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# Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State

Caitlin E. Carroll

## Introduction

Crimes occurring within the borders of a domestic state may attract international jurisdiction if the charges rise to the status of an international crime. International crimes have generally been held to include: war crimes, crimes of aggression, crimes against humanity, and genocide. Although, arguments may be made to expand this definition to include other atrocities, such as terrorism or slave trafficking. The common theme connecting these offenses, and thus prompting international review, is the violation of what has been identified as universal inherent human rights. The severity associated with violations of *jus cogens* norms, “higher law” to which no country is deemed to be above, often prompts external review in order to establish a universal sanction against such atrocities. Difficulties arise, however, in prosecuting international crimes because no universally accepted permanent institutional structure implementing international criminal law exists.<sup>1</sup>

Hybrid tribunals are often the most effective criminal tribunal currently exercised to adjudicate international crimes because they best blend domestic actors and norms while respecting international *jus cogens* norms. The involvement of domestic penal codes and jurisdiction respects state sovereignty and retains the cultural and political expectations of both the perpetrators and the victims. Removal to the international courts, as an alternate forum, is appropriate if the domestic state is incapable or unwilling to prosecute the international crimes in its territory. Hybrid tribunals, in addition to immediately benefitting domestic jurisdiction by

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<sup>1</sup> Allison Marston Danner, Constructing A Hierarchy of Crimes in International Criminal Law Sentencing, 87 Va. L. Rev. 415, 438 (2001)

involving local actors, are also more effective than other removed criminal bodies because hybrid tribunals do the most to transition the domestic state for long-term stability. This latter characteristic is unique to hybrid tribunals and elevates them above other international criminal bodies as the most effective process to adjudicate international crimes occurring within domestic states that are open to international assistance.

Part I of this paper will examine the progression from victor imposed criminalization to universal criminalization, detailing the evolution from the earliest international criminal tribunal, Nuremberg, to the modern *ad hoc* and hybrid tribunals. The advantages and disadvantages of each system will be measured to advocate in favor of hybrid tribunals as the proper balance between international accountability and domestic sovereignty.

Part II of this paper will be a reflection on modern hybrid tribunals in existence. The Kosovo, East Timor, Sierra Leone and Iraq tribunals' composition and structure will be compared and contrasted to demonstrate the flexibility of hybrid tribunals to be tailored to specific state's needs and resources.

Part III of this paper will present the argument for the primacy of hybrid tribunals. It will theorize the multiple advantages of hybrid tribunals over other forums while acknowledging the disadvantages and criticisms of such a blended approach.

#### Part I: The Evolution to Hybrid Tribunals

Nuremberg served as the first international criminal body to recognize the authority to universally condemn and prosecute international crimes. Nuremberg, in of itself, is limited as a guide for processing international crimes and should be read in context of the involved actors and crimes only. Since Nuremberg, several other criminal bodies have emerged to adjudicate international crimes. Of these, both *ad hoc* tribunals and the ICC remove the crime to external

courts run by international actors. In contrast, hybrid tribunals retain domestic involvement to the extent possible and are thus better methods to prosecute international crimes.

### **A. Nuremberg serves as a limited precedent**

Plaintiffs in domestic human rights litigation have pointed to the Nuremberg trials as the model for international jurisdiction.<sup>2</sup> The Nuremberg trials served as the pioneer for international prosecution and opened the door to a new era in international human rights. The Nuremberg trials' well-known legacy is that it dispelled the notion that States should not concern themselves with human rights violations occurring within the borders of another State (especially with regard to that States' own citizens). Prior to the Nuremberg trials, there existed “no specific legal precedent for subjecting offenses such as war crimes and crimes against humanity, such as genocide, to the principle of universal jurisdiction.”<sup>3</sup> Because of Nuremberg, the idea that there is universal jurisdiction over those who commit such offenses gained legitimacy.

Despite the unequivocal advancements of the Nuremberg trials, modern international crimes should not be modeled purely after Nuremberg because the trials are an unfit guide for modern international crimes. The Nuremberg trials meted out “victors' justice” as the Allied Powers, victors of WWII, ran the trials. The taint of “victor's justice” thus limits the use of Nuremberg as an instructional precedent.<sup>4</sup> It is unjust to allow the victors in a confrontation to met out punishment for their counterparts; the lack of objectiveness invalidates the trial. In addition to the great bias and power disparity involved in the WWII adjudication, the

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<sup>2</sup> Gwynne Skinner, Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute, 71 Alb. L. Rev. 321, 323-24 (2008)

<sup>3</sup> Universal jurisdiction refers to a State's power “to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the [traditional] bases of jurisdiction...is present.” 1 Restatement (Third) of Foreign Relations Law of the United States § 404 (1987).

<sup>4</sup> Gwynne Skinner, Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute, 71 Alb. L. Rev. 321, 324 (2008)

relationship between Germany and the Allies was unique and too dissimilar to compare with modern international disputes. As a result of the war, the Allied Powers “had established a strong nexus with the offenses by fighting and winning the war in which the enemies' war crimes had been committed.” Because of the distorted connection to the crimes involved in Nuremberg, universal jurisdiction is still an evolving doctrine that has yet to be decided emphatically under the Nuremberg model.<sup>5</sup> The lesson from Nuremberg is that the international criminal court should not be tied to other nations that had fought against the crimes because it results in procedural and substantive unfairness and injustice due to the lack of objectivity.

While it may be internationally agreed that Nuremberg is but a blue print, and not a precise model, there is no universal forum that has emerged to meet with unanimous international approval. Courts in various countries have considered which law to apply to international crimes occurring within a domestic state, and there has yet to be a settled and agreed upon universal method to decide this question in a particular instance. For instance, the Ninth Circuit held that the substance of international law should be applied “as developed in the decisions by international criminal tribunals such as the Nuremberg Military Tribunals,” rather than domestic law.<sup>6</sup> Conversely, a district court in In re South African Apartheid Litigation rejected the notion that Nuremberg and other international criminal tribunals are applicable precedents, further finding that “[n]one of these sources establishes clearly-defined norms...”<sup>7</sup> So while the American court demonstrates the general consensus as to *jus cogens* norms, the South African court also shows the refusal to acknowledge such crimes. As a result of the disparities in international law, an alternative to the Nuremberg precedent emerged.

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<sup>5</sup> See Filartiga, 630 F.2d at 881.

<sup>6</sup> Doe, 395 F.3d at 947-48 & n.21, 953 (discussing The Krupp Case in particular). (948)

<sup>7</sup> Id. at 542.

