HYBRID TRIBUNALS AS A VALID ALTERNATIVE TO INTERNATIONAL TRIBUNALS FOR THE PROSECUTION OF INTERNATIONAL CRIMES

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I Introduction

The end of the Cold War facilitated the emergence of "transitional justice",[1] paving the way for the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the International Criminal Court (ICC) as well as over 20 truth and reconciliation commissions (TRCs)[2] and, more recently, the creation of hybrid or mixed tribunals.[3] This

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1 Transitional justice may be defined as "the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes": R Teutel "Transitional Justice Genealogy" (2003) 16 Harv Hum Rts J 69, 69.

2 Reference may also be made to transnational accountability efforts based on universal jurisdiction, for instance Spain's attempt to extradite Augusto Pinochet to stand trial for torture committed in Chile, Belgium's application of its relatively recent universal jurisdiction law to foreign leaders or the use of the Alien Tort Claims Act in the United States to allow civil tort claims brought by victims of human rights abuses. For a recent discussion of the principle of universal jurisdiction, see O Swaak-Goldman "Recent Developments in International Criminal Law: Trying to Stay Afloat between Scylla and Charybdis" (2005) 54 ICLQ 691, 697-703. Domestic prosecution of international crimes is beyond the scope of this paper.

hybrid model has developed in a range of settings, generally post-conflict situations where no politically viable international tribunal exists. The increasing reliance of the international community on hybrid tribunals to prosecute alleged international criminals is a consequence of the costs and frustrations of bringing to justice those responsible for genocide and ethnic cleansing in Yugoslavia and Rwanda and the political problems affecting the ICC. Accordingly, the international community has preferred to deal with the atrocities committed in East Timor, Kosovo, Sierra Leone and Cambodia through the use of hybrid tribunals.

International tribunals and TRCs have recurrent, structural problems, ranging from limited resources to the politicization of the process to virtual impunity for a wide number of offenders. These deficiencies require us to ponder: Can hybrid tribunals successfully replace fully international tribunals in order to bring perpetrators of international crimes to justice? Do hybrid tribunals fulfil better the expectations of transitional justice than ad hoc tribunals, the ICC or TRCs? Do hybrid tribunals represent the building blocks of a new, just world order or are they subject to the same imperfections?

The paper seeks to answer these questions. It first surveys the problems related to TRCs and international tribunals from the military trials at Nuremberg to the creation of the permanent ICC. The paper then looks in particular at hybrid tribunals, discussing their conceptual advantages and disadvantages compared to purely international mechanisms. The conclusion is that a hybrid tribunal as a model for the enforcement of international criminal law is not necessarily flawed, but such a tribunal may only operate successfully if there is active international support and if there is a genuine will to facilitate the process of reconciliation in a society.

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3 Such tribunals 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": L A Dickinson "The Promise of Hybrid Courts" (2003) 97 Am J Int'l L 295, 295.

II A Brief History of Transitional Justice

The field of transitional justice draws on the slow development of international humanitarian law and early efforts to prosecute war criminals, most famously at Nuremberg and Tokyo after World War II (WWII). However, the current experience of transitional justice surfaced in response to the development of human rights, the democratization process and the end of the Cold War.

A From Nuremberg to Rome

The history of post-conflict justice can be divided into three generations. The first generation came about at the end of WWII, when, in 1945, the victorious powers, namely Great Britain, the Soviet Union, and the United States, established the International Military Tribunals (IMTs) at Nuremberg and Tokyo.

With the failure of the war crimes trials in the aftermath of World War I in mind, the Allies wanted to ensure that high-level politicians and senior military officers would be judged and sentenced by an international body for their role, or complicity, in the perpetration of crimes against peace, war crimes and crimes against humanity.[4] The IMTs firmly established the proposition that there are some crimes of international concern or crimes of international law.[5] Such crimes being committed by natural persons, individual punishment is necessary for the enforcement of international law. The Nuremberg and Tokyo Tribunals were innovative in that state sovereignty was rejected and replaced with the notion of individual criminal responsibility.[6] The IMTs had a self-proclaimed legality: the unconditional surrender of the German and Japanese sovereigns conferred upon the victorious states the legislative power to enact and proceed with such tribunals[7] and the accounts of systematic atrocities committed by German and

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4 L C Green *The Contemporary Law of Armed Conflict* (Manchester University Press, Manchester, 1993) 39-40.

5 See R S Clark "Nuremberg and Tokyo in Contemporary Perspective" in T L H McCormack and G J Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer, The Hague, 1997) 171, 184-185.

6 K Kittichaisaree *International Criminal Law* (OUP, Oxford, 2001) 18.

7 Kittichaisaree, above n 6, 18-19.

Japanese forces respectively created an urge for punishment of those responsible.[8]

However, this novelty was quickly associated with the notion of victors' justice. [9] Also, critics of the trials referred to the *tu quoque* argument, whereby Germany and Japan were unable to accuse the victors, namely the Soviet Union and the United States, for atrocities committed against their citizens.[10] Moreover, crimes against peace and crimes against humanity had not been defined formally yet, thus allowing the IMTs to act *ex post facto* with retroactive jurisdiction.[11]

Despite these difficulties, Nuremberg brought morality into international law by insisting on a legal process with a fair trial and due process instead of revenge. The notions of individual international responsibility for crimes and of crimes against humanity were coined at Nuremberg.[12]

The second generation refers to the creation in 1993 and 1994 of the ICTY and the ICTR in response to extensive violations of international humanitarian law in the Balkans and Rwanda. Since the crimes committed in those places represented a threat to international peace and security according to Article 39 of the UN Charter, both tribunals were established by resolutions of the United Nations (UN) Security Council acting under Chapter VII,[13] thus binding on all member states of the UN. The ICTY may

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8 Y Beigbeder *Judging War Criminals: The Politics of International Justice* (St Martin's Press, New York, 1999) 27.

