 7, at 265. Katzenstein’s discussion of East Timor capacity-building programs is worth noting:

work, operating under time pressure, and lacking necessary pedagogical or mentoring experience, 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, with a focus on good leadership and management. Institution-building could be fostered on the 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 and by receiving regular feedback and constructive criticism, local employees working under international staff can be exposed to norms and methods that will improve their work as judges, prosecutors, and public defenders later on.<sup>51</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.

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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.

*Id.* at 267.

51. *Id.*; see also Linton, *New Approaches*, *supra* note 7, at 134.

Hybrid structures should incorporate providing continuing legal education (CLE) to judges, prosecutors, defense attorneys, and court personnel.<sup>52</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>53</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 to 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 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>54</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 . . .).

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, can be fed back into the local justice system at the conclusion of the hybrid court's term. Infrastructure creation for hybrids may also prove useful for the local judiciary insofar as it can serve as a model, and its development for the hybrid can train service providers to better serve the local justice system down the line. In countries where the justice systems' infrastructures were devastated by war, and were not particularly professional to begin with, this is not a negligible factor. If planned appropriately, the buildings of hybrid tribunals can house a future domestic court, providing well-built courtrooms, offices, logistical set ups for efficacious transcription and case management, and a functioning library. Especially if planned and built with such a transfer in mind, the hybrid can contribute in a highly visible and symbolic way to local justice. 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.

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52. See Ellis, *supra* note 7, at 189-90. Mark S. Ellis is the Executive Director of the International Bar Association in London, England. *Id.* at 165.

53. *Id.* at 190.

54. *Id.* at 191.



#### 4. Recognition of the Importance of Local Empowerment by Key Decision-Makers

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 local empowerment and connecting with local populations. Indeed, some have gone so far as to argue for trials held locally whenever possible: 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>55</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>56</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>57</sup>

Secretary General Boutros-Boutros-Ghali implied that regional criminal law enforcement mechanisms can generate a greater buy-in among affected communities when the communities are more directly represented in a regional court. As Boutros-Boutros-Ghali has observed, regional action can “contribute to a deeper sense of participation, consensus and democratization in international affairs.”<sup>58</sup>

Likewise, local decision-makers and 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>59</sup> Similarly, the post-genocide Rwandan government was keen to receive international financial aid and training to rebuild its devastated judiciary, and was reluctant to accept a purely international tribunal to prosecute *génocidaires*.

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55. Interview by Ljubica Gojic with Judge Theodor Meron, President, Int’l Criminal Tribunal for the Former Yugoslavia, in Belgrade, Serb. (Sept. 18, 2003), <http://www.b92.net/intervju/eng/2003/meron.php>

56. England, *supra* note 33.

57. *Priorities for the International Community*, *supra* note 5.

58. The Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, ¶¶ 63-64, U.N. Doc. A/47/277-S/24111 (June 17, 1992) [hereinafter *Agenda for Peace*].

59. Dickinson, *The Promise of Hybrid Courts*, *supra* note 7, at 299.

### III. 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 outlines 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 the U.N. to the failure of capacity-building programs for inexperienced East Timorese officials, it did not live up to its full potential. Second, this section summarizes 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 looks at the Special Court for Sierra Leone and argue that it has achieved yet higher standards of efficacy and enhanced outreach with local populations, although with substantial room for improvement. The fourth segment examines the Extraordinary Chambers in Cambodia, although this analysis will focus on the structure of the EC and the process of its creation rather than an evaluation of operations, which have not yet fully begun. The fifth component briefly touches on the Iraq Special Tribunal (IST)/Supreme Iraqi Criminal Tribunal (SICT), the founders of which consciously failed to build on lessons from past hybrids and created an internationalized domestic court whose efficacy is jeopardized by violence and legitimacy issues. In conclusion, the sixth part analyzes the new Bosnian hybrid which appears to be implementing the most promising model of hybrid tribunal thus far. As this is a rapidly evolving field, these descriptions are subject to change.

#### **A. East Timor's Serious Crimes Unit and Special Panels for Serious Crimes Within the District Court in Dili**

Around the 1999 referendum process in East Timor to determine independence from Indonesia, more than 1000 people died in bloody fighting, massive human rights violations were perpetrated against civilians, and over a quarter of a million people went into hiding, fled, or were forcibly expelled to Indonesia. The pro-Indonesian militias and Indonesian security forces also carried out widespread arson and destruction of infrastructure. In the aftermath of horrific human rights violations which the Indonesian army orchestrated to intimidate independence activists, the international community's outrage eventually pressured the reluctant Indonesian government into holding trials.<sup>60</sup> With the U.N.

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60. For a review of the horrific human rights violations in East Timor, see Commission for Reception, Truth and Reconciliation in East Timor, CAVR Final Report,

largely in control of East Timor but unwilling to confront Indonesia, the U.N. relied on Indonesian promises that Indonesian suspects would be tried in Jakarta.<sup>61</sup> At the same time, the U.N. established a partly internationalized institution in East Timor's capital, Dili, to deal with local perpetrators of serious crimes within East Timor.<sup>62</sup>

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available at <http://www.ictj.org/en/news/features/846.html>. Based on interviews with almost 8000 witnesses from East Timor's thirteen districts and sixty-five sub-districts, as well as statements from refugees over the border in West Timor, the report also relies on Indonesian military papers and intelligence from international sources. The Commission's 2500-page report found that between 1975 and 1999 the Indonesian military used starvation as a weapon to exterminate the East Timorese and that the Indonesian government and the security forces are responsible for the deaths of as many as 183,000 civilians, more than ninety percent of whom died from hunger and illness. The deaths amounted to almost a third of East Timor's pre-invasion population. Napalm and chemical weapons, which poisoned the food and water supply, were used by Indonesian soldiers against the East Timorese in the brutal invasion and annexation of the half-island. The report documents a litany of massacres, thousands of rapes including the use of rape as a weapon of war, claims Indonesian police or soldiers were to blame for seventy percent of the 18,600 unlawful killings or disappearances between 1975 and 1999, and records the torture of 8500 East Timorese with horrific details of public beheadings, the mutilation of genitalia, the burying and burning alive of victims, use of cigarettes to burn victims, and ears and genitals being lopped off to display to families. The violence culminated in the 1999 reprisals for the independence vote, when the Indonesian military and its militia proxies rampaged through East Timor, killing as many as 1500 people, displacing some 400,000, deporting many to West Timor by force, and destroying sixty to eighty percent of the property. According to the Commission, violations were committed in execution of a systematic plan approved, conducted, and controlled by Indonesian military commanders at the highest level. The violence ended only with the arrival of the U.N. International Force in East Timor. *Id.*; see also the CAVR website, <http://www.easttimor-reconciliation.org/>.

61. Facing intense international pressure, Indonesian authorities accepted the report of the Indonesian Commission of Inquiry (KPP HAM) appointed by the National Human Rights Commission (Komnas HAM) and instituted the "Ad Hoc Human Rights Court" in Jakarta under the attorney general's office and the Government of the Republic of Indonesia in accordance with Indonesian law 26/2000. For an informed commentary on the Jakarta Court, see David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (Aug. 2003) [hereinafter Cohen, *Intended to Fail*], <http://hist-socrates.berkeley.edu/~warcrime/IntendedtoFail.pdf>.

62. See, e.g., U.N. Transitional Administration in East Timor (UNTAET), *On the Authority of the Transitional Administration in East Timor*, U.N. Doc. UNTAET/REG/1999/1 (Nov. 27, 1999); UNTAET, *On the Establishment of a Transitional Judicial Service Commission*, U.N. Doc. UNTAET/REG/1999/3 (Dec. 3, 1999) (amended by UNTAET/REG/2000/25 (Aug. 3, 2000)); UNTAET, *On the Organization of Courts in East Timor*, UNTAET/REG/2000/11 (Mar. 6, 2000) (amended by UNTAET/REG/2000/14 (May 10, 2000)); UNTAET, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (June 6, 2000); UNTAET, *On the Organization of the Public Prosecution Service in East Timor*, UNTAET/REG/2000/16 (June 6, 2000). All UNTAET regulations are available at

The U.N. Transitional Administration in East Timor (UNTAET)<sup>63</sup> established prosecutorial and judicial bodies: the Serious Crimes Unit (SCU) under the Office of the General Prosecutor, and the Special Panel for Serious Crimes in Dili District Court.

The Dili District Court was created by UNTAET in March 2000 (at the same time as other district courts) to exercise exclusive jurisdiction over the most serious crimes, namely, genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offenses, and torture committed between January 1 and October 25, 1999.<sup>64</sup> In June 2000, Special Panels were created within the Dili District Court and the Court of Appeal, with two international judges and one national judge on each panel. Acting under the jurisdiction of the District Court of Dili, the hybrid Special Panels applied both international law and the laws of UNTAET-administered East Timor. The mix of national and international judges in the Special Panels mirrored the blending of national and international prosecutorial staff in the Serious Crimes Unit (SCU).<sup>65</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 Indonesian trials held in Jakarta<sup>66</sup>

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<http://www.un.org/peace/etimor/untaetR/UntaetR.htm>. 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). See also *Hybrid Courts: East Timor, PROJECT ON INT'L CTS. & TRIBUNALS*, [http://www.pict-pecti.org/courts/eastimor\\_basic\\_doc.html](http://www.pict-pecti.org/courts/eastimor_basic_doc.html). See UNTAET Press Office, Fact Sheet 7 (Feb. 2002), available at <http://www.un.org/peace/etimor/fact/fs7.pdf>, for a useful review of events up to 2001.

63. See S.C. Res. 1272, ¶ 2, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (the Security Council established the U.N. Transitional Administration in East Timor (UNTAET) by Resolution 1272 (1999) to maintain law and order, provide an administration, and help develop capacity for self-government).

64. See Linton, *Rising from the Ashes*, *supra* note 7, at 139.

65. Staffing levels varied over time at the SCU. In April 2003 the unit had 124 staff members of whom forty were national staff and an additional five East Timorese police investigators and fourteen local trainees. The unit was downsized in 2003 and by February 4, 2005, it had only seventy-four staff members. See Megan Hirst & Howard Varney, *Justice Abandoned?: An Assessment of the Serious Crimes Process in East Timor*, INT'L CTR. FOR TRANSITIONAL JUSTICE 6 (June 2005), available at <http://www.ictj.org/images/content/1/2/121.pdf>.

66. Facing intense international pressure, Indonesian authorities from the Attorney General's Office in the Ad Hoc Human Rights Court reluctantly charged a mere eighteen political and military leaders in Jakarta with failing to prevent the violence (which was portrayed as spontaneous clashes between local groups), 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 defense, the prosecution has purposefully failed to bring sufficient testimony and evidence which is

nor UN-sponsored trials in the District Court of Dili established the long-awaited accountability promised to East Timorese victims.

Severely under-funded<sup>67</sup> and inefficient, the Serious Crimes Unit (SCU) began with good intentions but suffered from lack of strategic planning, under-funding, a premature U.N. transfer of control to inexperienced East Timorese judiciary, the failure of capacity-building programs, and domestic politicking:<sup>68</sup>

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

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readily available. Only six defendants have been convicted, and those who have been convicted received derisively low sentences. All were free pending their appeals, and five convictions were overturned on appeal. Most high profile suspects were never even indicted. The most important and successful trial was the prosecution of Major General Adam Damiri, the regional commander in 1999 of the military region where East Timor was located. That case demonstrated typical prosecutorial incompetence but also the bravery of a few judges who, in the face of intimidation and interference, sentenced him to three years in prison on August 5, 2003. By August 2004, the court had acquitted or overturned the convictions of nearly all Indonesians indicted for crimes against humanity in East Timor and cut in half the ten-year sentence of Eurico Guterres, the former leader of the notorious Aitarak militia in East Timor. For an informed commentary on the failure of political will in the Indonesian attorney general's office and at the highest levels of government to permit any accountability initiatives, see Cohen, *Intended to Fail*, *supra* note 61. See also Human Rights Watch, *Indonesia: Courts Sanction Impunity for East Timor Abuses* (Aug. 7, 2004), <http://hrw.org/english/docs/2004/08/06/indone9205.htm>.

67. The SCU's inability to function adequately because of under-funding has been widely publicized by NGOs and in the media. Appointments to key positions in the judiciary were left vacant, paralyzing the court. See Joanna Jolly, *Investigators Struggle with Criminal Lack of Resources*, SOUTH CHINA MORNING POST (Hong Kong), Nov. 14, 2000, at 18; *UN Pledges More Resources to East Timor's Chief Investigator*, AGENCE FRANCE-PRESSE (Jakarta, Indonesia), Nov. 20, 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 [fifty-six] 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.'

*Id.*

68. Katzenstein, *Searching for Justice*, *supra* note 7, at 268.

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>69</sup>

Many of the SCU’s failings can also be attributed to the U.N.’s “persistent failure to consult in a genuine and meaningful way with the East Timorese [and its] bureaucratic and inflexible institutional nature,”<sup>70</sup> as well as contradictions in the role of the U.N., whose staff was often overstretched, inexperienced, and disorganized.<sup>71</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 . . . [and] key organizations are now unwilling to cooperate with the Serious Crimes Unit.”<sup>72</sup>

The court’s work was made more complicated by the fact that in East Timor, the U.N. undertook the challenging task of drafting a new Criminal Code, but did not pay enough attention to East Timor’s “notoriously variable and complex, but frequently significant” customary law.<sup>73</sup>

The U.N.’s role was further complicated by the end of UNTAET’s mandate on May 20, 2002, when UNTAET ceased to operate and Timor-L’este

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69. *Id.* at 268-69.

70. See Linton, *Rising from the Ashes*, *supra* note 7, at 176.

71. See Katzenstein, *Searching for Justice*, *supra* note 7, at 252.

72. Amnesty Int’l, *East Timor: Justice Past, Present and Future*, ASA 57/001/2001, pt 3.4, July 27, 2001. “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.” *Id.*

73. Hansjorg Strohmeyer, *Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, 24 U. NEW S. WALES L.J. 171, 179 (2001).

became an independent state, with the U.N. Mission of Support in East Timor (UNMISET) replacing some of UNTAET's functions.

Institution-building in East Timor should have focused more on bringing in international expertise for a transitional period with numerous East Timorese counterparts appointed as deputies on probation, with each international to receive appropriate training. They could have gradually been empowered to assume full responsibility as judges, prosecutors, and public defenders. All Indonesian judicial and criminal justice officers evacuated East Timor with the Indonesian retreat in 1999, leaving only a small number of Timorese with law degrees, none having worked as a judge, and only one with experience as a prosecutor.<sup>74</sup> The country was in desperate need of large-scale capacity building, but training of local staff only took place on a very small scale. Initially, the U.N. had no plans for skills transfers or legacy creation. A training program was created in 2002 with Norwegian funding for trainees' salaries, but was limited to SCU staff, with only informal mentoring for judges on the Special Panels.<sup>75</sup>

However, despite the resource and political constraints on the SCU, "a small group of determined practitioners managed to achieve a small measure of justice for the victims of the East Timor conflict."<sup>76</sup> The court's accomplishments must be understood in the context of its mission and the situation it confronted. The Special Panels for Serious Crimes within the District Court in Dili made several courageous indictments in the face of serious Indonesian intimidation and obstructionism. In particular, the tribunal issued an arrest warrant for former Indonesian military chief Wiranto, who was running for president at the time of the warrant, citing crimes against humanity in 1999 under his command. The warrant came more than a year after Wiranto was indicted by prosecutors for the East Timor Serious Crimes Unit and less than a month after he won the presidential nomination of the Golkar Party. Indonesian officials have previously made clear that the nation does not consider the East Timor court to have jurisdiction over its nationals and have said Indonesia has no intention of arresting or extraditing those charged by the panel.<sup>77</sup>

Suzannah Linton argues that the challenges "cannot be overstated"<sup>78</sup> and that UNTAET's justice initiatives must be situated against the background of its mandate "to build a nation from scratch."<sup>79</sup> She emphasizes that UNTAET "became custodian of a traumatised and ravaged land with barely a building left intact from the maelstrom of violence in 1999."<sup>80</sup> The U.N. "created a judicial

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74. See Hirst & Varney, *supra* note 65, at 8.

