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Hybrid Courts Remain Promising

Elisabetta Baviera

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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Introduction

I wish to explore one of the most hazardous pitfalls of post-conflict international criminal prosecutions: to lack, or to be perceived to lack solid foundations of legitimacy. While the context selected to exemplify my arguments is post-genocide Rwanda, with the International Criminal Tribunal for Rwanda[1] as the main object of critique, many of the issues raised have wide repercussions that transcend any particular post-conflict scenario. Indeed, lack of legitimacy is a question that has been identified, and extensively debated, in the enterprise of international criminal justice from the moment of its alleged inception at Nüremberg.[2] It is worthy of note that a parallel legitimacy debate can be discerned surrounding the doctrine of universal jurisdiction, that certain crimes are so heinous that anyone suspected of having committed them must be arrested, charged, tried and sentenced by any court in any state. In practice, the exercise of universal jurisdiction varies abruptly from country to country, testifying to an uneven acceptance of the principle, thus casting a cloud of doubt over its legitimacy. "[T]he disparities in practice should raise serious concerns as to the legitimacy and perceived legitimacy of such globalized justice."[3] Further damage is caused by the remoteness of "externalized justice",[4] its inability to touch the affected society. The relationship between international criminal prosecutions and exercises of universal jurisdiction in certain national fora is suggested by, *inter alia*, the fact that many judges pondering universal jurisdiction refer explicitly to institutions of international criminal justice, such as the International Military Tribunal at Nüremberg, the

[1] International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by *S/RES/955 (1994)*, hereinafter referred to as 'ICTR' or 'the Tribunal'.
[2] M. Minow, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*, p. 27: "In their own time … the Nuremberg and Tokyo trials were condemned by many as travesties of justice, the spoils of the victors of war, and the selective prosecution of individuals …"
[3] C. L. Sriram, "Revolutions in Accountability: New Approaches to Past Abuses" *19 American University International Law Review 301* (2003), p. 307.
[4] *Id.* p. 313.

International Criminal Tribunal for Former Yugoslavia,[5] the ICTR and, of course, the International Criminal Court, precisely in order to *legitimise* an exercise of jurisdiction.

'Legitimacy' is a much invoked and rarely defined concept. A brief *description* of what it entails in the context of this discussion will be briefly addressed here. Essentially, 'legitimacy' denotes *acceptance*, by reference to various standards, such as morality or legality or 'politics', in the eyes of different observers, such as the 'international community' or 'Rwandan society'. It is, therefore, a highly subjective value.[6] As this essay unfolds, the legitimacy of the ICTR will be considered primarily by reference to Rwandan society, additionally touching upon the judgment of various actors external to Rwanda, such as the 'international community' and non-governmental organisations (NGOs). It will appear that there is no consensus between these groups; it should also be remembered that agreement *within* them does not exist either. The nebulosity surrounding the idea of legitimacy should not, however, detract from its momentous significance. *International* legitimacy, that is, legitimacy in the eyes of international governmental and civil society, impacts on the future of international criminal justice, transitional and permanent alike, for it plays an important role in policy shaping. *Local* legitimacy equally carries great weight in determining the success of international criminal justice mechanisms. For example, the declaratory function of trials is wasted on an audience that considers them illegitimate, thus depriving the procedure of any potential to fulfil the expectations it raises as well as its stated aims, including the establishment of a 'truthful' historical record, or a contribution to some form of reconciliation.

This inquiry considers whether *hybrid* tribunals might encounter, or engender, fewer shortcomings than purely international ones, in particular with regard to legitimacy. Tarnished legitimacy is of course not the only thorn in the side of international criminal prosecutions. It will also be suggested that purely international tribunals, in comparison with 'hybrids', do not possess the potential to contribute as significantly to other fundamental post-conflict processes, such as institutional reconstruction, some form of reconciliation and the development of an institutional and jurisprudential body of law which addresses local needs and

[5] International Tribunal for the Prosecution of persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia since 1991, established by *S/RES/827 (1993)*.
[6] Therefore, 'legitimacy' and 'perceived legitimacy' are broadly interchangeable terms.

dynamics while conforming to international human rights standards. These shortfalls do, nonetheless, deal damaging blows to the trials' legitimacy, as do perceptions that they might be inefficient or insensitive. No single post-conflict measure is capable of meeting the needs of torn societies completely: this essay does not seek to condemn international trials by reference to standards outside their stated objectives.[7] However, should hybrid courts display the potential to reach further and deeper than purely international ones, the argument that the former constitute a more attractive choice in certain post-conflict contexts will have been made.

The focus on 'hybrid solutions' will require some justification, which will be provided in Part I. The nature of hybrid tribunals will be outlined first; their advantages introduced; the "hybrid" tribunals of East Timor and Sierra Leone display what may appear congenital defects: these will be addressed; it will nonetheless be advanced that, especially in view of the current developments in international criminal justice, the hybrid idea must not be abandoned on the basis of its disappointing performance thus far. Part II will be focused on Rwanda and the ICTR: it will be advanced, through an analysis of the legitimacy stumbling-blocks encountered by the Tribunal, that hybrid courts, in part relieved of the burden of their past failures in the first part of the discussion, do still provide a viable solution to address some of the defects discerned. In Part III, some additional benefits that hybrid tribunals can entail will be briefly outlined.

[7] The "sole purpose" contained in S/RES/955 (1994), the 'Statute of the ICTR', is to prosecute "…persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994…" The Preamble does, however, refer to wider aims, or expected effects, such as a contribution "…to the process of national reconciliation and to the restoration and maintenance of peace."

Part I. Hybrid Tribunals: Nature and Debate

What Are Hybrid Tribunals?