9 Kittichaisaree, above n 6, 19.

10 Beigbeder, above n 8, 46-47.

11 Green, above n 4, 39-40.

12 For an interesting historical account, see R Overy "The Nuremberg Trials: International Law in the Making" in P Sands (ed) *From Nuremberg to The Hague. The Future of International Criminal Justice* (Cambridge University Press, Cambridge, 2003) 1-29.

13 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (25 May 1993) S/RES/827/1993, art 1 ["ICTY Statute"]; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

exercise jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity allegedly perpetrated in the former Yugoslavia since 1 January 1991.[14] The ICTR has competence over genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of the Second Additional Protocol allegedly perpetrated in Rwanda or in neighbouring states by Rwandan citizens from 1 January to 31 December 1994.[15]

The creation of the ICTY and the YCTR showed that the international community was serious about punishing "the topmost government officials responsible."[16] As opposed to the IMTs, the crimes for which the two tribunals received jurisdiction are now well established under customary international law and the concept of individual criminal responsibility is now widely accepted.[17] Moreover, the ICTY and the ICTR are real international tribunals, composed of expert judges and prosecutors, acting with respect for due process and the rights of defendants.[18] The fact that they share a common Prosecutor and a common Appellate Chamber demonstrates "the need for ensuring some uniformity in the administration of international criminal justice."[19]

Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (8 November 1994) S/RES/955/1994, art 1 ["ICTR Statute"].

14 ICTY Statute, above n 13, arts 2-5.

15 ICTR Statute, above n 13, arts 2-4.

16 C T Call "Is Transitional Justice Really Just?" (2004) 11 Brown J World Affairs 101, 105. Both tribunals were granted primacy over the national courts of all states for the prosecution of those responsible for the atrocities: ICTY Statute, above n 13, art 9; ICTR Statute, above n 13, art 8.

17 Kittichaisaree, above n 6, 18-19.

18 ICTY Statute, above n 13, arts 13, 21-22; ICTR Statute, above n 13, arts 12, 20-21.

19 A Cassese "International Criminal Law" in M D Evans (ed) *International Law* (OUP, Oxford, 2003) 721, 729.

These tribunals have made a useful contribution to international criminal law and strengthened international humanitarian law. The ICTY had humble beginnings until Slobodan Milosevic and other high-ranking Serb, Croat and Bosnian officials were handed over, often following pressure on local governments.[20] The successful conviction of some offenders helped clear the way for the return of refugees who had fled ethnic cleansing in some areas of Bosnia. In Rwanda, the ICTR obtained "the first-ever successful conviction of a former prime minister, the first conviction for genocide in history and the first conviction of rape as a crime against humanity, helping cement that crime in the laws of war."[21]

Nevertheless, the ICTY and the ICTR have faced serious criticisms. Perceptions of these novel tribunals as expensive, biased against groups not allied with the West and remote from the people all undermine the notion that they are effective, efficient or fair. First, their remoteness – they are located in The Hague (The Netherlands) and Arusha (Tanzania) respectively – has deprived victims' families of direct involvement in the proceedings.[22] Second, some ethnic groups in the former Yugoslavia and Rwanda view them as tools for ethnic persecution rather than prosecution.[23] Third, their operating costs have raised eyebrows. By 2003, the ICTR had completed 13 cases with 62 in progress whereas the ICTY had concluded 17 cases with a total of 60 indictments and proceedings despite combined annual budgets of US$250 million (exceeding 10 per cent of the annual UN budget) and a staff of over 2200 employees.[24] Considering the magnitude of the atrocities committed, it is clear that the ad hoc tribunals cannot bring all the perpetrators to justice. In view of the figures involved, as transitional justice

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20 Call, above n 16, 105.

21 Call, above n 16, 105.

22 R Zacklin "The Failings of Ad Hoc International Tribunals" (2004) 2 J Int'l Crim Justice 541, 544.

23 For a recent critique of the ICTR, see L Reydams "The ICTR Ten Years on: Back to the Nuremberg Paradigm?" (2005) 3 J Int'l Crim Justice 977.

24 Zacklin, above n 22, 543.

mechanisms, "they exemplify an approach that is no longer politically or financially viable."[25]

The third generation has been a long time in the making. Despite some discussions in the UN in the early 1950s, interest in the creation of a permanent criminal tribunal soon dissipated. It is only with the end of the Cold War, the emergence of transnational crimes and the establishment of the ICTY and the ICTR that the question resurfaced before the General Assembly.[26]

On 17 July 1998, the ICC was established pursuant to the Rome Statute,[27] which 120 States signed. Its mandate is to prosecute "the most serious crimes of concern to the international community as a whole"[28] in accordance with general principles of criminal law and with respect for the rights of accused and the victims.[29] The ICC may exercise jurisdiction through any of three ways:[30] a situation is referred to the Prosecutor by a state party; a situation is referred to the Prosecutor by the UN Security Council acting under Chapter VII; or, the Prosecutor himself initiates an investigation. Article 5 defines these "serious crimes" as genocide, crimes against humanity, war crimes and aggression, although jurisdiction in regard to the latter is conditional upon the future adoption of a definition. As Antonio Cassese pointed out, it was hoped that such a limited jurisdiction would facilitate widespread acceptance of the Rome Statute and accelerate the ratification process.[31] State interests are also accommodated by the principle of complementarity, which gives priority to

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25 Zacklin, above n 22, 545.

26 Cassese, above n 19, 730-731.

27 Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3; A/CONF.183/9 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002) ["Rome Statute"]. It entered into force on 1 July 2002.

