

# **A Comparative Analysis of International Tribunals: The Formation of an Iraqi Judiciary to Try Sadaam Hussein**

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## **I. Introduction**

Iraqi Tribunal Officials are attempting to establish judicial legitimacy and maintain legal order, while insurgents are threatening the lives of tribunal judges and lawyers. Iraqi Judge Barwes Mohammed Mahmoud al-Merwani was killed in a drive-by-shooting along with his son, lawyer Aryan Barwez al-Merwani on March 1, 2005.<sup>1</sup> Family members of the slain men think they were assassinated by insurgents because the judge and his lawyer son were both minority Kurds working for the court.<sup>2</sup> This constant threat to tribunal officials raises major obstacles in continuing to try Iraqi War Criminals in this hostile environment on Iraqi soil.

Tribunal officials put a great deal of thought in assessing where to set up a tribunal to try Hussein and members of his Baathist regime. In April 2004, the Iraqi National Congress formed a war crime tribunal made up of Iraqi judges and Iraqi prosecutors, in order to try Hussein and other members of his Baathist regime in Iraq. Prior to the establishment of the New Iraq Tribunal, founders visited the International Criminal Court in The Hague, Netherlands to research the complex procedural issues of trying high-profile subject like Hussein. The founders

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<sup>1</sup> Todd Pittman, *Judge, Lawyer on Saddam Tribunal Killed*, ABC News International, at <http://abcnews.co.com/International/wirestory?id=544219> (last visited on Mar. 15, 2004).

<sup>2</sup> Todd Pittman, *Judge, Lawyer on Saddam Tribunal Killed*, ABC News International, at <http://abcnews.co.com/International/wirestory?id=544219> (last visited on Mar. 15, 2004).

researched the structure of other international tribunals and met with experts from tribunals in Rwanda, Sierra Leone, East Timor, and the former Yugoslavia.<sup>3</sup> Through advanced study and analysis of other international tribunals, the Iraqi Court founders evaluated which aspects to employ in their emerging court system. The Iraqi National Congress wants the new Iraqi Tribunal to be a purely domestic court, but will combine international regulations with domestic criminal laws and experiences from international tribunals.<sup>4</sup> The goal is that Iraqis will ultimately run this new court, as they learn how to put a judiciary system together.<sup>5</sup>

Iraqi Tribunal officials evaluated three international tribunal models to determine it's' formation, procedural development, and legitimacy: (1) the ad hoc ICTY and ICTR models, (2) the International Criminal Court, and (3) the hybrid model. By researching the different International Tribunals, the founders of the Iraqi court evaluated the structure, procedure, location, and enforcement power of the existing tribunals, and applied the positive methods to the new Iraqi Tribunal.

## II. Historical Context

International Criminal law represents a particularly fertile area of institutional expansion.<sup>6</sup> Genocide and war crimes are subject to universal jurisdiction under the fundamental principles of international common law. According to

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<sup>3</sup> Alex Johnson, *Iraqi leaders create tribunal to try Saddam*, MSNBC, at <http://www.msnbc.msn.com/id/4789450> (last visited Apr. 20, 2004).

<sup>4</sup> Alex Johnson, *Iraqi leaders create tribunal to try Saddam*, MSNBC, at <http://www.msnbc.msn.com/id/4789450> (last visited Apr. 20, 2004).

<sup>5</sup> Neil A. Lewis and David Johnson, *U.S. team to assist Iraqi trial of Hussein*, New York Times, at <http://www.denverpost.com/Stories/0,1413,36~6439~2001752,00.html> (last visited on Mar. 7, 2004).

<sup>6</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.702 (May 2003).

international law, such crimes may be punished by any state because the offenders are common enemies of all mankind and all national have equal interest in their apprehension and punishment.<sup>7</sup> When crimes against humanity were charged against a nation state, customary international policy dictated the formation of an International Military Tribunal or an International Tribunal located in the *Locus Delicti*, “*place of the wrong.*”<sup>8</sup> At the present time, however, ad-hoc and hybrid tribunals are established in a variety of locations. Some are located in the “*place of the wrong,*” while others exist in neighboring states or in a centrally devised international location such as The Hague, Netherlands.

The development of International Courts formed in order to enforce the *jus cogens* rules of international morality, those crimes against humanity that are manifestly illegal under international law.<sup>9</sup> By definition *jus cogens* is Latin for “compelling law” and is a mandatory norm of general international law which no two or more nations may exempt themselves or release one another.<sup>10</sup> Violations of human rights such as genocide, slavery and torture are considered *jus cogens* rules.

In the aftermath of The Great War (World War I), an era of international creativity and reformation commenced and the Permanency Court of International Justice (PCIJ) was established. It was formed by the League of Nations and

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<sup>7</sup> RESTATEMENT (THIRD) OF LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

<sup>8</sup> Al-Adsani v. United Kingdom, ECHR 35763/97, *passim* (Nov. 21, 2001).

<sup>9</sup> See Yvonne C. Lodico, *The Justifications for Humanitarian Intervention: Will the Continent Matter?* 35 Int'l Law. n.1027, 1035 (2001). See also, Michael Byers, Custom, Power and the Power of Rules n.164 (1999).

<sup>10</sup> Black's Law Dictionary 695, (Abridged 7<sup>th</sup> ed. 2000).

located at the Peace Palace at The Hague, Netherlands.<sup>11</sup> “The PCIJ marked a qualitative change in the settlement of inter-State disputes in that its composition and its procedures were not under the control of the disputant States.<sup>12</sup> The PCIJ fell simultaneously with the League of Nations at the start of World War II. But, it revived “another guise” subsequently as part of the United Nations.<sup>13</sup>

Following World War II, the international community outraged at the atrocities committed by the Nazi regime, took action by holding the Nuremberg Trials and tried many leaders who were responsible for egregious violations.<sup>14</sup> The Nuremberg trials established a basic framework and precedent for the prosecution of war crimes and crimes against humanity and condemned a war of aggression in the strongest terms.<sup>15</sup> To initiate a war of aggression... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

Nuremberg held individuals accountable for crimes against peace, defined as the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.<sup>16</sup>

In addition, another Tribunal was created in the Far East. These two International Military Tribunals “were made up of rules of procedure tailored to

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<sup>11</sup> J. Oppenheim and W. van der Wolf, War Crimes Tribunals in Future, Global War Crimes Tribunal Collection Vol. III, *passim*.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> [www.ciaonet.org/conf/cfr22/cfr22.html](http://www.ciaonet.org/conf/cfr22/cfr22.html)

<sup>15</sup> [www.ciaonet.org/conf/cfr22/cfr22.html](http://www.ciaonet.org/conf/cfr22/cfr22.html)

<sup>16</sup> [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm)

that tribunal, and differed markedly from most National procedural systems, probably being a composite of several systems.”<sup>17</sup> Evidence from these military tribunals was not technically bound; instead any evidence of probative value was admitted.<sup>18</sup> In addition, the jurisdiction was expanded and the courts consisted of multinational characters but were located in a domestic setting.