75. *Id.* at 24.

76. *Id.* at 1.

77. Achmad Sukarsono & Jerry Norton, *East Timor Judge Issues Arrest Warrant for Wiranto*, REUTERS, May 10, 2004, available at <http://www.globalpolicy.org/intljustice/tribunals/timor/2004/0510arrest.htm>.

78. See Linton, *Rising from the Ashes*, *supra* note 7, at 122.

79. *Id.* at 124.

80. *Id.*

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>81</sup> Facing tremendous challenges arising from the physical devastation of the 1999 campaign, the exodus of many qualified East Timorese, and resources shortages, “the tribunal continue[d] to improve. The SCU, in particular, . . . responded to criticism effectively and [underwent] substantial restructuring and vast improvement.”<sup>82</sup> UNTAET responded positively to critiques of “its early tendency towards benevolent paternalism, which sidelined the East Timorese [and] ‘Timorisation’ [became] a key objective of the mission, with East Timorese gradually being moved into leadership positions.”<sup>83</sup> In spite of the qualitative inadequacy of some of the trials,<sup>84</sup> these and other positive developments must inform critiques of the SCU’s work.

In early 2003 the number of investigators was significantly reduced and one SCU office was closed.<sup>85</sup> The Security Council resolved in May 2004 that the SCU should complete all investigations by November 2004 and conclude all activities by May 20, 2005.<sup>86</sup> The SCU wound up operations accordingly, and issued final indictments in December 2004, bringing the total number of indictments to ninety-five, with 391 of the accused facing at least one indictment, spanning all levels of the Indonesian military and East Timorese militia command structure.<sup>87</sup> The high number of indictments filed and cases adjudicated must be recognized and appreciated, as well as the SCU’s diligence in preparing for the “handover” process which involved scanning some 60,000 pages of documents,

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81. Katzenstein, *Searching for Justice*, *supra* note 7, at 252.

82. *Id.* The SCU “improved management and recruitment problems, strengthened its training and mentoring programs, and enhanced its public education and outreach efforts.” *Id.* at n.35. See also Interview by Susan Katzenstein with Eric MacDonald, Prosecutor, Serious Crimes Unit, in Dili, East Timor (July 23, 2002).

83. Katzenstein, *Searching for Justice*, *supra* note 7, at n.35.

84. See also Cohen, *Seeking Justice on the Cheap*, *supra* note 7 (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); Press Release, Judicial System Monitoring Programme, *East Timor Special Panels for Serious Crimes: More Postponements than Hearings* (Oct. 11, 2002), available at [http://www.jsmp.minihub.org/News/News/12N\\_10\\_02.htm](http://www.jsmp.minihub.org/News/News/12N_10_02.htm); Press Release, Judicial System Monitoring Programme, *East Timor Urgently Needs Court of Appeal to Guarantee Fundamental Human Rights* (Oct. 14, 2002), available at [http://www.jsmp.minihub.org/News/News/14N\\_10\\_02.htm](http://www.jsmp.minihub.org/News/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).

85. Tiago A. Sarmiento, Judicial System Monitoring Program, The Future of the Serious Crimes Unit, Address at Victoria University, Melbourne, Australia, June 16, 2005.

86. S.C. Res. 1543, ¶ 8, U.N. Doc. S/RES/1543 (May 14, 2004).

87. See Hirst & Varney, *supra* note 65, at 8.



creating a searchable database, translating all key documents into Tetum, bringing as many unfinished cases to indictment as possible, drafting instructions for future investigators, and holding community meetings in each district to explain what was happening.<sup>88</sup>

Faced with Indonesia's near-total failure to cooperate in an accountability process, inadequate international support, insufficient funds, linguistic hurdles, and enormous infrastructural devastation, the SCU achieved significant successes.

### **B. Regulation "64" Panels in the Courts of Kosovo**

Conflict in Kosovo committed primarily by Serb forces against ethnic Albanians expelled around 800,000 Kosovars and internally displaced approximately 500,000 of a pre-conflict population estimated at 1.7 million, virtually emptying ethnic Albanian towns and villages.<sup>89</sup> In June 1999, after a NATO-led bombing campaign helped put a stop to mass atrocities, the U.N. Security Council issued a resolution establishing the U.N. Mission in Kosovo (UNMIK).<sup>90</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>91</sup> UNMIK made "an effort to address what was rapidly becoming an accountability and justice crisis."<sup>92</sup>

These efforts occasionally did more harm than good, for instance when the U.N. used a confusing compendium of the 1989 Kosovo Criminal Code, UNMIK regulations, and the European Convention on Human Rights, and took months to translate and distribute the laws.<sup>93</sup> After much debate over the creation

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88. *Id.*

89. See The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 8, U.N. Doc. S/1999/779 (Jul. 12, 1999).

90. For information on the Kosovo hybrid, see S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing UNMIK). See also U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999) (on the authority of the Interim Administration in Kosovo), available at [http://www.pict-pecti.org/courts/pdf/kosovo/Re1999\\_1.htm](http://www.pict-pecti.org/courts/pdf/kosovo/Re1999_1.htm).

91. See Press Release, 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/pressreal/p437-e.htm>.

92. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1061.

93. International Crisis Group, Balkans Report 134, *Finding the Balance: The Scales of Justice in Kosovo*, at 13 (Sept. 12, 2002), available at [http://www.theigloo.org/wing.igloo?r0=library&r0\\_attributeinfo=true&r0\\_objId=316443](http://www.theigloo.org/wing.igloo?r0=library&r0_attributeinfo=true&r0_objId=316443)

of a special court, to be called the Kosovo War and Ethnic Crimes Court,<sup>94</sup> underfunding and political obstacles led to an impasse and the court was abandoned.<sup>95</sup>

Meanwhile, the taint of the former oppressive regime undermined public confidence in the justice system that had systematically excluded ethnic Albanians and had been run by Serbians perceived as oppressors. “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.”<sup>96</sup> In response, UNMIK issued new resolutions, but it still faced staffing difficulties.

Problems of deciding upon applicable laws 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>97</sup> 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>98</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 of international and local judges. On 29 May 2000, following pressure from hunger strikers in Mitrovicë/Mitrovica, the majority of whom were Kosovo Serb detainees investigated or awaiting trials for war crimes, the SRSG passed UNMIK Regulation 2000/34 that extended the power to appoint international judges and prosecutors to the whole territory of Kosovo.<sup>99</sup>

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[hereinafter Balkans Report]. The President of the Kosovo Supreme Court expressed frustration that UNMIK regulations take seven to eight months to be translated into Albanian and Serbian. *Id.*

94. 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.

95. For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts et al., *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, 381 (2001); Strohmeyer, *Making Multilateral Interventions Work*, *supra* note 16; Strohmeyer, *Collapse and Reconstruction*, *supra* note 7.

96. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1063.

97. *Id.*

98. *Id.*

99. See Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights & Rule of Law, Legal Systems Monitoring Section, *Kosovo’s War Crimes Trials: A Review*, Sept. 2002, available at <http://www.osce.org/item/1038.html> [hereinafter *Kosovo’s War Crimes Trials*]; see also U.N. Interim Administration Mission in Kosovo, *On the Appointment and Removal from Office of International Judges and*

These “regulations allowing foreign judges<sup>100</sup> to sit alongside domestic judges on existing local Kosovar courts, and allowing foreign lawyers to team up with domestic lawyers to prosecute and defend the cases”<sup>101</sup> led to the creation of the “Regulation 64 panels” in the courts of Kosovo, which applied a blend of international and domestic law.<sup>102</sup> The U.N. believed that inviting in foreign experts would help build local capacity and independence, in a dynamic synergy with the newly revamped local judicial process.<sup>103</sup> These initial appointments of

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*Prosecutors*, U.N. Doc. UNMIK/REG/2000/6 (Jan. 12, 2001); U.N. Interim Administration Mission in Kosovo, *On the Appointment and Removal from Office of International Judges and Prosecutors*, U.N. Doc. UNMIK/REG/ (May 29, 2000) (amending UNMIK/REG/2000/6).

100. International judges had minimal impact initially, as they did not comprise a majority on the trial panels. See *Kosovo’s War Crimes Trials*, *supra* note 99, at 12. A new UNMIK regulation enacted in December 2000 sought to rectify this problem. See U. N. Interim Administration Mission in Kosovo, *On Assignment of International Judges/Prosecutors and/or Change of Venue*, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_64.htm](http://www.unmikonline.org/regulations/2000/re2000_64.htm) [hereinafter *Assignment of International Judges*]. 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.

101. *Assignment of International Judges*, *supra* note 100; see e.g., U. N. Interim Administration Mission in Kosovo, *On the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor*, U.N. Doc. UNMIK/REG/1999/5 (Sept. 4, 1999); U.N. Interim Administration Mission in Kosovo, *On Recommendations for Structure and Administration of the Judiciary and Prosecution Service*, U.N. Doc. UNMIK/REG/1999/6 (Sept. 7, 1999); U. N. Interim Administration Mission in Kosovo, *On the Establishment of the Administrative Department of Justice*, U.N. Doc. UNMIK/REG/2000/15 (June 6, 2000).

102. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1063.

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.

*Id.* at 1063-64.

103. See generally Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights & Rule of Law, Legal Systems Monitoring Section,

international personnel to the courts did help to alleviate some concerns with respect to impartiality. However, given the limited number of such international judges and the restricted scope of their powers, the appointments did not completely address neutrality concerns.

The Regulation 64 Panels in the courts of Kosovo experienced numerous problems,<sup>104</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>105</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>106</sup> As a result, some commentators like Sylvia de Bertodano have declared the Regulation 64 Panels to be a disappointment.<sup>107</sup>

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*Report 9 – On the Administration of Justice*, Mar. 2002, at 5-6, available at [http://www.osce.org/documents/mik/2002/03/863\\_en.pdf](http://www.osce.org/documents/mik/2002/03/863_en.pdf).

104. See *Kosovo’s War Crimes Trials*, *supra* note 99.

Supreme Court judgments in Kosovo are a meager source of war crimes jurisprudence. They are characterized by brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues [and hence] are not useful tools for providing guidance to the local legal community in the complex field of war crimes and international humanitarian law. International Supreme Court panels have reversed . . . convictions . . . reviewed in war crimes cases, [often because] . . . the facts were not correctly verified . . . [or] the trial court did not call witnesses proposed by the defence. However, war crimes jurisprudence in Kosovo may attain higher levels of professionalism, coherence and overall legal quality, and thus fulfill its ultimate scope of promoting truth and reconciliation in Kosovo.

*Id.* at 48.

105. Balkans Report, *supra* note 93, at 5-6.

106. *Id.* at 9.

107. Sylvia de Bertodano, *Current Developments in Internationalized Courts*, 1 J. INT’L CRIM. JUST. 1 (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.

*Id.*

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."<sup>108</sup> Most importantly, "the verdicts of the hybrid tribunals have alleviated some impartiality concerns, even among Serbs."<sup>109</sup> The Kosovar courts ultimately held effective trials of alleged perpetrators<sup>110</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>111</sup> Clint Williamson, Justice Department Director of Kosovo from October 2001 to November 2002 assessed the 64 panels as a mixed success.<sup>112</sup> 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 sixty-four 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 more local buy-in.<sup>113</sup> An OSCE report endorsed the Kosovo hybrid experiment overall, lending credence to arguments that despite significant

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108. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1066 (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.).

109. *Id.*

110. As of June 2002, Kosovo courts had held trials in seventeen war crimes cases. 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 thirty-five trials and investigations. See The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 46, U.N. Doc. S/2000/1196 (Dec. 15, 2000); see also Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights & Rule of Law, Legal Systems Monitoring Section, *Kosovo: A Review of the Criminal Justice Division* (Feb. 28, 2001).

111. Dickinson, *The Case of Kosovo*, *supra* note 7, at 1063. See also The Human Rights Center and the International Human Rights Law Clinic et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 127-36 (2000) [hereinafter *Justice, Accountability and Social Reconstruction*].

112. Interview with Clint Williamson, U.S. Dept. of Justice, Former Director of Kosovo (Dec. 7, 2004). Clint Williamson served as the Justice Department Director of Kosovo from October 2001 to November 2002.

113. *Id.*

flaws, Kosovo represents an improvement on the hybrid model over the East Timor process.<sup>114</sup>

### **C. Special Court for Sierra Leone**

In the aftermath of a horrific civil war in Sierra Leone, which claimed the lives of an estimated 75,000 individuals, displaced a third of the population, and was characterized by widespread atrocities,<sup>115</sup> the Sierra Leonean government and the U.N. set up the Special Court for Sierra Leone.<sup>116</sup> The tribunal was designed to try those who “bear the greatest responsibility for the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone.”<sup>117</sup>

A treaty between the U.N. and the Sierra Leone government, the Statute for the Special Court for Sierra Leone, established the Court in 2002.<sup>118</sup> While the ICTY and ICTR were established under Security Council resolutions pursuant to Chapter VII of the U.N. 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>119</sup> Rather than being a subsidiary organ of the

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114. See *Kosovo’s War Crimes Trials*, *supra* note 99.

115. See Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT’L & COMP. L. 237 (2001).

116. Letter from the Permanent Representative of Sierra Leone to the United Nations President of the Security Council, U.N. Doc. S/2000/786 (Aug. 9, 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 & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 *FORDHAM INT’L L.J.* 391, 400 (2001).

117. 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 website developed by the NGO, No Peace Without Justice, at <http://www.specialcourt.org>. For documents on the establishment of the court, see The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 1, U.N. Doc. S/2000/915 (Oct. 14, 2000), available at <http://www.un.org/Docs/sc/reports/2000/915e.pdf>. The annex to the report contains the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, U.N.-Sierra Leone, Jan. 16, 2002, Appendix II, U.N. Doc. S/2002/246, available at <http://www.sc-sl.org/scsl-agreement.html> [hereinafter *Sierra Leone Agreement*]. The enclosure contains the draft *Statute of the Special Court for Sierra Leone* (Aug. 14, 2000) [hereinafter *Sierra Leone Statute*]. The No Peace Without Justice website concerning the Sierra Leone Special Court includes a consolidated version of the Sierra Leone Statute and the Sierra Leone Special Court Agreement.