28 Rome Statute, above n 27, preamble.

29 Rome Statute, above n 27, arts 22-33, 66-68.

30 Rome Statute, above n 27, art 13.

31 Cassese, above n 19, 732.

national courts unless the state in question is unable or unwilling to carry out the investigation or prosecution.[32]

Space constraints do not allow us to analyse the Rome Statute in detail or the arguments of its detractors, not least the United States.[33] Insofar as transitional justice is concerned, the number of cases the ICC will be able to investigate will depend on the budget afforded by the parties to the Rome Statute.[34] Should more atrocities be committed than the ICC can investigate and prosecute, some of the cases might need to be dealt with through alternative transitional justice mechanisms. A similar fate awaits crimes falling outside the ICC's jurisdiction, since its temporal jurisdiction is limited to crimes committed after 1 July 2002 and its personal and territorial jurisdiction restricted to crimes committed on the territory or by a national of a state party to the Rome Statute.[35] In reality, the ICC will only try those most responsible for an atrocity, such as in the Democratic Republic of Congo, a policy consistent with other international tribunals, leaving all other suspected offenders to be dealt with through alternative means, if at all.

B Truth and Reconciliation Commissions: A Hiatus in the Quest for International Justice or a Necessary Alternative to an Imperfect Criminal Process?

In the past 30 years, TRCs have often been set up in order to establish historical records of human rights abuses over a specific time period, shed light on who committed abuses, elicit admission of misconduct and restore

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32 Rome Statute, above n 27, art 17.

33 For a recent compilation of essays on the various aspects of the ICC, see O Bekou and R Cryer (eds) *The International Criminal Court* (Ashgate, London, 2005). See also H-P Kaul "Construction Site for More Justice: The International Criminal Court after Two Years" (2005) 99 Am J Int'l L 370. The main issue for the United States is the lack of control of the United Nations Security Council over the activities of the ICC and the absence of effective mechanisms to prevent "politicised" prosecutions of American soldiers and officials: see generally W A Schabas "United States Hostility to the International Criminal Court: It's All About the Security Council" (2004) 15 EJIL 701; D J Scheffer "Staying the Course with the International Criminal Court" (2001-2002) 35 Cornell Int'l LJ 47.

34 See Z D Kaufman "The Future of Transitional Justice" (2005) 1 STAIR 58, 71.

35 Rome Statute, above n 27, arts 11-12.

some degree of social reconciliation and moral order.[36] TRCs are often said to offer unique contributions that judicial trials cannot provide by responding to public need for official acknowledgement of past societal wrongs and dealing with patterns of abuse rather than individual cases.[37] For instance, the work of the South African TRC focused on public accounting rather than secret proceedings, providing victims a central role in the proceedings and bringing social processes and consequences to the fore.[38] The very availability of TRCs sometimes offers an alternative to those who oppose wide-ranging war crimes trials, despite the fact that recent legal developments render amnesties both less politically acceptable and less legally relevant. In Sierra Leone, the TRC operated as a complement to criminal trials and shielded child soldiers from prosecution.[39]

Yet, the possibility remains for TRC bodies to be misused. In Latin America, where powerful military regimes grudgingly yielded to degrees of liberalization, demanding amnesties for torture, massacres and extrajudicial executions, TRCs by necessity pursued what was possible rather than the unattainable but righteous path.[40] Even in South Africa, the TRC contributed to the idea of "restorative justice," emphasizing social reconciliation, largely because common notions of "legal" or "retributive" justice were unattainable.[41] Many TRCs are unable to secure sufficient funding to complete their work adequately. Some cannot obtain detailed accounts of

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36 Call, above n 16, 103. See also E Kiss "Moral Ambition Within and Beyond Political Constraints" in R I Rotberg and D Thompson *Truth vs Justice* (Princeton University Press, Princeton, 2000) 68-98.

37 See generally M Minnow *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston, 1998).

38 Beigbeder, above n 8, 115-121.

39 Special Court for Sierra Leone Public Affairs Office "Special Court Prosecutor says He Will Not Prosecute Children" (2 November 2002) Press Release <www.sc-sl.org> (last accessed 8 December 2005).

40 Call, above n 16, 103.

41 J Zalaquett "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" in N Kritz *Transitional Justice* (vol I, USIP Press, Washington, 1995) 203-206.

events from perpetrators.[42] In sum, TRCs serve too often as second-best alternatives to international tribunals and they are simply instruments of social peace and harmony.

C Problems with Traditional Transitional Justice Mechanisms

The emergence of a new culture of human rights and individual criminal responsibility has heralded the principle that there can be no impunity for international crimes. Unfortunately, although some of those responsible for this era's worst atrocities have been successfully prosecuted and international criminal law has emerged as a legitimate discipline, a close examination of traditional transitional justice mechanisms has revealed some serious issues. In a nutshell, persistent problems relate to excessive personnel and expenses compared to the gains achieved, lack of public education and awareness, inability to promote reconciliation, abbreviated time frames and apparent arbitrariness in the selection of crimes, time periods, victims and offenders.[43]

Laura Dickinson has conceptualized the limitations of purely international or domestic trials along three main themes: lack of legitimacy; limited contribution to domestic capacity-building; and, negligible impact on the development of domestic substantive norms.[44] First, it is important to evaluate whether or not "the decisions of a juridical body [are] acceptable to various populations observing its procedures."[45] In her view, domestic show trials and overly zealous prosecution for past crimes could occur where the

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42 See Call, above n 16, 104. East Timor's Commission for Reception, Truth, and Reconciliation (CAVR), for instance, had taken 7,000 testimonies by January 2004, but none of them from a perpetrator. In Haiti and Uganda, TRC reports were not completed or circulated.

43 See for instance Zacklin, above n 22, 544-545. P M Wald "Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?" (2004) 98 Am Soc Int'l L Proc 192, 193 provides a good example of the lack of reconciliation in Bosnia. Ten years after the end of hostilities, in Mostar, a city largely destroyed by fighting between Bosnian Croats, Muslims and Serbs, Muslims and Croats still do things separately from the Serbs and there are "two sets of ... hospitals, universities, … public transportation, even waste disposal services."