**B. Nuremberg's progeny: *ad hoc* tribunals fail to respect state sovereignty and distance the crime from the domestic domain**

In sharp contrast to pure internationalization of universal crimes, there is a theory that states have complete sovereignty over their populations, and no other state has a right to intervene.<sup>8</sup> *Ad hoc* tribunals developed in the 1990's and served to respect state sovereignty greater than the Nuremberg trials conducted by the Allied Powers appeared to do. By definition, *ad hoc* tribunals are criminal bodies that are "formed for or concerned with one specific purpose,"<sup>9</sup> (similar to the Nuremberg Trials which were formed to resolve WWII). By involving the domestic state in the adjudication, the *ad hoc* tribunals pay marginally greater respect to state independence and dignity than the victor's justice demonstrated in Nuremberg. The *ad hoc* tribunals still fail in involving the domestic state because *ad hoc* tribunals assert international primacy over the domestic nation's courts. The modern models of *ad hoc* tribunals, the ICTY ("International Criminal Tribunal for Yugoslavia") and the ICTR ("International Criminal Tribunal for Rwanda"), did not go far enough from Nuremberg in respecting domestic jurisdiction because the *ad hoc* tribunals still apply international law in a forum outside of the domestic state.

The central inadequacy of the Nuremberg trials and *ad hoc* tribunals is their inability to respect state sovereignty. The Nuremberg trials provide limited precedent for full-blown [universal jurisdiction]<sup>10</sup> because the Allies had a distinct connection to the crimes they were prosecuting. This connection does not exist in domestic human rights litigation because there are no conquering victors imposing foreign law in domestic litigation. Even were there a civil war within a state, the domestic disputes would be resolved under the same domestic penal code and

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<sup>8</sup> Gwynne Skinner, Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute, 71 Alb. L. Rev. 321, 360 (2008)

<sup>9</sup> <http://www.thefreedictionary.com/ad+hoc>

<sup>10</sup> Id. at 127-28. Kontorovich

would involve nationals—not victorious foreigners imposing foreign standards.<sup>11</sup> Because of the unique connection the Allied Powers had to the Nuremberg trials, neither it nor its *ad hoc* progeny, which rely on the same impunity principles, should serve as a model for international adjudication. Today, international crimes occurring within a domestic state rarely forge such a strong connection with external states so as to give the external states authority to impose their sense of prosecution or adjudication on the domestic state.

Currently, both the ICTY and the ICTR have three Trial Chambers, with the ICTY's located in the Hague, Netherlands, and the ICTR's based in Arusha, Tanzania.<sup>12</sup> The *ad hoc* trials are thus occurring outside the domestic state, away from the epicenter of the crime. Perpetrators are removed from the cultural and legal expectations of the domain in which they performed the crime and are subjected to foreign standards. The gravest injustice served by *ad hoc* tribunals is the relinquishment of victim's retribution. Victims are not able to participate in the trial, nor be present for the punishment. There is far less compensation for victims of international crimes as a result of *ad hoc* tribunals because of the separation of justice from the crime. These removal mechanisms, which cause the significant deficiencies enumerated above, result out of the *ad hoc* tribunal's failure to respect state sovereignty. These weaknesses could be resolved by maintaining domestic sovereignty over such crimes through hybridism.

In addition to the distancing deficiency of the *ad hoc* tribunals, the ICTY and ICTR are also inadequate answers to adjudicating international crimes occurring within a domestic state's borders because they overemphasize international law. It is unjust to hold domestic criminals

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<sup>11</sup> Gerry J. Simpson, Didactic and Dissident Histories in War Crimes Trials, 60 Alb. L. Rev. 801, 805-06 (1997). For discussion of others who have criticized the trials as victors' justice, see generally Henry J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals 122-25 (2d ed. 2000).

<sup>12</sup> S.C. Res. 977, U.N. SCOR, 50th Sess., 3502d mtg., U.N. Doc. S/RES/977 (1995) (designating seat of ICTR); ICTY Statute, *supra* note 27, art. 31 (designating seat of ICTY).

wholly accountable for external standards. If the domestic law does not condone the criminal acts or provide jurisdiction over the offenses at issue in international trials, then the domestic penal codes should be supplemented by national actors to reflect the necessary *jus cogens* norms. Hybrid tribunals allow for such flexibility of interpreting universal standards into the specific national laws rather than intrusively supplanting domestic law with international standards.

For instance, in first recognizing the crime of rape into domestic penal code, the nation hosting a hybrid tribunal may legislate the punishment to be less severe than the international average punishment for rape in reflection of the domestic state's different cultural and societal expectations and traditions. This hybrid approach allows the tribunal to recognize international crimes and still respect the domestic state's sovereignty over its own penal code. While there are certain *jus cogens* norms that are held to have universal acceptance, domestic actors should be punished in accordance with the domestic state's laws instead of under an *ex post facto* expansion of criminal liability under international laws designed to reflect an international community's view of *jus cogens* norms, norms that may be antithetical to those of the state in which the crimes occurred.

The *ad hoc* tribunals substitute perceived insufficient domestic penal codes for foreign international standards. For instance, the ICTY and the ICTR Statutes contain identical sentencing provisions, providing that "(t)he penalty imposed by the Trial Chamber shall be limited to imprisonment."<sup>13</sup> This provision tacitly precludes the imposition both of the death penalty and alternative forms of punishment, such as fines.<sup>14</sup> Rwanda, in reaction to the ICTR's

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<sup>13</sup> ICTR Statute, *supra* note 27, art. 23(1); ICTY Statute, *supra* note 27, art. 24(1). The Rome Statute, by contrast, limits the penalty for all the crimes within the jurisdiction of the ICC to thirty years, with the exception that a term of life imprisonment may be imposed "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Rome Statute, *supra* note 11, art. 77(1)(b).

<sup>14</sup> Restitution is allowed as an additional punishment but not as a substitute for imprisonment. ICTR Statute, *supra* note 27, art. 23(3); ICTY Statute, *supra* note 27, art. 24(3).



refusal to apply domestic penal punishments, lobbied for the inclusion of the death penalty in the ICTR Statute. “The Security Council, however, found its inclusion incompatible with the United Nations' opposition to this form of punishment and instead chose to apply international standards to the [Rwandan] Nationals accused of perpetrating international crimes [in Rwanda]”.<sup>15</sup> The *ad hoc* tribunals, then, “remain relatively free to develop their own methods of determining an appropriate sentence, within the constraints of their Statutes, their Rules, and the Security Council's expressed goals for them”.<sup>16</sup>

Proponents of *ad hoc* tribunals suggest they lead to more consistent treatment of international crimes, as opposed to a criminal body that incorporated more domestic law that would, by definition, vary from state to state. However, this goal of consistency has not been demonstrated by the ICTY and ICTR. Indeed, “the radical difference between the sentencing methodologies used by the two Tribunals lessens the coherency of international justice and provides conflicting precedent for the ICC.”<sup>17</sup> The divergence between the two central *ad hoc* tribunals, conducted temporally, demonstrates that the central goal of universal consistent standards is not being achieved and the inadequacies of the *ad hoc* tribunals, impunity and distancing, are not justified because of the unfulfilled promises. The ICTY has specifically “failed to provide a meaningful distinction between international and domestic criminalization.”<sup>18</sup> These deficiencies prevent *ad hoc* tribunals from being an adequate response to international crimes that occur within a domestic state.