As early as 1946, the United Nations General Assembly overwhelmingly affirmed the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal (The Nuremberg principles). In 1948, it adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which “defined genocide and proclaimed it a crime against international law.”<sup>19</sup> “In this wave of remorse and idealism, the United Nations and its charter are now considered the foundation for international human rights law.”<sup>20</sup> It was in the resolution adopting that Convention that the United Nations General Assembly first considered the establishment of an international criminal court.<sup>21</sup>

The Geneva Conventions of 1949, not only codified and expanded the rules of war, but also included basic protections for civilians.<sup>22</sup> The Conventions contained common articles regarding grave breaches, which in effect constitute war crimes or

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<sup>17</sup> See Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. n.429 (1995).

<sup>18</sup> See Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. n.429 (1995).

<sup>19</sup> [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm)

<sup>20</sup> See U.N. CHARTER art 43. See also INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS AND MORALS n.118-22 (Henry J. Steiner & Phillip Altson eds., 1996). See also Yvonne C. Lodico, *The Justifications for Humanitarian Intervention: Will the Continent Matter?* 35 Int’l Law. n1027, 1037 (2001).

<sup>21</sup> See United Nations Department of Public Information, *Crimes within the Court’s Jurisdiction* available at [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm), at 1.

<sup>22</sup> See Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. n.429 (1995).

crimes against humanity. Under these articles, states are obligated to search for persons who commit grave breaches and bring them to trial regardless of their sovereign links.<sup>23</sup>

As a result of the Geneva Conventions and the movement for resolution of international conflicts, the United States adopted the concept of Universal Jurisdiction. Under customary international law principles, a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.<sup>24</sup> Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely accepted international agreements and resolutions of international organizations.<sup>25</sup>

The suffering and atrocities that took place in the course of the conflicts of the 1990s stimulated a series of far-reaching responses by the international community, including collective humanitarian interventions and the subsequent creation of the temporary entities International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) by the United Nations Security Council and NATO respectively.<sup>26</sup> This intervention by the International Community

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<sup>23</sup>See Yvonne C. Lodico, *The Justifications for Humanitarian Intervention: Will the Continent Matter?*, 35 Int'l Law. n.1027, 1037 (2001). See also, Michael Byers, Custom, Power and the Power of Rules n.164 (1999).

<sup>24</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

<sup>25</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

<sup>26</sup> Compare Michael J. Matheson, 97 A.J.I.L. n.466 (2003), and LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT n.253 (2003) (explaining that Moir's book analyzes the strengths and weaknesses of the

began an ascendance that went beyond territorial borders and sovereign abuses therein,<sup>27</sup> and international courts made up of international and domestic judges, to lay a foundation for grave abuses of human rights violations. In this regard, international organizations and states have gained more responsibility toward protecting lives and toward delivering humanitarian assistance, even through military means.<sup>28</sup>

The formation of these new ad-hoc tribunals was costly and time consuming. United Nations officials began to realize that tribunals established after the fact are typically bound by mandates that are specific in time and place.<sup>29</sup> The need for a permanent International Court was forthcoming, as temporary tribunals like the ICTY and ICTR were challenging, lengthy and expensive undertakings. The United Nations began to look into the possibility of forming a treaty-based permanent international court.

Therefore in July 2002, the International Criminal Court (ICC) in The Hague, Netherlands was established, through a treaty of nations. The ICC aims through a mandate to bring to justice individuals responsible for the world's most serious crimes, atrocities and mass murders in an efficient and effective manner.<sup>30</sup> The ICC has jurisdiction over member states, without a special mandate from the

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efforts of the international community to control international conflicts through the formation of the ICTR, ICTY, and the ICC).

<sup>27</sup> G.A. Res. 260(A), U.N. GAOR, 78 U.N.T.S. 277 (1948).

<sup>28</sup> See Yvonne C. Lodico, *The Justifications for Humanitarian Intervention: Will the Continent Matter?* 35 Int'l Law. n.1027, 1037 (2001).

<sup>29</sup> [www.un.org/News/facts/iccfact.htm](http://www.un.org/News/facts/iccfact.htm)

<sup>30</sup> [www.un.org/News/facts/iccfact.htm](http://www.un.org/News/facts/iccfact.htm)

United Nations Security Council.<sup>31</sup> The intent of this international judiciary is to deter war criminals, and is established as an independent entity.<sup>32</sup>

Although the ICC has no cases in its books, the new investigatory power of this global court is beginning to raise awareness and gain recognition in order to “tackle the world’s gravest of crimes.”<sup>33</sup> In December 2003, the President of Uganda referred the tumultuous situation concerning the Lord’s Resistance Army to the ICC Prosecutor. The first investigation of the International Criminal Court is now underway in an attempt to uncover violations of international law and custom in Uganda.<sup>34</sup> This particular method of discovery could assist nations who do not have internal intelligence agencies at their disposal, in order to uncover evidence regarding crimes on humanity. Most recently, in April 2004, the President Joseph Kabila of the Democratic Republic of the Congo asked for the ICC to investigate possible war crimes, genocide and crimes against humanity stemming from their civil war, which killed around three million people.<sup>35</sup>

In addition, nations with struggling or non-existent judiciary systems have reached out to the United Nations, after witnessing the formation of the Ad-Hoc tribunals of the ICTY and the ICTR. As a result, need-based hybrid tribunals were recently set up by the United Nations in East Timor, Sierra Leone, Kosovo, and

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<sup>31</sup> [www.un.org/News/facts/iccfact.htm](http://www.un.org/News/facts/iccfact.htm)

<sup>32</sup> [www.un.org/News/facts/iccfact.htm](http://www.un.org/News/facts/iccfact.htm)

<sup>33</sup> Reuters, *Congo Asks for War Crimes Probe*, CNN, at <http://www.cnn.com/2004/WORLD/africa/04/19/congo.warcrimes.reut/index.html> (last visited Apr. 19, 2004).

<sup>34</sup> See e.g., ICC News Point, *President of Uganda refers situation concerning the Lord’s Resistance Army to the ICC* available at [www.icc-cpi.int/php/news/details.php?id=29](http://www.icc-cpi.int/php/news/details.php?id=29)

<sup>35</sup> Reuters, *Congo Asks for War Crimes Probe*, CNN, at <http://www.cnn.com/2004/WORLD/africa/04/19/congo.warcrimes.reut/index.html> (last visited Apr. 19, 2004).

