THE EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS ON LOCAL JUDICIAL CULTURE: THE SUPERIORITY OF THE HYBRID TRIBUNAL

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INTRODUCTION

The purpose of this paper is to explore the effect international tribunals have on the judicial culture of domestic legal systems compared to the effects of hybrid tribunals, and will show that the latter best develops domestic judicial culture. In doing so, six tribunals will be examined. After finishing the separate examinations, this paper will conclude that hybrid tribunals are better suited to develop a domestic judicial culture. Last, from a perspective that prioritizes the development of local judicial culture, this paper will consider the continuing viability of future tribunals given the creation of the International Criminal Court (ICC). It will then conclude for several reasons that ad hoc tribunals are not only still relevant, but preferable to the ICC.

I. HISTORY OF INTERNATIONAL CRIMINAL COURTS

a. What is an International Criminal Tribunal?

Obvious as this may seem, this paper recognizes two very distinct categories of international adjudicatory bodies: (1) “purely” international criminal tribunals and (2) hybrid international criminal tribunals. The

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1. As I write this, I am beginning my tenth week of work at the International Criminal Tribunal for the Former Yugoslavia. The attitude in my work environment has been one of energy, purpose, and hope: energy, because we recognize the synergy and potential of the tribunal; purpose, because we understand the important mission of the tribunal and our part in it; and hope for the future because we know from personal experience that justice can be—and is—done by international criminal tribunals.

2. Throughout this paper the terms “domestic judiciary,” “domestic legal systems,” and “local judiciary” are used interchangeably. For the sake of this paper, they mean the same thing. They very broadly define any and all jurisprudential mechanisms which draws its jurisdictional authority from a state itself or any smaller municipality within the state. For the former Yugoslavia, these terms refer to all six Republics which came from it, but most specifically Bosnia-Herzegovina, Croatia, and Serbia. “Judicial culture” is a completely separate term that reflects, fittingly, the culture of the domestic judiciary; it represents a legal system’s adherence to the rule of law, the energy of its courts, fairness of its trials, etc.

3. The Nuremberg Tribunal, the Tokyo Tribunal, International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Extraordinary Chambers in the Courts of Cambodia (ECCC), and Special Court for Sierra Leone (SCSL).
former is designed to function completely independently of any one state and is made by either an intergovernmental organization—such as the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) created by the United Nations (“UN”)—or a treaty multiple states accede to, like the ICC’s Rome Treaty. A hybrid tribunal, by its very nature, is an institution dependent on and inseparable from the State; it is a unique blend of national and international, a national tribunal infused with so much international that it is neither.

b. A Brief History of International Criminal Tribunals

The first recorded punishments of wartime criminals were promulgated by the ancient Greeks as early as 400 B.C. However, these trials were neither international, nor did they apply international law or norms. Instead, “the concept of an international tribunal with its own super-national criminal justice power [can] be traced to the 15th century” in eastern France.

Peter von Hagenbach, the tyrannical and abusive ruler of a small French town, was brought before a panel of twenty-eight judges: eight from Breisach, two from “Berne, a member of the Swiss Confederation,” two from Solothurn, an ally of Berne, and the remaining sixteen from the allied towns on the Upper Rhine, with the Archduke of Austria presiding. While it is not perfectly clear whether this trial was “international,” most scholars maintain that it was. Hagenbach was

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5. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (3d ed. 2001).
charged generally with “trampling under foot the laws of God and man,” and specifically with murder, rape, and perjury. Defense counsel, in a foreshadowing of arguments made by Nazi defense counsel, argued that Hagenbach’s adherence to his duty to obey his military superior absolved him from blame. The court disagreed, holding that Hagenbach’s defense was “contrary to the law of God” and sentenced him to death. This was the first time an international court held an “individual responsible for perpetrating crimes that” would fall under the modern day definition of crimes against humanity.

The next notable international criminal tribunal was created almost 400 years later by Great Britain. After Great Britain abolished its slave trade in the early 19th century, it struggled to enforce this decision on the high seas; this was because many slave trading ships switched between the flags of various western European nations and thus, under the law of the sea, this precluded her majesty’s ships from searching them, even if they were suspected slave ships.

To remedy this, Great Britain proposed to several nations that they jointly establish courts at each nation’s major harbors to try suspected slave traders and agree to relax, among themselves, the law of the sea regarding immunity of a ship flying another nation’s flag. Portugal, Brazil, the Netherlands, and Spain agreed fairly quickly, but the United

9. Because all participants were arguably members of the Holy Roman Empire at this time, the title of “International Tribunal” depends on the one of the sovereignty’s independence from another. The utter disintegration of the Holy Roman Empire had changed Western European international relations into an ever-changing game of political alliances and unstable relations between small nation-states, up and coming towns, and traditional empires. GEORG SCHWARZENBERGER, supra note 7, at 464. The legal relationship between these entities was “more comparable and akin to that of international law,” thus creating a sort of quasi-international law relationship. Id.


11. SCHWARZENBERGER, supra note 7, at 465.

12. Id. at 466.


15. Id. at 575-76.
States and France continued to balk for several decades, the former citing constitutional provisions it claimed would be violated by an accession to the treaty.\footnote{Id. at 577, 628-29.}

These early slave trade tribunals did not have very advanced evidentiary procedures and the like, but substantively they applied the law of nations relatively fairly and equitably.\footnote{Id. at 592 n. 184.} They issued written decisions, but there was no appellate process—just an arbitrator if a party claimed an unfair verdict.\footnote{Id. at 587, 589-90.} The success of the court varied tremendously by nation and region (the British judges were by far the most energetic), but on the whole it was an important and noteworthy step in the international criminal tribunal timeline.\footnote{Id. at 615.}

After this, several attempts were made in the late 19th and early 20th to codify international humanitarian law with varying success.\footnote{See e.g., The Hague Conventions of 1899 and 1907, Geneva Conventions of 1864, 1929, etc.} However, there was no global movement to set up a system of international criminal adjudication until 1945.\footnote{Of course, there were other international courts such as the Permanent Court of International Justice, but these courts were not granted the power to try people criminally because international criminal law was still in a very rough form. \textsc{The Oxford Handbook of International Adjudication}, 53-54 (Cesare Romano et al. eds. 2013).}

c. Nuremberg

\hspace{1em} i. Background and Results

As WWII drew to a close and the allies began uncovering the horrors of the Nazi concentration camps, they knew they had to respond.\footnote{One army Major was so struck by the horrors of Buchenwald that he said, “We need not be afraid of a hard peace settlement. The Germans upon whom it will fall have lost their right to consideration as human beings. They have lost their dignity of humanity. They have discarded every law of Christian decency.” \textsc{William Birch & Abner Zehm, In Through the Gate, Out Through the Chimney}, available in the Holocaust Museum Archives.} On August 8, 1945, they created the International Military Tribunal (Nuremberg Tribunal) to try “persons who, acting in the interest of the
European Axis countries, whether as individual or as members of an organization, committed” crimes against peace, war crimes, or crimes against humanity.\textsuperscript{23} The framers of the charter were careful to meticulously define each crime,\textsuperscript{24} and the tribunal garnered widespread international support besides the four principal WWII victors: Great Britain, the United States, France, and China.\textsuperscript{25}

As far as the workings of the tribunal, each defendant had to be convicted by a majority of the four judges, and each major WWII victor had one judge on the court.\textsuperscript{26} The drafters also provided for additional tribunals,\textsuperscript{27} declared that there would be no immunity for government or political leaders,\textsuperscript{28} gave themselves the right to try individuals \textit{in absentia},\textsuperscript{29} and gave the Court authority to make its own procedural rules.\textsuperscript{30} Besides two suicides, most notably Herman Goering’s, the tribunal was successful in bringing the accused to justice. Within nine months\textsuperscript{31} it handed out nineteen sentences, including executions, life imprisonments, twenty year sentences, and a fifteen and ten year sentence.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{23} U.N. Secretary-General, \textit{The Charter and Judgment of the Nurnberg Tribunal: History and Analysis}, at 4, Int’l law Comm’n, U.N. Doc. A/CN.4/5 (1949) [hereinafter \textsc{United Nations}].
\item \textsuperscript{24} Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].
\item \textsuperscript{25} \textsc{United Nations}, supra note 23, at 3 (1949) (“Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.”).
\item \textsuperscript{26} Nuremberg Charter, supra note 24, art. 2, 4.
\item \textsuperscript{27} \textit{Id.} art. 5.
\item \textsuperscript{28} \textit{Id.} art. 7.
\item \textsuperscript{29} \textit{Id.} art. 12.
\item \textsuperscript{30} \textit{Id.} art. 13.
\item \textsuperscript{32} \textsc{United Nations}, supra note 23, at 7-8.
\end{itemize}
ii. Importance of the Nuremberg Tribunal in International Criminal Law

It is hard to overstate the importance of the Nuremberg Tribunal. It was not the first international criminal tribunal, but it was the first modern one. It is the foundation upon which the world’s notion of “international criminal tribunal” rests. It was the first tribunal to gain such a powerful international cadre of supporters, the first to develop its own detailed system of procedural rules, the first to explicitly state that government or political leaders could be tried like anyone else, and, perhaps most importantly, the first to define the substantive law it applied. This was such an accomplishment that after the tribunal concluded its work, the General Assembly, at the request of President Truman, stated that it officially “affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal.”

The Nuremberg Tribunal advanced international criminal law in three major ways. First, it showed that international criminal courts should apply customary international law to punish heinous acts. The Nuremberg Charter, and later the substantive law of the tribunal, was seen as a codification rather than creation of international law. Of
course, many argued that Nuremberg applied ex post facto law and not pre-existing principles of international law as the victors claimed. The court gave two strong responses: First, it pointed out that the tribunal was developed by the authority of the victors of WWII, in “their competence under international law,” and, second, it reiterated the application of already existing international law by resolutely highlighting Germany’s violations of the Kellog-Briand Pact of 1928.

Second, the Nuremberg Tribunal stood for the idea that these tribunals could hold not just states in violation of international norms, but individuals as well. Indeed, the defense argued vigorously that, as soldiers, the defendants were merely following their orders given to them by the state, and therefore should be protected under the doctrine of state sovereignty. The court strongly disagreed, stating that “if we cannot punish men for these crimes, we can punish no one. Men commit these violations not abstract entities.” Almost more than anything else, Nuremberg enshrined forever the concept of individual responsibility in international law.

Finally, Nuremberg advanced international criminal law when it defined three crimes, all of which are still prosecuted by modern tribunals. First, crimes against peace: the court, in following the French suggestion to give the Kellog-Briand pact great weight, found Germany’s aggressive battle-field tactics to be criminal on multiple levels. Second, the court punished the accused for “War Crimes,” defined as “violations of the laws or customs of war.” The court listed several examples of what this could entail, including murder, killing of hostages, wanton destruction of cities, and ill-treatment of prisoners of war. The decision as the best description, but the Tribunal itself stated that its substantive rules were “the expression of international law existing at the time of its creation.”

37. Id. at 37-38, 43.
38. Id. at 38, 43. The Kellog-Briand Pact practically outlawed war and was signed by 63 nations, including Germany, Italy, and Japan. Id. at 43.
40. UNITED NATIONS, supra note 23, at 41. Note the similarity to the Hagenbach Tribunal above. See supra, n. 11.
41. UNITED NATIONS, supra note 23, at 41; Skinner, supra note 33.
42. UNITED NATIONS, supra note 23, at 46-61.
43. Id. at 61.
44. Id.
to prosecute these war crimes had “far reaching implications” that impact tribunals today.45 The court was careful to note that even though ‘war crimes’ was new phraseology, the substantive nature of these crimes was punishable under pre-existing international law.46

It is through the third and last crime—crimes against humanity—that “Nuremberg principals have been legitimized and incorporated into the fabric of international law.”47 Crimes against humanity were defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population” during a war, “or persecutions on political, racial, or religious grounds” when committed in conjunction with war crimes or crimes against peace.48 This phraseology is still used by every international criminal tribunal. Each of these crimes is still punished today, largely due to their codification at Nuremberg.

iii. The Nuremberg Tribunal's Impact on Germany's Judicial Culture

The reaction of Germany’s judiciary to Nuremberg was very complicated and, some say, is still evolving. Directly after the Nuremberg Tribunal had concluded, East and West Germany had nearly opposite and (perhaps to some) counter-intuitive reactions to the verdict.

In West Germany, the population as a whole was largely indifferent to the trial: perhaps from shame or remorse, but, irrespective of psychological motivation, it became clear that, supportive as they were of the trial at the time, they wanted to forget about it.49 If Nuremberg enjoyed any popularity in West Germany, it was strictly limited to the months and years directly following the end of the war.50 Later, the population’s feelings shifted towards a more open rejection of the tribunal.51 West Germany’s judiciary hesitantly accepted the idea of

45. Id. at 62; Skinner, supra note 33, at 328.
46. SCHWARZENBERGER, supra note 7, at 498.
47. Skinner, supra note 33, at 356-57.
50. Id.
51. Id.
crimes against humanity, but strongly opposed the tribunal’s alleged use of victor’s justice and its violation of the principle of *nullum crimen sine lege*. These two criticisms would dominate West Germany’s thinking until reunification and the German system even after; indeed, the German legal system was largely the Nazi system with a new face—many judges were members of the “old guard” and rejected Nuremberg’s legacy for emotional reasons. The prevalence and universality of these critiques created a judicial culture hesitant to punish state sponsored crime.

East Germany, on the other hand, accepted the Nuremberg Tribunal’s decisions and applied them liberally—perhaps with too much enthusiasm. For example, when it came to the principle of retroactivity, something the Nuremberg court strictly avoided, the East Germany legal code contained an explicit exception in its prohibition of retroactivity for Nazi-related crimes. Of course, at this time the communist propaganda in East Germany twisted all things to benefit Moscow. Indeed, East German courts were driven by the Soviets to prosecute Nazis more and more in the years following Nuremberg because, first, Nazis were the political enemy of communism and, second, these prosecutions had a palpable psychological effect on East Germany’s citizens. The Soviets wanted to erase positive feelings for the past in the East Germans’ minds—they wanted a new state with a new beginning; they used Nuremberg’s verdicts and the alleged retroactivity doctrine to legally and systematically eradicate all vestiges of the Nazi past.

There is no better example of this than the Waldheim trials, a series of East German prosecutions of Nazis that consisted of rehearsed, Stalin-esque trials lasting no longer than a half hour and finishing with pre-arranged sentences.

