jilir
JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Printed in Canada by Webcom Inc.
Cover design by uomo studio.
ISSN: 1712-2988.

The *Journal of International Law and International Relations* is a peer-reviewed scholarly journal that fosters interdisciplinary discourse at the nexus of international law and international relations. In promoting critical, informed, and interdisciplinary debate on international affairs, the journal provides a forum for the advancement of knowledge, ideas, dialogue and dialectic.
The opinions expressed in the *Journal of International Law and International Relations* are those of the individual authors and do not necessarily reflect the opinions of the journal, its editors or its publisher.
The *Journal of International Law and International Relations* gratefully acknowledges the financial and institutional support of the Faculty of Law and the Munk School of Global Affairs at the University of Toronto.
Each volume of *Journal of International Law and International Relations* consists of two issues, which are published biannually. The subscription cost per volume is USD$64.
Please direct subscription requests to:
Journal of International Law and International Relations
University of Toronto
84 Queen's Park Crescent
Toronto, Ontario M5S 2C5

Subscription requests may also be made via e-mail at subscriptions@jilir.org.

Past issues of the *Journal of International Law and International Relations* can be found online at Westlaw, Hein Online, Proquest and EBSCOhost.

The citation for this issue is (2011) 7 J Int'l L & Int'l Rel

EDITORIAL BOARD

The Journal of International Law and International Relations is published by the University of Toronto Faculty of Law.

JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS
VOLUME 7
FALL 2011

Contents

EDITORS' ACKNOWLEDGEMENT

MEGAN DERSNAH, RYAN LISS & BRENDAN MORRISON

This was a year of big changes for the Journal: the largest staff in its history by a significant margin, a new production schedule, and our first full year affiliated with the new Munk School for Global Affairs. The Editors-in-Chief are indebted to the many people that helped implement these changes seamlessly and contributed tireless efforts to bring this Volume together. While we cannot thank everyone directly, please know that your contributions were very much appreciated.

We would like to begin by thanking both our predecessors and successors. Last year's Editors-in-Chief, Aaron Kreaden and Dan Moore were always available to answer our many questions. Likewise, the incoming Editors-in-Chief, Louis Century and Tim Hughes, were gracious and enthusiastic collaborators making the transition an easy one. We have no doubt that Volume 8 is in good hands.

The publication of this Volume would not have been possible without our incredible editorial staff. The Associate Editors devoted a great deal of time to reviewing the submissions, ensuring the accuracy of footnotes, and providing feedback to our authors. Our Managing Editors, Jonathan Bright, Sam Plett and Kate Robertson, and our Production Editor, Todd Brayer provided truly invaluable contributions through their meticulous efforts to ensure that the selected submissions were properly prepared for publication. In addition, the Senior Associate Editors were a significant part of the editorial team, participating in the editorial process and aiding in the co-ordination of the reviews. Finally, we would like to thank our Board of Senior Editors – not only did they provide insightful commentary on the many submissions we considered, they were also an incredible group of people to work with and a great group of thinkers to challenge and to be challenged by. Among our Senior Editors, special thanks goes to Lindsay Beck, who also acted as our Executive Editor. Reliable, diligent, and exceedingly positive can only begin to describe Lindsay's work ethic, and it was great to work with her.

The Journal's faculty advisors provided critical support and guidance. We thank Professors Audrey Macklin and Jutta Brunnée from the Faculty of

Law and Professor Steven Bernstein from the Munk School of Global Affairs for all of their help.

In closing, we would like to thank the authors who contributed to this Volume. It was a pleasure to work with you all, and we thank you for your contributions to the Journal and to the fields of international law and international relations.

Hybrid Tribunals at Ten
How International Criminal Justice's Golden Child became an Orphan

PADRAIG MCAULIFFE

I. Introduction

In the decade that has passed since their foundation in 2000, the popularity of hybrid criminal tribunals as an avenue for transitional criminal justice has declined dramatically. While six such tribunals were created in the first half of the decade, none were created subsequently. Those that are completed or ongoing have generally been subject to strident criticism by scholars who initially hoped, or expected, that the combination of international and domestic law and expertise would cause the tribunals to

Vol. 7, pp. 1-65. ISSN: 1712-2988.

appear more legitimate to the survivor populations concerned, and to leave a lasting legacy by strengthening national domestic justice systems. This article examines the nature of these claims by revisiting the circumstances and drafting history that gave rise to each tribunal. It identifies a divergence of expectations between those who assumed an inherent 'promise' in this novel structure to leave a legacy in the long-term, and those who actually negotiated the founding agreements for such tribunals with more short-term, security-driven concerns. It then goes on to contrast the optimistic and holistic assessment of their inherent potential with the dominant impetuses in international criminal justice policy of retributivism and non-impunity, which have marginalized the longer-term concerns supported by the hybrid model's initial advocates.

Employing a comparative perspective to examine how and why the six hybrid tribunals established to date in East Timor, Kosovo, Sierra Leone, Cambodia, Bosnia and Lebanon fell so far short of initial hopes, this article reviews the performance of hybrid courts in the past decade to urge a re-evaluation of their potential. After briefly contextualizing the present day position of hybrid courts in Part I, Part II summarizes the claims initially posited about the potential of hybrid tribunals to improve on the national/international dichotomy. Part III goes on to argue that the tribunals have not developed from reasoned application of such theories or a conscious process of experimentation to these ends; rather, they have been implemented as the result of forced compromises and haphazard bargains to fill pressing impunity gaps in emergency situations. It argues that wider, more holistic, rule of law development has been an afterthought at best. In effect, the cart was put before the horse. Arguments based on the potency of hybrid tribunals to have greater legitimacy before the affected public or to develop judicial capacity were idealized post-hoc rationalizations of what, in truth, were politically contingent compromises concerned more with expedient punishment than the reconstruction of justice systems. Part IV examines the experience of the tribunals in the intervening years. Particularly, it observes how these hopes of a publicly legitimate, capacity-building, and norm-promoting institution went unrealized in courts whose paramount concern was the fight against impunity. Part V, by contrast, re-evaluates the underestimated success of the tribunals in providing accountability as a core rule of law value and a necessary precursor to stability in the post-conflict period. The article concludes that the hybrid tribunal remains worthy of the enthusiasm it once attracted, but not in idealized terms under which it can only disappoint. Instead, such tribunals should be re-evaluated in light of their role as versatile and complementary stopgap measures to fill impunity gaps occasioned by the politics of international tribunals and the inevitable weaknesses of the justice systems in post-conflict States, where they have hitherto found their greatest success.

II. Background

The advent of the complementarity regime outlined in Article 17 of the 1998 Rome Statute appears to have cemented the choice of either the

International Criminal Court or purely domestic trials as the primary avenues for criminal accountability in the wake of war or gross human rights violations.[1] The effect of the Statute's complementarity regime is that responsibility for investigation and prosecution of human rights abuses and breaches of international humanitarian law is delegated to ostensibly willing and able States on the rebuttable presumption that such efforts will be genuine. The ICC only steps in as a last resort when national justice mechanisms fail. International criminal justice policy is now dominated by a binary (some would argue antagonistic) choice between domestic and international prosecution. Where domestic prosecutions are impossible, the ICC has become the "definitive model" for the implementation of international criminal justice.[2] The Court does not so much "add another layer to the geometry of transitional justice"[3] as smother other institutional alternatives. While the Court has begun to develop a varied praxis and jurisprudence on issues of complementarity, animated by an ICC Prosecutor jealous of his jurisdiction, States like Sudan have made forceful assertions of the sovereign right to punish. The binary distribution of responsibility for punishing war crimes and gross breaches of human rights between national courts and The Hague is becoming ever more entrenched.

This re-enforcement of the national/international dichotomy—a dichotomy that has animated debates on international criminal justice since Nuremberg—is the predictable consequence of extensive efforts by sovereignty-anxious States to limit the intrusive powers of the ICC. It may nonetheless have surprised many commentators, who saw the innovation of the hybrid tribunal model as a preferable option to purely domestic or purely international jurisdiction when it emerged in the interregnum between the adoption of the Rome Statute in 1998 and its entry into force in 2002. As recently as 2005, former ICTY judge Patricia Wald could extol the virtues of hybrid tribunals as "a phenomenal development" towards which international tribunals for trying war crimes and crimes against humanity were likely to evolve.[4] The hybrid character of the tribunals Wald so admired

---

[1] Subsection 1 provides:
"Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(*a*) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(*b*) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(*c*) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(*d*) The case is not of sufficient gravity to justify further action by the Court."
Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

[2] Lindsey Raub, "Positioning Hybrid Tribunals in International Criminal Justice" (2009) 41 NYU J Int'l L & Pol 1013 at 1015.

[3] Carsten Stahn, "The Geometry of Transitional Justice: Choices of Institutional Design" (2005) 18 Leiden J Int'l L 425 at 459.

[4] "Wald Sees International Tribunals Evolving Toward 'Hybrid' Courts", Remarks made at the award of Thomas Jefferson Foundation Medal in Law from University of Virginia (15 April

stemmed from the features they all share, in contradistinction to the Rome Statute's apparent binary choice. Both the institutional mechanism and the applicable law consist of a combination of international and domestic components. There is no single or monolithic model of hybrid tribunals, and all manifestations enjoy a diverse nomenclature.[5] All hybrid tribunals are to a greater or lesser extent grafted onto the national legal order, though the degree to which they are primarily national or international has generated interesting case law on questions of amnesty and jurisdiction.[6] Foreign prosecutors, judges and sometimes defence counsel work side-by-side with domestic equivalents, with the composition of the blend dependent on the political and legal exigencies of the State in question.[7] The law applied is usually a mix of international criminal law modelled on definitions contained in the Rome Statute and domestic law reformed to include international standards. The domestic crimes are usually those not included or covered differently in the Rome Statute on account of qualitative differences (such as murder or rape), plus crimes with additional resonance in the aftermath of repressive rule, such as kidnapping minors in Sierra Leone, or cultural crimes in Cambodia. The seat of the tribunal can alternate between the *locus delicti* State and a neutral location, but is usually located in the former.

At the time of Wald's comments in 2005, the ICC Prosecutor was still casting his net forlornly for suitable initial cases to fight an incipient crisis of relevance.[8] On the other hand, the novel hybrid structure was on the ascent: the East Timor Special Panels, the Special Court for Sierra Leone (SCSL), Kosovo's Regulation 64 Panels, Bosnia's War Crimes Chamber (BWCC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were

---

2005), online: University of Virginia School of Law <http://www.law.virginia.edu/html/news/2005_spr/wald.htm>.

[5] Internationalized courts/tribunals and mixed courts/ tribunals have proven the most popular labels. Indeed, Stahn differentiates between hybrid tribunals, internationalized domestic courts and internationally-assisted courts (Stahn, *supra* note 3 at 436).

[6] *Prosecutor v Morris Kallon and Brima Bazzy Kamara*, SCSL-2004-15&16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber); *Prosecutor v Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara*, SCSL-04-15, 14 & 16-PT-032, Decision on Constitutionality and Lack of Jurisdiction (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber)*Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004) (Special Court, Appeals Chamber); E216, *Prosecutor v Kang Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTCO1), Decision on Appeal Against Provisional Detention Order of Kang Guek Eav, alias Duch (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, 3 December 2007).

[7] The East Timorese, Lebanese, and Sierra Leonean hybrid tribunals provided for international majorities. The Kosovo hybrid allowed for both domestic and international majorities. The Cambodian Extraordinary Chambers have a domestic majority, while the BWCC began with a 2:1 international-domestic ratio before switching to a domestic majority in its third year.

[8] Schabas convincingly argues that the ICC's first proceedings against the conveniently-captured Thomas Lubanga on lesser charges than those for which he was to be tried in the DR Congo's own courts may be seen as mirroring the ICTY's self-justifying initial prosecutions of the low-level Nikolic and Tadic. He argues the indictment was the product of impatience where "we had to get an indictment quickly." William A Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts" (2008) 19 Crim L F 5 at 32-33.

underway. A Special Tribunal for Lebanon (STL) was soon to be created. For a brief period between 2002 and 2006 before the ICC became truly effective, it was widely believed that the hybrid tribunals could leave a legacy of holistic rule of law reform in the subject State above and beyond the broad sociological impact of trials. This legacy would be one of development of the judicial capacity of national judges and lawyers involved in the process, the incorporation of fair trial norms, and fostering cultural commitment to the courts in the reconstruction of the national judicial system. These gains would be made feasible by their more legitimate appearance in the eyes of the affected population. This 'promise' of the hybridized model made them, for some, a superior option for the trial of serious crimes than distant international tribunals like the ICTY or ICC.[9] At the time it was no by means unusual to view the hybrid tribunal as superior to purely international criminals courts on the basis of how their structure "collapsed" the "artificial distinction between the international and domestic."[10] Though many argued that hybridized tribunals and the ICC should operate in a complementary fashion, in this period it even appeared reasonable to posit that a future proliferation of the model could create damaging overlaps of jurisdiction and duplication of work to the detriment of the ICC.[11] The future of hybrid tribunals as a primary institution in international criminal justice seemed secure.

In the five years since, hybrid tribunals appear to have fallen into both practical obsolescence and theoretical disfavour. The apparent obsolescence may be explained by the relative lack of post-conflict situations occasioning intrusive UN involvement in the likes of East Timor, Sierra Leone and Kosovo at the turn of the century that acted as a prelude to the hybrid tribunals. Additionally, the effective functioning of the ICC has presented an alternative means of international criminal accountability that did not exist when they were being formed. The Lebanese hybrid tribunal is the only new one to have been established in the last six years, while proposed or potential hybrid tribunals in Burundi and Iraq have fallen by the wayside.[12] An academic community once voluble in its support for new hybrid structures in Afghanistan,[13] Colombia,[14] Liberia,[15] Iraq,[16] and Palestine[17] now

[9] See for example Estelle R Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform" (2006) 23 Ariz J Int'l & Comp L 347 at 417; Brady Hall, "Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal" (2005) 13 Mich St J Int'l L 39.
[10] Frédéric Mégret, "In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice" (2005) 38 Cornell Int'l LJ 725 at 747.
[11] Stahn, *supra* note 3 at 465.
[12] A hybrid court was mooted by the UN Secretary-General in *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, UNSCOR, 2005, UN Doc S/2005/158, at para 60.
[13] Laura Dickinson, "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals" (2002) 31 Denv J Int'l L & Pol'y 23 [Dickinson, "Transitional Justice"].
[14] Antonio Cassese, "The Role of Internationalized Courts in the Fight Against Criminality" in Cesare P R Romano, Andre Nollkaemper & Jann K Kleffner, eds, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004) 3 at 10 [Cassese, "Fight Against Criminality"].

concentrates on the merits of ICC prosecutions and national initiatives. The once-forceful or even "quasi-euphoric"[18] advocacy for this model of international criminal justice as a first port of call for international criminal justice on a par with, or superior to, purely international or domestic trials, is nowadays largely muted.

This marginalization is perhaps best explained by the perceived betrayal of earlier hopes by the failure of the existing tribunals. The hybrid Special Panel process in East Timor has been completed with widespread condemnation.[19] The Khmer Rouge Trials before Cambodia's Extraordinary Chambers have been dogged by corrosive and credible accusations of corruption and bias.[20] Though "significant progress" had been made in putting together a case against Rafik Hariri's assassins since its foundation in March 2006, the Special Tribunal for the Lebanon has (at the time of writing) yet to hold a hearing of a suspect despite costing over US$50 million per year.[21] The Special Court for Sierra Leone is correctly deemed to be the most successful of the hybrid tribunals but, in trying its most important suspect Charles Taylor in the Netherlands, has shed critical elements of its hybrid form and moved further towards the international ad hoc court paradigm.[22] The last of Kosovo's Regulation 64 Panels' twenty-three prosecutions for war crimes occurred in 2006. The performance of the Panels was deemed to have been "so flawed that the example in Kosovo cannot serve as a model for internationalizing national judicial systems."[23] The Bosnian War Crimes

---

[15]Chernor Jalloh & Alhaji Marong, "Ending Impunity: The Case for War Crimes Trials in Liberia" (2005) 1 African J Leg Stud 53.

[16] David M Gersh, "Poor Judgment: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law" (2004) 33 Ga J Int'l & Comp L 273; Sylvia de Bertodano, "Were There More Acceptable Alternatives to the Iraqi High Tribunal?" (2007) 5 J Int'l Crim Justice 294.

[17] Cassese, "Fight Against Criminality", *supra* note 14 at 11.

[18] Mégret, *supra* note 10 at 746.

[19] Megan Hirst & Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (2005), online: International Center for Transitional Justice <http://www.ictj.org/images/content/1/2/121.pdf>; Kelly Askin, Sonja Starr & Stefanie Frease, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor* (2004), online: Open Society Justice Initiative and Coalition for International Justice, <http://www.globalpolicy.org/intljustice/tribunals/timor/2004/1104unfulfilled.pdf>.

[20] Anne Barrowclough, "Corruption Fears Cast Shadow Over Khmer Rouge Trial" *The Times* (16 February 2009), online: The Times <http://www.timesonline.co.uk>.

[21] For the first year of operations, the 2009 approved budget was USD 51.4 million. *Special Tribunal for the Lebanon Annual Report 2009/2010*, at 42, online: Special Tribunal for Lebanon <http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf>.

[22] Pádraig McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to the Netherlands to The Hague Defeats the Purpose of Hybrid Tribunals" (2008) 55 Neth Int'l L Rev 365.

[23] Amnesty International, "Serbia – Kosovo: The Challenge to Fix a Failed UN Justice System" (2007) at 5, online: ReliefWeb <http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SODA-7BBALA-full_report.pdf/$File/full_report.pdf>. See also Tom Perriello & Marieke Wierda, "Lessons Learned From the Deployment of International Judges and Prosecutors in Kosovo" (2006), online: International Center for Transitional Justice <http://www.ictj.org/static/Prosecutions/Kosovo.study.pdf> [Perriello & Wierda, "Lessons"].

Chamber has been more successful than the others, but, as will be examined, it enjoys significant advantages that are denied to its counterparts. Overall, it might be said that the hybrid tribunal structure has slipped from the parity of esteem with international tribunals it briefly enjoyed because of the gap between the early theory and disappointing practice.

International criminal law has seen similar periodic bouts of enthusiasm for innovations like ad hoc tribunals and universal jurisdiction, which were followed by disappointed hopes and later marginalization.[24] However in the case of hybrid tribunals, enthusiasm was not so much misguided as misdirected. Hybrid tribunals were created as expedient stopgaps to plug holes the national/international jurisdiction dichotomy could not fill, but were evaluated on the basis of their legitimacy in the eyes of the local population, contribution to capacity-building, and inculcation of fair trial norms. In retrospect, these standards proved quite unsuitable.

III. Idealizing the Hybrid Tribunal

In the years 2000 and 2001, when hybrid tribunals were established in East Timor and Kosovo and became the basis of negotiations in Cambodia, the novel hybrid structure was presented in evolutionary terms in the history of international criminal justice. It was posited as the last stop in a progressive trail of enforcement of international justice that led naturally from the supranational agreements to prosecute crimes at Nuremberg and Tokyo, to the ICTY and ICTR, to the ICC, then to domestic trials through the exercise of universal jurisdiction, and finally to mixed tribunals. For example, Dickinson placed hybrid tribunals as a fifth stage in accountability mechanisms.[25] Higonnet, on the other hand, saw hybrids as a third generation of international criminal tribunals after Nuremberg and the ad hoc international tribunals.[26] Burke-White contextualized the hybrid tribunal historically as an example of the evolutive delegation of authority; just as the international community delegated authority to prosecute international crimes first to international tribunals and then to international courts by Conventions, now both the international community and domestic States jointly delegate the authority to hybrid structures.[27]

Analysis of the hybrid tribunals followed an almost dialectic process revealed through critique of international tribunals in terms of axes of legitimacy, capacity-building and norm penetration, which were then contrasted with the benefits of local participation and location in the State where the crimes occurred.[28] The idea that additional benefits, above and

[24] Luc Reydams, "The Rise and Fall of Universal Jurisdiction" in William A Schabas and Nadia Bernaz, eds, *Handbook of International Criminal Law* (London: Routledge, 2010) at 337.
[25] Laura Dickinson, "The Promise of Hybrid Tribunals" (2003) 97 Am J Int'l L 295 at 295 [Dickinson, "Promise of Hybrid Tribunals"].
[26] Higonnet, *supra* note 9 at 352.
[27] William W Burke-White, "A Community of Courts: Towards A System of International Criminal Law Enforcement" (2002) 24 Mich J Int'l L 1 [Burke-White, "Community"].
[28] In this, it built on trenchant contemporaneous criticisms of the ad hoc tribunals in Jose

beyond the paramount concern with accountability that animated earlier tribunals from Nuremberg to the ICC, should be associated with hybrid tribunals was in one sense opportunistic. Simply put, the mixed nature of hybrid courts offered possibilities which hitherto had not existed. Speculation about the model's potential was perhaps inevitable. However, the argument about hybrid courts' potency acquired a sense of urgency from the very contexts in which the first hybrid tribunals arose, namely the transitional nature of the state in which they were deployed. As will be examined later, Sierra Leone, Kosovo and East Timor were subject to highly intensive peacebuilding missions engaged in precarious processes of transitional governance, including significant measures of judicial reconstruction. Indeed, so weak were the latter two territories that they were subject to direct territorial administration by UN transitional authorities empowered to exercise all legislative and executive authority, including the administration of justice. Arguments about hybrid court potential outlined below were arguably born out of a sense of necessity. Hybrid tribunals were argued to serve a different purpose than other international criminal tribunals because it was felt that they needed to. It was not merely enough for these tribunals to try suspects—their practice and jurisprudence should catalyze wider response to make precarious transitions more sustainable. Though the BWCC came later, it was obvious in the earliest years of the century that the ICTY could not be sustained indefinitely, and that some war crimes function would have to be incorporated into the ongoing processes of judicial reform in the transition to democratic rule in Bosnia-Herzegovina.

This sense of necessity was perhaps compelled by the recognition that purely domestic proceedings in the States where hybrid tribunals emerged were precluded by the fact that the administration of justice had broken down, while the prospects for a fair and competent trial were far from promising.[29] In areas where hybrid tribunals were founded, societies were emerging from prolonged periods of repression or conflict. Such conditions were typified by "an abundance of arms, rampant gender and sexually-based violence, the exploitation of children, the persecution of minorities and vulnerable groups, organized crime, smuggling, trafficking in human beings

---

Alvarez, "Crimes of States/Crimes of Hate: Lessons From Rwanda" (1994) 24 Yale J Int'l L 365; David Tolbert, "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings" (2002) 26 Fletcher F World Aff 5; and Marieke L Wierda, "What Lessons Can be Learned from the Ad Hoc Tribunals?" (2002-2003) 9 UC Davis J Int'l L & Pol'y 13.

[29] For an examination of the state of the courts in Kosovo East Timor in 2000, see Hansjoerg Strohmeyer, "Making Multi-Lateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" (2001) 25 Fletcher F Wld Aff 107; on Sierra Leone, see Niobe Thompson, *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone* (2002), online: Commonwealth Human Rights Initiative <http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf>, while Human Rights Watch's report entitled *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Trial Agreement* (2003) summarizes the various problems attaching to the Cambodian court system, online: Human Rights Watch <www.hrw.org/en/reports/2003/04/30/serious-flaws-why-un-general-assembly-should-require-changes-draft-khmer-rouge-tr>.

and other criminal activities."[30] Though it is at these times that the need for law, order, and stability is greatest, the essential conditions for a fair and effective judiciary were rarely present. Where the transitional State was in the developing world or emerging from colonization, institutions of justice may never have been very strong to begin with, as in Sierra Leone and Cambodia. Many judges and lawyers may have been killed in conflict or fled from it, while legal education may have ground to a halt under repression, as in Cambodia and East Timor. The complexities of international criminal law were such that domestic judges and lawyers ran serious risk of misapplying it.

In the States where hybrid tribunals were established, the legitimacy of the national judiciaries and legal professions were greatly diminished. Justice was tainted by association with the former regime, a microcosm of the social and political divisions in each country. This had two main consequences. First, justice may have operated either as an instrument of the prior rulers in vindicating and upholding persecutory and discriminatory laws, or in failing to prevent them. Inclusion or promotion of judges may have depended on subservience, complicity in crimes, or loyalty to a party or junta. Ethnicity may have been determinative, as in the occupied courts in Kosovo and East Timor which were dominated by Serbs and Indonesians. If judges propped up the prior regime, there was little prospect that their decisions would enjoy legitimacy in the eyes of the local population. Where the judiciary operated in the narrow interests of ruling elites rather than the population as a whole, there existed no expectation that justice could be done through the courts. The second main consequence was that in the aftermath of repressive regimes, the public generally had little or no conception of what justice fairly administered meant, with predictable results for public trust in the judicial system:

> When it is the state that is complicit in persecution, fundamental notions of criminal justice are turned on their head; state complicity, cover-up, and other obstructions affect the very possibility of justice.[31]

The transitional State frequently knows neither democracy nor justice. Law may mean little more than discriminatory emergency decrees or is unknown to the people. The political machinery may have broken down, while there may be little technical or financial capacity to remedy the situation. Justice was the product of political distortion and contrived weakness, reflecting neither human rights norms nor procedural fairness. Ideas of judicial independence are frequently anathema in illiberal rule. Thus, while international tribunals offend against sovereignty and are unaccountable to the population they are working for, domestic courts were too weak and compromised to make full complementarity a workable

---

[30] UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, 2004, UN Doc S/2004/616, at para 27 [UN Secretary-General, *Rule of Law Report*].

[31] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 65.

proposition.