### **C. Removal to the ICC fails to respect state sovereignty and distances the crime from its locality**

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<sup>15</sup> Allison Marston Danner, Constructing A Hierarchy of Crimes in International Criminal Law Sentencing, 87 Va. L. Rev. 415, 428 (2001)

<sup>16</sup> *Id.* at 415, 436-37

<sup>17</sup> *Id.* at 415, 501

<sup>18</sup> *Id.*

Unlike the ICTY and ICTR, the International Criminal Court (ICC) maintains consistent laws and a consistent existence, thereby resolving the inability of *ad hoc* tribunals to provide consistent justice. The ICC operates under a complementarity doctrine that allows for domestic prosecution unless the domestic state is unable or unwilling to prosecute. The international court thus complements the domestic judiciary by removing jurisdiction to the extent it is necessary because of the inadequacies of the domestic courts. This process is more respectful of state sovereignty, and only impinges on state authority in order to protect *jus cogens* norms.

The ICC however, is still flawed and maintains the same inefficiencies of *ad hoc* tribunals because of its location and composition. Like *ad hoc* tribunals, the ICC adjudicates its disputes from locations outside of the domestic state in which the crime occurred, and thus distances perpetrators and victims from the state sovereignty through the removal of the proceedings to the Hague. The ICC is exclusively administered by international actors and, like the Nuremberg trials, imposes an international prosecutor and judiciary on the domestic criminal. Furthermore, the “enumerated acts tried by the ICC and *ad hoc* tribunals include a wide range of offenses that would largely, on their own, be criminal under domestic law.”<sup>19</sup> Thus, both the ICC and *ad hoc* tribunals unnecessarily infringe on state sovereignty, as opposed to merely supplementing inadequate penal codes.

**D. Hybrid tribunals are the most effective international process, to the extent the domestic capabilities allow, to adjudicate international crimes**

In contrast to *ad hoc* tribunals and the ICC, hybrid tribunals are the most effective criminal body to adjudicate international crimes that occur within a state which is viable for

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<sup>19</sup> Although not indicated by the language of the Statute, and not always clearly stated by the Trial Chambers, each enumerated act must presumably be committed with at least a mens rea of knowledge. See, e.g., Celebici I, Case No. IT-96-21, ¶ 494 (Trial Chamber, ICTY, Nov. 16, 1998), at <http://un.org/icty/judgement.htm> (stating that torture requires an intentional act); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶ 592 (Trial Chamber, ICTR, Sept. 2, 1998), at <http://ictt.org/ENGLISH/cases/Akayesu/index.htm> (hereinafter Akayesu) (finding that the mens rea for the crime of extermination is intent).

hybridism. Hybrid tribunals consist of both an institutional judiciary apparatus located within of the domestic forum, and an application of a blend of international and domestic law to their adjudication of international crimes. “Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries.”<sup>20</sup> “The judges apply domestic law that has been reformed to accord with international standards,”<sup>21</sup> thus respecting domestic responsibility while ensuring international approval. This hybrid model has developed in a range of settings; generally post conflict situations where no politically viable full-fledged international tribunal exists, including: Kosovo, East Timor,<sup>22</sup> Sierra Leone, and Iraq.<sup>23</sup>

The hybrid tribunals have been attacked by proponents of *ad hoc* tribunals and the ICC for giving too much deference to allegedly undemocratic domestic penal codes. In contrast, like the other international criminal bodies, hybrid tribunals have also received criticisms that they involve too much of an international presence in domestic matters. For instance, the Bush Administration criticized hybrid tribunals for removing the adjudication from a purely domestic process.<sup>24</sup> But it is precisely the duality of these criticisms, that they do not involve enough of an international standard and that they also involve too great of an international influence that suggests that hybrid tribunals are the best promise for international crimes where the domestic

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<sup>20</sup> Laura A. Dickinson, The Promise of Hybrid Courts, 97 Am. J. Int'l L. 295 (2003)

<sup>21</sup> Id.

<sup>22</sup> See Seth Mydans, U.N. and Cambodia Reach an Accord for Khmer Rouge Trial, N.Y. TIMES, Mar. 18, 2003, at A5

<sup>23</sup> See Neil A. Lewis, Tribunals Nearly Ready for Afghanistan Prisoners, N.Y. TIMES, Apr. 8, 2003, at B1 (reporting plans to create “civilian tribunals conducted by Iraqi lawyers and judges with the help of the United States to prosecute crimes against humanity committed over the past 20 years, including charges of genocide against the Kurds”).

<sup>24</sup> See, e.g., Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, Opening Statement Before the Senate Commission on Governmental Affairs, April 10, 2003, available at <<http://www.state.gov/s/wci/rm/19556.htm>>. Although the administration has not explicitly ruled out a hybrid court, officials to date appear to be publicly supporting a domestic, rather than a hybrid, process. See Elizabeth Neuffer, Plan Concerning Abuse Cases Gets Mixed Response, BOSTON GLOBE, Apr. 9, 2003.

state is viable for international assistance because of the compromise between international accountability and domestic impunity.

## Part II: Hybrid Tribunals Infrastructure and Implementation.

Hybrid tribunals have been implemented during the past two decades to resolve conflicts of international concern. The hybrid tribunals vary to meet the needs of the domestic state and respond to the particular crimes and the particular penal code in existence. Each hybrid tribunal involves both domestic and international actors and a mix of domestic and international law. It is precisely this flexibility that allows for the most effective adjudication.