44 Dickinson, above n 3, 300.

45 Dickinson, above n 3, 301.

judiciary infrastructure has been destroyed, the available personnel is likely to be severely compromised by association with the prior regime or lacking in essential skills and experience. At the same time, international tribunals can only handle few cases and their legitimacy can be challenged. The ICTY was established by Security Council resolution, without the consent of the Federal Republic of Yugoslavia. Although the ethnic tensions within the region and the scale of the atrocities made it necessary for the creation of an international tribunal to be removed from the scene of the crimes and run by international judges and staff, support within the Serb population of any of the countries and regions that now comprise what was the former Yugoslavia has been difficult to elicit.[46]

Purely domestic and purely international institutions also often fail to promote local capacity-building or the "application and development of substantive norms criminalising mass atrocities in transitional countries."[47] In post-conflict situations, the need to develop local capacity in the justice sector is important. For instance, in East Timor, the conflict had virtually eliminated the physical infrastructure of the judiciary. In Kosovo, only Serbs had the experience and training to work as judges and prosecutors, yet these Serbs often refused to work in the new system whereas Albanians had some training but little experience, as they had been excluded from the system for many years. There was also clear antagonism against the laws of the "occupier". An international tribunal located far away from the affected country and operated by foreigners cannot train local actors in necessary skills. The lack of capacity of the local judiciary can only be remedied by an international process that involves local participation and exchanges leading to the "cross-fertilization of norms across national boundaries and between international and domestic institutions."[48]

In view of the imperfect character of traditional transitional justice mechanisms, it is important to examine whether the latest addition to the

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46 Dickinson, above n 3, 301-302. Some consider the ICTY an imposition of Western European powers and the United States and thereby tainted by imperialism.

47 Dickinson, above n 3, 304.

48 Dickinson, above n 3, 304.

armoury of international justice, hybrid tribunals, are better suited to combat impunity and to assist the transition of a society to democracy, peace, respect for the rule of law and reconciliation.

III The Next Generation: Hybrid Tribunals

Hybrid tribunals aim to redress the deficiencies of international tribunals on the one hand and domestic courts on the other. They incorporate national laws, judges and prosecutors, contributing to the capacity-building of the judiciary and the legal system, while also including international norms and personnel, conferring legitimacy, resources, experience and technical knowledge. With the lack-lustre performance of the ICTY and the ICTR, the mixed results of TRCs and the uncertainties surrounding the ICC, a climate of "tribunal fatigue"[49] has descended upon the international community, paving the way for the creation of hybrid tribunals in order to foster the development of legal norms within emerging legal systems and to tackle mass atrocities committed in Kosovo, East Timor, Sierra Leone and Cambodia.

A Hybrid Tribunals as an Integral Part of the Domestic Judicial System: Kosovo and East Timor

1 Kosovo

Despite years of discrimination against the ethnic Albanian population, Kosovo only attracted the attention of the international community following the Dayton peace process and the fragmentation of the then Republic of Yugoslavia. Belgrade's firm intention not to let go its grip over Kosovo and growing resistance by ethnic Albanian leaders fuelled a conflict that devastated the already poor infrastructure of the region. Divisions within the international community on the necessary means to restore order, unsuccessful peace negotiations and continuing fighting led to the much contested NATO operation in March 1999. Designed to prevent further civilian casualties and human rights abuses, NATO's 78-day bombing campaign did in fact accelerate the human crisis, especially the forced

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49 The term "tribunal fatigue" was first used by D Scheffer, then Senior Counsel and Advisor to the United States Permanent Representative to the United Nations: see Cassese, above n 19, 734.

deportation of ethnic Albanians to Albania and Macedonia.[50] Once Belgrade capitulated in June 1999, the UN Security Council created the United Nations Mission in Kosovo (UNMIK), which faced the daunting task of rebuilding the infrastructure of the region and restoring law and order.[51]

One of the major tasks of UNMIK was to apprehend those suspected of participating in the commission of past atrocities and those who perpetrated crimes after the establishment of UNMIK. The problem resided in the incapacity of the local judiciary to prosecute the many detainees who were now crowding prison facilities. Not only was the physical infrastructure of the judiciary severely destroyed during the conflict, but there were also few available local lawyers and judges. Most ethnic Albanians had been barred from the judiciary and legal practice for many years whereas most Serbian judges and lawyers had fled or were refusing to serve.[52] Accordingly, the local judiciary system did not have the capacity or the independence to conduct trials. Although in theory some of the offences fell under the jurisdiction of the ICTY, the latter made it clear it only could try those who had committed the "worst atrocities on the widest scale."[53]

As a solution, the Head of UNMIK promulgated a series of regulations enabling foreign judges to sit alongside domestic judges on existing local Kosovar courts and foreign lawyers to team up with domestic lawyers to prosecute and defend the cases. Fully integrated into the local justice system, with jurisdiction over war crimes and certain post-conflict crimes such as inter-ethnic crimes, corruption and organised crime, these hybrid panels would apply a mix of pre-existing local law and international standards.[54]

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50 See generally M Barutciski "Peut-on justifier l'intervention de l'otan au Kosovo sur le plan humanitaire? Analyse de la politique occidentale et ses consequences en Macedoine" (2000) 38 CYIL 121.

51 UNSC Resolution 1244 (10 June 1999) S/RES/1244/1999. See generally H Strohmeyer "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" (2001) 95 Am J Int'l L 46.