A recent addition to the armoury of international criminal justice, hybrid tribunals are intended to synthesise purely international criminal prosecutions (incarnated most recently in the *ad hoc* tribunals and the International Criminal Court) and purely national avenues for post-conflict retribution, reconstruction, and, perhaps, restoration and reconciliation. Essentially, a hybrid tribunal may take the form of any combination of human, physical, institutional and normative capital from two realms: the *national* legal system of the society concerned, and *international* criminal, humanitarian and human rights law and mechanisms. Hybrid tribunals may be usefully conceptualised in the context of wider nation-building exercises, in which the 'international community' purports, in co-operation with local actors, to rebuild (or, in many cases, build) an institutional framework based on democratic governance, the rule of law, and human rights. Tribunals of this nature have been attempted, *inter alia*, in Sierra Leone and East Timor. The present analysis will concentrate on these examples.

The Promise of Hybrid Tribunals?

The most often invoked justification for hybrid tribunals is that by endeavouring to use those local resources available, and by 'injecting' them with international norms, staff, and, naturally, funding, the exercise in retribution and international condemnation is complemented by concrete reform and development of local legal infrastructure, and, over time and by extension, a contribution to 'national reconciliation'. A nation-building perspective on hybrid tribunals is held by numerous scholars[8] and activists: "These bodies have typically been established by agreement between the United Nations and a given government in the wake of a serious conflict in an effort both to address crimes of concern to the international community and to assist that society's transition to democracy, peace and the rule of law."[9]

[8] See, e.g., R. G. Teitel, "Human Rights in Transition: Transitional Justice Genealogy", *16 Harvard Human Rights Journal 69*, (Spring 2003), p. 71: "While the post-Cold War wave of transition theoretically raises the possibility of a return to … international transitional justice, the form of transitional justice that in fact emerges is associated with the rise of nation-building."

[9] Justice Initiative, "Hybrid Tribunals", http://www.justiceinitiative.org/activities/ij/hybrid

Secondly, in the context of a permanent international criminal law order with a nascent institution that encounters sustained resistance from diverse and multiple quarters, it is argued that hybrid tribunals are necessary to fill the "impunity gap" created by the initial implementation phases of the ICC's complementarity regime, during which states supposedly build their legal capacity to enable national trials. While local competence is built, and as a contribution to that very process itself, hybrid tribunals are thus considered functional mechanism to ease the development, which is especially arduous in post-conflict societies.[10]

A third 'internationalist' argument in favour of persisting on the hybrid path is that which contemplates the *failure* of the ICC either to effectively encourage national proceedings, or to attract a significant number of cases itself. Serious concern in this regard is triggered by the position of the United States.[11] In particular, its pursuit of bilateral agreements with signatories of the Rome Statute to the effect that no American citizen will be submitted to the operation of the ICC at the signatories' instigation is a direct blow at the foundations of the ICC's regime. Hybrid tribunals, then, might provide a solution inasmuch as they are potentially less controversial than the permanent Court, mainly because they are established on an *ad hoc* basis. Furthermore, they can be cheaper than purely international prosecutions, which would enable regional organisations (such as the European Union, the African Union and other emerging and consolidating regional treaty frameworks) to create a hybrid tribunal without excessive dependence on the Security Council, and indeed on the United States, should the latter be resolutely opposed to the pursuit.

However, the most significant "promise of hybrid courts"[12] must lie in their enhanced potential, as compared with purely international criminal prosecutions, to impact positively on the conflict-torn societies whose sagas must not be relegated to being an experimental ground for budding international law criminal procedure. The "local perception" will constitute one of the main threads of this discussion, which will be woven in more detail in relation to Rwandan society.

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[10] *Id.*
[11] See, e.g., G. Robertson, "Crimes against Humanity. The Struggle for Global Justice", *Penguin Books*, p. 347: "The United States initially wanted a court, but one that would never work against the interests of the United States."
[12] See L. Dickinson, "The Promise of Hybrid Courts", *97 American Journal of International Law 295 (2003)*

Precedents?

The practical obstacles encountered by attempted hybrid solutions have sparked much criticism and cynicism. I would suggest, however, that these failures should not be attributed to 'hybridity' *per se*, but to specific adverse circumstances which prevented the initiatives from thriving.

a. East Timor

When a UN-sponsored referendum in East Timor, since 1975 occupied by Indonesia, reflected widespread independence aspirations, the Indonesian Army, aided by Timorese pro-Indonesian militias, waged a campaign of violence and arson in the region which left an estimated 2,000 dead and a further 500,000 displaced.[13] The United Nations Transitional Administration in East Timor (UNTAET[14]) established the Serious Crimes Investigation Unit (SCIU[15]) to investigate and prosecute cases in the newly created Special Panel for Serious Crimes in the District Court of Dili, East Timor's capital. It is important to visualise the SCIU and the Special Panel in their geopolitical context: they were rivalled in many respects by a sham judicial process in Indonesia, and by the Indonesian government's insistence that it should be the host of any trial. Most perpetrators of the atrocities were, however, members of the Indonesian military or security forces, which created a risk that prosecutions in Indonesia might lead to critical instability there.[16] The Special Panel's subsequent shortcomings must, therefore, be viewed in this context. Abundant, nevertheless, they were, criticisms ranging from inefficiency[17] to both political and popular illegitimacy.[18] The United Nations was, however, faced with a dilemma, under pressure from the Indonesian government to leave prosecutions for violations of international humanitarian law to its own national judiciary. United Nations officials believed that a purely international tribunal would have provided the most effective and legitimate avenue to pursue transitional criminal justice, but this was deemed

