

The Promise of Hybrid Courts

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NOTES AND COMMENTS

THE PROMISE OF HYBRID COURTS

Over the past decade, issues of accountability and reconciliation in the aftermath of mass atrocities have increasingly dominated the field of international human rights. Indeed, the proliferation of international and domestic courts, truth commissions, civil compensation schemes, and other mechanisms for confronting the past has spawned its own scholarly field: transitional justice.¹ And the sheer number and variety of institutional mechanisms suggests that questions of how peoples address gross human rights abuses and move forward into the future will continue to be a source of international interest as well as a site for innovation and creative adaptation.

Much of the transitional justice discussion has centered on four types of accountability mechanisms that have proven to be both significant and controversial. First, the promise and pitfalls of international criminal justice bodies—such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—have taken on increased importance with the establishment of the International Criminal Court (ICC). Second, the growing use of truth commissions, pioneered in Latin America, developed famously in South Africa, and now being used around the globe from East Timor to Nigeria to Peru, has elicited enormous interest within policy, advocacy, and scholarly communities. Third, transnational accountability efforts—such as Spain’s attempt to extradite Augusto Pinochet to stand trial for torture and other human rights abuses committed in Chile, or Belgium’s application of its relatively recent universal jurisdiction law—have sparked vigorous debate. Finally, the use of the Alien Tort Claims Act in the United States to allow civil tort claims brought by victims of human rights abuses continues to be controversial.

Comparatively little attention has been paid, however, to a fifth, newly emerging, form of accountability and reconciliation: hybrid domestic-international courts. Such courts are “hybrid” because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards. This hybrid model has developed in a range of settings, generally postconflict situations where no politically viable full-fledged international tribunal exists, as in East Timor or Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo. Most recently, an agreement to create a hybrid court in Cambodia has been reached,² and there is discussion about establishing such a court in postwar Iraq.³

¹ See generally STEVEN R. RATNER & JASON ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); AVENUES TO ACCOUNTABILITY: NATIONAL AND INTERNATIONAL RESPONSES TO ATROCITIES (Jane Stromseth ed. forthcoming 2003) [hereinafter AVENUES TO ACCOUNTABILITY]; ALEX BORAINÉ, *A COUNTRY UNMASKED* (2000); PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS* (2001); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz, ed. 1995).

² See Seth Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, N.Y. TIMES, Mar. 18, 2003, at A5.

³ 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”).

Frequently, such courts have been conceived in an ad hoc way, the product of on the ground innovation rather than grand institutional design. As a result, hybrid courts have not yet been the subject of sustained analysis, even among scholars and policymakers who focus on transitional justice issues. This Comment seeks to fill that gap by identifying hybrid courts as an important area of future study and making a preliminary assessment of their potential strengths and weaknesses.

Interestingly, one reason the hybrid courts have received comparatively little attention so far may be that their very hybridity has left them open to challenge both from those advocating increased use of formal international justice mechanisms and those who resist all reliance on international institutions. For example, many supporters of international justice seem to fear that hybrid tribunals may be used as an alternative to, and possibly as a means to undermine, the use of full-fledged international criminal courts. Indeed, it is striking that two government officials who played key roles in establishing hybrid tribunals in Kosovo and East Timor have resisted the notion that such courts could serve as a model for the future.⁴ Many within the human rights advocacy community have been critical of the hybrid courts as well.⁵ From the opposite end of the political spectrum, those who generally eschew international justice mechanisms—such as Bush Administration officials who have opposed the ICC—may see hybrid tribunals as carrying *too many* of the trappings of international courts. For example, administration officials have been wary of international involvement in efforts to establish courts to try those suspected of committing mass atrocities in Iraq, instead advocating an Iraqi-led domestic process.⁶ In a sense, then, hybrid courts are being squeezed from both sides.

This dual resistance to hybrid courts is unfortunate. As I argue in this Comment, such courts hold a good deal of promise and may even offer an approach to questions of accountability that addresses some of the concerns raised in both camps. At the very least, such courts warrant further study and careful examination. In this Comment, I look at three recent examples of hybrid courts, those established in Kosovo, East Timor, and Sierra Leone to hear cases involving war crimes, crimes against humanity, genocide, and other mass atrocities in those countries. I then address some of the advantages and disadvantages of these courts, particularly with regard to their perceived legitimacy (among both international and domestic constituencies), their ability to catalyze local efforts to establish rule of law institutions, and their potential to foster the development of human rights norms within emerging legal systems. Finally, I discuss ways in which hybrid courts might fit into the ICC's complementarity regime. I argue that such courts are best seen not as an alternative to international or local justice, but rather as an important complement to both.

I. THREE EXAMPLES OF HYBRID COURTS

Kosovo

In June 1999, the United Nations Mission in Kosovo (UNMIK) faced the daunting task of apprehending, trying, and punishing those who had committed past atrocities as well as those

⁴ 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 Hansjörg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, 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 an assistant legal advisor to the UN transitional administrators there.

⁵ See, e.g., U.N. Action on Sierra Leone Court Welcomed But "Mixed" Tribunal Has Shortcomings, Press Release, Human Rights Watch (Aug. 14, 2000) (warning that Sierra Leone authorities could manipulate the hybrid court, "leading to biased prosecutions and inadequate protections for persons standing trial before the tribunal").

⁶ 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.

who committed crimes after the establishment of UN authority.⁷ This task was not easily fulfilled. 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.⁸ 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.⁹ Detainees suspected of committing atrocities, once apprehended by UN security forces, were crowding prison facilities, with little prospect of trial.¹⁰ Devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trials. Yet the prosecutor for the International Criminal Tribunal for the former Yugoslavia made it clear that the international tribunal had the resources to try only those who had committed the worst atrocities on the widest scale.¹¹ As the detainees continued to languish in prison, many argued that the continued detention itself violated international human rights standards, and local frustration with the failure of the judicial process contributed to increasing ethnic violence.¹²

To address what was rapidly becoming an accountability and justice crisis, UN authorities issued a series of regulations allowing foreign judges 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.¹³ The substantive law applied in these cases has also been a blend of the international and domestic. Initially, after 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.¹⁴ This decision outraged many ethnic Albanian Kosovars, who considered FRY/Serbian law to be the law of the oppressive Serbian regime.¹⁵ Kosovar Albanian judges refused to apply the law, resulting in widespread confusion.¹⁶ In response, UNMIK issued new resolutions describing the applicable law to be the law in force in Kosovo prior to March 22, 1989.¹⁷ But, like the initial decision, the applicable law was to be a hybrid of preexisting local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.