### **A. Kosovo**

The international community responded to the Kosovo atrocities in 1990 by enacting a hybrid tribunal. Pure domestic adjudication was perceived as an impossibility. Much of the “physical infrastructure of the judicial system—court buildings, law libraries, and equipment—had been destroyed or severely damaged during years of civil conflict.”<sup>25</sup> Local lawyers and judges were scarce, and “those available lacked experience because most ethnic Albanians had been barred from the judiciary for many years and Serbian judges and lawyers had mostly fled or refused to serve.”<sup>26</sup> The ICTY prosecutor in charge of the nearby *ad hoc* tribunal made it clear that there were only enough resources to try those most culpable—the method utilized by *ad hoc* tribunals, and leave the remainder of perpetrators to the domestic courts.<sup>27</sup> Such a process would result in disparate treatment under international law, which forbade the death penalty, and domestic law, which applied it to the crimes at issue. In effect, the worst criminals would receive life imprisonments in contrast to their less culpable counterparts. The UN responded to

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<sup>25</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295, 297 (2003)

<sup>26</sup> Strohmeyer, *Collapse*, supra note 7, at 49-50, 53.

<sup>27</sup> See Carla Del Ponte, Prosecutor of the ICTY, “Statement on the Investigation and Prosecution of Crimes Committed in Kosovo,” The Hague (Sept. 29, 1999).

the “crisis by allowing a medley of foreign judges to sit alongside domestic judges in Kosovo and allow foreign lawyers to join domestic lawyers in the prosecution and defense of the criminals”.<sup>28</sup>

In addition to the blend on domestic and international actors involved in the proceedings, the UNMIK (“United Nations Interim Administration Mission in Kosovo”) authorities applied a hybrid of domestic and international law to the tribunal. The UNMIK “issued resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989.”<sup>29</sup> But, the existing “domestic law was modified to comply with international human rights standards.”<sup>30</sup> In essence, the Kosovo tribunal applied local law to the extent that it did not conflict with international human rights norms which would have prevented the entire tribunal from being deemed valid and respected under international law.

## **B. East Timor**

Like Kosovo, East Timor lacked the infrastructure to satisfy international critics that proper adjudication could successfully be implemented by the state. Only a scarce number of East Timorese had been trained as lawyers and even fewer served on the judiciary.<sup>31</sup> “In response to the mass atrocities [committed over a twenty-four year occupation regime, including rape, murder, torture, and crimes of aggression], which demanded accountability by the international community and the perceived inability of the domestic courts, the UNTAET (“United Nations Transitional Administration in East Timor”) issued regulations ensuring that “serious crimes” would be tried before multiple-judge panels, comprised of two international

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<sup>28</sup> Betts, *supra* note 7, at 381.

<sup>29</sup> UNMIK Resolution 1999/1

<sup>30</sup> *Id.*

<sup>31</sup> See Strohmeyer, *Collapse*, *supra* note 7, at 50.

judges and one East Timorese judge, sitting within East Timor.”<sup>32</sup> Like Kosovo, the prosecutors and defense lawyers were both international and local attorneys.<sup>33</sup> The tribunal was “required to apply the laws of East Timor and, where appropriate, applicable treaties and recognized principles and norms of international law, including the established principles of the international law of armed conflict.”<sup>34</sup> For instance, the regulations regarding genocide were modeled after “the customary international law definition of genocide, embodied in article II of the Genocide Convention and the statutes of the ICC, ICTY and ICTR.”<sup>35</sup> Similarly, the tribunal looked to the ICC for guidance on regulating crimes against humanity and “essentially replicate[d] the definition with one subtle distinction, namely that both the punishable act and the widespread or systematic attack must be directed against a civilian population.”<sup>36</sup> A hybrid tribunal was preferable in East Timor, as opposed to an *ad hoc* or ICC forum because of the long-term objectives of the state; establishing a viable system of self-government, which would require an inclusive, decentralized state-building approach that emphasized the training and participation of

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<sup>32</sup> See Section 10 of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor, *available at* <<http://www.un.org/peace/etimor/untaetR/Reg11.pdf>> (last visited Oct. 21, 2002) [hereinafter Regulation No. 2000/11], which gives to the Dili District Court exclusive jurisdiction over the most serious crimes, including genocide, war crimes, and crimes against humanity. Regulation No. 2000/11 is further supported by UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction for Serious Crimes, promulgated on June 6, 2000, available at <<http://www.un.org/peace/etimor/untaetR/Reg0015.pdf>> (last visited Aug. 27, 2002). For an analysis of these provisions and the hybrid courts they establish, see Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 145-73 (2001); Strohmeyer, *Multilateral Interventions and Collapse*, supra note 7; Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U.J. Int'l L. & Pol. 1101 (2001); see also UNTAET Press Office, *Fact Sheet 7, Justice and Serious Crimes* (Dec. 2001), available at <<http://www.un.org/peace/etimor/fact/fs7.pdf>> (last visited Oct. 21, 2002).

<sup>33</sup> See, e.g., Strohmeyer, *Multilateral Interventions*, supra note 7, at 118; Sharifah al-Attas, *Picking Up the Pieces*, THE NEW STRAITS TIMES, Jan. 21, 2002, at 8 (interview with Malaysian prosecutor who works for the Serious Crimes Unit Prosecution office; notes that other prosecutors come from Brazil, Burundi, Canada, England, Sri Lanka, and the United States); see also UNTAET Daily Press Briefing (Jan. 9, 2002), available at <<http://www.un.org/peace/etimor/DB/db090102.htm>> (last visited Oct. 21, 2002) (announcing arrival of Siri Frigaard, from Norway, to take the position as the new chief prosecutor for the serious crimes unit).

<sup>34</sup> [http://www.essex.ac.uk/armedcon/story\\_id/000385.pdf](http://www.essex.ac.uk/armedcon/story_id/000385.pdf)

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

East Timorese. Thus the involvement of state actors and on-site forums is sufficient justification for hybrid tribunal use.