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[13] Global Policy Forum, "Ad-Hoc Court for East Timor", http://www.globalpolicy.org/intljustice/etimorindx.htm
[14] Established by SC/RES 1272 (1999).
[15] The mandate of the Serious Crimes Investigation Unit has been extended, ultimately until May 2005, by SC/RES 1543 (2004)
[16] Sriram, *supra* note 3, pp. 401-402
[17] See, e.g., Amnesty International, "East Timor: Justice Past, Present and Future" http://web.amnesty.org/library/Index/ENGASA570012001?open&of=ENG-TMP
"UNTAET's investigations into crimes against humanity and other serious crimes committed by the Indonesian security forces and pro-Indonesian militia against the supporters of East Timorese independence during 1999 have been unacceptably slow."
[18] See, e.g., S.Powell, "Justice Sidelined as E Timor Courts its Neighbour", *The Australian*, 17th May 2004: "[President Gusmao met] with Indonesian President Megawati Sukarnoputri in Bali on Saturday. Both leaders agreed that they did not want the issue of past human rights violations to disturb their bilateral relations."

politically unworkable, "…an outcome that the Indonesian government would [have] prefer[red] to avoid…"[19]

Examined in this context, then, the decision to adopt a hybrid tribunal in East Timor resembles more a desperate compromise, an attempt to preserve any international element in what otherwise promised to be a show trial in the name of human rights. A further indicator that a hybrid tribunal would not have been the preferred choice for East Timor is that it adopted Indonesian law, where compatible with international human rights. This was a necessity given the existing training pattern of local actors, but carried with it negative symbolism which obscured its legitimacy and popular acceptance. Indeed, the Indonesian government's co-operation with the SCIU has been dire, and a significant contribution to building an *entente cordiale* by the SCIU has yet to be seen.[20] It is not obvious, given the political scenario of these events, that the East Timorese experience was less than satisfactory merely *on account of its hybrid nature*.

b. Sierra Leone

The Special Court for Sierra Leone is a joint venture by the Government of Sierra Leone and the United Nations[21] in response to gross human rights violations committed, despite the Lomé Peace Agreement of June 1999, in the persistent civil war between the Sierra Leonean government and the Liberia-backed Revolutionary United Front (RUF). "It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[22] This tribunal's prospects are, too, rather bleak, as it begins its journey in the wake of preliminary polemics surrounding the alleged bias of its former[23] President, Geoffrey Robertson QC.[24] There is widespread scepticism of the Court's capacity to fulfil its ambitious objectives by mid-2005, and NGOs such as International Crisis Group warn of early signs of weakness in the Special Court. Particularly relevant to legitimacy is

[19] Sriram, *supra* note 3, p. 417
[20] See, e.g., A. Sipress, "Most Suspects in East Timor Violence Remain Free in Indonesia", *The Washington Post,* 15th October 2003
[21] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Done at Freetown**,** on 16 January 2002
[22] Special Court for Sierra Leone Homepage, http://www.sc-sl.org/index.html
[23] See, e.g., H. Davies, "War Crimes Tribunal Bars its Judge", *The Daily Telegraph,* 15th March 2004
[24] Defence counsel referred to allegations by G. Robertson in his book, *supra* note 11, that, *inter alia*, the RUF carried out "missions of pillage, rape and diamond-heisting", that it "had no political agenda: its sponsor was Charles Taylor, Liberia's vicious warlord." (p.466)

its "perceived Americanisation", which ICG attribute to the US government's eagerness for it to succeed, "… at least in part in the expectation that a demonstration of how such an *ad hoc* tribunal can handle the gravest of war crimes and crimes against humanity will reduce the widely perceived need for the new International Criminal Court…"[25] This allegation sits uncomfortably with my suggestion above[26] that hybrid tribunals can be *supportive* of the ICC regime: a closer look at the Special Court's structure should iron out any inconsistencies. It reveals a 'hybrid' with considerably more international elements than perhaps expected. The Court's mandate explicitly states that "[o]ffences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone."[27] On the surface, the Court applies law from two domains: international humanitarian law, applicable by virtue of the international norms assigning individual criminal responsibility, and Sierra Leonean law, with its own regime of individual accountability.[28] The latter normative framework, however, was vetted by international human rights lawyers to 'purge' it of any incompatible material. The overall legislative balance appears to be tilted heavily in the international direction. Further, while Article 8(1) of the Statute states that "The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction", Article 8(2) equally clearly enunciates the primacy of the Special Court in that power relationship.[29] The provisions relating to *non bis in idem*, a relatively straightforward principle of criminal procedure, additionally shift the balance of power in favour of the international arena, by stipulating that "[n]o person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court",[30] rather than the reverse proposition. Aside from the ratio of judges, which is higher for the 'international community',[31] Article 10 of the Statute further asserts that "[a]n amnesty granted to any person falling within the jurisdiction of the Special Court … shall not be a bar to prosecution."[32] Most indicative of all the provisions in the Court's documentation is that contained in

[25] International Crisis Group, "The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'", *Africa Briefing*, 4th August 2003
[26] *Supra*, page 5.
[27] Special Court Agreement, 2002, Ratification Act, 2002 Supplement to Sierra Leone Gazette, vol. CXXX, No. II (Mar. 7, 2002), Part III, Article 13
[28] Statute of the Special Court for Sierra Leone, Articles 2 – 6, "Crimes Against Humanity", "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II", "Other Serious Violations of International Humanitarian Law", "Crimes under Sierra Leonean Law", "Individual Criminal Responsibility"
[29] *Id.*, Article 8, "Concurrent Jurisdiction"
[30] *Id.*, Article 9, "*Non bis in idem*"
[31] *Id.*, Article 12, "Composition of the Chambers"
[32] *Id.*, Article 10, "Amnesty"