The obvious response in such cases was once thought to be a fully international tribunal. However, the shortcomings of the ad hoc tribunals in The Hague and Arusha made apparent the reality that "as the benefits of supranational adjudication are realized, those of domestic adjudication are lost."[32] Hybrid tribunals were considered to represent a mid-point between the two jurisdictions, "collapsing" their distinctions in an attempt to utilize the positive aspects of both.[33] Constituted as a response not only to the shortcomings of domestic courts outlined above, but also to the problems that emerged from the ad hoc tribunals (outlined below), hybrid tribunals supposedly merged the best elements of both systems as a more successful and sustainable means of transitional accountability.[34] This approach was adopted in very influential and widely cited articles by Laura Dickinson in 2002 and 2003, with the critique therein refined and developed by a number of subsequent commentators.[35]

1. Legitimacy

The primary advantage claimed for hybrid tribunals was the fact that they avoided the legitimacy deficit that impaired the expected progress of the ad hoc courts in advancing reconciliation in Yugoslavia and Rwanda. Dickinson saw the question not as a formal one of political or democratic legitimacy. Instead, she looked at perceived legitimacy in a more observable sense, namely "which factors tend to make the decisions of a judicial body acceptable to the various populations observing its procedures."[36] It should be pointed out that it was never simply a matter of saying that international courts do not enjoy the legitimacy domestic courts would. Significant portions of the Yugoslav and Rwandan societies supported the formation of purely international tribunals, and the ad hoc tribunals were in many respects effective. However, by the time UNMIK and UN Secretariat negotiators were cobbling together the Regulation 64 and Extraordinary Chambers structures, much of the initial goodwill towards the ad hoc

---

[32] William W Burke-White, "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration" (2003) 38 Texas Int'l L J 729 at 734 [Burke-White, "Regionalization"].
[33] Mégret, *supra* note 10 at 747.
[34]Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 Harv Hum Rts J 245 at 245.
[35] Most notably Higonnet, *supra* note 9; Jenia Iontcheva Turner "Nationalizing International Criminal Law" (2005) 41 Stan J Int'l L 1; Hall, *supra* note 9; and serving as the critical point of reference for Sarah MH Nouwen, "'Hybrid courts': The hybrid category of a new type of international crimes courts" (2006) 2 Utrecht L Rev 190. Dickinson's analysis is followed to a lesser extent, or referred to approvingly, in David Cohen, "'Hybrid' Justice in East Timor, Sierra Leone and Cambodia: 'Lessons Learned' and Prospects for the Future" (2007) 43 Stan J Int'l L 1 [Cohen, "Hybrid Justice"]; Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan" (2006) 106 Colum L Rev 182; Danielle Tarin, "Prosecuting Saddam and Bungling Transitional Justice in Iraq" (2005) 45 Va J Int'l L 467; Olga Ortega-Martin & Johanna Herman, "Hybrid Tribunals and the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia", online: (2010) JAD-PbP Working Papers Series No 7 <http://www.uel.ac.uk/chrc/documents/WP7.pdf>; and Gersh, *supra* note 16.
[36] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 301. Hall uses the same definition, *supra* note 9 at 46-47.

tribunals had been lost. Far from assuming that popular disenchantment with the tribunals was the inevitable product of the intractable problems of the radically imperfect context of transitional trial for mass atrocity, observers instead ascribed it to problems hybrid tribunals seemed uniquely placed to remedy.

The primary problem identified in the ad hoc tribunals was their perceived democratic deficit. The legitimacy of any court is undermined in the eyes of the population if it operates outside the normal domestic system of checks and balances, and is accountable only to an unaccountable international mission. With purely international courts enjoying no domestic input or control, it became all too easy for the likes of Slobodan Milosevic to invoke the jurisdictional imperialism critique that trials are "illegal" political instruments,[37] and thereby prejudice domestic opinion.[38] It had become apparent that too much international control or insensitivity to local needs could see legitimacy tainted by perceptions of imperialism, or claims that the tribunal was the instrument of big powers. These fears were easily stoked up by certain parties in States such as Rwanda or Yugoslavia with historic experiences of imperialism or manipulation by larger States. For example, a Croatian survey found that a "high percentage of Croatians believed that The Hague was biased," 52 per cent believed it wanted to "criminalize the Homeland War," and 78 per cent believed it should not extradite citizens to it.[39] The top-down imposition of international courts unattuned to the needs of the local population (which were at best an afterthought in the creation of the ad hoc tribunals) incurred local enmity, especially when the local courts were given no opportunity to pronounce as to the legitimacy of the trials. The perception of illegitimacy or victors' justice made it difficult for the domestic government to cooperate, as was seen in Serbia and Croatia.

Notwithstanding the fact that the international community had committed itself only a few years earlier to an ICC based in The Hague, much was made of the physical and psychological distance between the sites of the atrocities in Yugoslavia and Rwanda and the courts in the Netherlands and Tanzania. This dislocation meant there was little or no connection between the affected population and the trials.[40] As more ethical concerns about the interests of victims came to the fore, holding the trials in a different

---

[37] *Prosecutor v Milosevic*, IT-02-54, Transcript of Initial Appearance (3 July 2001) (International Criminal Tribunal for the former Yugoslavia), online: United Nations <http://www.un.org/icty/transe54/010703IA.htm>.

[38] Sandra Coliver, "The Contribution of the International Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina" in Dinah Shelton, ed, *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, New York: Transnational Publishers, 2000) 19 ("[m]ost Croats and Serbs View the Tribunal as utterly biased against their communities, and more than willing to turn a blind eye to atrocities committed by Bosniaks" at 20).

[39] Burke-White, "Regionalization", *supra* note 32 at 736.

[40] Alvarez, *supra* note 28 ("[t]o many surviving members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they can understand, subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty" at 403).

country was deemed to deny both the immediate victims of the crime, and the victim community as a whole, the restorative justice element of the trials. It was argued that when victims could not attend the trials and see justice done with their own eyes, perceptions of justice were damaged.[41] Connections with the ICTY were at best piecemeal rather than the type of consistent constructive engagement that would have made the trials relevant to the local population. Studies confirm that remoteness engenders negativity and apathy towards trials. For example, a highly influential study of Bosnians from every ethnic group in the legal professions and their perceptions of the ICTY found that though they were generally supportive of the Tribunal's work, the distance did little to ameliorate their self-confessed ignorance of the procedures and rules of evidence and suspicions of perceived political biases.[42] Similar apathy (and indeed antipathy) was noted in Rwanda.[43] Turner drew a negative comparison between how closely domestic trials in France, Argentina, South Korea and Israel were followed by the local people with how the more distant trials at the ICTY and ICTR were observed.[44] The capacity for restorative justice where the local communities were unaware or uninterested in the trials was obviously diminished. These problems were exacerbated by failure to adequately publicize the tribunals' work. This omission was all the more unfortunate as the unfamiliar law and proceedings were frequently reported by self-interested third party sources, and lead to "gross distortions and disinformation."[45]

Those who argued that legitimacy is a prerequisite for the effectiveness of any transitional justice mechanism in advancing punishment and reconciliation found in the hybrid tribunal structure a means for importing legitimacy to successor trials in politicized and hostile environments, for three main reasons. First, the presence of international judges and prosecutors (and defenders, where provided) in either a majority or minority would alleviate fears of partiality or lack of independence in relation to national judges on the part of the local population. International prosecutors could moderate extremely dilatory or zealous prosecutions initiated by local prosecutors. Transitional criminal trials are inherently politically transformative, but legality demands independence from political pressure. It was posited that the presence of international actors in the units of the

---

[41] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004) at 166-187.
[42] The Human Rights Center and International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors" (2000) 18 Berkeley J Int'l L 102 at 136-40 [Berkeley & Sarajevo].
[43] Pernille Ironside, "Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation" (2002) 15 NY Int'l L Rev 31 at 31.
[44] Turner, "Nationalizing", *supra* note 35 at 27-28.
[45] Tolbert, *supra* note 28 at 11. See also Kingsley Chiedu Moghalu, "Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda" (2002) 26 Fletcher F World Aff 21, where it is argued that the African dependency on frequently negative or disinterested international media coverage of the ICTR has impaired its legitimacy.

hybrid tribunals, especially when in a majority or in leadership positions, would suffice to insulate the court from domestic political factors, the most obvious of which is governmental interference.[46] Because international personnel were removed from domestic politics, and because they were to be paid by the UN in whole or in part, the process was predicted to be infinitely less likely to be manipulated by governments and other factions. Given that most domestic transitional trials try either political enemies or estranged allies of the new polity, the presence of a foreign honest broker would be welcome. The supposition is that the bench, being the ultimate arbiter in criminal proceedings, would be the most likely to attract (if not the most susceptible to) such interference or pressure. It is for this reason that there was so much wrangling over the makeup of the Extraordinary Chambers in Cambodia, while the necessity of international judges became apparent in Kosovo and acknowledged by the Government of Sierra Leone. An international majority would serve to refute allegations of ethnic or victor's bias.

Second, though internationalization was required for the perception of impartiality, it was assumed that the trials would enjoy greater legitimacy in the eyes of the local population because judges "of their own kind are present as actors in the tribunal."[47] Because of the presence of local judges, the courts would become tied into the national polity.[48] It was argued that this sense of ownership flowing from a defined degree of national responsibility for the judicial process that would increase the relevancy of the court for the survivor populations.[49] Furthermore, it would accord with the emerging consensus that nationally-led strategies were more conducive to sustainable peacebuilding.[50] Furthermore, the foreign counterparts of the domestic contingent could confer with them and gain a greater sensitivity to local attitudes, history, and culture. This cooperation would help create a "framework for consultation that may have enhanced the general perception of the institution's legitimacy."[51]

Third, the problem of remoteness would be avoided. Victims could travel to the trials, facilitating restorative justice and possibly some degree of emotional catharsis. The media could attend with greater ease to help transmit the lessons and history revealed in court.[52]

2. Capacity-Building

At the time hybrid courts were created, the ad hoc courts had no

---

[46] Burke-White, "Regionalization", *supra* note 32 at 742.
[47] Hall, *supra* note 9 at 58.
[48] Similarly, Alvarez argued in the Rwandan context that "[i]f Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may itself be determinative of the legitimacy of these processes" (Alvarez, *supra* note 28 at 416).
[49] Philip Rapoza, "Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?" (2006) 21 Am U Intl L Rev 525.
[50] UN Secretary-General, *Rule of Law Report*, *supra* note 30 at para 15.
[51] Dickinson, "Promise of Hybrid Tribunals", *supra* note 32 at 306.
[52] Higonnet, *supra* note 9 at 362-367.

capacity-building or training remit for the domestic courts. Any contact between the ad hoc courts and the domestic courts was more about the pursuit of accountability in the former than development of the latter.[53] The lack of any sort of sustainable connection meant that Rwandan prosecutors played no part in investigating the crimes with their international colleagues; Bosnian judges played no role in adjudicating the trials of their countrymen, while the Tribunals were staffed and administered almost exclusively by foreigners. This was considered particularly unfortunate given that the sheer size and complexity of the cases, allied to the qualifications of the staff involved, could have trained domestic actors in almost all conceivable skills that a domestic criminal court requires. Tolbert, in a review of the ICTY, states that the tribunal suffered from "a strategic failure in that [it] has not had much impact on the development of courts and justice systems in the region…"[54] It was not that the capacity-building function was sidelined or pushed down the agendas of the ICTY and ICTR. Counter-intuitively, the mandate of the ad hoc courts to develop the long-term security and stability of two post-conflict societies was construed as narrowly as possible. The focus remained primarily on ending impunity for leading criminals in the war, with no specific role in judicial reconstruction for the self-evidently shattered domestic systems.

Hybrid tribunals were posited as a response to this failure.[55] Trials in transition would not only serve as a catalyst for further domestic successor trials, but also instruct the domestic court system in how high-quality trials should be operated generally. Mixed panels of judges and lawyers could help develop the abilities of judges, prosecutors, defence counsel and administrators who might gradually be empowered to assume full responsibility.[56] It was argued that by comparison with the ad hoc tribunals, hybrid courts theoretically had much to offer to the nascent justice system in terms of institutional legacy. This would either flow as an inherent consequence of the collaborative relationships involved, or would constitute a pedagogical spill-over effect from the proceedings.[57] To adopt a time-worn development cliché, while ad hoc tribunals fished for justice, hybrids could teach how to fish. Perhaps most forcefully, Cohen argued that hybrid composition:

> [O]ffers unique opportunities for capacity-building in all areas of the court.

---

[53] Jane Stromseth, Michael Wippman & Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006) at 273.
[54] Tolbert, *supra* note 28 at 10.
[55] For example, Jann K Kleffner & André Nollkaemper, "The Relationship Between Internationalized Courts and National Courts" in Romano, Nollkaemper and Kleffner, eds, *supra* note 14, 359 at 378; Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York: United Nations, 2008), online: OHCHR <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> [OHCHR]; Parinaz Kermani Mendez, "The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International [Humanitarian] Law or an Idealistic Solution With Empty Promises?" (2009) 20:1 Crim LF 53 at 94.
[56] Higonnet, *supra* note 9 at 377.
[57] Cassese, "Fight Against Criminality", *supra* note 14 at 6.

> Training court actors and administrators, introducing best practices and modern systems in case and document management, and providing a model for the domestic legal system and for the operation of the rule of law, represent some of the most important contributions that a 'hybrid' tribunal can make.[58]

A cooperative working environment was envisaged that could develop the skills of domestic actors. Local judges would deliberate and draft decisions in consultation with international judges who had knowledge of international standards and procedural norms. Local prosecutors and defence lawyers would work with international prosecutors, forensic analysts and researchers. Defence lawyers would cooperate with international defenders. It was argued that this on-the-job training was more likely to be effective than "abstract classroom discussion," or merely observing a purely international mission.[59] Even if there was no formal mentoring component, it was presumed that on conclusion of hybrid tribunals, local staff returning to the domestic system would have learned valuable lessons and skills from the process. It was furthermore argued that links could be formed between the domestic and hybrid institutions that would influence domestic law reform.[60] If the local government had experience of the practical running of a fair and competent special court, it appeared to follow that it could use these lessons in operating an international-standard domestic system.

3. Norm-Penetration

It was initially argued that having local judges and lawyers participating in high-profile, foundational trials in their own country would have a beneficial 'demonstration effect' on emerging local legal systems. The trial process would offer exemplary standards of independence, impartiality and norms of fair trial that could inculcate a cultural commitment to (and expectation of) such yardsticks among the public. The location of the hybrid tribunal within the domestic political infrastructure would provide the quality of trial visible at the ad hoc tribunals but in a manner less abstracted from local conditions. At a time when advocates of transitional justice were arguing with some force that actions in trials could have beneficial communicative effects in the field of politics and community, it was blithely accepted that trials could similarly have a demonstrative effect on public attitudes to legal processes. As Higonnet put it, "translation and cultural mediation can be an integral part of the tribunal rather than an afterthought or a bureaucratic detail."[61] In treating the successor trials as legitimate, the population might also treat the institution of courts generally as legitimate. For example, in relation to a trial of a Rwandan colonel indicted on genocide charges, Alvarez argued,

---

[58] Cohen, "Hybrid Justice", *supra* note 35 at 36-37.
[59] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 307.
[60] OHCHR, *supra* note 55 at 37-39.
[61] Higonnet, *supra* note 9 at 365.

> A local trial for Bagasora, even one subject to extensive international observation or even the possibility of appeal to the ICTR, would have affirmed to the world, and most importantly to all Rwandans, that Rwanda's institutions, including its judiciary, were capable of rendering justice even with respect to formerly exalted public officials.[62]

The collaborative structure of hybrid tribunals integrating local laws and personnel was predicted to resolve these problems. The process would exchange the insularity from local opinion and chauvinism of the ad hoc tribunals for consultation with, and involvement of, local people, easing the permeation of these norms.[63] Writers in the field proposed that hybrid tribunals would allow greater opportunities for public debate,[64] construct networks between international experts and the local judiciary,[65] and encourage cross-fertilization of international and domestic norms.[66] The model would go beyond the ad hoc tribunals' concern with crimes against humanity and war crimes, and go on to illustrate how a court system should approach issues like equality of arms, detention, due process and defendants' rights. Hybrid trials would serve as a platform on which the local people "absorb, apply interpret, critique and develop" international norms in the national criminal justice system.[67] Turner posited a relationship between hybrid composition and norm penetration as follows,

> Encouraging national communities to supplement these broad international norms with more concrete rules and interpretations of their own is consistent with ideals of autonomy and self-determination. It provides those communities with the opportunity to influence, in accordance with their core values, the laws and institutions that govern them.[68]

While the idea of foreign experts inculcating legality on a step-by-step basis seems almost paternal, inviting and participating in a hybrid tribunal could equally be considered a reclamation by the State of its responsibility and duty to live up to its international commitments to a fair trial, most notably under Article 14 of the ICCPR. It was furthermore argued that the application of domestic procedural and substantive law amended to international standards in high profile cases would not only undermine allegations of victors' justice; rather, such practices could fundamentally alter the people's expectations of their rights in court, and make less likely the reversion to the unfair and politicized practices of the past. The very example of these trials—accessible in their home territory—would construct what

---

[62] Alvarez, *supra* note 28 at 402.
[63] Higonnet, *supra* note 9 at 358, quoting Ivana Nizich, "International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal" (2001) 7 ILSAJ Int'l & Comp L 353 at 364, observes: "If donor countries or the UN are to succeed in changing a country for the better, they 'cannot display and elitist, paternalist attitude' toward war crimes victims and national judiciaries, 'i.e., viewing local participation as inherently biased, tribal, inexperienced and inept.'"
[64] Burke-White, "Regionalization", *supra* note 32 at 737.
[65] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 304.
[66] *Ibid* at 307.
[67] *Ibid* at 304.
[68] Turner, "Nationalizing", *supra* note 35 at 22.

Mani calls a "shared political and civic commitment to justice and rights, in terms that are both embedded in local culture/s and imbued with universal norms."[69] For example, Horsington suggested that Cambodian citizens seeing international trial standards at the ECCC may be more inclined to expect courts generally to be "stable trustworthy, competent, credible and reliable."[70] Whereas ordinarily, transitional trials are approached in a retributivist manner aimed towards condemnation and non-impunity for past acts, in the hybrid trial the domestic inculcation of exemplary fairness and due process standards would be equally determinative of success. Hybrid tribunals would cross a psychological Rubicon—where something like the right to counsel is seen as law in one context within a State, it would assume a validity and force of its own in analogous contexts.

4. Hybrid Tribunal Advocacy in Context

The principles underlying these ambitious claims about the promise of hybrid tribunals to remedy the problems in the domestic justice systems which compelled their creation were fundamentally sound. Arguments that "it is maintaining effective judicial systems and stabilizing the rule of law, not ending impunity, that enables nations emerging from conflict to establish orderly systems that ... prevent nations sliding back into conflict,"[71] are normatively and intuitively satisfying. The contention by another hybrid court advocate that "[i]t is only when a state 'accepts the challenges and responsibilities associated with enforcing the rule of law' on its own terms, that the rule of law is strengthened and a barrier to impunity is erected,"[72] finds support in the UN's doctrinal reform of peacebuilding operations.[73] By the time of the UN Secretary General's seminal 2004 Report on Transitional Justice and the Rule of Law (formulated to strengthen United Nations support of transitional justice as a peacebuilding tool), hybrid tribunals had been mainstreamed as a policy choice. The Report repeated many of the academic arguments in favour of hybrid structures that emerged after their formation, arguing that "specially tailored measures for keeping the public informed and effective techniques for capacity-building, can help ensure a lasting legacy in the countries concerned."[74] The Report, imbibing the academic advocacy of hybrid structures, assumed throughout that internationalization of trials would guarantee their independence and impartiality.[75] By 2008, a Report by the Office of the United Nations High

---

[69] Rama Mani, *Beyond Retribution – Seeking Justice in the Shadows of War* (Cambridge, UK: Polity Press, 2002) at 172.
[70] Helen Horsington, "The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal" (2004) 5 Melbourne J Int'l L 462 at 480-482.
[71] Lipscomb, *supra* note 35 at 184.
[72] *Ibid* at 199, quoting US Undersecretary for Political Affairs, Marc Grossman, "American Foreign Policy and the International Criminal Court", Remarks given at the Center for Strategic and International Studies (6 May 2002), online: CSIS <http://csis.org/files/media/csis/events/020506_grossman.pdf>.
[73] UN Secretary-General, *Rule of Law Report*, *supra* note 30.
[74] *Ibid* at para 44.
[75] *Ibid.*

Commissioner for Human Rights on hybrid tribunals as a peacebuilding tool was a little more cautious, realizing that little flowed automatically from the structure and that any wider rule of law legacy needed to be planned for.[76] It identified many of the problems with hybrid tribunals' practice in the past and counselled that "too much emphasis on legacy may give rise to unrealistic expectations."[77] However, it still found that "substantive legal framework reform, professional development ... and raising awareness of the role of courts as independent and well-functioning rule-of-law institutions" remain at the core of their remit.[78]

However, what such claims ignore is the degree to which any aspirations towards integrating successor trials with holistic rule of law reform have historically remained at the margins of policy when negotiating internationalized judicial responses to gross human rights violations. Those who negotiated the Nuremberg and Tokyo trials, the ad hoc tribunals, and the ICC were more concerned with creating a global culture of accountability or non-impunity as goals in themselves than fostering domestic rule of law. Hybrid tribunals were expected to engage with peacebuilding dynamics that international tribunals had hitherto assiduously avoided. International criminal tribunals have, by comparison with the perceived "promise" of hybrid tribunals, been more circumscribed in terms of ambition, concerned more with the immediate dangers to peace than long-term rule of law development. Since Nuremberg, all fully- or partly-internationalized criminal tribunals were tied to the UN, but this has meant they were closely linked to the aspirations of the world organization, whose paramount purpose has been the maintenance of peace and security.[79] This was stated in the ICTY's very first trial of *Prosecutor v Tadic*, where the Tribunal noted that the Security Council may resort to establishing international criminal tribunals as "instrument[s] for the exercise of its own principal function of maintenance of peace and security."[80] This concern with peace and security has manifested itself in a retributive prioritization of ending impunity for egregious crimes against the peace. In transition, the dominant assumption is that justice must be pursued. The argument is usually posed as a counterfactual—what if there is no justice? Where the crimes concerned are as reprehensible as crimes against humanity, they must be prosecuted.

---

[76] OHCHR, s*upra* note 55.
[77] *Ibid* at 5.
[78] *Ibid* at 2.
[79] Article 1 of the UN Charter outlines the purposes of the organization states that its first purpose is:
"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (*Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7 (entered into force 24 October 1945)).
[80] *Prosecutor v Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 38 (International Criminal Tribunals for the former Yugoslavia, Appeals Chamber).

Though no punishment can be equal to the crime itself, only the sentencing power of prosecution is deemed to guarantee a penalty of sufficient severity. As Crocker puts it, "ethically defensible treatment requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment."[81]

While other more restorative or rectificatory goals of prosecution like pedagogy, rehabilitation, or incapacitation have obvious forward-looking social benefits, the more readily-attainable retributive goal of punishment as an end in itself tallies best with the emergency-driven impetus of international criminal justice in unstable societies. By contrast with the capacity-building or norm inculcation predicted of the hybrid tribunal model, a more limited utilitarian justification attaches to retribution, namely its contribution to shoring up the emergent peace. This aspiration is perhaps best described by Bassiouni who argued that prosecution is necessary "if peace is not intended to be a brief interlude between conflicts."[82] Similarly, Teitel notes that "[t]he leading argument for punishment in periods of political flux is consequentialist and forward-looking. ... At these times in a variant of the conventional "utilitarian" justification for punishment, the basis for punishment is its contribution to the social good."[83] From such prosecutions may stem some related security-based goals such as deterrence, based on the argument that "failure to punish invites repetition,"[84] and containment of destabilizing violence by incapacitating revanchists[85] or "channelling" public demand for vengeance.[86] However, deterrence theory is problematical in that most perpetrators initially presume their cause will win out, or that they will never be held to account.[87] Serbia's perpetration of the war in Kosovo while the ICTY was underway is but the most obvious example of deterrence theory's limitations in the context of war.[88] Though the logic of containment was expressly accepted by the ICTY,[89] indictment of the

---

[81] David A Crocker, "Reckoning With Past Wrongs: A Normative Framework" (1999) 13 Ethics & Int'l Affairs 43 at 53.
[82] M Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59 Law & Contemp Probs 9 at 15.
[83] Teitel, *supra* note 31 at 28.
[84] Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice Vs. Peace in Times of Transition* (London: Frank Cass, 2004) at 7.
[85] "The first step is security. A secure environment is the sine qua non of the new beginning of peace. It preceded new courts, human rights, property, laws, democracy and so forth," in Michael W Doyle & Richard Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton: Princeton University Press, 2006) at 338.
[86] Miriam J Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice" (2002) 15 Harv Hum Rts J 39 at 60. Similarly, Cassese notes that international trials "establish individual responsibility over collective assignation of guilt" and in so doing counteract calls for vengeance against a whole community (Antonio Cassese, "Reflections on International Criminal Justice" (1998) 61:1 Mod L Rev 1 at 5-6).
[87] Mark A Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005) 99:1-2 NW L Rev 539 at 589-590.
[88] In establishing the Tribunal, the UN Security Council opined that the work of the ICTY "will contribute to ensuring that such violations are halted" (UNSCOR, 47th Year, 3217th Mtg, UN Doc S/RES/827 (1993) at Preamble).
[89] *Prosecutor v Momir Nikolic,* IT-02-60/1-S, Sentencing Judgment (2 December 2003) at para 60

likes of Milosevic, Al-Bashir and Mladic have had little success in suppressing criminal acts.

Because deterrence and containment have proven inadequate as justifications for international criminal justice, the thrust of international criminal justice has coalesced around the relatively limited but more readily attainable goal of combating impunity for serious offenders against the international criminal legal order. This is a goal positioned somewhere between a purely retributive theory of *lex talionis* ("an eye for an eye and a tooth for a tooth") and a belief in deterrent effect. Simply put, punishment is just and avoidance of such punishment is intolerable. To the extent that some perpetrators, often the most serious, are tried and punished, impunity can be said to have been combated, if not entirely defeated. This emphasis is more principled than a purely security-based realpolitik—Zacklin forcefully argues that this concern is synonymous with "a new culture of human rights and human responsibility, in which there can be no impunity for such crimes."[90] This is, however, a less ambitious conception of human rights' relationship to transitional trial than those who would argue for hybrid tribunals as a vehicle for justice sector reconstruction. The more readily attainable opportunity to demonstrate immediate progress in relation to criminal accountability for human rights abuses has trumped more long-term institutional concerns. This is a phenomenon that has been exacerbated by the noted tendency of the Security Council and donor countries to put pressure on UN missions to demonstrate that objectives are being fulfilled quickly and that substantial improvements on the ground are being made.[91]

This limited ambition of international criminal justice has frustrated many scholars. As noted above, the ad hoc tribunals were criticized for their failure to contribute to the development of the rule of law domestically, but this is merely symptomatic of a wider marginalization by international justice policy-makers of purposes not immediately related to retribution. Others criticize international criminal justice's limited focus on non-impunity for its failure to engage with wider issues that underpin peace. Mani, for example, is a trenchant critic of the sacrifice of distributive justice in the pursuit of retribution, in the light of the connection between political and economic inequalities with conflict.[92] Other critics argue that the adversarial nature of a vigorously contested trial can undermine potential for reconciliation in the long-term,[93] while some are sceptical of the value of trials in recovering the truth and historical context on which a future polity can be built.[94] Wider social functions beyond non-impunity have historically

(International Criminal Tribunals for the former Yugoslavia, Appeals Chamber).

[90] Ralph Zacklin, "The Failings of Ad Hoc International Tribunals" (2004) 2 J Int'l Crim J 541 at 541. See also Diane F Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Legal Regime" (1991) 100 Yale LJ 2537.

[91] Joel C Beauvais, "Benevolent Despotism: A Critique of UN State-Building in East Timor" (2001) 33 NYUJ Int'l L & Pol 1101.

[92] Mani, *supra* note 69 at 126-157.

[93] Jenia Iontcheva Turner, "Defence Perspectives on Law and Politics in International Criminal Trials" (2008) 48 Va J Int'l L 529 at 568-569.