### **C. Sierra Leone**

In Sierra Leone, as in Kosovo and East Timor, establishing a hybrid tribunal became a “priority in the summer of 2000 after a severe accountability crisis developed at the end of a long civil conflict.”<sup>37</sup> Although the Sierra Leone infrastructure was ill-equipped to handle the adjudication of the mass atrocities, “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>38</sup> The President’s insistence on a purely international process is consistent with state independence and the need to respect state sovereignty. The President accurately noted the injustice to the legal actors, defendants, and victims in constructing a foreign legal process to adjudicate the domestic acts. To balance the two interests, the Sierra Leonean government asked the United Nations in June of 2001 to help set up a Special Court to try those who “bear the greatest responsibility for the commission of crimes against humanity, war crimes, and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996.”<sup>39</sup>

Like Kosovo and East Timor, the Sierra Leone tribunal is staffed with a blend of international and domestic judges, prosecutors, and defense attorneys. The court consists of two trial chambers and an appeals chamber, as well as a prosecutor's office and a registry. Each trial chamber is composed of three judges, two international and one domestic (to be appointed by the government of Sierra Leone). “The appellate chamber is composed of five judges, three

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<sup>37</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295, 299 (2003)

<sup>38</sup> *Id.* at 295, 299

<sup>39</sup> Sierra Leone 2001 Country Report, *supra* note 33, at § 4.

international and two domestic.”<sup>40</sup> “The eight judges of the court—two Sierra Leoneans, and one judge each from Australia, Canada, Austria, Nigeria, Cameroon, and Gambia—began serving in December 2002.”<sup>41</sup> The applicable law is a blend of the international and the domestic, “because the court has jurisdiction to consider cases both under international humanitarian law and under domestic Sierra Leonean law.”<sup>42</sup> The court’s statute specifically contemplates that the court will be “guided by” both the decisions of the ICTY and ICTR (with respect to the interpretation of international humanitarian law) and the decisions of the Supreme Court of Sierra Leone (with respect to the interpretation of Sierra Leonean law).<sup>43</sup>

The tribunal made several significant adjustments to international law in order to respect state sovereignty and to accommodate local needs. For instance, the Sierra Leone tribunal used vague language to define the crime of rape, and included the broad phrasing “and other crimes of sexual violence,” rather than the specific definition used in the ICC in order to capture a greater number of crimes committed specific to the conflict in Sierra Leone that had not been previously contemplated by the ICC.<sup>44</sup> Additionally, the tribunal also inserted domestic penal code for the criminalization of child soldiers. “In light of the extent of atrocities committed by child soldiers” in Sierra Leone, the tribunal “struck a balance between the clearly expressed desire of the Sierra Leonean government for juveniles to be made accountable for their actions and those of the international and local NGO community who objected to any kind of judicial accountability for children below eighteen years of age for fear that such process would place at risk the existing

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<sup>40</sup> See generally Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, Appendix II, UN Doc. S/2002/246, [hereinafter Special Court Agreement]; Statute of the Special Court for Sierra Leone, Appendix II, Attachment, UN Doc. S/2002/246 [hereinafter Statute of the Special Court]; Report of the Secretary-General, *supra* note 37. For an overview of the court’s central features, see Michael Scharf, *The Special Court for Sierra Leone*, ASIL INSIGHTS, October 2000, available at < <http://www.asil.org/insights/insigh53.htm.at3>>.

<sup>41</sup> *War Court Judges for Sierra Leone Take Their Oaths*, N.Y. TIMES, Dec. 3, 2002, at A8.

<sup>42</sup> Statute of the Special Court, *supra* note 38, at Art. 1.

<sup>43</sup> Statute of the Special Court, *supra* note 38, at Art. 20.

<sup>44</sup> [http://www.essex.ac.uk/armedcon/story\\_id/000385.pdf](http://www.essex.ac.uk/armedcon/story_id/000385.pdf)



child soldier rehabilitation programme.”<sup>45</sup> The domestic input was necessary to best rehabilitate the country for long-term peace and stability. Had the ICC or NGO philosophy governed, the uniqueness of Sierran Leone crimes would not have been properly addressed, nor would the state have progressed independently.

#### **D. Iraq**

The Iraqi High Tribunal (“IHT”) was established in December 2003 to try Iraqi defendants for genocide, war crimes, crimes against humanity, and stipulated violations of Iraqi law.<sup>46</sup> The Iraqi Tribunal “is a largely domestic court with international advisors”.<sup>47</sup> While the tribunal is intended to comply with international standards, the drafters also sought “to account for the wishes of the Iraqi people that the process be substantially Iraqi and that the death penalty be available.”<sup>48</sup> The Iraqi Tribunal was initiated by Iraqis and revalidated at every stage by the domestic political processes. “After an extensive and genuine partnership that entailed months of debate, drafting and consideration of expert advice solicited from the Coalition Provisional Authority (CPA) – which included both British and US lawyers – as well as the advice of other experts outside Iraq, the Iraqi Governing Council issued the Statute of the Tribunal.”<sup>49</sup> The drafting process is a democratic antidote to any oppression perceived to be inherent in the domestic law.

Iraqi officials were adamant that a tribunal in Baghdad would be closer to the conflict in temporal terms as well as to the available evidence and the victims whose rights had been violated by the regime. “While it created the seeds of subsequent controversy, the Iraqi decision

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<sup>45</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, supra note 146, para. 35.

<sup>46</sup> Page 194 Criminal law textbook

<sup>47</sup> International Criminal Law and its Enforcement, Pg. 161

<sup>48</sup> page194 criminal alw textbook

<sup>49</sup> Statute of the Iraqi Special Tribunal. The original statute is available at ,[http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm)..

to incorporate international norms into the domestic criminal code was consistent with the established practice of the international community, and prevented a widespread sense of hopelessness and renewed victimization for ordinary citizens.”<sup>50</sup>

The Iraqi Tribunal has jurisdiction to cover any Iraqi national or resident of Iraq charged with crimes listed in the Statute and that were committed between July 1968 and May 2003. In addition, its geographical jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other states, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait. For the first time in Iraqi domestic law, Articles 11–13 of the Statute establish the competence of the Tribunal to prosecute genocide (Art. 11), crimes against humanity (Art. 12), and war crimes committed during both international and non-international armed conflicts (Art. 13). “These substantive provisions are perhaps the most significant aspect of the Statute, because they are modeled on those found in the Rome Statute and thus incorporate international law into the fabric of Iraqi domestic law. The Iraqi criminal code was blended with the international law.”<sup>51</sup>

Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts had been so corrosive to the rule of law inside Saddam’s Iraq. The officials who committed the acts included in Article 14 in essence waged war on the Iraqi people and society; the prosecution of those acts was seen by the Iraqis as a prerequisite for restoring the rule of law inside Iraq. From the Iraqi perspective, the crimes listed in Article 14 are of comparable severity to the grave violations of international norms found in Articles 11–13. Therefore, the Iraqis felt that prosecution of the domestic crimes described in

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<sup>50</sup> [http://www.icrc.org/eng/assets/files/other/irrc\\_862\\_newton.pdf](http://www.icrc.org/eng/assets/files/other/irrc_862_newton.pdf)

<sup>51</sup> For a summary of state practice implementing the comparable criminal provisions in the Rome Statute, see M. C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Transnational Publishers, Ardsley, New York 2005, Vol. I, pp. 188–91.