Article 11(2) of the Ratification Act 2002: "The Special Court shall not form part of the Judiciary of Sierra Leone."[33] Indeed, Chandra Lekha Sriram warns that "[t]his separation has created concerns among the members of the court that they must ensure that they leave a 'legacy' for the country beyond the specific trials."[34]

Is this a truly adequate design for a *hybrid* tribunal? Should the conclusion be drawn that, in reality, the Special Court is suffering from the very same shortcomings that *international* criminal 'justice' presents, the argument that *hybrid* tribunals are a pointless endeavour is undermined. I consider the issue sufficiently debatable not to rule out that the defects of the Court, as those of the East Timorese Special Panel, might not be due to the hybrid nature of those bodies. The latter presents acutely precarious political foundations, while the former's characterisation as 'hybrid' is not without logical flaw. Should we consider that the Special Court is more akin to an *ad hoc* international forum than anything else, then the deduction that it will devolve attention from the launch and operation of the ICC holds more water. Equally, it would not detract substance from my contention[35] that hybrid tribunals have the potential to supplement and fuel the engine of the 'mother of all courts'.

Conclusion to Part I

Some themes and assumptions underpinning hybrid tribunals have been outlined in the above reflections. The main intent has been to justify the remaining inquiry, to rationalise some of the hurdles encountered in the experiences of East Timor and Sierra Leone so that they would not hinge on the hybrid idea as much as on specific circumstances. Legitimacy has further been a theme underlying of the discussion, and the main focus has been on issues of international legitimacy of hybrid tribunals. One final consideration precedes a look at some legitimacy-related issues surrounding the Rwandan case, turning on the persisting viability of the hybrid tribunal as a post-conflict judicial option. Hybrid tribunals evolved from the attempt to circumvent some of the problems of purely international criminal prosecutions, such as their cost and their remoteness. Since the first hybrid attempt in Kosovo,[36]

[33] Special Court Agreement Ratification Act 2002, *supra* note 27, Part III, Article 11(2).
[34] Sriram, *supra* note 3, p. 423
[35] *Supra*, page 5.
[36] Continuing tensions in the Mitrovica area prompted UNMIK Regulation No. 2000/6, appointing international judges and prosecutors to the Mitrovica judicial district. Through a series of regulations, UNMIK added elements of hybridity to the Kosovan legal system. For an analysis of its vices and virtues, see, e.g., Dickinson, *supra* note 12, and W. S.

we have not seen the creation of a purely international one, without considering the doubtful pedigree of the Special Court for Sierra Leone. The disappointing performance of the hybrids considered above should not detract from the idea's continuing potential to address the multifarious deficiencies of purely international solutions, in particular those relating to legitimacy. The following examination of legitimacy in Rwanda, then, will be the theatre for these debates.

Part II. Legitimacy Problems, 'Hybrid Solutions'?

The Tribunal's (Il-)Legitimacy?

The International Criminal Tribunal for Rwanda presents a web of controversy regarding legitimacy. Issues immediately spring to mind in relation to legitimacy vis-à-vis Rwanda, and that is almost certainly where most of the complexity lies. It is worthy of note, however, that the *international* political and legal legitimacy of the ICTR is not unquestionable. While it benefited from a primogenitor in The Hague,[37] and possibly from a sense of face-saving in the Security Council,[38] the ICTR was somewhat dubiously conceived under Chapter VII of the United Nations Charter which bestows powers on the Security Council in the event of a "threat to international peace and security".[39] The situation in Rwanda was not an international conflict at all: the genocide was perpetrated in Rwanda, by Rwandans; the background civil war between the RPF[40] and the former government is more appropriately classified as an internal conflict. However, the wave of displaced persons that the genocide engendered, as well as the 'ethnic composition' of the Great Lakes Region and its pervasive instability, created a sufficient aura of 'internationality' for the Security Council to adopt Resolution 955 under Chapter VII.

Betts, S. N. Carlson, G. Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law", 22 *Michigan Journal of International Law* 371 (Spring, 2001).

[37] A. Des Forges, "The International Criminal Tribunal for Rwanda", presentation at the conference "Justice in the Balance: Military Commissions and International Criminal Tribunals", UC Berkeley, March 2002: "The fact that there was already in existence the ICTY made a very easy route for … [the international community], and they adopted exactly the same procedures as the ICTY." Transcript available at http://www.hrcberkeley.org/download/justice_alisondesforges.pdf

[38] S. Power, "A Problem from Hell. America and the Age of Genocide", *Flamingo*, p.484: "With a UN court in place to hear charges related to the killing of some 200,000 Bosnians, it would have been politically prickly and manifestly racist to allow impunity for the planners of the Rwandan slaughter, the most clear-cut case of genocide since the Holocaust." Also, A. Des Forges, *supra* note 37: "…having been themselves in effect complicit in allowing the genocide to move forward, … [the international community] found it all the more necessary to punish the perpetrators."

[39] Charter of the United Nations, Ch.VII, Art.39

A further challenge to the ICTR's international legitimacy is voiced by various academics, including Payam Akhavan, who noted in 1995, "… such ad hoc solutions are insufficient for the prevention and punishment of other genocidal situations where *realpolitik* and humanitarian considerations do not converge."[41] I will, however, focus my attention on the more intricate issues of legitimacy that the ICTR faces *in Rwanda*, and will analyse some of their more consequential aspects in turn. The Security Council meeting of 8th November 1994, where the establishment of the Tribunal was discussed, will provide a useful insight to the views of the Rwandan government at that time, which carry weighty consequences for both the international and the national legitimacy of the body. The focus will then turn to a more detailed examination of some of the government's arguments, which have also received substantial attention by human rights organisations and academics: the Tribunal's vulnerability to political manoeuvring; its location; its consequent lack of potential to contribute to the rebuilding of the national legal system, and to ease the route to national reconciliation.[42] They are particularly damaging to the Tribunal's legitimacy.