118. See *Sierra Leone Agreement*, *supra* note 117.

119. *Id.*

UN, or directly administered by the UN, the Special Court for Sierra Leone is independent from both its parent entities—the U.N. and from the Sierra Leone government.<sup>120</sup> This set the Special Court for Sierra Leone apart from other international and hybrid tribunals, which had not been products of agreements between the UN, and local decision-makers.<sup>121</sup>

The novel structure of the Special Court for Sierra Leone cannot be said to have been a conscious imitation of the Kosovar or Timorese hybrids<sup>122</sup> or of ad hoc tribunals. It represented an innovative attempt by the U.N. to establish an effective international criminal body, more open to local participation and influence. The Special Court for Sierra Leone 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>123</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>124</sup> and applying law that blends international humanitarian law and domestic Sierra Leonean law;<sup>125</sup> although, thus far the indictments have referred only to international law. The court is “‘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>126</sup>

Thus far the Special Court for Sierra Leone is arguably proving to be more efficient,<sup>127</sup> less costly,<sup>128</sup> more accessible to local populations,<sup>129</sup> and less

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120. The tribunal employs its own staff and receives its funds directly from donor governments and private donors.

121. See The Special Court for Sierra Leone website, <http://www.sc-sl.org>.

122. 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.

123. See *Sierra Leone Statute*, *supra* note 117, art. 8.

124. See *Sierra Leone Agreement*, *supra* note 117.

125. See *Sierra Leone Statute*, *supra* note 117, art. 1.

126. Dickinson, *The Promise of Hybrid Courts*, *supra* note 7, at 300.

127. 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 Special Court for Sierra Leone, at <http://www.sc-sl.org/index.html> (last visited May 19, 2006). 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. *Id.*

128. See Cockayne, *The Fraying Shoestring*, *supra* note 25, at 629. “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

politically inflammatory with groups of former low-level perpetrators<sup>130</sup> than either ad hoc tribunal or the other two hybrids. It has also garnered more endorsements from local elites and civil society<sup>131</sup> and has been more successful in promoting local justice reform.<sup>132</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 under 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

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accordance with relevant international financial and management standards.” *Id.* See also Shauket A. Fakie, Auditor-General of the Republic of South Africa, Summary Report of the Auditor (Mar. 26, 2004) (submitted to the Management Committee for the Special Court), available at <http://www.sc-sl.org/auditreport2003.pdf>. 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 ¶ 1. See also *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).

129. The Special Court for Sierra Leone is the first international/hybrid 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.

130. During 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 relatively 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.

131. In particular, President Kabbah has come to visit the Court several times and publicly endorsed it.

132. A widely cited legacy of the Court is rule of law reform. See e.g., *Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings and Needed Support*, 16 HUM. RTS. WATCH 32 (Sept. 2004), available at <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>; First Annual Report of the President of the Special Court for Sierra Leone 3, 28 (March 31, 2004), <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf> [hereinafter Annual Report].



joint trials. These are all significant achievements of which the Special Court should be proud.<sup>133</sup>

The International Center for Transitional Justice (ICTJ)'s thoughtful and detailed analysis of the work of the Special Court for Sierra Leone 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,"<sup>134</sup> it notes that "after [eighteen] months of operations, the Special Court for Sierra Leone has shown a clear understanding of its mandate, and its management seems relatively efficient."<sup>135</sup> 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>136</sup>

Only three years after its establishment, three trials of nine accused were proceeding simultaneously before two trial chambers, and as of August 2005 more than 150 witnesses had testified and the prosecution had closed its case in one of the three trials.<sup>137</sup> The appointment of Trial Chamber II in January 2005 was a major development that enhanced the court's efficiency by enabling the third major trial to commence in March 2005. During the trials which began in June 2004, the Special Court made substantial progress in extremely complex cases, with trial chambers demonstrating efficiency and "an active interventionist style of courtroom management."<sup>138</sup> The Registrar has consistently promoted effective courtroom management. The work of the Office of the Principal Defender (Defence Office) represents an unprecedented innovation for international and hybrid tribunals. The Special Court has also developed a sophisticated and comprehensive witness protection and support program, with security, medical assistance, psychosocial counseling, investigation of threats, and relocation where necessary. Perhaps most innovative and important program is the court's robust outreach programs to increase Sierra Leoneans' awareness of the court's work, which include training local media, production of audio and video materials, nation-wide activities and community meetings.

Despite its achievements, some concerns remain regarding court operations. The Special Court would have been more successful if it had embraced true hybridity at the highest levels of the court, to ensure that Sierra

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133. For a succinct overview, see Cockayne, *The Fraying Shoestring*, *supra* note 25. A more comprehensive account is provided by the Special Court for Sierra Leone. Annual Report, *supra* note 132.

134. Thierry Cruvellier & Marieke Wierda, *The Special Court for Sierra Leone: The First Eighteen Months*, INT'L CTR. FOR TRANSNATIONAL JUSTICE (Mar. 2004), available at <http://www.ictj.org/images/content/1/0/104.pdf>.

135. *Id.*

136. *Id.*

137. Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone* (Nov. 2005) [hereinafter Human Rights Watch, *Justice in Motion*], available at <http://hrw.org/reports/2005/sierraleone1105/>.

138. *Id.*

Leonean views be heard at the decision-making level of the court. According to leading human rights lawyer and former Special Court Prosecutor Abdul Tejan-Cole, “[t]he government of Sierra Leone made a fundamental mistake when it amended the statute to remove the requirement that the deputy prosecutor should be a Sierra Leonean.”<sup>139</sup> Provisions should have been made to employ and train more Sierra Leoneans at every level of the court, with intensive capacity-building programs. Little interaction has taken place between Special Court judges and staff with judges and staff of the national courts, although fostering such communications could have had a tremendous impact on the national justice system, a crucial aspect of strengthening the rule of law in Sierra Leone. The court could have linked this type of initiative with better outreach to civil society: increased radio programming and greater attendance in the public gallery.

The Special Court for Sierra Leone suffered major blows with the death of two prominent indictees (Foday Sankoh and Sam Bockarie)<sup>140</sup> and the disappearance and presumed death of a third indictee, Johnny Paul Koroma.<sup>141</sup> A fourth indictee, Charles Taylor, was able to dodge arrest in Nigeria with the full knowledge and support of most world leaders for years,<sup>142</sup> but in an enormous step toward ensuring justice for atrocities in West Africa he was handed over by Nigerian President Obasanjo to newly elected Liberian President Ellen Johnson-Sirleaf, who promptly transferred him to the Special Court on March 29, 2006.

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139. Interview with Abdul Tejan-Cole, Office of the Prosecutor, Special Court for Sierra Leone, March 31, 2006. Mr. Tejan-Cole was an appellate lawyer in the Office of the Prosecutor in the Special Court for Sierra Leone.

140. For an article on Foday Sankoh’s death, see Amnesty Int’l, *Sierra Leone: Foday Sankoh’s Death Will not Diminish the Special Court’s Role in Ending Impunity*, AI Index AFR 51/008/2003, July 30, 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*, May 9, 2003, <http://www.africaonline.com/site/Articles/1,3,52949.jsp>.

141. For an article on Johnny Paul Koroma’s reported death, see Africa Online Liberia, *Sierra Leone War Crime Suspect Dead after Shootout*, May 7, 2003, available at <http://www.africaonline.com/site/Articles/1,3,52916.jsp>. See also U.S. Dep’t of State, Bureau of African Affairs, *Background Note: Sierra Leone* (Sept. 2005), available at <http://www.state.gov/r/pa/ei/bgn/5475.htm>:

On May 5th Bockarie was killed in Liberia, probably on orders from President Charles Taylor, who expected to be indicted by the Special Court and feared Bockarie’s testimony. Several weeks later word filtered out of Liberia that Johnny Paul Koroma had been killed, as well, although his death remains unconfirmed.

142. For an article on Taylor’s presence in Nigeria, see Press Release, Amnesty Int’l, *Sierra Leone: Commitments to the Special Court Must Remain Firm and not Falter* (Jan. 16, 2004), available at <http://web.amnesty.org/library/Index/ENGAFR510022004> (urging Nigeria to cooperate fully with the Special Court by surrendering Taylor).

Taylor has supposedly hinted that he will do everything to undermine his trial by questioning the legitimacy of the Court, making accusations to embarrass both the Court and those advocating for his trial and using proxy groups and some Liberian legislators to simultaneously call for a reversal of his handover decision and cause sustained unrest and chaos in Monrovia. Although Taylor's trial promises to bring long awaited justice to the victims of Sierra Leone's brutal war and promote the rule of law in a region devastated by violence, it is scheduled to be held in Europe rather than Sierra Leone—a fact which has been widely decried by Sierra Leonean press and civil society.

The only other major shortcoming of the Special Court<sup>143</sup> is its financial instability.<sup>144</sup>

Initially forced to rely exclusively on voluntary contributions, the Special Court has faced constant financial shortfalls. Following a request by the U.N. Secretary-General in March 2004 for a U.S. \$40 million subvention to help address the court's financial difficulties, the U.N. General Assembly has assisted the court enormously by granting it up to U.S. \$33 million to help fund operations through the end of 2005. However, this assistance will not cover the court's budget for its final period of operations nor during its post-completion phase.<sup>145</sup>

This problem can hardly be ascribed to court staff, which made tremendous achievements on scarce and insecure resources, and should be clearly blamed on governments which have not made voluntary contributions, or who have made pledges but failed to redeem them. The General Assembly likewise bears responsibility for not authorizing additional funding. However, the Court's financial precariousness reflects negatively on the vulnerability of hybrid tribunals generally, which cannot rely on assessed contributions in the U.N. as ad hoc international tribunals can.

In large part thanks to the leadership of former Registrar Robin Vincent, former Prosecutor David Crane, and the Management Committee, the Special Court for Sierra Leone seems to be an improvement on the hybrid model. The Court has tapped into many of the inherent strengths of hybrid tribunals as such, and has made impressive strides in the face of great difficulties, including establishing an infrastructure in a severely underdeveloped country devastated by conflict, with limited and uncertain funding. It is too early to qualify it

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143. Minor failings include delays in some decisions on motions, inadequate funding for defense teams' expert witnesses and international investigators, and uneven performance of some defense counsel at the Special Court.

144. For a discussion of the Sierra Leone Special Court's lack of funding, see Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. RED CROSS 121 (2002).

145. Human Rights Watch, *Justice in Motion*, *supra* note 137.

definitively as a success in comparison with other courts<sup>146</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, but its accomplishments are all the more significant given the obstacles the court has had to overcome.

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

During the three years, eight months and twenty days of rule by 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>147</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>148</sup> The defeated Khmer Rouge retreated to strongholds along the Thai border, where, aided and funded by China, Thailand, and the US, it rearmed and continued to perpetrate crimes against humanity, staging attacks on Cambodia as a guerilla force.<sup>149</sup>

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146. 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 (2002); 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*, 30 DENV. J. INT'L L. & POL'Y 325 (2002).

147. DAVID CHANDLER, *A HISTORY OF CAMBODIA* (3d ed. 2000); DAVID CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* (1991); DAVID CHANDLER, *BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT*, (rev'd ed. 1999) [hereinafter CHANDLER, *BROTHER NUMBER ONE*]. See also BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* (1996).

148. For a thoughtful scholarly review of the Vietnamese overthrow of the Khmer Rouge and installation of a new Cambodian government, see STEPHEN J. MORRIS, *WHY VIETNAM INVADED CAMBODIA: POLITICAL CULTURE AND THE CAUSES OF WAR* (Stanford University Press, 1999).

149. The United States primarily supported the genocidal Khmer Rouge in order to undermine communist Vietnam, which had overthrown the Khmer Rouge and was propping up the post-Khmer Rouge Cambodian government, as well as rebuilding the devastated country. Thailand cooperated with the United States as part of its Cold War strategy of anti-communist alignment. The United States gave the Sihanouk-Khmer Rouge coalition millions of dollars in aid while enforcing an economic embargo against the

The U.S. and China's active support for the genocidal Khmer Rouge in Thailand ensured that international efforts to sanction the authors of the Killing Fields in the U.N. and other fora were scuttled.<sup>150</sup> Moreover, the Cold War isolation that communist Cambodia faced in the aftermath of the Khmer Rouge guaranteed that its domestic transitional justice endeavors received little or no international recognition or help. For instance, after overthrowing the Khmer Rouge, the Vietnam-dominated Cambodian government which overthrew the Khmer Rouge tried both Pol Pot and Ieng Sary in 1979 in absentia, amassing an enormous collection of valuable evidence of Khmer Rouge atrocities. Although it was the world's first genocide trial based on U.N. policy and the first trial of a head of government on a human rights-related charge, the endeavor was dismissed by the United States and its Cold War allies as a kangaroo court farce because the defendants' guilt was treated as a foregone conclusion and the defendants were tried in absentia.<sup>151</sup> Other efforts seeking to establish meaningful transitional justice initiatives were likewise ignored, such as the Cambodian government and civil society's efforts to create numerous memorials and establish a national day of mourning/day of rage.<sup>152</sup> The notable exception to the international

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Vietnamese-backed Cambodian government, and likewise the Chinese gave the Khmer Rouge millions of dollars in order to undermine the Vietnam regime which they, like the United States, perceived as threatening. See EVAN GOTTESMAN, *CAMBODIA AFTER THE KHMER ROUGE; INSIDE THE POLITICS OF NATION-BUILDING* (Silkworm Books, 2003) (providing an excellent overview of the post-Khmer Rouge Cambodian government's policies and position relative to Vietnam, China, Thailand, and the U.S.). For a description of the Khmer Rouge in Thailand, see CHANDLER, *BROTHER NUMBER ONE*, *supra* note 147, at 158-78.

150. Even the U.N. Transitional Authority in Cambodia (UNTAC) endeavored to placate the Khmer Rouge, who still controlled and/or regularly attacked large swaths of territory, for instance, by requiring that school books expunge all negative references to the Khmer Rouge—a shameful concession which has resulted in many young Cambodians being woefully ignorant of the history of the Khmer Rouge period.

151. *GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY* (Howard J. De Nike et al., eds., University of Pennsylvania Press, 2000). *GENOCIDE IN CAMBODIA* assembles documents from the historic August 1979 trial of the Khmer Rouge government's most powerful leaders, Pol Pot and Ieng Sary, in the People's Revolutionary Tribunal, tried in absentia on charges of genocide as it was defined in the U.N.'s genocide convention of 1948. The book opens with essays that discuss the nature of the primary documents and places the trial in its historical, legal, and political context. The documents are divided into three parts: those relating to the establishment of the tribunal; those used as evidence, including statements of witnesses, investigative reports of mass grave sites, expert opinions on the social and cultural impact of the actions of Pol Pot and Ieng Sary, and accounts from the foreign press; and finally, the record of the trial, beginning with the prosecutor's indictment and ending with the concluding speeches by the attorneys for the defense and prosecution.