As of June 2002, these courts had held trials in 17 war crimes cases.¹⁸ Initially, international judges had minimal impact, as they did not comprise a majority on the trial panels.¹⁹ An UNMIK

⁷ For an overview of efforts to establish the rule of law in postconflict Kosovo, see Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT'L L. 371 (2001); Hansjörg Strohmeyer, *Making Multilateral Interventions Work: the U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, FLETCHER FOR. WORLD AFF. (2001) [hereinafter Strohmeyer, *Multilateral Interventions*]; Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AJIL 46 (2001) [hereinafter Strohmeyer, *Collapse*].

⁸ Betts, *supra* note 7, at 376–77.

⁹ Strohmeyer, *Collapse*, *supra* note 7, at 49–50, 53.

¹⁰ *Id.*

¹¹ See Carla Del Ponte, Prosecutor of the ICTY, “Statement on the Investigation and Prosecution of Crimes Committed in Kosovo,” The Hague (Sept. 29, 1999).

¹² See Strohmeyer, *Collapse*, *supra* note 7, at 49. When UNMIK issued a regulation allowing for longer pretrial detention of suspects, the Legal System Monitoring Section (LMS) of the Organisation for Security and Co-operation in Europe (OSCE) concluded that the new regulation was a “clear breach” of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). OSCE LMS, Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26 (April 29, 2000).

¹³ Betts, *supra* note 7, at 381.

¹⁴ UNMIK Resolution 1999/1.

¹⁵ Strohmeyer, *Multilateral Transitions*, *supra* note 7, at 112–13.

¹⁶ *Id.*

¹⁷ UNMIK Resolution 1999/24 and UNMIK Resolution 1999/25.

¹⁸ OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Kosovo’s War Crimes Trials: A Review, September 2002, available at <<http://www.osce.org/kosovo/documents/reports/justice/>> [hereinafter Kosovo’s War Crimes Trials].

¹⁹ *Id.*

regulation enacted in December 2000 sought to rectify this problem, however,²⁰ and after that date all cases of war crimes have been held in front of courts composed of a majority of international judges, while prosecution has mostly been undertaken by international prosecutors.²¹ And even a report that is critical of the tribunals in many respects suggests that the presence of international actors has improved the quality of justice delivered in these cases.²²

East Timor

East Timor's path to hybrid courts resembles Kosovo's, though the decision to use them was perhaps more self-conscious. As in Kosovo, the United Nations Transitional Administration in East Timor (UNTAET) was charged with establishing a process to provide meaningful accountability for serious violations of international humanitarian law.²³ Yet, the capacity of the local judiciary was perhaps even weaker than in Kosovo. Very few East Timorese had been trained as lawyers at all, and most civil service posts had been reserved for Indonesians.²⁴ The physical infrastructure of the country had been almost completely destroyed during the period of looting prior to the arrival of the multinational force.²⁵ Militia members suspected of committing mass atrocities were being held in makeshift prison facilities.²⁶ And, while no domestic court system existed to allow for meaningful trials, unlike Kosovo no international court existed either.²⁷

Under these circumstances, hybrid courts were particularly attractive. UNTAET issued regulations providing that "serious crimes" would be tried before three-judge panels, comprised of two international judges and one East Timorese judge, sitting within the jurisdiction of the District Court of Dili.²⁸ "Serious crimes" were defined as war crimes, crimes against humanity, and genocide, as well as murder, sexual offenses, and torture, insofar as the latter three crimes were committed between January 1, 1999, and October 25, 1999.²⁹ Prosecutors and investigators were again drawn from other countries, as well as the local population.³⁰ By June 2002 the serious crimes unit had issued forty-two indictments for 112 individuals and

²⁰ UNMIK Regulation 2000/64 (Dec. 15, 2000).

²¹ Kosovo's War Crimes Trials, *supra* note 18.

²² *Id.*

²³ See SC Res. 1272 (Oct. 25, 1999).

²⁴ See Strohmeyer, *Collapse*, *supra* note 7, at 50.

²⁵ See *id.* at 57.

²⁶ See *id.*

²⁷ For a discussion of the interactions among various accountability mechanisms in East Timor and Indonesia, see Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in AVENUES TO ACCOUNTABILITY, *supra* note 1.

²⁸ 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).

²⁹ Regulation No. 2000/11, *supra* note 28.

³⁰ 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).

obtained twenty-four convictions.³¹ The serious crimes unit continues to be hampered by lack of funding, inexperienced personnel, and vacancies in key positions. For example, the appellate panel currently cannot function because too few judges have been hired, and the trial courts have also been forced to suspend proceedings periodically because of lack of personnel.³² Nevertheless, despite these problems, trials are proceeding, and it appears that the hybrid court will continue to play a significant role in the process of accountability for human rights abuses, even now that East Timor has gained independence.

Sierra Leone

In Sierra Leone, as in Kosovo and East Timor, establishing a hybrid court became a priority in the summer of 2000 after a severe accountability crisis developed at the end of a long civil conflict.³³ The domestic justice system, strained to the breaking point by the civil war and rife with corruption, was ill-equipped to handle any serious case involving atrocities committed during the war, particularly the impending trial of Revolutionary United Front (RUF) leader Foday Sankoh, who had been taken into government custody.³⁴ Yet, there was little prospect that a new international criminal tribunal would be created, and 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. At the same time Kabbah did not want the responsibility for the prosecution of Foday Sankoh to fall entirely on his government's shoulders,³⁵ in part because he feared the potential for retaliation against judges and other government officials involved in the case. And while the trial of Foday Sankoh posed serious problems for the government of Sierra Leone, so did his detention without prospect of trial or release. Accordingly, in June of 2000 the Sierra Leonean government asked the United Nations 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."³⁶

Unlike the East Timor and Kosovo courts, the Sierra Leonean tribunal established in response to this request operates outside the national court system.³⁷ Nevertheless, the hybrid institutional features are similar. Again, the personnel is both international and domestic.³⁸

³¹ Judicial System Monitoring Program, Summary of Serious Crimes Cases, *available at* <<http://www.jsmp.minihub.org/Trialsnew/htm>>.