Article 14 would be a necessary component of the broader IST objective of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

### **E. Conclusion**

The eclecticism of hybrid tribunals demonstrates the flexibility of hybrid tribunals as a superior process. Each tribunal is tailored to the crimes of the locale, thus ensuring individualized attention and specificity. Unlike purely international tribunals, the locality is respected and involved in the adjudication, while international norms are still upheld. These advantages are unique to hybrid tribunals and elevate hybrid tribunals as the prime mechanism for handling international disputes as long as the domestic state is capable of hosting the trials and is open to international influence.

### Part III: The Superiority of Hybrid Tribunals

Hybrid tribunals have several advantages over other international criminal bodies that contribute to their effectiveness. The locality is preferential over *ad hoc* tribunals, or the ICC, which both remove the crime and the criminal to a foreign forum. Domestic forums are often more effective than distanced tribunals because “first, the state in which a crime is committed is generally the best place to find evidence, and second, the legal system that is known by the resident or citizen accused is preferable because he understands it.”<sup>52</sup> Admittedly, this may not be advantageous if the domestic state is corrupt or does not provide for the prosecution of such crimes. In such a situation, removal to international forums will be the best method to assure justice. But if the domestic court may be worked with, hybridism is preferred.

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<sup>52</sup> Al-Dujail Case, Case No. 1/9 First/2005, Judgement, pp.31-33 (Nov. 26, 2006), available at [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf) (above is unofficial translation version).

In addition to the close nexus with the crime, hybrid tribunals protect against encroachment on the domestic state and respect state sovereignty. The emphasis on state law for hybrid tribunals is based “on the necessity of re-affirming regional sovereignty.”<sup>53</sup> State sovereignty is necessary in order to promote international peace, to preserve resources, and to allow those most familiar with the criminal action to resolve it under the legal norms of the involved actors. The emphasis on domestic law does not supplant international norms, it simply supplements. The international involvement ensures international acceptance and accountability in trial.

Hybrid tribunals are preferable over other transitional criminal courts because they allow the domestic states greater responsibility and participation while ensuring accountability—the central goal in any judicial process. In contrast, *ad hoc* tribunals and ICC trials do not contribute anything in return to the lasting success of the domestic states governing. Hybrid tribunals build a foundation to which the domestic state relies upon after the international presence and resources have been withdrawn.

#### **A. Criticism of Hybrid Tribunals**

Critics of hybrid tribunals recognize that such a blended system fails to ensure international uniformity for the consistent enforcement of humanitarian law. Hybrid courts, according to some, emphasize the individual domestic state too greatly rather than applying a broad mandate for the elimination of international crimes. In the case of Adolf Eichmann, the Israeli Supreme Court emphasized the unique characteristics of crimes under customary international criminal law when it stated that, “these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community;

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<sup>53</sup> Al-Dujail Case, Case No. 1/9 First/2005, Judgement, pp.31-33 (Nov. 26, 2006), available at [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf) (above is unofficial translation version).

they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.”<sup>54</sup> The nature of the crime thus should determine the nature of the prosecution. Admittedly, hybrid tribunals have acknowledged that the universal condemnation of certain crimes within their jurisdictions “do not affect the interests of one State alone but shock the conscience of mankind.”<sup>55</sup> The argument for universal jurisdiction follows, that international crimes “are crimes against the United Nations, indeed against all humanity; they are more than crimes against any one national, and should not be open to punishment by any one nation.”<sup>56</sup> Accordingly, major international criminals should be first and foremost tried by international criminal tribunals, even if domestic courts are capable.

In addition to the universal interest in international crimes, removal to an international setting would, ostensibly, promote fairness. The international court’s externality creates an objective distance between judges and judged, without any concern over local bias. For example, the ECCC (Extraordinary Chambers in the Courts of Cambodia”) hybrid tribunal has been criticized as being highly politicized as “most judges are perceived as serving the interests of political parties” as evidence by the lack of legal reasoning in the decisions and the evidence that “the trials of serious offenses can only last an hour.”<sup>57</sup> Another reason for promoting an international court over a hybrid system is for consistency in the prosecution of international crimes. One scholar noted, “permanent outsourcing to domestic courts may simply result in

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<sup>54</sup> Israel, Supreme Court, Eichmann case, Judgement, 29 May 1962, §11

<sup>55</sup> Kadic V, Case No. IT-94-1, ¶ 57 (Appeals Chamber, ICTY, July 15, 1999), at <http://www.un.org/icty/judgement.htm>; see Erdemovic I, Case No. IT-96-22, ¶ 32 (Trial Chamber, ICTY, Nov. 29, 1996), at <http://www.un.org/icty/judgement.htm> (rejecting the idea that the penalty for a crime against humanity should be based on the punishment under domestic law for the relevant enumerated act); see also Schabas, *supra* note 54, at 477-78 (arguing that sentencing a war criminal based on the analogous domestic crime he committed is flawed because such an approach ignores the inherent increased seriousness of a war crime).

<sup>56</sup> Quote textbook?

<sup>57</sup> <http://webcache.googleusercontent.com/search?client=safari&rls=en&oe=UTF-8&hl=en&q=cache:mC8mHvkL46wJ:http://www.uel.ac.uk/chrc/documents/WP7.pdf+ECCC+Cambodia+politicized&ct=clnk>

discrepancies in the substantive law, as international criminal law is incorporated, interpreted, and applied in ways that inevitably vary from one country to the other...”<sup>58</sup> One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice.<sup>59</sup> Hybrid tribunals do not fulfill the goal of consistency, and indeed may in fact be more inconsistent because domestic law will be different in each state. This will and has resulted in different applications of law—the Sierra Leone tribunal did not apply the same law as the Iraqi tribunal. *Ad hoc* or ICC criminal bodies may result in more consistency, and thus a more rational and fair system of punishment.

The final central critique on hybrid tribunals is their infrastructure. The goal of adjudication is justice, but if justice will not be gained then the advantages of a local trial lose their appeal. Indeed, ill-equipped “local courts and local lawyers, unfamiliar with international standards, may seek to apply ordinary criminal law to the mass atrocities in question.”<sup>60</sup> This is a potentially significant problem because using local criminal law “will not capture the complexity or magnitude of the atrocities committed, thereby minimizing the wrongs suffered” and the deterrent and denunciation effect of the sentences imposed.<sup>61</sup> The inadequacies of the domestic state sometimes serve as a deterrent to international acceptance of hybrid tribunals and instead promote a stronger international influence to ensure the legality of the system.

**B. Hybrid tribunals have several advantages that often make it a more favorable process over other methods of prosecuting international crimes**

“Incorporating some aspects of the formal international criminal justice models while seeking to include local actors and develop local norms, the hybrid approach has been thought

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<sup>58</sup> Dickinson 305

<sup>59</sup> Celebici II, ¶ 756.