53. *Id.* at 814.
54. *Id.* at 815.
55. *Id.* at 816-17.
56. *Id.* at 817-18.
57. *Id.* at 817-20.
58. *Id.* at 816.
59. *Id.* at 818-19.
Today, a unified Germany has largely accepted a more reasonable interpretation of the Nuremberg Tribunal’s judgments and has distanced itself from the emotions of its past. Indeed, Germany today is one of the foremost advocates of consistently applying international criminal law, the fruit of the Nuremberg Tribunal, through bodies like the ICC.\textsuperscript{60} In sum, the Nuremberg Tribunal has had a positive and “enduring effect on the German legal culture.”\textsuperscript{61}

d. Tokyo

i. Background and Results

After Japan surrendered, the Allies appointed General Douglas MacArthur as the Supreme Allied Commander in Japan; MacArthur ruled Japan as a quasi-military dictator.\textsuperscript{62} In late 1945 he gave an order setting up the International Military Tribunal for the Far East (“IMFTE”), a tribunal patterned almost exactly after Nuremberg.\textsuperscript{63} It came to be known colloquially as the Tokyo Tribunal.\textsuperscript{64}

The accused were split into three classes: Class A, the only class tried by the Tokyo Tribunal, contained the individuals accused of the most egregious offenses like planning, initiating, and waging an aggressive war; Class B consisted of those accused of conventional war crimes; and Class C included those accused of crimes against humanity.\textsuperscript{65}

Class A’s trials lasted two and half years from April 1946 to November 1948, with seven of the accused sentenced to death, sixteen to

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\textsuperscript{60} Werle \& Jebberger, \textit{supra} note 49 (“Germany strongly supports the enforcement of international criminal law.”).

\textsuperscript{61} Id. at 822.


\textsuperscript{64} Id. at 755-56. The tribunal was so closely patterned after the Nuremberg tribunal that repetition of its Charter would be redundant given the Nuremberg Charter’s treatment in Section II(c)(i).

\textsuperscript{65} Kaufman, \textit{supra} note 63, at 764-65.
life imprisonment, one to twenty years, and one to seven years.\textsuperscript{66} Three of the accused had either died or were absent from trial for some reason.\textsuperscript{67} These sentences were delivered by a majority of eleven judges appointed by General MacArthur, prosecuted by a team consisting almost entirely of Americans, and defended by a defense team dominated by Americans and Japanese.\textsuperscript{68} It did not seem to have crossed the mind of the great General to include the Japanese judicial system at all in the process.\textsuperscript{69}

As far as Class B and C criminals, these “lesser offenses” were tried by various national tribunals several victor states established. For example, the United States military tribunals tried almost one and a half thousand Class B and C accused; several other nations (Australia, China, France, the Netherlands, Philippines, and the United Kingdom) tried a combined almost 6,000 accused.\textsuperscript{70} These trials, most of which started in 1945, lasted until 1951.\textsuperscript{71}

\textit{ii. The Tokyo Tribunal’s Impact on Japan’s Judicial Culture}

It would be difficult to argue that the Tokyo tribunal impacted Japan’s judicial culture in any appreciable way. First, the Japanese people’s response to the tribunal, much like the German population’s response to Nuremberg, was apathetic.\textsuperscript{72} If anything, the Japanese were even more distant from the Tokyo tribunal than the Germans were of Nuremberg.\textsuperscript{73} This deadened the tribunal’s impact on Japan’s post-war judicial system to the point of neutrality.\textsuperscript{74}

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.} at 769-71.
  \item \textsuperscript{67} \textit{Id.} at 771.
  \item \textsuperscript{68} \textit{Id.} at 782.
  \item \textsuperscript{69} \textit{Id.} at 773.
  \item \textsuperscript{70} \textit{Id.} at 777-78.
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.} (“One paradoxical result of the Tokyo IMT, inferred from its almost negligible impact in Japan except as something to be condemned as victor’s justice, is that the more you hold a group of individual leaders legally responsible for war, the less the rest of the population feel politically responsible.”).
\end{itemize}
Second, many of the legal doctrines and practices of the majority United States prosecution were not understood well by the largely Japanese defense team, and even though the IMTFE was not technically a United States institution, the overwhelming nationality of the personnel gave it that de facto feel.\footnote{Maj. Nathaniel H. Babb, \textit{Don’t Forget the Far East: A Modern Lesson from the Chinese Prosecution of Japanese War Criminals After World War II}, 222 \textit{Mil. L. Rev.} 129, 140 n. 63 (2014).} This was reflected in the courtroom, where Japanese defense counsel were often perplexed at legal theories and doctrines from not only the American attorneys, but the judges as well, all of whom reflected common-law and civil traditions from Western Europe, something that the Japanese legal professionals were fairly new to, especially procedurally.\footnote{See \textit{Timothy P. Maga, Judgment at Tokyo: The Japanese War Crimes Trials} 54 (2001).} All in all, the IMTFE as a tribunal, and later as a potential source of substantive law for the Japanese, was discarded simply because it was so substantively foreign that the Japanese could not have used it even if they had had a desire to—which they did not.

In sum, the IMTFE had neither a positive nor negative effect on the Japanese judicial culture. It was a foreign, confusing, and unimportant institution to the Japanese who, unlike the Germans, seemed to accept the fate of their leaders quickly and silently; there are “few traces,” if any, of an impact it had beyond the initial sentences it set down.\footnote{Caroline Joan (Kay) S. Picart, \textit{Attempting to Go Beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence Against Women}, 7 \textit{E. Asia L. Rev.} 1, 3 (2012).}

II. PURELY INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA.

What is a purely international criminal tribunal? For lack of a better term, I use this phrase to describe the two tribunals that do not operate in the affected country and do not include within their institutions any part of the local or domestic judiciary. These are, respectively, the ICTY and
ICTR. These tribunals, created by the UN Security Council ("SC"), were established because the international community saw that the domestic judiciaries of the former Yugoslavia and Rwanda were unable to handle the difficulties that trying the necessary cases would bring.

a. The International Criminal Tribunal for the former Yugoslavia

i. Background of the International Criminal Tribunal for the former Yugoslavia

Throughout history, the Balkan region has become a semi-geographically ordered mass of Catholics, Orthodox, and Muslims—Serbs, Croats, and Bosnians. This ethnic diversity has continued until today. Traditionally, the Croats, Bosnians, and Serbs existed in a state of fairly constant tension, the former two peoples constantly jealous of the latter’s attempts—perceived or otherwise—to deprive them of their painfully fragile independence. Following the conclusion of WWII, Josip Tito and his Partisans set up the Socialist Federalist Republic of Yugoslavia (SFRY), encompassing the Balkan Peninsula’s many people groups. A few weeks after President Slobodan Milošević

78. Of course, the ICC also fits this definition, but the question of the ICC’s impact on the local judiciary will be addressed later in the article; for right now, the discussion is limited to ad hoc tribunals.

79. It is no secret that revolutionaries and anti-government parties instinctively target the existing legal structure in their coups or rebellions. William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2. (as part of the general plan to commit regicide and overthrow the King, a coconspirator suggests that the first step for a successful coup will be to eviscerate the justice system; he states, “The first thing we do, let’s kill all the lawyers.”); Magnarella, supra note 39, at 435 (“As of February 1, 1995, Rwanda had only a few surviving judges and not a single functioning court.”). Every international criminal tribunal has been instituted to serve justice in a state plagued by civil war, and war-torn, emotionally exhausted nations do not have strong normative legal systems, especially because the winner of the civil war almost always imposes “victor’s justice.” Alejandro Chehtman, Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia, 49 Stan. J. Int’l L. 297, 303 (2013). Indeed, many times, as in the case of Yugoslavia, the obliteration of local judicial systems are so complete that the effects are incredibly “difficult to overcome.” Id. at 302.

81. Id. at 11.
82. Id. at 13.
was reelected in 1991, the country began to disintegrate: Slovenia voted by referendum to become independent, and both it and Croatia passed resolutions officially proclaiming independence.83

Relations with the newly formed Bosnia-Herzegovina deteriorated as well, and between 1992 and 1995 war crimes, crimes against humanity, and crimes against peace were perpetrated in and by many of the Balkan republics.84 At least 100,000 people died85 and 20,000 women raped over the five year period.86 A total analysis of the conflict is far beyond the scope of this paper, most specifically the conflict in Bosnia-Herzegovina, which was “especially complex.”87 The Commission of Experts set up by the SC to determine whether there was a reason to set up a tribunal stated that:

[I]n the former Yugoslavia, ‘ethnic cleansing’ has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.88

In 1993, after a long series of debates, the SC passed Resolution 827, establishing the ICTY.89

83. Id. at 25.
84. Id. at 11.
86. Elisabeth J. Wood, Multiple Perpetrator Rape During War, in HANDBOOK ON THE STUDY OF MULTIPLE PERPETRATOR RAPE: A MULTIDISCIPLINARY RESPONSE TO AN INTERNATIONAL PROBLEM 132, 140 (Miranda A.H Horvath & Jessica Woodhams eds., 2013).
87. BASSIOUNI, supra note 80, at 41. My limited work at the ICTY has borne out the sometimes dizzying intricacies of the conflict.
When the SC adopted 827, it also adopted the proposed international criminal tribunal’s statute annexed to report (S/25274). Although amended nine times in the next few decades, this annex is still the heart of the ICTY’s daily operations. 90

The ICTY, funded by the general UN budget, is located in The Hague, Netherlands. 91 Both the judges elected by the UN’s General Assembly and the staff attorneys are incredibly diverse, coming from Japan to Malta to the United States to South Africa. The tribunal began prosecutions in 1993, and at the time this article is being published, is finishing one of its last trials—that of Ratko Mladic. 92 As proudly displayed on an infographic at the ICTY welcome desk, the ICTY has had an impressive trial and appeals record; not counting pleas, it has sentenced seventy-four accused, acquitted eighteen, transferred thirteen to regional courts, withdrawn indictments or terminated proceedings for thirty-six, and continues to both try and hear appeals for over twenty.

As with all international criminal tribunals, trials are lengthy ordeals, usually taking years to complete; many accused have already served practically all of their sentences while in detention. 93 Resolution 827 made the job of extradition and suspect apprehension relatively easy for ICTY personnel by mandating that all UN member-states cooperate with


91. “As a matter of justice and fairness, it would not be appropriate for the International Tribunal to have its seat in the territory of the former Yugoslavia or in any State neighbouring upon the former Yugoslavia,” and not in the region. U.N. Secretary-General, Rep. of the Secretary-General Pursuant to Para. 2 of S.C. Res. 808 (1993), ¶ 131, U.N. Doc. S/25704 (May 3, 1993).

92. I have had the tremendous opportunity to be involved with the Trial Chamber trying his case.

93. See, e.g., ICTY, Case Information Sheet for Blagoje Simić, Miroslav Tadić, Simo Zarića, http://www.icty.org/x/cases/simic/cis/en/cis_simic_et_al.pdf (last visited Oct. 24, 2015) (combined, these three convicted individuals were sentenced to a total of twenty-nine years in prison; because of time already served during the trial, they served only a total of six years after conviction and an appeal).
the tribunal both in apprehending the accused and enforcing prison sentences.94

The ICTY statute has many similarities to the Nuremberg charter. Just as the Nuremberg Tribunal did, the ICTY has the power to draft its own rules of procedure, but what really differentiates it from the Nuremberg Tribunal is the Appeals Chambers, created by Article 11 of the ICTY statute.95 Also, similar to the Nuremberg Tribunal, the ICTY has power to try breaches of the Geneva Conventions, war crimes, and crimes against humanity.96 Finally, Article 7 of the ICTY’s statute specifically emphasizes individual criminal responsibility and has also preempted arguments justifying actions on the basis of following military orders.97

Conversely, the SC gave the ICTY the power to try crimes against genocide98—not something the Nuremberg Tribunal was explicitly commissioned to do. And, while the Nuremberg Tribunal only tried those who had helped the Axis powers, thus creating a de facto time window that closed with Japan’s surrender in 1945,99 Article 1 of the ICTY’s statute gives it jurisdiction over any case arising in the region “since 1991.”100 Theoretically, the ICTY could begin more trials today as long as the alleged crimes fit under its subject matter jurisdiction.101 Perhaps most importantly for its public image—and by extension its ability to impact local judicial culture—the ICTY is an independent, autonomous body, not dependent on or controlled by states as was the Nuremberg Tribunal.

94. See S.C. Res. 827, supra note 89, at ¶¶ 4-5.
95. ICTY Statute, supra note 90, art. 11.
96. Id. arts. 2, 3, and 5.
97. Id. art. 7.
98. Id. art. 4.
99. See supra, Part I(c)(i).
100. ICTY Statute, supra note 90, art. 1.
101. Of course, the ICTY is doing just the opposite and, at the time this article is being written, is supposed to close in 2017.
iii. Perception of the International Criminal Tribunal for the former Yugoslavia in the Eyes of the Local Civilian Population

While the ICTY has had an undeniable and positive impact on the development of international criminal law, this invaluable contribution is not recognized by the local population, which sees the ICTY as a threat to the delicate balance of power in the region. Indeed, many former Yugoslavians see the ICTY not as an agent of justice, but as an apology from the UN for having let the conflict occur in the first place. This notwithstanding, surveys of the population have shown that most of the population generally understands the ICTY’s worth as an agent of justice, reestablishing the rule of law. In the words of an anonymous Bosnian magazine editor, “People do not have confidence in the Tribunal. But it is the only light at the end of the tunnel. Without it, there would be no justice and this would be the final betrayal.”

102. The body of procedural rules they created from customary international law continues to impact international criminal tribunals, especially because Nuremberg’s tribunal handed down no such guidance. See Theodor Meron, The Making of International Criminal Justice 240 (2011). The substantive rules were no less important. Id. Also, the reaffirmation of individual responsibility begun at Nuremberg was critical to shaping international criminal law’s handling of state and personal responsibility. Id. Most importantly, the ICTY has “laid to rest the age-old question of whether international law really is law.” Id.


104. Varda Hussain, Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals, 45 VA. J. INT’L L. 547, 563 (2005). For example, while lamenting his country’s fragmented judiciary, one Bosnian journalist stated that the ICTY’s fundamental structure and framework, “was planted and rooted badly.” HRCIHRLC, supra note 103.