52 Strohmeyer, above n 51, 49-50, 53.

53 Dickinson, above n 3, 297.

54 UNMIK Resolution 1991/1, UNMIK Resolution 1999/24 and UNMIK Resolution 1999/25.

The benefits of these hybrid panels are substantial. In addition to rebuilding the judicial infrastructure, they ensure that war crimes, inter-ethnic crimes and organised crime in Kosovo are dealt with independently and impartially. International judges play a key role in protecting local judges from undue pressures and influences, preventing the politicization of the judicial process and contributing to greater public confidence in the judiciary. Provided it does not conflict with international human rights standards, local law is applicable to those cases. The hybrid panels have also created opportunities for mutual exchange of ideas and best practices between judges from different legal systems. This being said, ethnic barriers between Serbs and Albanians in Kosovo run deep and hybrid panels have had little impact so far on reconciliation efforts.

2 East Timor

The UN-sponsored referendum of 1999 finally gave the people of East Timor, a former Portuguese colony under Indonesian occupation since 1975, the opportunity to exercise their right of self-determination.[55] For almost 25 years, consistent accounts depicted the atrocities committed by the occupying forces. Most civil service posts were reserved for Indonesians and few East Timorese were trained as lawyers.[56] The overwhelming majority vote for independence unleashed a torrent of destruction and violence. Pro-Indonesia militias, aided by the withdrawing Indonesian army, killed over 2000 persons, embarked on numerous episodes of mass rapes and forced the displacement of a third of the population. The physical infrastructure of the country was almost completely destroyed by the time a multinational force was sent in.[57] The UN Security Council responded. Based on the precedent of UNMIK, it created the United Nations Transitional Administration for East Timor (UNTAET) to take over the overall responsibility for the administration of East Timor,[58] effectively functioning as the main governing body until East Timor became independent on 20 May 2002.

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55 H D Bowman "Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor" (2004) 18 Emory Int'l L Rev 371, 375-379.

56 Strohmeyer, above n 51, 50.

57 Bowman, above n 55, 377.

58 UNSC Resolution 1272 (25 October 1999) S/RES/1272/1999.

Accountability for serious humanitarian law violations was a top priority for UNTAET. With no prospect of an international tribunal, porous borders and an almost inexistent infrastructure, bringing to justice individuals suspected of committing mass atrocities seemed as an impossible task. The idea of courts composed of national as well as international experts soon appeared attractive. UNTAET established the Serious Crimes Investigation Unit (SCIU) to investigate and prosecute "serious crimes" before a Special Panel for Serious Crimes in the District Court of Dili consisting of three-judge panels (including 2 international judges).[59] "Serious crimes" were defined as war crimes, crimes against humanity, and genocide, as well as murder, sexual offences, and torture, insofar as the latter three crimes were committed between 1 January 1999 and 25 October 1999. Prosecutors and investigators were drawn from within and outside East Timor.

Overall, cases may be considered to have been handled expeditiously and smoothly, given the country's poverty and the very few educated and experienced legal professionals available among the Timorese.[60] However, the work of the Special Panel and of SCIU has been hampered throughout the years by limited funding, the absence of expert personnel and chronic vacancies in key positions. The Special Panel only took up common murders and rapes committed in 1999, failing to address similar crimes committed from the time of the Indonesian takeover in 1975 until 1998. By the time UN Security Council Resolution 1543 was adopted,[61] calling for all trials to be completed by 20 May 2005, 87 defendants had been prosecuted, 84 convicted and 3 acquitted. Almost 400 indictments never proceeded, mainly because most of the alleged offenders were located in Indonesia, where a tainted

59 UNTAET Regulation 2000/15.

60 See generally S Katzenstein "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 Harv Hum Rts J 245. In four years, the Special Panels almost matched the number of cases processed by the ICTY in its 11 years of operation and doubled the total processed by the ICTR in nine years: Call, above n 16, 107.

61 UNSC Resolution 1543 (14 May 2004) S/RES/1543/2004.

judicial process has seen most of them walk free or being subjected to insignificant sentences.[62]

The decision to wind down the Special Panel was taken for political reasons. It was perceived that the situation in East Timor had stabilized three years after independence and domestic courts could now handle cases reasonably well.[63] In practice, the decision seems to have been taken to appease Indonesia, a powerful neighbour whose support for the war on terror was considered crucial in the region and which had always stated its opposition to the Special Panel. Interestingly, powerful states conditioned aid to Serbia on cooperation with the ICTY; no such conditionality was applied to Indonesia's cooperation with East Timor's Special Panel.

Nevertheless, the Special Panel and the SCIU have played a significant role in the process of accountability of human rights abuses in East Timor and made, according to the former Deputy General Prosecutor for Serious Crimes in East Timor, a "significant contribution towards the goal of establishing respect for the rule of law in East Timor and to building the capacity of the domestic system."[64]

B Hybrid Tribunals as a Separate Body: The Special Court for Sierra Leone

Since gaining independence in 1961, Sierra Leone has been politically unstable and economically weak.[65] In 1991, the Revolutionary United Front (RUF) attempted to overthrow the government. A brutal conflict erupted,

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62 J Aglionby "Army Officers Cleared of East Timor Crimes" (7 August 2004) *The Guardian* <www.guardian.co.uk> (last accessed 30 November 2005); Bowman, above n 55, 393-399.

63 In fact, after operating under UNTAET authority until 20 May 2002 (date of independence of East Timor), the SCIU and the Special Panel were integrated into the domestic justice system.

64 N Koumjian "Accomplishments and Limitations of One Hybrid Tribunal: Experience at East Timor" (Guest Lecture Series of the Office of the Prosecutor, The Hague, 14 October 2004) 5.