<sup>60</sup> Laura A. Dickinson, “The Promise of Hybrid Courts,” *The American Journal of International Law* Vol. 97, No. 2 (April, 2003), pp. 305

<sup>61</sup> *Id.* at 295-310

beneficial in addressing practical, on the ground dilemmas about criminal accountability for human rights abuses.”<sup>62</sup> Despite critics’ calls for uniformity and consistent adjudication by international courts for international crimes, the hybrid approach is more appropriate because the numerous benefits of hybridism outnumber the criticisms. Hybrid tribunals are the best compromise between respecting the independence and sovereignty of nation states while still protecting and acknowledging international norms of universal human rights. The recent Iraqi hybrid tribunal exemplifies the resistance to universal sovereignty over international crimes.

Iraq’s justice minister, Hashim Abdul, Raham Al-Shalabi said, “the presence of foreign judges will undermine Iraqi sovereignty and would undercut the value of Iraqi judiciary.”<sup>63</sup> Accordingly, the Iraqi Tribunal was “built on the truism that sovereign states retain primary responsibility for adjudicating violations of crimes defined and promulgated under international law.”<sup>64</sup> Furthermore, the Iraqi Tribunal “was established on a self-evident truth that countries have judicial authority over crimes that are part of international criminal law...”<sup>65</sup> Specifically, requests regarding transfers of the trials outside of Iraq were denied because of the “firm rule in law that crimes committed inside national territory should be tried in those lands.”<sup>66</sup> So although some states may be ready to concede authority to an international court, this must a careful process that is agreed upon and not commanded. Clearly there are states that are resistant to the relinquishment of jurisdiction. The current quest for a mandated international adjudication is premature and infringes unduly on domestic states. The Iraqi tribunal’s structure is demonstrable

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<sup>62</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int’l L. 295, 300 (2003)

<sup>63</sup> David M. Gersh, *Poor Judgement: Why the Iraqi Special Tribunal is the Wrong Mechanism For Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 Ga. J. Int’l Comp. L. 272, 287-289 (2004).

<sup>64</sup> [http://www.icrc.org/eng/assets/files/other/irrc\\_862\\_newton.pdf](http://www.icrc.org/eng/assets/files/other/irrc_862_newton.pdf)

<sup>65</sup> Al-Dujail Case, Case No. 1/9 First/2005, Judgement, pp.31-33 (Nov. 26, 2006), available at [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf) (above is unofficial translation version).

<sup>66</sup> Al-Dujail Case, Case No. 1/9 First/2005, Judgement, pp.31-33 (Nov. 26, 2006), available at [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf) (above is unofficial translation version).

of the success of hybridism in that it respected sovereignty while still addressed the magnitude and transnational nature of the war crimes.

In addition to respecting nation states, hybrid tribunals are preferable because they require fewer resources and thus may be utilized more easily to ensure quicker execution of justice. In contrast, “the *ad hoc* tribunals were criticized for their exorbitant costs.”<sup>67</sup> For example, “the ICTY’s annual budget reached approximately \$173.7 million per year, and the ICTR, \$133.7 million per year. Hybrid tribunals are instead less expensive to operate than international courts, as shows the \$89 million budget of the Special Court for Sierra Leone.”<sup>68</sup> The more resources preserved, the more resources available to help other states in need of assistance. The goal of universal human rights, as mandated by *jus cogens* norms and the existence of “international crimes” will be better served with the greatest reach possible. Hybrid tribunals are the most effective criminal forum to reach the greatest number of states in need of justice for international crimes.

Hybrid tribunals are also more effective than other international processes because they provide more significant justice for the victim population. Since hybrid tribunals often operate at the *locus delicti*, victims are sometimes afforded greater transparency and participation to the proceedings. The Iraqi Tribunal in the Al-Dujail Case explained, “the proceedings or any penalty resulting from this trial in the country affected by the crime shall have the psychological and administrative effect which may help society understand what happened and in addition to understanding the responses of others, and this may play a preventative role for future or

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<sup>67</sup> What are the advantages of hybrid tribunals? (Mélodie Sahraie)

[http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#\\_ftn4](http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#_ftn4)

<sup>68</sup> Lindsey Raub, “Positioning hybrid tribunals in international criminal justice” (2009) 41 N.Y.U. J. Int’l L. & Pol. 1013.



probable crimes.”<sup>69</sup> This accessibility and opportunity in investigation are consequently facilitated for the traumatized populations, whose needs are thus much more taken into account by bringing justice closer to them.<sup>70</sup> Such victim-centered justice “[leads] to gradual reconciliation and a cathartic process for the victims,”<sup>71</sup> as well as bringing “restitution and redress for the victims.”<sup>72</sup>

Unlike international courts, hybrid tribunals are more accurate and exacting with the ability to provide on sight evidence and support for the trials. In contrast to the removed *ad hoc* proceedings, the evidence and witnesses for hybrid trials are better accessible, so are logistics of the proceeding, facilitated by the proximity of the tribunals to where the atrocities took place.<sup>73</sup> If domestic institutions are involved (such as Truth and Reconciliation Commissions or Non-Governmental Organizations dealing with human rights abuses), or investigation is necessary, such as in Sierra Leone, both goals will be better coordinated with the tribunals’ functions, thanks to the proximity created.<sup>74</sup> Efficiency in adjudication as well as justice in providing the most accurate and filling information is better served by on site proceedings.

The lasting effects of hybrid tribunals directly contribute to the post-trial success of the domestic state in independent governance; international courts and *ad hoc* tribunals do not. “The legal landscape of post-conflict societies is devastated, along with collapsed infrastructures

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<sup>69</sup> Al-Dujail Case, Case No. 1/9 First/2005, Judgement, pp.31-33 (Nov. 26, 2006), available at [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf) (above is unofficial translation version).

<sup>70</sup> Alberto Costi, “Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations” (2006) 22 *New Zealand Universities Law Review* 213

<sup>71</sup> Antonio Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality’ in Romano, Nollkaemper & Kleffner, *Internationalized Criminal Courts and Tribunals* (Oxford University Press, 2004).

<sup>72</sup> Alberto Costi, “Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations” (2006) 22 *New Zealand Universities Law Review* 213.

<sup>73</sup> Eileen Skinnider, “Experiences and Lessons from ‘Hybrid’ Tribunals: Sierra Leone, East Timor and Cambodia” (2007) Symposium on the International Criminal Court (Beijing, China).