105. See HRCIHRLC, supra note 103.

106. Id.
iv. Perception of the International Criminal Tribunal for the former Yugoslavia in the Eyes of the Local Judiciary

Generally

Multiple factors have contributed to the local judiciary’s distrust of the ICTY\textsuperscript{107}: The first fear of the local judiciary is that the ICTY’s decisions are too political, i.e., biased.\textsuperscript{108} “[S]ome [judges] welcomed the change” from the inept local judiciary, but there is a sneaking suspicion in many minds that the ICTY was, and is, “an intrusion by the international community into domestic affairs,” and thus administers only politically motivated victor’s justice.\textsuperscript{109} The “top-down” approach taken by the ICTY statute drafters led to harbored suspicions on the part of the local judiciary of political intervention.\textsuperscript{110} Second, the ICTY is located far away from the affected country in The Hague, Netherlands. This put a large amount of psychological distance between the population of the former Yugoslavia and tribunal.\textsuperscript{111} Third, the ICTY has only had sporadic contact with the local judiciary. Many legal professionals have felt disrespected by this lack of consistency, which they see as disregard for the local legal system.\textsuperscript{112} This is especially true in the context of international relations because the haphazard attention paid to judicial culture building emphasizes the disinterested and indifferent attitude the ICTY has taken. This has left the ICTY with a major problem of legitimacy in Bosnia.\textsuperscript{113} For example, local victim groups have “express[ed] bitterness when they learn of ICTY plea bargains,” something “unheard of in their national legal systems.”\textsuperscript{114} The ICTY seldom shared with the local judiciary or

\textsuperscript{107} Id. at 103-04.
\textsuperscript{108} Id. at 107. \textit{But see} Arzt, \textit{supra} note 103, at 235 (stating that since the ICTY’s inception, various defendants’ “confessions have made the tribunal more acceptable to Serbs and Croats who previously believed it was biased”) (citation omitted).
\textsuperscript{109} HRCIHRRC, \textit{supra} note 103, at 116.
\textsuperscript{110} Arzt, \textit{supra} note 103, at 232.
\textsuperscript{111} Id. at 228.
\textsuperscript{112} HRCIHRRC, \textit{supra} note 103, at 103-04.
\textsuperscript{113} See generally, Hussain, \textit{supra} note 104. For example, local victim groups constantly are in the dark as to ICTY proceedings; and, when they are made aware, they are often confused and bitter at half-explained, foreign concepts. Arzt, \textit{supra} note 103, at 235.
\textsuperscript{114} Arzt, \textit{supra} note 103, at 235.
population the reasons for its plea deal. Rather, it simply made the
decision and left it to the population to figure out both that the plea
existed and the reasons for it.

Not surprisingly, feelings towards the tribunal differ depending on the
ethnicity of the individual judicial personnel—whether they are Serbian,
Croatian, or Bosnian. Understandably, Serbs tend to be skeptical of
the ICTY. Thus far, vast majority of those convicted by the ICTY have
been Serbian, something many Serbian judges see as a sign of the
ICTY’s partiality. Serbian judicial personnel see the court as a tool of
the UN: an imposition by the international community on an ethnic
group the latter considers most responsible for the genocide. One
Serbian judge in an academic survey stated that his “court is more
mature in its proceedings, and more expert and diligent in the conduct of
trials.” Ironically, in this same survey, researchers found that even
when Serbian judicial officials strongly disapproved of the tribunal; it
was very rare that they felt “it should be abolished.”

Ethnic Croatian judges are far more supportive of the ICTY, but the
Croatian civilian population overwhelmingly opposes sending indictees
to the ICTY for trial. This makes sense given Croatia’s relatively less
publicized role in the conflict’s crimes, and the wish of both the judiciary
and civilians alike that Croat defendants be tried in national courts and
not an entity almost a thousand miles away. While the Croatian

115. Id.
116. Id.
117. HRCIHRLC, supra note 103, at 131. Each of the judges in the following
survey lived in Bosnia, so a statement of his or her ethnicity does not denote residence or
work in the Balkan Republic of the same name. Id. at 102-03, n. 1. The survey asked
questions of ethnic Serbs, ethnic Croats, and ethnic Bosnians who were living in
Bosnia-Herzegovina several years after the ICTY was created. Id. at 102-04.
118. Id.
119. Id.
120. Id.
121. The project employed qualitative methods to allow the judges and
prosecutors to discuss their views in response to a series of open and closed-ended
questions. [Some had war crime experience, others did not].” Id. at 111.
122. Id. at 131.
123. Id. at 132.
124. Id. at 135.
125. Arzt, supra note 103, at 233.
126. Id.
population may be skeptical of the ICTY, most Croatian judges believe that given enough time, “the work of the Tribunal could play an important role in reconciliation and reconstruction” of the local judicial culture.\footnote{HRCIHRLC, supra note 103, at 135.}

Ethnic Bosnians, legal professionals and civilians alike, have the most positive view of the ICTY of any ethnicity in Yugoslavia.\footnote{Id. at 128.} In higher levels than Serbians or Croats, Bosnians view the court as a neutral and fair institution for two reasons: First, Bosnian judges see the international community as the correct and even necessary authority to try high-profile war criminals because so many of these people “still wield tremendous power” within the country.\footnote{Id.} Second, even if the ICTY would have allowed local courts to try criminals, many Bosnian courts were not well enough equipped to handle the political pressure that would come along with these trials; it would be a difficult trial even for the most well-intentioned, fair judge.\footnote{Id.} In sum, most Bosnian judicial personnel, and especially judges, see the ICTY as “a neutral and fair court,” especially for those in power.\footnote{Id. at 127.}

v. Impact of the International Criminal Tribunal for the former Yugoslavia on the Local Judiciary

Early in its history, scholars were not sure whether the ICTY had an identifiable impact on the local judiciary or its prosecution of war crimes.\footnote{See id., at 107 (publishing the article in 2000).} Of course, with its focus on the deterrence of future crimes and not the improving of the local legal system, it is no surprise that the ICTY was completely apathetic with regards to local judicial culture.\footnote{Hussain, supra note 104, at 561.} Its primary focus was showing a “commitment on the part of the international community to hold perpetrators of atrocious war crimes responsible,” not to the Balkan’s rule of law.\footnote{Id.} Thus, any local judicial
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culture development the ICTY accomplished was really “ancillary to the role of the tribunals.”

It is now clear that the ICTY’s impact on the local judicial culture has been negligible. The appreciation the Bosnian and Croatian judges had for the ICTY shows that at one time it possessed the ability to influence the domestic judiciary, and the ICTY may have been the institution most capable of restoring the local judiciary’s legitimacy and rule of law culture. The uniqueness of the ICTY’s de facto responsibility to shape the local judicial culture, even if this responsibility is not explicit in its original mandate, makes its failure in this area sting. Indeed, even though many local judicial personnel—especially judges—see the ICTY as a fair and neutral court, it has probably negatively impacted the development of the region’s judicial culture in several ways.

First, relationships between the ICTY and “national courts ha[ve] been virtually non-existent.” Some have described this lack of relationship as “detrimental” to the local judiciary’s development. For example, the ICTY does not conduct training or teaching sessions for the domestic judiciary in the former Yugoslavia, but has largely “focused solely on its own prosecutions.” This is an irresponsible choice on the part of the ICTY if it at all wants to strengthen courts in the region. After any civil war, and especially after a conflict as vicious as that which surrounded Yugoslavian dissolution, a country’s judiciary must struggle to reclaim its legitimacy; a basic, functioning judiciary and growing a strong judicial culture is pivotal for this, so the ICTY making the domestic judiciary ‘ride the bench’ has weakened the latter’s legitimacy in the eyes of the populace and increased its trouble building a strong judicial culture.

Second, not only has the ICTY generally refused to build relationships, but it also consistently refuses to engage in the most basic communication with local courts—a gesture even less involved than

135.  Id.
136.  HRCHRLC, supra note 103, at 140.
137.  Id. at 146.
139.  HRCHRLC, supra note 103, at 102.
140.  Hussain, supra note 104, at 562.
141.  HRCHRLC, supra note 103, at 146.
more traditional relationship building. Judicial officials have pointed to The Hague’s near-deafening silence as one of their chief concerns with the ICTY and a major reason that—respected as it may be in the abstract—its existence and work has not generated parallel practices on the part of the regional judiciary. Communicating with the local judiciary is a necessary element in judicial culture development, and the ICTY has failed in this.

Third, incredible sums of money have been spent on the ICTY, and, much as it may have accomplished in the field of international criminal law, no effective law enforcement exists today in the former Yugoslavia because this money and other resources of the ICTY were not invested in the domestic judiciary—the most secure investment the UN could make to get a good return on judicial culture growth—but the preservation and continuation of the institution. Eventually some outreach programs were started, but by that point the damage was done.

Fourth, the ICTY’s “flying solo” approach has discouraged the local courts from prosecuting war crimes. This approach allows—and indeed forces—the local judiciaries to assume that the ICTY will clean up their jurisprudential messes, so if they have an unfair trial, slipshod procedures, or even corruption, they rely on the safety net of the ICTY

142. Sara Darehshori, Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court, 14 NEW ENG. J. INT’L & COMP. L. 299, 301 (2008).
143. See generally HRCIHRLC, supra note 103.
144. Id. at 144.
146. Id.
147. Inter alia, in 2012 the ICTY started an internship program for prosecutors in the former Yugoslavian republics to help develop the ability of local prosecutors to effectively prosecute war crimes. In allocating 1 million Euros to the program over a two year period, the goal of the program is to encourage “[b]etter prosecution of war crimes; [a] network of trained prosecutors; acceptance of international legal standards and best practice; [and] improved regional legal cooperation.” Eur. Comm’n, Training war crime prosecutors Fighting impunity in the former Yugoslav countries (last visited Mar. 13, 2015), http://ec.europa.eu/enlargement/pdf/case-studies/2014/20140722_training_prosecutors_en.pdf.
148. Darehshori, supra note 142.
instead of conducting a fair, efficient trial themselves. 149 The ICTY’s “reliev[ing] local authorities from the expectation of having to conduct effective prosecutions in war crimes cases” is the antithesis of judicial culture development. 150 Keeping in mind the dangers of politically motivated trials, in 2005 the ICTY began cautiously transferring many cases to courts in the region, but this came about 12 years after the court was founded, and only a handful of cases have been transferred. 151

The bright spot in all of this failure is that the domestic judiciary still believes in the ICTY’s mission, especially those who have had the rare opportunity to interact with the ICTY. Some judicial professionals and civilians have reservations, especially Serbians, but most believe that the ICTY will aid judicial culture development long-term. 152 Judicial leaders want to interact with the ICTY—even those who disapprove understand the uniqueness and wealth of knowledge it brings to the Balkan Republics and they “express[] genuine interest in receiving more and direct communication from the Tribunal.” 153 Those who have gotten a chance to interact with the ICTY gained “a deep respect for” both it and its staff; this interaction almost always erases any of the concerns mentioned above and emphasizes the “professional integrity” of the institution to those who need to understand its legitimacy the most. 154

149. Chehtman, supra note 79, at 321. See also, HRCIHRLC, supra note 103, at 133 (“Bosnian prosecutors must seek permission from the ICTY before initiating arrest and prosecution of war criminals.”).

150. Chehtman, supra note 79, at 321. Many would contend that transferring cases earlier was impossible for reasons just mentioned, i.e., politically motivated trials. Two responses: First, this is very probably true, but that only answers why the ICTY did not transfer cases earlier, not whether trying the vast majority of cases at the ICTY was beneficial for judicial culture. It is an understandable, necessary, and pragmatic—if also non-sequitur—question that incorrectly focuses on fair trial practices, not judicial culture development. Second, while by no means certain or clear, the success of alternative kinds of courts like in the case of the ICTR and Gacaca courts is evidence that something more could have at least been attempted or explored; the ICTY did not even try.


152. HRCIHRLC, supra note 103, at 136.

153. Id. at 146.

154. Id. at 147.
In sum, while it may have started off altogether wrongly, the positive feelings of judicial personnel provide hope—dim though it may be—that in its twilight years the ICTY, through its outreach programs and intentional communication with the domestic judiciary, might somehow reverse its negative impacts on the region’s domestic judicial culture in. However, it remains just that: a dim hope.

b. International Criminal Tribunal for Rwanda

i. Background of the International Criminal Tribunal for Rwanda

The background of the Rwandan genocide is one of the most coldblooded, chilling tales in modern history. The great majority of Rwanda’s population comes from two tribes: the Hutus and Tutsis. After a Tutsi rebellion which resulted in the death of President Habyarimana of the Hutu Party, the Hutu-controlled government responded by arranging a systematic genocidal campaign against the Tutsis beginning in mid-1994.

The military incited civilians to act with them against the Tutsis by arming civilians and urging them to fight. It even targeted moderate Hutus who did not approve of the killing. “[A]t least one million people in a country of 7.5 million were killed between April and July 1994,” and of the 930,000 Tutsis in Rwanda pre-genocide, only 130,000 survived; a stunning 800,000 persons were killed in a 100 day period, mostly with machetes. Post-civil war, the Tutsi’s regained control of the Rwandan government.

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156. Id. at 334.
157. Id. at 335.
159. Id. at 686-87; Westberg, supra note 155.
ii. Creation of the International Criminal Tribunal for Rwanda

The legal system of Rwanda was decimated by the genocide. In keeping with the motif of killing all the lawyers, the rebels slew all but a few judges, “and not a single functioning court” existed in Rwanda as of February, 1995.161 Seeing this, the SC took action in July 1994 by requesting that the Secretary General establish a commission to decide whether genocide had taken place in Rwanda.162 In November, the Secretary General responded that there had been genocide, and asked the SC to create a tribunal using its Chapter VII authority.163 The SC immediately agreed, finding authority under Articles 39, 41, and 48 of Chapter VII of the UN Charter to create a tribunal with jurisdiction in Rwanda and the surrounding countries.164

These provisions give, in varying degrees, the SC broad discretion on how and when to take actions in the interest of international peace; the SC, probably considering “the massive flow of refugees and the remnants of the Hutu militias to neighboring countries” as a potential breach of international peace,165 set up the ICTR to “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”166 Ironically, on the motion to create the tribunal, the only dissenting vote was Rwanda.167

161. Magnarella, supra note 39, at 435. The disappearance of the judicial infrastructure was so apparent that other countries refused to comply with Rwanda’s extradition requests because the decimated Rwandan courts could not guarantee a fair trial. Chehtman, supra note 79, at 301. And, Rwanda cited this lack of a national judiciary in its request to the SC to establish the ICTR. Haile-Mariam, supra note 158, at 697.