152. Projects like the Center for Peace and Development's work to gather testimonies from former Khmer Rouge and provide them with training have also been marginalized. Likewise, the Cambodian government's initiative to establish a list of victims has been

community's general undervaluing of transitional justice endeavors in Cambodia has been the widespread recognition of the Yale Cambodian Genocide Project and its affiliate, the Documentation Center of Cambodia (DC-Cam), rightly heralded as a sort of unofficial truth commission.<sup>153</sup>

More international attention focused on Cambodia when the Khmer Rouge crumbled in the 1990s following Cambodian government granting of amnesties in return for mass defections from the Khmer Rouge (1996) and the death of Pol Pot in April 1998.<sup>154</sup> 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.<sup>155</sup> Difficult negotiations dragged on for six years between the U.N. and the Cambodian government<sup>156</sup> and within the Cambodian government as well.<sup>157</sup>

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disregarded because of its methodological failings (inability to cross-check resulting in the listing of victims multiple times) and was never appreciated as a serious truth-seeking endeavor. See TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE?: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* (Sydney UNSW Press, 2005).

153. The Yale Cambodian Genocide Project and its affiliate, the Documentation Center of Cambodia (DC-Cam) have rightly been heralded as a sort of unofficial truth commission for the vast collection of testimonials, maps of 19,440 mass graves, 167 extermination centers, seventy-seven genocide memorials, and over 600,000 pages of Khmer Rouge documents, and dossiers on 18,000 Khmer Rouge cadres. See Yale University, Cambodia Research Program, *available at* <http://www.yale.edu/cgp/news.html>.

154. See generally CHANDLER, *BROTHER NUMBER ONE*, *supra* note 147.

155. Prime Ministers Ranariddh and Hun Sen jointly wrote to Kofi Annan on June 22, 1997. See Helen Jarvis, *Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide*, 18 *CRITICAL ASIAN STUD.* 606, 607-24 (2002), *available at* [http://www.yale.edu/cgp/Cambodia\\_Docs\\_Oct16.pdf](http://www.yale.edu/cgp/Cambodia_Docs_Oct16.pdf).

156. See FAWTHROP & JARVIS, *supra* note 152 (providing a historical overview on the delays in creating the EC). The General Assembly commissioned a Group of Experts who endorsed a plan for trials of former Khmer Rouge officials. Hun Sen welcomed the U.N. 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 U.N. 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 U.N. feared that Cambodia's judiciary would be too inexperienced and politically aligned, not impartial or independent enough; that the rights of the accused and access to counsel would not be respected; and that Hun Sen had amnestied former Khmer Rouge officials suspected of committing atrocities. Negotiations were fraught with tensions resulting from these and other disagreements, and even resulted at one point in negotiations being broken off by Kofi Annan and Hans Corell. Press Briefing, Hans Corell, UN Legal Counsel, *Negotiations Between the UN and Cambodia Regarding the Establishment of the Court to Try Khmer Rouge Leaders* (Feb. 8, 2002), <http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm>.

Ultimately, a Memorandum of Understanding (MOU) was negotiated between the U.N. and the Cambodian government, adopted by U.N. General Assembly on March 17, 2003, formally accepted by the Royal Government of Cambodia and the U.N. on June 6, 2003, and unanimously ratified by the Cambodian parliament on October 4, 2004.<sup>158</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 Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (EC Law).”<sup>159</sup> The EC Law provides for co-investigating judges to conduct the investigations and co-prosecutors to prepare indictments against suspects.<sup>160</sup> Judges will be both international and Cambodian, and it is interesting to note that unlike the Special Court for Sierra Leone where judges can be nominated by Sierra Leone without being Sierra Leonean, the judges in the Extraordinary Chambers must be Cambodian nationals. The office of administration will be headed by a Cambodian (Sean Visoth), while the deputy head will be a non-Cambodian. The Tribunal will also have hybrid subject matter jurisdiction over crimes set forth both in Cambodian law<sup>161</sup> and international law. Unfortunately, the statute – and indeed, much of international law – does not map onto the particular crimes associated with the Khmer Rouge era, except perhaps the crime of cultural genocide.<sup>162</sup> The Tribunal is to be located in Phnom Penh in the High

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157. 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.

158. Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, accepted on June 6, 2003, *available at* <http://www.cambodia.gov.kh/krt/english/draft%20agreement.htm>. *See also* Courts of Cambodia, *supra* note 13. For more information on the Cambodia hybrid, see Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>; G.A. Res. 57/228, U.N. Doc. A/RES/57/228B (May 22, 2003), *available at* [http://www.pict-pcti.org/courts/pdf/Cambodia/Cambodia\\_052203.pdf](http://www.pict-pcti.org/courts/pdf/Cambodia/Cambodia_052203.pdf).

159. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [hereinafter EC Law], *available at* <http://www.cambodia.gov.kh/krt/english/index.htm>.

160. *Id.* at arts. 7, 12.

161. *See generally* Penal Code of Cambodia (1956).

162. Noah Novogrodsky, On the Current Status of Preparations for the ECDK, Presentation at the UBC Centre for Southeast Asia Research of the Institute for Asian Research, *The Promises and Limits of International Criminal Justice: The “Extraordinary Chambers” in Cambodia* (Feb. 3, 2006), *available at* <http://www.iar.ubc.ca/centres/csear/PDF2/present-novogrodsky2.pdf>.

Command Headquarters of the Royal Cambodian Armed Forces<sup>163</sup> and the official working language shall be Khmer, with translations into English and French.<sup>164</sup>

The Cambodian government and the U.N. will share the burden for the \$56.3 million estimated total three-year budget, with the U.N.'s share in voluntary contributions amounting to \$43 million<sup>165</sup> (\$21 million of which will be paid for by Japan) and Cambodia's government set to provide the remaining \$13.3 million. Amongst other costs, the U.N. will be responsible for international staff salaries and Cambodian authorities will pay for Cambodian staff expenses.<sup>166</sup> Cambodian staff will be receiving only fifty percent of the allowances of the U.N. staff. "Despite this uneven treatment, [representatives of the Cambodian government] are optimistic that people in the court will be able to overcome, and forge good working relationships."<sup>167</sup> The Cambodian government has stated that it will disburse \$1.5 million in cash, and will seek the rest of the \$13.3 million from

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163. The EC Law clearly specified that the tribunal had to be located in Cambodia. EC Law, *supra* note 159, art. 43. The Cambodian Government arranged the handover of the premises for the Extraordinary Chambers in the Courts of Cambodia at the High Command Headquarters of the Royal Cambodian Armed Forces (RCAF) in Kambol. The RCAF agreed to postpone their occupancy of their new headquarters for three years—the proposed duration of the EC. See Press Release by Sean Visoth, Director of the Office of Administration and Executive Secretary of the Royal Government Task Force for the Khmer Rouge Trials, Kingdom of Cambodia, Statement on the Handover of the Premises for the Extraordinary Chambers in the Courts of Cambodia (Jan. 18, 2006), available at <http://www.cambodia.gov.kh/krt/pdfs/Press%20Release%20on%20Handover%20the%20HCH%20for%20the%20ECCC-Eng.pdf>.

164. EC Law, *supra* note 159, art. 45.

165. Press Release, Pledging Conference for UN Assistance to Khmer Rouge Trials: Governments Pledge \$38.48 Million for Khmer Rouge Trials in Cambodia, U.N. Doc. L/3082 (Mar. 28, 2005), available at <http://www.un.org/News/Press/docs/2005/13082.doc.htm>. Japan has pledged \$21,600,000; France \$4,800,000; Australia \$2,350,000; Canada \$1,610,000; Germany \$1,000,000; Netherlands \$2,000,000; Denmark \$525,000; Luxembourg \$66,000; Austria \$360,000; Sweden \$150,000; United Kingdom \$2,870,000; Norway \$1,000,000; and the Republic of Korea \$150,000. *Id.* Although the United States played a major role in destabilizing Cambodia prior to the Khmer Rouge take-over (amongst other things carpet-bombing the country and supporting a coup) and gave the Khmer Rouge millions in cash and aid after the genocide, the United States has refused thus far to pledge any monies towards the Tribunal, and rather allocated millions towards unofficial documentation and research initiatives for the crimes committed in Cambodia.

166. EC Law, *supra* note 159, art. 17. The U.N. has agreed to contribute \$43,000,000 to the three-year proceedings, while the Cambodian government is obligated to pay nearly \$12,000,000. Although the Cambodian government's capacity to contribute its share is currently a matter of debate, it is worth noting that the Extraordinary Chambers may receive voluntary assistance from foreign governments, international institutions, NGOs, and other persons.

167. Interview with Helen Jarvis, Chief of Public Affairs for the Extraordinary Chambers in the Courts of Cambodia (Mar. 19, 2006).



direct bilateral aid. It will also donate about \$5.2 million of in-kind contributions, including land, buildings, detaining defendants and defraying their medical expenses, providing security not only for the tribunal but also for investigations, maintaining witness protection, and giving free visas to all international staff for three years.<sup>168</sup> Adding up the Cambodian government's \$1.5 million cash contribution to the EC and in-kind contributions, it is slated to pay approximately ten percent of the total cost of the tribunal.

The EC is expected to run for three years and to prosecute fewer than ten of the most senior Khmer Rouge still living,<sup>169</sup> several of whom are already in custody (Ta Mok and Deuch). The EC will not try mid- or low-ranking perpetrators, and its trials will thus be symbolic. The tribunal will also not be able to try the many senior Khmer Rouge who were directly responsible for mass atrocities but who died in purges or killings during the Khmer Rouge period and thereafter – including Pol Pot.

Various critics of the Extraordinary Chambers (EC) refer to fears of an inadequately rigorous defense of the Khmer Rouge,<sup>170</sup> a “lack of competent judges and established judicial infrastructure,”<sup>171</sup> the possibility that Cambodian judges will be controlled by the government, and fears that certain well-connected potential defendants will escape prosecution.<sup>172</sup> Some EC-watchers are especially anxious about the government being pressured by China to influence court staff, given China's major economic influence on the country and its desire to bury evidence of China's active support for the Khmer Rouge prior to April 1975, during Pol Pot's rule of terror, and after January 1979. Secretary-General Annan stated “[t]here still remains doubt . . . regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia.”<sup>173</sup> He reflected the opinion of the Group of Experts<sup>174</sup> and others who

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168. *Id.*

169. See STEPHEN HEDER WITH BRIAN D. TITTEMORE, WAR CRIMES RESEARCH OFFICE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2001), available at [http://www.cij.org/pdf/seven\\_candidates\\_for\\_prosecution\\_cambodia.pdf](http://www.cij.org/pdf/seven_candidates_for_prosecution_cambodia.pdf). This report by the War Crimes Research Office (WRCO) at American University and the Coalition for International Justice (CIJ) identifies seven possible candidates for prosecution: Nuon Chea, Communist Party Deputy Secretary; Ieng Sary, Deputy Prime Minister for Foreign Affairs; Khieu Samphan, State Presidium Chairman; Ta Monk, Central Committee Member; Kae Pok, Central Committee Member; Sou Met and Meah Mut, both Military Division Chairmen. *Id.* at 5-6.

170. Bunyanunda, *supra* note 7.

171. Luftglass, *supra* note 7, at 934.

172. HEDER, *supra* note 169, at 25. 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. See *id.*

173. *Id.*

174. On 15 March 1999, an expert group appointed by the U.N. Secretary-General proposed that an international court be established. Letter from Kofi A. Annan, UN Secretary-General, to the President of the Gen. Assembly and the President of the Sec.

voiced concerns regarding the lack of a stable, established judicial system and called for a purely international ad hoc like the ICTY.<sup>175</sup> Other critiques center on the lack of a culture of respect for the judicial system and the rule of law in Cambodia,<sup>176</sup> or concerns that Cambodian law is “confused, inconsistent, internally contradictory and full of important omissions.”<sup>177</sup>

More radical condemnations note that the court will have no jurisdiction over Kissinger, Nixon, and others responsible for the carpet-bombing of Cambodia and the killings of approximately 200,000 Cambodians in the bombings and fighting that took place prior to the 1975 Khmer Rouge takeover. Other detractors feel that the crimes against humanity committed after the defeat of the Khmer Rouge in 1979 ought to be tried as well.

Different opponents of the court argue that trials of Khmer Rouge could destabilize the nation, creating potential military and political unrest, while wreaking psychological and physical havoc on fragile communities that have struggled to maintain a delicate peace between former victims and former perpetrators living side by side. Many Cambodians fear reopening the painful wounds of their past, knowing that only a small fraction of the top perpetrators

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Council, U.N. Doc. A/53/850, S/1999/231 (Mar. 15, 1999), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/059/72/pdf/N9905972.pdf?OpenElement>.

175. *Id.*, para. 129. See also Letter from Prince Norodom Ranariddh and Hun Sen, the First and Second Prime Ministers of Cambodia, to the U.N. Secretary-General, U.N. Doc. S/1997/448, A/51/930, Annex (June 24, 1997), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/170/55/PDF/N9717055.pdf?OpenElement>. The reports of the Special Representative of the Secretary-General for Human Rights in Cambodia also support this position. See, e.g., The Special Representative of the Secretary-General for Human Rights in Cambodia, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia*, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/1999/101 (Feb. 26, 1999); The Secretary-General, Human Rights in Cambodia, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia*, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/2001/103 (Jan. 24, 2001). See also The Secretary-General, *Report of the Secretary-General on the Situation of Human Rights in Cambodia, delivered to the General Assembly*, U.N. Doc. A/54/353 (Sept. 20, 1999). For a law review article that entirely embraces this position and cites many similarly minded authorities, see Luftglass, *supra* note 7. Luftglass’ note argues that a hybrid would fail to meet international standards of justice and pose a greater risk than complete withdrawal of international involvement. Luftglass demands the establishment of an ad hoc international tribunal for Cambodia like the ICTY or a complete withdrawal from any adjudication of the Khmer Rouge’s crimes.

176. Press Release, Amnesty Int’l and Human Rights Watch, Cambodia: Judiciary on Trial (June 20, 2001), available at <http://www.amnesty.org.uk/news/press/12943.shtml>.

177. Human Rights Watch, *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement* (April 2003), available at <http://hrw.org/backgrounders/asia/cambodia040303-bck.htm>.

will be tried and that most Khmer Rouge killers will never face any type of accountability mechanism.<sup>178</sup>

Yet others are perplexed and suspicious of promises to hold Khmer Rouge leaders accountable when so many of them are relatively rich, owning large tracts of land in the Northwest, controlling gem smuggling, and having benefited from government concessions to them made during the peace process.<sup>179</sup> Such detractors point to the probable reluctance of the current government to see certain individuals implicated who hold or have held powerful positions in post-Khmer Rouge regimes.<sup>180</sup>

While the aforementioned critics have a bleak prognostic, other commentators remain hopeful that the EC will mete out impartial justice, and bolster and reform the local Cambodian judiciary in so doing.<sup>181</sup> Numerous safeguards exist 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>182</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 underscoring the value of holding the trials in Cambodia, in Khmer, that are reported on local media and accessible to Cambodian people. As an EC representative pointed out:

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178. Peou, *supra* note 29.

179. *Id.*

180. These include individuals such as Chea Sim (chair of the Cambodian People's Party, member of the Politburo, and President of the Senate), Heng Samrin (President of the first government after the Vietnamese invasion), Bou Thang, Chea Soth, Ros Samay, Pen Sovan, and Kaev Chanda.