[94] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass*

appeared low on the hierarchy of purposes for those involved in international tribunals.[95]

If the more holistic "promise" of hybrid tribunals was prioritized, it could have represented a welcome attempt to integrate the traditional emphasis on accountability justice with more long-term concerns related to weak domestic rule of law. However, it would have swum very much against the historical tide. Two years before the establishment of the first hybrid tribunals, the Rome Statute's strategic prioritization of non-impunity over all else became visible in its Preambular affirmation that "the most serious crimes of concern to the international community as a whole must not go unpunished." Similarly, it was evidenced in the stated determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." These priorities should have made apparent that, on the ground, the normative framework of international criminal justice had not shifted sufficiently far from its historic moorings.

Projects such as capacity-building have always been most ancillary to the requirement to secure convictions.[96] Though the arguments advocating hybrid tribunals had "intuitive logic,"[97] international criminal justice policy-makers remain more focused on punishment in the immediate case than institution-building in the long-term, and are at best agnostic as to whether it has a beneficial impact on the national justice system and domestic legitimacy:

> But while other sectors have paid more attention to the idea of building domestic capacity and creating exit strategies, war crimes tribunals have remained largely unconcerned with these projects. ... The human rights community has concerns about whether it is even normatively desirable to elevate the goal of capacity-building to the level of other goals of accountability mechanisms. This position assumes that certain important principles intrinsic to fully achieving accountability will be sacrificed if collaboration increases with domestic institutions and people.[98]

Violence (Boston: Beacon Press, 1998) (arguing that "if the goal to be served is establishing consensus and memorializing controversial, complex events, trials are not ideal" at 47).

[95] Daniel Joyce, "The Historical Function of International Criminal Trials: Re-thinking International Criminal Law" (2004) 73 Nord J Int'l L 461 at 465. As Fletcher and Weinstein point out: "Criminal trials single out intellectual authors and actual perpetrators of atrocities while leaving to broader initiatives in rule of law, humanitarian assistance, democracy building, and economic development the task of resuscitating a 'sick society'….. such an approach that does not integrate these trials with these other capacity-building measures is insufficient to attend to social repair. If we do not comprehend the processes of civil destruction in a broader, ecological context, how can we identify and address crucial aspects of civic reconstruction?" (Laurel E Fletcher and Harvey M Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24 Hum Rts Q 573 at 580).

[96] Varda Hussain, "Sustaining Judicial Rescues: The Role of Judicial Outreach and Capacity-Building Efforts in War Crimes Tribunals" (2005) 45 Va J Int'l L 547 at 551.

[97] Mariana Goetz, Book Review of *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* by Cesare P Romano, Andre Nollkaemper & Jann K Kleffner, eds, (2006) 69 Modern L Rev 672 at 673.

[98] Hussain, *supra* note 96 at 551.

Similarly, Mégret notes that most of the justifications of international criminal justice such as deterrence and retribution flow from the verdict more than the process itself, relegating communicative or exemplary functions of trials to a diminished standing in the hierarchy of priorities:

> The problem with much of the rhetoric surrounding international criminal justice is that it has been focussed on outcome (the repression of given criminals, the fight against impunity, the establishment of the foundations of a new legal regime) rather than process. ... Typically the emphasis has been on the ability of any given mechanism to achieve successful prosecutions that would lead to those desired results.[99]

As such, while it was reasonable to argue that a holistic rule of law reconstruction legacy could be tacked on to the traditionally minimalist goals of international criminal law institutions, this would constitute more a revolution in the priorities of the UN and wider international community than a creative adaptation of existing attitudes. Section IV goes on later to show that in the era of the ICC, no less than the era of the ad hoc tribunals, it is still the case that the more immediate goals of combating impunity, containment and deterrence remain the dominant motivations behind the formation of institutions of international criminal justice. Domestic rule of law development, like the harmonious development of international criminal law, rehabilitation of offenders, or creation of a historical record, remains a mere secondary aspiration of those who negotiate international criminal tribunals by comparison with the overriding retributive impulse of international criminal justice. This remains so regardless of how pressing the need to reform the institutions of justice domestically is in a given case.100 As Section III now demonstrates, the circumstances that gave rise to the hybrid tribunals served to prioritize traditional emergency-driven, short-term judicial responses concentrated primarily on retribution at the expense of more long-term, holistic planning. There was never intended to be a revolution in the policies that had hitherto guided international criminal justice.

IV. The Unpromising Emergence Of Hybrid Tribunals

Hybrid tribunals have been presented thus far as a natural evolution of international criminal justice. However, such a perspective elides the extent to which the tribunals themselves were more the product of the politics of international criminal justice, happenstance, and idiosyncratic national contexts than a conscious improvement on old models or a new departure from the purposes that previously animated the internationalization of criminal justice. Far from tempering claims about the promise of hybrid

---

[99] Mégret, *supra* note 10 at 741-742.

[100] As Condorelli and Boutrouche note, "[a]s the international community is increasingly worried about impunity, there is a need to establish a system that will enable us to avoid impunity, when the national domestic systems do not work at all or work badly" (Luigi Condorelli & Théo Boutruche, "Internationalized Criminal Courts and Tribunals: Are They Necessary?" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 427 at 429).

tribunals, the context-specific bargains that gave rise to them were either overlooked or explained away as a process of trial and error in pursuit of the optimum response to the conditions of post-conflict States.

Observers such as Cohen,[101] Hussain,[102] and Linton[103] have suggested that hybrids were developed "experimentally" as a response to the shortcomings of the ad hoc tribunals. However, there is little evidence on the part of the UN Secretariat or Transitional Administrations tasked with forming or negotiating the new tribunals of any conscious process of experimentation, at least in the conventional sense of a test or trial of a principle or supposition in the pursuit of a hypothesized outcome. Nor, it is submitted, is there much evidence of any fundamental critique of the predominant aims of international criminal justice. Certainly, the negotiators of the structure in East Timor were aware of simultaneous processes in Kosovo[104] and Cambodia,[105] while the Cambodian negotiations fed into the Sierra Leonean process.[106] It may be presumed that the architects of the BWCC were familiar with the neighbouring 64 Panels. However, far from being primarily a tailored application of a general concept of hybrid tribunal or a conscious improvement on the shortcomings of international and domestic mechanisms, early hybrid tribunals were usually a process of "quick decisions and tough compromises."[107] The various iterations of the model were creative adaptations in response to pressing transitional security imperatives, "the product of on the ground innovation rather than grand institutional design."[108]

What was overlooked in early analyses, or acknowledged merely in passing, was that hybrid tribunals did not emerge from reasoned critiques of purely international tribunals on the one hand, or of domestic trials on the other. In the first two hybrid tribunals, purely international tribunals were outside the realms of possible UN policy choice given the simultaneous existence of the ICTY in the Kosovo context and the absolute refusal of the Cambodian Government to countenance any type of internationally-dominated process. In East Timor, it was expediency more than idealism which motivated the creation of the Special Panels. In each State, purely domestic court processes were precluded by histories of ethnic exclusion (East Timor and Kosovo), destruction of the judicial system (Sierra Leone,

---

[101] Cohen, "Hybrid Justice", *supra* note 35 at 1 and 4.
[102] Hussain, *supra* note 96 at 557.
[103] Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 Crim LF 185.
[104] *Ibid* at 203.
[105] Press Briefing by Deputy Legal Adviser, UN Mission in East Timor (19 April 2000): "The credibility of these trials would be insured because the model under consideration for Cambodia was being used in East Timor", cited *ibid* at 186 (footnote 1).
[106] Cambodian Deputy Prime Minister Sok An announced in Parliament on debates on the Law on the Extraordinary Chambers that the Cambodian model was the basis for the SCSL (Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts" (2008) Singapore YB Int'l L 81 at 85).
[107] Dickinson, *supra* note 18 at 27. They "have been created on an ad hoc basis to respond to special situations" (Condorelli and Boutrouche, *supra* note 100 at 429).
[108] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 296.

East Timor, and Bosnia to a certain degree), the danger of bias by the surviving community of judges (Lebanon, Kosovo, Cambodia, and Bosnia to a certain degree) and fears over the security of judges (Lebanon and Sierra Leone).[109] These circumstances spurred internationalization, but this internationalization was not immediately concerned with the ameliorating the circumstances that gave rise to the transfusion of foreign influence.

1. More Emergency than Experiment

After the ICTY Prosecutor made it clear that she intended to try about twenty senior criminals from the Kosovo conflict who committed the worst atrocities on the greatest scale,[110] it became apparent that responsibility for trying potentially thousands of less high-profile criminals would rest with a locally-based process.[111] However, the emergence of a mixed tribunal in Kosovo owed more to emergency than design by the transitional UN Mission in Kosovo (UNMIK), which enjoyed wide legislative and administrative powers.[112]

The impetus for what became known as the Regulation 64 Panels came from both the bias evident in the initial trials of Serb suspects by the Albanian judiciary,[113] and frustration over the continued detention of Kosovars suspected of committing atrocities;[114] both of which ran the risk of sparking violence. A series of UNMIK Regulations progressively increased the potential number of international judges and prosecutors as expedient stopgaps to mitigate the bias. UNMIK introduced Regulation 2000/6 which permitted the appointment of international judges and prosecutors to the Mitrovica Court.[115] Later, Regulation 2000/34 allowed for the appointment of international judges to any court or prosecutor's office in Kosovo after Serb rioting in response to unjust trials.[116] However, because it did not ensure a majority of international judges in trial, questionable decisions persisted. In a

---

[109] *Ibid*.
[110] Carla Del Ponte, Prosecutor of the ICTY, "Statement on the Investigation and Prosecution of Crimes
Committed in Kosovo," The Hague (29 September 1999), cited in Carsten Stahn, "The United Nations Transitional Administrations: A First Analysis" (2001) 5 Max Planck YB UN L 105 at 174.
[111] For example *Milutinovic et al* (IT-99-37), *Milosevic et al* (IT-99-37-1), *Limaj et al* (IT-03-66), *Pavkovic et al* (IT-03-70), *Haradinaj et al* (IT-04-84).
[112] *Resolution 1244*, SC Res 1244, UNSCOR, 4011th Mtg, UN Doc S/RES/1244 (1999).
[113] As two UNMIK officials put it: "Reports came in that the courts, predominantly staffed with ethnic Albanians (who constitute 85 per cent of Kosovo's residents) were releasing ethnic Albanians charged with crimes against Serbs, even where the evidence was strong. Conversely, Serbs were often placed in indefinite pre-trial detention without any apparent will to bring their cases to trial." Jean-Christian Cady & Nicholas Booth, "Internationalized Courts in Kosovo: An UNMIK Perspective" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 59 at 59.
[114] Hansjoerg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" (2001) 95 Am J Int'l L 46 at 49.
[115] Special Representative of the Secretary-General, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/6.
[116] Special Representative of the Secretary-General, *Amending UNMIK Regulation 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/34.

sense, things were even worse as the presence of internationals served as "window dressing" to justify unjust decisions.[117] Eventually, Regulation 2000/64 was passed which recognized the danger of bias and gave the accused, defence, prosecutor, or Department of Justice the right to ask UNMIK to intervene in a case and assign international judges or prosecutors to it.[118] In such circumstances, UNMIK could designate a three-judge panel of whom at least two would be international, one of whom would preside.[119]

The real mistake was allowing trials to go ahead in the first place without international supervision in a climate of such hostility. An international judicial presence was imperative from the moment UNMIK arrived. Instead, as will be seen, the most discriminatory of victor's justice was rampant. Rather than being the first phase of a strategic plan of judicial reconstruction, the 64 Panels were an emergency design to plug holes caused by earlier inertia.

The Bosnian War Crimes Chamber also exists in the shadow of the ICTY. As with Kosovo, fears over the loss of skilled judges since the war, bias, unfair arrests, and ethnic prosecutions motivated the internationalization of domestic processes of accountability.[120] However, it is widely accepted that it was "born primarily as a result of a drive to ensure the completion of the work of the ICTY ... it would appear that, were it not for the ICTY Completion Strategy, national capacities such as those which are now in existence may never have been created."[121] Security Council Resolution 1503 (2003) urged the Tribunal to complete all trial activities by the end of 2008 and all of its work in 2010. The process was to be facilitated by focusing "on the prosecution and trial of the most senior leaders suspected of being responsible for crimes" while "transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions."[122] Specifically, the Resolution provided, cases would be heard by a "special chamber within the State Court of Bosnia-Herzegovina."[123] Rule 11*bis* of the ICTY's amended Rules of Procedure and Evidence enabled the transfer of ICTY cases to national authorities by ICTY judges after considering the

---

[117] Michael E Hartmann, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping" (October 2003) at 10, online: United States Institute of Peace <http://www.usip.org/files/resources/sr112.pdf>.
[118] Special Representative of the Secretary-General, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/64.
[119] *Ibid* at section 2.1(c).
[120] See for example Organization for Security and Co-operation in Europe–Mission to Bosnia and Herzegovina, "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles" (2005), online: OSCE <http://www.oscebih.org/documents/1407-eng.pdf >, and Human Rights Watch, "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro" (2004), online: Human Rights Watch <http://www.hrw.org/en/node/11965>.
[121] Tarik Abdulhak, "Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina" (2010) 9 Int'l Crim L Rev 333 at 335.
[122] *Resolution 1503 (2003)*, SC RES 1503, UNSCOR, 2003, UN Doc S/RES/1503 (2003), Preamble and para 7.
[123] *Ibid* at Preamble.

gravity of the crimes and whether the individual involved constituted a "lower- and intermediate-rank accused." A War Crimes Chamber was created within the State Court, while a Special Department for War Crimes was established within the State Prosecutor's Office. Until 2008, there were five trial panels and two appellate panels containing two international judges and one domestic judge. The Special Department for War Crimes was also of mixed composition. After 2008, the composition switched to include two Bosnian judges and one international,[124] with the ultimate aim of becoming fully national by 2009 (later extended to 2012).[125]

Though it is clearly of mixed composition, it is worth remembering that the BWCC is merely one of three Chambers of mixed-international composition operating within the Criminal Division of the State Court of Bosnia, the others being Organized Crime and General Crime Chambers. Indeed, the judges may sit simultaneously in the different chambers. Each project is intended to be fully absorbed into the national courts. Therefore, though hybrid in structure, the BWCC might best be conceptualized as a regional project of strengthening the rule of law and creating national capacity,[126] as occurs in other jurisdictions such as national courts in the Caribbean and Africa. As one observer points out, "although it contains a significant international component, the WCC is essentially a domestic institution operating under international law."[127] This difference is worth remembering when later examining its superior performance relative to the other hybrid courts. Bosnia-Herzegovina has existed as a *de facto* protectorate of the EU's Office of the High Representative, whose policy objective is "a stable, viable, peaceful and multiethnic BiH, cooperating peacefully with its neighbours and irreversibly on track towards EU membership."[128] To the extent it has performed better than other hybrid tribunals, it may be as a result of the significant advantages it enjoys. Though generally enthusiastic about the Chamber, Ivanisevic warns that the Bosnian model may not be applied easily elsewhere because "[t]he creation of the War Crimes Chamber has taken place ten years after the end of the war, in a country with a functioning infrastructure and administration, skilled human resources, [and] a strong and powerful international presence under the political authority of the OHR [Office of the High Commissioner]."[129]

---

[124] Office of the High Representative, *War Crimes Chamber Project: Project Implementation Plan. Registry Project Report* (2004) at 8, online: <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf >.
[125] Office of the High Representative, *Decision Enacting the Law on Amendment to the Law of the Court of Bosnia and Herzegovina* (2009), online: <http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=44283> , Article 1 [OHR, *Law on Amendment*].
[126] Ortega-Martin & Herman, *supra* note 35 at 10.
[127] Human Rights Watch, "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina" (2006) at 2, online: Human Rights Watch <http://www.hrw.org/en/reports/2006/02/07/looking-justice-0>. [HRW, "Looking for Justice"].
[128] *Council Joint Action 2008/130/CFSP of 18 February 2008, Extending the Mandate of the European Union Special Representative in Bosnia and Herzegovina*, article 2, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:043:0022:0025:en:PDF>.
[129] Bogdan Ivanisevic, "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court" (2008) at 39, online: International Center for Transitional Justice

A Group of Experts created to explore various legal avenues for holding the Khmer Rouge accountable initially rejected the hitherto unprecedented concept of a hybrid tribunal in Cambodia. The rejection was based, *inter alia*, on the concerns of possible Governmental interference, the low level of professional competence of domestic jurists, and delay.[130] However, the UN Secretariat negotiators ultimately agreed upon a mixed tribunal structure, but only as a very reluctant compromise between the UN's desire for a fully international process and the Government's aim of retaining as much control as possible.[131] In 2002, the UN even withdrew from negotiations (ongoing since 1998) because the proposed structure departed too far from international control, stating that "as currently envisaged ... [the structure] would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have."[132] The hybrid structure that was agreed upon only emerged after a Group of Interested States used a General Assembly vote to force a very reluctant UN to capitulate.[133] Uniquely, the ECCC became a hybrid tribunal that mixes a minority of international judges with a majority of domestic equivalents to try those "most responsible" for crimes under international and domestic law committed between 17 April 1975 and 6 January 1979. Responsibility for prosecution and investigation was allocated between equal Cambodian and international co-prosecutors and co-investigating judges.[134] The Extraordinary Chambers only became fully operational in 2007.

In East Timor too, the hybrid structure that emerged was considered a second or even third choice alternative to an international tribunal (as in Cambodia) and as an emergency response to post-conflict exigencies (as in Kosovo). In December 1999, a report by Special Rapporteurs of the Commission on Human Rights recommended that an international tribunal commencing in "a matter of months" might be the most appropriate mechanism for prosecution of crimes surrounding the independence referendum if the Jakarta Government did not undertake a credible investigation and prosecution process.[135] While there was initially some support for such a tribunal, it diminished in the light of Indonesian

---

<http://www.ictj.org/images/content/1/0/1088.pdf >.

[130] *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135*, UNGAOR, Annex, UN Doc A/53/850-S/1999/231 (1999) at paras 185-97.

[131] Craig Etcheson, "'A Fair and Public Trial': A Political History of the Extraordinary Chambers" in Stephen Humphreys and David Berry, eds, *The Extraordinary Chambers* (New York: Open Society Justice Initiative, 2006) 7 at 16-19.

[132] United Nations, Press Briefing, "Negotiations between UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders, Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York" (8 February 2002) online: United Nations <www.un.org/News/dh/infocus/cambodia/corell-brief.htm>.

[133] *Khmer Rouge Trials*, GA Res 57/228, UNGAOR, 57th Sess, UN Doc A/RES/57/228, (2003).

[134] *Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea* (6 June 2003) at Articles 5 and 6, online: Extraordinary Chambers in the Courts of Cambodia <www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf> [*ECCC Agreement*].

[135] *ECCC Agreement*, *ibid* at Articles 5 and 6.

reassurances that it would pursue justice fully in its own courts.[136] These reassurances were accepted by the UN Secretary-General.[137] A later Commission of Inquiry then recommended a bi-locating internationalized tribunal,[138] but what ultimately transpired was a dual-track process of an Indonesian Ad Hoc Human Rights Court for East Timor which would sit in Jakarta, while the UN Transitional Administration in East Timor (UNTAET) would establish a parallel process in Dili. Unfortunately, the former become the paradigmatic example of biased domestic proceedings and ultimately convicted only one relatively low-level Timorese.[139] The widespread reluctance to upset the fragile state of Indonesian democracy meant that no serious pressure was ever applied to Indonesia to accept an international tribunal.[140] The onus of justice would fall on the UN.

The greatest impetus for the creation of a tribunal in East Timor came not from the parlous state of the Timorese legal system, but rather INTERFET's application of its mandate in Security Council Resolution 1264 to restore peace and security by arresting individuals caught in the act or accused of committing serious offences and by initiating preventive detention.[141] As many as forty Timorese militia members were held in UN custody and needed to be charged or released promptly, precluding any resort to the lengthy process of establishing an international tribunal.[142] However, the East Timorese legal profession was in no fit state to deal with such cases. Necessity was the mother of this judicial invention. UNTAET Regulation 2000/15 of 6 June 2000 created international-majority Special Panels in the Dili District Court to deal specifically with accountability for the crimes against humanity and war crimes.[143] UNTAET Regulation 2000/16

---

[136] *Letter Dated 26 January 2000 from the Minister of Foreign Affairs of Indonesia to the Secretary-General, in Identical Letters dated 14 March 2000 from the Secretary-General Addressed to the president of the General Assembly, the President of the Security Council, and the Chairperson of the Commission on Human Rights*, UNGAOR, 54 Sess, Annex, Agenda Item 96, UN Docs A/54/727 and S/2000/65 (2000).

[137] UN Secretary-General, *Situation of Human Rights in East Timor: Note by the Secretary-General* (1999) UN Doc A/54/660, at para74.6.

[138] *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UNGAOR, 54th Sess, Annex, UN Doc A/54/726 (2000), at para 153.

[139] On the prevalence of bias, see Stefanie Frease, "Playing Hide and Seek with International Justice: What Went Wrong in Indonesia and East Timor" (2004) 10 ILSA J Int'l & Comp L 283 at 287-88. On the final conviction statistics for the Indonesian ad hoc tribunal, see *Report to Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UNSCOR, Annex II, UN Doc S/2005/458 (25 May 2005) at paras 48 and 120 [*Commission of Experts*]

[140] Herbert D Bowman, "Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor" (2004) 18 Emory Int'l L Rev 371 at 381-382.

[141] *Resolution 1264 (1999)*, SC Res 1264, UNSCOR, 1999, UN Doc S/RES/1264 at para 3.

[142] Michael Kelly, *INTERFET Detainee Management Unit in East Timor* (2000), online: Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20(e).pdf>.

[143] Special Representative of the Secretary-General, *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, UNTAET, UN Doc UNTAET/REG/2000/15 (2000), s 1.1. Prior to this, another UN regulation provided for the establishment courts exercising exclusive jurisdiction in East Timor: Special Representative of the Secretary-General, *Regulation 2000/11 on the Organization of Courts in East Timor*, UNTAET, UN Doc UNTAET/REG/2000/11 (2000), s 10(3).

established an internationally-led Serious Crimes Unit (SCU) to investigate and prosecute the resulting cases.[144] Geopolitical marginalization, more than idealism, motivated the preference for a mixed tribunal over an international one. As Bassiouni noted, "East Timor is yet another case where national trials are insufficient and an ad hoc international tribunal is legally and morally justified but politically improbable."[145]

Of the earliest hybrid tribunals, only in Sierra Leone could the establishment of such a structure be said to be the product of a shared preference of both the UN and the Government. The latter resisted a fully-fledged international tribunal on the basis of a legitimacy argument that Sierra Leonean participation in the trial process was imperative.[146] The Security Council Resolution requesting the Secretary-General to negotiate with the Government to establish the SCSL appeared to accept arguments about the potency of hybrid courts to develop capacity and legitimacy. The Resolution made specific reference to the need to address "the negative impact of the security situation on the administration of justice and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone."[147] Nevertheless, the Preamble to Security Council Resolution 1315 left no doubt that the primary objective of the international community in establishing the Court was to reduce the threat to international peace and security that the impunity there presented.[148] With between 50,000 and 73,000 ex-combatants in camps "more familiar with a life of violence and impunity than of schooling or job training,"[149] the risk of a resumption of war in a country where a small band of rebels could convulse society in war for a decade was ever present.[150] In such a precarious and hostile peacebuilding ecology, there was a clear short-term need to make the peace process irreversible. Accountability was a key tool in doing so: "[t]he consensus among policy-makers was that peace would remain fragile until

---

[144] Special Representative of the Secretary-General, *Regulation 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET, UN Doc UNTAET/REG/2000/16 (2000), s 14.6.

[145] M Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational Publishers, 2003) at 566.

[146] Tom Perriello and Marieke Wierda, "The Special Court for Sierra Leone Under Scrutiny" (2006) at 4, online: International Centre for Transitional Justice <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf > [Perriello & Wierda, "Special Court for Sierra Leone"].

[147] *Resolution 1315 (2000)*, SC Res 1315, UNSCOR, 2000, UN Doc S/RES/1315, at 2.

[148] The very first paragraph of the Preamble expressed deep concern at the prevailing situation of impunity in Sierra Leone, while the eighth Preambular paragraph recognized "that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace" (*ibid*).

[149] Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE) & International Center for Transitional Justice (ICTJ), *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone* (2002) at 13, online: International Center for Transitional Justice <http://www.ictj.org/images/content/0/9/090.pdf>.