Cambodia. These institutions blend international and domestic laws, and are set up with the help of the United Nations, to provide a justice where a Baathist run court system existed. After the Baathist party came to power in 1968, the judiciary ended separation of powers, and civilian courts became subservient to military courts.<sup>36</sup> The court system was then comprised of military courts, religious courts, revolutionary courts and special courts. In revolutionary courts, no appellate level existed.<sup>37</sup>

The goal to form a new Iraqi Court was announced in April 2004, to try the Baathist regime leaders and former Iraqi leader Sadaam Hussein. The Iraqi Court is comprised of a panel of seven Iraqi judges and four Iraqi prosecutors. There have been serious doubts that the special tribunal will meet international standards, primarily because the judges are not familiar with international law.<sup>38</sup> The United States has sent a small group to assist Iraqi investigators and judges, however they are not going to be running the process.<sup>39</sup> The international tribunal models of the ICC, ICTY, ICTR, Sierra Leone, East Timor, and the former Yugoslavia; will surely influence the direction of the new Iraqi Tribunal. Yet continued violence against the new tribunal may not only inhibit the legal function and effectiveness of the Court, but will surely deter some judges and lawyers from wanting to participate in the legal process when their lives are at stake.

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<sup>36</sup> <http://www.usip.org/pubs/specialreports/sr104html>

<sup>37</sup> <http://www.usip.org/pubs/specialreports/sr104html>

<sup>38</sup> Ved Nanda, *Will Iraq tribunal be a success?*, The Denver Post, Sunday, Feb. 20, 2005.

<sup>39</sup> The Federal News Service, Interview with Salem Chalabi, Appointed Head of the Tribunal for Sadaam Hussein, Discussing the upcoming trial (CNN International) April 21, 2004.

### III. Legal Analysis

#### A. Ad Hoc Tribunals

##### a. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The International Criminal Tribunal for the Former Yugoslavia celebrated its tenth anniversary last year.<sup>40</sup> In the past decade, the ICTY ad hoc tribunal has created more legal precedent than all the previous international and domestic war crimes cases combined.<sup>41</sup> But, there is also sharp criticism regarding efficiency, legitimacy, and local.

The framework of the court system in the former Yugoslavia is vast and there are several legal institutions adjudicating the atrocities stemming from crimes against humanity. The International Court of Justice, national courts, and a hybrid tribunal also help to play a part of this seemingly, “institutional constellation in the former Yugoslavia.”<sup>42</sup> The ICJ deals with reparative claims involving state responsibility while national courts are involved in civil and criminal litigation.<sup>43</sup> Additionally, a hybrid overflow tribunal was created to handle the backlog of cases from the ICTY, and is located in Kosovo. Since such a “diverse array of

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<sup>40</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.702 (May 2003).

<sup>41</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.702 (May 2003, *See also*, Conference Program: “*The ICTY at Ten*,” at the New England School of Law in Boston, Mass. (Nov. 9, 2002)(on file with the New England Center for International law and policy).

<sup>42</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

<sup>43</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

institutions” are involved, a number of jurisdictional co-existence rules have developed as a result.<sup>44</sup>

“Several rules have been developed regarding the relationship of the ICTY with local and national institutions when it comes to the adjudication of individual criminal responsibility for mass atrocity in the former Yugoslavia.”<sup>45</sup> International tribunals have jurisdictional primacy over national or local courts in criminal adjudication of mass atrocities.<sup>46</sup> ICTY now has primacy of over national courts, but no person may be tried before a national court, if that person already has been tried by the ICTY. Rules of evidence are also affected by the multi-layered national and international court infrastructure. Under the ICTY Rules of Procedure and Evidence Rule 12, any state determination is not binding upon the ICTY. “As such, the ICTY is not compelled to follow national decisions regarding important legal findings (for example the existence of genocide in Bosnia and Herzegovina).”<sup>47</sup>

When criminals of the former territory of Yugoslavia were tried for crimes against humanity in an International Tribunal, numerous jurisdictional objections arose as to whether the tribunal had subject-matter jurisdiction over offenses, which constituted International Conflict.<sup>48</sup> Yugoslavia was charged with the

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<sup>44</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

<sup>45</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

<sup>46</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

<sup>47</sup> See Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, Washington & Lee Public Law and Legal Theory Research Paper Series, n.707 (May 2003).

<sup>48</sup> See 1 BHRC 479 (1996).

violation of international humanitarian law, and former leaders of the territory were prosecuted for grave breaches of the 1949 Geneva Conventions. An indictment was issued against the commander of the Bosnian Croat forces in response to the following violated conventions:

- (a) Willful killing; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; violations of the laws and customs of war, as recognized by article 3.<sup>49</sup>

In addition, the International Court of Justice also tried the former Yugoslavia for violations against the Universal Declaration of Human Rights.<sup>50</sup>

Bosnia and Herzegovina wanted to hold Yugoslavia accountable for breach of its obligations under general and customary international law, as well as obligations under the United Nations Charter.<sup>51</sup> The basis for the International Court's jurisdiction is grounded in the Customary and Conventional International Laws of War and International Humanitarian Law, but was also formed according to the four Geneva Conventions of 1949 and their Charter, The Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles.<sup>52</sup>

The ICTY was established at The Hague, far removed from the scene of the atrocities, and the court is comprised of International judges and staff.<sup>53</sup> With that

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<sup>49</sup> See 1 BHRC 479 (1996).

<sup>50</sup> See 1993 I.C.J 325, 327.

<sup>51</sup> See 1993 I.C.J 325, 327.

<sup>52</sup> See *Id* at 341.

<sup>53</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. 295, 301-303 (April 2003).

said, the lack of perceived legitimacy and connection to the local population is a root of many problems centered in the ICTY:

“A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina indicates that a wide cross-section of lawyers and judges from all ethnic groups, while playing a different roles within Bosnian society, were similarly ill-informed about the ICTY’s work, and were often suspicious of its motives and its results.”<sup>54</sup>

The ICTY is centered in The Hague but also does work in Bosnia. However, the failure of the ICTY to publicize its Bosnia connection and the lack of local participation attributes to a lack of perceived legitimacy.<sup>55</sup> Critics maintain that a “purely international process that bypasses the local population does little to help improve the capacity of the local population to establish its own justice system.”<sup>56</sup> “An international court staffed by foreigners, or even a local justice system operated exclusively by the UN transitional administration, cannot hope to train local actors in necessary skills.”<sup>57</sup>

Despite all the criticisms regarding jurisdictional scope and legitimacy, the ICTY has set forth precedent in International law. On April 19, 2004, the ICTY ruled on an extended definition of “genocide.”<sup>58</sup> The term genocide as set forth by the ICTY encompasses:

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<sup>54</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n.295, 301-303 (April 2003).