³² For an overview of the shortfalls of the special panels, caused in part by scarce resources, see Richard Dicker, Mike Jendrzeczyk & Joanna Weschler, East Timor: Special Panels for Serious Crimes, Human Rights Watch, Aug. 6, 2002, *available at* <<http://www.hrw.org/press/2002/08/etimor-ltr0806.htm>> (last visited Dec. 26, 2002); see also David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?* ASIA PACIFIC ISSUES, *available at* <<http://www.ewc.hawaii.edu/stored/pdfs/api061.pdf>> (last visited Dec. 26, 2002).

³³ For an account of the conflict and efforts to establish postconflict mechanisms of accountability and reconciliation, see Avril D. Haines, *Accountability in Sierra Leone: The Role of the Special Court*, in AVENUES TO ACCOUNTABILITY, *supra* note 1; see also U.S. Department of State, Sierra Leone, 2001 Country Reports on Human Rights Practices, March 4, 2002, *available at* <<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8402.htm>> [hereinafter Sierra Leone 2001 Country Report].

³⁴ See Barbara Crossette, *U.N. to Establish a War Crimes Panel to Hear Sierra Leone Atrocity Cases*, N.Y. TIMES, Aug. 15, 2000, at A6 (describing fears that Foday Sankoh would be able "to bargain for amnesty if the country's weakened judicial system has control of the tribunal").

³⁵ See Robert Holloway, *Security Council Approves International Court for Sierra Leone*, AGENCE FRANCE-PRESSE, Aug. 14, 2000 (describing Kabbah's concerns about domestic prosecutions).

³⁶ Sierra Leone 2001 Country Report, *supra* note 33, at §4.

³⁷ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN SCOR, UN Doc. S/2000/915 (2000) [hereinafter Report of the Secretary-General].

³⁸ 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 (to be appointed by the Secretary-General) and one domestic (to be appointed by the government of Sierra Leone). The appellate chamber is composed of five

All components are staffed by a combination of international and domestic actors,³⁹ and 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.⁴⁰ Adding to its hybrid character, 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).⁴¹

As of this writing, the work of the court has only just begun. 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 2002.⁴² Ultimately, the court is expected to try approximately 20 people.

Thus we can see that, in three very different postconflict settings over the past several years, officials have turned to the hybrid court mechanism. Faced with the reality that international courts would be unable to try more than a handful of the most serious perpetrators at best and the specter of a domestic court system in disrepair, these officials have improvised a compromise strategy. 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 beneficial in addressing practical, on the ground dilemmas about criminal accountability for human rights abuses. Now that we have seen the experiment at work in at least two of the three settings, it is time to take a step back and evaluate both the promise of hybrid courts (in comparison to purely international and purely domestic alternatives) and the degree to which the hybrid model appears to be fulfilling that promise.

II. THREE PROBLEMS OF PURELY INTERNATIONAL AND PURELY DOMESTIC TRIBUNALS

Until recently, the primary mechanisms for imposing individual criminal responsibility for grave human rights abuses fell into two categories. Either new regimes attempted domestic trials or the international community established international tribunals to hold wrongdoers accountable. Both of these approaches, however, have significant limitations, which can be conceptualized along three axes: first, problems of legitimacy, second, problems of capacity-building, and third, problems of norm penetration. Focusing on the lessons learned from Kosovo and East Timor (and to a lesser degree Sierra Leone), this part outlines the problems of both purely domestic and purely international tribunals before turning to a discussion of ways in which hybrid domestic-international courts might address some of these problems.

judges, three international and two domestic, and while the Secretary-General is to appoint the prosecutor, the government of Sierra Leone is to appoint a deputy. Other court staff is also to include both international and domestic personnel. 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>> at 3.

³⁹ Special Court Agreement, *supra* note 38, at Art. 2; Statute of the Special Court, *supra* note 38, at Art. 12.

⁴⁰ Statute of the Special Court, *supra* note 38, at Art. 1. Specifically, the court may hear cases concerning crimes against humanity, violations of common Article 3 of the Geneva Conventions, and other serious violations of international humanitarian law, including intentional attacks on civilians or humanitarian personnel, and the abduction and forced recruitment of children under the age of 15. *Id.* at Arts. 2–4. At the same time, the court has jurisdiction over certain domestic crimes, including offenses related to the abuse of girls, and arson. *Id.* at Art. 5. Because there was no evidence that the mass killing in Sierra Leone was at any time perpetrated against an identifiable national, ethnic, racial, or religious group with the intent to annihilate the group as such, the Special Court does not have jurisdiction over the crime of genocide. See Report of the Secretary-General, *supra* note 37, at 3.

⁴¹ Statute of the Special Court, *supra* note 38, at Art. 20.

⁴² *War Court Judges for Sierra Leone Take Their Oaths*, N.Y. TIMES, Dec. 3, 2002, at A8.