65 J Webster "Sierre Leone – Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security" (2001) 11 Ind Int'l & Comp L Rev 731, 733-735.

involving RUF rebels, the armed forces and the government-aligned Civil Defense Force. In addition to mass amputations, systematic rape, sexual slavery and the use of child soldiers, the conflict claimed 75,000 lives and displaced a third of the population.[66] In July 1999, the Lomé Peace Agreement was signed, providing for the creation of a TRC and granting a blanket amnesty to ex-combatants "in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement."[67] Fighting resumed briefly in 2000 until the United Nations Mission in Sierra Leone (UNAMSIL), the UN peacekeeping operation set up in October 1999 to implement the Lomé Peace Agreement, and British troops intervened.

The government of Sierra Leone, which had now taken into custody the RUF leader, Foday Sankoh, was well aware that the domestic judicial system was not able to prosecute serious cases involving the atrocities committed during the civil war. Moreover, there were risks associated with a purely domestic process, not least the risk that Sankoh might somehow walk free. The system was ripe with corruption and all those involved could be subject to retaliation. At the same time, the idea of a purely international tribunal was opposed by the government and not really supported by the international community.[68] Sierra Leone thus asked the UN for assistance in bringing to justice those most responsible for the atrocities committed during the civil war.[69]

In August 2000, the Security Council requested "the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court."[70] An official declaration that the war was over in

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66 International Centre for Transitional Justice (ICTJ) "The Special Court for Sierra Leone: The First Eighteen Months" (2004) <http://www.ictj.org> (last accessed 3 December 2005) 1.

67 See E M Evenson "Truth and Justice in Sierra Leone: Coordination Between Commission and Court" (2004) 104 Colum L Rev 730, 737.

68 Dickinson, above n 3, 299.

69 ICTJ, above n 66, 1. D A Mundis "New Mechanisms for the Enforcement of International Humanitarian Law" (2001) 95 Am J Int'l L 934, 935.

70 UNSC Resolution 1315 (14 August 2000) S/RES/1315/2000.

early 2002 enabled the Sierra Leone government and the UN to sign an agreement on the establishment of the Special Court for Sierra Leone (SCSL).[71] According to the SCSL Statute, the Court has jurisdiction over persons bearing "the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[72] The SCSL is a "treaty-based sui generis court of mixed jurisdiction and composition."[73]

The SCSL is the first tribunal of its kind. In Kosovo and East Timor, UNMIK and UNTAET were responsible for setting up and managing the hybrid process within the existing court systems. The SCSL is set up with the consent of a fully functional national government and operates outside the national judicial system.[74] Still, it shares similar features as the other hybrid tribunals. The SCSL's staff comprises local and international judges, prosecutors, head of registry and other staff members.[75] The presence of international personnel ensures respect for international procedural standards and the involvement of local and foreign legal experts helps building bridges between the international dimension of the work and local customs, language

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71 Statute of the Special Court for Sierra Leone annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) <http://www.sc-sl.org> (last accessed 1 December 2005) ["SCSL Statute"].

72 SCSL Statute, above n 71, art 1.

73 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (4 October 2000) S/2000/915, para 9.

74 Mundis, above n 69, 943, 945. Although the SCSL and national courts evolve in separate spheres, the SCSL shall have primacy in prosecuting alleged offenders: SCSL Statute, above n 71, art 8.

75 There are three judges in the Trial Chamber (two appointed by the United Nations Secretary-General and another one by Sierra Leone) and five Appellate Judges (three nominated by the United Nations Secretary-General and the remaining two by Sierra Leone). The Presidents of both Chambers are appointed by the United Nations Secretary-General as is the Prosecutor. See generally Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, above n 71.

and mentalities.[76] Moreover, its location in Freetown, the capital of Sierra Leone, in the country where the atrocities took place, enables the population to identify more easily to the process. It also impacts on the development of the local judiciary, still in its infancy.

The SCSL moved quickly to indict top rebel commanders for their horrific atrocities. However, by early 2004, several problems arose. The SCSL had difficulty meeting its budget; prominent suspects either died (Foday Sankoh passed away on 29 July 2003) or fled the country (the former President of Liberia Charles Taylor, who was also implicated in some of the atrocities has obtained asylum in Nigeria);[77] public education about the Special Court was ineffective as less than 60 per cent of the population supported its work.[78] The latter issue has since been tackled through increased publicity of the SCSL's activities. Bringing to justice Charles Taylor has proven difficult since other states are not required to cooperate with it as the SCSL was not created under Chapter VII of the UN Charter – as opposed to the ICTY and the ICTR.

C Hybrid Tribunals with Minority International Participation: Cambodia's Extraordinary Chambers

From April 1975 to early January 1979, nearly a quarter of the population of Cambodia died as a result of human rights abuses and other atrocities perpetrated by the ruling Khmer Rouge regime.[79] The Khmer Rouge's vision of a classless and ethnically homogenous Kampuchea never materialised. Phnom Penh fell on 7 January 1979 to Vietnamese forces. Until the end of the Cold War, a Vietnamese-backed government ruled the country despite continuing attempts by the Khmer Rouge to topple the new regime and it is only with the involvement of the UN that a fragile democracy emerged in

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76 Article 20 of the SCSL Statute provides that the SCSL will "be guided by" the decisions of the ICTY and the ICTR in relation to the interpretation of international humanitarian law and by the decisions of the Supreme Court of Sierra Leone as regards the interpretation of domestic law.

77 ICTJ, above n 66, 5-7.

78 Call, above n 16, 108.

79 A Costi "The Khmer Rouge Tribunal" [2005] NZLJ 95, 95.

1992. However, the Khmer Rouge refused to participate in the political process and continued their attempts at destabilizing the country.