<sup>55</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n.295, 303 (April 2003) at page 5.

<sup>56</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n.295, 303 (April 2003).

<sup>57</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n.295, 304 (April 2003).

<sup>58</sup> [www.un.org/icty/latest/latestnewsmain-e.htm](http://www.un.org/icty/latest/latestnewsmain-e.htm)

“Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all humanity.”

The ICTY Appeals chamber unanimously found that “genocide was committed in Srebrenica in 1995.”<sup>59</sup> This recent ruling will send rippling effects to other international tribunals and domestic tribunals who follow international law, and set the stage for trials concerning genocide and crimes against humanity in the future.

#### b. International Criminal Tribunal for Rwanda (ICTR)

The United Nations Security Council Chapter VII Resolution established a temporary entity, the International Criminal Tribunal for Rwanda in 1994, after recognizing that serious violations of humanitarian law were committed.<sup>60</sup>

Rwandan President Paul Kagame, painted a cryptic picture of crimes against humanity, describing the genocide of almost 1 million people in 1994 as, “the most brutal and fastest massive killing in world history.”<sup>61</sup> President Kagame says Rwanda seeks reparations and, “to forgive, but not forget; to bury the dead, but not spirits; and to bring forth justice and reconciliation.”<sup>62</sup>

Since its inception, the ad hoc International Criminal Tribunal for Rwanda delivered the first ever judgment on the crime of genocide by an international court. The ICTR has encountered obstacles much like its counterpart the ICTY.

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<sup>59</sup> [www.un.org/icty/latest/latestnewsmain-e.htm](http://www.un.org/icty/latest/latestnewsmain-e.htm)

<sup>60</sup> [www.icttr.org/ENGLISH/geninfo/intor.htm](http://www.icttr.org/ENGLISH/geninfo/intor.htm)

<sup>61</sup> President of the Republic of Rwanda Paul Kagame, Address at the University of Denver (Apr. 14, 2004).

<sup>62</sup> President of the Republic of Rwanda Paul Kagame, Address at the University of Denver (Apr. 14, 2004)

However, The ICTR faces even greater problems due to the lack local support, inefficiency, inequity, leniency and distant location hindrances.

The Rwandan government itself is critical of the ICTR, as they have a seat on the UN Security Council and originally voted against the formation of the tribunal.<sup>63</sup> The ad hoc tribunal for Rwanda is located in the neighboring country of Tanzania, and the seat of the council is set up in Arusha. This creates difficulties in obtaining evidence, as travel is difficult for witnesses and guarantees “further intractable delays.”<sup>64</sup>

The ICTR proceedings, which adhere to the “Western Rules of the Law,” are criticized as slow, expensive and unduly selective.<sup>65</sup> The subject matter of the ICTR is broad, and encompasses violations of international humanitarian law, which are also part of customary international law.<sup>66</sup> An American Judge, David M. Ebel, helped set up the International Criminal Tribunal for Rwanda is discouraged by it’s performance:

“It is a bloated an inefficient Tribunal that has squandered staggering amounts of money and valuable time. Had the budget of the ICTR been allocated to the Country of Rwanda, they could have tried the 120,000 prisoners that have been held in Rwandan prisons for more than 10 years. Instead, the ICTR has manages only a handful of trials to date.”<sup>67</sup>

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<sup>63</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13, n.2 (2002).

<sup>64</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

<sup>65</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13, n.2 (2002).

<sup>66</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>67</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

The structure of the ICTR consists of three organs; the Chambers and Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; and the Registry, responsible for providing overall judicial and administrative support to the Chambers and the Prosecutor.<sup>68</sup>

The ICTR is composed exclusively of international judges elected by the United Nations General Assembly, and a Prosecutor selected by the Security Council.<sup>69</sup> The judges are elected by the United Nations General Assembly, and are submitted by the Security Council.<sup>70</sup> They are initially selected from a list submitted by Member States of the United Nations. The judges are elected for a four-year term, and no two judges may be nationals of the same state.<sup>71</sup>

The International mixture of judges can further complicate the structure if the ICTR, “because each of the judges is of a different nationality and comes from different traditions.<sup>72</sup>” In addition, an internationally equitable pay scale can create an incentive for some to work slowly and collect high pay:

“The U.N. has a pay scale that tries to compensate everyone equally according to the private pay scale of the highest employee. Because some of the judges are from the United States or Europe, where pay is high, that means that extraordinarily high pay is also given to the judges from the underdeveloped countries. The pay scale for those from underdeveloped regions is so unrealistic compared to local economic conditions that the local

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<sup>68</sup> [www.ictor.org/ENGLISH/geninfo/ictorlaw.htm](http://www.ictor.org/ENGLISH/geninfo/ictorlaw.htm)

<sup>69</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>70</sup> [www.ictor.org/ENGLISH/geninfo/structure.htm](http://www.ictor.org/ENGLISH/geninfo/structure.htm)

<sup>71</sup> [www.ictor.org/ENGLISH/geninfo/structure.htm](http://www.ictor.org/ENGLISH/geninfo/structure.htm)

<sup>72</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

prosecutors, defenders and judges have every incentive to turn this appointment into a life-time job.”<sup>73</sup>

Therefore, the differences in language, custom and pay lead to an inequity among judges and perpetrate an unduly slow process at the ICTR.

Furthermore, the International Criminal Tribunal of Rwanda is criticized as being less strict on those convicted than are the customary Rwandan domestic courts. There is a lot of tension between the government of Rwanda and the ICTR, because Rwanda believes that the ICTR has intermingled in its affairs by grabbing prominent and culpable criminals and “providing them with an easier forum where they are guaranteed not to get the death penalty.”<sup>74</sup> The ICTR has custody over those who masterminded the genocide of the Rwandan people, and may not issue a death sentence.<sup>75</sup> As a result, many Rwandan citizens feel that the court emphasizes the rights of the accused, and does not give enough respect to the rights of the victims.<sup>76</sup> In contrast, domestic Rwandan courts can issue death sentences to less notorious criminals, and have issued death sentences to 20 percent of their criminals.<sup>77</sup>

The ICTR faces staunch criticism as being inefficient and slow, and has faced tension from the government of Rwanda regarding jurisdictional matters and

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<sup>73</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

<sup>74</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

<sup>75</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13, n.3 (2002).