Legitimacy Problems

In the adjudication of serious violations of international humanitarian and human rights law, both purely domestic trials on the one hand and purely international processes on the other may face problems of perceived legitimacy. It is important to make clear when discussing such problems, however, that what I mean by perceived legitimacy is *not* the formal question of political legitimacy or democratic legitimacy that is often debated in political philosophy or international law theory. Although such debates are certainly important, I am focusing here on legitimacy in a more on-the-ground sense: what factors tend to make the decisions of a juridical body acceptable to various populations observing its procedures? Thus, in this Comment I am less interested in whether or not a particular criminal justice approach can be justified as legitimate on a theoretical level than in whether or not various local and international communities are likely, as a practical matter, to “buy in” to the approach and treat the activities of the institutions involved as legitimate.⁴³

Of course, different constituencies viewing the work of any court system may have different ideas about what constitutes its legitimacy. For example, various national communities may focus on very different factors in assessing a court’s legitimacy, and these factors might, in turn, be different from those that underpin legitimacy in the eyes of various international communities standing outside a country and judging its legal process. It is beyond the scope of this brief essay to provide a comprehensive overview of the legitimacy problems facing juridical institutions in postconflict societies. Nevertheless, while it is impossible to measure with absolute accuracy the sort of perceived legitimacy I have in mind, I believe that we can at least make some tentative observations based on experience over the past decade that may be useful in assessing the likely efficacy of various juridical mechanisms in the future.

Not surprisingly, the perceived legitimacy of domestic judicial institutions in postconflict situations is often in question. To the extent that such institutions exist at all, they typically will have suffered severely during the conflict. The physical infrastructure often will have sustained extensive, crippling damage, and the personnel is likely to be severely compromised or lacking in essential skills. Judges and prosecutors may remain in place from the prior regime, which may have backed the commission of widespread atrocities. Thus, the state may continue to employ the very people who failed to prosecute or convict murderers or torturers or ethnic cleansers. Alternatively, the new regime may replace 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.

For example, in both Kosovo and East Timor the utter lack of functional domestic institutions created the need for a UN transitional administration in the first place. The physical infrastructure of the legal systems had been severely damaged by the conflicts, and the systems were still tainted by the former oppressive regimes, undermining public confidence in, and the broad societal legitimacy of, legal processes. Indeed, the justice systems had been run virtually exclusively by perceived oppressors—Serbs in Kosovo and Indonesians in East Timor—and ethnic Albanians and East Timorese had been systematically excluded from participation.⁴⁴ Although Sierra Leone did not see the same sort of ethnic division as in Kosovo and East Timor, the RUF retained control over various areas of the country,⁴⁵ raising the possibility that local judges would be unable to deliver verdicts holding RUF members accountable for human rights violations.

⁴³ Obviously, these two inquiries may be similar. For example, the perceived legitimacy of a juridical body might be related to the transparency or democratic accountability of the body, two factors that might also be relevant for evaluating the legitimacy of that body as a matter of political theory.

⁴⁴ See Strohmeyer, *Collapse*, *supra* note 7, at 48–53.

⁴⁵ Sierra Leone 2001 Country Report, *supra* note 33.

Even if a new local justice system can be established quickly, overcorrection for these imbalances can create new problems. In Kosovo, for example, it was easier after the conflict to appoint ethnic Albanian judges than ethnic Serbian judges. Only a few Serbian judges were willing to serve, and even those Serbs who were initially appointed stepped down after feeling pressure from Belgrade.⁴⁶ Yet, without Serbian representation in the judiciary, the independence of the decision making—a key factor in establishing the court system's perceived legitimacy among the entire local population—was severely imperiled.⁴⁷ In fact, several judgments imposed against Serbian defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges, due to concerns about lack of due process and insufficient evidence.⁴⁸ In East Timor, this was less of a problem because most Indonesians had fled the territory, and the remaining population was largely pro-independence Timorese.⁴⁹ Nonetheless, a small segment of the population supported only limited autonomy for East Timor under the authority of Indonesia,⁵⁰ and many of those individuals were the ones most likely to face trial for committing atrocities,⁵¹ raising concern about whether they could receive a fair trial under the newly created Timorese system. In Sierra Leone, the possibility of domestic prosecutions was made even more difficult because the Lomé peace accord had included a broad amnesty provision, which would have posed a significant obstacle to domestic prosecutions. As former UN Ambassador Richard Holbrooke said at the time, “[t]he Lomé agreement created this amnesty provision in domestic law, but the United Nations did not accept it in international law, and therefore an international character to the court was required.”⁵² Thus, in Kosovo, East Timor and Sierra Leone, the local justice system on its own was unlikely to be able to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities.

At the same time, broad acceptance of purely international processes may be difficult to establish as well. In Kosovo an international tribunal—the ICTY—did exist as a forum to try those responsible for the most egregious atrocities. Yet, this institution was ill-equipped to address more than a handful of cases—as international courts undoubtedly always will be. Moreover, international institutions like the ICTY are likely to encounter resistance on the ground. For example, in light of the continuing ethnic tensions within the region, the ICTY was established at The Hague, far removed from the scene of the atrocities, and the court was staffed by international judges and staff. However, the lack of connection to local populations has been problematic. A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina indicates that a wide cross-section of lawyers and judges from all ethnic groups, while playing different roles within Bosnian society, were similarly ill-informed about the ICTY's work, and were often suspicious of its motives and its results.⁵³ The study

⁴⁶ See Organisation for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, Report 9—On the Administration of Justice, March 2002, at 5 [hereinafter March 2002 OSCE Report].

⁴⁷ See Andrew McKay, *Judicial Affairs: Delivering Effective Law and Order*, FOCUS KOSOVO, Oct. 2001, at <<http://www.unmikonline.org/pub/focuskos/oct01/focusklaw1.htm>> (last visited Oct. 21, 2002); *Multi-Ethnic Justice*, FOCUS KOSOVO, Dec. 2001, at <<http://www.unmikonline.org/pub/focuskos/dec01/focuskchron.htm>> (last visited Oct. 21, 2001).

⁴⁸ *Detentions: A Tale of Two Prison Groups*, FOCUS KOSOVO, Feb. 2002, at <<http://www.unmikonline.org/pub/focuskos/feb02/focusklaw1.htm>> (last visited Oct. 21, 2002).

⁴⁹ See Strohmeyer, *Collapse*, *supra* note 7, at 50–53.

⁵⁰ See Beauvais, *supra* note 28, at 1119–20.

⁵¹ Most of the atrocities were committed by pro-autonomy (anti-independence) militias, backed by Indonesian authorities. See Strohmeyer, *Collapse*, *supra* note 7, at 46.