The Cambodian Parliament adopted a law in 1994 banning the Khmer Rouge as an organisation but providing immunity from criminal prosecution to Khmer Rouge members who defected to the government forces. The end of foreign assistance to the remnants of the Khmer Rouge consolidated the position of the Cambodian authorities, which, in June 1997, requested the UN to assist in prosecuting those responsible for Khmer Rouge crimes committed between 1975 and 1979.[80] The UN subsequently appointed a Group of Experts to explore the options for bringing Khmer Rouge leaders to justice.[81] The Group recommended the establishment of an ad hoc international tribunal outside the borders of Cambodia and raised the possibility of establishing a TRC.[82] The absence of a fair, independent and effective judiciary and adequate infrastructure and the lack of respect for due process weighed heavily on the views of the Group of Experts.[83] The Group particularly noted the influence of the government over judges and the widespread belief that the judiciary was corrupt.[84]

The proposal proved unacceptable to Vietnam[85] and negotiations between the UN and Cambodia continued with the formulation in July 2000 of a draft

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80 Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, annexed to UNGA, UNSC "Identical Letters Dated 15 March 1999 from the Secretary General to the President of the General Assembly and the President of the Security Council" (16 March 1999) A/53/850, S/1999/231, para 5 ["Experts' Report"].

81 Pursuant to UNGA Resolution 52/135 (27 February 1998) A/RES/52/135, para 16.

82 Experts' Report, above n 80, paras 139-163, 198-209. The idea of a hybrid tribunal was rejected: Experts' Report, above n 80, paras 185-192.

83 Experts' Report, above n 80, para 126.

84 Experts' Report, above n 80, para 129.

85 Apparently, Vietnam believed that China (a long-time supporter of the Khmer Rouge) would veto a proposal for an international tribunal: S Williams "The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?" (2004) 53 ICLQ 227, 229.

Memorandum of Understanding (MOU) envisaging a domestic court with limited international participation.[86] Based loosely on the draft MOU, the Cambodian Parliament in 2001 passed the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers Law).[87] The UN withdrew its support in February 2002, citing the government's lack of active and positive commitment to the process.[88] However, in late 2002, the UN General Assembly requested the UN Secretary-General to renew talks,[89] leading to the adoption of the Agreement between the UN and Cambodia concerning the prosecution of crimes committed during the period of Democratic Kampuchea (Agreement)[90] in early 2003. It was ratified by Cambodia in October 2004 and in April 2005 the UN announced it had raised sufficient funds for the Chambers to become operational.[91]

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86 Yale University Cambodian Genocide Project "Chronology of a Khmer Rouge Tribunal: 1994-present" <http://www.yale.edu> (last accessed 12 December 2005).

87 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers Law) <http://www.derechos.org> (last accessed 1 December 2005).

88 Williams, above n 85, 229; United Nations Secretary-General "Report of the Secretary-General on Khmer Rouge Trials" (31 March 2003) A/57/769, para 14.

89 UNGA Resolution 57/228 (27 February 2003) A/RES/57/228.

90 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (13 May 2003) approved by UNGA Resolution 57/228B (18 December 2002) A/RES/57/228B ["UN/Cambodia Agreement"].

91 "Agreement Between UN and Cambodia on Khmer Rouge Trials Takes Effect" (29 April 2005) *UN News Centre* <http://www.un.org> (last accessed 13 December 2005). The Extraordinary Chambers Law was also amended to bring it into broad conformity with the Agreement: United Nations Secretary-General "Report of the Secretary-General on Khmer Rouge Trials" (12 October 2004) A/59/432, para 2.

The Agreement governs the legal cooperation between the UN and Cambodia and is to be implemented in Cambodia through the Extraordinary Chambers Law."[92] The Agreement sets up a two-tiered system of Extraordinary Chambers created through Cambodian law and integrated into the existing judiciary: a Trial Chamber (composed of five judges, including two international judges) and a Supreme Court Chamber (composed of seven judges, including three international judges) acting as a final court of appeal.[93] As opposed to other hybrid and international criminal tribunals, international judges form a minority at each level. As a compromise between international concerns about the weakness of the Cambodian judiciary and Cambodia's insistence on a majority of judges, the Agreement adopts a "supermajority" rule requiring the affirmative vote of at least one international judge.[94] This represents an important guarantee against political influence from the Cambodian government.

Mixed teams of national and international investigating judges and prosecutors will lead investigations and prosecutions. The investigating judges and prosecutors are expected to develop a joint strategy. Where the investigators or the prosecutors fail to reach a common view as to whether to investigate or prosecute, the investigation or prosecution will proceed. The Law sets up a Pre-Trial Chamber composed of five judges to settle disputes between the co-prosecutors or co-investigating judges provided one of them refers the case to the Pre-Trial Chamber. The decision to prevent the investigation or prosecution will require a "supermajority".[95]

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92 UN/Cambodia Agreement, above n 90, art 2(2).

93 UN/Cambodia Agreement, above n 90, art 3. The Supreme Council of the Magistracy of Cambodia will appoint the national judges and select the international judges from a list of seven names submitted by the United Nations Secretary-General.

94 UN/Cambodia Agreement, above n 90, art 4.

95 UN/Cambodia Agreement, above n 90, arts 5-7.

The jurisdiction of the Chambers is limited in time and scope.[96] First, only the crimes committed between the moment the Khmer Rouge seized power on 17 April 1975 until 6 January 1979, the last day before the overthrow of the Pol Pot regime, may be investigated. Secondly, only the senior leaders of Democratic Kampuchea and those most responsible for the crimes falling within the jurisdiction of the Chambers will be prosecuted. The Chambers are competent to hear offences under both international humanitarian law and Cambodian criminal law and they must exercise their jurisdiction "in accordance with international standards of justice, fairness and due process of law" set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, which must be "respected at all stages of the criminal process". [97] All penalties shall be limited to imprisonment following the trend of all international tribunals against the death penalty.