165. Magnarella, supra note 39, at n. 44.


167. It raised three objections: (1) it wanted the ICTR to be able to mete out capital punishment, (2) it wanted the tribunal physically in Rwanda, and (3) it wanted “the temporal jurisdiction of the ICTR extended back to 1990 to cover earlier crimes.”
iii. The Tribunal Itself: Jurisdiction and Substantive Law of the International Criminal Tribunal for Rwanda Compared to the International Criminal Tribunal for the former Yugoslavia and Nuremberg Tribunal

The ICTR was created just a year after the ICTY, so the ICTR had the benefit of using several institutional organs of the older, already established ICTY. For example, the prosecutor of the ICTY doubled as the prosecutor for the ICTR. Both had the same appellate chambers, rules and procedures, and tried violations of the same substantive laws—Additional Protocol II, the Genocide Convention Rwanda signed, and the universal jurisdiction crimes punished at Nuremberg; and, the judges were elected in the same way.\footnote{Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) arts. 2, 4, 12 [hereinafter ICTR Statute].} Also like the ICTY, the trials were not held in the affected country, but in a remote location: Arusha, Tanzania.\footnote{This was not originally decided in the Statute; at that time, the seat of the tribunal was undecided. S.C. Res. 955, supra note 164, ¶ 5-6. S.C. Res. 977, U.N. Doc. S/RES/977 (Feb. 22, 1995) assigned it to Arusha, Tanzania.}

However, unlike the ICTY, the ICTR had jurisdiction over crimes that occurred in the territory of adjacent countries such as well as Rwanda itself.\footnote{ICTR Statute, supra note 168, art. 8.} Most interestingly, the ICTR “and national courts” were given “concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law in the territory of Rwanda.”\footnote{Id.} This article did not give grant judiciary authority, but ensures that the ICTR has a piece carved from the same jurisdictional pie.\footnote{Haile-Mariam, supra note 158, at 695-96.} The ICTR statute also gave the tribunal primacy over all national Rwandan courts.\footnote{ICTR Statute, supra note 168, art. 8.} By the time the tribunal announced its closure in late December 2014,\footnote{“Closure” is a misnomer; although the ICTR itself no longer technically exists as an active court, its work is carried on by the “Mechanism”—a quasi-court that...} twenty

Magnarella, supra note 39, at 425. Most of all, though, Rwanda generally mistrusted the UN and its slow-moving bureaucracy. Westberg, supra note 155, at 342. But, Rwanda did not have enough political clout to force extraditions, making it dependent on the ICTR to bring the perpetrators to justice—most had fled the country—so it accepted the imposition of the ICTR.
years after its creation, it had entered sixty-one convictions at the cost of two billion dollars and was on its last Appeal.\(^{175}\)

The purpose of the ICTR is critical to understanding its impact on the judicial culture. Like the ICTY, the ICTR’s purpose was not to try every murderer in Rwanda.\(^{176}\) Rather, it was instituted to try those who had led the genocide—top level military and political leaders upon whom the responsibility for the genocide ultimately rests.\(^ {177}\) It also was instituted for the purpose of deterrence.\(^{178}\) Even after a million people died tensions still ran high in Rwanda, so it was necessary to demonstrate that blatant human rights abuses would not be tolerated by the international community.\(^{179}\)

\[\text{iv. Struggles of the International Criminal Tribunal for Rwanda}\]

The ICTR has had several struggles: First, it did not strike an “appropriate balance between the local culture and the international tribunal.”\(^ {180}\) Soon after the genocide ended, the ICTR developed Gacaca courts—local courts focused on lower level genocide trials.\(^{181}\) These courts were highly successful,\(^{182}\) but for the first six years of its existence, the ICTR largely ignored them because they were a non-traditional system of adjudication.\(^{183}\) This initial lack of communication (practically speaking) hardened many Rwandan hearts toward the ICTR.

\[^{175}\text{Rwanda genocide court to shut down after 20 years, }\text{PRESSTV (Dec. 17, 2014), http://www.presstv.ir/Detail/2014/12/17/390381/Rwanda-genocide-court-to-shut-down.}\]

\[^{176}\text{Haile-Mariam, supra note 158, at 695-96.}\]

\[^{177}\text{Id. at 695.}\]

\[^{178}\text{Id. at 738.}\]

\[^{179}\text{Julian Ku \& Jide Nzelibe, }\text{Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?, }84 \text{ WASH. U. L. REV. 777, 779 (2006).}\]

\[^{180}\text{Westberg, supra note 155, at 332.}\]

\[^{181}\text{Id.}\]

\[^{182}\text{Id.}\]

\[^{183}\text{Hussain, supra note 104, at 564-65.}\]
and almost completely barred it from positively impacting Rwanda’s judicial culture. This happened not only because the ICTR chose to ignore Gacacas, but was also the result of Rwandan judicial officials’ deep seated mistrust of international involvement in Rwandan affairs.

Second, relations between the Rwandan judiciary and ICTR have never been smooth because the issues Rwanda originally raised with regards to the ICTR were never addressed by the UN, and this has hurt the legitimacy of the ICTR in the eyes of the local judiciary. One organization of genocide survivors went so far as to ask its members to boycott the tribunal because it saw the tribunal’s work as “victor’s justice.” Indeed, many view the tribunal as enshrining and protecting Tutsi power post-genocide in Rwanda.

Finally, the domestic government has done much to oppose the workings of the tribunal. Rwanda’s extremist Tutsi party, the RPF, placed excessively restrictive travel requirements on witnesses traveling from Rwanda to Tanzania, “effectively blackmailing” the tribunal to ensure that their actions during the conflict would not be brought to the court’s attention. Further, the Rwandan government attempted to undermine the ICTR by publicly criticizing them and occasionally suddenly withdrawing local support; these actions were met with only a mild SC warning, which came far too late to be of any practical use.

v. Impact of the International Criminal Tribunal for Rwanda on the Local Judiciary

Overall, though, the ICTR has had a net positive effect Rwanda’s judicial culture. From its inception, the drafters of its statute understood

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184. Id.
186. Id. at 1230-32.
188. Waldorf, supra note 185, at 1229.
189. Id. at 1231-32 (quoting Carla Del Ponte, Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity 224 (2008)).
190. Id. at 1231-34.
that its shared jurisdiction with the local judiciary allowed it to facilitate the growth of Rwandan judicial culture in five specific ways: legitimacy, deterrence, judicial reform, personnel, and political reform.191

First, even though the ICTR stretched the bounds of pre-existing international criminal law, all challenged portions of the statute survived judicial scrutiny.192 Legitimacy is a necessary but not sufficient component to a strong judicial culture, and legitimizing the ICTR, specifically with regards to the kinds of crimes it was created to prosecute, allows it to impart that legitimacy to the local judiciary.193

Second, the ICTR proved a deterrent to “renewed genocidal attacks.”194 Ethnic tension in Rwanda did not end with the creation of the tribunal, and there was a real threat that the conflict would renew.195 The international presence the ICTR brought with it was enough to stop any potential renewal of hostilities. This gave domestic Rwandan courts time to rebuild their infrastructure and legitimacy with the local population. In short, the ICTR effectively gave the Rwandan judiciary the breathing room it needed to get back on its feet and prepare itself for any potential future ethnic troubles and prosecutions of already-committed crimes.196

Third, Rwanda undeniably reformed its judicial culture because of the ICTR, and the ICTR’s policies.197 Because the ICTR had primary jurisdiction over Rwandan courts, it often chose to prosecute cases itself rather than hand them over to Rwanda’s tattered judiciary.198 Like any country, Rwanda desperately wanted international recognition of its government and legal system, and the ICTR’s perceived spurning was

191. Id. at 1245.
193. Although the ICTY’s legitimacy was proven in the same way, it did nothing to help the local judicial culture because the ICTY did not transpose it onto the local judiciary as did the ICTR; as stated above, legitimacy is a necessary but not sufficient element for a strong judicial culture.
195. Id.
196. See id. at 7-8.
198. Id.
just the opposite.\(^{199}\) Rwanda has undertaken several reforms in order to facilitate this transfer of cases from the ICTR to the local judiciary.\(^{200}\) For example, it abolished its death penalty.\(^{201}\) Not only did this policy decision facilitate case transfers, but general relations between the local judiciary and the ICTR improved as well.\(^{202}\) It also established a witness protection unit, probably to remedy the government’s earlier refusal to provide this protection.\(^{203}\) Additional reforms “paved the way for the ICTR to agree to transfer cases to” the Rwandan judiciary.\(^{204}\) The Rwandan judiciary’s increased caseload is a positive thing because not only are “domestic prosecutions . . . better at fighting impunity than international trials,”\(^{205}\) but these judicial successes breed even more success and a heightened sense of legitimacy. Thus, the ICTR’s policy to only hand over a case if it thought the defendant would get a fair trial was instrumental in shaping Rwanda’s judicial culture for the better.\(^{206}\)

Fourth, the human element: Local judicial culture has been bolstered by the personnel coming into and out of the tribunal. Foreign personnel bring expertise and experience to a decimated legal system, and local legal professionals have gotten quite a bit of beneficial training while employed by the tribunal, even with the ICTR physically in another country.\(^{207}\) Further, “thousands of African staff members,” their families, and communities have been employed—by and interacted with—the tribunal, many of them Rwandan.\(^{208}\) One scholar grandly described this human element as “a stone cast into a pond—sending ripples extending

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\(^{199}\) Id.

\(^{200}\) Sadat, supra note 194. See also The Human Rights Watch, supra note 197.

\(^{201}\) Sadat, supra note 194. The irony of Rwanda’s decision, especially because its death penalty was one of its original reasons for opposing the tribunal, should not be ignored.

\(^{202}\) Id. at 7-8.

\(^{203}\) The Human Rights Watch, supra note 197.

\(^{204}\) Id.


\(^{206}\) One might point out that the ICTY did precisely the same thing. The sharp difference is that the ICTR did actually hand out cases practically from the start; the ICTY waited over a decade to begin.

\(^{207}\) Sadat, supra note 194, at 4-8.

\(^{208}\) Id. at 8.
all the way to far off and as yet unknown shores.”

Thus, not only has the ICTR infused Rwanda’s professional legal community with legal knowledge and competent attorneys, but the latter’s judicial culture has grown because civilians have learned concepts like human rights and the rule of law.

Finally, the ICTR has “profoundly affected the political landscape in” Rwanda. Unlike other national judiciaries of affected nations, “the Rwandan national courts have vigorously pursued prosecutions of suspected war criminals,” and this is specifically due to the influence of the ICTR. Although there was undoubtedly Tutsi-caused disruption early on in the tribunal’s work, a complete view of the ICTR’s history reveals that it had a profound impact on the attitude of the country’s leaders with regards to war crimes prosecution; instead of blocking the work of justice, Rwanda’s government, led by their judiciary, has now become an active proponent—albeit, sometimes perhaps self-servingly—of prosecuting international law violations.

Comparatively, the ICTR did far more for local judicial culture than the ICTY has by legitimizing the local judiciary, deterring future conflict, acting as a catalyst for reforms in Rwanda’s legal system, imbuing Rwanda’s legal system with competent professionals, and changing the way Rwanda’s government views war crimes adjudication. Of course, now that the ICTR has finished its work, additional judicial culture development can no longer be institutionally accomplished, but, “beyond a doubt, the ICTR had a profound short and medium term effect locally, regionally in East Africa[,] and internationally.”

c. Five Problems Both Tribunals Face

While every tribunal is different, there are several struggles which international criminal tribunals and domestic judiciaries of war torn countries alike find difficult to navigate. First, the tribunal usually faces a kneejerk and carte blanche rejection of its work by the local judiciary;

209. Id. at 9.
210. Id. at 1-2.
211. Id. at 7.
212. Hussain, supra note 104, at 564.
213. Id.; Sadat, supra note 194, at 4-8.
this is hard to overcome. What is worse, though, is that these judiciaries not only reject the tribunal’s specific sentences and mandates, but its legal ideology as well; the fundamental principles the tribunal espouses become collateral damage, made guilty by their association with the tribunal’s more concrete work. Also, local judiciaries often reject a tribunal’s normative system because they feel a loyalty to their own pre-existing normative systems. However, the affected region’s systems usually do not exist or are so shattered by conflict that it is not practical to rely on them. Of course, local judiciaries do not see this.

Second, every tribunal struggles with legitimacy in the eyes of the local citizens. It should capture the hearts of its country’s citizens or, at the very least, establish credibility with them in order to deter future war crimes, especially because deterrence by building respect for law is one of the main functions of international criminal tribunals. After a country suffers a horror like genocide, a tribunal is in the perfect position to rebuild a “culture of accountability” within the local judiciary. Unfortunately, this rarely happens. The citizenry are all too ready to transpose the faults of their justice system onto this new entity, doing so with nearly every tribunal, and a tribunal devoid of legitimacy itself has none to impart to the local judiciary.

More specifically, tribunals struggle in how to fix this lack of legitimacy. A tribunal can try to publicize the process of the tribunal—this has helped in some situations—or it can seek to include citizens as witnesses, local legal professionals as members in the court, or by

216. Id. To use a colloquialism, the local judiciaries will often “throw out the baby with the bathwater.”
217. Id.
218. Id.
221. Arzt, supra note 103, at 227.
222. Hussain, supra note 104, at 574.
224. Hussain, supra note 104, at 574.
reaching out to the local media. No matter where a tribunal is located or what it does, local “ownership is vital if a tribunal is to have an impact on the often stated goals of promoting reconciliation, developing a culture of accountability, and creating respect for judicial institutions in a post-conflict society.”

Third, in large part, a tribunal’s effectiveness depends on—in the words of American business theory—location, location, location. Because a “tribunal located far away from the affected country and operated by foreigners cannot train local actors in the necessary judicial skills” that further judicial culture, tribunals located outside the affected country have little to no impact on the local judiciary. Seemingly, in the mind of the beleaguered populace, geographical distance equates to institutional indifference. There is any number of reasons for this phenomenon; the crimes did not happen overseas, but in the affected country, and a potentially limited level of education of the affected country precludes an understanding that justice can still be meted out from thousands of miles away. Also, a removed tribunal cannot disseminate information about processes and progress effectively, and even if it was located in the affected country; mere location is not enough to “instill a sense of the court’s legitimacy” in local opinion. At the end of the day, we will always have a problem determining how much location impacts the legitimacy of a tribunal and, by extension, the eventual legitimacy of the local judicial culture.