⁵² As quoted in Minh T. Vo, *War-Torn Sierra Leone Gets Help from the West*, CHRISTIAN SCI. MON., Aug. 10, 2000, available at <<http://www.csmonitor.com/durable/2000/08/10/fp7s2-csm.shtml>>.

⁵³ See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 136–40 (2000).

attributes this lack of perceived legitimacy not only to the physical distance between the tribunal and the local population, but also the failure of the ICTY to publicize its work within Bosnia, the lack of participation of local actors, even as observers, and the use of predominantly common law approaches to criminal justice unfamiliar to local legal professionals, trained in a civil law tradition.⁵⁴ While no such study exists for Kosovo, similar problems might be expected there. Of course, over time, the perceived legitimacy of the ICTY may change as new generations of opinion makers in the former Yugoslavia come to view the conflict and its aftermath in new ways. Indeed, the norms articulated by the ICTY may play a role in shaping such popular perceptions. Nevertheless, at least in the short term, the ICTY must grapple with ongoing local resistance.

It is too simple to say that international tribunals have legitimacy with respect to the international community, but not with respect to local populations. In fact, the story is always much more complicated. Many segments of the local population, as in the case of Kosovo and East Timor, often strongly support international justice in the wake of mass atrocities. Moreover, the international community does not always support the establishment of such institutions, and of course there is never one, monolithic international community. Rather, there are multiple international constituencies: communities of nation-states (such as UN members, Security Council members, NATO countries, the Council of Europe, and the Organization of American States), communities of non-governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), or communities of other actors such as corporations, academics, and on and on. Indeed, even the division between the international and the local may make little sense in the globalized era, given that international NGOs often partner with local NGOs, foreign governments give aid to local civil society organizations, and public policy networks routinely bridge gaps between local and international actors. Nonetheless, despite these complexities, it does appear that international courts such as the ICTY do face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than they do in establishing legitimacy within broader international communities.

Finally, an international tribunal may not always be an option. In East Timor, for example, no international tribunal existed to handle even the most egregious cases. While many voices, both domestic and international, called for such a tribunal in the immediate aftermath of the atrocities of 1999, there is little chance that one will be established.⁵⁵ Similarly, calls for an international court in Sierra Leone were resisted because such a tribunal would be too expensive and time-consuming to create.⁵⁶ Even the creation of the International Criminal Court will not alleviate this problem, because the ICC will never be able to try more than a handful of the most egregious cases stemming from any particular conflict.

Capacity-Building Problems

Purely domestic and purely international institutions may also fail to promote local capacity-building, which is often an urgent priority in postconflict situations. As discussed previously, the conflicts in Kosovo and East Timor virtually eliminated the physical infrastructure of the judiciary, including court buildings, equipment, and legal texts.⁵⁷ But even more devastating than the physical loss was the loss in human resources. In Kosovo, only Serbs had the experience and training to work as judges and prosecutors; yet these Serbs often refused to work

⁵⁴ See *id.* at 144–47.

⁵⁵ See Michael J. Jordan, *Hopes Dim for International Tribunal in Thoenes Case*, CHRISTIAN SCI. MONITOR, June 25, 2002, at 7.

⁵⁶ See, e.g., Vo, *supra* note 52.

⁵⁷ See Strohmeyer, *Collapse*, *supra* note 7, at 49–51.

in the new system because doing so would constitute a betrayal of their ethnic heritage.⁵⁸ There were some Albanians with legal training, but they had been almost completely excluded from the system for many years and therefore had little experience.⁵⁹ In East Timor, the capacity deficit was even more severe because the Indonesians, who had staffed the judiciary, had evacuated, and few Timorese possessed any legal training or experience.⁶⁰ Indeed, there were no East Timorese judges or prosecutors until UNTAET made its first appointments in 2000.⁶¹ Likewise, in Sierra Leone, the lack of judges, magistrates, prosecutors, and courtrooms led to huge backlogs of cases.⁶² The High Court was only functional in Freetown and two other provincial towns, and many magistrates courts had been shut down during the civil war.⁶³ Under such circumstances, a domestic legal system stands little chance of being established for a significant period of time.

Moreover, a purely international process that largely bypasses the local population does little to help build local capacity. An international court staffed by foreigners, or even a local justice system operated exclusively by the UN transitional administration, cannot hope to train local actors in necessary skills. In short, local actors lack the resources to run the system themselves, but a system run completely by the international community—whether physically located inside or outside the territory in question—will do little to help improve the capacity of the local population to establish its own justice system.

Norm-Penetration Problems

Finally, purely international or purely local accountability mechanisms may have little impact on the application and development of substantive norms criminalizing mass atrocities in transitional countries. The reach of such norms depends not only on the existence of formal institutions—such as legislatures and courts—but also on both networks among the professionals who run them and links from those networks to broader groups within the population at large.⁶⁴ Networks of judges and other legal professionals from different countries, forged through informal face-to-face meetings as well as more formal and official encounters and exchanges, can lead to the cross-fertilization of norms across national boundaries and between international and domestic institutions.⁶⁵ It is through these networks that international law can be implemented and developed domestically, and that domestic law in one country can take into account the domestic law of other countries.⁶⁶

With respect to accountability for mass atrocities, for example, the mere existence of a domestic law incorporating international norms does not, in itself, result in the application of those norms in domestic cases. When international and transnational networks exist, however, judges and legal professionals in a given country are more likely to apply, interpret, critique, and refine such norms. They are also more likely to develop domestic norms addressing these issues. Accordingly, these networks are essential to foster a transnational legal process that might result in the internalization and interpenetration of norms.⁶⁷ Because purely international and purely local processes of accountability and reconciliation do not open the pathways for the creation of such networks as readily as hybrid courts, they are much less able to contribute to this transnational process.

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.* at 50.

⁶¹ *See* Linton, *supra* note 28, at 133–34.

⁶² *See* Human Rights Watch, World Report 2003, Sierra Leone, available at <<http://www.hrw.org/wr2k3/africa10.html>>.

⁶³ *See id.*

⁶⁴ *See, e.g.,* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–46 (1997).