a) <u>The Position of the Rwandan Government</u>

Akhavan[43] usefully reminds us that an international prosecution mechanism was the initially the suggestion of the Rwandan government, for reasons which most defenders of purely international models would endorse: the genocide was not merely a crime against Rwandans and Rwanda, but also against the conscience of humanity; it was unambiguously proscribed by universal norms, thus warranting the censure (if not the concerted action) of the 'international community'; the government wished to avoid allegations that justice had deteriorated to vengeance; it was imperative that the planners of the genocide be condemned and punished, for the "culture of impunity"[44] to be broken, a crucial step towards national reconciliation and peace. Nevertheless, the final decision of the government resulted in a vote

[40] Rwandan Patriotic Front, the Rwandan army-in-exile headed by General Kagame.
[41] P. Akhavan, "Enforcement of the Genocide Convention: A Challenge to Civilisation", *8 Harvard Human Rights Journal 229*
[42] These complaints were recently expressed by Martin Ngoga at the conference "The Rwandan Genocide and Transitional Justice. Commemorating the 10th Anniversary of the Genocide" at St.Antony's College, Oxford, 15th May 2004 (hereinafter recorded as 'the Conference'). Martin Ngoga is the former representative of the Rwandan government to the ICTR, and is currently Deputy Prosecutor General for the Government of Rwanda.
[43] Akhavan, *supra* note 41, pp. 504-505
[44] Speech by Mr. Bakuramutsa (representing Rwanda) at the Security, interpretation from French, UN Doc. S/PV.3453 (1994), p.14

against the Tribunal. Many of the reasons its representatives advanced to justify this are pertinent to the present discussion, as they unveil issues of legitimacy.

There was strong opposition to the temporal jurisdiction of the Tribunal[45] because it did not reach sufficiently into the past to encompass evidence that the genocide had been under construction for several years. The Security Council was, however, compelled to have regard for the proper use of Chapter VII of the UN Charter, and in fact compromised with the Rwandan government by extending the time-frame until the beginning of 1994. Nevertheless, the balance reached was perceived by the government as displaying a lack of respect, of acknowledgement, for the meticulous, calculated nature of the atrocity, by neglecting to expose the perpetrators' machinations devised long before the moment the plan was deployed.

Secondly, the government shunned the structure and operation of the Tribunal, particularly criticising the number of judges and the divided Office of the Prosecutor and Appeals Chambers. The disdain displayed at the Security Council is an especially poignant attack on the legitimacy of the ICTR. The delegation remarked that "…the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular."[46]

A further, vehement attack on both the international and the national legitimacy of the Tribunal was expressed in the Security Council. Hardly any additional comment is necessary to the words of the Rwandan delegate: "… certain countries, which need not be named here, took a very active part in the civil war in Rwanda. My Government hopes that everyone will understand its concern at seeing those countries propose candidates for judges and participate in their election."[47] A throng of legitimacy predicaments stems from the acts and, moreover, omissions by the international community with respect to the genocide and the civil war.

Although we have witnessed some improvement in the relations between the Rwandan authorities and the ICTR since both came into being ten years ago, the former's position has severely hindered the operation and perceived legitimacy of the

[45] Statute of the ICTR, Article 1, *supra* note 7.
[46] UN Doc. S/PV.3453, p. 15
[47] *Id.*

Tribunal.[48] In the first place, the legitimacy-enhancing function potentially fulfilled by governmental public statements about the ICTR is lost. On the contrary, the Tribunal's legitimacy in Rwanda (at least in the eyes of those influenced by the authorities' proclamations) is jeopardised by damning criticism, regardless of its incoherence or the impropriety of its purpose. Furthermore, there have been incidents of open and active antagonism by the government. For example, in 2002, it carried out a policy of obstructionism to the presentation of testimony at the Tribunal, by confiscating witnesses' passports and refusing them permission to travel to Arusha.[49] Given that the architects of the Rwandan genocide did not leave much written evidence of their actions and intents, unlike many genocidal regimes, the difficulties in obtaining witness testimony had a particularly severe impact on the speed of the trials, and a knock-on effect on its legitimacy.

The centrality of governmental co-operation with and endorsement of an international transitional justice mechanism cannot be over-emphasised. In the case of Rwanda, the motives lying behind the government's hostility were highly suspect: it intended to rule out any possibility that the RPF's role in the genocide might be brought into question, and embarked on a form of blackmail to secure that aim. This issue will be examined more fully below, but it appears that, given those motives, a hybrid option would not have encountered any less resistance. In general, however, hybrid tribunals do have more potential to enjoy the support of the relevant national authorities: they can escape the perception that they are being imposed, while their capacity to contribute more directly than purely international tribunals to the reconstruction of the local judicial structures is beneficial to their acceptance.

b) Political Malleability

Unfortunately, politics are rife in the administration of most types of transitional justice, be they national or international. The nature of international normative structures ties them inextricably to international as well as domestic politics: political will within the Security Council, in particular among its five permanent members, is usually a prerequisite for their very inception. The comparison between a hybrid tribunal and a purely international one based on their potential for political manipulation must be premised on the following realist

[48] A. Guichaoua, "Tribunal pour le Rwanda: de la crise à l'échec?", *Le Monde* 04.09.2002: "…c'est dans ses rapports avec les autorités rwandaises que le TPIR a rencontré les écueils les plus redoutables."
[49] *Id.*

consideration: until international criminal justice becomes a truly self-contained, independent, *supra*-national structure, should this ever come to pass, its very 'internationality' subjects it to considerable political pressure from its 'creators'.