One of the most sensitive issues the Extraordinary Chambers will have to address is the legality of amnesties and pardons granted by Cambodia in the 1990s. Under the Agreement and the Law, Cambodia will not request an amnesty for anyone investigated or convicted for a crime.[98] The fate of those individuals who were granted amnesty or pardon prior to the Agreement remains unclear though. Whereas most amnesties were granted informally, in fact, only one person ever received a formal pardon: Ieng Sary. The Chambers will have to decide whether such a pardon or the de facto amnesties granted to other members of the Khmer Rouge are legally valid for international crimes, a decision that seems to clash with the well-settled position of the UN and a recent decision of the Special Court for Sierra Leone.[99]

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96 UN/Cambodia Agreement, above n 90, arts 2, 9. None of the crimes committed by the Khmer Rouge before or after that period will be prosecuted. Some serious offences might go unpunished as crimes committed by subordinate officials and leaders of other political factions of that period will not be investigated.

97 UN/Cambodia Agreement, above n 90, art 13.

98 UN/Cambodia Agreement, above n 90, art 11.

99 The SCSL has held that national amnesties granted to perpetrators of crimes against humanity are not recognisable before international courts: Decision SCSL-04-15-PT-060-II (13 March 2004) para 88 <http://www.sc-sl.org> (last accessed 15 October 2005).

Time will tell whether the Extraordinary Chambers will provide a major step toward the prosecution of certain former Khmer Rouge officials. Amnesty International has highlighted some "serious deficiencies" as reflecting a "significant retreat from current international law and standards".[100] Some critics have openly questioned the wisdom of the UN in signing the Agreement and capitulating before Cambodia's demands. They have also deplored the world community's apathy in that matter.[101] Others on the contrary prefer to look at the Agreement and the Extraordinary Chambers Law as a substantial progress towards the aim of ascertaining the facts and providing legal accountability for the crimes of the Pol Pot regime. With sufficient funds and determination, they argue, this is a unique opportunity to help reform the Cambodian judicial system and kick-start a reconciliation process that is long overdue. [102]

IV Concluding Assessment of Hybrid Tribunals

There are some valid arguments for national justice to be given preference over international justice. Domestic processes are closer to the population, to its history and culture. However, in post-conflict and transition societies, it is often very complicated to establish or restore the rule of law or to prosecute crimes and human rights abuses resulting from a conflict. In some cases, there is not enough political will, the justice system has previously been involved in oppression, the infrastructure has been destroyed or qualified personnel have been killed or left the country.[103] Doubts might be cast over the fairness of the proceedings in the context of continued war-related animosity and the breakdown of society. If national justice is not possible, hybrid or international tribunals are necessary.[104]

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100 Amnesty International "Cambodia: Amnesty International's Preliminary Views and Concerns about the Draft Agreement for the Establishment of a Khmer Rouge Special Tribunal" (21 March 2003) ASA23/003/2003.

101 Costi, above n 79, 96.

102 Williams, above n 85, 245.

103 Cassese, above n 19, 734-735.

104 Other possible transitional justice mechanisms include "internationalised" domestic courts, such as the Iraqi Special Tribunal, a domestic tribunal applying domestic law as well as some international norms. For a complete overview

Like the ICTY and the ICTR, hybrid courts are ad hoc institutions, created to address particular situations. They result from singular political and historical circumstances. However, hybrid tribunals have all been established with a degree of enthusiasm by the governments concerned. The fact that they operate where atrocities took place, but rely on the combined expertise of local and international judges, investigators and prosecutors suits the needs of the host country and the long-term objectives of justice.[105] Because of their location, they may also better coordinate their functions with other domestic institutions dealing with human rights abuses. In particular in cases like Sierra Leone and East Timor, where TRCs and judicial reforms have also been used, transitional justice seems to bring together all the separate strands of justice, integrating the past and the future, the individual level and the social level, the local and the international. Hybrid courts can, therefore, help overcome what has been dubbed a "dual legitimacy problem": "situations where domestic transitional justice processes are not accepted either because they represent "victors' justice" or because they fail to meet minimal international standards; and where international tribunals are rejected by locals skeptical of their motives."[106]

This being said, like any other mechanisms, hybrid courts require strong international cooperation and judicial assistance. Hybrid tribunals sometimes have difficulties obtaining the assistance of foreign authorities in the investigation of international crimes. The case of Charles Taylor living in impunity outside the reach of the SCSL sadly illustrates this point, as does the blatant lack of cooperation of Indonesia with East Timor. It is important for all stakeholders to ensure that wealthy countries support the creation of justice mechanisms, help capture the suspects and adequately fund the functioning of those mechanisms. The difficulties in raising the necessary yet modest funds to establish the Extraordinary Chambers in Cambodia testify to the challenge ahead. Finally, mixed tribunals might be seen as a less coherent

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largely favourable to that Special Tribunal, see M A Newton "The Iraqi Special Tribunal: A Human Rights Perspective" (2005) Cornell Int'l LJ 863.

105 See Cassese, above n 19, 735, who believes the proximity of hybrid tribunals to the affected community may have some "cathartic effect" on victims and stigmatise the culprits.

106 Call, above n 16, 107.

means of developing international criminal law. The more a hybrid tribunal relies on domestic procedures and expertise in judging international crimes, the more likely its interpretation of international humanitarian law will differ from that of other hybrid tribunals or of other transitional justice mechanisms, thus jeopardizing the uniform interpretation of international humanitarian law.

Nonetheless, hybrid courts represent a sincere and laudable effort to improve on past transitional justice experiences and to remedy many of the major shortcomings of purely international tribunals.[107] Some of the potential advantages of hybrid courts include the ability to foster broader public acceptance, build local capacity and disseminate international human rights norms. The collaboration of national and international legal personnel helps bring international law and norms to bear in ways that can be internalized and institutionalized.[108]

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107 For a strong defence of hybrid tribunals, see F Megret "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice" (2005) 38 Cornell Int'l LJ 725.

108 Dickinson, above n 3, 310.