Thus, although international tribunals have developed a rich jurisprudence concerning the application of international humanitarian law to the question of individual responsibility for mass atrocities,⁶⁸ it is unclear how far this body of norms has actually penetrated both the local jurisprudence of the countries affected, and, just as importantly, the popular consciousness of local populations. Because the work of the international courts is physically remote from the countries in question, and the judges and personnel have not been drawn from the local population, 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. 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.

Where justice is purely local, on the other hand, the problem takes a slightly different form. Local courts and local lawyers, unfamiliar with international standards, may seek to apply ordinary criminal law to the mass atrocities in question, even if the local law technically incorporates international humanitarian law. For example, prosecutors may choose to charge perpetrators with murder rather than genocide or crimes against humanity.⁶⁹ The difficulty with such “ordinary law” charges is that while they may be more familiar to local actors, they do not capture the complexity or magnitude of the atrocities committed, thereby minimizing the wrongs suffered. And even when perpetrators are charged with the more serious international law offenses, lawyers unfamiliar with the elements of such crimes may fail to understand how best to prove them, and judges are often not sure how to evaluate such charges—despite the potentially useful case law of the ICTY and ICTR.

For example, in Kosovo, before provisions were made for international judges to sit in the local courts, many defendants were charged with and convicted of genocide and other serious international law offenses.⁷⁰ Yet it was apparent that these convictions failed to properly apply the actual elements of these crimes, such as the more stringent intent requirement to prove genocide.⁷¹ As a result, many of the convictions were highly suspect. Later, when international judges were appointed to serve on the panels, these convictions often were reversed and remanded for new trials.⁷² Similarly, in Indonesia, prosecutions of international humanitarian law crimes led to difficulties because prosecutors failed to establish the elements of these crimes—such as the requirement that atrocities be systematic or widespread in order to qualify as crimes against humanity—despite the fact that such evidence was readily available.⁷³ Thus, although international humanitarian law norms are now sufficiently well-established, they often fail to penetrate even the local judicial institutions, let alone the popular consciousness more broadly.

III. POTENTIAL ADVANTAGES OF HYBRID COURTS

The success of any effort to confront past atrocities, whether through criminal trials, truth commissions, civil compensation schemes, vetting of public officials, or some combination

⁶⁸ Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AJIL 57, 95 (1999).

⁶⁹ In East Timor, for example, the Serious Crimes Unit tried its first cases as murder cases, rather than the more complex crimes against humanity that might have been charged. See, e.g., Suzannah Linton, *Prosecuting Atrocities at the District Court of Dili*, 2 MELBOURNE J. INT'L L. 415, 425 (2001); see also Human Rights Watch, *Trial Welcome but Justice Still Elusive in East Timor*, Jan. 26, 2001, available at <<http://www.hrw.org/press/2001/01/easttimortrial.htm>>.

⁷⁰ Kosovo's War Crimes Trials, *supra* note 18, at 34–36.

⁷¹ *Id.*

⁷² *Id.* at 12–27.

⁷³ See, e.g., International Crisis Group, *Indonesia: Implications of the Timor Trials*, May 8, 2002, available at <<http://www.crisisweb.org/projects/showreport.cfm?reportid=643>>.

thereof, will depend on the particular social, political, and cultural context. The need for such an effort to confront the past, and the role it might play in establishing peace and democratic institutions of governance, likewise varies considerably depending on the unique circumstances of each case: there are no cookie-cutter solutions to these highly complex problems. The Kosovo, East Timor, and Sierra Leone cases share enough similarities, however, that one can use them to draw a few tentative conclusions about the promise that hybrid courts hold in other settings. In particular, hybrid courts may offer at least partial responses to the problems of legitimacy, capacity, and norm-penetration discussed previously.

In Kosovo and East Timor, the addition of international judges and prosecutors to cases involving serious human rights abuses may have enhanced the perceived legitimacy of the process, at least to some degree. In both contexts, the initial failure of UN authorities to consult with the local population in making governance decisions generally, and decisions about the judiciary specifically, sparked public outcry. Without normal political processes in place, of course, such consultation is inherently difficult. When no elected officials exist to give advice, and civil society is badly damaged by years of oppression and conflict, it is not at all clear precisely which people should be consulted without creating impressions of bias. Thus, in both Kosovo and East Timor the appointment of foreign judges to domestic courts to sit alongside local judges and the appointment of foreign prosecutors to team up with local prosecutors helped to create a framework for consultation that may have enhanced the general perception of the institution's legitimacy. By working together and sharing responsibilities, international and local officials necessarily consulted with each other.⁷⁴

The appointment of international judges to the local courts in these highly sensitive cases may also have helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population. In Kosovo this was most apparent, as the previous attempts at domestic justice had failed to win any support among Serbs.⁷⁵ Indeed, Serbian judges refused to cooperate in the administration of justice and the verdicts in the cases tried by ethnic Albanians were regarded by the ethnic Serbian population as tainted.⁷⁶ In contrast, the verdicts of the hybrid tribunals garnered considerable support, even among Serbs.⁷⁷

The sharing of responsibilities among local and international officials is not a complete cure for legitimacy problems, of course. Indeed, such hybrid relationships can raise new questions about who is really controlling the process. When international actors wield more power than local officials—when the majority of judges on a given panel is international, for example, or when the local prosecutors merely serve as deputies to international prosecutors—some may charge that the international actors control the process and that such control smacks of imperialism. In East Timor, some local actors involved in the criminal justice process criticized the hybrid court on these grounds.⁷⁸ On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally controlled processes.⁷⁹ And the devil is, of course, often in these details. Nonetheless, the shared arrangement does offer more promise of working out these difficulties than a purely international or a purely domestic process.

⁷⁴ See Beauvais, *supra* note 28 (describing the benefits of this consultation process in East Timor).

⁷⁵ March 2002 OSCE Report, *supra* note 46, at 6.

⁷⁶ *See id.* at 5–6.

⁷⁷ *See id.*

⁷⁸ See Linton, *Rising From the Ashes*, *supra* note 28, at 150.