<sup>76</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13, n.3 (2002).

<sup>77</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13, n.3 (2002).

the inability to apply the death penalty. But, despite such tension and discord the International Criminal Tribunal of Rwanda has raised awareness of the human rights violations, created a permanent record, and convicted numerous individuals for crimes of genocide:<sup>78</sup>

“The ICTR had also given critical international legitimacy to the trial of some of the leading perpetrators of the genocide. It has established two very important legal precedents: first, that rape can be an instrument of genocide. Secondly, that private citizens who do not directly participate in the genocide and who have no official responsibilities for the genocide, can nevertheless be held accountable for the genocide if they encourage and otherwise indirectly aid and abet the genocide. These legal principles, by themselves are probably worth the enormous budget of the ICTR. It has provided a forum for international jurisdiction to obtain perpetrators who have fled across the globe. Some of the apprehending countries probably would not have extradited their prisoners back to Rwanda although they were willing to extradite to the ICTR.”<sup>79</sup>

Therefore, the Rwanda Tribunal laid down important international legal precedents, amidst all the difficulties of structure and procedure.

The ICTR is somewhat of a “mixed bag” as it has laid a foundation for justice in Rwanda, though encountering serious delays and structural problems.<sup>80</sup> As a result of those expensive and lengthy proceedings of the ad hoc tribunals of the former Yugoslavia and Rwanda, and in an effort to reform the international court system, the United Nations took steps towards forming a treaty to develop a permanent International Criminal Court.

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<sup>78</sup> See Mark A. Drumbl, *Lessons for International Criminal Justice from Rwanda*, Washington & Lee Public Law Research Paper No. 02-13 n.2-3 (2002).

<sup>79</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

<sup>80</sup> Email from Honorable David M. Ebel, Judge at the Byron White U.S. Courthouse, to Melissa Dougherty, International Law Student, University of Denver College of Law (Apr. 21, 2004).

## B. International Criminal Court

In July 1998 in Rome, Italy, 120 member states of the United Nations formed a treaty and established the International Criminal Court.<sup>81</sup> The permanent international court had jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>82</sup> Four years later, sixty nation states became parties to the Rome Statute through ratification or accession.<sup>83</sup> These parties have consented to jurisdiction at the ICC. The Rome Charter of the ICC is the first ever treaty based, international criminal court established to promote the role of international law and to ensure the gravest crimes do not go unpunished.<sup>84</sup>

The ICC (much like the ICTY and ICTR) has also encountered opposition due to sovereign notions, lack of enforcement, centralized location efficiency, and its euro-centric death penalty stance.

In an effort to preserve internal sovereignty, the United States did not sign the Rome Charter. The United States voted against the Rome Statute, concluding that it could pose an unacceptable risk to the U.S. military personnel and to the ability of commander in chief to deploy forces worldwide to protect the United States and global interests.<sup>85</sup> The United States looked at globalization as a transformation of the world economy, and also an alteration of the competence of

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<sup>81</sup> [www.un.org/News/facts/icc.fact.htm](http://www.un.org/News/facts/icc.fact.htm)

<sup>82</sup> [www.ciaonet.org/conf/cfr22/cfr22.html](http://www.ciaonet.org/conf/cfr22/cfr22.html)

<sup>83</sup> [www.un.org/News/facts/icc.fact.htm](http://www.un.org/News/facts/icc.fact.htm)

<sup>84</sup> See, e.g., United Nations Department of Public Information, *Crimes within the Court's Jurisdiction* available at [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm), at 1.

<sup>85</sup> [www.ciaonet.org/conf/cfr22/cfr22.html](http://www.ciaonet.org/conf/cfr22/cfr22.html)

sovereignty and of the principle of the nation state being the principal center of power.<sup>86</sup> “Some now argue that, on balance, any such court (ICC) would disserve American interests. Others contend that with the (ICC) court becoming a reality, the costs of not joining far outweigh the costs of joining.”<sup>87</sup> In any event, by voting against the Rome Statute, the United States refused to accept jurisdiction under the International Criminal Court.

The courts jurisdiction is limited to the most serious crimes of concern to the international community. It has jurisdiction of member states with respect to the crimes of genocide, crimes against humanity and war crimes.<sup>88</sup> The ICC intends to be complementary to the national criminal jurisdictions, but does not aim to replace national courts. The court will only investigate and prosecute matters when a state is unable or disinclined to do their legal duties.<sup>89</sup>

In addition to statutory international law, the ICC also takes violations of customary international law into account. The list of customs applicable in international armed conflicts enumerates the following criminal acts:

- Targeting civilians
- Targeting buildings devoted to art or science;
- Killing combatants who have laid down their arms and surrendered

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<sup>86</sup> See Yvonne C. Lodico, *The Justifications for Humanitarian Intervention: Will the Continent Matter?* 35 Int'l Law, n.1027, 1037 (2001).

<sup>87</sup> [www.ciaonet.org/conf/cfr22/cfr22.html](http://www.ciaonet.org/conf/cfr22/cfr22.html)

<sup>88</sup> See, e.g., United Nations Department of Public Information, *Crimes within the Court's Jurisdiction* available at [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm), at 1.

<sup>89</sup> [www.icc-cpi.int/php/show.php?id=gi\\_icc](http://www.icc-cpi.int/php/show.php?id=gi_icc)

- Declaring that no quarter will be given
- Pillaging
- Using a flag or truce or other flag or insignia falsely, resulting in death or serious injury
- Rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and other forms of sexual violence
- Intentional starvation of civilians as a method of warfare

Proposals have been made to include poisoned weapons, gas weapons, chemical weapons, bacteriological weapons, and nuclear weapons.<sup>90</sup> Until these weapons proposals are instilled in ICC law, it might be difficult to show a violation of customary international law regarding weapons of mass destruction or chemical weapons by Sadaam Hussein or leaders of the former Iraqi government.

Evidence of violations of Geneva Accords, the Rome Statute of the ICC, crimes against United Nations Personnel, international treaties, or customary international law can be initiated through an investigation authorized by a Pre-Trial Chamber as a means of “international discovery.”<sup>91</sup> This international method of obtaining evidence of crimes against humanity is paving the way for international procedural discovery.

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<sup>90</sup> See, e.g., United Nations Department of Public Information, *Crimes within the Court’s Jurisdiction* available at [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm), at 4.

<sup>91</sup> See, e.g., United Nations Department of Public Information, *Crimes within the Court’s Jurisdiction* available at [www.un.org/icc/crimes.htm](http://www.un.org/icc/crimes.htm), at 2.