181. 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 to 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. Open Society Justice Initiative, Cambodia Working Group, *available at* [http://www.justiceinitiative.org/activities/ij/cambodia\\_working\\_group](http://www.justiceinitiative.org/activities/ij/cambodia_working_group) (last visited Apr. 19, 2006).

182. 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. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *available at* <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>.

The notion of having the trials in Cambodia is crucial. We have every reason to believe that the trials in Phnom Penh will be a more meaningful process because they are in the country where the crimes took place instead of being remote trials imposed from without. In the negotiations with the UN, the government wanted to be a partner and even more, in no way wanted to relinquish ownership. It would have been unacceptable to follow the recommendations of the Group of Experts that this be an entirely international process, neither domestic nor hybrid.<sup>183</sup>

This local ownership is considered critical not only for symbolic and cultural reasons, but from a very pragmatic approach as well, one focused on the idea that “there is a great potential for transfers from the hybrid back into the domestic legal system, with better techniques, technologies, information systems, financial and personnel management systems, databases.”<sup>184</sup> The Cambodian nominees to the EC “hope that the EC will be able to play the role of a model court.”<sup>185</sup>

While the local judiciary does have its flaws, there is every reason to believe that the defense will mount a vigorous case, that competent judges will be chosen who will remain independent of the government, and that the Cambodian staff involved in the EC will hone a large variety of crucial skills which they can transfer back to the local justice system. Unless the EC experiences unexpected and serious failures, it offers a real opportunity to foster a culture of respect for the judicial system and the rule of law in Cambodia, and potentially even inspire much-needed reforms of Cambodian domestic criminal law.

Moreover, anxieties about the choice of defendants must be addressed here. It seems quite probable that the ten most senior Khmer Rouge still living will in fact be prosecuted, regardless of their current status and connections. On another note, the decision to limit prosecutions to those most responsible must be recognized as a creative engagement on the one hand with the need to fight impunity at the highest levels, and on the other with the importance of encouraging healing and integration of lower-level perpetrators and victims, lest prosecutions undermine Cambodia’s fragile peace.<sup>186</sup> In conclusion, it is worth noting that although the court’s jurisdiction is indeed spatially and temporally limited, it nonetheless presents a unique opportunity to highlight the crimes of

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183. Interview with Helen Jarvis, Chief of Public Affairs, Extraordinary Chambers in the Courts of Cambodia (March 19, 2006).

184. *Id.*

185. *Id.*

186. Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 191-229 (George J. Andreopoulos ed., 1994).

Kissinger, Nixon, Mao, and others whose actions contributed to atrocities in Cambodia.

### **E. Supreme Iraqi Criminal Tribunal, Formerly the Iraq Special Tribunal**

During his dictatorship of Iraq, Saddam Hussein killed an estimated 180,000 Kurds and destroyed over 450 Kurdish villages and towns, killed approximately 200,000 Shi'a, killed an additional 200,000 people, displaced about 900,000 people or forced them into camps, embroiled his nation in the Iran-Iraq war which claimed 500,000 to 700,000 lives, and left behind at least 300 mass graves.<sup>187</sup> Ravaged by decades of brutal authoritarian rule and massive human rights violations under the regime of Saddam Hussein, Iraq has been profoundly destabilized since the 2003 United States and British occupation, plagued by violence and political turmoil. Efforts to build accountability mechanisms for Saddam-era abuses proved fraught with dangers and complexities, and ultimately culminated in the creation of an internationalized domestic court which stretches the definition of "hybrid tribunal."

Although the Bush administration has tentatively allowed for hybrid courts as viable alternatives to the ICC in theory,<sup>188</sup> administration officials 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 significant international intervention in the trials of Saddam Hussein and other Iraqi leaders for political reasons, out of a desire to control the justice process, in order to avoid embarrassing reminders of past American support for Saddam's government,<sup>189</sup> or as a response to local desires for Iraqi trials.<sup>190</sup> For whatever reason, in crafting a

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187. SADDAM HUSSEIN: HISTOIRE D'UN PROCÈS ANNONCÉ (Arte (France) television broadcast Nov. 21, 2005). For a sophisticated account of Saddam's regime and its human rights violations, see KANAN MAKIYA, *REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ* (1998).

188. For one of the many descriptions of the Bush administration's resistance to the International Criminal Court, see Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?*, 14 *EMORY INT'L. L. REV.* 213, 272-75 (2000). See also Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 *GEO. L.J.* 381, 385 (2000).

189. For a discussion about U.S. resistance to a hybrid in Iraq, see Mark Matthews, *During Trial, Hussein May Try to Implicate Western Leaders*, *BALTIMORE SUN*, Dec. 17, 2003, available at <http://www.sunspot.net/news/nationworld/iraq/bal-te.trial17dec17,0,3097763.story?coll=bal-home-headlines>.

190. Interviews with Tom Parker, Former Officer, M.I.5, British Intelligence Agency (Oct. 2003). Parker was the head of the Coalition Provisional Authority's crimes against humanity investigations unit, and also taught at Yale. See also Tom Parker, *Judgment at Baghdad*, *N.Y. TIMES*, July 7, 2004, at A21, available at <http://www.nytimes.com/2004/07/07/opinion/07PARK.html?ex=1090250826&ei=1&en=a>

position on trials in Iraq, the Bush administration staunchly opposed involvement by the U.N. or any other international body as such.<sup>191</sup> The Bush administration rejected proposals by State Department representatives,<sup>192</sup> academics, and international law practitioners<sup>193</sup> who advocated a hybrid court for Iraq and who drafted models for a mixed tribunal, which would have applied domestic and international law with Iraqi judges and international judges drawn from Arab countries.

In September 2003, the idea of an Iraqi national tribunal bolstered by international support was being actively pursued by DoD [US Department of Defense], DoS [US Department of State], and DoJ [US Department of Justice], and it was coordinated by the National Security Council . . . . Ultimately supported by the GC and the CPA [Coalition Provisional

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50f7dca15be3f71; Human Rights Center, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, INT'L CTR. FOR TRANSITIONAL JUSTICE (May, 2004), available at <http://www.ictj.org/images/content/1/0/108.pdf> (the study, conducted in Iraq in July and August of 2003 with 395 Iraqi men and women from a variety of ethnic, religious and social backgrounds, in exploring popular perceptions of post-Saddam justice initiatives, asked respondents if they preferred local or hybrid tribunals; the overwhelming response was in favor of local trials).

191. See Frank J. Murray, *U.S. Will Prosecute Iraqis for War Crimes*, WASH. TIMES, Apr. 9, 2003, at A1.

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.'

*Id.*

192. 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 [forty-one] Iraqi expatriate jurists and a number of US experts." See Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the "Iraq Special Tribunal"* at 11 (unpublished paper, on file with The Arizona Journal of International and Comparative Law).

193. For a discussion on drawing on judges from Arab countries with distinguished judiciaries to enhance the legitimacy of the proposed Iraqi court, see Burke-White, *supra* note 7, at 755. 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.

Authority], the initiative led to the drafting of the statute for the Iraqi Special Tribunal, September to December 2003.<sup>194</sup>

In the end, the Iraqi Special Tribunal statute<sup>195</sup> allows for non-Iraqi participants chosen by Iraqis, as the government may also appoint non-Iraqi judges if such a move is deemed necessary. However, the statute does not mandate that non-Iraqi participation be structured or linked with any kind of institution like the U.N.<sup>196</sup> (Presumably the President of the Tribunal may request assistance from the U.N. or any other entity in appointing non-Iraqi experts or international advisors, but there is no formal structure/requirement to do so.)

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>197</sup>

This provides for international participation of some sort, although given the tribunal’s enforcement of the death penalty few countries with reputable judiciaries aside from the U.S. are likely to be involved or send staff.<sup>198</sup> Indeed, thus far, “international” participation has been more of a euphemism for U.S. involvement than anything else. The current structure of the Iraqi court (which was amended from the Iraqi Special Tribunal<sup>199</sup> to the Supreme Iraqi Criminal Tribunal (SICT) in a process described below) closely resembles a domestic court

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194. See Bassiouni, *supra* note 192, at 19.

195. See The Coalition Provisional Authority, *The Statute of the Iraqi Special Tribunal*, available at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm).

196. *Id.* 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.” *Id.*

197. See Bassiouni, *supra* note 192, at 44.

198. Interview with Tom Parker, *supra* note 15. Tom Parker served for six months in 2003-2004 as the United Kingdom’s Special Adviser on Transitional Justice to the Coalition Provisional Authority (CPA) in Baghdad, Iraq and as Head of the CPA’s Crimes Against Humanity Investigation Unit, prior to which he worked for six years for British Security Service (MI5) running complex counterterrorism and organized crime investigations. Parker stated that “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.” *Id.* For a comprehensive list of those countries that apply the death penalty and those that do not, see the Death Penalty Information Center website, <http://www.deathpenaltyinfo.org/article.php?scid=30&did=140>.

199. The Iraqi Special Tribunal Website is at <http://www.iraq-ist.org/en/home.htm>.

although the court retains the authority to apply both domestic and international law, making it an internationalized domestic court with extensive U.S. participation.

The Iraqi judges and prosecutors have thus far proven to be of very high caliber, in part thanks to the relatively large pool of available legal talent, especially when contrasted to more devastated post-atrocity judiciaries like that of East Timor. According to one of the five experts selected from around the world by the Department of Justice Regimes Crimes Liaison Office (DoJ RCLO) in Baghdad to help train the IST judges, in January 2005, there were approximately 20,000 members of the Iraqi bar, 10,000 of whom resided in Baghdad. Of 900 available judges, about 150 were disqualified because they were active members of the Ba'athist party associated with Saddam Hussein's National Security Courts. This left 750 judges with experience in non-political murder cases, assault cases, rape cases, and cases involving torts, contracts, family law, and property matters.<sup>200</sup>

Like the judges, the rest of the staff has proved competent. The prosecution in particular has been able to develop a clear and coherent strategy. Thus far, the IST/SICT has decided to try Saddam Hussein and other former Ba'ath regime leaders in a series of cases focusing on specific incidents rather than a mega trial like the Milosevic case at the ICTY.<sup>201</sup> By deciding to start with a small, simple case, the prosecution will be able to focus on the broad legal challenges to the process brought by the defense, which will then prevent the defense from re-litigating these thorny issues because of *res judicata*. It is

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200. Curtis F. J. Doebbler & Michael P. Scharf, "Can Saddam Hussein get a Fair Trial?", Debate at Case Western Reserve School of Law (Jan. 13, 2005) [hereinafter Fair Trial Debate], available at [http://www.law.case.edu/saddamtrial/entry.asp?entry\\_id=1](http://www.law.case.edu/saddamtrial/entry.asp?entry_id=1).

201. The first case brought—in many ways one of the simplest possible cases Saddam Hussein could face—was the al-Dujail case, dealing with the crimes against humanity that occurred in 1982; the torture, forced expulsion, disappearance, and premeditated murder of more than 140 individuals of a Shi'a Muslim town in retaliation for a 1982 assassination attempt on Hussein as his motorcade passed through the town, fifty miles north of Baghdad. Prosecutors are expected to set out how the former Iraqi president subsequently sent his security forces to punish the town, imprisoning and torturing residents before finally executing 143 of them at the Abu Ghraib jail. Reportedly, eye witnesses are available to testify, forensic evidence has been collected and preserved, and videos and documents discovered in the aftermath of the 2003 U.S.-led invasion are claimed to prove the atrocity as well as who ordered it and how it was carried out, and to link Hussein directly to the killings, making it easier to prosecute than some higher-profile incidents where the chain of command is harder to demonstrate. The Dujail case sees Hussein and seven co-defendants in the dock: his then-intelligence chief, Barazan Ibrahim Al-Hassan; his vice president, Taha Yassin Ramadan; the head of his court, Awad Hamed al-Bandar; and four senior Ba'ath Party officials in the Dujail region, Abdullah Kazim Ruwayyid, Ali Dayim Ali, Mohammed Azawi Ali, and Mizhar Abdullah Ruwayyid. Other future defendants could include Aead Futaih Khaleefa, Muhsen Khedher Abass, Watban Ibrahim Al-Hassan, Mohammed Zeman Abd Al-Razaq, and Lateef Nusaif Jassim.



estimated that approximately twelve cases will be brought to put Saddam in the dock with a small group of top Ba'athists, including: the case of al-Dujail where 143 Shi'a suffered crimes against humanity and were killed in 1982; the gassing of the Kurdish town of Halabja in 1988; the Anfal campaign against Kurds between February and September 1988; ethnic attacks in Kirkuk; the massacre of Shi'a Muslims after their 1991 revolt; the 1990 invasion of Kuwait; the 1980-88 Iran-Iraq war; the systematic attacks on Marsh Arabs; the killing and deportation of the U'Faii Kurds; and the liquidation of political and religious parties.

From the beginning, the tribunal had to cope with a range of worrisome difficulties. Logistically, the court suffered from linguistic problems,<sup>202</sup> partly due to the dramatic lack of Arabic-speakers in the Regimes Crimes Liaison Office which ran and is running many operations for the IST. Moreover, the IST faced conflicts inherent in mingling an American-style adversarial system with an Iraqi inquisitorial one, and had to tackle the issues of excessive American interference, and politicization.<sup>203</sup> More worrisome was the inadequate training of staff, especially of judges whose background as low-ranking judicial officers left them unprepared to cope with the massive dimensions of the IST trials.<sup>204</sup> Despite the importance of the aforementioned problems, the main obstacles to the IST's smooth functioning proved to be legitimacy concerns, political interference, and security crises.

The IST's legitimacy remained uncertain for some time because of massive political change in Iraq, raising the question of what future Iraqi governments would decide to do about the IST and how much they would challenge American ownership of the trials. The problem of the United States violation of international occupation law and the fundamentally problematic nature of the TAL<sup>205</sup> raised many questions about the court's legitimacy for some time. Numerous scholars made the argument that the Iraqi tribunal could be considered an illegal entity because 1) the American-British invasion of Iraq was an illegal occupation, based on an illegal use of force against the territorial integrity and political independence of a sovereign country, in violation of

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202. The official language of the IST is set to be Arabic, but the official, controlling version of the Statute is in English. Moreover, "[p]ursuant 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." *Id.* at 43.

203. Eric Stover et al., *Bremer's "Gordian Knot:" Transitional Justice and the US Occupation of Iraq*, 27 HUMAN RIGHTS Q. 830 (2005).

204. Interview with Salem Chalabi, General Director of the Iraqi Special Tribunal (Feb. 3, 2005).

205. 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 Greg Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 211-12 (2005).

international law,<sup>206</sup> and 2) there was an ongoing use of force against the people of Iraq and an occupation of large parts of Iraq.<sup>207</sup> This argument hinges on the Fourth Geneva Convention statement that an occupying power may not dissolve the judicial bodies of a country and institute its own judicial bodies except in a situation of necessity. Thus, a narrow interpretation of the Geneva Conventions would view the IST as having been an illegitimate judicial institution with regard to its status as a creation of an occupying power without a military or an emergency humanitarian reason for its establishment.