Nevertheless, the potential for manipulation in the operation of the ICTR is a dark shadow that looms over its symbolic significance, as well as its practical performance. Security Council resolution 1503, adopted in August 2003, urges the ICTR and the ICTY to complete all investigations by 2004, all trials by 2008, and all appeals by 2010.[50] This might be viewed by Rwandan and foreign observers as premature impatience in 'the West' to bring the operations of the ICTR to an end before it fulfils the full breadth of its mandate. The current US administration, in what appears a policy of stalling the international criminal justice's development, has allegedly exerted pressure on the Security Council to this effect, which opens the door further for accusations of deference to political power.[51] This is perceived as a sign of flagrant illegitimacy, combining criticisms of political malleability and of lassitude in the fulfilment of the ICTR's mandate.

As illustrated in Part I of this essay, it might be that a hybrid tribunal would suffer from this evil to a lesser extent. In practical terms, the reduced cost of the operation might serve to limit the need for the financial participation of the United States: while would not eliminate that country's influence, which goes far beyond financial leverage, it might dilute it, for example if a regional organisation should undertake the task of establishing the hybrid. Of course, the United States is not alone in its ruffian behaviour towards international legal initiatives, but the ratification pattern of the ICC Statute is some indication that, were American influence abated, the political pressure on the tribunal might be somewhat reduced.

There is much debate regarding whether *ad hoc* tribunals, established to prosecute crimes perpetrated in against a backdrop in which a relatively clear distinction between oppressors and oppressed can be drawn, should engage in prosecuting similar acts committed by those representing, or, in this case, liberating, the surviving victims. Carla Del Ponte, former Chief Prosecutor of the ICTR, was of

[50] *S/RES/1503 (2003)*

[51] Statement by M. Johnson, Former Chief of Prosecutions for the ICTY, and former Acting/Interim Deputy Chief Prosecutor for the ICTR. This was in response to a question by A. Des Forges, whether the ICTR could be said to have fulfilled its mandate if it ultimately did not succeed in "prosecuting persons responsible for genocide and other serious violations of international humanitarian law".

the opinion that not to investigate *a crime*, regardless of its perpetrator, was to bow to political will. She claims that this position cost her appointment,[52] which constitutes further evidence of the anxiety in certain political spheres to maintain a firm grip on the *ad hoc* Tribunals. Political influence in the administration of prosecutorial functions is extremely detrimental to the ICTR's legitimacy: it serves to discredit it in the eyes of many external observers, but, moreover, it further hinders the difficult road to reconciliation in Rwanda, impeding the Tribunal's operation, fuelling the arguments of revisionists and apologists,[53] and generally undermining the legitimacy of international criminal 'justice' in Rwanda. The objective conduct of prosecutions is also under attack from within Rwanda, as already mentioned above.[54] It appears that President Kagame consistently exploits the guilty conscience of the 'international community' to ensure opposition by the West,[55] notably the United Kingdom,[56] France and the United States, to investigations and possible ensuing prosecutions of crimes committed by the RPF. Thus, prosecutorial discretion and independence are severely corroded, further damaging the Tribunal's legitimacy, internationally and in Rwanda alike. On the other hand, it may be that had investigations into the role played by General Kagame and the RPF not been halted, the ICTR's legitimacy would nevertheless have been marred if that had been understood as diminishing the gravity of the genocide or the culpability of the *génocidaires*. International tribunals must to some degree be attentive to these delicate political questions: to that degree they must behave, therefore, like political creatures.[57] The question of objective prosecutions is a pertinent example of the complexities surrounding the ICTR's legitimacy concerns, for it could constitute a double-edged sword.

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[52] Carla Del Ponte, "The Role of International Criminal Prosecutions in Reconstructing Divided Communities", address at LSE, 20th October 2003. A transcript is available at http://www.lse.ac.uk/Depts/global/DelPonte.htm although this particular comment was made during a Q&A session after her speech.

[53] Guichaoua, *supra* note 48: "Face à des accusés recourant à une stratégie de défense purement politique et s'abritant derrière les crimes des vainqueurs, pouvant faire taire parmi eux les accusés de second rang ou déviants qui auraient eu intérêt à plaider coupable, l'accusation semble impuissante à conserver l'initiative et à se sortir des blocages procéduriers."

[54] *Supra*, page 13

[55] For example, in an interview granted to the BBC, President Kagame said: "If people stood by watching genocide take place why can't they be tried?" *Talking Point Special: Ask Rwanda's President*, February 2004.

[56] "Co-operation Secretary Clare Short [was] enthusiastically supporting the Rwandan government and initially denouncing critical human rights reports as "political propaganda."" *Human Rights Watch World Report 2001*, "Rwanda", "The Role of the International Community" http://www.hrw.org/wr2k1/africa/rwanda3.html

[57] As implied, for example, in the International Crisis Group's *Africa Report no.69*, "The International Criminal Tribunal for Rwanda: Time for Pragmatism", 23rd September 2003, in its recommendation to the ICTR to "[r]e-launch discreetly outside Rwanda the investigation into crimes alleged to have been committed by the RPA, keep the cases open past 2004 and be ready, if necessary, to bring indictments."