There is much criticism concerning the ICC's ability to enforce International judgments. A considerable body of international law exists to protect civilians during internal armed conflict.<sup>92</sup> The main problem lies not in the content of those rules, but rather in their enforcement.<sup>93</sup> In the past in cohesive resolutions made by the United Nations Security Council, the ICC, and national governments in the international arena have carried little weight, since they are unable to be enforced and carried out. Measures which might facilitate enforcement are: criminal prosecution of violators by national courts and international tribunals; belligerent reprisals; dissemination of humanitarian law; measures by other governments (including the use of force); measures by the International Red Cross, the United Nations and other international entities; and action by regional human right bodies. The signs are hopeful that the international community is beginning to face up to its responsibilities as regards to the enforcement of international law – largely on the basis of the creation of the ICTR, ICTY, and the ICC.<sup>94</sup>

The ICC is under scrutiny by those favoring a hybrid model as being too remote. The ICC holds trials in The Hague, Netherlands rather than in the location where the crimes occurred:

“Because the work of the international courts is physically remote from the countries in question, and the judges and personnel have not been drawn

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<sup>92</sup> Compare Michael J. Matheson, 97 A.J.I.L. n.468 (2003), and LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT, n.232 (2003) (emphasizing the lack of treatment regarding a fundamental impact on development due to conflicts through the formation of the ICTR, ICTY, and the ICC).

<sup>93</sup> Compare Michael J. Matheson, 97 A.J.I.L. n.468 (2003), and LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT, n.232 (2003) (emphasizing the lack of treatment regarding a fundamental impact on development due to conflicts through the formation of the ICTR, ICTY, and the ICC).

<sup>94</sup> Compare Michael J. Matheson, 97 A.J.I.L. 468, (2003), and LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT, 277 (2003) (emphasizing the lack of treatment regarding a fundamental impact on development due to conflicts through the formation of the ICTR, ICTY, and the ICC).

from the local population, there is little opportunity for domestic legal professionals to absorb, apply, interpret, critique, and develop international norms. The mere existence of an international court does not create a channel for its jurisprudence to be used and developed, or even merely respected and understood on a local level.”<sup>95</sup>

The remote location of the ICC can hinder witnesses, delay proceedings, and create unduly expensive trials.

In addition, the International Criminal Courts cannot sentence violators of gross international crimes to death. Widely disapproved in international custom, the death penalty is also restricted in Article 4 of the American Convention of Human Rights recognizes the right to life and restricts the application of the death penalty. One exception is the reservation is set forth in Article 2 allows the death penalty for extremely serious wartime crimes of a military nature.<sup>96</sup> Unless war crimes of a grievous nature take place, then the international community will not advocate the death penalty. Some nations, who apply the death penalty, may not want to submit their membership to the ICC, because of perceived leniency.

The ICC is a separate entity from the United Nations, and is funded by from states contributions, voluntary contributions from governments, international organizations, individuals, and corporations.<sup>97</sup> The International Criminal Court has developed a permanent court structure to “handle the world’s most serious crimes, atrocities and mass murders.”<sup>98</sup> For years to come, the ICC will build upon

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<sup>95</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n. 295, 305(April 2003).

<sup>96</sup> 29 I.L.M. 1447-1448 (1990)

<sup>97</sup> [www.un.org/News/facts/iccfact.htm](http://www.un.org/News/facts/iccfact.htm)

<sup>98</sup> [www.un.org/News/facts/icc.fact.htm](http://www.un.org/News/facts/icc.fact.htm)

its successes and failures to improve the international forum for crimes of universal proportion.

## B. Hybrid Model – UN Helping Domestic Arena

The Hybrid Model is an intermediary between the ad-hoc tribunals (ICTY, ICTR, ICC) and a purely domestic tribunal. Hybrid models can change “considerably depending on the unique circumstances of each case.”<sup>99</sup> The proponents of the hybrid model feel that, “there are no cookie-cutter solutions to the highly complex issues of confronting past atrocities.”<sup>100</sup>

A hybrid model was set up in Kosovo by the United Nations, in order to relieve a backlog of human rights cases from the International Courts for the Former Yugoslavia (ICTY) International Tribunal. In East Timor and Sierra Leone, the hybrid model was employed where no politically viable full-fledged international tribunal previously existed. Additionally, a hybrid model is currently under negotiation in Cambodia.<sup>101</sup> In order to carry out their mission, the hybrid courts need to rely on international cooperation and judicial assistance by states and international organizations.<sup>102</sup>

Hybrid Courts have attracted little attention, while standing in the shadows of the ICC. The hybrid model is criticized as only providing a temporary solution

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<sup>99</sup> See Laura A. Dickenson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, Vol. 97, n.306 (2003).

<sup>100</sup> See Laura A. Dickenson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, Vol. 97, n.306 (2003).

<sup>101</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *American Journal of International Law*, Vol. 97, n.295 (2003).

<sup>102</sup> <http://www.pict-pecti.org/courts/hybrid.html>

for adjudication, and since the hybrid model is not a permanent international court, critics content:

“That hybrid courts like those of East Timor and Sierra Leone arose only because of “tribunal fatigue” and that the existence of an international tribunal with applicable jurisdiction would have made the hybrid tribunals unnecessary.”<sup>103</sup>

Another criticism arises regarding the ultimate goal of judicial independence in countries, which would rather instill a permanent judicial system, and are looking towards future stability, not just temporary solutions.

Conversely, the hybrid model is also considered a newly emerging form of accountability and reconciliation, is a blend of the ICC and a domestic military tribunal.<sup>104</sup>

Proponents feel the hybrid court maintains a balance, as both the institutional apparatus and the applicable law consist of a blend of the international and the domestic and is set up by the United Nations.<sup>105</sup> The hybrid model is generally utilized in post-conflict settings and is mixture of domestic and international structure and procedure. Hybrid courts are made up of domestic and foreign judges, and tried by local prosecution and defense teams. Domestic law is

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<sup>103</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 307 (2003).

<sup>104</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295 (2003).

<sup>105</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295 (2003).

reformed to accord with international standards, and the courts are conceived in an ad hoc way.<sup>106</sup>

This blend strikes up controversy from those critical to the ICC, such as the Bush Administration. The hybrid model may be seen as too close to the formal international courts, and too far from the domestic war crimes tribunal. The hybrid model is seemingly a balancing-act between domestic and international infusion, and the goal is to attain a balance in a locale where not other feasible judiciary exists.

a. Kosovo (overflow)

The United Nations established a hybrid court in Kosovo to deal with a backlog of the many egregious human rights cases overflowing from the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY only had enough resources to try only those who had committed the worst atrocities on the widest scale, and needed to pass off some of the human rights violations and war crimes cases to the hybrid court.<sup>107</sup> The legal infrastructure of Kosovo was virtually non-existent, as the law libraries and courts were ravaged during the years of conflict between the Serbians and Albanians.<sup>108</sup> There were

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<sup>106</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 296 (2003).