Changes made to the IST and its transformation into the SICT may be considered to have obviated some legitimacy concerns. The retroactive approval of both elected and unelected Iraqi governments, in some sense could rectify problems arising from the original establishment by the American occupying forces. Important modifications include the retroactive approval by the Iraqi Governing Council—although it was unelected—and more specifically the IGC’s promulgation of the Statute of the Iraqi Special Tribunal on December 10, 2003. Another key legal development was Article 48 of the Law of Administration for the State of Iraq for the Transitional Period (Iraq’s interim constitution), which confirms the 2003 Statute as exclusively defining the IST’s jurisdiction and procedures. On August 11, 2005, the Transitional National Assembly instituted a revised Statute for the IST, which abrogated in full the 2003 Statute, demonstrating that the IST was the will of the elected Iraqi Government and lending legitimacy to the institution. By voting to change the court’s name and some of its practices in order to bring them more into line with the rest of the country’s judicial system, the Iraqi National Assembly weakened the argument that the court is an illegal entity established by an occupying power in violation of the Geneva Conventions.

Although some of the court’s larger legitimacy issues have been partially resolved by Iraqi government actions described above, and although the prosecution strategy appears to be sound in many respects, the Iraqi court has shown itself to be vulnerable to violence, intimidation, and interference from powerful political interests.

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206. A brief list of some scholars making this claim includes: Professor Philippe Sands QC, a member of Cherie Booth’s Matrix chambers; Professor Christine Chinkin, professor of international law at the London School of Economics; Jan Kavan, the president of the U.N. General Assembly and former Czech foreign minister; British Attorney General, Lord Goldsmith; Professor Robert Black QC Professor of Scots law, Edinburgh University, and architect of the Lockerbie trial in The Hague; Professor Vaughan Lowe Chichele Professor of Public International Law, All Souls College, Oxford; Professor James Crawford Whewell Professor of International Law, Jesus College, Cambridge; Professor Mary Kaldor Professor of global governance, London School of Economics; Professor Burns Weston, a human rights lawyer at the University of Iowa; Professor Sean Murphy Associate professor of law at George Washington University, Washington D.C.

207. *See* Fair Trial Debate, *supra* note 200.

Political interference remains a major challenge for the court. The continued influence and, indeed, dominance of American staff through the Regimes Crimes Liaison Office, headed up by Greg Kehoe, raises uncomfortable questions about politically motivated U.S. interference in the trials.

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 grater influence than a mere technical support group, and [has been] very engaged in almost every aspect of the tribunal's work, from evidence gathering to establishing the infrastructure.<sup>208</sup>

Likewise, the appearance of Iraqi government interference with the independence of the judges may threaten the fairness of the proceedings and can be seen as an attack on judicial independence.<sup>209</sup> In particular, public criticism by senior Iraqi government officials and demands by ruling party parliamentarians for Presiding Judge Rizgar Amin's dismissal, which contributed to Judge Amin's resignation, and the subsequent challenges to Judge Amin's successor Judge Saeed al-Hammashi by Iraq's De-Ba'athification Commission, have created the appearance of a court subject to political interference. This is particularly so in light of the De-Ba'athification Commission's July 2005 request for the dismissal of more than twenty judges and other court personnel due to alleged former membership in the Ba'ath Party. A dismissal was blocked only by the intervention of Iraqi President Jalal Talabani and Prime Minister Ibrahim al-Ja'afari.

The court has also suffered significantly from problems with security, since the war in Iraq makes both investigations and trials extremely dangerous.<sup>210</sup>

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208. Bassiouni, *supra* note 192, at 22.

209. Press Release, Human Rights Watch, Saddam Hussein Trial at Risk: Government Undermines Independence of Judges (Jan. 27, 2006), available at <http://hrw.org/english/docs/2006/01/27/iraq12541.htm>.

210. In the Lancet medical journal, available at <http://www.thelancet.com/>, experts from the United States and Iraq published a study finding that the risk of death for Iraqi civilians was 2.5 times greater after the United States invasion. L. Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, THE LANCET, Nov. 20, 2004, at 1857-64. The Lancet estimated that nearly 100,000 more Iraqis have died during the U.S.-led occupation than would have been expected otherwise. The major causes of death before the invasion were found to be myocardial infarction, cerebrovascular accidents, and other chronic disorders whereas after the invasion violence was the primary cause of death. Violent deaths were widespread, reported in fifteen of thirty-three clusters,

According to Salem Chalabi, the first General Director of the IST, the tribunal suffered from the volatile security situation on the ground in Iraq from the beginning. Elaborate security measures have been taken to protect judges, prosecutors and witnesses in the Saddam trial, including keeping their names secret as long as possible. Many prosecution staff and judges live under virtual house arrest in the Green Zone where the courtroom is located, which serves to further create the impression of a court run by occupying American forces. Still, several staff members and defense attorneys in the Iraq court have been killed.<sup>211</sup> After the killings of defense attorneys Saadoun al-Janabi and Adel al-Zubeidi, the defense demanded “direct, neutral international intervention that guarantees” security from the tribunal<sup>212</sup> and suspended dealings with the court until their security was guaranteed – although the defense turned down offers to move trials elsewhere or to live in the heavily guarded Green Zone for the duration of the trial.

Ultimately, the Iraq court is a fascinating departure from the more classic model of a hybrid court. It is a national Iraqi court which will apply domestic and international law with tremendous U.S. influence, but hardly any input from other international actors or bodies, all in a highly volatile, dangerous context.

#### **F. The War Crimes Chamber of the State Court of Bosnia and Herzegovina**

An estimated 150,000 to 250,000 people were killed in the armed conflict in Bosnia and Herzegovina (BiH) between 1992 and 1995.<sup>213</sup> The war was also characterized by widespread rapes, massive displacement of people with approximately 1,000,000 refugees and another 1,000,000 internally displaced, and

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and were mainly attributed to coalition forces. Most individuals reportedly killed by coalition forces were women and children. The risk of death from violence in the period after the invasion was fifty-eight times higher than in the period before the war. The Iraq Body Count organization provides a credible compilation of civilian deaths that have been *reported* by recognized sources, and its minimum estimates for Iraqi civilian casualties is 34,446, with a 38,594 maximum. See <http://www.iraqbodycount.net/> (last visited Apr. 17, 2006).

211. Defense lawyer Saadoun al-Janabi was abducted by masked gunmen the day after the opening session. His body was found later with bullets in his head. Adel al-Zubeidi, lawyer for former Vice President Taha Yassin Ramadan, was killed by gunmen in Baghdad and another attorney was wounded.

212. Khalil al-Doulaïmi, the head of the defense team, released a statement to reporters declaring that the defense considers the Nov. 28 trial date “null and void” because of the “very dangerous circumstances that prevent the presence” of the attorneys and demanding security guarantees. *Saddam Lawyers Demand Protection During Trial*, ASSOCIATED PRESS, Nov. 9, 2005, available at <http://www.msnbc.msn.com/id/9966676/>.

213. The Sarajevo based Research and Documentation Center estimates that the final figure is unlikely to be higher than 150,000. Research and Documentation Center, Sarajevo, <http://www.idc.org.ba/aboutus.html>.

the destruction of about thirty-five percent of pre-war residential dwellings including much of BiH's technical and social infrastructure. The war in BiH was brought to an end by the signing of the General Framework Agreement for Peace in the BiH.<sup>214</sup>

Civilian and military domestic courts in BiH tried war crimes during and after the conflict, but were hampered by the loss of skilled lawyers and judges, physical destruction, and the difficulties of working in a two-entity state with separate legal systems, police forces, and ministries of justice. The judiciary and prosecutor offices in different parts of the country were dominated by the majority ethnicity, which compounded the minority's lack of public faith in the judicial system<sup>215</sup> and widespread perceptions of ethnic bias.<sup>216</sup>

The formal establishment of the War Crimes Chamber (WCC) of the State Court of Bosnia and Herzegovina (BiH) on January 6, 2005 in Sarajevo marked the creation of the latest, and perhaps best planned, hybrid tribunal after several years of discussions.<sup>217</sup> Its location in Sarajevo makes the WCC accessible to the local population, and its structure harnesses the strengths of international elements while remaining anchored in local law, recognizing the need to maintain local ownership of the justice process. International and domestic law will both play key roles.<sup>218</sup> The WCC is an institution of BiH operating under the laws of

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214. The General Framework Agreement for Peace in the BiH (GFAP), also known as the Dayton Peace Agreement, which divided the state of Bosnia into two entities: the Republic of Srpska and the Federation of Bosnia and Herzegovina, wherein the Brčko District is separately organized.

215. See *Kosovo's War Crimes Trials*, *supra* note 99.

216. See Human Rights Watch, *Looking for Justice: the War Crimes Chamber in Bosnia and Herzegovina*, 18 HUM. RTS. WATCH REP. No. 1 (2006) [hereinafter Human Rights Watch, *Looking for Justice*], <http://hrw.org/reports/2006/ij0206/ij0206web.pdf>; see also Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, 16 HUM. RTS. WATCH REP. No. 7 (2004), available at <http://hrw.org/reports/2004/icty1004/icty1004.pdf>.

217. The new Chamber was first formally proposed at the Peace Implementation Council (PIC) Steering Board meeting on June 12, 2003, and was the subject of subsequent discussion between the ICTY and Office of the High Representative (OHR) throughout 2003 and 2004. See Peace Implementation Council (PIC) Declaration, June 12, 2003, available at [http://www.ohr.int/pic/default.asp?content\\_id=30074](http://www.ohr.int/pic/default.asp?content_id=30074). For the websites of the Registry and the State Court, see <http://www.registrarbih.gov.ba> and <http://www.sudbih.gov.ba>.

218. Article II(2) of the Constitution of BiH provides that the rights and freedoms set forth in the European Convention on Human Rights (ECHR) shall apply directly in BiH and have priority over all other laws. See Constitution of Bosnia and Herzegovina art. II(2). The BiH also ratified the ECHR on July 12, 2002. The Geneva Conventions of 1949 were ratified on April 21, 1950, and the 1977 Protocols on June 11, 1979. The BiH became a party to these conventions upon its succession on December 31, 1992. Applicable domestic law will be the 1977 Criminal Code of the Socialist Federal Republic of

the State of BiH, but creatively engages with international personnel and international law. Its international staff will play an important role at first but will be phased out in about five years. Although in the first phase the WCC will have two international judges sit with one national judge on all panels (trial and appeals), the international judges will be phased out in a five year period, leaving only national judges in the end. Likewise, the Office of the Prosecutor will start out with seven international prosecutors but will be replaced by locals. The Registry will also evolve from a hybrid to a purely domestic structure.<sup>219</sup> Headed by an international director, the Criminal Defense Support Section is widely known by its Bosnian acronym OKO (*Odsjek Krivicne Odbrane*)<sup>220</sup> and represents a step forward in a system where previously defense counsel were not assisted. With the assistance of the American Bar Association Central European and Eurasian Law Initiative (ABA-CEELI), the OKO has made “considerable efforts to contribute to the existing capacity of local legal professionals in order to promote the effective representation of defendants in war crimes proceedings before the WCC . . . . By the end of 2007, it is estimated that OKO will have trained approximately 350 lawyers.”<sup>221</sup>

In the Bosnia hybrid, the international staff may be able to build local capacity with respect to complex war crimes cases, and perhaps help prepare their domestic counterparts to better engage with the newly reformed, more adversarial Bosnian law. The prosecution has already organized training sessions for personnel on international humanitarian law, the Geneva Conventions, human rights, war crimes investigations, information technology, and media.

As the ICTY implements its completion strategy, lower and intermediate ranking cases will be referred to the new War Crimes Chamber, which will probably hear about eighty or 100 cases.<sup>222</sup> “The ICTY maintains the jurisdiction to rescind the order for referral before conviction or acquittal of the defendant if there are concerns regarding the conduct of the trial in Bosnia,”<sup>223</sup> which provides additional incentive to prosecute the cases fairly. Although the precise number to be tried by this new Chamber has yet to be determined, the BiH Prosecutor’s

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Yugoslavia (SFRY) rather than the new criminal codes adopted in Federation of Bosnia-Herzegovina (FBiH), Republika Srpska (RS), and at BiH state-level.

219. Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles* 10 (Mar. 2005) [hereinafter OSCE Report], available at [http://www.osce.org/press\\_rel/2005/pdf\\_documents/03-4802-bih1.pdf](http://www.osce.org/press_rel/2005/pdf_documents/03-4802-bih1.pdf).

220. OKO’s website is located at <http://www.okobih.ba>.

221. See Human Rights Watch, *Looking for Justice*, *supra* note 216, at 24.

222. The WCC will probably hear three types of cases: 1) those deferred by the ICTY in accordance with Rule 11 bis of the ICTY Rules of Procedure and Evidence (about fifteen people), 2) those for which the ICTY has not yet issued indictments (from thirty to fifty), and 3) Rules of the Road cases. The ICTY Appeals Chamber has already referred to the WCC the cases of Radovan Stakovic and Gojko Jankovic

223. See Human Rights Watch, *Looking for Justice*, *supra* note 216, at 9.

Office has confirmed that the Chamber will hear only the most serious “highly sensitive” cases, as it will have “neither the resources nor the time to try all war crimes cases.”<sup>224</sup> Thus, its work will have to be completed at a lower level with war crimes trials before the cantonal and district courts of BiH, the Basic Court of Brčko District, and the district courts of the Republika Srpska.<sup>225</sup> Thus, the ultimate success of the transitional justice initiative will depend not only on the War Crimes Chamber, but also on the lower courts receiving the funding and attention that they need.

Obstacles to effective functioning include “political indifference of biased or uncommitted authorities, the fear of judges and prosecutors for their personal security, difficulties with locating and securing the attendance of witnesses and defendants, as well as inadequate commitments, structures and procedures for trans-border cooperation.”<sup>226</sup> Prosecutors also have to face “inadequate witness protection mechanisms, large case loads, inadequate legal resources and poor dissemination of law reports and legal texts, insufficient training on humanitarian law and necessary skills such as cross-examination, indictment drafting and witness selection.”<sup>227</sup> The War Crimes Unit of the Bosnian State Investigation and Protection Agency (SIPA), which has the authority to conduct investigations, is also tremendously understaffed and overburdened.<sup>228</sup>

Major legal reforms in the local justice system, the new 2003 criminal procedure codes and the establishment of the state-level War Crimes Chamber created substantial procedural and jurisdictional uncertainty which the entity courts have had to face.<sup>229</sup> However, the concomitant implementation of thoughtful, wide-reaching legal reform and the creation of a hybrid court serving as a model court offer not only challenges, but also opportunities.

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224. See OSCE Report, *supra* note 219, at 10.

225. *Id.*

226. OSCE Report, *supra* note 219, at ii.

227. *Id.*

228. See Human Rights Watch, *Looking for Justice*, *supra* note 216, at 14.

229. *Id.*

The creation of the WCC was part of an overhaul of the national justice system by the High Representative. This overhaul included numerous reforms of Bosnian criminal law, among them the introduction in 2003 of the state-level criminal and criminal procedure codes, the former of which established the State Court’s jurisdiction over war crimes. As part of the State Court, the WCC exercises supreme jurisdiction over the most serious war crimes cases in Bosnia, while the cantonal and district courts can handle other war crimes cases.