⁷⁹ See March 2002 OSCE Report, *supra* note 46, at 6. Indeed, efforts to establish a hybrid court in Cambodia stalled due to an inability to agree about the balance of international and local control. See Seth Mydans, *U.N. Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4. An agreement to establish a hybrid court has now been reached. See Mydans, *supra* note 2.

The hybrid process offers advantages in the arena of capacity-building as well. The side-by-side working arrangements allow for on-the-job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles.⁸⁰ And the teamwork can allow for sharing of experiences and knowledge in both directions. 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. In addition, hybrid courts can serve as a locus for international funding efforts, thereby pumping needed funds into the rebuilding of local infrastructure.

To be sure, hybrid courts also face difficulties in capacity-building. A lack of resources has proven to be the most serious problem so far. For example, in both Kosovo and East Timor, the hybrid courts have been given an enormous mandate without receiving sufficient funding. Court personnel lack even the most basic equipment necessary for them to do their jobs; translators and other administrative personnel are in short supply; and, perhaps most significantly, the courts have had trouble attracting and retaining qualified international personnel to fill posts as judges, prosecutors, and defense counsel.⁸¹ To the extent that hybrid courts are touted as a means of doing justice on the cheap and are then deprived of even the most basic resources, they cannot fulfill their potential. Nonetheless, such concerns about funding are issues more of implementation than conception. And, of course, lack of resources can be a problem regardless of the legal framework adopted.

With respect to the penetration and development of the norms of international humanitarian law, hybrid courts potentially offer still further benefits. Because the personnel of such institutions include both international and domestic judges, the opportunities are much greater for the cross-fertilization of international and domestic norms regarding accountability for mass atrocity. In a sense, the hybrid courts themselves create a network of international and domestic legal professionals, providing a setting in which they can interact, share experiences, and discuss the relevant norms, both in and out of the courtroom.⁸² Of course, the argument that this network will result in the better use and richer development of international norms (and of domestic ones) assumes that the foreign judges will be experts in the jurisprudence of the international tribunals, an assumption that has not been borne out in the Kosovo case, where the hybrid courts often have failed even to cite relevant cases from the ICTY.⁸³ In East Timor, the difficulty in attracting qualified international personnel has led to similar problems.⁸⁴

Yet again, these problems stem more from resource constraints than from structural problems with the hybrid model. Because international and local legal professionals can work together in the hybrid court setting, there is at the very least an opportunity for the kinds of interactions that can result in the local application of existing international humanitarian law as well as the local development of mass atrocity norms.⁸⁵ In Sierra Leone, for example, the Secretary-General has emphasized that the hybrid court should be guided by the jurisprudence of the ICTR and ICTY. To the extent that some of the judges appointed to the court are aware of this jurisprudence, they are more likely to apply it and share their knowledge with the others. In turn, the Sierra Leonean legal professionals involved in the work of the court will be more likely to use and develop these principles, not only within the hybrid court but perhaps in future cases in domestic Sierra Leonean courts as well. The international humanitarian law norms are thus more likely to penetrate into Sierra Leonean legal culture than norms applied in a remote tribunal by foreigners.

⁸⁰ See Beauvais, *supra* note 28, at 1157–59.

⁸¹ See, e.g., *id.* at 1160; Linton, *Rising From the Ashes*, *supra* note 28, at 149; Kosovo's War Crimes Trials, *supra* note 18.

⁸² See Slaughter, *supra* note 64.

⁸³ Kosovo's War Crimes Trials, *supra* note 18, at 46–47.

⁸⁴ See Dicker et al., *supra* note 32.

⁸⁵ In this respect, hybrid courts can be seen as a potentially effective form of transnational legal process. See Koh, *supra* note 66, at 2602 (defining "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").

Indeed, the establishment of hybrid courts may not only aid in the penetration of norms *within* the transitional countries affected, but in the growth of *regional* human rights norms as well. For example, it is significant that many of the judges on both the ICTR and the Sierra Leonean hybrid court are African. Because the hybrid court will be applying norms from the ICTR, the interaction among the various judges will create a cadre of African jurists who have become familiar with international humanitarian and human rights law as well as international legal procedures. Ultimately, these judges will return to their various countries, bringing their experience and knowledge with them. Moreover, the hybrid court in Sierra Leone may well develop and apply these norms in an African context and perhaps contribute to a regional mass atrocity jurisprudence.

IV. THE RELATIONSHIP BETWEEN HYBRID COURTS AND INTERNATIONAL COURTS

Some critics have suggested that hybrid courts are a mere second best alternative to international courts.⁸⁶ So, for example, it could be argued that the hybrid courts established in East Timor and Sierra Leone arose only because of “tribunal fatigue” and that the existence of an international tribunal with applicable jurisdiction would have made these courts unnecessary. On the other hand, the experience in Kosovo demonstrates that hybrid courts need not be a replacement for international justice (or for local justice either). Rather, the hybrid courts in Kosovo were a necessary complement to international tribunals. Indeed, the use of hybrid courts in Kosovo, in the shadow of the ICTY, may have implications for the relationship of such courts to the newly established ICC.

The ICC’s complementarity regime ensures that, in general, the ICC can only assume jurisdiction if national courts are unwilling or unable to investigate.⁸⁷ Yet, it is precisely in these circumstances that large numbers of cases cannot adequately be resolved by local courts, and the volume of these cases is likely to far outstrip the ability of the ICC to adjudicate them. In these circumstances, hybrid courts can play a useful role by addressing the less high profile cases, thereby providing a forum to try those accused of committing mass atrocities, who might otherwise languish in prison for many years awaiting trial or escape accountability altogether. Indeed, as noted previously, the United Nations established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region.

In addition to serving simply as a supplemental adjudicatory body, the potential advantages of hybrid courts that have already been discussed—fostering broader public acceptance, building local capacity, and helping to disseminate norms—may also help the ICC to function. Hybrid courts may help the international court gain legitimacy among local populations because, operating in tandem with the ICC, hybrid courts can ground the pursuit of individual accountability for atrocities more squarely within local legal and popular culture. Of course, reciprocity can work in both ways: if a hybrid court were plagued with problems—such as perceived bias toward specific political or ethnic groups or excessive delay due to lack of resources—those problems might taint the entire international justice effort. And turf battles between the two types of institutions, including disputes about evidence-sharing and the appropriate division of cases among the two institutions, might lead to difficulties. Nonetheless, it is easy to envision ways in which both institutions might help to reinforce the legitimacy of the other.