<sup>107</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 297 (2003).

<sup>108</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 297 (2003).

shortages of local lawyers and judges as Albanians were barred from judiciary for many years, and the Serbian judges and lawyers fled or refused to serve.<sup>109</sup>

To deal with the sparse legal resources, a mixture of international and domestic lawyers and judges serve the hybrid courts.<sup>110</sup> The war-crimes trials were held in courts with a majority of international judges and prosecutors.<sup>111</sup> Judges applied substantive law that was also a blend of international and domestic. In addition, local law was only applied when it followed the “international human rights norms.”<sup>112</sup>

#### b. East Timor

The United Nations responded to a security crisis in East Timor by sending in an Australian peacekeeping force to restore order in September 1999.<sup>113</sup> The United Nations later established a hybrid court in East Timor, where the local legal infrastructure was in even greater disarray than in Kosovo. As a result of the militia rampage and violence, shelter and supplies were difficult to obtain.<sup>114</sup>

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<sup>109</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 296 (2003); Strohmeier, *Collapse*, supra note 7, at n.49-50, 53.

<sup>110</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 297 (2003).

<sup>111</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 298 (2003).

<sup>112</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 297 (2003).

<sup>113</sup> See Ruth Wedgewood, *East Timor and the United Nations*, Columbia International Affairs Online Curriculum Modules, n.5, August 2001.

<sup>114</sup> See Ruth Wedgewood, *East Timor and the United Nations*, Columbia International Affairs Online Curriculum Modules, n.5, August 2001.

There were few trained lawyers, and the “militia members suspected of committing mass atrocities were being held in makeshift prison facilities.”<sup>115</sup>

Serious crimes such as, war crimes, crimes against humanity, genocide, murder, and sexual offenses were held before panels of three judges. The panel was made up of one East-Timorese judge and two International judges.<sup>116</sup> This was a historic concept because, “never before have East-Timorese judges sat in judgment of their fellow people, and never before have East Timorese prosecutors and defense lawyers appears as professionals in their own land.”<sup>117</sup> Now that East-Timor has gained independence from Indonesia, the hybrid system will continue to play a significant role in finding accountability for human rights abuses. However, this hybrid court is having problems because of the lack of funding and personnel at the present time.<sup>118</sup>

### c. Sierra Leone

Soon after a peace agreement in Sierra Leone was reached in July 1999, rebels resumed attacks in Sierra Leone.<sup>119</sup> The resurgence of attacks prompted the government of this West African country to ask the United Nations to establish an international court to prosecute those responsible for war crimes during their civil

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<sup>115</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 298 (2003).

<sup>116</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 298 (2003).

<sup>117</sup> See, Suzannah Linton, *Prosecuting Atrocities at the District Court of Dill*, Melbourne Journal of International Law, n.2 (Dec. 2001)

<sup>118</sup> See Laura Dickinson, *The Promise of Hybrid Courts*, American Journal of International Law, Vol. 97, n.295, 299 (2003).

<sup>119</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 1.

war.<sup>120</sup> The Security Council asked the Secretary-General of the United Nations, Kofi Annan, to make a blueprint for an independent special court whose subject matter included “crimes against humanity, war crimes and other violations of international humanitarian law.”<sup>121</sup> This special court is set up at the headquarters of the United Nations peacekeeping mission in Freetown, Sierra Leone. The special court of Sierra Leone is loosely based on the ICTY/ ICTR models, but was designed to differ from the Rwandan and Bosnian models in several ways.

The hybrid court of Sierra Leone is a treaty based-court, and differs from the ICTR/Y in primacy, composition, subject matter jurisdiction, location, and efficiency.<sup>122</sup> The Special Court will also have the full backing of the Sierra Leone government,<sup>123</sup> which will ultimately facilitate its success. The local support will be integral to the efficiency of the Sierra Leone court, as evidenced by the constant obstacles posed on the ICTR arising from the criticism by the Rwandan government and people.

The first difference is the hybrid model can issue binding orders to the government of Sierra Leone, but unlike the ICTR/ ICTY, it will be unable to assert primacy over national courts of third states to order surrender of an accused.<sup>124</sup> Secondly, this hybrid model is composed of both Sierra Leonean judges and

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<sup>120</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 1.

<sup>121</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 1.

<sup>122</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>123</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 3.

<sup>124</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

international judges. The Government of Sierra Leone will appoint two judges, and the U.N. Secretary-General Kofi Annan will appoint one judge.<sup>125</sup> Thirdly, the subject matter of the special court will extend to encompass not only violations of international humanitarian law, but also certain crimes under Sierra Leonean law.

The Special court will not have subject matter jurisdiction over the crime of genocide, unlike the ICTR/ ICTY.<sup>126</sup> There was no evidence that the mass killing in Sierra Leone was against an identifiable national, ethnic, racial group with the intent to annihilate that group.<sup>127</sup> Since the government of Sierra Leone asked for help from the U.N. in forming the special court, their compliance will surely help the process to move more quickly than the ICTY/R which each took more than two years to become fully operational.<sup>128</sup>

The hybrid model of Sierra Leone, infuses the local customs and laws of the domestic state with international law. This special court was loosely based in the ICTR/Y, yet also took into account special circumstances behind its treaty-based inception, which gives it less U.N. power and backing than the ICTR/Y. Hybrid courts such as the Sierra Leone model can strike a balance between domestic and international, and this court may be a model for other U.N. treaty-based courts in the future.

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<sup>125</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>126</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>127</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 2.

<sup>128</sup> See Michael P. Scharf, *The Special Court for Sierra Leone*, The American Society of International Law, available at [www.asil.org/insights/insigh53.htm](http://www.asil.org/insights/insigh53.htm) at page 3.

#### d. Cambodia

A fourth hybrid tribunal is currently under negotiation between the United Nations and Cambodia. The Cambodia court will be named the “Extraordinary Chambers in the Courts of Cambodia.” The U.N. has expressed grave concern regarding the numerous violations of human rights in Cambodia, which include: extra judicial executions, torture, rape, and lack of due process.<sup>129</sup> There is special concern regarding the current judicial system of Cambodia and the reluctance and inability to charge members of the government and militia with violations of human rights.<sup>130</sup>

#### IV. Appraisal

As International Criminal Tribunals have evolved and blended international and domestic structures, more choices exist for countries looking to expand and reform their judiciary systems. This era of international and domestic legal integration comes as a result of the increases in communication, diplomacy, democracy, and an inter-connected global economy.