The hindrance to prosecutorial discretion is unlikely to disappear in the context of a hybrid tribunal: that model maintains international characteristics, making it vulnerable to interference from powerful members of the 'international community'; equally, the government of the concerned state could presumably exert more power over a hybrid than a purely international tribunal, both during the negotiations leading to its establishment[58] and in the course of its operation. The multiple sources of political manipulation might constitute a necessary price to pay for the enhanced local perception of legitimacy that hybrids are capable of possessing, as well as their other advantages. Moreover, the above discussion shows that the pressures on the ICTR's prosecutorial agenda stem mainly from the 'international community', even though it might be acting on behalf of, or in deference to, the Rwandan authorities. Therefore, I would doubt that a hybrid would be subjugated to *more* political influence than a purely international tribunal.

c. The Tribunal's Distance

The ICTR is located in Arusha, Tanzania, with the exception of a branch of the Office of the Prosecutor, which resides in Kigali, Rwanda. That decision was reached for reasons of perceived independence, of security and, possibly, as a result of the United Nations' partiality to the Arusha Accords.[59] Indeed, it may be that this quest for an 'international policy of continuity' was counter-productive with respect to legitimacy, *inter alia*. At the time of the Tutsis' decimation, the insistence of the 'international community' on the Accords arguably led to the overshadowing of the events that truly warranted concerted and decisive international efforts: the genocide, meticulously planned for at least two years, that took centre-stage within the wider context of the civil war. It is argued[60] that this focus was instrumental in the reticence of the Security Council,[61] individual powerful States and the press to call the events unfolding between April and July 1994 by their legally accurate name:

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[58] An example from Cambodia: "…[T]he Cambodian government has insisted that Cambodians have a dominant role. The U.N. at first resisted because of the Cambodian government's long history of manipulating its legal system. But the U.N. was later forced to acquiesce when the U.S. government brokered a deal largely on Cambodian terms." *Human Rights Watch World Report 2001*, "Introduction", "International Tribunals" http://www.hrw.org/wr2k1/intro/intro15.html

[59] The Arusha Peace Accords, signed by President Habyarimana and the Chairman of the RPF on 5th October 1993. They formed the grounds for the presence of the United Nations Assistance Mission for Rwanda (UNAMIR), the peacekeeping force headed by General Romeo Dallaire.
C. Aptel states in "The International Criminal Tribunal for Rwanda" *321 International Review of the Red Cross 675* (1997): "Arusha is symbolic in that it hosted the negotiations on the political stabilization of Rwanda, which culminated in the conclusion of the Arusha Accords." She does not, however, attach to this statement the negative connotations that I ascribe to it.

[60] See e.g. Power, *supra* note 38, pp. 345-348.

genocide. Alternatively, the early, concealed refusal to tread into the domain of the *Genocide* Convention[62] was the reason behind a prolonged focus on the *civil war*.[63] This analysis allows one to infer that the ICTR, the embodiment in (or closer to) Rwanda of the "international community", the very same entity that failed Rwandans ten years ago, might be in fact burdened by this association to the extent that its legitimacy is tarnished.

There are more immediately felt problems arising from the ICTR's location. Proponents of international prosecutions often suggest that the declaratory power of such trials is fundamental to a sense of "healing" and "justice" (the distinct concepts are in fact collapsed, one might suggest) among the divided community. The expressive function of trials is severely dented if the physical distance between the 'symbol' and the divided community is such that the declaratory force cannot overcome it. There is a risk of destabilising fragile witnesses, who are forced to travel some way to testify in a foreign and possibly intimidating environment.[64]

Further, a distant location (which, after all, was chosen to facilitate the work of the ICTR) imposes additional responsibilities on the Tribunal to ensure that its proceedings are widely and promptly publicised in Rwanda, to all communities and via all media. There are frequent allegations that this duty is not being met. This leads the Rwandan Government, along with several international and Rwandan commentators to suggest that the location impacts negatively on the perceived legitimacy of the Tribunal to deal with the genocide, particularly with respect to the secondary aims expressed in the Preamble of the Statute of the ICTR: the Security Council was "[c]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would … contribute to the process of national reconciliation and to the restoration and maintenance of peace."[65] It does appear from the wording of the relevant parts of the Preamble that the Security Council did not intend thereby to

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[61] Of which the Habyarimana government was a non-permanent member at the time.
[62] Convention on the Prevention and Punishment of the Crime of Genocide, *78 U.N.T.S. 277*, entered into force Jan. 12, 1951.
[63] More recently, due to the de-classification of various official documents, allegations have re-surfaced of certain States' actual complicity with the *genocidaire* government. L. Melvern, "The West Did Intervene in Rwanda, On the Wrong Side", *The Guardian, 5th April 2004*.
[64] At the Conference, *supra* note 42, Mr. Ngoga illustrated this point with an example: he claimed that many rape victims felt extremely intimidated: rape testimony would have been much easier to handle had the Tribunal been close to the victims, not only because of the delicate issues involved, but also because of what he denoted as a particular 'Rwandan culture of privacy'.

prescribe the modalities of publication and dissemination of the ICTR's work. Instead, the implication appears to have been that the "process of reconciliation and … the restoration and maintenance of peace" would automatically flow from the mere existence of prosecutions. To its credit, the ICTR itself has acknowledged the imperative of publicity,[66] both as a benefit in itself and as a means to achieve its secondary objectives. However, the success of the measures adopted by the Tribunal in this regard has been criticised by, *inter alia*, Rwandan interest groups,[67] although the ICTR must be credited with at least some attempts at implementing a policy of outreach to compensate the drawbacks of its removed location, further exasperated by other legitimacy deficits.

Hybrid solutions can advance a dual function in redressing the shortcomings stemming from international tribunals' distant location. They have the potential to enhance the judicial process' publicity in the affected country; moreover, their ability to build the capacity of local legal systems, structurally and normatively, can produce several practical benefits, thus contributing to post-conflict reconstruction. These advantages are intertwined with legitimacy considerations: the physical proximity of prosecutions for gross violations of human rights can heighten their declaratory value, providing an increased sense of acknowledgment of victims' pathos, as well as reinforcing public condemnation of perpetrators' actions. At the same time, hybrids' pragmatic contribution to reconstruction, while of course valuable in itself, can also corroborate the proceedings' legitimacy, reducing the perception that international tribunals are more concerned with promoting and developing international criminal law than with addressing a specific conflict to the satisfaction of those involved. Moreover, physical reconstruction is arguably a pre-requisite to any kind of reconciliation.