⁸⁶ See *supra* notes 4–5 and accompanying text.

⁸⁷ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, UN Doc. A/CONF. 183/9 (1998), 37 ILM 999 (1998) [hereinafter 1998 Rome Statute], Art. 17. One exception to this requirement is if the Security Council directly authorizes ICC jurisdiction in a particular situation. *Id.* For further background on the ICC, see generally, *e.g.*, LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002).

Likewise, the interaction between the ICC and a hybrid court could help in the development of the local justice sector. Finally, with respect to norm penetration, the existence of a hybrid court is more likely to foster the regional and domestic implementation of the norms articulated and interpreted in the jurisprudence of the international court.

One difficult question is whether the successful operation of hybrid courts might strip the ICC of jurisdiction because of the complementarity regime. As mentioned previously, the ICC's complementarity principle generally deprives the court of jurisdiction unless domestic courts are "unwilling" or "unable" to prosecute a given case.⁸⁸ This presents a dilemma with regard to hybrid courts. After all, if a domestic court system otherwise without the ability to prosecute a case is able to do so only because of the creation of a hybrid court within that system, as in Kosovo or East Timor, does the establishment of the hybrid court strip the international court of jurisdiction? If so, then we might worry that the creation of hybrid courts could endanger the effective deployment of the ICC.

Nevertheless, while the answer to this question is not obvious, I believe the existence of hybrid courts need not divest the ICC of jurisdiction under the complementarity regime for several reasons. First, the existence of hybrid panels might render the domestic court system capable of handling some cases but not others. For example, the existence of a hybrid court might make it possible for the local justice system to handle the trials of lower level subordinates, but even a hybrid court might have difficulty trying the leaders most responsible for mass atrocities. Admittedly, this is not the model of the Sierra Leonean Special Court, which was created specifically to try those bearing the "greatest responsibility."⁸⁹ However, in the Sierra Leonean case, no international forum existed with which to share cases.⁹⁰ In contrast, once the ICC is in operation, an international forum would be available, and a hybrid court would not need to try the high level leaders. Thus, a more likely model of coexistence with international tribunals is the Kosovo example, where the hybrid court and the ICTY have divided cases in this way.

Second, even apart from the argument about ability, a state that does not *wish* to prosecute a given case and would prefer ICC involvement might well be deemed "unwilling" to prosecute. Thus, a state could choose to leave some cases for the international forum to resolve, even if a hybrid court existed.

Third, it could be argued that the ICC jurisdictional test must be applied based on the capacity of the domestic court system *prior to* international involvement. Thus, even if a hybrid court had been established, with international judges and prosecutors playing key roles, such activity would not necessarily alter the inquiry regarding whether the *domestic* court system was willing and able to prosecute. This is because, regardless of the formal label, the hybrid court is not truly part of the domestic court system; by definition, it is a hybrid domestic/international court.

Finally, as a practical matter, the decision to establish a hybrid court will most likely be made at the same time that the ICC is considering its jurisdiction, rather than at some prior point. Thus, one would expect that, after order is established in the wake of a series of human rights violations, various actors both domestically and internationally would consider how best to ensure accountability. At that point, the ICC would evaluate its jurisdiction, while the possibility of a hybrid court would also be considered. Accordingly, it seems unlikely that a hybrid court option would supplant ICC jurisdiction. Rather, from the very start, they could be viewed as complementary processes.

⁸⁸ Rome Statute, *supra* note 87, Art. 17.

⁸⁹ See *supra* note 36 and accompanying text.

⁹⁰ Moreover, the hybrid court was not established within the domestic court system.

V. CONCLUSION

A hybrid court is not a panacea, of course. Indeed, one of the important lessons of the scholarship on transitional justice is that no mechanism is perfect, and none is appropriate in all contexts. Moreover, many accountability and reconciliation processes can operate in tandem and complement one another. Thus, the use of one approach almost never excludes other possibilities. This ecumenical perspective may be one of the primary reasons that the field of transitional justice continues to be a font of on-the-ground creativity and innovation.

Hybrid courts are merely the most recent step in this endless process of creative adaptation. Responding to significant shortcomings in both purely international and purely domestic approaches, hybrid courts have been devised in at least four settings and are under consideration elsewhere. These courts, though often hampered by underfunding and other logistical difficulties, at least have the potential to address three serious drawbacks of both international and domestic tribunals. First, they may be more likely to be perceived as legitimate by local and international populations because both have representation on the court. Second, the existence of the hybrid court may help to train local judges and funnel money into local infrastructure, thereby increasing the capacity of domestic legal institutions. Third, the functioning of hybrid courts in the local community, along with the necessary interaction—both formal and informal—among local and international legal actors may contribute to the broader dissemination (and adaptation) of the norms and processes of international human rights law.

Moreover, any fears (or hopes) that these hybrid courts will serve as a complete substitute for purely international or purely domestic courts are misplaced because the hybrid courts are best viewed as a complement to both. Indeed, there is no reason to believe that hybrid courts will divest the ICC of jurisdiction. Rather, because the ICC will never be able to try more than a few cases in any given setting, the hybrid courts may continue to be a necessary part of any transitional justice process.

In any event, simply by highlighting hybrid courts as a new transitional justice mechanism to be recognized and considered, I hope to encourage further study of their strengths and weaknesses both in theory and in practice. While the heartbreaking reality of this field is that atrocities continue to occur, the saving grace is that people continue to innovate and create new models to address the brutality of the past and help to build a more peaceful future. Hybrid domestic/international courts are merely the most recent creative adaptation, and those who work in this area should soberly assess the promise and pitfalls of hybrid courts, while celebrating the innovative spirit that has led to their creation.

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SEYMOUR J. RUBIN (1914–2003)

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