[150] The PRIDE and ICTJ report quotes one ex-combatant: "Foday Sankoh, a single individual, started a war that caused so much mayhem. Imagine what harm fifty disgruntled ex-combatants could do with support from anybody" (*ibid* at 11).

certain individuals (and, by implication, factions) were neutralized."[151]

Unlike the Special Panels and Regulation 64 Panels which were the result of legislative action by transitional administrations, the SCSL was established by treaty between the Government of Sierra Leone and the UN on 16 January 2002.[152] The SCSL was hybrid in terms of the law applied (international and domestic) and the personnel. Two out of five Chamber judges were to be appointed by the Government of Sierra Leone with the other three appointed by the UN.[153] The SCSL was, in Cassese's words, "conceived as a new type of judicial body, designed to avoid the pitfalls of two ad hoc international criminal tribunals."[154] However, the pitfalls it was primarily concerned with were delay and cost more so than the failure to develop judicial capacity or inculcate human rights norms. Though there was a loosely defined aspiration to leave a legacy (a legacy officer was appointed in the Registry and a white paper was produced in late 2005),[155] no systematic capacity-building initiatives were agreed in the treaty. A Management Committee responsible for advising and funding the Court instead prioritized the completion of operations "within tight budgets and timeframes."[156] The primary aim, as stated by its independent assessor, remained "to dispense justice expeditiously, in a cost-effective manner and with a direct impact on the population amongst which crimes had been perpetrated," and indeed was welcomed as such.[157]

The Special Tribunal for Lebanon was established to prosecute persons responsible for the attack on 14 February 2005 that resulted in the death of Prime Minister Rafik Hariri and in the death or injury of other persons.[158] It has jurisdiction only over domestic crimes under the Lebanese Penal Code.[159] International judges are appointed by the UN Secretary-General in consultation with the Beirut Government and constitute a majority, while an international Prosecutor appointed in the same fashion is served by a Lebanese Deputy Prosecutor, with a similarly mixed staffing structure beneath.[160] Even with the STL, the primary motivation for establishing it was the impunity-based "if not" argument: to fail to punish assassinations would

---

[151] Perriello & Wierda, *supra* note 146 at 12.
[152] *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, UNSCOR, Appendix II, UN Doc S/2002/246 (16 January 2002). The Statute of the Court is annexed to the Agreement.
[153] *Statute of the Special Court for Sierra Leone*, art 12.1(a).
[154] Antonio Cassese, *Independent Expert Report on the Special Court for Sierra Leone* (2006) at 65, online: SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> [Cassese, *Report on the SCSL*].
[155] Perriello & Wierda, *supra* note 146 at 39.
[156] OHCHR, *supra* note 55 at 8.
[157] Cassese, *Report on the SCSL*, *supra* note 154 at 65.
[158] *Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Annex, UN Doc S/RES/1757 (2007) [*Lebanon Agreement*].
[159] *Statute of the Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Attachment, UN Doc S/RES/1757 (2007), at Article 2.
[160] *Lebanon Agreement*, *supra* note 158 at Articles 2-4.

only allow future assassinations "to materialize with impunity."[161]

2. Finance

Though Katzenstein and Mendez have argued that hybrid tribunals were designed partly or wholly in response to criticisms of the ad hoc tribunals,[162] it seems the most pressing of the lessons of The Hague and Arusha were more financial than normative. If the need for domestic ownership and judicial emergencies can be said to have partially motivated the formation of hybrid tribunals, the financial attractiveness of cheaper hybrid tribunals relative to the ICTY and ICTR (which at the time amounted to 15 per cent of the UN budget with costs between 1995–2003 of US$22.5 million and US$45.5 million per conviction respectively[163]) may with greater certainty be said to have been determinative of the structure.[164] Indeed, Cassese identifies the lack of will by major powers to fund an international tribunal as one of two prime motivating factors for the creation of hybrid tribunals.[165] Even the UN Secretary General admitted that the genesis of the hybrid innovation was a response to "tribunal fatigue."[166] The biggest savings hybrid tribunals offer is in terms of salaries—local actors are paid at local rates while international staff can be paid salaries to reflect the cost of living in the area, which are far less than those in The Hague. Collection of evidence and day-to-day operation of the court were anticipated to be much cheaper, one of the few predictions about hybrid tribunals that proved unimpeachably accurate.[167] Most notably, the BWCC's €13–14 million annual budget,[168] funded jointly and sustainably[169] by EU-American donor states and the Bosnian Government, was at one stage estimated to cost about 6 per cent of the funds

[161] Nadim Shehadi and Elizabeth Wilmshurst, "The Special Tribunal for Lebanon: The UN on Trial?", online: (2007) Chatham House Middle East/International Law Briefing Paper MEP/IL BP 07/01 at 9 <http://www.chathamhouse.org.uk/files/9408_bp0707lebanon.pdf>.
[162] Katzenstein, *supra* note 34; Mendez, *supra* note 55 at 62.
[163] George S Yacoubian, "Evaluating the Efficacy of the International Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law" (2003) 165 World Affairs 133 at 136.
[164] "Realists would argue that the rise of the 'special panel model' and the 'hybrid tribunal model' is not the result of the international community wringing its hands over the best way to foster the growth of domestic legal culture. Rather, it is simply a result of funding constraints as a by-product of donor country fatigue after the establishment of tribunals like the ICTY and the ICTR" (Hussain, *supra* note 96 at 560).
[165] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 334.
[166] As the UN Secretary-General admitted: "Partly in reaction to the high costs of the original tribunals, the financial mechanisms of the mixed tribunals for Sierra Leone and for Cambodia have been based entirely on voluntary contributions." UN Secretary-General, *Rule of Law Report*, *supra* note 30 at para 43.
[167] For example, a total of US$213,000 per annum funded two judges on a Special Panel. See e.g. Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 271 at 286.
[168] The Prosecutor's Office of Bosnia & Hergegovina and The Registry, *The General Budgets for the Judicial Institutions of BiH*, cited in Ivanisevic, *supra* note 129 at 23.
[169] The budget was deliberately designed to be sustainably based on national justice sector wages and ultimately is to be absorbed entirely into the national budget (Ivanisevic, *supra* note 129 at 23 and 1).

considered essential for the operation of the ICTY.[170]

Though hybrid tribunals were welcomed by policy-makers (but criticized academically) as "shoestring justice"[171] and "justice on the cheap,"[172] one caveat that should have been readily apparent is that, as in many legal systems, the quality of justice rendered would be proportional to resources provided. While the ICC, ICTR and ICTY are funded by assessed contributions in accordance with a pre-defined scale of assessment of costs, the funding of the hybrid tribunals has been more precarious. The 64 Panels and Special Panels processes were primarily funded from the stretched UN administration budgets. The Special Panels budget hit a maximum of US$7-8 million in its final year,[173] while the usual US$6 million budget proved woefully inadequate for the needs of even the most rudimentary trial in the previous years.[174] The ECCC is funded primarily by voluntary contributions with the Government making up the balance. Similarly, voluntary contributions from States make up 51 per cent of the STL's budget, with the Beirut Government financing the remainder.[175] The SCSL's annual budget was to be entirely funded by voluntary international contributions from donors but fell short. In its concluding phase, annual budgets hovered at the US$25–30 million mark[176] and led to shortcomings in the quality of trial.[177] All tribunals at some stage lacked equipment and struggled to recruit qualified international personnel. Even before hybrids began, the absence of assessed contributions and their justification as cheaper alternatives to international tribunals should have checked some of the more optimistic assessments of their potential. As Cohen notes, hybrid tribunals by their nature tend to be under-funded, because important court functions like outreach, legacy and training have "not appeared essential."[178] If hybrid tribunals enjoyed an inherent promise, the inescapable inference is that the

---

[170] HRW, "Looking for Justice", *supra* note 127 at 2.
[171] Avril McDonald, "Sierra Leone's Shoestring Special Court" (2002) 84:845 Int'l Rev Red Cross 121.
[172] David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" online: (2002) 61 Analysis from the East-West Center, <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>.
[173] David Cohen, "'Justice on the Cheap' Revisited: The Failure of the Serious Crimes Trials in East Timor" (Analysis from the East-West Center, Asia Pacific Issues No. 80), online: (2006), 5 < http://www.eastwestcenter.org/fileadmin/stored/pdfs/api080.pdf>.
[174] In 2002, the budget saw a meagre increase to US$6.3 million (Ingadottir, *supra* note 167 at 283). Things improved little in the 2003 to May 2005 period, where the operating cost of the units was US$14.4 million (*Commission of Experts*, *supra* note 139 at para 99).
[175] *Lebanon Agreement*, *supra* note 158 at Article 5.
[176] The voluntary contributions consistently fell short so the budget for the first three years was halved to US$57 million and even then voluntary contributions fell short, with the budget subsidized by UN subventions. The Court's Management Committee estimated in the completion budget approved on 15 May 2007 that the Special Court for Sierra Leone needed US$89 million to conclude its operations US$36 million for 2007, US$33 million for 2008 and US$20 million for 2009 (European Union, Parliament, *Official Journal of the European Union*, C187E (24 July 2008)at 243, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:187E:0242:0244:EN:PDF>.
[177] James Cockayne, "The Fraying Shoestring: Rethinking War Crimes Tribunals" (2005) 28 Fordham Int'l L J 616; McDonald, *supra* note 171.
[178] Cohen, "Hybrid Justice", *supra* note 35 at 13.

tribunals were "being asked to do more than their *ad hoc* cousins, but with fewer resources."[179]

3. Lack of Legacy Planning

The different hybrid tribunals established were the result of different bargains and were given very different mandates, which in turn resulted in differing structures. In this context, any wider rule of law legacy was an afterthought. Apart from the unique circumstances of the BWCC which will be discussed later, the "legacy ideal" was never specifically incorporated into the mandates of the tribunals, and so was marginalized as a priority: "Without an explicit mandate on the issue, the interpretation of legacy is, to a large extent, left to the discretion of individual actors. Many will automatically gravitate to an approach which focuses on the efficient disposing of cases.[180] The point made here is in a sense similar to one made by Nouwen, who, at an early stage in scholarly analysis of hybrid tribunals, outlined the fundamentally different legal foundations, history, staffing, and applicable law of the tribunals. She doubted that any uniform promise could be ascribed to a category of court that had only the very marginal common defining characteristic of mixed staffing.[181]

Given these highly compromised origins of the tribunals and the palpable lack of sufficient financial and diplomatic support to enable them to realize any potential beyond closing impunity gaps, why did such exaggerated and wishful hopes attach to them? One possible answer may lie in David Kennedy's theory of tool enchantment which posits that presumptions, biases, blind spots, and professional vocabularies of humanitarians lead them to attach an "inherent humanitarian potency" to a particular tool such as the hybrid tribunal model, which might explain the gap between the promise anticipated and the conditions on the ground.[182] He notes a tendency of academics and policymakers in the human rights community to attach to their ideas and institutions a humanitarian potential abstracted from the context of its application. International criminal law, with its noted tendency towards "judicial romanticism" about what trials can achieve, may be particularly susceptible in this regard.[183] Kennedy argues that the particular peacebuilding ecology of the area is overlooked as myths of progress are substituted for reasoned application of tools to contexts and the evaluation of consequences.[184] The gaps between theory and practice in the hybrid tribunals may bear out such an hypothesis, and provide an explanation for the recent diminution in advocacy.

By comparison with the more optimistic claims of their potential legacy

---

[179] Cockayne, *supra* note 177 at 618.
[180] OHCHR, *supra* note 55 at 7.
[181] Nouwen, *supra* note 35 at 190-214.
[182] David A Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: New Jersey: Princeton University Press, 2004) at 119.
[183] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 Am J Int'l L 7 at 31.
[184] Kennedy, *supra* note 182 at 141.

at the emergence of the hybrid model, the more realistic position may have been that of Condorelli and Boutrouche who took a noticeably circumspect look at the purposes of the internationalized courts. They succinctly argued that "[such tribunals] aim to accomplish a certain objective and are bound to disappear once they do so."[185] The lack of legacy planning tends to vindicate this position.

V. Expectations Dashed

With the cessation of the hybrid tribunals in East Timor and Kosovo by the middle of the decade, the impending completion of the Sierra Leonean process with the Charles Taylor trial, and observation of a combined eight years of investigation, prosecution and trial in Cambodia and Bosnia, one can assess how far short of initial hopes they have fallen. First, it is necessary to summarize the performance of each tribunal under each of the areas where they were deemed to have added value over purely national and purely international trials, bearing in mind that while individual studies are abundant, comparative study has lagged behind. The heterogeneity of approaches evident in the six hybrid tribunals is a testament to the flexibility the hybrid structure lends. What is apparent is that notwithstanding financial shortcomings and diplomatic weakness, each tribunal struggled when it came to making the predicted cultural, normative, and institutional impacts on domestic rule of law. It is these particularized dissatisfactions that appear to have led to a general dampening of enthusiasm for hybrid tribunals.

1. Capacity-Building

Take for example the failure to build capacity and the related phenomenon of "misplaced ownership" for which all hybrid tribunals have been criticized. Hopes for local ownership fell short of expectations in all three hybrids. Though it was argued that local ownership imported by the hybrid model should be maximized to the extent compatible with fair and competent trial in the pursuit of legitimacy and capacity-building, the reality at the time was that: UN officials were vetoing negotiations with Cambodia because local participation was too great, UNMIK was forcefully overturning decisions of Kosovar-only courts, and the Sierra Leone Government was relinquishing ever-greater control over the bench and prosecution to internationals. The great danger, overlooked for the most part in scholarly analysis, but readily apparent in the affected States, was that international dominance, even where tempered by local participation, could be perceived as imperialism little different to the ad hoc tribunals. This danger was heightened where international judges served in a majority, or where domestic prosecutors and defence counsel served merely as deputies to international figures who controlled proceedings.[186]

---

[185] Condorelli & Boutrouche, *supra* note 100 at 428.
[186] It should be pointed out that Dickinson was one of the few to note this danger (Dickinson,

Though it was assumed that hybrid tribunals would be genuinely cooperative, the tendency of both controlling partners (the UN and the domestic governments) in each tribunal has been to transfer as much responsibility to international actors as possible, with the exception of the BWCC. The Timorese Government considered the Special Panels to be a purely international project, given their preference to move on in their relations with Indonesia and focus on development.[187] Ambiguity over ownership and allocation of responsibility in the process allowed both sides to avoid responsibility.[188] The Sierra Leone Government gave the UN almost full responsibility for the SCSL, and played little or no part in trials. It even deliberately scuppered opportunities for involvement, choosing to appoint only three national judges out of the possible four appointees they could make to the Trial and Appeals Chambers.[189] Indeed, they even went so far as to amend the Agreement to replace the words "Sierra Leone judges" with "judges appointed by the government of Sierra Leone."[190] The Government also chose to appoint a foreign Deputy Prosecutor when it was expected they would appoint a national.[191]

In Kosovo, Regulation 2000/64 gave international actors the opportunity to take over entire cases without any domestic involvement. Contrary to the logic of progressive development where international involvement is phased out over time, each phase in UNMIK's judicial response to insecurity was marked by an increase in the presence of international judges and international control. This phenomenon ran counter to intuitions and early expectations among theorists in the area that as the domestic system is strengthened, international involvement would be decreased. Instead, what occurred was a reactive "linear reverse model" that initially gave responsibility to Kosovars only to then wrest it back.[192] Naarden and Locke argue that international prosecutors "often had a negative impact on the institutional development of local prosecutorial services, as the decision by an [international prosecutor] to assume a case frustrated the opportunity to

---

"Promise of Hybrid Tribunals", *supra* note 25 at 306).

[187] "[The serious crimes program], which has been largely internationally operated is clearly perceived by the Government as the responsibility of the international community. It is also reasonably clear that it is politically and financially convenient to the Government of Timor-Leste for the responsibility for the SCP
to rest with the international community, particularly in the context of Timor- Leste's continued reliance upon the international community for financial support, and in the face of the emerging realities of the politics of the Indonesian- Timor-Leste bilateral relationship"
(UNMISET, "Strategic Plan for the Justice Sector" cited in Caitlin Reiger & Marieke Wierde, "The Serious Crimes Process in Timor-Leste: In Retrospect", online: (2006) International Centre for Transitional Justice Prosecutions Case Studies Series, at 33 <http://www.ictj.org/static/Prosecutions/Timor.study.pdf>.

[188] Cohen, "Hybrid Justice", *supra* note 35 at 9.

[189] *Statute of the Special Court for Sierra Leone*, *supra* note 153 at art 12.1.

[190] Abdul Tejan-Cole, "The Special Court for Sierra Leone: Conceptual concerns and alternatives" (2001) 1 African Hum Rts L J 107 at 119.

[191] *Statute of the Special Court for Sierra Leone*, *supra* note 153 at art 15(4). The first two were British and Australian, but a Sierra Leonean was appointed in 2008 and even served as Acting Prosecutor in 2009.

[192] Hartmann, *supra* note 117 at 14.

'test' the hypothesis that local prosecutors were unable or unwilling to take on that case."[193] Instead of responding to widespread dismay over ongoing impunity, over time international prosecutors moved from ethnically sensitive prosecutions of war crimes to those organized crime cases that local prosecutors were too fearful to take.

The reluctance of each State (bar Cambodia and Bosnia) to assume ownership of the process increased the likelihood of marginalizing national judges and prosecutors into minor assistance positions, which could only serve to further diminish any sense of ownership in the process the local legal community had. The approach of the Dili, Freetown and UNMIK/Prishtina Governments reinforced what Perriello and Wierda call "the spaceship phenomenon"— where the court is seen by the people as an irrelevant, alien anomaly.[194]

While domestic authorities were largely marginalized or disengaged in each Tribunal, international staff that dominated the process focused almost exclusively on the traditional goal of closing the impunity gap. Mooted schemes of instruction or skills transfer to domestic actors were left by the wayside.[195] The focus at all times was on securing convictions at the expense of integrating local professionals or leaving a legacy of competence. Mentoring and professional development played little role in any of the mixed tribunals, which were hybrid in form but never in ethos. This suggests that professional development and mentoring may invariably suffer diminished roles where successor justice is conceptualized primarily as a matter of combating impunity. Given the weaknesses of the Kosovar, Sierra Leonean and Timorese judicial systems after years of ethnically or politically motivated exclusion, it was expected by some commentators that every advantage for collaboration and development would be maximized. However, even in Sierra Leone, which arguably planned the most ambitious approach to engaging in holistic judicial reconstruction through the Special Court's embryonic legacy and outreach programmes, capacity-building was minimal because so few nationals were involved. This, in addition to the language problems that affected each tribunal, exacerbated the disconnection local legal professionals felt from the SCSL.[196] The Court has been criticized for its failure to integrate Sierra Leoneans in positions of high responsibility,[197] and for its minimal impact on the national judiciary overall.[198]

---

[193] Gregory L Naarden and Jeffrey B Locke, "Peacekeeping and Prosecutorial Policy: Lessons From Kosovo" (2004) 98 Am J Intl L 727 at 729.
[194] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 2.
[195] For example in the Timorese context, see Katzenstein, *supra* note 34 at 265-66.
[196] OHCHR, *supra* note 55 at 10.
[197] Thierry Cruvellier, "From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test" (2009) at 30-33, online: International Center for Transitional Justice at <http://ictj.org/static/Publications/ICTJ_SLE_TaylorTrialtoLastingLegacy_pb2009.pdf >.
[198] "At this stage, I do not think that it is realistic to expect that the Court's legacy will directly: (a) ensure greater respect for the rule of law in Sierra Leone; (b) promote or inspire substantive law reforms; (c) improve the conditions of service and remuneration of judges in Sierra Leone; or (d) alleviate corruption allegedly existing in the judiciary. The Court may contribute to these

In Kosovo, the 64 Panels had no capacity-building remit whatsoever because the hundreds of previously marginalized ethnic Albanian judges and prosecutors were already deemed to be sufficiently competent. It was the possibility of ethnic bias, not lack of competence, which was the primary motivation for introducing international assistance. Consequently, international and local prosecutors had little contact as the former simply appropriated cases for themselves, resulting in the separation of Kosovar and international actors.[199] The presence of international judges became "unfortunately reminiscent of the 'parallel system' the Kosovar Albanian community had struggled so long against."[200]

In East Timor's atmosphere of alternating Governmental indifference and hostility, international actors took control of all major units and marginalized Timorese involvement. Initially, there were no plans to integrate Timorese professionals or to leave a legacy of prosecutorial competence. Given the rushed and overworked nature of the Special Panels, more time was spent clearing the docket than mentoring. East Timorese began to migrate from Serious Crimes to the exclusive practice of ordinary crimes, while the Special Panels became a fiefdom of international lawyers only. As one-time international defence mentor Caitlin Reiger put it, "[t]hey feel that [the tribunal] has nothing to do with them."[201] Because there was no Timorese capability to conduct investigations and prosecutions after independence, the work of the SCU continued to be dominated by international staff. By the close of the trials in 2005, there were only thirteen Timorese trainees in the Unit, yet they were never given responsibility for appearing in court and were confined to preparation work.

Far from catalyzing domestic assumptions of responsibility, in both East Timor and Kosovo the hybrid tribunals built dependence over time rather than competence. Independent observers of the Timorese justice system, which remains dominated by international judges and prosecutors in the years after the Special Panels, have consistently warned against the dangers of a "dependency syndrome."[202] This is notably similar to the position of international authorities in Kosovo, where even today forty international judges "tend to handle the more challenging cases, including politically charged crimes and ethnically divisive disputes."[203] Though the structure of

---

goals, but they will only materialise as an indirect effect, in the long run, and thanks to other concomitant factors" (Cassese, *Report on the SCSL*, *supra* note 154 at para 279).

[199] Julie Chadbourne, "Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004", online: (2006) 18:4(D) Human Rights Watch at 11 <http://hrw.org/reports/2006/kosovo0506/kosovo0506web.pdf>.

[200] Wendy S Betts, Scott N Carlson & Gregory Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons-learned in Efforts to Establish a Judiciary and Rule of Law" (2001) 22 Mich J Int'l L 371 at 379.

[201] Quoted in Katzenstein, *supra* note 34 at 263.

[202] UNDP Mid-term Evaluation Team, *UNDP Strengthening the Justice System in Timor- Leste Programme: Independent/External Mid-Term Evaluation Report September 2007* (2008) at 59, online: NORAD <http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109793>.

[203] International Crisis Group, "The Rule of Law in Independent Kosovo", online: (2010) Europe

the ECCC reflected an explicit lack of confidence on the part of the UN in the Cambodian justice system,[204] no systematic effort is being made through the process to improve it.

As noted above, the BWCC constituted the exception to this trend. Though conceived as a joint initiative of the ICTY and OHR, the organizing principle of the Chamber was that accountability should remain the responsibility of the Bosnian people.[205] This principle had both a positive and a limiting effect on national capacity-building. It was positive in that the BWCC was to be a permanent national structure with a six-phase plan to transition from international dependence to fully-functioning national court. It was limiting in the sense that the capacity it sought to develop was entirely limited to war crimes, and as such could make a finite contribution to the wider Bosnian criminal law on which the stability of the Chamber will ultimately depend. Certainly by comparison to the other hybrid courts generally (and the neighbouring 64 Panels particularly), the BWCC model was a more appealing example of sustainability and ownership. As noted earlier, the trial and appellate panels initially consisted of two international members to one domestic, a ratio which was reversed after 2008. It was intended that by 2009 the Chamber would be fully domestic, but this has been extended to 2012.[206] Nevertheless, progress has been significant—in 2010, there were forty-one national judges compared to seven international ones. Commendably, international judges and prosecutors have deliberately played a "behind-the-scenes role," deferring to their national counterparts in all but the initial Rule 11*bis* referrals.[207] One judge claims, "[i]t is good that nationals take responsibility. … In the long-term it is the only way to restore public confidence in the judiciary."[208] Indeed, the mentoring relationship in Bosnia has been reversed, with international judges being assigned local mentors.[209] Criminal defence has mostly been by Bosnians, spurring an extraordinary amount of training by the OKO—within the first two years, it had trained approximately 350 lawyers.[210] After the overall Bosnian Criminal Procedure Code was revolutionized in 2003 to switch from an accusatorial system to a more common law adversarial process, international staff in the Chamber were commended for contributing to the capacity of local legal professionals in applying it.[211]

On the other hand, the Chamber has been criticized for the merely

---

Report No 204 at 15 <http://www.crisisgroup.org/~/media/Files/europe/balkans/kosovo/204%20The%20rule%20of%20Law%20in%20Independent%20Kosovo.ashx>.

[204] OHCHR, *supra* note 55 at 24.

[205] Office of the High Representative, "War Crimes Chamber Project: Project Implementation Plan–Registry Progress Report" (2004) at 4, online: <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf >.

[206] OHR, *Law on Amendment*, *supra* note 125 at Article 1.

[207] Ivanisevic, *supra* note 129 at 11-12.

[208] *Ibid* at 11.

[209] *Ibid* at 40.

[210] HRW, "Looking for Justice", *supra* note 127 at 24.

[211] *Ibid* at 10. Ivanisevic notes: "A Bosnian judge insisted that the experience of foreigners from the common law tradition was of great use to the domestic practitioners who were adapting to the adversarial system" (Ivanisevic, *supra* note 129 at 42).

"sporadic" nature with which it interacted with the cantonal and district courts of federalized Bosnia, where most ordinary and war crimes will be tried in future.[212] Expectations expressed initially, that the BWCC could strengthen the capacity of the Bosnian legal system overall,[213] are likely to be disappointed. While standards of trial have been high, most cases have dealt with war crimes and crimes against humanity, which will have limited application to the other branches of the Bosnian legal system in an era of peace and stability. As Ortega and Herman note, "[t]his makes it less important that the WCC or State Court, in general, participate in direct capacity-building to the rest of the members of the judiciary."[214] The sustainable domestic capacity which the BWCC will undoubtedly generate will be ring-fenced in war crime trials indefinitely. The ICTY is due to end in 2013, meaning the BWCC will take full responsibility for trying the most serious intermediate suspects left over from the conflict. There is an intention to prosecute as many perpetrators as possible—the National War Crimes Prosecution Strategy states that around 8,000 people remain under investigation.[215] Bosnian prosecutors lack the discretion to discard cases, as they are obliged by law to initiate a prosecution if evidence exists that a criminal offence has been committed.[216] While developing this competence is undoubtedly useful for a Bosnian justice system, and is undoubtedly more aggressive than its comparators in punishing war crimes in the long-term, this approach is perhaps less ambitious than the hopes many advocates entertained for the capacity-building potential of hybrid tribunals.

While hybrid structures temporarily filled the extant skills and trust gaps in each situation, they could not repair them. In none of the first three hybrid tribunals (East Timor, Kosovo, and Sierra Leone) could it be said that "solidarity" won out at the expense of "substitution."[217] In fact, it can be argued that the hybrids replicated the tendency of internationally-driven courts to move issues of justice away from politically accountable actors to less accountable international ones in States where such accountability needed to be inculcated. The later Bosnian and Cambodian tribunals witnessed something of a swing towards domestic control over time, but only the former took responsibility for developing the local justice system. It is as yet too early to assess how the international-domestic dynamic will function in the Special Tribunal for Lebanon, but its remote location in the Netherlands and international majority may replicate the remoteness of the

---

[212] *Ibid* at 29.
[213] Lillian Barria and Stephen Roper, "Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY" (2008) 9 Hum Rts Rev 317 at 327-328.
[214] Ortega-Martin & Herman, *supra* note 35 at 20.
[215] Morten Bergsmo et al, "The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina" (2009) Annex 2 at 183, online: International Peace Research Institute <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=106723>.
[216] Criminal Procedure Code, Official Gazette of BiH, No 36/2003 (21 November 2004) atArticle 17.
[217] Rule of Law Report, *supra* note 30 at para 17.

Charles Taylor trial. One can excuse the failure to build capacity by the evident need to process case backlogs. However, this ultimately begs the question of whether it is realistic in the first place to expect a relatively superficial process of mentoring by international actors and observation by domestic personnel to significantly develop professional competence. OHCHR's review of hybrid tribunals suggest that more careful planning and consultation can make skills transfer a reality;[218] however, the imperative to prosecute, try, and defend as many cases as possible in the shortest period of time is not consistent with the type of patient, on-the-job integration successful mentoring requires. The experiences of the hybrid tribunals counsel the need to be realistic about their capacity-building potential. The idea that a self-sufficient criminal justice system could arise in such difficult post-conflict conditions from a mentoring process in courts with other, more pressing, short-term requirements is, in retrospect, overly optimistic and finds little support in judicial reconstruction literature. Given that justice system reconstruction in the fullest sense of the word could take over a generation to take shape,[219] it is inappropriate to judge hybrid tribunals by this standard. A decade's experience suggests it is possibly utopian to expect significant impact from an unavoidably superficial process of cooperating and/or mentoring. In Sierra Leone, Kosovo, Bosnia, and eventually in East Timor, professional development was ultimately entrusted to legal training centres.[220]

2. *Legitimacy*

The second main contention about the promise of hybrid tribunals was that their trials would be more legitimate in the eyes of the domestic population relative to purely international or purely domestic trials, because of their location and the impartiality international involvement would guarantee. The argument that domestic location would encourage greater attendance than if a cross-border odyssey to a foreign-based court was required is belied somewhat by the fact that "often, the only people who attended Special Panel hearings were monitors and the occasional journalist; few members of the public were ever present."[221] Kendall and Staggs note that sometimes at the SCSL there were as little as two people in the gallery, though this figure improved when witnesses testified openly.[222] Studies of popular attitudes to the tribunals show a lack of interest, and in some cases

---

[218] OHCHR, *supra* note 55 at 23.
[219] Thomas Carothers, "The Rule of Law Revival" (1998) 77 Foreign Affairs 95 at 105.
[220] For example, the Kosovar Judicial Institute (KJI) was established in February 2000. In Bosnia, a number of specific institutions have taken responsibility for development of the judiciary and prosecution. East Timor created a Legal Training Centre in 2005.
[221] Reiger and Wierda, *supra* note 187 at 31.
[222] Sara Kendall and Michelle Staggs, *From Mandate to Legacy: The Special Court for Sierra Leone and a Model for "Hybrid Justice"* (2005) online: War Crimes Studies Centre, University of California, Berkeley <http://www.hrcberkeley.org/download/BWCSC_Interim_Report.pdf> at 29. The BWCC represents an improvement, at times attracting only three or four (Ivanisevic, *supra* note 129 at 36).

hostility, towards the processes.[223] It is far from clear that the actual trials met the aforementioned minimal Dickinson test of acceptance by those observing its procedures.[224] It would appear that the case for national location was overstated to begin with. Security-driven considerations have overridden any commitment to domestic location as the Charles Taylor trial and the Special Court for Lebanon returned to the spiritual home of international criminal law in The Hague.