The fourth problem is international recognition and support. The international political community is a dynamic, ever-changing landscape, and no tribunal is ever sure of even moderately stable support. For better or worse, tribunals depend on international recognition to succeed, and given current theories of international law with the sovereign state as the dominating actor, this is understandable. Of course, not only must the tribunal have “the full support of the international community,” but also

226. Id. at 6.
228. Darehshori, supra note 142, at 301.
229. Glasius, supra note 215, at 63.
230. Costi, supra note 223, at 238.
the “major local stakeholders.” This second endorsement may be harder to secure than the first.

Finally, there is a great danger that substantive law principals developed and applied by the tribunal will not be adopted by the local judicial culture. Unfortunately, the critical work of developing substantive norms in local judiciaries post-conflict may be where international criminal tribunals fail the most. As Costi explains, legal norms imported from the relatively healthy legal systems of the tribunal judges are not integrated with the affected country’s legal system because judicial culture is difficult to change by extrinsic means. Instead, the local judiciary and population must take ownership of these values, and the only way to do this is by teaching and integrating, not imposing. Tribunals have a great ability to impact a local judicial culture’s normative and substantive standards, and can do so by involving the local judiciary and seeking to merge substantive ideals instead of impose them.

d. Problems Using the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda in a Judicial Culture Development Analysis

An analysis of the ICTY’s and ICTR’s impact on the respective domestic judiciaries has the danger of treating those tribunals unfairly for three reasons. First, they were not created to build local judicial culture or bring reconciliation to the people, but simply to punish violations of international law. At the time of their formation, the specific goal of judicial culture development was not a priority in anyone’s mind. Only now are we beginning to see local development as a priority of international criminal tribunals.

232. Costi, supra note 223, at 238.
233. Id. at 224-25.
234. Id. at 224.
235. Id. at 224-25.
236. Id.
237. Id. at 225.
238. Hussain, supra note 104, at 582.
239. Id.
240. Id.
Second, unlike later tribunals, the ICTY and ICTR placed an extraordinarily heavy focus on self-preservation, potentially ignoring the financial and logistical needs of the local judiciary. A substantive analysis of their success aside, the ICTY and ICTR were massive money pits, (which is what eventually led to the adoption of “smaller hybrid courts”), and, thus, local judicial culture development never appeared as a potential line item in the tribunals’ budgets.

Third, consistent with ignoring local judicial culture, both tribunals were located outside the affected country. This, as discussed above, “creates a number of challenges and difficulties, principally involving making the trials accessible and meaningful to those victims in whose name justice is pronounced.” In sum, the success of the tribunals is not—nor was it intended to be—the building of the local judicial culture. Instead, the tribunals’ purpose and respective success has been twofold: to “fend of critiques of ‘victor’s justice’ and to create a growing body of substantive and procedural law on crimes against humanity.”

III. HYBRID TRIBUNALS GENERALLY

Hybrid tribunals are tribunals in which “both the institutional apparatus and the applicable law consist of a blend of the international

242. See Costi, supra note 223, at 218.

By the time the ICTY shuts down in 2016, it will have been in existence for some twenty-three years—six times longer than the Nuremberg trials and more than eight times longer than the Tokyo tribunal. The tribunal’s costs have been astronomical; the final price tag will probably run over $2 billion. Legal scholar and anthropologist Robert Hayden has estimated that the ICTY will have spent about $14 million per individual trial. The ICTY’s budget for 2012–13 was approximately $251 million. . . . Similarly, at a cost of more than $1 billion, the International Criminal Tribunal for Rwanda has convicted fewer than one hundred people.

Id.

244. Cohen, supra note 220, at 4.
245. Id. at 5.
247. Id.
They suffer a few of the normal problems of purely international criminal tribunals, such as legitimacy in the eyes of the local judiciary, but also must deal with more specific problems caused by their unique blend of international and national jurisprudence. Equally, this blend gives them the parallel opportunity to positively influence the affected country in ways a purely international criminal tribunal cannot.

First, because their very nature is one of cooperation and coordination, hybrid tribunals must deal with the whims of local government. This often leads to problems because of differences in purpose and prioritization. For example, local tribunal personnel focus on the immediacy of impending trials rather than spending time and resources training train staff. Because the international members recognize the need to prioritize training, this can bring the different sides of the tribunal into conflict. A lack of or negative “state cooperation is the Achilles’ heel” of hybrid tribunals.

Second, the international segment of the tribunal can behave in a way the local personnel take as presumptuous. Local legal professionals, especially judges, are often hesitant to accept advice from outside sources. As legal professionals, they feel competent in their abilities and may consider it an insult to be trained as if they were new to the profession, especially by a junior or foreigner. Thus, because a hybrid tribunal is, by definition, interwoven with the local judiciary, there is a higher chance that local judicial officials feel this presumptiveness.

Third, purely international tribunals have only themselves to blame if their adjudicatory processes begin to slow; hybrid tribunals are partially dependent on the energy, motivation, and knowledge of the local judicial personnel to get results, especially with regards to external functions like police investigation, searches, etc. Some scholars have posited that a

248. Costi, supra note 223, at 214.
250. Id.
251. Id.
252. Waldorf, supra note 185, at 1224.
253. This problem does not arise in purely international tribunals because there is not nearly as much interaction between the local judiciary and the tribunal officers.
254. Chehtman, supra note 79, at 305.
255. Id.
256. Id. at 302-03.
lack of energy or incentive on the part of the local judicial personnel is “the most crucial determinant” in a hybrid tribunal’s success.257

Conversely, the positives of hybrid tribunals are just as specific as their shortcomings, and a hybrid tribunal can develop judicial culture in a myriad of ways.258 For example, first, the tribunal’s presence in the affected country can help build an enduring rule of law and a professional legal base, as well as “leav[e] an informational legacy” and encourage legal reform.259 This allows hybrid tribunals to overcome both the problem of domestic judicial legitimacy and international criminal tribunal legitimacy by providing one legitimate vehicle for both.260

Second, at least theoretically, hybrid tribunals have a substantial advantage over purely international tribunals that comes from their ability “to develop local capacity through mentoring”261 rather than solely showing by ill-communicated example, as is the case with the purely international tribunals. It is far easier for a hybrid tribunal, constantly interacting and exchanging ideas with the local judicial personnel to leave a lasting positive impact on their culture than a purely extrinsic and aloof example thousands of miles away. Mentoring instead of instructing by example allows the hybrid tribunal to “be sensitive to the local legal culture,” an absolutely essential element in facilitating judicial culture development.262

Of the five hybrid tribunals this article could examine, it will consider two: the Extraordinary Chambers in the Court of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL).263

257. Id.
258. Ciocciari & Heindel, supra note 249, at 431.
259. Id.
260. Costi, supra note 223, at 237.
261. Chehtman, supra note 79, at 310.
262. Id. at 303-04.
263. Of course, the Special Tribunal for Lebanon, East Timor Tribunal (Crimes Panels of the District Court of Dili), and Kosovo Tribunal (“Regulation 64 Panels” in the Courts of Kosovo) are all hybrid courts as well, but the ECCC and SCSL are larger, have had quite a bit more jurisprudence, and provide a full spectrum of the good and ills of hybrid tribunals, allowing for more comprehensive analysis.
a. The Extraordinary Chambers in the Court of Cambodia

i. Background of the Extraordinary Chambers in the Court of Cambodia

In 2003 the UN and Cambodia created the ECCC to try the remaining members of the Khmer Rouge, a Communist regime which came to power in 1975 under leader Pol Pot. From 1975 to 1979, Cambodia was one of the most dangerous places on earth; a devastating “combination of domestic instability and international apathy rendered the country paralyzed [and] a once-promising government . . . a killing machine.”

Over a fifth of the Cambodian people died by starvation, torture, and execution; a total of 1.7 to 2 million died in a space of four years because of Pol Pot’s reign of terror and his forced communist agricultural communes. The Vietnamese eventually overthrew the regionally disruptive regime, and in 1993 the remnants of the Khmer Rouge permanently dispersed and it was officially outlawed in 1994.

ii. Creation of the Extraordinary Chambers in the Court of Cambodia

Soon after the Khmer Rouge was dispelled, the prime minister of Cambodia sent a letter to the UN’s Secretary General asking for an international criminal tribunal. He specifically requested that this

266. Id. at 900. For example, at just one prison, the torture his men inflicted included, inter alia, “electric shocks, severe beatings, removal of toenails and fingernails, submersion in water, cigarette burnings, needling, suffocation, suspension, and forced consumption of human waste.” Ehrisman, supra note 264, at 30.
tribunal be allowed to prosecute two kinds of crimes: genocide and crimes against humanity. In addition to beginning a five year conversation with the UN, this letter unlocked the door for future involvement by the international community. The UN commissioned a report on into the Cambodia’s judiciary. The report stated that the only way to maintain fair trials of Khmer Rouge officials would be to create a purely international tribunal.

Tension between the UN and Cambodia arose during the following months and years. Cambodia insisted that the tribunal be in Cambodia, apply Cambodian law, and be staffed by Cambodians. The UN objected to this power being given to Cambodia because it had almost no legal professionals or infrastructure and could not guarantee fair trials. Two years later in 1999 officially recommended a purely international tribunal. Cambodia retaliated by passing legislation setting up its own tribunal in 2001. The UN came back to the table and negotiated a relatively drama-free deal with Cambodia in 2003. Ideologically, the deal struck was heavily in favor of maintaining Cambodia’s state sovereignty—many thought at the expense of human rights.

269. The letter asked “for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.” Id. 31 at 221-22.

270. Id.

271. U.N. Secretary-General, Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc. A/53/850--S/1999/231 (“If the international standards of justice, fairness and the process of law are to be met . . . the tribunal in question must be international in character.”).


273. See id.

274. Id.

275. Id.

276. Id.

277. Id.
iii. The Tribunal Itself: Jurisdiction and Substantive Law of the Extraordinary Chambers in the Court of Cambodia

The ECCC, located in Angk Snuol, Cambodia, was created on June 6, 2003 by the UN and Cambodia per an official agreement to try the senior level leaders of the Khmer Rouge who had committed crimes between April 1975 and January 1979. Since then it has cost the UN and Cambodia—mostly the UN—over $200 million, secured four convictions, and continues to prosecute cases today.

The ECCC was given the power to try both domestic and non-domestic crimes, genocide, crimes against humanity, and “grave breaches of the Geneva Conventions.” In the trial chamber there are three Cambodian judges and two foreign judges; in the appellate chamber there are four Cambodians and three foreigners. To ensure that at least one judge of each “side” agrees with each conviction, a majority of four judges is needed in the trial chamber and five judges in the appeals chamber. To maintain the theme of diversity, there are co-prosecutors—one Cambodian and one foreigner.

Also, the court was located in Cambodia and relies on the Cambodian government for all of its logistical support, contrary to the wishes of the UN. The UN opposed the idea because Cambodia—then and now—“remains a one-party state dominated by the Cambodian Peoples Party and Prime Minister Hun Sen, a recast Khmer Rouge official in power

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280. ECCC Statute, supra note 278, art. 3.

281. Id. art. 4.

282. Id. art. 5.

283. Id. art. 6.

284. Id. art. 9.

285. Id. art. 14.

286. Id. art. 16.

287. Id. arts. 43-44.
since 1985.” There is no shift in leadership and the same corrupt people from the same political ideology administer so-called justice. While it was necessary to have the ECCC in Cambodia for judicial culture building’s sake, the UN was fearful that the government of Cambodia, having subsumed much of the Khmer Rouge’s leadership into its own, would subvert justice. Unfortunately, this fear appears to have been realized.

iv. Impact of the Extraordinary Chambers in the Court of Cambodia on the Local Judiciary

As exhaustively shown above, international criminal tribunals, and especially hybrid tribunals, can only build the local judicial culture if they themselves maintain institutional integrity. In this regard, the ECCC has failed and, by extension, has done nothing to contribute to Cambodia’s domestic judiciary’s culture. Indeed, every shortcoming of the ECCC has a direct, negative impact on Cambodia’s judicial culture.

Even from an objective perspective, the ECCC has accomplished little; it has secured only four convictions, and the only other two indictees died and were released. The ECCC has also failed subjectively. For example, as arguably one of the most important aspect of the tribunal, the substantive law should have been a priority of the ECCC. However, it took almost a year for the court to decide what


289. Charlie Campbell, Cambodia’s Khmer Rouge Trials Are a Shocking Failure, TIME (Feb. 13, 2014), http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/. Prof. Greg Stanton, an expert in genocide studies and prevention at George Mason University’s School for Conflict Analysis and Resolution, says it was important to base the court domestically “to give Cambodians a way to understand what happened in their country.’ However, he concedes that ‘Judges who are part of the Cambodian system are always going to continue to be influenced by Cambodian politics.’” Id. See also Jaya Ramji, Reclaiming Cambodian History: The Case for a Truth Commission, 24 Fletcher F. World Aff. 137, 141 (2000) (“In a striking display of unanimity, every one of the interviewees stated that a trial could not be held in Cambodia because the judiciary is too corrupt and weak.”).

290. Hume, supra note 279.
This inability to perform basic court functions indicates a deeper problem stemming from the corrupt Cambodian judiciary.

First, internal pressure from the Cambodian government through the Cambodian justices destroys the ability for the ECCC to function as a fair and unbiased judicial institution should. Of course, given Cambodia’s history, this political interference has been more of an expectation than surprise. Cases have been dismissed and reopened several times based on which party is in power, and more than once specific instruction on whom to prosecute has been given to the Cambodian judges. The Cambodian government largely does not care about the success of the ECCC, but rather maintaining its power, even at the cost of hijacking the ECCC. This blatant obstruction of justice is harmful to both the ECCC and, by extension, the judicial culture development of Cambodia.