*Id.* at 7.

Moreover, the Public Information and Outreach Section (PIOS) of the WCC has engaged in “several innovative and potentially far-reaching initiatives,”<sup>230</sup> including visits by victims groups to the State Court, media awareness initiatives<sup>231</sup> and developing the Court Support Network, which facilitates the creation of a network of NGOs to disseminate information about the WCC throughout Bosnia.

#### IV. CRITIQUES OF HYBRIDS

All of the existing hybrids have provoked their fair share of criticisms, many of them justified, and some of which are elucidated above. 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 the failure of existing hybrids’ on the ground, and to explore possible solutions to these problems.

##### **A. Differentiating between Inherent Flaws of the Hybrid Model and the Problems of Existing Hybrids**

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>232</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 existing 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 might well reveal that many of

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230. *See id.* at 35.

231. The PIOS assisted in designing the curriculum of the training of journalists in war crimes reporting organized by the Balkan Investigative Reporting Network.

232. 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, Apr. 16, 2003, at A4.



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>233</sup> is revelatory.

## **B. Flaws Inherent in the Hybrid Model**

One of the hybrid model's most serious potential flaws is that instead of incorporating the best of both international and local judicial systems, it may reflect the worst of both. Ideally, hybrids' value lie in their fluidity and ability to adapt to local culture, language, and law while maintaining the core values of international criminal law, which anchor them, and impart 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, and they can still become kangaroo courts, valuing expediency at the expense of proper procedure.

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, good management, and funding.

### **1. Dangers of Violence and Intimidation**

Hybrids share many of the problems experienced by national courts. It can frequently be dangerous for war crimes trials to take place *in situ* – 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, and police leaders in their former fiefdoms when they retain significant support bases can be enormously dangerous.<sup>234</sup> Even incarcerating

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233. 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 (Apr. 7, 2004).

234. Nizich, *supra* note 22, at 234.

perpetrators might “not be feasible if their supporters retain significant military or paramilitary power to force their release.”

With trials held in-theatre, 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>235</sup> The very real dangers of intimidation are acknowledged in the U.S. legal system’s change of venue laws—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.<sup>236</sup>

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; adequate sums should also be disbursed for the best available security technology. In extreme circumstances, a portion of the trials can be held outside of the country.

## 2. 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>237</sup> Local participation in hybrid tribunals can thus open the door to “sham trials by insincere regimes implicated in the very atrocities adjudicated.”<sup>238</sup> On the opposite extreme of the spectrum, local input can also create a space for “political

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235. 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.

236. See 28 U.S.C. § 1404 (2000) (change of venue). 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 *Brecheen v. Okla.*, 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. See, e.g., *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993); *United States v. Vario*, 943 F.2d 236 (2d Cir. 1991). A case where nationwide 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.

237. See Madeline H. Morris, *Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 337 (2001).

238. Alvarez, *Crimes of States*, *supra* note 20, at 370.

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>239</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 and 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.

### 3. Logistical and Personnel Difficulties and the Danger of Corruption

Hybrid courts face many of the logistical and training difficulties of local trials. Since 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 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, but creating compensatory mechanisms, strict operating guidelines, transparency and information-sharing systems, and external audits can stem excesses.

### 4. 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

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239. *Id.*

substantive rules emerge in different regions.”<sup>240</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>241</sup> Jonathan Charney explains the danger: “Significant variations in general international law . . . could undermine the perceived uniformity and universality of international law.”<sup>242</sup> The net result could be that “the increased multiplicity of international dispute settlement forums may present particular difficulties for the international legal system.”<sup>243</sup> Variations in substantive rules of international criminal law might create havoc<sup>244</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. 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>245</sup>

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240. Burke-White, *supra* note 7, at 755.

241. 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., Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT’L L.J. 57, 65-66 (1994); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 105, 125 (1998), available at <http://www.ppl.nl/bibliographies/all/showresults.php?bibliography=recueil&authorstartswith=C>.

242. Charney, *supra* note 241, at 134.

243. *Id.*

244. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT’L L. 267, 272 (2001).

245. Burke-White, *supra* note 7, at 756-57.

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

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>246</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>247</sup>

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>248</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>249</sup>

Jonathan Charney’s exhaustive study to determine the impact of the proliferation of international tribunals<sup>250</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>251</sup> across eight substantive

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acts including murder conducted against a civilian population as part of a wide-spread and systematic attack.

*Id.* at 756. Burke-White cautions that if a regional court redefined “widespread” or “systematic” even slightly, “great variation in what constitutes a crime against humanity could occur. 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.” *Id.* at 756. See also Guénaél 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) (noting that the core elements of the crime are (1) a widespread and systematic attack on (2) a civilian population).

246. See Charney, *supra* note 241, at 134.

247. See Buergenthal, *supra* note 244, at 272.

248. Burke-White, *supra* note 7, at 757.

249. Charney, *supra* note 241, at 137.

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

251. 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 Charney, *supra* note 241.

areas,<sup>252</sup> Charney found that the various tribunals “share a coherent understanding of that law,”<sup>253</sup> and differ remarkably little in their interpretation of 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>254</sup>

Based on his interviews with actors in various international tribunals,<sup>255</sup> William Burke-White finds that other courts’ “deference to the ICTY has effectively created a system whereby ICTY decisions have a quasi-stare decisis effect, thus helping to ensure uniformity of the international legal system.”<sup>256</sup> He believes that similarly, “a great deal of deference . . . to the decisions of the ICC can be expected.”<sup>257</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>258</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>259</sup>

##### 5. Lack of Chapter VII Authority to Require State Cooperation

While international ad hoc tribunals established by the Security Council pursuant to its Chapter VII powers have the authority to require state cooperation, hybrids which are otherwise established do not (although the Security Council

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252. These include sources of law, the law of state responsibility, and the law of exhaustion of domestic remedies. *Id.*

253. *Id.* at 347.

254. *Id.* at 371.

255. Interview by Burke-White with Sylver Ntukamazina, Judge, UNTAET Special Crimes Unit, in Dili, East Timor (Jan. 19, 2002) (Judge Ntukamazina frequently relies on the ICTY and ICTR). *See also* Interview by Burke-White with Stuart Alford, Prosecutor, UNTAET Special Crimes Unit, in Dili, East Timor (Jan. 14, 2002) (Alford also consults the Rome Statute, the ICC Preparatory Commission materials, and ICTY and ICTR judgments).

256. Burke-White, *supra* note 7, at 757.

257. *Id.*

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

259. Mettraux, *supra* note 245, at 238.

could establish hybrid tribunals, it has shown no signs of considering this possibility thus far). Theoretically speaking, this weakens hybrids considerably, since they have less leverage with states where alleged perpetrators are located. Hybrids not created by the Security Council cannot, for example, threaten recalcitrant host states with sanctions. Rather, effective prosecutions would be heavily dependent on the willingness of authorities to cooperate in order to substantiate allegations, obtain evidence, and locate, arrest, and try defendants.

However, in reality, international ad hoc tribunals established by the Security Council pursuant to its Chapter VII powers are not able to harness the power of the Security Council to impose sanctions—they too rely on the goodwill of states for cooperation. In practice, hybrids are no weaker than international ad hoc tribunals when it comes to requesting the help of states.

Moreover, a civil law model of international justice trials in absentia might be permitted if it were clear that defendants had received ample notice, that the defense was satisfactory, that the trial had been fair and impartial, and that defendants had purposefully evaded trial.

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.

## V. 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 existing international ad hoc tribunals with a focus on defects that hybrids can remedy.

### **A. Shortcomings of the International Criminal Tribunal for Rwanda**

Established in 1994 in the wake of the Rwandan genocide,<sup>260</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>261</sup> Indeed, “allegations of incompetence” have continually “dogged the

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260. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955/Annex (Nov. 8, 1994) [hereinafter S.C. Res. 955].

261. In February 1997, a United Nations 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.*, Office of Internal Oversight Services, *Report on*

Rwanda court.”<sup>262</sup> Linguistic difficulties abounded, since translations were often haphazard and occasionally nonexistent. Moreover, the ICTR has “been tainted by charges of racism . . . and the revelation that four genocide suspects were working on defense teams.”<sup>263</sup> Critics also argue the court is too slow.<sup>264</sup>

Partly because of its inefficiency, corruption, and costliness, but also due to its culturally and physically inaccessible nature (the ICTR is located in Arusha, Tanzania, not in Rwanda), 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. The International Crisis Group concurs that “the survivors of the genocide find the tribunal distant and indifferent to their lot.”<sup>265</sup> Indeed, many “witnesses refused to testify after a genocide survivors’ group known as IBUKA criticized the tribunal and suspended cooperation with it.”<sup>266</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>267</sup>

The ICTR opened its Kigali information center in 2000,<sup>268</sup> five years after the tribunal’s creation. Rwanda scholar and Human Rights Watch Rwanda researcher Alison Des Forges, who worked extensively with the ICTR, told journalists 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—

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*the Audit and Investigation of the International Criminal Tribunal for Rwanda*, U.N. Doc. A/51/789/Annex (Feb. 6, 1997), available at <http://www.un.org/Depts/oios/reports/a51789/ictrtit.htm>; 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, 43 (2001).

262. England, *supra* note 33.

263. *Id.*

264. Despite the fact that most of the key suspected architects of the genocide are in custody, the ICTR has only delivered fifteen judgments involving twenty-one accused people, convicting eighteen 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 Mirjam van den Berg, *Commemorating the Rwanda Genocide: What Have We Learned?*, EUROPAWORLD (Sept. 4, 2004), available at <http://www.europaworld.org/week172/commemorating9404.htm>.

265. Kathy Marks, *The Rwanda Tribunal: Justice Delayed*, INT’L CRISIS GROUP (June 7, 2001), available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0607icg.htm>.

266. *Id.* For a description of Ibuka’s mandate and position on the ICTR, see the IBUKA website, <http://www.ibuka.org/>.

267. Marks, *supra* note 265.

268. Press Briefing, International Criminal Tribunal for Rwanda, Outreach Programme to Rwanda, ICTR/INFO-9-13-016 (Sep. 19, 2000) available at <http://69.94.11.53/ENGLISH/pressbrief/2000/brief190900.htm>.



can provide little help to most victims and surviving families.”<sup>269</sup> She pointed out that “some [ninety] percent of Rwanda’s 8.5 million people are peasants, most of whom live without electricity.”<sup>270</sup> Radio documentaries and traveling plays recreating trials in local communities that were developed by NGOs had significantly greater impact on Rwandans’ understanding of the ICTR trials than the ICTR’s meager outreach efforts.<sup>271</sup> Pernille Ironside, a specialist on the *gacaca* system,<sup>272</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.”<sup>273</sup> 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 serving their “terms in ‘luxurious’ Western prisons and, in any event, avoiding the death penalty.”<sup>274</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 genocide survivors. From the moment the U.N. drafted the ICTR statute, the Rwandan government protested<sup>275</sup> and

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269. England, *supra* note 33.

270. *Id.*

271. See, e.g., Kate Gehring, *Rwandans Laud Film on Genocide Trials, Want to See More*, INTERNEWS, March 28, 2001, available at [http://www.internews.org/news/2001/032801\\_film/032801\\_film.htm](http://www.internews.org/news/2001/032801_film/032801_film.htm).

272. *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*, Global Justice Program, [http://www.gjp.ubc.ca/\\_media/srch/030613genocide\\_through\\_gacaca.pdf](http://www.gjp.ubc.ca/_media/srch/030613genocide_through_gacaca.pdf). See also Minh Day, Note, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235 (2001); Penal Reform International, *Research Project on the Gacaca Courts*, available at [http://www.penalreform.org/english/gacaca\\_research.htm](http://www.penalreform.org/english/gacaca_research.htm). The purpose of PRI’s work on *gacaca* is to inform and advise the planning and practice of the Rwandan authorities and provide the international community with the data necessary to gauge developments in *gacaca* programme activities. By aggregating, translating and interpreting the comments, reactions and experiences of a variety of groups of ordinary Rwandans over time, PRI—with the support of the Ministry of Justice and the Gacaca department of the Supreme Court (the 6th Chamber)—has provided objective, scientifically-based findings to underpin and guide the design and implementation of the *gacaca* process.

273. See Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT’L L. REV. 31 (2002).

274. *Id.* at 35.

275. For information on the joint tribunal on Rwandan soil originally sought by Rwanda’s post-genocide government, see Alvarez, *Crimes of States*, *supra* note 20. See also Carroll, *supra* note 21.

expressed its reservations.<sup>276</sup> Irate that the seat of the ICTR was to be in Arusha, Tanzania, and that the court's proposed jurisdiction would extend beyond mid-July 1994 to include the period after the new government assumed power, 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>277</sup> Despite some positive efforts to engage with the Rwandan government,<sup>278</sup> the ICTR proved incapable of effectively managing the complex relations with the post-genocide regime.<sup>279</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>280</sup> Although the severance of diplomatic relations between the ICTR and Rwanda was later formally repaired, very little cooperation has existed 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>281</sup> signal just how little the ICTR has been able to improve

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276. For information on the Rwandan government's position, see Alvarez, *Crimes of States*, *supra* note 20; see also S.C. Res. 955, *supra* note 260. 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 through July 1994. This was rejected since broader jurisdiction for the ICTR could have led to inquiries that would have embarrassed either the U.N. or 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.

277. S.C. Res. 955, *supra* note 260 (statement of Manzi Bakuramutsa, representative of Rwanda).

278. See, e.g., Akhavan, *supra* note 27. One instance of a demonstrated effort to cooperate and reach out to the Rwandan government was the laudable proposal by then Prosecutor Louise Arbour to hold "periodic sessions in Kigali." *Id.*

279. See M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT'L L. REV. 1383 (1998).

280. See J. Coll Metcalfe, *Rwanda Normalizes Relations with UN Tribunal*, INTERNEWS, Feb. 10, 2000, available at [http://www.internews.org/activities/ICTR\\_reports/ICTRnewsFeb00.html#feb10b](http://www.internews.org/activities/ICTR_reports/ICTRnewsFeb00.html#feb10b).

281. 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.

law-making and judicial institutions on the ground in Rwanda.<sup>282</sup> With over 800 employees and a budget of around ninety million U.S. dollars, the ICTR diverted enormous resources that could have been used to rebuild parts of Rwanda's shattered judiciary. The ICTR's budget could have served to rebuild local courthouses and improve jails, endow a law school with appropriate facilities, and train a cadre of Rwandan lawyers, all of which would have been invaluable for rebuilding the Rwandan justice system in the long run and fostering a culture of rule of law.

Rwanda has been burdened with over 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>283</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>284</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>285</sup> which fails even to

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282. For a representative example of international lawyers' emphasis on the shortcomings of Rwanda's administration of the Organic Law, see RATNER & ABRAMS, *supra* note 20, at 154-56; *see also* HUMAN RIGHTS FIRST, PROSECUTING GENOCIDE IN RWANDA: THE ICTR AND NATIONAL TRIALS (July 1997), *available at* <http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm>.

283. *See* Ironside, *supra* note 273, at 32; *see also* Human Rights Watch, *Rwanda: Elections May Speed Genocide Trials* (Oct. 4, 2001), *available at* <http://www.hrea.org/lists/hr-headlines/markup/msg00053.html>; 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).