Outreach has, over time, become recognized as central to the legacy of international tribunals. Ivanisevic argues that in the battle against bias and lack of knowledge, "a well-designed outreach strategy, rather than the presence of internationals, is of decisive importance."[225] Outreach was non-existent in East Timor[226] but is relatively successful in the ECCC's Public Affairs Office[227] and was particularly rewarding in Sierra Leone.[228] Perhaps surprisingly given its strength in other areas, the BWCC's Public Information and Outreach Section has been understaffed and has underperformed, especially with regard to outreach in perpetrator communities and engaging media interest.[229]

Nevertheless, it appears that issues like location and outreach are less significant in terms of public satisfaction than the prosecution policy adopted. Attending trial, or being better-informed about it, ultimately matter far less than whether the population disagrees with the prosecution policy or the manner in which trials are conducted. An examination of national attitudes to the hybrid tribunals show that neither of the divergent policies in East Timor (widespread accountability for physical perpetrators) or Sierra

---

[223] Stanley notes that "few survivors knew about the judicial processes established in Jakarta (the Ad Hoc Court) and Dili" but of those aware of the latter, survivors took "a uniformly negative view with regard to the Dili process" (Elizabeth Stanley, "Torture Survivors: Their Experiences of Violations, Truth and Justice" (2007) at 4, online: Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Reports/2007/Tortura/JSMP%20Torture%20Survivors%20and%20Transitional%20Justice%20(Final).pdf>). See also Piers Pigou, "Law and Justice in East Timor – A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor" (2004), online: Asia Foundation <http://www.asiafoundation.org/pdf/easttimor_lawsurvey.pdf>, which notes general lack of interest. On the other hand, Artzt notes a general receptiveness domestically to the SCSL (Donna E Artzt, "Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone" (2006) 603 Annals Am Acad Pol & Soc Sci 226 at 233). Cambodian attitudes towards the ECCC are quite positive at present, but surveys find a general lack of awareness about the trials (Phuong Pham et al, *So We Will Never Forget: A Population-Based Survey On Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Centre, University of California Berkeley, 2009), online: University of California, Berkeley, Human Rights Center <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>).

[224] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 301.

[225] Ivanisevic, *supra* note 129 at 43.

[226] The Special Panels as a whole never had any dedicated outreach unit.

[227] Ortega-Martin & Herman, *supra* note 35 at 23. It produces a court report every month and publishes materials explaining the work of the Chambers.

[228] Cassese, *Report on the SCSL*, *supra* note 154 at 59. The ECCC website demonstrates a vigorous outreach programme, online Extraordinary Chambers in the Courts of Cambodia <http://www.eccc.gov.kh/english/outreach.aspx>.

[229] Ivanisevic, *supra* note 129 at 1 and 33.

Leone (selective accountability for organizers of violence) were met with public approval. Human Rights Watch noted in Sierra Leone that "local civil society groups … expressed frustration that a limited number of regional or mid-level commanders known for their notorious behaviour, some of whom physically carried out the crimes, have escaped indictment by the Special Court."[230] This was so even though indictments were the result of consultations by the Prosecutor with the general public on who bore greatest responsibility.[231] On the other hand, many Timorese citizens questioned the fairness of only convicting their low-level countrymen when the main organizers of the violence were safe in Indonesia or in West Timor.[232] Bosnian citizens have equally expressed frustration at the lack of "big fish" perpetrators, notwithstanding the ICTY trials and the Rule 11*bis* procedure.[233] Recent studies on international criminal tribunals increasingly show that there are many aspects to justice that criminal trials cannot fulfil for victims. The perceived legitimacy of tribunals is inextricably linked with a plethora of issues at multiple levels such as the progress of social reconstruction and reconciliation, of which location and national involvement are but tangential factors.[234] While foreign location of tribunals does detract from the legitimacy of a trial process, assertions that domestic location would ensure public acceptance have proven somewhat superficial.

The other argument in terms of the legitimacy of hybridized trials was that the international component would import impartiality and undermine the perception (or reality) of victor's justice or politicization of trials. Transitional justice is so inherently political that, historically, the temptation for Governments to interfere has proven irresistible. The biased proceedings in Kosovo prior to Regulation 2000/64 suggest that in very polarized post-conflict States international involvement is necessary to secure the impartiality and independence of the processes. However, the experience of the other tribunals suggests that even significant international involvement is not sufficient to guarantee independence.

In Cambodia, responsibility for initiating prosecutions rests with one international Co-Prosecutor and one Cambodian Co-Prosecutor who both enjoy equal competence to initiate prosecutions. Each may do so by engaging

---

[230] Human Rights Watch, "Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings and Needed Support" (2004) at 5, online: Human Rights Watch <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>. See also Chandra Lekha Sriram, "Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone" (2006) 29 Fordham Int'l L J 472 at 493, pointing out that victims "wish to know why it is that a commander is in custody, rather than a man who actually cut off a hand, or burned down a house."

[231] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 27.

[232] Reiger and Wierda, *supra* note 187 at 20-21, 31-33, and 41.

[233] Human Rights Watch, "Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber" (2007) at 9, online: Human Rights Watch <http://www.hrw.org/en/node/11032/section/1>.

[234] Hugo van der Merwe, Victoria Baxter & Audrey R Chapman, eds, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009); Fletcher and Weinstein, *supra* note 95; Jeremy Sarkin and Erin Daly, "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies" (2003-2004) 35 Colum Hum Rts L Rev 661 at 665-66.

in brief preliminary investigation and sanctioning the opening of a judicial investigation by sending an introductory submission and case file to the Co-Investigation Judges.[235] By late 2008, it had become apparent that an internal dispute over the need for further prosecutions had arisen between the international Co-Prosecutor and his domestic counterpart, whose independence has been called into question. A complex mechanism had been put in place to deal with such disputes. Article 6(4) of the Agreement establishing the ECCC provides that where a dissenting party does not wish to proceed, that party can within thirty days call for a hearing before a Pre-Trial Chamber of five judges, of which Cambodians constitute a majority to decide.[236] Here, the supermajority rules applied, requiring at least one international judge to agree that prosecution or investigation should cease—where the Pre-Trial Chamber fails to reach a blocking supermajority of four, the case will proceed.[237] This was much to the chagrin of the Cambodians, who unsuccessfully proposed that a supermajority instead be required for the prosecution to go ahead.[238] In what became known as the "Co-Prosecutors Dispute" over whether or not to charge more suspects beyond the five currently detained, the Pre-Trial Chamber could not reach a supermajority vote on a decision concerning the Disagreement. Internal Rule 74(1) provides that the action of the International Co-Prosecutor to forward the new Introductory Submissions should be executed.[239]

The separate opinions of the judges show a strict division on the basis of nationality, with the three Cambodian judges unanimous in favour of blocking prosecution and their two international colleagues unanimously deciding otherwise. Just over three years into a process which may yet run for another four or five, the predicted divisions that gave rise to the UN's reluctance to participate in a Cambodian-dominated tribunal have become manifest. After the *Considerations of the Disagreement*, the acting International Co-Prosecutor submitted the names of five suspects in two separate cases (Cases 003 and 004) to the Co-Investigating Judges on 7 September 2009.[240] Immediately afterwards, Prime Minister Hun Sen denounced the additional investigations, declaring: "[i]f you want a tribunal, but you don't want to consider peace and reconciliation and war breaks out again, killing 200,000 or 300,000 people, who will be responsible?"[241] The names of the five new suspects are confidential, but credible leaks suggest they include KR air force

---

[235] *ECCC Agreement*, *supra* note 134 at Articles 5 and 6.
[236] *Ibid* at Article 7.
[237] *Ibid* at Article 7(4).
[238] Etcheson, *supra* note 131 at 13.
[239] *Prosecutor v Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC-OCIJ (PTCO1), Considerations of the Pre-Trial chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71 (Public redacted version) (18 August 2009) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh>.
[240] Extraordinary Chambers in the Courts of Cambodia, News Release, "Acting International Co-Prosecutor requests investigation of additional suspects" (8 September 2009) online: ECCC <http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310>.
[241] Cheang Sokha and Robbie Corey-Boulet, "ECCC ruling risks unrest: PM", *Phnom Penh Post* (8 September 2009).

commander Sou Met and his naval equivalent Meas Muth.[242] On 29 April 2011, the ECCC's co-investigating judges closed their investigation in Case 003 without ever genuinely investigating the allegations.[243] Independent observers cite received information from confidential sources within the court that the ECCC has allowed its mandate to pursue the case to be undermined by political and financial factors.[244] Perhaps surprisingly, and in contrast to earlier stages in the case, the international co-investigating judge is in agreement with his national colleague that Cases 003/004 should be dismissed on the basis that the five are not "senior leaders" or "most responsible" and therefore do not fall under the court's jurisdiction.[245] It is clear that the investigation falls far short of the standard established in Cases 001 and 002 - the co-investigating judges did not formally notify the suspects they were under investigation, summon and question them or any witnesses, examine crime sites or transfer pertinent evidence available from Cases 001 and 002.[246] Case 004 investigation is officially still ongoing, but no little or no investigation has actually taken place.

Even where international judges are in a majority, assumptions that this would guarantee impartiality and buttress the independence of the process from political interference proved optimistic. Though the Special Panels enjoyed an international majority, the Timorese Government succeeded in interfering to restrain prosecutorial policy whenever it conflicted with their policies of rapprochement with Indonesia.[247] The perceived political dangers emanating from the Special Panels process came not from the judges (because after all, there was little chance of Indonesian figures appearing before them) but from diplomatically embarrassing investigation and indictment of these figures. In February 2003, the internationally dominated SCU issued the indictment of eight high-level figures including Indonesian General Wiranto, who at the time was expected to (and subsequently did) run as Presidential candidate for Indonesia's biggest party. From this point onwards, the Timorese Government subjected the Timorese Office of the Prosecutor-General (to whom the SCU ultimately reported) to interference to

---

[242] Douglas Gillison, "Before Charges, Activist Cites Two in a Dormant KR Inquest", *Cambodia Daily* (4 April 2011), 26.

[243] Case File No: 003/07-09-2009-ECCC-OCIJ, Notice of Conclusion of Judicial Investigation, 29 April 2011, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D13_EN.pdf

[244] "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011", online: Open Society Justice Initiative < http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf> at 7.

[245] *Ibid*.

[246] Extraordinary Chambers in the Courts of Cambodia, Press Release, "Statement by the International Co-Prosecutor Regarding Case File 003" (9 May 2011), online: <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003>.

[247] The indifference of the Government to the people's demand for justice might best be explained by then-President Gusmao's declaration that "the relationship between Timor-Leste and Indonesia is far too important for any issue that might arise to discourage us or to derail this relationship" (F D Unidjaja, "Dili Says Relations With RI More Important Than Justice", *The Jakarta Post* (5 March 2003) online: The Jakarta Post <http://www.thejakartapost.com/news/2003/03/05/dili-says-relations-ri-more-important-then-justice.html>).

the degree that pursuit of the indictments to their conclusion was abandoned,[248] a process in which the UN acquiesced. The episode demonstrates that internationalization does not necessarily buttress a process against interference—a UN Commission of Experts Report relayed how the Timorese Prosecutor-General admitted that Government policy made supporting the SCU a challenge at times, notwithstanding UN pressure.[249]

The argument that hybrid tribunals could establish the parameters of a relationship with the rulers of the country similarly based on respect for the independence of judicial institutions proved misguided. Predictions that the international component of hybrid tribunals would serve as a means of externalizing the diplomatic costs of prosecuting powerful States have also proven unduly optimistic, though they were likely premised on a more forceful commitment to justice than that evinced by the UN in the face of Indonesian intransigence.[250] On the other hand, in the politicized environments of the 64 Panels and SCSL, the UNMIK and the Freetown Governments showed an admirable unwillingness to interfere in the successor trials where historically executive interference in the judiciary was prevalent. Internationalization could not even guarantee the perception of independence. While in Bosnia, the participation of international judges "may have bolstered a perception of fairness and independence and helped to address any perceived ethnic bias,"[251] the Chamber has, like the ICTY it replaces, "been the subject of repeated public attacks and allegations (often made by prominent politicians) of ethnic bias, partiality and discrimination."[252]

The international judges that constituted a majority on the Special Panels served only renewable six-month or one-year terms with reappointment dependent on the assent of the Special Representative of the Secretary-General. As Schabas notes, "international human rights law has distinguished between 'independence' and 'impartiality.' While independence is desirable in and of itself, its importance really lies in the fact that it creates the conditions for impartiality." [253] Ultimately, it is impartiality—not simply independence—upon which a fair trial is so dependent. In the Special Panels, the situation was such that the ambition to be reappointed may have influenced the decisions of any given judge.

Obviously, there are no concrete examples of this occurring, but subsequent comments of the judges suggest a conflict between the highest standards of judging and the apparent desire of many to see an expedited process. Chanda quotes one international judge's attitude to the complexities

---

[248] The UN Commission of Experts factually established that on issuance of the indictment, the Timorese Prosecutor General was summoned to the office of President Gusmao (Commission of Experts, *supra* note 139 at para 71).
[249] *Ibid* at para 69.
[250] Burke-White, "Community", *supra* note 27 at 47-53.
[251] Ivanisevic, *supra* note 129 at 11.
[252] Abdulhak, *supra* note 121 at 343.
[253] William A Schabas, *The UN International Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, UK: Cambridge University Press, 2006) at 506.

of defence of serious crimes that encapsulates the weariness or hostility with which an accused's assertive defence would be greeted:

> People criticize the process for the weakness of the defence, but 99 percent of the murders took place in broad daylight where witnesses knew the perpetrators by name. What kind of defence can be mounted in such cases? It was not like, for example, in certain countries in South America where people were taken away at night, and nobody knew who did it.[254]

At a 2005 symposium on the Special Panels, Timorese Judge Maria Gumao Perreira expressed concern at "the mass production of judgments" to enhance the Special Panel's statistics.[255] In addition, while an unnamed Special Panels judge alleges that some judges were "unwilling to hear both sides," did "not have an open mind about defence," and ignored the presumption of innocence.[256] Examples from the Kosovar experience perhaps indicate that the issue of contracts potentially dependent on convictions is a recurring problem; NGOs suggested that the threat of non-renewal could diminish prosecutorial independence by causing jurists to favour the Special Representative of the Secretary-General's position in a given case.[257] On the other hand, the decision of the Appeals Chamber in the RUF case to disqualify Justice Robertson on the basis of Statements made about Foday Sankoh and the RUF in his book on crimes against humanity was both the correct decision and laid down an important marker about judicial bias and the importance of public perception of justice.[258] Of course it is questionable whether Robertson should have been appointed in the first place. A better example may have been set by Robertson recusing himself.[259]

3. Norm-Penetration

Advocates of the hybrid structure further contended that the very process of trying cases fairly, meeting procedural requirements, applying clear law, and generating just convictions could contribute to the permeation of these legal and human rights norms in the national courts. This appears to have been the case at the BWCC. The ICTY confirmed that the Chamber was fully capable of providing the defendant Radovan Stankovic with a fair trial in the first referral by the Appeals Chamber to Sarajevo,[260] and subsequent

---

[254] Ateesh S Chanda, *Transitional Justice: The Case of East Timor* (Senior Thesis, Brown University, 2004) [unpublished], online: RMIT University, Globalism Institute <http://globalism.rmit.edu.au/files/Timor%20Thesis.pdf> at 84.
[255] Judge Maria Natercia Gusmao Perreira, "The Future of Serious Crimes" (Symposium in Dili, 28 April 2005), cited in David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor* (Honolulu: East-West Centre Special Reports, 2006) at 18 [Cohen, "Indifference and Accountability"].
[256] *Ibid* at 41.
[257] Hartmann, *supra* note 117 at 8.
[258] *Prosecutor v Issa Sesay*, SCSL-04-15-PT-058, Decision on Defence motion seeking the disqualification of Justice Robertson from the Appeals Chamber (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber).
[259] James Cockayne, "Special Court for Sierra Leone: Decisions on the Recusal of Judges Robertson and Winter" (2004) 2 J Int'l Crim Just 1154.
[260] *Prosecutor v Radovan Stankovic*, Case No. IT-96-23/2-AR11bis1, Decision on Rule 11 bis referral, (1 September 2005) at para 30 (International Criminal Tribunal for the former

trials have been generally endorsed as fair.[261] International actors have increased awareness of international human rights instruments and fair trial rights.[262] Judges writing judgments and prosecutors formulating indictments regularly refer to the European Convention on Human Rights, adding force to the Bosnian Constitution's provision in Article 2(2) that the Convention shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law."[263] Judges and prosecutors are deliberately recruited from the three main ethnic groups, helping to draw a line in the sand from the era of biased prosecutions and convictions. However, as with the BWCC's capacity-building successes, Ortega-Martin and Herman remind us that "such impact is diminished by the fact that it is seen as a very specialised court with its own competences and therefore unable to interact on a day-to-day basis with the rest of the judicial domestic system."[264]

The other hybrid tribunals have not been as influential in inculcating and setting an example of fair trial standards. Many of the quintessential elements of due process and fair trial, such as public trial, exclusion of illegally-obtained evidence, or provision of appeal, are far from onerous in any legal system. However, other prerequisites such as avoidance of detention without trial, undue delay, and separation of adults and minors in prison become infinitely more difficult to attain in transitional trials of complex crimes than is the case in normal criminal trials in ordinary times. To add to these problems, the prioritization of non-impunity and punishment over all other goals mean that standards of fair trial were frequently breached. As Jordash and Parker note, "[i]n cases of a political nature, there may well be (undue) pressure to 'get results.'"[265]

In the case of most hybrid tribunals, the objective of prosecuting as many wrongdoers as possible to advance the transition took precedence over the need to secure equality of arms: the provision of defence was often no better than rudimentary. In *Tadic*, the ICTY Appeal Chamber held that "at a minimum, 'a fair trial must entitle the accused to adequate time or facilities for his defence' under conditions which do not place him at a substantial disadvantage as regard his opponent."[266] It also held that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[267] However, in each tribunal, the international community equipped the prosecution unit to a significantly greater degree than the defence. While in keeping with the "shift in human rights law from a defence-based to a prosecution-based perspective," [268] this phenomenon

---

Yugoslavia, Appeals Chamber).
[261] Ivanisevic, *supra* note 129 at 1.
[262] HRW, "Looking for Justice", *supra* note 127 at 10.
[263] Ivanisevic, *supra* note 129 at 41.
[264] Ortega-Martin & Herman, *supra* note 35 at 15.
[265] Wayne Jordash and Tim Parker, "Trials in Absentia at the Special Tribunal for Lebanon" (2010) 8 J Int'l Crim Just 487 at 498.
[266] *Prosecutor v Tadic*, Case No. IT-94-1-A (15 July 1999) at para 48 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber)
[267] *Ibid* at para 48.
[268] William A Schabas, "Balancing the rights of the accused with the imperatives of

undermined the potential for tribunals to provide an example of respect for the fair trial rights of the citizens tried before them. While UNTAET passed Regulation 2000/16 governing prosecutors, there was no new legislation to regulate the provision of defence in Special Panel trials.[269] As Cohen noted, "[i]t appears simply not to have occurred to the UN administration that provision had to be made for defense, particularly in the post-conflict situation where no experienced lawyers were available."[270] Inequality of arms was rampant. An under-resourced Defence Lawyers Unit was belatedly created in 2002, more than half-way through the process. The 64 Panels were founded primarily out of concern for defendant's rights to a fair trial and the Panels showed little inclination to try war criminals by comparison to the SCU. Thus, it is perhaps surprising that neither Regulation 2000/64 nor its predecessors provided for international defenders or a specialized hybrid defence office, even in cases related to war crimes.[271] Amnesty International noted,

> While some international judges have made genuine efforts to guarantee this right to equality of arms, overall the defence has been severely impeded by a lack of resources, training, adequate interpretation and translation, access to documents, funding and access to international expertise.[272]

The failure to provide adequate defence tended over time to undermine the persistent rhetoric of international human rights standards and norm penetration. Expedient, cost-efficient trial trumped the possibility of a more considered, defendant-conscious (if not defendant-centred) process.

On the other hand, the SCSL became more than the rote, mechanical punishment seen in Dili, and this is most apparent in the innovative approach to defence. A Defence Office was created to centralize a number of defence functions in one location.[273] However, even here, defence was merely an "afterthought" created after the Sierra Leone/UN agreement to establish the Court.[274] The prosecution budget of US$83 million dwarfed the defence's US$4 million in 2005, demonstrating a greater concern to secure

---

accountability" in Ramesh Thakur & Peter Malcontent, eds, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York: United Nations University Press, 2004) 154 at 155.

[269] Mohamed C Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (New York: Springer, 2005) at 103.

[270] Cohen, "Hybrid Justice", *supra* note 35 at 16.

[271] In cases involving international judges and prosecutors, the Kosovar Department of Judicial Administration and the Ministry of Public Services paid defence teams. Sometimes private funds were used in high-profile KLA cases to get high-quality counsel (Perriello & Wierda, "Lessons", *supra* note 23 at 24).

[272] Amnesty International, *supra* note 23 at 58.

[273] Rule 45 of the Rules of Evidence and Procedure provided that the Defence Office was to fulfil the following functions: "In accordance with the Statute and the Rules, provide advice, assistance and representation to suspects questioned by the Special Court and accused persons before the Special Court; provide initial legal advice and assistance, as well as legal assistance ordered by the Special Court to the accused persons; provide adequate facilities for counsel in the preparation of defence; and maintain a list of highly qualified criminal defence counsel and manage the assignment, withdrawal and replacement of counsel acting for accused persons."

[274] Cohen, "Hybrid Justice", *supra* note 35 at 8-9.

prosecutions.[275] Sufficient candidates were recruited to provide ten defence teams with over twenty counsel, guaranteeing that trials were generally considered fair.[276] However, by comparison with a highly impressive prosecutorial unit, the inequality of arms led to independent observations that "performance of some defence counsel at the Special Court is, not surprisingly, deficient in certain circumstances,"[277] with particular criticism over levels of preparation and professionalism.[278]

Lessons appear to have been learned from the Dili and Kosovar experiences. Provision of defence has progressively improved as each new hybrid court comes online, though problems remain. The BWCC's Criminal Defence Support Section is better known by its Bosnian acronym OKO. Its two main roles are the provision of direct assistance to defendants (such as choice of counsel) and administrative support.[279] It provides legal advice, research, and keeps rosters of over a hundred available lawyers to fill the two defence positions to which each defendant is entitled. However, there is still troubling inequality of arms owing to the significant support the prosecutorial Special Department for War Crimes enjoys from the ICTY. Cooperation is a fundamental component of the relationship between the two courts—after all, the BWCC was established to complete the process of punishment initiated in The Hague. The ICTY furnishes the BWCC prosecutors with background material, pre-trial briefs, witness and exhibition lists, and documentary evidence, which can swamp the defence counsel (for example, 14,000 pages of documentation were forwarded in the *Stankovic* case).[280] Defence counsel have insufficient time to prepare.[281] While the prosecution can make requests for evidence to the ICTY and rely on facts established at The Hague, no specific budget has been allotted to the defence to conduct its own investigations to help establish innocence.[282]

Rule 11 of the Internal Rules of the ECCC outlines the duties of a specialized Defence Support Section (DSS) in supporting the one foreign and one domestic Co-Lawyer each defendant is entitled to. Like the SCSL Defence Office and the OKO, the DSS is responsible for providing indigent accused with a list of lawyers who can defend them. The DSS also provides administrative support to the lawyers, including the payment of fees. DSS lawyers are precluded from giving advice, however. Though the Co-Lawyers have mounted competent defence in the completed *Duch* case and the ongoing Case 002 proceedings, Skilbeck notes a consistent problem of short-staffing, meaning that suspects have been interviewed without the presence

---

[275] Cockayne, *supra* note 177 at 671. See generally John R W D Jones et al, "The Special Court for Sierra Leone: A Defence Perspective" (2004) 2 J Int Crim Just 211.
[276] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 26.
[277] Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone" (2005) at 5, online: HRW <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105wcover.pdf>.
[278] Thompson & Staggs, *supra* note 174 at 46-48.
[279] HRW, "Looking for Justice", *supra* note 127 at 23.
[280] *Ibid* at 17.
[281] Ivanisevic, *supra* note 129 at 16.
[282] *Ibid* at 17.

of defence lawyers, while the DSS has no role in detention issues.[283] It is noticeable that the DSS and the Bosnian OKO have been far more vigorous in terms of training lawyers than the judicial and prosecutorial sections.[284] It may perhaps be surmised that their relative weakness may have spurred this response out of necessity. Though significant progress was made in the later years of the SCSL and in the more recent Bosnian and Cambodian defence support sections, it is worth noting that the Statute of the Special Tribunal for Lebanon was the first to constitute its Defence Office as an *equal* organ of the Court.[285]

Unduly delayed trial is a factor common to all. The average number of days in pre-trial detention for East Timorese indictees was 477 days, with the longest such detention lasting three years and six months.[286] Extended detentions were an even bigger problem in Kosovo,[287] while in the SCSL delayed trial was widely considered its greatest failing.[288] All hybrid tribunals have been criticized for failing to exemplify the standards of fair trial upheld at the ad hoc tribunals; however, to an extent, this is to be expected given both the lack of resources and the process of incorporating domestic lawyers and judges, whose failure to guarantee such standards previously was the *raison d'être* of the tribunals in the first place.