Iraqi Tribunal Founders evaluated the Ad-hoc models of the ICTY and ICTR, the ICC, and the hybrid models when forming their new judiciary. By doing this preliminary research and appraisal, officials learned from historic lessons in this area in order to build-upon the setbacks and problems of the already existent tribunal models. Learning from the previous successes and failures of

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<sup>129</sup><http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/ee74e24f4834b57a8025664800550026?Opendocument>  
<sup>130</sup><http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/ee74e24f4834b57a8025664800550026?Opendocument>

already established International Criminal Tribunals will potentially solidify a stable foundation for the Iraq Court.

## V. Recommendation

The founders of the new Iraqi Tribunal should weigh the attributes of each International Criminal Court model, and apply the rationale to their specific situation, much like the rationale behind the hybrid model. In addition, tribunal officials should remain flexible as the volatility of the region lends itself to potential problems for this new judicial body. Iraq should look to maintain a legitimate court, employ new laws, utilize international law as well as customary international law, and maintain a connection with the international legal community.

Maintaining legitimacy will be important to the success of the New Iraqi Tribunal. Hussein is a high-profile figure like Milosovic, and therefore the Iraqi founders can learn a great deal from the successes and failures of the ICTY. The ICTY has set forth precedent, but the perceived legitimacy by the local people has been its greatest problem. Since, the newly formed Iraqi Tribunal is being set up through a seemingly nepotistic connection (familial connection between head of congress and a former head of judiciary Salaam Chalabi), this has already posed a great threat to perceived legitimacy of the court as a puppet to United States interests. In addition the legitimacy of the tribunal has also been questioned because its creator, Paul Bremer as the head of the Coalition Provisional Authority,

selected the tribunals personnel and provided for it's funding.<sup>131</sup> This it is construed by some as a "victors' tribunal."<sup>132</sup>

The domestic location of the Iraq Court will be beneficial to maintaining economic efficiency, and to the establishment of a reformed court system. The Iraqi founders have established the new court inside the borders of Iraq, and thus should not experience problems like the ICTY and ICTR regarding the great expenditures related to obtaining evidence and witnesses. The Iraqi people will have to draft a new constitution, and update Iraqi's criminal and commercial codes to ensure consistency with the needs of a modern democratic society and market economy.<sup>133</sup>

Since the Iraq court is set up in a post conflict setting, this mirrors a hybrid model in regards to location in the "place of the wrong." Since the tribunal will be comprised of Iraqi judges, this should help speed up the trial process, unlike the multi-national efficiency problems of the ICTR and ICTY. Because the officials of the new court are all from Iraq there may be a balanced pay scale, which will also create a higher level of procedural efficiency. However, the current hostility of insurgents is plaguing the Iraqi Tribunal and is a constant threat to all officials. Pentagon intelligence data shows an escalating insurgency, as each monthly peak in the number of violent incidents is followed by a higher average number of

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<sup>131</sup> Ved Nanda, *Will Iraq tribunal be a success?*, The Denver Post, Sunday, Feb. 20, 2005.

<sup>132</sup> Ved Nanda, *Will Iraq tribunal be a success?*, The Denver Post, Sunday, Feb. 20, 2005.

<sup>133</sup> <http://www.usip.org/pubs/specialreports/sr104.html>

violent attacks in subsequent months.<sup>134</sup> The court should remain flexible and may need to move locations if the region increasingly becomes unstable to house a judiciary.

In addition, the blending of local and international laws might cause complex problems to occur. Human rights groups are warning that the court is already flawed, and Human Rights Watch points to the lack of protection of witnesses and the failure to involve non-Iraqi prosecutors and investigative judges.<sup>135</sup> Problems may arise if the local laws are not balanced properly with international laws:

“Where justice is purely local, on the other hand, the problem takes a slightly different form. Local courts and local lawyers, unfamiliar with international standards, may seek to apply ordinary criminal law to the mass atrocities in question, even if the local law technically incorporates international humanitarian law.”<sup>136</sup>

The backing of the international community is necessary if crimes against humanity and war crimes are to be enforced in an international forum. Since the international community could possibly take a back seat in the proceedings, as there are no international judges or prosecutors, problems may arise regarding international backing and enforcement of the new Iraqi Tribunal issued judgments.

“In August 2003, a team of U.N. specialists concluded that Iraq had a degraded system that is not capable of rendering a fair and effective justice

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<sup>134</sup> From Reuters via the Australian Broadcasting Corporation available at [http://www.command-post.org/2\\_archives/2005\\_03.html](http://www.command-post.org/2_archives/2005_03.html) (last checked March 15, 2005).

<sup>135</sup> The Federal News Service, Interview with Salem Chalabi, Appointed Head of the Tribunal for Sadaam Hussein, Discussing the upcoming trial (CNN International) April 21, 2004, available at page 5.

<sup>136</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, *The American Journal of International Law*, 97 A.J.I.L. n.295, 305 (April 2003).

for violations of international humanitarian law and other serious criminal offenses involving the prior regime.”<sup>137</sup>

It is unapparent who will provide funding for the new Iraqi Court, and if the United Nations will back this court at all.

Under Iraqi law, there is a statute specifying that Sadaam Hussein’s lead attorney needs to be an Iraqi.<sup>138</sup> To defend him, Husseins’ family has selected 20 lawyers out of nearly 600 who offered their services.<sup>139</sup>

The International Criminal Court was not a particularly feasible forum to try members of the former Iraqi regime. In order to try Hussein at the ICC, either Iraq or the United States would need to be a member party to the Rome Treaty. In addition, the ICC cannot issue a death sentence, and to the United States and Iraq this may be considered an unattractive and lenient punishment.

In conclusion, the Iraqi Tribunal faces a long road towards legitimacy, permanency and complete formation. This tribunal currently employs a domestic base, with some hybrid and ad-hoc additives. The Iraq Tribunal wants to maintain purely domestic and become a permanent fixture in the new Iraq, however this will be an increasingly difficult task to obtain until the region is stable. Ultimately, the court will need to maintain international ties, to reform laws, and learn from the successes and failures of the prior international tribunal models.

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<sup>137</sup> The Federal News Service, Interview with Salem Chalabi, Appointed Head of the Tribunal for Sadaam Hussein, Discussing the upcoming trial (CNN International) April 21, 2004, available at page 5.

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<sup>139</sup> Ved Nanda, *Will Iraq tribunal be a success?*, The Denver Post, Sunday, Feb. 20, 2005.