284. *See* Ironside, *supra* note 273, at 32; *see also* Human Rights Watch, *Report on Rwanda: Justice and Responsibility* (1999), *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); 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*, THE INDEPENDENT (London), Mar. 27, 1997, at 19 (adding that thousands of children are also being held in the overcrowded Rwandan jails).

285. *See* Marks, *supra* note 265.

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 [twenty-eight] months without hearing a substantial matter . . . .

give victims the satisfaction of swift, impartial justice being meted out to top perpetrators.

In sum, the ICTR's inability to connect to local populations or with the local judicial system has had major impact on its inability to fulfill its broader moral mandates of fostering the rule of law and cultivating accountability.<sup>286</sup>

### **B. Shortcomings of the International Criminal Tribunal for the Former Yugoslavia**

Most commentators agree that the ICTY<sup>287</sup> suffered from few of the ICTR's problems relating to corruption and mismanagement, despite some instances of slowness and incompetence.<sup>288</sup> However, many of the ICTR's

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*Id.*

286. *Id.* The ICTR 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.

*Id.*

287. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (annexed to Report of the Secretary-General).

288. See David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975. 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." *Id.* at 986. See also Michael P. Scharf, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: Foreword*, 37 NEW ENG. L. REV. 865 (2003). For an analysis of the court's jurisprudence, see Lucas W. Andrews, *Sailing Around the Flat*

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>289</sup>

The work of the court has often been misunderstood within all ethnic groups. 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 1999 empirical study by the University of California, Berkeley Human Rights Center, of a representative sample of Bosnian judges and prosecutors with primary or appellate jurisdiction for national war crimes trials elucidates some perceptions of lawyers and judges from all ethnic groups within Bosnia and Herzegovina. The study indicates that most interviewees were ill-informed about the ICTY and often suspicious of its motives and its results.<sup>290</sup>

Serb populations across all of the former Yugoslavia have been particularly unresponsive, typically considering the ICTY a Western imposition and tainted by imperialism.<sup>291</sup> According to Bogdan Ivanisevic of Human Rights

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*Earth: The International Criminal Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471 (1997).

289. Facts On File News Services, *War Crimes Tribunals: An In-Depth Analysis* (May 23, 2003), available at [http://www.2facts.com/ICOF/search/i0202010.asp#i0202010\\_4](http://www.2facts.com/ICOF/search/i0202010.asp#i0202010_4).

290. *See Justice, Accountability and Social Reconstruction*, *supra* note 111.

291. *See id.* Bosnian

judges and prosecutors had limited or no access to legal publications from or about the ICTY. A universal criticism of the ICTY by legal professionals was that they perceived their sporadic contact with the tribunal as a sign of disrespect. Moreover, they expressed several areas of concern with the ICTY: its unique blend of civil and common law procedures; the way in which cases are selected; the way in which indictments are issued – particularly sealed indictments; the length of detention and trials; and the evidentiary rules applied by the Tribunal. In some of these areas, participants of particular national groups

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.”<sup>292</sup> 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,”<sup>293</sup> with a disastrous and “decisive impact on public opinion.”<sup>294</sup> The media thus “cements the widely-shared hostility against the ICTY among Serbian society.”<sup>295</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 ICTY by Croatia’s public opinion. Beyond such impressionistic data, a survey conducted in August 2000 in Croatia<sup>296</sup> found that:

a high percentage of Croatians believed that The Hague is biased, while fifty-two percent believed that ‘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>297</sup>

Ivana Nizich of Human Rights Watch notes 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.”<sup>298</sup> Nizich adds that “even proponents of the

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expressed reservations unique to that national group. For example, the Bosnian Serb and Bosnian Croat participants disapproved of or questioned the use of sealed indictments. Further, virtually all participants in these two groups expressed concern that the ICTY was a “political” organization; in this context, “political” meant biased and thus incapable of providing fair trials.

*Id.* at 103-04.

292. Bogdan Ivanisevic, *The Grapes of Wrath*, HUM. RTS. WATCH, May 7, 2004, available at <http://hrw.org/english/docs/2004/05/07/serbia8573.htm>.

293. *Id.*

294. *Id.*

295. *Id.*

296. See Foreign Broadcast Information Service, *Survey Shows ‘Anti-Hague Atmosphere’ Increasing in Croatia*, FBIS Doc. EUP20000823000244 (Aug. 19, 2000) (trans. of Jutarnji List (Zagreb)).

297. Burke-White, *supra* note 7, at 736 (citing *Survey Shows ‘Anti-Hague Atmosphere’ Increasing In Croatia*, FBIS Doc. EUP20000823000244 (Aug. 19, 2000) (trans. of Jutarnji List (Zagreb), at 31)).

298. Nizich, *supra* note 22, at 355.

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>299</sup>

The ICTY’s outreach program was only created in 1999, six years after the tribunal’s creation and five years after its first indictments were issued.<sup>300</sup> The Registrar’s Office staffs someone to engage in outreach in one or two locations in the Balkans (in Zagreb or in 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>301</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 to provide justice to the victims of the region.”<sup>302</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>303</sup> This sense of being marginalized or ignored by distant foreigners led many local legal professionals to perceive the court negatively. A widespread criticism of the ICTY by Bosnian legal professionals was that they perceived their sporadic contact with the

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299. *Id.*

300. See President of the International Tribunal, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, delivered to the Security Council and the General Assembly*, U.N. Doc. S/1999/846, A/54/187 (Aug. 25, 1999), available at <http://www.un.org/icty/rappannu-e/1999/AR99e.pdf>.

301. For assessments of the Rules of the Road program, see Press Release, Office of the High Representative and EU Special Representative, High Representative Develops Strategy for ‘Rules of the Road’ Court Proceedings (Nov. 8, 2001), available at [http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=6292](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=6292); Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, *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).

302. Nizich, *supra* note 22, at 361.

303. See *Justice, Accountability and Social Reconstruction*, *supra* note 111, at 103.

Tribunal as a sign of disrespect.<sup>304</sup> Most participants in the survey 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.”<sup>305</sup>

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 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>306</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>307</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

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304. See generally Nizich, *supra* note 22.

305. See *Justice, Accountability and Social Reconstruction*, *supra* note 111, at 104.

306. 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, 15 (2002).

307. *Id.* at 16. 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.” *Id.*



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. 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 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, the ICTY's and ICTR's inability to improve domestic legal systems and their unpopularity in Rwanda and the former Yugoslavia raise 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, letting the international community to expiate its guilt.

### **C. Financial Burden of Wholly International Tribunals**

Some commentators have noted higher degrees of U.N. involvement in an internationalized court make it easier to secure a sustainable source of funds.<sup>308</sup> This refers specifically to courts like the ICTY and ICTR, with budgets derived from assessed contributions from U.N. 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 U.N. and often rely on voluntary contributions) are also substantially less expensive than wholly international courts. The higher the degree of U.N. involvement in an internationalized court, the more money the court will need.<sup>309</sup>

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 ten per cent of the Organization's total regular budget. Expenditures for the ICTR from 1995-2003 totaled approximately \$410 million, which computes to \$8 million per indictment and \$45.5 million per conviction.<sup>310</sup> The budget for the ICTY in the same period

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308. Webb, *supra* note 18.

309. Even judges at the ICTY and ICTR have 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." 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). See also *The Rule of Law Report*, *supra* note 1.

310. *Id.* The estimated appropriation for the ICTY for 2002-2003 is just over \$256 million (U.S. dollars).

reached approximately \$471 million, an average of \$5.5 million per indictment and \$22.5 million per conviction.<sup>311</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>312</sup> Ultimately the U.N. Security Council has paid over \$1.6 billion to operate International Criminal Tribunals in Yugoslavia and Rwanda.<sup>313</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 between U.S. \$60,000 and U.S. \$80,000.<sup>314</sup> A hybrid court might need to pay some salaries in the U.S. \$60,000 to U.S. \$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 U.N. 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>315</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.

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 U.S. \$19 million first-year budget roughly equal to one-fifth of the ICTR’s annual budget. Its total budget for three years is estimated to be around \$75 million.<sup>316</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

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311. George S. Yacoubian, *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 *WORLD AFF.* 133, 136 (2003).

312. *Id.*

313. See Cohen, *Seeking Justice on the Cheap*, *supra* note 7, at 1.

314. 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).

315. See Yacoubian, *supra* note 311, at 136.

316. Richard Dowden, *Justice Goes on Trial in Sierra Leone*, *GUARDIAN* (London), Oct. 3, 2002, at 16.

dedicated to the operation of the court itself).<sup>317</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. The exorbitant cost of the Rwanda and Yugoslavia tribunals creates widespread frustrations, and their cost thus compounds the problems of their unpopularity with the very populations they purport to serve<sup>318</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 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, international 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>319</sup> Enhancing ad hoc tribunals' public relations

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317. See Cohen, *Seeking Justice on the Cheap*, *supra* note 7, at 5.

318. See Marks, *supra* note 265. “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.” *Id.* See also Ironside, *supra* note 273, at 38:

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.

319. *Justice, Accountability and Social Reconstruction*, *supra* note 111, at 105.

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.

## **VI. 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 crimes cases. This is where hybrid courts come in. Indeed, the potential for ICC-hybrid symbiosis speaks to the heart of hybrids' importance.<sup>320</sup> Hybrids will neither undermine the ICC nor be rendered superfluous by the ICC.

### **A. The ICC does not Render Hybrids Superfluous**

The establishment of the ICC by no means lessens the need for hybrid courts.<sup>321</sup> Even those who would wish to see the ICC supplant other international criminal tribunals must admit 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.<sup>322</sup> 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.

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320. Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712, 716 (2003).

321. 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. 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. 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. 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.

322. ICC Statute, *supra* note 6, art. 11.

Indeed, the ICC statute<sup>323</sup> recognizes the value of local prosecutions, since the ICC gives preference to legitimate 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>324</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 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>325</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 less glamorous 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.

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>326</sup>

The non-conflictual relationship between the Kosovo and Bosnia hybrid courts and the ICTY demonstrates that hybrids need not replace international justice (or local justice, for that matter). Indeed, the ICTY has improved the Bosnian WCC's access to non-confidential information in its possession.

Each of the prosecution teams in the [Bosnian] Special Department for War Crimes has been provided with a password to access the Evidence Disclosure Suite (EDS) of the ICTY . . . . Further, there is currently a proposal to provide access to the Judicial Database (JDB) [which] would facilitate the search for judgments, decisions, and orders issued by the ICTY.<sup>327</sup>

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323. *See id.*

324. Concannon, *supra* note 7, at 202.

325. Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 120 (2001).

326. 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, *supra* note 7.

327. *See* Human Rights Watch, *Looking for Justice*, *supra* note 216, at 19.

The OTP of the ICTY formalized cooperation with the Special Department for War Crimes in a Memorandum of Understanding on September 2, 2005, and is developing another. This close cooperation should be hailed as a model.

In cases where hybrids overlap with an international tribunal, hybrids must assume responsibility for high-ranking war criminals who cannot be processed by the international tribunal. This number may be quite considerable, given that international tribunals 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.

### **B. Hybrids do not Mitigate the Need for the ICC**

From a purely legalistic perspective, hybrid courts will not strip the ICC of jurisdiction because of the principle of complementarity, which only grants the ICC jurisdiction where domestic courts are "unwilling" or "unable" to prosecute a given case. A hybrid court is not truly part of the domestic court system, since by definition it is a mixed domestic/international court. Thus, if domestic courts were incapable of trying serious crimes, a hybrid court could be established in tandem with ICC prosecutions (although no one defendant can be tried twice according to the principle of *res judicata*), with hybrid panels handling some cases, but not others, for instance trials of mid-ranking subordinates, but not top leaders. Moreover, a state that does not wish to prosecute a given case or see it tried in an existing hybrid court may well refer a case for the ICC to resolve.

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, morally arbitrary world politics, which give Rwanda and the former Yugoslavia their own dedicated tribunals, but leave regions which are too explosive or lie further down the political-priorities totem pole, like Darfur or Chechnya suffering atrocities without the hope of any international justice. To some extent, the ICC can provide an independent and universal process for critical cases in situations where the U.N. 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 their roles in atrocities, the dangers of 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.

### **C. 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 need to rely on entities better able to connect 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>328</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, and applying previously unheard-of laws. Notwithstanding provisions in the ICC Statute on stronger victim participation and Prosecutor Luis Moreno Ocampo's stated commitment to communicate with concerned populations,<sup>329</sup> the ICC could appear even more like a *deus ex machina* than the ad hoc tribunals, yet further removed from local realities.<sup>330</sup>

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.

## **VII. CONCLUSION**

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328. 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 6, arts. 3(1), 3(3).

329. *See* Luis Moreno Ocampo, Prosecutor, International Criminal Court, address at Yale Law School (March 26, 2004).

330. Nizich, *supra* note 22, at 364.

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.

*Id.*

The increased interest in criminal responsibility for perpetrators of gross violations of humanitarian law and human rights has stimulated a remarkable multiplication of international judicial fora. As institutional mechanisms to sanction atrocity flourish, ranging from domestic trials to hybrid tribunals and international courts, it is becoming imperative to hone and develop more effective accountability mechanisms.

Ad hoc international tribunals' days appear to be numbered. This is largely because the ICTY and ICTR's cost has produced tremendous donor fatigue, although their inherent weaknesses and inability to communicate effectively with local populations have not sparked the criticism they deserved. Both of these tribunals are being forced to speed up operations in anticipation of closing shop.<sup>331</sup> The clock is 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 and jurisdiction, hybrid courts must be embraced and supported as one of the most promising new forms of transitional justice.

The hybrid model can be even more successful in combating cultures of impunity when linked to broader domestic justice reform initiatives. Hybrids' mandates could be broadened to include spurring local justice reform via CLE, mentoring, or trial observer programs, to name but a few mechanisms. Equipping national justice systems to investigate and prosecute war crimes, crimes against humanity and genocide strengthens the capacity of local legal systems to deliver justice in the long run. By creatively engaging with local culture and domestic legal institutions, hybrid tribunals can contribute to more responsive, realistic, and effective global commitment to accountability.

Justice resides not only in material acts such as holding specific perpetrators accountable, but also in perceptions. Accountability mechanisms in post-atrocity areas must be accepted by local populations, integrated into local consciousness and legal culture. While hybrid courts do not automatically ensure good communication with local populations, their very structure helps to reach out to locals. Hybrid courts thus offer a potentially powerful blend of international legitimacy and local understanding. Studies of hybrid courts should move to the forefront of academic and practitioner debates, exploring how accountability mechanisms must adapt to the idiosyncratic conditions of each different post-atrocity country. Only when hybrid models and existing mixed courts are

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331. The ICTY will end operations in 2008 and the ICTR in 2010. See Jan Repa, *US Wants No Permanent Tribunals*, BBC NEWS, Mar. 1, 2002, available at <http://news.bbc.co.uk/1/hi/world/americas/1849094.stm>. "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." *Id.*



carefully and comparatively studied can these tribunals live up to their full potential. In our search for mechanisms to end impunity and provide victims with the justice they deserve, we must focus on the promise of hybrid courts.