Nevertheless, most observers generally accept to differing degrees, that the trials in Sierra Leone, Bosnia, Cambodia, and Kosovo were fair. This is particularly true if one accepts Warbrick's sufficiency requirement, that in post-conflict States, the UN "should aim for trials that are 'fair enough' rather than raising expectations of an exemplary or superior level of 'fairest of all' which could never be met."[289] The ongoing Khmer Rouge preliminary motions and trials have surprised many by their competence and fairness, notwithstanding a domestic majority and widespread allegation of corruption and political interference surrounding the process. While adopting the Warbrick "fair enough" standard means one can perhaps be tolerant of the trial delays, mistranslation, and lack of victim support that typically blight internationalized justice in less developed areas, in East Timor the trials did not even achieve this limited level of fairness. Timorese

---

[283] Rupert Skilbeck, "Defending the Khmer Rouge" (2008) 8 Int'l Crim L Rev 423 at 440-441.
[284] See for example Ortega-Martin & Herman, *supra* note 35 at 20. The DSS works with the Bar Association of the Kingdom of Cambodia to offer a range of training courses for lawyers who wish to appear before the ECCC (See ECCC Defence Support Section, online: <http://www.eccc.gov.kh/english/defence_office.aspx>.
[285] *Statute of the Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Attachment, UN Doc S/RES/1757 (2007), at Article 7.
[286] Judicial System Monitoring Programme (JSMP), *Digest of the Jurisprudence of the Special Panels for Serious Crimes* (2007) at 23, online: JSMP <http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf>.
[287] David Marshall & Shelly Inglis, "The Disempowerment of Human Rights-Based Justice in the UN Mission in Kosovo" (2003) 16 Harv Hum Rts J 95 at 111; Adam Day, "No Exit Without Judiciary: Learning a Lesson from UNMIK's Transitional Administration in Kosovo" (2005) 23 Wis Int'l LJ 183 at 191.
[288] Cassese, *Report on the SCSL*, *supra* note 154 at 18.
[289] Colin Warbrick, "International Criminal Courts and Fair Trial" (1998) 3 J Confl & Sec L 45 at 54.

defendants who came before the Dili District Court were liable to face, *inter alia*, illegal detention, inequality of arms, and prejudicial retrospective legislation. These conditions were not a consequence of unfortunate transitional vagaries of a developing legal regime, but were rather the result of a systematic determination to convict them as quickly and cheaply as possible.[290]

As argued earlier, each hybrid tribunal should be commended for establishing accountability as a standard of law and governance where the alternative was systematic impunity. In each instance, the presence of international actors in the hybrid tribunal established a standard of fair or competent trial unattainable, and hitherto unprecedented, in each State. Nevertheless, the international domination of each tribunal, and the perception of each as a transitory "space-ship" phenomenon, can only beg the question to what extent the tribunals can inculcate such standards domestically among the judiciary and the people. Standards of fair trial and professionalism in each State are gradually improving from the parlous conditions that existed at the time their hybrid courts were created. However, it remains impossible to tell how much such improvement is due to the earlier trials and how much is explicable by increasing democratization, training schemes, retention of international actors, or the simple determination of the national leaders and jurists who now run the domestic justice systems to avoid the iniquities of the past. In recent years, scholars from the development, peacebuilding, and political science communities have begun to examine the field of transitional justice, hitherto dominated by lawyers and philosophers. Studies have urged a need to integrate perspectives of rule of law development and reconstruction with transitional justice, which has catalyzed a growth of empirical and interdisciplinary study.[291] As transitional justice scholarship moves from "faith-based" to "fact-based," the theoretical claims that individual measures of transitional justice are a means to strengthen the rule of law domestically have been subject to experiential criticism.[292] As one early critic of the SCSL

---

[290] Symptomatic of this is the highly coercive plea-bargaining system in place: "Clients often have no choice but to enter into a plea agreement. Plea agreements occur in the context of high conviction rates. A client is almost certain of being convicted once an Indictment is filed. If he agrees to plea bargain, he can get away with a very low sentence, but if he fights for his rights and innocence, he can be sure of a very high sentence even if he proves his innocence by circumstantial evidence or the prosecution case is riddled with inconsistencies. Furthermore if a client goes to trial and gets a low sentence, the sentence will be increased on appeal if the prosecutor disagrees with it. It has become a highly coercive technique to elicit a plea of guilt and avoid trial and get a lesser sentence." (Ramavarma Thamburan, "The Defence Lawyers Unit", handout accompanying a lecture at the "Future of Serious Crimes" symposium in Dili (28 April 2005), cited in Cohen, "Indifference and Accountability", *supra* note 255 at 39.

[291] Pablo de Greiff & Roger Duthie, eds, *Transitional Justice and Development: Making Connections* (New York: Columbia University Press, 2009) at 250-282; Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2 Int'l J Transitional Just 253.

[292] Oskar Thoms, James Ron & Roland Paris, "Does Transitional Justice Work? Perspectives from Empirical Social Science" (2008), at 7 [unpublished Social Science Research Network paper], online: Social Science Research Network <http://ssrn.com/abstract=1302084>.

noted, "[m]uch of the rhetorical support for 'legacy' creation, both within the Court and from external commentators, appears either not to appreciate the complexity of the notion, or not to translate into a willingness to provide nuanced plans of action for realization of the notion."[293] Comparative studies in the peacebuilding community find little empirical basis for many of the stronger claims made by theorists. Stromseth, Wippman, and Brooks' recent analysis of the impact of transitional trial processes on domestic rule of law found the effects to be mixed and unclear.[294] Similarly, Call finds no clear link between justice for past abuses and the quality and accessibility of justice in the future.[295] Sadly, empirical studies of the impact of the hybrid tribunals on domestic attitudes to fair trials standards or on catalyzing local efforts to establish rule of law institutions are negligible.

4. A Broken Promise

The crucial question that must be asked at this point is whether, and to what extent, the failure of the tribunals to contribute to the holistic development of the national rule of law detracts from the success of the hybrids in fulfilling the primary imperative of accountability as a necessary part of a short-term process of mediating transition from war to peace. In each tribunal, "there has been a risk that instead of incorporating the best of the international and local judicial systems, it may reflect the worst of both."[296] Academic analysis of the Special Panels has not been kind. Behind the impressive statistics, there were very serious shortcomings in the quality of the process. As resources became stretched and international attention waned, law was misapplied, defendants' rights were not protected, judgments were unclear, and a number of bewildering decisions were issued which again call into question the overall fairness of the trials. Reiger and Wierda describe the paradox of the process:

> Had nothing at all been done, it would have been viewed as entirely unacceptable by human rights organizations. At the same time, around $20 million has been spent on a venture that no one in retrospect could seriously have expected to deliver meaningful results, and nor has it much of a lasting legacy in terms of the domestic justice system.[297]

The SCSL has been criticized for excessive length of proceedings, cost, failure to ensure greater respect for the rule of law in Sierra Leone, and failure to promote or inspire substantive law reforms.[298] The 64 Panels have been labelled a failure.[299] The proceedings at the Khmer Rouge trials have

---

[293] Cockayne, *supra* note 177 at 661.
[294] Strometh, Wippman & Brooks, *supra* note 53.
[295] Charles T Call, "What We Know and Don't Know About Postconflict Justice and Security Reform" in Charles T Call, ed, *Constructing Justice and Security After War* (Washington, D.C.: United States Institute of Peace, 2007) at 3.
[296] Katzenstein, *supra* note 34 at 246.
[297] Reiger & Wierda, *supra* note 187 at 40.
[298] Cassese, *Report on the SCSL*, *supra* note 154 at 66.
[299] Amnesty International, *supra* note 23 at 1.

manifest the sort of interference and corruption[300] that motivated the inclusion by the UN of a "nuclear option" in Article 28 of the Agreement establishing the ECCC. Article 28 permits withdrawal by the UN participants where the Cambodian Government causes the Chambers to function in a manner that does not conform to the terms of the Agreement.[301] Nonetheless, before condemning the tribunals, it is necessary to consider the contributions they made in the societies where they were established, bearing in mind the states of emergency and ruin that were present, as discussed in Section III.

VI. Qualified Success: Re-Evaluating the Performance of the Tribunals

As noted earlier, the initial expectations of hybrid courts deviate significantly from the standards by which international and domestic processes of transitional criminal accountability have been judged. While it remains valid, as the first hybrid courts advocates did, to criticize the narrowness of this approach, there is a danger of throwing the baby out with the bathwater. The foregoing examination has shown legitimacy to be at best a nebulous (and perhaps unattainable) concept, demonstrated that capacity-building may be better pursued by specialized institutions, and that norm penetration remains a multifaceted process, made particularly difficult by the radically imperfect conditions of post-conflict/repressive societies. Bearing this is mind, it is worth considering how the hybrid tribunals fared in terms of the more traditional retributive calculus, and the enduring value of such a measurement.

1. The Fight Against Impunity

Each tribunal found its greatest success in punishing the most serious offenders within the territory of the State. Given the absence of Indonesian military figures outside the territory, any East Timorese process could only try the numerous Timorese militia figures of relatively minor status in custody within its borders.[302] The Special Panels in East Timor achieved impressive statistics after pursuing a policy of fullest possible accountability. By the time it (prematurely) wound up in 2005 due to insufficient donor support,[303] 391 suspects were indicted (of which 339 remained untouched outside the jurisdiction[304]) and 55 trials were completed in four years involving over eighty convictions, with three acquittals.[305] This marked a

---

[300] Barrowclough, *supra* note 20.
[301] *ECCC Agreement*, *supra* note 134 at Article 28, provides: "Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement."
[302] Bowman, *supra* note 140 at 383.
[303] The Timorese process was wound up pursuant to *Resolution 1543 (2004)*, SC Res 1543, UNSCOR, 2004, UN Doc S/RES/1543.
[304] *Commission of Experts*, *supra* note 139 at para 48.
[305] *Ibid* at paras 120 and 142. While four acquittals were originally entered, one was reversed on

milestone in the fight against the impunity which had hitherto been the norm for human rights violations. It furthermore helped incapacitate figures who might destabilize the peace and "discouraged private retributive and vengeful attacks."[306]

The SCSL took a diametrically opposed approach to ending impunity for the series of conflicts that convulsed the State for the prior decade: representative accountability. Security Council Resolution 1315 authorizing negotiations between the Secretary-General and the Government of Sierra Leone on a war crimes court[307] recommended that the Court have a narrow personal jurisdiction over persons "who bear the greatest responsibility" for crimes committed. The Resolution, in fact, made specific reference to leaders who "threatened the establishment of and implementation of the peace process in Sierra Leone," thus, serving to concentrate attention more on immediate sustenance of the peace than on more long-term ambitions.[308] In fulfilling this mandate, the Chief Prosecutor indicted only twelve individuals from the three factions, in addition to Charles Taylor.[309] Three individuals from each faction in the war ultimately went on trial, and all were convicted. The prosecution policy sent a strong message of non-impunity when the widely popular Deputy Minister of the Interior Sam Hinga Norman, viewed by many as a war hero, was prosecuted in addition to those of the vanquished RUF and AFRC. The non-partisan range of indictments sent a message that "the court operates impartially and independently."[310] While many successor trials have been criticized as victor's justice—concerned with punishing the losing side—the Court created in response to a request by the Government ended up trying a member of that Government. This sent an important pedagogical message about the propriety of political violence and the universality of the obligation to punish it. The SCSL is generally considered a success overall, especially in comparison with the contemporaneous Special Panels.[311]

Similarly, the BWCC responded to criticism of the Bosnian legal system before the Chamber's establishment that it was solely focused on ethnic Serbs; the Chamber has ensured the ethnic composition of the accused included Bosniaks and Croats.[312] This marks a significant symbolic change from the pre-war era where justice was an instrument of ethnic discrimination through biased and politically contingent implementation of

---

appeal *Prosecutor v Paulino de Jesus*, 6/2002, Judgement (Criminal Appeal No. 2004/29),(4 November 2004) (Special Panels for Serious Crimes (East Timor), Court of Appeal).

[306] *Ibid* at Summary at para 8.

[307] *Resolution 1315 (2000)*, SC Res 1315, UNSCOR, 2000, UN Doc S/RES/1315.

[308] *Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 UNTS 137, art 1.

[309] For a summary of those indicted, who died in custody, who was sentenced and the duration of the sentences. See, "Did Sierra Leone get war crimes justice?" *BBC News* (6 November 2009) online: BBC News <http://news.bbc.co.uk>.

[310] Human Rights Watch, "Bringing Justice", *supra* note 230 at 18.

[311] Cohen, "Hybrid Justice", *supra* note 35 at 26.

[312] Ivanisevic, *supra* note 129 at 34.

the law.[313] The BWCC's jurisdiction casts a wide net, extending to four types of case:

(*a*) Cases transferred by the ICTY with confirmed indictments under Rule 11*bis* of the ICTY Rules of Procedure and Evidence;

(*b*) "Category II" cases investigated, but not prosecuted, by the ICTY Prosecutor;

(*c*) New investigations commenced by the SWDC; and

(*d*) "Rules of the road" cases not processed by local authorities (pre-BWCC cases initiated in Bosnia that were reviewed by the ICTY for evidence of bias).

Between 2005 and 2010, the BWCC had handed down trial verdicts in over sixty cases of war crimes, crimes against humanity, and genocide that arose during the war.[314] The state prosecutor has estimated that anywhere between 10,000 and 16,000 possible suspects may be indicted.[315] It may be arguable that the traditional preoccupation with accountability *simpliciter* is too narrow a conception of a hybrid tribunal's potential in transition; nevertheless, the importance of creating a functioning war crimes accountability process in Bosnia was so significant that it constituted one of the five political and economic objectives set by the Office of the High Representative in Bosnia before its mandate could be completed.[316]

In Kosovo, the Regulation 64 Panels were never a freestanding institution like the others and differed greatly in jurisdiction. While the SCSL and Special Panels could try a restricted number of domestic crimes, the 64 Panels could try any type of crime in Kosovo regardless of how big or small it was, in addition to international crimes:

> The Kosovo system is so unique in that there is no fixed internationalized court or panel. Rather, the international judges permeate the court system, sitting on panels throughout Kosovo on a case-by-case basis.[317]

The 64 Panels' role ultimately turned out to be quite circumscribed in relation to punishing war crimes relative to hybrid tribunals elsewhere. As noted above, the Panels were designed primarily as a response to concerns about bias of ethnic Albanian judges against Serb defendants, and in favour of Albanians, in domestic war crime trials. In terms of dealing with wartime atrocities, the Panels never went far beyond this narrow remit, limiting themselves to reversing and re-trying clearly ethnically biased judgments of

---

[313] Michael H Doyle, "Too Little,Too Late? Justice and Security Reform in Bosnia and Herzegovina" in Call, ed, *supra* note 295 at 248-270.

[314] Claire Garbett, "Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina" (2010) 10 Hum Rts L Rev 558 at 558.

[315] Ivanisevic, *supra* note 129 at 9.

[316] Titled "Entrenchment of the Rule of Law", it was deemed achieved in the May 2010 report of the OHR (37th Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations (2010), online OHR <http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=44970>.

[317] John Cerone & Clive Baldwin, "Explaining and Evaluating the UNMIK Courts System" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, at 41-42.

Kosovar-majority courts. Although extensive investigatory work was done by the ICTY in 1999 and 2000 (600 experts exhumed 4000 bodies from 429 sites), very little made its way into 64 Panels indictments.[318] Once international prosecutors did arrive, in contrast with Bosnia, East Timor, and Sierra Leone, they made little effort to pursue criminal accountability for international crimes. Ultimately, the Panels conducted only twenty-three prosecutions for war crimes in Kosovo since 1999, the majority of which commenced before internationals arrived.[319] It has been suggested that accountability was not prioritized due to a belief that resolving the political status of Kosovo was sufficient to mediate the transition, though the simultaneous existence of the ICTY trying the most senior offenders in the conflict on both sides best explains this relative inertia.[320]

At the Khmer Rouge trials, ambiguous guidance was provided in Article 2 of the ECCC Agreement on *ratio personae*, which limited the personal jurisdiction of the Chambers to those who were "senior leaders of Democratic Kampuchea" and those who were "most responsible" for atrocities committed during the Khmer Rouge period.[321] The distinction between those "most responsible" and "senior leaders" reflects the desire of international drafters that the ECCC not be limited merely to the political leadership of the Khmer Rouge, but instead to include anyone who was significantly responsible, regardless of their position in the hierarchy.[322] At present, two cases at the Extraordinary Chambers in Phnom Penh are underway. The *Duch* case (Case 001), was completed on 26 July 2010 when Kaing Guek Eav was sentenced to thirty years imprisonment for crimes against humanity for his involvement in the mass murder of 15,000 men, women, and children at Tuol Sleng prison.[323] The four most senior surviving leaders in the KR regime are charged in Case 002, which commenced on 27 June 2011.[324] As noted earlier, the pursuit of additional indictments of individuals further down the ranks of the Khmer Rouge has been the cause of bitter disputes between the domestic and international co-prosecutors and co-investigators.[325] It appears highly unlikely that accountability will

---

[318] International Crisis Group, "Finding the Balance: The Scales of Justice in Kosovo", online: (2002) ICG Balkans Report No 134 at 18 <http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/134-finding-the-balance-the-scales-of-justice-in-kosovo.aspx>.
[319] Chadbourne, *supra* note 199 at 18.
[320] *Ibid* at 54-55.
[321] *ECCC Agreement*, *supra* note 134 at Article 2, provides *inter alia* that "the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement."
[322] Scott Worden, "An Anatomy of the Extraordinary Chambers" in Jaya Ramji & Beth Van Schaak, eds, *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, New York: Edward Mellen Press, 2005) 171 at 179.
[323] *Prosecutor v Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC-OCIJ, Judgement (26 July 2010) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh>.
[324] The Open Society Justice Initiative predicts that *Prosecutor v Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan*, 002/19-09-2007/ECCC-PTC will commence in mid-2011 (Press Release "Khmer Rouge Tribunal Legacy Hinges on Final Cases" online: OSJI (2010) <http://www.soros.org/initiatives/justice/focus/international_justice/news/khmer-rouge-tribunal-20101110>).
[325] See earlier discussion of Co-Prosecutors' Dispute.

advance beyond cases 001 and 002. As noted earlier, the Special Tribunal for the Lebanon has yet to hold a hearing, but Lebanese lawyers have argued the very process of investigating and prosecuting systemic assassinations could "rejuvenate" the domestic legal system.[326]

In punishing these crimes, the various tribunals contributed significantly to international criminal jurisprudence and established a number of legal/jurisprudential "firsts." For example, the SCSL's trial of three former leaders of the Revolutionary United Front (RUF) filled a gap in international humanitarian law by marking the first time an internationalized court convicted defendants on the charge of "forced marriage."[327] The Court provided a precedent for future legal efforts seeking to hold perpetrators to account in its seminal decisions on issues such as whether amnesties granted under domestic law are a bar to the prosecution of serious international crimes before an international criminal court,[328] and whether an incumbent head of State is compellable as a witness before an international criminal court.[329] Similarly, the Bosnian War Crimes Chamber showed considerable leadership in bringing charges for crimes committed against both male victims,[330] and underage persons in the course of warfare.[331] The ECCC Pre-Trial Chamber broke new legal ground in finding that concept of Joint Criminal Enterprise liability would have been sufficiently foreseeable to the Case 002 defendants in 1975.[332] This may be a function of the relatively greater quality of judges in these tribunals by comparison with the 64 Panels and Special Panels, which made little contribution (or even reference) to international jurisprudence.

Notwithstanding the disparity in the numbers of indictments, prosecutions, and trials, the advanced or completed tribunals have done something revolutionary in each society: they punished egregious breaches of human rights in the State's courts for the first time where impunity was previously the norm. In so doing, they condemned the use of mass violence, murder, and rape as instruments of State policy to achieve political aims as beyond the pale. The various courts did so selectively in terms of the time

---

[326] Choucri Sader, "A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusions" (2007) 5 J Int'l Crim Justice 1083 at 1089.

[327] *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-T, Judgment (2 March 2009) (Special Court for Sierra Leone, Trial Chamber I). See also *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-T, Appeal (26 October 2009) (Special Court for Sierra Leone, Appeals Chamber).

[328] *Prosecutor v Allieu Kondewa*, SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome Accord(25 May 2004) (Special Court for Sierra Leone).

[329] *Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Decision on Motion by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testifi candum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone (13 June 2006) (Special Court for Sierra Leone).

[330] *Prosecutor's Office v Kurtovic*, X-KR-06/299.

[331] *Prosecutor's Office v Radic and Others*, X-KR-05/139.

[332] *Public Decision on the Appeals against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE)*, 002/19-09-2007-ECCC/OCIJ(PTC38), (20 May 2010) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh/english/case002.aspx>.

and type of crime, but nonetheless punished a representative number of the most serious criminals within their borders in open trial. Morally justified retribution won out at the expense of impunity, on the one hand, and collective guilt, on the other.

Beyond this punitive imperative, another essential but limited goal was achieved. By processing criminals in East Timor, Cambodia, and Sierra Leone and reversing unjust convictions in Kosovo, the influence of individuals and the potency of certain revanchist appeals based on political allegiance or ethnicity was undermined. This has been interpreted as contributing to decreasing the incidence of destabilizing retributive attacks and reverse ethnic-cleansing. A Commission of Experts appointed to review the Timorese tribunal noted that the "existence of an effective and credible judicial process such as the Special Panels has also discouraged private retributive and vengeful attacks."[333] Due in significant respect to the Special Panels and the concurrent Commission for Reception, Truth and Reconciliation in East Timor, by 2005 there were only 30,000 refugees (from an original figure of 225,000 who fled at the time of the popular consultation) left in West Timor.[334] The containment of conflict entrepreneurs like Foday Sankoh, Sam Hinga Norman, and Charles Taylor has helped increase human security in a State where previous peace agreements from Abidjan, Conakry and Lomé failed completely and presaged escalations of violence. Observers argue that the work of the BWCC "can send the powerful message that new safeguards are in place and old patterns of impunity and exploitation are no longer tolerated."[335]

The 64 Panels, even in tandem with the more heralded ICTY, could not douse all the flames of an ethnic antagonism that goes back centuries. However, a process of accountability in the years before the ICTY Prosecutor could finalize indictments greatly diminished the risk of instability arising out of vindictive prosecutions, and even won support of both Serbs and Kosovars.[336] In Cambodia, the moral and legal imperative to punish the instigators of the greatest genocide since World War II is being executed in a way that has avoided the risk of instability predicted beforehand.[337] The rule of law has been described as "an exceedingly elusive notion" which has given rise to a rampant divergence of understandings,[338] but prime among what many consider to be the rule of law is the notion of accountability for serious and systematic violations of the fundamental rights of others.

In none of the States where hybrid tribunals were active did society lurch back into the violent antagonisms that gave rise to them. However, the extent

---

[333] *Commission of Experts*, *supra* note 139 at para 126.
[334] Taina Jarvinen, "Human Rights and Post-Conflict Justice in East Timor", online: (2004) UPI Working Papers at 65 <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=19246>.
[335] Ortega-Martin & Herman, *supra* note 35 at 22.
[336] Perriello & Wierda, "Lessons", *supra* note 23 at 31-32.
[337] Commission on Human Rights, *Situation of Human Rights in Cambodia*, UNESCOR, 2000, UN Doc E/CN.4/1999/101/Add 1, at para 9.
[338] Brian Tamanaha, *On the Rule of Law*: *History, Politics, Theory* (Cambridge; New York: Cambridge University Press, 2004) at 3.

to which this was a result (if at all) of the legacy of these courts becomes impossible to gauge when one considers the wide array of social, political, security, and historical dynamics that will always influence a developing post-conflict society more than a temporary court. None of this is to say that hybrid tribunals cannot effect a post-conflict change in attitudes, but the extent to which they can will always be obscured by other factors that weigh as heavily in the balance. One should be slow, therefore, to draw direct causal links between trials and a peaceable aftermath. Nevertheless, even if their beneficial effect on society cannot be accurately measured, it is credible to contend that in combating impunity, the hybrid courts did not harm the process of reckoning with the legacies of human rights abuses or jeopardize peacebuilding. Insofar as they achieved their initial purposes, such as ending the intolerable situation of indefinite detention in East Timor, reversing the ethnicization of transitional accountability in Kosovo, punishing genocidaires in Cambodia, and containing the figures that might destabilize peace in Sierra Leone, the hybrid tribunals were undoubtedly successful. The trials ended extreme impunity understood as exemption of all from punishment and cooperated effectively with truth and reconciliation processes in East Timor and Sierra Leone,[339] and with the ICTY in the case of Kosovo and Bosnia.[340] The SCSL in particular serves as a strong model for future hybrid tribunals given the successful execution of its primary mandate to end impunity for senior perpetrators of crime under a budget neither too parsimonious to do justice nor too expensive to negate its sustainability.

2. *Re-Evaluating the Hybrid Model*

Notwithstanding the successes of the tribunals in achieving the traditional goals of international criminal justice, for the Dickinsonian "idealist" school, the legacy of each hybrid tribunal in terms of capacity, legitimacy, and norm-penetration remain the normative grounds by which the performance of the structure should be judged.[341] From such a perspective, the failure of the various hybrid tribunals to achieve these aims merits the criticism of the past and the disillusionment of the present.