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[65] *U.N. Doc. S/RES/955 (1994)*

[66] Examples can be found in the ICTR's "Outreach Programme" (1998, detailed at detailed at http://www.ictr.org/commemoration/faq/faq-4.asp) and its policy on access to documentation, Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management, Section No. 2/98, which states the "Principle of Publicity" Article 32: "In conformity with the principle of publicity of the work of the Tribunal, the Court Management Section shall provide public access to documents."

[67] See, e.g., M. Kabanda, vice-président de la Communauté Rwandaise de France, and A. Gauthier, président du Collectif des Parties Civiles pour le Rwanda, "IBUKA2002: Huit ans après le génocide, quelle justice pour le Rwanda?", *Liaison-Rwanda*, 1st May 2002

Part III. Capacity Building and Norm-Dissemination Potential

In Part I of this essay, I suggested that hybrid tribunals are often considered part of the wider process of 'nation-building', unlike purely international ones, which limit themselves mainly to judicial functions. Hence, hybrids must be located inside the affected country. In addition to the declaratory and legitimacy-enhancing effects of transitional justice mechanisms' very proximity, hybrid tribunals can be structured with a view to delivering additional advantages to the affected society. They can also serve to improve and advance international criminal justice.

The presence of international actors can supplement other legal training programs, by providing "…on-the-job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles."[68] Local legal professionals and trainees could especially benefit from observing and participating in the practical application of international law. Not only does the local legal system accrue relevant international experience, the international normative sphere can also benefit from the active dissemination of its rules and principles within local legal cultures. Furthermore, international lawyers involved in a hybrid judicial process will draw valuable lessons regarding other legal cultures, while witnessing the realities of the interaction between international and national law.

The latter process of 'cross-fertilisation'[69] should, in the long run, contribute to reforming international law itself, perhaps by broadening the relatively narrow, 'Western' grounds on which it is edified. In truth, international criminal law is in dire need of reform; increasingly, it has been the target of severe reproaches (in part fuelled by the failures of the *ad hoc* Tribunals to address local needs adequately) directed at its theoretical *lacunae*. Paul Roberts, for instance, penned a convincing critique[70] of international criminal law, arguing that it lacks the extensive interdisciplinary research that national criminal law in the West is shaped by. The retributive understanding of 'criminal justice' arises out of years of debate, controversy and policy changes surrounding the proper purpose of criminal trials. The notion of 'deterrence' similarly flows from socio-legal research based on national

[68] Dickinson, *supra* note 12, p. 307
[69] *Id.* "Because the personnel of such institutions include both international and domestic judges, the opportunities are much greater for the cross-fertilization of international and domestic norms regarding accountability for mass atrocity."

data, and has indeed been in many respects discounted at the national level. Several further examples exist, yet international criminal justice rests on a compromise between different 'Western' frameworks, with their underlying assumptions. Moreover, the socio-legal studies shaping these national models are not undertaken with mass atrocities and transitional societies in mind. International criminal justice is thus debilitated from the very outset, stunted by "…isolationist tendencies and stultifying disciplinary exclusivity…"[71] that prevent it from adequately responding to the needs of post-conflict societies. While it rests primarily with academics and policy-makers to address these attacks on the very foundations of international criminal justice, hybrid tribunals can offer a fruitful arena for identifying problems, collecting data and exchanging ideas.

Turning back to the more immediate concerns of post-conflict societies, it should also be observed that hybrid tribunals, by virtue of their location and their use of whatever local structures and human capital employable, can carry substantial economic benefits, such as donor funding, international actors' contribution to the reconstructing local economy and the physical rebuilding of the local judicial infrastructure. Certainly, their potential for economic contributions is greater than that of a purely international tribunal, especially but not exclusively due to the latter's distant location.

[70] P. Roberts, "For Criminology in International Criminal Justice", *1(2) Journal of International Criminal Justice 315* (2003)
[71] *Id.* p.317

Concluding Remarks

In this essay, I have analysed some of the dangers that the operation of the ICTR has been riddled with, in particular regarding its national and international legitimacy. The focus has been on those shortcomings that are not limited to the Tribunal; on the contrary, governmental hostility, political manipulation, remoteness and lack of physical, human and normative capacity-building are common problems of purely international criminal prosecutions. The possible remedies that hybrid courts can offer for such grievances have been discussed. Their potential, of course, will remain unrealised if they continue to be plagued by chronic under-funding, which can leave them without even the most basic necessities to function properly. Furthermore, as can be deduced from, *inter alia*, the reluctance of powerful states to defer to its authority, the future of the entire international criminal law system is far from definite. In what can be interpreted as an attempt by the Coalition Provisional Authority to corroborate its alleged 'hand-over of sovereignty' to Iraq, Saddam Hussein, among other members of the 'Baghdad 12', has been consigned in secret to a purely national tribunal, despite repeated calls for a hybrid solution to be implemented there.[72] Until today, the policy debates surrounding international criminal law, whether 'pure' or 'hybrid', remain subordinate to extemporaneous political circumstances. Such pitfalls are not, however, limited to hybrid tribunals, rather they span all internationally propelled post-conflict mechanisms.[73] In the future, where international initiatives are permitted to proceed, hybrid tribunals should not be discarded from the varied 'menu' of transitional justice options.

[72] "Good Morning. I have a few questions for you…", *Guardian Unlimited*, 1st July 2004, available at http://www.guardian.co.uk/Iraq/Story/0,2763,1251237,00.html .
[73] Dickinson, *supra* note 12, p. 307.