Second, the supermajority requirement, which at first seemed so ingenious, is hampering the ability of the ECCC to operate smoothly and has led to serious infighting among the justices. Specifically with regards to the substantive law and procedural rules of the court, the ECCC’s international judges advocate upholding international law norms, whereas the Cambodian judges advocate whatever the government tells them to at that time. Because neither group alone has

291. Ehrisman, supra note 264, at 34.
292. Luftglass, supra note 265, at 936.
293. Ehrisman, supra note 264, at 35; Campbell, supra note 289 (“Certainly, senior Khmer Rouge figures close to the Hun Sen administration have been barred from testifying, such as current National Assembly Chairman Heng Samrin and Senate President Chea Sim. ‘In any other international tribunal the importance and relevance of someone like Heng Samrin would be so obvious,’ says Koppe, frustrated that his ‘firsthand knowledge of decisions being made in ‘75 and afterwards’ cannot be called upon. Blocking Heng Samrin from court, he adds, ‘is a clear sign of the unfairness of the proceedings.’ Critics say the trials have been highjacked to specifically absolve former leading Khmer Rouge figures now within Hun Sen’s Cambodia People’s Party. ‘I’m in awe of Hun Sen,’ says Theary Seng sardonically, deploring the manipulated and whitewashed’ history the ECCC is now helping to propagate. ‘It will go down in all the history books as a brilliant move.’”).
294. Cambodian officials will “continue their improper influence and intimidation” into the future. Ehrisman, supra note 264, at 37.
295. Id. at 34-35.
the supermajority, there is a sort of gridlock which has stifled the ECCC’s progress.

Third, Cambodian national courts are so ill-equipped to handle adjudication that using them as a foundation for this hybrid tribunal has proven unworkable. In Cambodia, the idea that judges are corrupt and in the pocket of their government is almost axiomatic; any lawyer or judge brave enough to faithfully administer justice was targeted by the Khmer Rouge.297 Like Yugoslavia and Rwanda, there was an utter decimation of Cambodia’s judiciary.298 Thus, when the tribunal was formed, there was nothing on which to build the institution that would become the ECCC—at least nothing upon which a tribunal should be built. Cambodia insisted on an instrumental role in it, and yet had nothing to offer because they lacked “a competent, qualified judiciary.”299 Again, this has damaged Cambodia’s judicial culture because the ECCC’s success is critical for judicial culture development and post-conflict growth.300

Fourth, the incompetence of the local judiciary is quite pervasive; corruption and bribery existed as the rule in pre-ECCC Cambodia, and continue to plague the ECCC today.301 There has never really been a judicial “culture of respect for the rule of law,” even in the highest chambers of the ECCC.302 Something that cannot be overemphasized is the constant and pervasive meddling of the Cambodian government, and the instability and illegitimacy this inflicts on ECCC and Cambodian jurisprudence.303 The ECCC had an opportunity to set an example and precedent for the rest of Cambodia’s judicial system, but does just the opposite through the actions of its personnel, e.g., the ECCC’s Chief Judge “admitted that he was taking money from the people who appeared before his court after their trials were over, maintaining that there was no

298. Luftglass, supra note 265, at 934.
299. Id.
300. In an almost circular way, the ineptitude of the Cambodian judiciary at first seems self-perpetuating; the judiciary depends partially on the ECCC for its success, and the ECCC, being partially the Cambodian judiciary, depends on the latter for its success. The SCSL demonstrates that this is not an unbreakable circular cycle.
301. Nielsen, supra note 297, at 304.
302. Id.
303. See id.
other way to survive on his salary of $30 per month.”\textsuperscript{304} It is difficult to lead by example or instruction when a tribunal’s chief judge publicly admits to taking bribes.

Finally, many Cambodians are very sensitive to any criticisms of their judicial system, especially criticisms from international counterparts.\textsuperscript{305} Indeed, one of the most common problems that beset the ECCC’s international judges is how to tactfully approach situations where they are clearly at odds with the Cambodians: especially when the Cambodian criminal statutes are vague.\textsuperscript{306} This problem has been exacerbated by debates within the ECCC, and many Cambodians judicial officials are now immune to remonstrance from international colleagues who stress a rule of law culture.\textsuperscript{307}

Thus, because of its utter failure to successfully adjudicate, there are serious doubts regarding the ECCC’s ability to positively influence judicial culture, and these doubts have largely precluded Cambodia’s people from paying the ECCC the slightest modicum of respect.\textsuperscript{308} Similarly to each of its counterparts, the ECCC has the tremendous privilege and responsibility of shaping Cambodia’s domestic judicial culture.\textsuperscript{309} However, also similarly to every other tribunal, its success depends on the legitimacy it garners from the population at large, and, when dealing with a hybrid tribunal, this determination is made by the people concurrently with and partially based on the success of the local judiciary.\textsuperscript{310}

\begin{itemize}
\item \textsuperscript{304} Id. at 306.
\item \textsuperscript{305} Ciorciari & Heindel, \textit{supra} note 249, at 410.
\item \textsuperscript{306} Nielsen, \textit{supra} note 297.
\item \textsuperscript{307} \textit{Recent Developments at the Extraordinary Chambers in the Courts of Cambodia}, THE OPEN SOC’Y FOUND., 16-19 (November 14, 2011) https://www.opensocietyfoundations.org/sites/default/files/eccc-developments-20111114.pdf (“Read in conjunction with other features of their treatment of the Case 003 investigation, these publicly available decisions consistently demonstrate the CIJs’ willingness to violate basic legal principles in order to reach pre-determined legal outcomes.”).
\item \textsuperscript{308} Id.
\item \textsuperscript{309} As a hybrid court with local staff, the ECCC has great potential to create a sense of legitimacy and to mobilize popular support, as well as foster an appreciation amongst the Cambodian public that their own legal system can function fairly and impartially.
\item \textsuperscript{310} Luftglass, \textit{supra} note 265, at 935.
\end{itemize}
This is the case with Cambodia. Because the ECCC exists as an extension of the local judiciary, it not only suffers the same woes, but, by virtue of association, is condemned for the same faults, albeit reasonably so.311 When a nation’s court system refuses to administer justice, all the people have left is a hope that someone else will. It is more than armchair politics for the Cambodians; their cultural perception and expectation of justice has greatly suffered.

The Cambodian people see their judicial culture as illegitimate because they see the ECCC as illegitimate;312 as one, the country’s populace recognizes the corrupt judicial culture the ECCC has erected, and refuses to give it respect.313 In sum, the ECCC’s failure to change Cambodia’s judicial culture is even more stinging because that failure has destroyed a people’s hope.314

b. The Special Court for Sierra Leone

i. Background of Special Court for Sierra Leone

In 1991, a partially indigenous rebel group, the Revolutionary United Front (“RUF”), invaded Sierra Leone from neighboring Liberia and began a ten-year civil war. The RUF allegedly acted with the support of Charles Taylor, former warlord and current president of Liberia. During the course of the war, Sierra Leone split into multiple factions, all of which engaged in “systematic war crimes.” An estimated one hundred thousand people were killed, and more than two million people were displaced. Sexual violence, such as gang rape and sexual slavery, was particularly prevalent: between 1997 and 1999 alone, more than 1,800 victims of sexual violence sought medical attention from Médecins

311. See id.

312. “Can you support a judicial institution that is willing to tolerate serious allegations of corruption without addressing them?” asked Heather Ryan, the Cambodia representative of the Open Society Justice Initiative, a legal monitoring group based in New York. “Funding a court that is unwilling to address credible allegations of corruption is a significant problem,” she said. “It makes it appear that you are in some respect condoning the situation.” Seth Mydans, Corruption Allegations Affect Khmer Rouge Trials, N.Y. TIMES, (Apr. 9, 2009) http://www.nytimes.com/2009/04/10/world/asia/10cambo.html.

313. Luftglass, supra note 265, at 939.

314. Not only has the ECCC “become a mockery of justice, but also a symbol of the unfulfilled promises for the Cambodian people.” Id.
Sans Frontières. In addition, Physicians for Human Rights reported that more than half the women who came into contact with the RUF suffered from sexual violence. . . . In July 1999, all of the factions had agreed to the Lomé Peace Agreement, which granted amnesty for all crimes committed by all parties and referred to the establishment of a Truth and Reconciliation Commission (“TRC”). The UN Special Representative of the Secretary-General, who was not a party to the agreement, appended a reservation, stating that the United Nations would not recognize amnesty for “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international law.” . . . Following a series of negotiations, in January 2002, the United Nations and the Government of Sierra Leone signed an agreement creating the Special Court for Sierra Leone (“SCSL”).

Sierra Leone’s judicial system was just as decimated as Yugoslavia’s, Rwanda’s, or Cambodia’s after their respective civil wars. It was so decimated, in fact, that when it came time to create the SCSL, the international community gave it far less deference than was given the ECCC. The main reason the UN refused to allow Sierra Leone to pursue trials at the local level was because its judicial culture was not one that prioritized a fair trial. Even if it did have a judicial culture that emphasized and prioritized fair trials, it could not prosecute offenses like genocide, war crimes, etc. because it does not have national laws that criminalize these specific crimes. Thus, Sierra Leone was forced to reach out to international institutions to prosecute its war crimes cases.

ii. Creation of the Special Court for Sierra Leone and Its Workings

The SCSL was created on August 14, 2000 by Resolution 1315 to prosecute those who bore the “greatest responsibility for serious

317. Id. at 480-81. (“The judicial system of Sierra Leone was simply too decimated for such an option to be available; there was also the standard concern that any prosecution might be viewed as biased or as the victor’s justice.”).
318. Chehtman, supra note 79, at 301.
319. Id.
320. Id.
violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996.”321 Located in Freetown, Sierra Leone’s capital, the SCSL tried violations of Common Article 3 of the Geneva Conventions, Additional Protocol II, other serious violations of international humanitarian law, and crimes under Sierra Leonean law.322

Like all the other courts discussed so far, it emphasized individual criminal liability, and like the ICTR and ECCC, it had concurrent jurisdiction with the national courts of Sierra Leone.323 The trial chamber had three judges: one from Sierra Leone and two foreigners, and the appeals chamber had five: two from Sierra Leone and three foreigners.324 The prosecution was similarly varied.325 Along with other logistics, the Statute also stated that the default state for imprisonment purposes was Sierra Leone, but that prisoners could be moved if the circumstances demanded it.326

Having successfully tried and convicted eighteen and acquitted two defendants, with six having died, been discharged, or fined without imprisonment and one still at large,327 the SCSL officially closed in 2013, handing over maintenance of the archives and responsibilities for emergency trials or appeals to the Residual Special Court for Sierra Leone.328 This court has less than fifteen staff members and does not exist to continue trying cases.329 Two unique aspects of the SCSL is that it accepted its funding only through donations from seven countries in the international community,330 and it has the power to not only try international crimes, but also crimes under Sierra Leonean law.331

322. Id. arts. 2-5.
323. Id. arts. 6, 8.
324. Id. art. 12.
325. Id. art. 15.
326. Id. art. 22.
329. Id.
331. Sriram, supra note 316, at 480.
iii. Failures of the Special Court for Sierra Leone

The SCSL had several failures: First, the court did not always prioritize maintaining a good relationship with the domestic legal systems.332 Second, sometimes attorneys at the SCSL did not see it as part of their responsibility to educate younger, national attorneys, but rather to focus exclusively on the work of the tribunal.333

Third, the SCSL did not have the legal authority to demand cooperation or coordination, so it often was not given; comparatively, if it had been created under Chapter VII of the UN’s Charter like the ICTY and ICTR, states, including Sierra Leone, would have had the legal obligation to cooperate.334 Of course, it must be noted that the aloofness of the government gave the SCSL critical autonomy. And, while at some level necessary, this space had the potential to hurt Sierra Leone’s judicial culture.

A fourth flaw scholars noted in the SCSL was an alleged lack of support for the domestic judiciary’s community as a whole.335 Fifth, many young foreign attorneys inadvertently took a potentially offensive demeanor towards older judges when they arrived in Sierra Leone.336 The culture of Sierra Leone is one of great respect to elders, and the energetic, commanding presence of young attorneys, especially from England, sometimes chagrined the scant cadre of domestic judges that remained in Sierra Leone.337

Sixth, local NGO workers and judicial personnel expressed frustration that only the top-level perpetrators faced prosecution, and this seems to be a valid concern.338 However, one explanation of this could be that the purpose of the SCSL was not to prosecute every criminal, but only

332. Id.
333. Hussain, supra note 104, at 580 (“Lawyers in the Special Court largely have not seen it as their task to work with the national judiciary, not only because of time constraints but also because their perception of their roles does not encompass a ‘training’ element.”).
335. Hussain, supra note 104, at 582.
336. Id. at 580 (stating that many “older Sierra Leonean judges thought it an affront when younger human rights barristers were flown in from London to ‘train’ them on human rights law”).
337. Id.
338. Artz, supra note 103, at 233.
individuals who the national judiciary might be reticent to punish because of the individuals’ former positions. 339 Last, a suspicion swept through the local populace that the international community as a whole—and specifically the U.S.—controlled the tribunal; 340 even though this was patently false, the local population believed it, and this has damaged the ability of the SCSL to positively impact the judicial culture of Sierra Leone. 341 However, even with its struggles, there is hope that the SCSL’s work will have a long-term positive effect on the judicial culture in Sierra Leone. 342

**iv. Special Court for Sierra Leone’s Impact on Judicial Culture**

Thankfully, the success of the SCSL has greatly overshadowed these potential downsides. Sierra Leone supported the tribunal practically wholeheartedly, 343 and its civilian population, with some exceptions, accepted the legitimacy of the SCSL—concerned only with ancillary details. 344 Even with some frustration from NGOs, the SCSL’s legitimacy overall was been strong. Interestingly, this acceptance varied based on socioeconomic status, with the poorer Sierra Leoneans expressing a deep and unequivocal approval of the SCSL. 345

As an interesting counterpoint to a potential disadvantage mentioned above, even though Sierra Leone’s national government is not legally required to assist the tribunal, the SCSL received a uniquely large

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339. *Id.* (“Sierra Leone’s judicial personnel were reportedly asking, Is the world only interested in the prosecution of a handful of notorious criminals while the country must make do with a collapsed judicial system and the same venal petty officials who compounded the problems that plagued society before, during, and after the war?”) In response, the notorious criminals are precisely the group the SCSL should be prosecuting per their mission in Article 1 of the SCSL Statute. *Id.*

340. *Id.* at 234.
344. Artz, *supra* note 103, at 233 (“Local reaction to this seems to depend on one’s status: average villagers repeatedly express approval (‘It was the big, big ones who sent the children to do bad things’).”) (quoting Rosalind Shaw, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 11 (2005)).
345. *Id.*
amount of support from the national government relative to other
tribunals. This support has stemmed both from a sincere desire to assist
the SCSL and the Special Court Ratification Act, a law “which created
the obligation to assist the SCSL wherever possible.” This law has had
great success in maintaining a balance of judicial and political
independence while still providing crucial enforcement for the SCSL.