However, what is noticeable is that the metrics employed by these idealists are not those by which independent experts appointed by the UN to monitor these tribunals judged them. At all stages, the main emphasis remained on the primary mandate of combating impunity. The East Timorese Commission of Experts, though very critical of the Special Panels process generally, judged the process by what they called the Five Core Achievements of the ICTY, namely "spearheading the shift from impunity to accountability, establishing a historical record of the conflict, bringing justice

---

[339] William A Schabas, "Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court" (2004) 2 J Int'l Crim Justice 1082.
[340] International Crisis Group, *supra* note 196 at 22; Abdulhak, *supra* note 121 at 349.
[341] The expectation is alive and well is 2011. See for example Ortega-Martin & Herman, *supra* note 35 at 4 and 6.

to victims and giving them a voice, and accomplishments in international law.[342] Issues of capacity-building, norm-penetration and legitimacy played little role in this reckoning. Antonio Cassese's independent Report on the SCSL was often quite critical of the process, but complaints were primarily directed at the inexpedience of the Court in fulfilling its duty to prosecute those most responsible. Once more, issues of capacity-building and norm-penetration were of parenthetical interest, notwithstanding the ostensibly more holistic expectations of the Court initially.[343] A series of UNMIK and OSCE reports on the Regulation 64 Panels were similarly critical of its day-to-day functioning, but eschewed any examination of capacity-building or norm inculcation functions properties.[344] International support for the BWCC came from the ICTY and OHR whose avowed concern was the punishment of war crimes on a sustainable basis, with any wider by-products considered a bonus and delegated to other state-building processes. The endurance by the UN of delays, political interference, and corruption at the Khmer Rouge trials suggests that securing convictions of genocidaires is more central to their expectations of the trials than any role as exemplar of the rule of law in progress. So great was the emphasis on punishment above any exemplary or developmental function, that in all hybrid tribunals outside the former Yugoslavia, there was "a danger that the public begins to perceive the Prosecution and the Court as broadly indistinguishable."[345]

By contrast, those who adopt a more idealistic view of the hybrid tribunal's potential have been less sanguine about their performance. What is notable is that while they have condemned individual tribunals, believers in the model's inherent promise nevertheless retain faith in the mixed model concept as a whole. As a result, a residual hope in the promise of hybrid tribunal structure remains undimmed by actual practice.[346] It remains possible to argue that earlier hypotheses were tested imperfectly, based as they were on the presumption that international support and resourcing would be sufficient to buttress the capacity-building, independence, and outreach that to varying degrees were missing in all of the tribunals. As actors in the SCSL belatedly realized, "a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced."[347] It is clear that

---

[342] *Commission of Experts*, *supra* note 139 at para 31.
[343] Cassese, *Report on the SCSL*, *supra* note 154.
[344] For example, Organization for Security and Co-operation in Europe Mission in Kosovo/UNMIK, *Kosovo Review of the Criminal Justice System 1999-2005: Reforms and Residual Concerns* (2006), online: OSCE <http://www.osce.org/documents/mik/2006/03/18579_en.pdf>, at 39-43 especially. By contrast, in a 2007 review, Amnesty International criticizes the 64 Panels for failure to set an example of fair trial and for failure to develop the justice system *(supra* note 23 at 32, 57-89).
[345] Cockayne, *supra* note 177 at 673.
[346] For example, in a 2009 article Jain argues:
"Hybrid tribunals are said to hold out the promise of being able to transcend the problems of both purely domestic as well as purely international prosecutions: they are considered more independent and impartial than a domestic court and can overcome the burden of garnering resources and expertise in post-conflict societies" (Jain, *supra* note 106 at 85).
[347] UN Development Programme and International Center for Transitional Justice, "The 'Legacy' of the Special Court for Sierra Leone", unpublished paper on file with author, also cited by

predictions about the legacy of hybrid tribunals ignored the disjunction between idealized high-standard proceedings and the cultural context which demanded hybrid structures to begin with, and elided the extent to which pressing short-term exigencies motivated their creation. It remains conceivable then to argue that if sufficient resources and support were forthcoming, hybrid tribunals would prove equal to the elevated expectations of them. Notwithstanding the practice of the tribunals and their diminishing popularity in recent years, there remain those who contend that "the theoretical justifications for hybrid tribunals ... suggest that the hybrid approach can be more ethical, practical and sophisticated than alternative IHL accountability mechanisms."[348] As Dickinson argues, the problems endured by the tribunals are those of implementation and not of conception, "stem[ming] more from resource constraints than from structural problems with the hybrid model."[349] Similar arguments have been made by Burke-White,[350] Higonnet,[351] and most recently by Mendez.[352]

This argument retains some force. It is difficult to find flaws in the hybrid model per se—being simply an indistinct and malleable mix of international and domestic apparatus and law. It elastically allows for any number of approaches and priorities, successes and failures, as evidenced by the wide disparities in function and structure of, say, the BWCC and the Special Court for Lebanon. It is in essence a blank canvas—the picture that emerges may be a masterpiece or a travesty, but it reflects more the painter than what it was painted on. While the closure of impunity gaps has been their primary purpose, it remains entirely conceivable that in the future a hybrid tribunal could hire enough international actors to make mentoring a reality, enjoy the support of a domestic Government as constructive as that in Freetown, and strike the right balance with national aspirations for involvement, outreach, and legacy exercises.

One can accept therefore that there is nothing inherent in the hybrid tribunal structure that dooms it to failure in terms of wider rule of law reconstruction, even if the experience of the various hybrids does suggest that earlier arguments about the link between such tribunals and issues of legitimacy and capacity are more complex than previously understood. Furthermore, nothing that has happened under the implementation of the hybrid tribunal model to make the criticisms of purely international and purely domestic tribunals for their failures in these regards any less valid—they merely call into question whether this model is the answer to the

---

Higonnet, *supra* note 9 at 368.

[348] Mendez, *supra* note 55 at 55.

[349] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 307.

[350] Burke-White, "Community", *supra* note 27 at 74.

[351] Arguing that any "intrinsic flaws" of the hybrid tribunal model must be analyzed separately from "the failure of existing tribunals on the ground" (Higonnet, *supra* note 9 at 410).

[352] "However, despite the powerful justifications, to date hybrid tribunals have failed to fully live up to their promises and face a number of limitations. Nevertheless, the shortcomings do not imply any inherent weakness in the hybrid model. Rather they suggest that greater efforts are needed to improve their design and implementation so as to unleash the unique benefits they offer to post-conflict societies" (Mendez, *supra* note 55 at 55).

criticisms.

It is submitted that while this dampening of enthusiasm is an understandable reaction to a missed opportunity to re-orient the purpose of international criminal justice, the tendency to dwell more on the failure to catalyze improvement in the domestic justice system than on their actual achievements in combating impunity and deterring violations of the emerging peace risks obscuring their greatest utility. Because the successes of these hybrid tribunals, such as the removal of destabilizing actors, representative prosecutions, or ethnically unbiased judgment, are all equally achievable by purely domestic or purely international courts, hybrid tribunals have not been given credit for them. Attention has instead rested on the wider promise they are deemed capable of realizing, notwithstanding the fact they were not established to achieve these purposes. The success of a hybrid tribunal has not been judged primarily by output in terms of convictions, containment of destabilizing figures, or contribution to the historical record—the primary standards of review for domestic tribunals and international tribunals. Instead, hybrid courts are judged, and consequently criticized, for their limited capacity-building, their failure to inculcate international standards of fair trial norms, and the essentially unascertainable level of legitimacy they enjoy in traumatized societies. These are standards that are not expected of purely international or domestic tribunals, and which no hybrid structure has been adequately resourced to achieve.

The experience of the last decade does not demonstrate the failure of the hybrid tribunal hypothesis. In effect, the failures to resource them adequately as a result of the normative primacy of the retributive, emergency-oriented nature of international criminal justice have compromised the "experiment." However, what the last decade does show is that the mindset that would make the promise a reality does not exist. The holistic impact of a trial process on the domestic justice system and its legitimacy in the eyes of the population remain in a subordinate position in the normative hierarchy of priorities of those at UN and international level tasked with responding judicially to gross breaches of human rights and the laws of war. When hybrid tribunals are primarily designed to fill impunity gaps, any broader or more long-term promise will be neglected. Such tribunals have only ever arisen in post-conflict contexts in weak or failing States where the danger of a rapid lurch back into violence is ever-present, most notably Lebanon, Kosovo, and Sierra Leone. The hypothesis of hybrid tribunal potential may be valid, but only in conditions abstracted from the historic conditions of emergency and international indifference that have given rise to them. It is tempting to agree with the solution identified by the Office of the High Commissioner for Human Rights that "more planning is needed than has been the case to date," but this underestimates the difficulty of turning theory into reality.[353] Hybrid tribunals can only arise in situations where, almost inevitably, there is little time or opportunity to plan for perfect

[353] OHCHR, *supra* note 55 at 9.

solutions, and where the present normative hierarchies and strategic priorities of international criminal justice policy are antipathetic to such deliberation.[354] Though it also has been argued that hybrid tribunals could achieve their more holistic promise through greater investment in resources, a thorough-going re-orientation of purposes is what is most required.

While lessons can be learned from the experience of the last decade, as international criminal justice becomes ever-more dominated by the ICC's relatively circumscribed retributive concern with non-impunity, there is unlikely to arise the sea-change in attitudes that would make hybrid tribunals effective in a holistic sense. If anything, as the hybrid tribunal model approaches its teens, its future function is more likely than ever to be a resumption of its role in closing impunity gaps, this time as a complement or as an alternative to the Rome Statute's complementarity regime in states unwilling or unable to genuinely prosecute.[355] The most likely future role for hybrid tribunals is that of a useful, but largely subordinate, agent in the era of the ICC, in four ways:

(*a*) as a means for a State to create a genuine domestic proceeding to preclude admissibility of a case or situation before the ICC under Article 17 where otherwise it would be unwilling or unable;[356]

(*b*) as a complement to the ICC for the prosecution and trial of suspects further down the criminal hierarchy than those subject to proceedings in The Hague;[357]

(*c*) as a mechanism for trying serious crimes for which the ICC does not have temporal or geographic jurisdiction; or

(*d*) as a mechanism for trying political or *sui generis* crimes not covered, or not covered adequately, in the Rome Statute.[358]

---

[354] Richard Goldstone, "Advancing the Cause of Human Rights" in Samantha Power & Graham Allison, eds, *Realizing Human Rights: Moving from Inspiration to Impact* (New York: St. Martin's Press, 2000) 195 at 206-207.

[355] For example, Abdulhak argues that "the cooperation between the ICTY and WCC provides useful tools for developing modes of cooperation between the ICC and national courts, both at the legal and operational level" (Abdulhak, *supra* note 121 at 358).

[356] Bergsmo and Benzing contend that if a State were to discharge their duties under the Rome Statute by engaging the assistance of the international community (and in particular the UN), this would accord with the object and purpose of the Rome Statute (Markus Benzing & Morten Bergsmo, "Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court", in Romano, Nollkaemper and Kleffner, eds, *supra* note 14, 407 at 409).

[357] Broomhall argues that hybrid tribunals can assist the ICC by prosecuting lower-profile cases as part of a co-operative "joint venture" (Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) at 104.

[358] See e.g. the ECCC and SCSL's distinct subject matter jurisdictions over crimes specific to national conflicts such as abuse of young girls (Article 7 of the Statute of the SCSL) or cultural crimes (Article 7 on the Law on the ECCC); as well as, the Special Tribunal for Lebanon's jurisdiction over terror-related crimes (Article 2 of the Statute of the STL).

VII. Conclusion

After being greeted with great scholarly enthusiasm, the predicted "promise" of hybrid tribunals ultimately went unrealized. It is easy to pinpoint what went wrong in Dili, Freetown, or Phnom Penh and to urge financial and doctrinal reform in how such bodies operate. However, it must be remembered that the earliest predictions of their potential were abstracted from the conditions of emergency and insecurity that gave rise to them, and downplayed the dominant emphasis of non-impunity in the field of transitional justice. Thus, while there may be nothing inherent in the hybrid tribunal structure that makes failure inevitable, there may be something innate in the circumstances that have given rise to this halfway house form of accountability in the past that does.

A concern with non-impunity on the one hand, and the sort of holistic approach advocated by hybrid tribunal theorists on the other, are not mutually exclusive goals but could rather be mutually re-enforcing. The criticisms of the ad hoc tribunals as regards ownership and remoteness still apply to the ICC and therefore creative adaptations should not be precluded—hybrid tribunals still "offer at least partial responses to the challenges of legitimacy and capacity in a post-conflict environment."[359] However, pragmatic application of the model may continue to govern the limits of hybrid tribunals. The model has proven successful in fulfilling the task of bringing to justice those responsible for the most serious crimes in a comparatively timely and expeditious manner. This track record aligns better with the purposes envisaged in the Rome Statute Preamble's—"to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"—than the unwittingly revolutionary approach suggested by the hybrid court idealists. Though the ICC can be criticized for its failure to develop capacity, its questionable legitimacy, and likely failure to inculcate norms of fair trial domestically, such concerns remain confined to the margins of policy-making in international criminal law in the era of the ICC. There is a role for hybrid tribunals in responding to the inadequacies of domestic courts, but not necessarily in remedying them. In short, if given renewed opportunities, hybrid courts can be deployed in all sorts of post-conflict and post-repression societies like they have in the past, either as an alternative or complement to the ICC.

There will always be a role for a court model that can mix the expertise of the international community with the legitimacy of domestic actors and situation in the *locus delicti*; nevertheless, it is worthwhile to remain circumspect about what hybrid tribunals can achieve in a climate where non-impunity represents the pinnacle of ambition. The much-trumpeted advantages that hybrid tribunals have over purely international and purely domestic courts are entirely latent. If the support and re-orientation of the priorities of international criminal justice policymakers that would make the "promise" of hybrid tribunals a reality are not forthcoming, expectations

[359] Stahn, *supra* note 3 at 449.

should be dampened. While the manifold problems of the hybrid tribunals have lead to a diminution in popularity among NGOs and the academic community, the better position is that these difficulties are problems that do not rule out their ultimate usefulness. Those disappointed in hybrid tribunals should acknowledge their success in combating impunity. Those who still believe in the wider potential of hybrid tribunals should acknowledge the underlying reasons why it is not a self-fulfilling prophesy. They should, thus, abandon superficial reasoning based on finance and power politics, which are merely symptoms of a wider lack of concern with expansive and long-term conceptions of the rule of law in post-conflict States. Where the opinions of realists and idealists can coalesce is around the idea that hybrid tribunals fail most when they deliver injustice, undue delay, and unfair trial. Limited conceptions of the hybrid tribunal based around non-impunity and more expansive concerns with norm penetration and capacity-building should emphasize that the compromises on due process, equality of arms, judicial independence, and public alienation evident in the past should be limited as much as possible.

Knights of the Court
The State Coalition Behind the International Criminal Court

L. RUSH ATKINSON*

I. Introduction

In June 2011, the Tunisia became the 116th State Party to the International Criminal Court (ICC).[1] The number of ICC members has steadily increased since 1998, and the Court has, consequently, increased

* Graduate Fellow, Center on the Administration of Criminal Law, New York University School of Law. J.D., New York University; M.Phil., University of Cambridge; B.A., The University of Chicago. I wish to thank Marc Weller, Jose Alvarez, Mattias Kumm, Janina Dill, and Jessica Collins for their help and insights into this article. I am also grateful to the anonymous reviewer for critical advice and insights. This article was funded in part by a graduate research grant from Christ's College at the University of Cambridge. The data was presented at the International Studies Association's annual convention in 2008, with funding provided by the New York University Prominence Fund.

[1] Tunisia deposited its instrument of accession with the United Nations on June 24, 2011. Press Release, Tunisia becomes the 116th State to join the ICC's governing treaty, the Rome Statute, ICC-CPI-20110624-PR688 (June 24, 2011).

Vol. 7 pp. 66-103. ISSN: 1712-2988.

both its caseload and its role in defining the parameters of international criminal law.[2]

Not all nations, however, have supported these trends. The United States, not a member of the Court, has traditionally taken particularly great efforts to minimize the ICC's influence in the international system. The U.S. has, in connection with its ICC protests, removed troops from UN peacekeeping missions; refused to fund international criminal trials; vetoed the renewal of UN peacekeeping operations; revoked military aid to states that have supported the ICC; and threatened to halt humanitarian aid to ICC members.[3] These tactics have won the U.S. some victories in the form of exemptions from the Court's jurisdiction; however, despite the United States' remarkable use of resources towards limiting the Court's global role, such tactics have had limited effect, and the ICC has expanded its reach over U.S. objections.

While some of the ICC's increasing role can be attributed to the tribunal system itself and its fleet of non-governmental supporters, an often overlooked force is the coalition of states that has served as the ICC's guardian in its first years. During this period, State Parties to the ICC, and in particular a subset of member states, have been critical in protecting the ICC. The nascent Court has lived in a veritable political minefield, and its success and relevance are largely due to a de facto coalition that has championed a strong and independent international judiciary.

To date, the coalitional success has been entirely overlooked; instead, the success of the ICC has been more readily attributed to global movements and non-state forces of civil society. This article hopes to correct this oversight, largely by recounting the various political disputes over the ICC.[4] Using

---

[2] See *Prosecutor v Anto Furundzija*, IT-95-17/IT, Judgment, (10 December 1998) at para 227 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) (describing the ICC's role in developing customary international law).

[3] See generally Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court" (2002) 78 Int'l Affairs 693 (discussing early U.S.–ICC disputes); Mohamed El Zeidy, "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power Deferrals and Resolution 1422" (2002) 35 V and J Transnat'l L 1503 (discussing 2002 dispute over ICC in United Nations Security Council); Aly Mokhtar, "The Fine Art of Arm Twisting: The U.S., Resolution 1422 and Security Council deferral power under the Rome Statute" (2003) 3 Int'l Crim L Rev 295 (same); Corrina Heyder, "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Function and Status" (2006) 24 Berkeley J Int'l L 650 (discussing U.S. actions in opposition to ICC).

[4] The study of the ICC's evolution is also an examination of how international law is forged through a combination of treaty and subsequent state practice. To date, however, studies of the ICC have maintained a relatively narrow focus, limiting themselves to only one or two events in the ICC's history. No paper that this author is aware of has examined the developments of the ICC as an evolutionary process, a common omission in academia. See Oran R Young, "Regime Dynamics: The Rise and fall of International Regimes," (1982) 36:2 Int'l Org 277 at 277-278 (noting that the complexity of international legal regimes "makes it tempting to approach them in static terms, abstracting them from the impact of time and social change," a strategy that "cannot provide the basis for any comprehensive analysis"). Given the important political disputes that took place over a period of years, however, the ICC begs to be studied as a process rather than a moment of agreement. For this reason, examining the ICC as an evolving institution appears a previously unexplored issue of interest.

United Nations documents, contemporaneous media accounts, statements by diplomats, and various secondary sources, this article revisits the major political incidents concerning the ICC during the Bush Administration. While it is hoped that this account, itself, will enrich our understanding of the ICC, this article also uses the case study to assess how international law is forged.

In addition to this article being a state-centric discussion of the ICC's development, this article explains how power has influenced the Court's form. In this way, the article accepts the recent challenge of Nicole Deitelhoff that "[p]ower-based approaches … cannot account for ... the ICC's institutional design."[5] Quite to the contrary, this article argues: the Court's jurisdiction and caseload cannot be explained without discussing the various sources of power at play during the negotiations.

Ultimately, this article offers one example of how power dictates form, even in cases where normative factors play a hugely influential role in state motivations. However, it diverges from traditional power politics accounts of international law in that it concludes that the ultimate outcome of international disputes over international law can be dictated by a coalition of smaller states and not by a hegemonic force. For many that have previously disdained the concept of power politics for merely consequentialist reasons (i.e. they thought power politics was the game of the strong), the ICC example may lead some to reconsider their position.

The article proceeds as follows. Section I briefly offers a power-centric model of the forces behind international law, drawing in particular from the field of International Relations (IR).[6] The effort here is not to cover *all forms* of power that influence international law, but rather to identify the different forms of power that influenced the Court in its infant years. Section II contains this article's case study: the early history of the ICC and the role of the state coalition that supported it. After reviewing the coalition's origins, it turns to the coalition's behavior during the first years of the Court's operation, focusing on two particular disputes between the coalition and the United States. First, the article examines the coalition's role in limiting the U.S. campaign to exempt itself from the Court's jurisdiction. Second, the article examines the 2005 Security Council referral of Sudan to the ICC, which took place over U.S. objections. In Section III, the article returns to explanations of how states exercise power during international disputes. It highlights two facets of the ICC coalition—size and diversity—that were critical to its success in negotiations. The article concludes by considering the

[5] Nicole Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case" (2009) 63 Int'l Org 33 at 40.

[6] As others have previously noted, this type of interdisciplinary inquiry can help legal scholars better understand what the underpinnings of international law. Kenneth W Abbot, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) 93 Am J Int'l L 361 at 362 (arguing IR has descriptive, explanatory, and prescriptive functions in assessing law); Anne-Marie Slaughter, Andrew S Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 Am J Int'l Law 367 at 375.

importance of recognizing that power influences international law by examining how the ICC's attitude towards the prospect of power politics had a measurable effect on the outcome of certain smaller disputes. Put simply, refusing to acknowledge power politics does not reduce power's influence; indeed, an overly principled approach to these disputes merely affords opponents the opportunity to flex their own muscles unopposed.

II. Power, Inside and Out

As explained above, the story told here is one about power. In recent years, the academy's interest in power has been renewed and proposed power taxonomies—categorizations of the different types of power at play in the international system—have emerged with some frequency. This paper does not aim to add unnecessary ink to that debate and instead elects to employ the frameworks offered by others. Specifically, this paper begins within the four-faced taxonomy of power offered by Michael Barnett and Raymond Duvall[7] and then incorporates the insights of others along the way.

In their recent article, Barnett and Duvall argued that international relations had failed to develop adequate conceptualizations of power, which "limits the ability of international relations scholars to understand how global outcomes are produced and how actors are differentially enabled and constrained to determine their fates."[8] The fault, in their opinion, was two-fold. Certain schools had run from discussions of power, and as a result their paradigms lacked considerable explanatory force for some of the most common types of interaction in the international system.[9] At the same type, groups that had engaged in "power studies" had defined power too narrowly, thereby excluding obvious examples of power from their analyses.[10] Barnett and Duvall's solution was to offer a single framework that accounted for the most important forms of power at play in the international system and would incorporate the insights of disparate schools; their result was a structure that categorized power along two dimensions, giving a four-fold taxonomy of power.[11]

Though Barnett and Duvall offer four types of power that affect the international system, this article's focus is mainly trained on two: compulsory power and institutional power. These two types of powers constitute the types of power involved during the "interaction of specific actors," in this case states.[12] Non-interactive forms of power, in contrast, are relatively less influential in the ICC story.[13]

---

[7] Michael Barnett & Raymond Duvall, "Power in International Politics" (2005) 59 Int'l Org 39.
[8] *Ibid* at 41.
[9] *Ibid*.
[10] *Ibid* at 41-42.
[11] *Ibid* at 48.
[12] *Ibid* at 45-47.
[13] This article also uses a rather conservative notion of what power is, a definition analogous to Dahl's definition that "A has the power over B to the extent that [A] can get B to do something that B would not otherwise do." Robert A Dahl, "The Concept of Power," (1957) 2:3 Behavioural Sci 202 at 202-03. Dahl's definition of power has been the traditional definition used in

Finally, the line between compulsory power and institutional power is not clean. Barnett and Duvall themselves acknowledge that the distinction is sometimes difficult to draw.[14] Because the focus here is simply on emphasizing the role of power in general, and not overly concerned on identifying the precise type of power that was most influential during the formation of the ICC, this article does not spend a lot of time worrying about where to draw the line. In general, the analysis simplifies Barnett and Duvall's model so that exercises of power that come through multilateral organizations, particularly during negotiations within the Security Council, are considered examples of institutional power; examples of power exercised outside the organization are deemed compulsory power. Finer line-drawing is unnecessary for the purpose of this paper and would unnecessarily complicate the explanation offered here about the Court's first years.

1. Compulsory Power

Barnett and Duvall describe compulsory power as the "direct control of one actor over the conditions of existence and/or the actions of another."[15] Compulsion has been the traditional focus of international relations' focus on power, led primarily by the realist school.

Barnett and Duvall define compulsory power broadly enough to include normative forces like the shaming campaigns commonly led by transnational non-government organizations,[16] and this article similarly adopts this categorization. However, the general focus of this article remains on the traditional sources of compulsory power, namely economic and military capabilities. Realists, for instance, ignore the force of norms and categorize compulsory power as either "military" or "latent," the latter defined as "the socio-economic ingredients that go into building military power... largely based on a state's wealth and the overall size of its population."[17]

While latent resources and military capabilities are reservoirs of power, a different issue is the manner in which states utilize these resources to influence regime negotiations. Since reservoirs of power alone are not enough to exercise influence, if a theory fails to explain how sources of compulsory power are operationalized it sheds very little light on particular

---

international relations for years. See e.g. John J. Mearsheimer, "The False Promise of International Institutions", (1994) Int'l Security 9 at 57. Constitutive and non-interactive forms of power can also effect the decisions of a state, but since they cannot be as strategically deployed by states, they do not fit within Dahl's vision of power as well.

[14] Barnett & Duvall, *supra* note 7 at 51 (noting that it is "possible that a dominant actor maintains total control over an institution," which would be an example of compulsory power).

[15] *Ibid* at 48.

[16] *Ibid* at 50.

[17] John J Mearshimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton & Company, 2001) at 55; see also Stephen M Walt, *The Origins of Alliances* (Ithaca, NY: Cornell University Press, 1987). The most common source of latent power is economic capabilities, such as "control over raw materials, control over sources of capital, control over markets, and competitive advantages in the production of highly valued goods." Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

interactions between states.[18] Commentators on compulsory power have therefore proposed a variety of mechanisms by which power is operationalized. Robert Gilpin, for instance, notes that one common tactic is the "use of side payments (bribes), sanctions, and/or other means."[19] Such carrot-and-stick approaches can include access to markets, offers of technology, offers of military support, and foreign direct investment. A second way for great nations to control regime content, realists argue, is through the offer of public good provision. This mechanism is central to realist variants of the hegemonic stability theory (HST), in which a hegemon offers a public good in exchange for a regime system (trade, financial, etc.) that it views as stable and in its interest.[20] The public goods offered by a hegemon can also be varied, ranging from a system of stabilized currencies to the maintenance of an open trading system.[21] These goods, while non-excludable, are still offered by a larger power as a way to sweeten the large power's proposal.

While scholars agree public good provision and side payments are common methods of influence in international relations, other schools have attacked realism's singular focus on these mechanisms of influence as insufficient to explain a large number of agreements among nations.[22] Some authors suggest that latent power may not be equally fungible for all issue areas and in some cases has simply no purchase.[23] The structure of certain negotiations—particularly those involving the formation of regimes and international organizations—can also limit the amount of economic pressure that can be placed by one actor on others. In some circumstances, states may be blocked procedurally from using bribes and threats by parliamentary procedure and other rules governing negotiating conventions. In the limited time span during which regime negotiations often take place, sometimes little opportunity presents itself to influence negotiations via latent mechanisms.[24] Still others argue there is also a lack of evidence that states use

---

[18] Barnett & Duvall, *supra* note 7 at 50-51; see also *infra* notes 23-25 and accompanying text.
[19] Robert Gilpin, "The Politics of Transnational Economic Relations," in Robert O Keohane & Joseph S Nye, Jr, eds, *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972) at 97; see also Robert Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987) at c 3.
[20] Stephen D Krasner, "State Power and the Structure of International Trade" (1970) 28 World Politics 317; Gilpin, "The Politics of Transnational Economic Relations," *ibid* at 93-102; see also Duncan Snidal, "The Limits of Hegemonic Stability Theory" (1985) 39 Int'l Org 579; Joanne Gowa, "Rational Hegemons, Excludable Goods, and Small Groups: An Epitaph for Hegemonic Stability Theory?" (1989) 41 World Politics 377.
[21] See Krasner, *supra* note 20; Charles Kindleberger, *The World in Depression, 1929-1939* (Berkeley, CA: University of California Press, 1977) (theorizing hegemonic stability theory).
[22] See e.g. Barry Eichengreen, "Hegemonic Stability Theories of the International Monetary System" in Jeffrey A Frieden & David A Lake, eds, *International Political Economy: Perspectives on Global Power and Wealth*, 4th ed (New York: Routledge, 2000) 220 at 221 (arguing there is still "ambiguity about the instruments with which the hegemon makes its influence felt" during the course of negotiations); Oran R Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994) at c 5.
[23] Young, *supra* note 22 at 119-120.
[24] G John Ikenberry, "A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement" (1992) 46 Int'l Org 289.

economic penalties to punish states that oppose larger powers' efforts to introduce a new regime into the system, which leads to questions about whether sticks are used as often as realists suggest.[25] These criticisms, while not fully denying the role of compulsory power, suggest that a second form of interactive power influences the interaction of states during negotiations, one which Barnett and Duvall refer to as "institutional power."