<sup>74</sup> Antonio Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality’ in Romano, Nollkaemper & Kleffner, *Internationalized Criminal Courts and Tribunals* (Oxford University Press, 2004).

and lack of qualified local personnel who have been killed or left the country. With an allocated budget and the assistance of the international community, using the local resources available and incorporating experienced international judges, prosecutors, investigators, administrators, technical knowledge, legal training, will altogether contribute to build capacity in the country where the hybrid court has been established.”<sup>75</sup> In addition “to rebuilding and helping to strengthen the local judicial system, its long-lasting contribution on the system and the society has to be underlined.”<sup>76</sup> It is arguable that *ad hoc* proceedings actually leave the domestic state worse off than before U.N. interference because in *ad hoc* proceedings only the most severe cases are removed for international review, with no aid to the remaining prosecutions left to the ill-equipped domestic system. There is no transitional aid or sharing of knowledge or proceedings for the domestic state to benefit and attempt self-governance following the resolution of the disputes.

In addition to long-term aid, hybrid tribunals provide the independence and impartiality that may escape purely domestic trials. While hybrid tribunals may still face criticisms of partiality, hybrid tribunals are less vulnerable to bias than purely domestic courts. “National trials have often proved to be one-sided, especially when the prosecuting government may have had a hand in committing the crimes. They can take the form of a show trial used to eliminate political enemies and thus undoubtedly lack impartiality.”<sup>77</sup> “The assistance of the international community to the domestic jurisdiction in prosecuting crimes provides the accused with fair and unbiased trials.”<sup>78</sup> And unlike purely domestic courts, hybrid tribunals provide a legitimacy that

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<sup>75</sup> What are the advantages of hybrid tribunals? (Mélodie Sahraie)  
[http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#\\_ftn4](http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#_ftn4)

<sup>76</sup> Laura A. Dickinson, “The Promise of Hybrid Courts” (2003) 97 Am. J. Int’l L. 295.

<sup>77</sup> What are the advantages of hybrid tribunals? (Mélodie Sahraie)  
[http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#\\_ftn4](http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#_ftn4)

<sup>78</sup> Lindsey Raub, “Positioning hybrid tribunals in international criminal justice” (2009) 41 N.Y.U. J. Int’l L. & Pol. 1013

the public is comfortable with. Post conflict situations invariably involve “doubts and lack of confidence from a community that has been facing corruption and oppression so far.”<sup>79</sup> In this context, appointing international judges and requiring assistance from the international community would increase public confidence.<sup>80</sup>

In furtherance of changing and unanticipated needs of post-conflict communities, hybrid tribunals do not have a strict formula that requires abidance and are thus more flexible to the needs of the specific situation. This adaptability makes hybrid tribunals more versatile than *ad hoc* tribunals. “Hybrid tribunals can adapt to different or particular circumstances, and to specific needs. It is not a rooted model, but rather an evolving one, which can take into account past experiences and successes. The decisions of a specific hybrid tribunal may be inconsistent as compared to another hybrid tribunal in a different country, but that is a reasonable sacrifice to make in favor of more individualized treatment of the crimes at issue in a particular case. For instance, the strongest inconsistencies among hybrid tribunals are “in respect to the length of sentences imposed on similarly situated offenders”<sup>81</sup> as a result of the reliance on diverging domestic laws.

Moreover, this flexibility allows the prosecution of crimes that occurred before the entry into force of the Rome Statute, which stipulates that only the crimes committed after its entry will fall under the jurisdiction of the ICC.”<sup>82</sup> It additionally fills in the “impunity gap” created by the ICC’s regime, by enabling the possibility to extend to more states, rather than only those

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<sup>79</sup> What are the advantages of hybrid tribunals? (Mélodie Sahraie)

[http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#\\_ftn4](http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#_ftn4)

<sup>80</sup> Laura A. Dickinson, “The Promise of Hybrid Courts” (2003) 97 Am. J. Int’l L. 295.

<sup>81</sup> See Mark Drumbl, *Punishment, Atrocity, and International Law* 6 (2007) (surveying the sentencing practices of international courts and discussing possible means of reform).

<sup>82</sup> What are the advantages of hybrid tribunals? (Mélodie Sahraie)

[http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#\\_ftn4](http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds#_ftn4)

parties to the Rome Statute who are under its jurisdiction.<sup>83</sup> Furthermore, because the ICC only provides complimentary jurisdiction if the domestic state is unable or unwilling to address the domestic offenses, there is significant opportunity via hybrid tribunals for the international community to participate in domestic trials.

#### IV. Conclusion

International criminal bodies must exist in order to preserve universal human rights. Ignorance to the atrocities occurring within another state cannot be tolerated in the twenty first century. It is the international community's duty to unambiguously condemn war crimes, crimes of aggression, crimes against the peace, and genocide. Prosecution of such criminals ensures retribution for the victims and deterrence against future similar crimes. The difficulty amongst civilized nations exists in deciding how to implement the criminal tribunal.

Nuremberg established the duty of the international community to prosecute international crimes. It also demonstrated an extreme power imbalance that detracted from the court's impartiality and fairness through the imposition of "victor's justice." *Ad hoc* tribunals developed to represent the international community at large in prosecution of international atrocities. But these tribunals achieve international justice at too great a cost to the domestic state and fail to provide for long-term success. Similarly, the ICC likewise fails because the court is too removed from the evidence, the victims, and the perpetrator's cultural and legal expectations. Such tribunals are temporary solutions that do little for the prosperity and rehabilitation of the domestic state.

Hybrid tribunals serve as the perfect blend in upholding international human rights and respecting state sovereignty for domestic states that would benefit from international assistance.

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<sup>83</sup> Eileen Skinnider, "Experiences and Lessons from 'Hybrid' Tribunals: Sierra Leone, East Timor and Cambodia" (2007) Symposium on the International Criminal Court (Beijing, China).

The international actors involved in the dispute ensure fairness without the power disparities evident in Nuremberg. The use of domestic actors, infrastructure, and penal laws allow for greater domestic acceptance and respect. The state is instead transitioned with guiding hand, rather than broken up and removed by *ad hoc* or ICC proceedings. However, the *ad hoc* tribunals are more appropriate when the domestic courts are incapable of handling the caseload and the ICC trials are more appropriate if the domestic court is unable or unwilling to address the offenses. Hybrid tribunals build a foundation to which the domestic state relies upon after the international presence and resources have been withdrawn. There is significant precedential value for decisions reached by hybrid tribunals that can later be applied by domestic courts. The dichotomy between universal human rights and state sovereignty is best advanced through hybrid tribunals.