For example, there are multiple examples of Sierra Leone Police
coordinating with the SCSL on raids and arrests, something rarely if ever
seen with other tribunals. At the same time, however, the government
has also done a tremendous job of separating itself from the SCSL’s
politics and workings. Although some see this as a weakness, it has
provided the SCSL with necessary logistical support, while staying aloof
enough that the SCSL can maintain its independence and judicial
legitimacy, unlike the ECCC, which saw the opposite approach from its
government.

Further, the international community has gotten behind the SCSL both
monetarily and logistically. This has led to increased efficiency and
growth in both the SCSL and national judiciary, generally because of the
diversity and experience that various international attorneys bring to
Sierra Leone via their work at the SCSL. One of the strengths of the
SCSL was the strong individual leadership of those in the Registry
division, specifically compared to the ICTY Registry.

Also, the process by which the SCSL was created was the most
democratic of any tribunal. The discussion between the UN and Sierra
Leone was conducted relatively smoothly and with all parties largely

347. Id.
348. Id. at 321 (“Sierra Leone Police have closely cooperated with the Court. For
example, the police arrested five suspects within a few hours in March 2003.”).
349. Id. (stating that although Sierra Leone’s national government has received
criticism for distancing itself from the SCSL, this “preserves the independence of the
Court, in marked contrast to the experience of other hybrid courts, such as the ECCC”).
351. Id.
352. Id.
353. Nielsen, supra note 297, at 324.
satisfied by the SCSL. This has been a great help to judicial culture development because it created a positive lens through which the SCSL is viewed. Moving past its creation and potential, the SCSL has shown how effective an international criminal tribunal can be at developing an affected country’s judicial culture when it conducts intentional outreach. Indeed, the SCSL’s actions in reaching out to the local judiciary are exemplary and should serve as a model for future tribunals, hybrid or otherwise.

SCSL’s location has been crucial to its judicial culture building efforts. Like any tribunal in the affected country, the SCSL’s “location in the Sierra [city] where the atrocities took place, enables the population to identify more easily with the process.” This has given the people “a sense of self-ownership over the accountability process,” and has led to a deeper respect for the rule of law in both the local legal system and general population.

This location of the SCSL close to the geographical heart of Sierra Leone has given three specific benefits to the Sierra Leonean judicial culture. First, it has several buildings that will be able to be used by the local judiciary after the war. Second, the location of the SCSL in Sierra Leone has allowed budding young Sierra Leonean judicial personnel to get excellent training at the SCSL. The SCSL instills them with a sense

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354. Glasius, supra note 215, at 49 (“The Special Court for Sierra Leone is perhaps the international tribunal that comes closest to having been established through democratic consent[].”)

355. Id.

356. Darehshori, supra note 142, at 306.

357. Costi, supra note 223, at 230.

358. Hussain, supra note 104, at 570.


360. Hussain, supra note 104, at 570 (“Also, the location of the tribunal within the borders of Sierra Leone was meant to signal to Sierra Leoneans that a main purpose of the Special Court is to further a sense of self-ownership over the accountability process, and . . . bring the conception of the rule of law closer to Sierra Leonean society. As stated by one scholar, ‘In this respect, the UN might be said to have learnt the lessons of Rwanda well.’”)

361. Sriram, supra note 316, at 500.

362. Id. at 500-01 (pointing out that “approximately half of Court staff is Sierra Leonean. Registry staff are approximately sixty percent Sierra Leonean, and the Outreach staff are entirely Sierra Leonean; the finance staff are all African, though not all Sierra Leoneans. The detention facility currently employs approximately forty Sierra Leoneans,
of professionalism and pride and hammers home the importance of fair jury trial principles. Finally, the SCSL has provided Sierra Leone with an idea of what an organized judiciary looks like.

Sierra Leoneans recognize that the SCSL contributes not only to transitional justice, but also judicial culture development and growth long-term; this perspicacity on the part of the populace means that “[n]obody therefore challenged the court’s existence.” The gamble the Sierra Leoneans took when they put trust in the SCSL has turned out well. Even though there was some small initial fear that the SCSL could disrupt peace in the region, “Sierra Leoneans are amazed at the revelations coming out of the court” and at the great leaps in judicial culture development the SCSL has allowed the domestic judiciary to take.

IV. WHY THE HYBRID TRIBUNAL IS THE MOST EFFECTIVE KIND OF INTERNATIONAL TRIBUNAL FOR BUILDING LOCAL JUDICIAL CULTURE

I will lay out the factors that influence international criminal tribunals. Then, I will show that a hybrid tribunal can best emphasize positive factors and mitigate negative ones.

a. External Factors

Many factors that impact the legitimacy and success of international criminal tribunals cannot be helped or changed, but they undeniably have an impact on the ability of a tribunal to build the local judiciary. They have been grouped into five general categories: First, the kind of conflict: Similar though these conflicts may be in their end result of death and destruction, motivations for conflicts differ tremendously. The

who will bring their training in international standards to the domestic penal system when they return to work there”.

363. Id. at 501.
364. Id. at 500.
366. Id. at 233-34.
Nuremberg and Tokyo tribunals punished a group of men who tried to take over the world; the ICTY’s conflict sprung up from a desire to create ethnically homogenous states; the ICTR punished ethnic cleansing—a bloody, intense, and nearly total destruction of a people group, with little to no desire for territory or power; the ECCC was established to prosecute the heads of a purely political regime—an attempted communist utopia devoid of a defining motive of ethnic or religious discrimination.367

Second, the affected countries’ populations’ view of the conflict and popular sentiments on what justice should look like determine the lens through which they view the tribunal, and can predetermine its fate in local opinion. For example, nearly all stories, anecdotal or otherwise, indicate that the great majority of the Rwandan and Sierra Leonean people condemned the guilty in the court of public opinion. Conversely, the former Yugoslavia’s inhabitants’ opinions of the accused largely depended on the viewers’ ethnicity and location.368 In Cambodia, the people were so temporally distant from the tribunal—a quarter century had elapsed—that they were fairly ambivalent about the result.369

Third, the judicial culture and legitimacy of the domestic courts both pre-tribunal and after is incredibly important to the impact the tribunal has on local judicial culture. No affected country’s judiciary is intact after a conflict—nearly every modern conflict for which a tribunal has been made has decimated the local judiciary. 370 That notwithstanding, a decimated local judiciary is not an absolute bar to a local judicial culture development. For example, even though Rwanda and Sierra Leone had

367. See supra, Parts I(c)(i), I(d)(i), II(a)(i), II(b)(i), III(a)(i), III(b)(i) and references cited therein.
368. See supra, Parts II(a)(iii)-(iv) and references cited therein.
369. See supra, Part III(a)(iv) and references cited therein.
370. The obvious exception to this would be what the former Khmer Rouge judiciary looked like in Cambodia after the Khmer Rouge lost power. Because Cambodia’s “conflict” was not an armed conflict in the traditional sense of the word, but rather a open and lengthy abuse of the citizenry by a communist dictator that ended in a relatively non-tumultuous transfer of power. (Relative only to other conflicts studied here). This meant that the Khmer Rouge personnel remained in the judicial system, continuing to sit as judges and practice as attorneys. Thus, unlike other conflicts that included the decimation of the judicial system, the lack of armed conflict and a widespread violent takeover preserved much of the ideology and corruption for which the Khmer Rouge was famous.
no judiciary and Yugoslavia had practically none, this lack of an existing judiciary did not hurt the SCSL or ICTR’s efforts at local judicial culture development. Rather, it was an opportunity for new growth and training. The ECCC (and to a much lesser extent the ICTY) stands out as an example of how a local judicial culture of corruption pre-tribunal can hamstring a tribunal’s work, especially hybrid tribunals, thereby hampering, if not destroying, the opportunity to build the local judicial culture.

Fourth, local corruption is perhaps the greatest external force that can hamper judicial culture development by international tribunals. The ECCC has proved singularly ineffective, and not coincidentally, has also proved to be singularly corrupt. While both the Cambodian people and local judicial officials understand the evisceration of their judicial system by conflict, they cannot forgive without hesitation the corrupt actions of their judicial system. The ICTY does not face such a pervasive atmosphere of fraudulent in the region’s domestic courts, but ethnic bias and prejudice was strongly feared by the Commission of Experts, which is one of the reasons the ICTY was instituted. This fear has greatly inhibited cooperation (even should the concept of cooperation have crossed the tribunal’s existential mind) with the local judiciary because their adjudications cannot be trusted. This has, in turn, turned both the local judiciary and the populace against the ICTY, permanently damaging its ability to positively affect local judicial culture development.

Finally, although not readily apparent, the support of the international community for the tribunal and especially its subsequent decisions is absolutely critical for its ability to impact the local judicial culture. Nations make innumerable diplomatic decisions daily; understanding and accounting for the impact their decisions will have on international
criminal tribunals communicates respect and support for the tribunal to the local government and, practically, helps avoid potential international roadblocks for the tribunal. The existence of these factors and the level at which they appear should always influence the decision of whether to impose a purely international or hybrid tribunal or, most importantly, whether to have one at all.

b. Tribunal Structure

When the statute of a new international tribunal is being drafted, several critical decisions are made determining the basic outlines and fundamental characteristics of the tribunal. While none of these decisions are strictly dispositive of the tribunal’s success in any area—and thus, by extension, its ability to positively affect the local judicial culture—four of them have an undeniable impact on this success.

First, the location of the tribunal is critical. The physical distance of the ICTY and ICTR from the affected countries undeniably lessened their ability to build the domestic legal system and imbue it with legitimacy, and the ICTR’s success was only made possible by its relatively close presence in Tanzania, not Europe. The SCSL is the quintessential example of how critical the location of the tribunal is to its success. It has directly and positively impacted the local judicial culture specifically because of its location. The court’s presence in the affected country has contributed to every positive impact on Sierra Leone’s judicial culture and it is doubtful whether any of them would have been realized if the SCSL had not been located in Sierra Leone. The example of the ECCC provides an important caution to this general principle that tribunal presence aids in judicial culture development. The ECCC demonstrates that a corrupt government that is intent on stymieing the tribunal’s work can create an atmosphere in which the tribunal stagnates, both in its adjudicatory work and attempts to build the local judicial culture.  

378. See supra, Part II(b)(v) and references cited therein.  
379. See supra, Part III(b)(iv) and references cited therein.  
380. See supra, Part III(b)(iv) and references cited therein.  
381. See supra, Parts III(a)(ii), III(a)(iv) and references cited therein.
Further, the law the tribunal enforces directly impacts the extent to which the local judiciary imitates the tribunal. It is most beneficial to have both international and domestic laws prosecuted by the court. The ICTY only prosecuted international crimes and did not impact the local judicial culture positively at all.\textsuperscript{382} Conversely, the ICTR and SCSL had, to very different degrees, definitely positive impacts on the judicial culture of their respective affected countries and both prosecuted violations of national laws as well as international.\textsuperscript{383} Indeed, legitimizing the substantive law of the local judiciary and aiding in the law’s evolution is among the most important and beneficial functions an international criminal tribunal can perform outside its normal adjudicatory functions. Of course, the ECCC’s ability to prosecute both international and national laws is not at fault for its troubles, but rather the Cambodian government’s nefarious intrusion in its policies and decisions.\textsuperscript{384}

Following in the same vein, concurrent jurisdiction is also critical to local judicial culture development. Allowing the local judiciary to prosecute its laws side by side with the tribunal or international components of the hybrid tribunal has proven to be a catalyst for local judicial legitimacy and development.\textsuperscript{385} Judicial personnel gain confidence, knowledge, and experience in practical prosecution and defense skills and, perhaps more importantly, a deeper understanding of legal principles necessary for a fair trial.\textsuperscript{386} The ICTY did not have concurrent jurisdiction with the affected country, but did begin to transfer cases to Bosnia’s judiciary a decade after the former was created.\textsuperscript{387} The region’s judiciary did not gain nearly as much experience as they might have, and the ICTY again proved ineffective at developing the local judicial culture.

Last, the nationalities of the international tribunal’s personnel and judges must be diverse. As demonstrated by the SCSL, true and lasting judicial culture development can occur when the personnel of the tribunal is diverse with a heavy emphasis on employing and involving

\textsuperscript{382} See supra, Part II(a)(v) and references cited therein.
\textsuperscript{383} See supra, Part II(b)(v), III(b)(iv) and references cited therein.
\textsuperscript{384} See supra, Part III(a)(iv) and references cited therein.
\textsuperscript{385} See supra, Parts II(b)(v), III(b)(iv) and references cited therein.
\textsuperscript{386} See supra, Parts II(b)(v), III(b)(iv) and references cited therein.
\textsuperscript{387} See supra, Part II(a)(v) and references cited therein.
the affected country’s citizens. Different kinds of personnel act as a check on each other. A significant presence of local personnel naturally gives legitimacy to the tribunal in the eyes of the citizenry, deepens the tribunal’s respect for local legal tradition and custom, and trains a new generation of lawyers in fair trial principles and criminal adjudication. Simultaneously, a large international population serves to educate this new generation of lawyers and keep in check any practices not in accord with recognized principles of fairness and justice.


c. Tribunal Actions

There are three actions a tribunal can take to better the chance that its impact on the local judicial culture will be positive. First, it can communicate. This is the single most important factor, external or otherwise, in positively impacting the local judiciary. The concept of communication was absolutely foreign to the Nuremberg and Tokyo tribunals, and if it was not a foreign concept to the ICTY as well it made no one aware of that fact, especially not by its actions. Conversely, the SCSL was incredibly intentional about communicating with the local judiciary and saw tremendous results because of it. Similarly, the ICTR did to a limited extent and saw a commensurate amount of growth.

Second, tribunals can encourage local ownership of the judicial process by doing three things: (a) actively employing legal professionals from the affected country, thereby training the future that country’s future legal personnel. Pursuing Bosnian, Serbian, and Croatian interns has been a positive ICTY outreach, and the ICTR intentionally focused its employment efforts on Rwandans specifically. (b) Insist on normative standards which reflect fair trial principles. One of Rwanda’s

388. See supra, Part III(b)(iv) and references cited therein.
389. See as an example the discussion regarding the negative confrontations between Cambodian and international judges and personnel. See supra, Part III(a)(iv) and references cited therein.
390. See supra, Parts I(c)(iii), (d)(ii), II(a)(iv) and references cited therein.
391. See supra, Parts III(b)(iv) and references cited therein.
392. See supra, Parts II(b)(v) and references cited therein.
393. See supra, Parts II(a)(v), II(b)(v) and references cited therein. Notably, although the ICTR did try this and was partially successful, its location prohibited the ease of hiring. See supra, Part II(b)(v) and references cited therein.
chief objections to the ICTR was that it could not impose the death penalty.\footnote{See supra, nn. 150, 183 and references cited therein.} A few years later, Rwanda abandoned its death penalty after the ICTR refused to transfer cases with it due to its use of the sentence.\footnote{See supra, nn. 150, 183 and references cited therein.} Similarly, the ICTY spurred on the Bosnian judiciary to improve its standards for a fair trial by refusing to share cases until the local judiciary reached a satisfactory level of judicial integrity and it believed that a local court could ensure justice.\footnote{See supra, Part II(a)(v) and references cited therein.} (c) Leading by example. Every tribunal besides the ECCC has led positively by example; the SCSL aided in evolving Sierra Leone’s domestic judiciary’s standards of what constituted a fair trial and good evidentiary rules by providing an example of these standards in practice.\footnote{See supra, Part III(b)(iv) and references cited therein.} Conversely, the ECCC has utterly failed to do so.\footnote{See supra, Part III(a)(iv) and references cited therein.} While every other tribunal—to varying degrees—has exemplified the principles of justice it espouses, the ECCC’s corruption and highly suspect opening and reopening of cases based on changes in the political regime has cemented its hypocrisy in the minds of the Cambodian judiciary.\footnote{See supra, Part III(a)(iv) and references cited therein.} Unfortunately, through its Cambodian judges the ECCC has set an example of corruption and dishonesty.\footnote{See supra, Part III(b)(iv) and references cited therein.}

Third, tribunals should involve the courts in any way possible in the process of justice and reconciliation. For example, one of the great mistakes of the ICTR was that it did not acknowledge the Gacaca courts which proved effective in meting out justice.\footnote{See supra, Part II(b)(v) and references cited therein.} Conversely, the SCSL encouraged any and all prosecutions the fledgling judiciary could perform; it pulled the local courts along, giving them responsibility it thought they could handle when they could handle it.\footnote{See supra, Part II(b)(v) and references cited therein.} Basic principles of justice and fairness must be maintained, but different cultures express
this differently\textsuperscript{403} and tribunals must recognize the varied forms justice can take.\textsuperscript{404}

d. Why Hybrid Tribunals are the Better Option

Hybrid tribunals are the better option for the great majority of conflicts for several reasons. First, they are far more flexible than their counterparts, and can adapt easily to a country’s needs post-conflict. This is especially helpful when assessing the kind of conflict and best tribunal response. For example, a conflict like Yugoslavia’s may need increased monitoring of local courts to ensure that the deep-rooted ethnic differences do not prejudice the judgment against the defendants. In Rwanda, it could probably be more hands off, allowing the Gacaca courts to work. It also allows the tribunal to adapt itself to the expectations of the local people and judiciary while still maintaining core fair trial principles.

Second, hybrid tribunals allow for an easier infusion of international principles into the local judiciary because they are not seen as an external body forcing principles on the country’s judiciary, but a partner advancing in step with it. This simultaneously injects international standards into the local judicial culture while maintaining any legitimacy it has post-conflict. Third, they are far better at communication than public international tribunals. Not only do they have to communicate more effectively for public international tribunals for the sake of their prosecutions and sentences, but they also have an incentive to communicate better; a stronger domestic judiciary is a stronger tribunal and vice versa. We even see this in Cambodia, albeit for discouragingly dishonest purposes. Increased communication from honest hybrid tribunals is precisely what the domestic judiciary needs.

Fourth, hybrid tribunals are located inside the affected country itself. Of course, there is nothing to prohibit a public international tribunal from

\textsuperscript{403} See, e.g., supra, Part II(b)(iv) and references cited therein.

\textsuperscript{404} The above sounds like a perfect world. A court that communicates and involves the local judiciary; a domestic government that is honest and not corrupt, eager to raise itself to the level of judicial integrity demanded by international legal standards. Of course this will lead to better chances of success, irrespective of the kind of tribunal employed. However, a hybrid tribunal like the SCSL is the best institution to navigate the imperfect and challenging landscape many nations provide.
being located in the affected country. But, hybrid tribunals combine location with institutional intimacy, something no public international tribunal can match. Indeed, location in the affected country and consistent communication seem to be the two key elements for a tribunal success in building local judicial culture, and hybrid tribunals have both. Fifth, hybrid tribunals are better at enforcing local laws, which gives both the laws themselves legitimacy and the judiciary that enforces and maintains them. Hybrid tribunals are better for the simple fact that they can combine any existing knowledge of and experience with these laws in the form of the domestic portion of the tribunal’s personnel with consistent application of international legal norms. They both apply the law in tandem with the domestic judiciary and assist its evolution.\textsuperscript{405}

Sixth, hybrid tribunals best combine the need for an internationally diverse presence and training the next generation of the affected country’s prosecutors. In a public international tribunal there could theoretically be a push to focus on hiring the affected country’s attorneys (Rwanda did this),\textsuperscript{406} but only in a hybrid tribunal is there a natural and inescapable exchange between local legal personnel and a diverse mix of international officers. This diversification also allows hybrid tribunals to avoid the repeat of a Tokyo tribunal situation.

Granted, it is more difficult to leverage the local judiciary because it can prosecute any case the tribunal can due to it being half the tribunal itself. While this may seem to get rid of a bargaining chip public international tribunals have, the hybrid tribunal more than makes up for this by its ability to actively lead the tribunal by example. It can encourage and oversee the implementation of international norms directly rather than only encouraging them remotely. Thus, though it is

\textsuperscript{405} The huge “if” that will always accompany a hybrid tribunal, and the very issue that caused so much hesitance on the part of the UN in originally agreeing for the ECCC to be located Cambodia, is the possibility that a corrupt government will undermine the effectiveness of the tribunal, leaving the country with no justice and no strengthened local judiciary instead of at least a reasonable chance of justice that would come with a public international tribunal. A pervasively corrupt government such as Cambodia’s may be a reason to create a public international tribunal for a conflict rather than a hybrid tribunal. If this is the case, it would be best to base it on the ICTR’s statute, but located in the country with a stated focus on communication and empowering the local judiciary to improve itself in any way possible.

\textsuperscript{406} See supra, Part II(b)(v) and references cited therein.
beneficial for the local judiciary improve independently, the hybrid tribunal provides a healthier path to judicial culture growth.

V. NEED FOR HYBRID TRIBUNALS WITH THE INTERNATIONAL CRIMINAL COURT

Given the existence of the International Criminal Court (ICC), there is an implicit question that must be answered as to whether there is even a need for public international tribunals or hybrid tribunals at all. There most definitely is.

The ICC, located in The Hague, was created by the Rome Statute, and is the “the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”407 Almost 120 countries have ratified the Rome Statute, including major players in the international community such as France, Germany, and the United Kingdom.408 By the same token, though, the United States, China, Russia, and Japan have all not yet ratified. There is a major point of disagreement running through the international community with regards to the ICC’s usefulness, especially given that it is funded by donations from various states and NGOs.409 The ICC has only secured two convictions in its almost 13 years of existence, and has controversially focused almost exclusively on prosecuting perceived violations in Africa.410

Irrespective of the objective failure of the ICC and especially irrespective of its philosophy, allowing it to prosecute cases in lieu of a hybrid tribunal or public international tribunal would do nothing to build
local judicial culture, and would probably even damage it. Indeed, in addition to the reasons set out above as to why a hybrid tribunal is the preferred mechanism, the ICC would be worse for the judicial culture of affected nations than either a public international tribunal or hybrid tribunal for four reasons.

First, the ICC would have even less of an incentive to communicate with local governments than would a public international tribunal. By its very nature the ICC is not designed to specialize in one country’s problems, and special care and attention is precisely what a devastated judiciary needs post-conflict. Philosophically, *ad hoc* tribunals are instituted because there is a very large and very specific problem that needs to be addressed, while the ICC is the opposite. With the specific mission of hybrids can come specific help; but, it is not the ICC’s mission to specifically help any country’s judiciary. Thus, while the ICC might communicate no worse than the ICTY, it cannot match the communicative efficiency of a hybrid tribunal.

Also, the ICC cannot logistically handle the number of cases most of these conflicts generate. The ICC is theoretically supposed to be a court of last resort: a court that only is involved when a nation’s judiciary cannot effectively prosecute on its own.\(^411\) So far, the ICC has not shown it could do this even on a small scale let alone a large one. Its two convictions in 12 years leave little hope that it could do the job of a public international tribunal or hybrid tribunal.

Further, the ICC would not provide leadership to the domestic judiciary by example, nor would it provide case transferring incentives like the ICTY and ICTR. Again, the ICC is a court designed only to prosecute occasionally, and not to guide a local judiciary on the road to recovery by focusing on judicial culture.\(^412\) Nor did the drafters envision a situation where the ICC would hand a case off to the local court system to prosecute, let alone several of them on a consistent basis as was seen in the ICTR and ICTY’s twilight years.\(^413\)

\(^411\). *ICC at a glance*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx (last visited Oct. 24, 2015); see Sadat, *supra* note 194, at 14-15 (“The ICC will certainly not have the capacity to go as deeply into a situation country as the ICTR and ICTY did.”).

\(^412\). *Id.*

\(^413\). *See supra*, Parts II(a)(v), (b)(v).
Finally, the ICC leaves no infrastructure for the local judiciary in personnel or buildings. Unlike the SCSL and, to a lesser extent the ICTR, the ICC conducts no training of legal professionals; further, its building is in The Hague and, thus, it will leave no judicial buildings in any affected country. So far, given that the only two prosecutions have been of Congolese citizens, this has not turned out to be a tremendous issue, but this is because the ICC has done so little, and not because infrastructure is an unimportant issue. Personnel and physical infrastructure is one of the most important things to provide a fledgling judiciary, and the ICC fails in this regard.

Conversely, some may say the ICC helps build local judicial culture by ensuring that the local judiciary handles the bulk of the work. The problem with this notion is that in countries where there could be a question of whether to install a public international tribunal or hybrid tribunal rather than let the ICC prosecute, there is generally no judiciary to handle the work, and if there is it reeks of corruption. There is definitely a need for some court besides the ICC.

In sum, the ICC does not help local judicial culture, and thus does not alleviate the continuing need for public international tribunals and hybrid tribunals in special conflict situations. Indeed, as one writer even suggests, given the ICC’s notable focus on African countries, a regional court for African cases might be created to effectively do what the ICC has attempted to do but cannot. In evaluating an international court only by the impact it has on local judicial culture, ICC funds would be much better spent on a hybrid tribunal for Congo or any other future country rather than spent on an institution which does nothing both generally and specifically to help the local judicial culture.

414. See supra, Part III(b)(iv) and references cited therein.
416. See, e.g., supra, Part II(b)(ii) and references cited therein. See also, supra n. 79.
417. Sadat, supra note 194, at 15.
418. David Davenport, International Criminal Court: 12 Years, $1 Billion, 2 Convictions (Mar. 12, 2014) http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/ (“Since all the ICC cases so far have been brought in Africa, perhaps it would make sense to develop an African regional court.”).
419. “What if these hundreds of millions of dollars were invested directly into the national judiciaries of these countries, allowing the trials to take place closer to home
keeping local judicial culture development as a top priority, it would be better to have a public international tribunal—expensive, cumbersome, and unwieldy as they may be—than the ICC.\textsuperscript{420}

\section*{CONCLUSION}

As has been shown, public international tribunals suffer several intrinsic flaws that prohibit them from effectively shaping domestic judicial culture. In the examples of both the ICTY and ICTR, factors like remoteness, a lack of communication, and the inherent aloofness of a public international tribunal create a relational and professional distance from the local courts that neither has fully bridged (although the ICTR has done better in this respect).

Conversely, hybrid tribunals have proven to be very sensitive and influential with regards to local judicial culture and should always be used above purely international tribunals if there is such an opportunity. Of course, hybrid tribunals “are not necessarily a panacea, addressing all needs of societies emerging from violence, repression, or war,” and there is no single, perfect model of hybrid tribunals.\textsuperscript{421} Even so, the ECCC and SCSL had a clear effect on the judiciary of the affected country. Irrespective of the fact that the SCSL’s was markedly positive while the ECCC’s was negative, the point remains that hybrid tribunals can and do have much more of an effect than their purely international counterparts.

Many concerns influence the development of international criminal tribunals; every situation will have its nuances and complexities, and the

\begin{itemize}
\item where witnesses might be more readily available and the sense of justice and healing would be more directly felt?” \textit{Id. See also}, Sadat, supra note 194, at 14-15.
\item \textsuperscript{420} Sadat, supra note 194, at 14-15. \textit{See also} Davenport, supra note 418. Another alternative might be temporary international tribunals such as those created to deal with the massive genocide in Rwanda, or in the former Yugoslavia and elsewhere. These tribunals have not been inexpensive either, but at least they have brought hundreds of cases and a large number of convictions. By comparison, the trial docket in The Hague is embarrassingly small.
\item \textsuperscript{421} Sriram, supra note 316, at 506. Of course, it is not whether hybrid tribunals are the perfect jurisprudential answer to all international problems—no tribunal ever will be—but rather whether they offer the local judicial culture the best chance at a full recovery. Definitely, there still remain questions of whether certain “problems, such as the disconnect between international and local processes, and a lack of understanding by . . . the local population” will cripple ongoing hybrid tribunals the way they have purely international ones. \textit{Id.} at 476.
\end{itemize}
design of any future tribunal, purely international or hybrid, must be uniquely shaped to that conflict.422 However, with regards to the question of which best develops local judicial culture—the most certain way to assure a permanent, stable society—the answer is, and must be, hybrid tribunals.

422. Nielsen, supra note 297, at 325. Indeed, “[a]ny temptation to standardise hybrid tribunals should be resisted. Their design must reflect the unique circumstances in which they have to operate, the important challenges they face, and the distinctive aims they pursue.” Costi, supra note 223, at 239.