2. Institutional Power

"Institutional power exists in actors' indirect control over the conditions of action of socially distant others," Barnett and Duvall explain.[26] The indirectness of institutional power, they elaborate, is a result of the fact that a single actor does not "control" an institution in the way that an actor controls a missile or an aid package.[27] Generally, an "institution has some independence from specific resource-laden actors," forcing actors that exercise power through institutions to do so through an agent they cannot perfectly manipulate.[28]

The independence of international institutions has been discussed extensively in recent literature and a variety of explanations about the source of institutional independence have been offered.[29] Some have emphasized the "stickiness" or "frozen" nature of international organizations;[30] because reform of institutions requires significant resources, actors simply accept playing by old rules, even if those rules put them at a small advantage.[31] Others have noted that the uncertainty of the international system sometimes makes it rational for states to favour independent organizations.[32] And some scholars, particularly neoliberal institutionalists, have discussed how states can consciously elect to create independent tribunals in order foster international cooperation that leads to mutual gains.[33]

Compared to discussions of compulsory power, the literature examining

---

[25] See e.g. Keohane, *supra* note 17 at 38. Carrots, like *ex ante* bribes, are much more common.
[26] Barnett & Duvall, *supra* note 7 at 48.
[27] *Ibid* at 51.
[28] *Ibid*.
[29] For a very useful overview of different theories of international organizational independence, see Michael N. Barnett & Martha Finnemore, "The Power, Politics, and Pathologies of International Organizations" (1999) 53 Int'l Org 699 at 707-10. See also José E Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2006) at 585-620.
[30] G John Ikenberry, "State Power and the Institutional Bargain: America's Ambivalent Economic and Security Multilateralism," in Rosemary Foot, S Neil MacFarlane, & Michael Mastanduno, eds, *US Hegemony and International Organizations: The United States and Multilateral Institutions* (Oxford: Oxford University Press, 2003) 49 at 52; Robert O Keohane, "International Institutions: Two Approaches" (1988) 32 Int'l Stud Q 379 at 384.
[31] See Patrick Holden, *In Search of Structural Power: EU Aid Policy as a Global Political Instrument* (Burlington, VT: Ashgate, 2009).
[32] Eric A Posner & John C Yoo, "Judicial Independence in International Tribunals" (2005) 93 Cal L Rev 1 at 17-18.
[33] Kenneth W Abbott & Duncan Snidal, "Why States Act Through International Organizations" (1998) 42 J Conflict Res 3 at 16-23 (providing a variety of functions that independent international organizations serve to foster cooperation); Barnett & Finnemore, *supra* note 29 at 704-06.

how states exercise institutional power is rather undeveloped.[34] Barnett and Duvall are short on details when discussing institutional power, and neoliberal institutionalists—the most obvious candidate to discuss institutional power—largely have eschewed the subject.[35] But at least some scholars have discussed the exercise of power through international organizations. Susan Strange, for instance, discussed the notion of "political power," which she described as control over the machinery of any institution, such that a state could use the machinery to compel obedience or conformity to their wishes and preferences from others.[36] Stephen Krasner has offered a more general notion of institutional power that focuses on the ability to affect the conditions of a negotiation, via strategies that employ pre-existing regimes and organizations.[37] According to Krasner, an actor can affect the conditions of negotiation in a variety of ways, including (1) determining the actors who are involved in the issue resolution, (2) dictating the rules of negotiations (e.g. who makes the first move, the scope of negotiations, etc.), and (3) changing the relative payoffs of competing proposals during the course of the negotiations.[38] An exercise of institutional power, therefore, can be as nominal as the selection of one negotiating forum over another, as intricate as the use of procedural rules to filibuster negotiations, or as devious as vote swapping and issue linkage.[39]

The exercise of institutional power often has advantages compared to other mechanisms of coercion. One, where sticks and carrots are impossible because of time or resource constraints, political mechanisms may still be available. Two, institutional power can reduce the moments in which fights over regime form would end in mutually destructive behaviour like, for instance, the application of reciprocal sanctions between otherwise stable allies.[40] Third, a state may employ institutional power because the party

---

[34] To date, the most popular example of institutional power given by discussants of the Barnett and Duvall's framework is the creation of an international organization. The *use* of pre-existing organizations has gone almost entirely overlooked. One exception to this general rule can be found in Soo Yeon Kim, *Power and the Governance of Global Trade: From the GATT to the WTO* (Cambridge: Cambridge University Press, 2010) at 13-18 & 56-57 (outlining the exercise of institutional and compulsory power by the United States in the trade regime, particularly in the formation of the GATT).

[35] Barnett & Duvall, *supra* note 7 at 41.

[36] Susan Strange, *States and Markets* (New York: Pinter Publishers, 1994) at 25. Strange used the term "political power" to describe this type of power, but she describes essentially the same form of power that Barnett and Duvall classify as "institutional."

[37] Stephen D Krasner, "Global Communications and National Power: Life on the Pareto Frontier" (1991) 43 World Politics 336 at 340.

[38] *Ibid* at 340.

[39] See Robert Jervis, "Realism, Game Theory, and Cooperation," (1988) 40 World Politics 317 at 322; Ofer Eldar, "Vote-Trading in International Institutions" (2008) 19 Eur J Int'l L 3; David Leebron, "Linkages," (2002) 96 Am J Int'l L 5 (discussing the increasing importance of issue linkage in international forums); see also Giuloio M Gallarotti, "Soft Power: What it is, Why it's Important, and the Conditions Under Which it Can Be Effectively Used" (2011) Wesleyan Division II Working Paper 57, online: <http://wesscholar.wesleyan.edu/div2facpubs/57> (noting agenda control as form of institutional power).

[40] Since regime formation is a process, states can invest resources in efforts to establish a regime that is never codified.

wants to develop a regime with multiple partners simultaneously. In these circumstances, established regimes may be the most expedient forum for multiparty talks, but to effectively use these forums states must follow the established procedurals rules (many of which eliminate the chance for bribery and similar strategies). In this way, political institutions have a catalytic effect, reducing the transaction and bargaining costs.[41] These reasons are not exhaustive, but they do explain why a state could favour institutional mechanisms over other strategies to employ its latent power.[42]

The exercise of institutional power is particularly predominant in legal regime negotiations, in part because pre-existing regimes are often used as the forums for new negotiations.[43] Negotiations for the formation of the World Trade Organization (WTO) and the new trade regimes that accompanied it all took place in the context of its predecessor, the General Agreement on Trade and Tariffs (GATT). The UN is another common focal point for regime negotiations, itself being entwined with many regimes.[44] But it is worth reiterating that institutional power only refers to state actions done for coercive purposes, namely to induce states to agree to a regime, rule or collective action that it otherwise would not desire. Power here does not involve any form of socialization resulting from membership in an organization;[45] when a state changes course as a result of institutional power, it does so begrudgingly, and not because its interests have changed.[46]

Having laid out the traditional explanation of how power underpins international legal regimes and some of the procedural mechanisms by which power is exercised, the article now turns to the recent evolution of

---

[41] Like chemical catalysts, the presence or absence of international institutions can also be determinative as to whether or not a certain outcome is achieved. Where transaction costs are potentially prohibitively high, international institutions can be critical.

[42] Institutional power, like other mechanisms, has its limitations. Actors normally can only use pre-established regimes and organizations that have at least a prima facie relation to the issue area of the new regime. Nations would have great difficulty using the machinery of the WTO for negotiations on collective security. Actors also keep in mind that the use of institutional power in the negotiations of one issue area draws capital that could be used in other issue areas. This is not limited to political mechanisms of coercion. If state A threatens sanctions S against state B over issue X, then the rational state B will bow to the pressure of state A if $S > X$. However, if state A again threatens state B with sanctions S, but this time issue Y is in dispute, then state B will only acquiesce if $S > (X + Y)$. Similarly, if political pressure is placed on one issue area, a state must be aware that capital is lost for other current and future issues. Particularly in an era where many regimes are being simultaneously discussed and outright hegemony is not as clear-cut as it was even the most powerful nation is hard-pressed to use all of its potential institutional power on one issue, unless that regime was perceived as absolutely critical to its survival.

[43] James D Morrow, "Modeling the Forms of International Cooperation: Distribution versus Information" (1994) 48:3 Int'l Org 387 at 408-411.

[44] This is not always the case, of course. The Dumbarton Oaks negotiations outlining the United Nations, for instance, were conducted independent of the League of Nations or any other pre-existing regime. When negotiations are completed outside an established institutional framework, political mechanisms of coercion are largely absent from the negotiations; in these cases, coercion comes from other currencies.

[45] See also Barnett & Duvall, *supra* note 7 at 42 (excluding "persuasion" from their concept of power).

[46] This is not to preclude the possibility that established regimes may in fact change state interests; this question, however, is beyond the purview of the paper.

arguably the most important international legal institution to emerge in the last decade—the International Criminal Court. The analysis which follows seeks to examine the forces that shaped ICC's formal rules and its less formal practices, and what tactics were so successful for the ICC coalition.

III. The Coalition Behind the ICC

This Section lays out the recent disputes between the United States and ICC supporters, focusing predominantly on disputes after the Court came into existence in 2002.[47] To give appropriate context, however, the discussion begins before negotiations over the Court commenced, in order to understand the origins of the coalition. After describing the dynamics of the coalition, the Section focuses on two different disputes between the United States and the coalition: (1) the effort of the U.S. to exempt itself from the ICC's jurisdiction and (2) the 2005 debate in the United Nations Security Council over whether to refer Sudan to the ICC in connection with the atrocities in Darfur.

1. Overview of the ICC Coalition

A. Origins of the ICC Coalition

While the ICC coalition was not formally formed until 2002, the origins of today's ICC coalition predate the Court itself. As early as 1995, states began to ally and join in a campaign for a permanent international criminal tribunal.[48] By 1996 these states had agreed to "create a permanent international court as soon as possible."[49] The number of committed nations also began to grow significantly, forming a bloc that, between 1995 and June 1998, grew to approximately forty-two states.[50] This group referred to itself as the "Like-Minded Group" (LMG) and had collectively agreed to support a "strong," independent judiciary charged with prosecuting the most grave international crimes.[51] In 1997, the LMG informally agreed to four "cornerstone positions" that would dictate their principle foci for the court:

> [One], inherent jurisdiction over war crimes, genocide, crimes against humanity and aggression…; [second,] a defined and constructive relationship with the UN Security Council...; [third,] an independent prosecutor able to initiate proceedings in addition to ICC cases being

[47] Because much of the material presented here is original research, this Part gives a large narrative of the events in question.
[48] Marlies Glasius, *The International Criminal Court: A global civil society achievement* (London: Routledge, 2006) at 22 (noting that the original coalition included Argentina, Canada, Norway, and Netherlands).
[49] Fanny Benedetti & John L Washburn, "Drafting the International Criminal Court Treaty"(1999) 5 Global Governance 1 at 20.
[50] Leila Nadya Sadat, "The Establishment of the International Criminal Court: From the Hague to Rome and Back Again" in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 31 at 43 n11.
[51] For a list of the LMG states, see William A Schabas, *An Introduction to the International Criminal Court*, 2nd ed (Cambridge: Cambridge University Press, 2004) at 16 n54.

> 'triggered' by State complaints and/or referrals by the Security Council; and [fourth,] a recognition of the experiences of victims, particularly women and children, in armed conflict and the criminal law process.[52]

The LMG would become the chaperone for proposals of an international court and worked closely with non-governmental organizations in spearheading a "strong court" movement as negotiators headed to Rome in the summer of 1998 for the final negotiations over a proposed international criminal court.[53]

Though the LMG was vocal about the virtues of this general framework, history tends to forget that the LMG proposal was not the only serious design for the court developed at the time.[54] The LMG proposal, for instance, supported certain propositions that remained at odds with the proposal submitted by the International Law Commission.[55] In addition, the LMG initially found little support among the permanent members of the Security Council. States such as France and the United Kingdom, which would become critical supporters of the ICC in its first years of operation, were ambivalent about the LMG proposal at the start of the Rome negotiations.[56] Proposals for an independent and empowered Court similarly received opposition from many militarily active nations,[57] who feared that security externalities of an autonomous Court might jeopardize their military strength.[58] U.S. military leaders believed the ICC might hamstring U.S. hegemonic military capabilities by questioning the legitimacy of some military decisions and tactics.[59] In particular, the broad jurisdiction proposed for the ICC worried states because it abandoned the traditional requirement

---

[52] Glasius, *supra* note 48 at 23.

[53] The Rome Conference's official name was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

[54] The LMG "framework" was in fact more of a guiding set of principles than a single, detailed proposal. Glasius notes that this loose agreement also helped keep the coalition cohesive by allowing single states to pursue minor policies. Glasius, *supra* note 48 at 23.

[55] Schabas, *supra* note 51 at 15.

[56] Glasius, *supra* note 48 at 24. The United Kingdom would effectively join the LMG position in late 1997 when it agreed to oppose proposals for Security Council oversight of the ICC. France never joined the LMG but would become a major participant in the later ICC coalition after it ratified the treaty in June 2000.

[57] For instance, China, the United States, Russia, India, and North Korea—the five largest military powers, as measured by number of active troops—are all not party to the ICC. For troop size information, see Center for Strategic & International Studies, online: CSIS <http://www.iiss.org/publications/military-balance/>.

[58] The term "security externalities" here is adopted from the work of Gowa and others who have examined levels of interstate trading and the security concerns of the states in question. Joanne Gowa, "Bipolarity Multipolarity, and Free Trade" (1989) 83 Am Pol Sci Rev 1245 at 1245-46. The concept simply notes that an international regime's secondary effects on state security can dictate state interest in that particular regime. One other nuance is that externalities are often state-specific, depending on the state's relative position in the international system.

[59] Sarah B Sewall, Carl Kaysen & Micheal P Scharf, "The United States and the International Criminal Court: An Overview" in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 1 at 16; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) at 166.

of sovereign consent before starting an investigation, effectively eliminating the traditional state check on international institutions.

Despite the concerns of the U.S. and others, the LMG's "strong court" movement gained momentum at the Rome drafting conference in June and July 1998.[60] The forty-odd state bloc entering Rome expanded to sixty-one members by the final days of negotiation.[61] In addition, the bloc reached agreements with other non-LMG states through further negotiations.[62] Given the overlap between the LMG and the later ICC coalition, the LMG's success offers the first opportunity to understand the later coalition and its strengths.

B. The ICC Coalition after Rome

For matters of simplicity, when this article refers to the "ICC coalition," it is referring to all states party to the court, the 116 nations that have now ratified the convention.[63] Some have rightfully noted that this body is not homogenous and that member states have often disagreed on key issues involving the Court.[64] That said, treating the membership as a coalition is reasonable on both a theoretical and empirical level.

Abstractly, while the different member states do not have identical interests, there is significant overlap in their preferences. Generally, the ICC's security externalities are significantly less for states parties than non-parties; while ICC opponents have described the Court as a force that undermines their individual security, various state members have explicitly linked a strong Court with particular security goals.[65] Many ICC state parties,

---

[60] See e.g. O Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1st ed, (Baden-Baden: Nomos Verlag,, 1999) (describing debate and negotiation of each article at Rome); MC Bassiouni, *The Legislative History of the International Criminal Court* (New York: Ardsley, 2005) (recounting negotiation at Rome); A Cassese, P Gaeta & JRWD Jones, eds, *The Rome Statute of the International Criminal Court* (Oxford: Oxford University Press, 2002); Schabas, *supra* note 51 (discussing Rome conference).

[61] Schabas, *supra* note 51 at 15; Deitelhoff, *supra* note 5 at 50.

[62] Fen Olser Hampson & Holly Reid, "Coalition Diversity and Normative Legitimacy in Human Security Negotiations" (2003) 8 Int'l Negotiation 7 at 35.

[63] An updated list of Member States can be found at: International Criminal Court, "The States Parties to the Rome Statute," online: ICC <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

[64] See e.g. Daniel C Thomas, "Rejecting the U.S. Challenge to the International Criminal Court: Normative Entrapment and Compromise in EU policy-making" (2009) 46 Int'l Politics 376 at 382-83 (discussing diverging interests among European members of the ICC).

[65] The EU's pro-ICC stance became integrated into efforts to build a common foreign and security policy for Europe. Other states, like South Africa and Senegal, related their support of a strong ICC to their respective efforts to become regional leaders. Eastern European nations thought their support of the ICC would help them obtain EU membership and the corresponding economic benefits. These differing views about the ICC's "security externalities" became the critical wedge between nations and largely accounts for the different positions taken by states during the ICC's drafting sessions and afterwards. See Lawrence R Atkinson, "Global Use of the International Criminal Court: Jostling on the Pareto Frontier" (Paper presented to the Annual Convention of the International Studies Association, March 2008) online: at <http://www.allacademic.com/meta/p250991_index.html> (discussing externalities of the ICC); Mieczysław P Boduszyński & Kristina Balalovska, "Between a Rock and a Hard Place: How the U.S.-EU Battle over Article 98 played out in Croatia and Macedonia"(September 2003) 71 East European Studies Occasional Paper Series Woodrow Wilson International Center for Scholars online: <http://www.wilsoncenter.org/topics/pubs/

therefore, share the view that the ICC has positive security effects.

The act of joining the Court only increases the overlap of interests between state members. Under Article 12 of the Rome Statute, the Court exercises automatic jurisdiction over crimes committed on the territory of a state party as well as over all suspects that are nationals of a state party. In contrast, jurisdiction over non-members is generally limited to cases where (1) a non-member consents to jurisdiction, (2) the non-member commits a crime on a member's territory, or (3) the matter is referred to the ICC by the Security Council. Because the Court's jurisdiction over a state imposes a cost, ICC members share an interest not shared by non-members: increasing the ICC's jurisdiction over non-parties, particularly through Security Council referrals, so that non-members are forced to bear the same costs.[66]

The empirical evidence supports treating the ICC's state membership as a coalition. Between 2002 and 2005, these states' voting records on matters impacting the ICC was remarkably cohesive. In general, members of the ICC voted as a single bloc in the Security Council and General Assembly votes.[67] This voting pattern is not random but rather the result of member states negotiating among themselves before critical votes and reaching common positions.[68] Such behaviour is clearly coalitional and has minimized the United States' ability to fracture this bloc at critical moments.

Not all state parties to the ICC have played the same role, of course. Within this body, a smaller core group of states has taken the lead in promoting an active role for the Court.[69] Leadership has come in a couple of

---

71BalalovskaBoduszynskifinal.doc> (discussing EU and U.S. divergent interests on ICC and political pressure accordingly placed on Eastern European countries).

[66] This interest is particularly poignant if one accepts that states "are positional, not atomistic, in character," and therefore care about relative gains and costs. Joseph M Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Constitutionalism" (1988) 42 Int'l Org 485 at 486; see also Robert Jervis, "Realism, Game Theory, and Cooperation" (1988) 40 World Politics 317 at 334-35.

[67] The most notable exceptions to this trend were Brazil's vote against the Darfur resolution in 2005 and Germany's abstention from the Security Council's extension of the ICC exemption in 2003; neither vote was decisive, however, and bloc voting by other ICC members in those cases proved decisive in both cases. See *Security Council resolution 1487 (2003) [on extension for 12 months of suspension of investigation or prosecution cases involving personnel from States not parties to the Rome Statute of the International Criminal Court]*, SC Res 1487, UN SCOR, 58th Sess, 4722nd Mtg, UN Doc S/RES/1487(2003) (12 June 2003) ["*Resolution 1487*"]; *Security Council resolution 1593 (2005) [on referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court]*, SC Res 1593, UN SCOR, 60th Sess, 5158th Mtg, UN Doc S/RES/1593(2005) (31 March 2005) at para 1 ["*Resolution 1593*"]; see also *infra* note 149 and accompanying text (discussing Brazil's vote). France also abstained from the vote to extend the Security Council's year-long ICC exemption in 2003, while Spain, Bulgaria, and the United Kingdom voted for the extension. France's decision not to exercise its veto, however, was the more profound decision in that vote, and that decision was made after discussions with other ICC members.

[68] For examples of discussions among ICC members, see Thomas, *supra* note 64.

[69] Many of these countries are the same states that held leadership roles at Rome, but the group is not identical to that of the LMG. France, for instance, was not a member of the LMG; since its ratification of the ICC Statute in 2000, however, it has been one of the Court's strongest proponents. Circumstances have varied the roles of certain other states. Changes in national priorities (and in individual governments) have affected the state leadership behind the ICC. Canada's decreasing participation in the ICC movement, for example, seems partially attributable to the ascendancy of Paul Martin to prime minister in 2003, and the resignation of

forms. Strong supporters of the ICC, such as members of the EU and Canada, were among the first to ratify the ICC Statute. Such actions had an important 'snowballing' effect for the ICC coalition, causing various smaller states to accelerate their processes of ratification.[70]

On the other hand, the member states that played critical roles varied greatly during the ICC's first nascent years. The change in the forum in which the international negotiations concerning the Court took place had a notable effect on the relative roles within the coalition. Canada and Germany have remained vocal supporters of the Court but their role in negotiations has been limited by their absence from the Security Council, where many of the negotiations related to the Court have taken place.[71] Conversely, other smaller members' presence on the Security Council at opportune times has made them critical to the coalition's unified strategy. Benin, Romania, Tanzania, Argentina, and Chile are examples of smaller states that played a critical role in Security Council debates over the ICC because they occupied rotating Council seats when a debate implicating the Court arose. These states stood alongside France and the United Kingdom, both permanent members of the Council, and other Western states who supported the ICC, forming a unique opposition to the U.S.[72] The ICC coalition, therefore, is greater than just the EU and Canada, and the ICC's growth would not have been the same without the support of the Court's other members.

2. Exemptions to the ICC

By April 2002, 66 nations had ratified the ICC Statute, enough to bring it into force.[73] By the time the ICC officially came into operation in July 2002, however, the role of the ICC coalition had changed dramatically. Starting in May 2002, the U.S. began an "active" campaign to limit the role and reach of the ICC, beginning with the well-known "unsigning" of the Rome treaty.[74]

UN Ambassador Paul Heinbecker in 2004.

[70] Broomhall, *supra* note 59 at 169 (noting early ratification by these parties generated "political support and financial viability… that other States [particularly sub-Saharan African and Central and Eastern Europe] needed as a precondition for their own support").

[71] Germany served a term on the Security Council in 2003 and 2004, but it was neither present at the initial Security Council debates on the ICC in 2002 nor at the Council negotiations on the Darfur referral in 2005.

[72] While a largely distrusted member of the LMG at Rome, the United Kingdom has played a particularly important role in facilitating negotiations between the ICC coalition and the U.S. There was the constant worry that the U.K., in part due to its broader alliance with the U.S., would defect from the group. "Italy and Britain May Exempt U.S. From ICC," Associated Press (31 August 2005); Nicholas Kralev, "London Agrees to Keep Darfur Trials Out of ICC," *Washington Times* (5 February 2005) at A6. However, the U.K. has still ultimately stayed within the ICC coalition in the resolution of all major disputes and used its middle position to referee some disputes.

[73] See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 at art 126 ["*Rome Statute*"] ("[The ICC] Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."). The Statute officially entered into force on 1 July 2002.

[74] On 6 May 2002, Undersecretary of State John Bolton delivered a letter to the UN stating the asserted that despite signing the ICC Statute in late 2000, the U.S. "does not intend to become a

Off the record, at least one U.S. official confided at the time of the unsigning that it was the United States' "firm intention to do a lot of things to undercut the court."[75] This change in U.S. tactics forced the coalition to initiate a stand against the U.S. campaign, one that largely took place over the next three years.[76]

Though unable to stop the ICC's founding, the U.S. has successfully secured a variety of jurisdictional exemptions for its nationals and service members, much to the chagrin of Court supporters. These exemptions have come via two methods. On four occasions, the U.S. has obtained language in Security Council resolutions that limited the ICC's jurisdiction over U.S. peacekeepers. In addition, the U.S. has signed numerous bilateral treaties termed "Article 98 agreements." Under these agreements, the signing state agrees not to turn any U.S. national over to the ICC.[77] Given that the ICC may not try any suspect in abstentia (Article 63 of the ICC Statute), Article 98 agreements also effectively provide the nationals of any state that exercises its rights under these agreements with an exemption to the ICC. In April 2007, the U.S. reported that it had signed an Article 98 agreement with Montenegro, bringing the total number of Article 98 agreements to at least 106.[78]

Accounts of U.S.-secured exemptions generally describe them as a success for the U.S. and a blow to the ICC movement. These accounts, however, overlook the successes of the ICC coalition in limiting the concessions the U.S. has obtained. Using a variety of tactics capitalizing on the coalition's size and diversity, pro-ICC states have limited both Security

---

party to the [Rome Statute of the ICC]" and that therefore "has no legal obligations arising from its signature [to the treaty] on December 31, 2000." Letter from John Bolton to Kofi Annan (6 May 2002) online: CNN <http://articles.cnn.com/2002-05-06/us/court.letter.text_1_letter-treaty-rome-statute>.

[75] Jess Bravin, "U.S. to Pull Out of World Court on War Crimes," *Wall Street Journal* (6 May 2002). Prior to spring of 2002, the Bush Administration had withdrawn from the ICC's preparatory meetings in hopes that the ICC might not be able to develop without the aid of U.S. leadership. Broomhall, *supra* note 59 at 178. Such a 'stillbirth' had been the fate of the International Trade Organization (ITO) and the League of Nations, which collapsed after U.S. support soured. Arthur A Stein, "The Hegemon's Dilemma: Great Britain, the United States, and the International Economic Order" (1984) 38 Int'l Org 355 at 380.

[76] For the rationale of U.S. objections to the Court, see *supra* note 58 (discussing security externalities) and Atkinson, *supra* note 65 (recounting objections by U.S. diplomats). Also see Jason G Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007) for an excellent summary of the U.S. position and an assessment through an IR lens.

[77] Sean D Murphy, "U.S. Efforts to Secure Immunity from ICC for U.S. Nationals" (2003) 97:3 Am J Int'l L 710 at 711.

[78] In October 2006, the State Department announced the U.S. had signed 103 Article 98 agreements. U.S. Department of State, Press Briefing, "Daily Press Briefing" (3 Oct. 2006), online: U.S. Department of State <http://2001-2009.state.gov/r/pa/prs/dpb/2006/73500.htm>. In November 2006, the White House announced it had signed agreements with Comoros and Saint Kitts and Nevis. White House, Press Release, "Memorandum for the Secretary of State" (22 November 2006), online: White House <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061122-5.html>. In April 2007, the U.S. signed an additional agreement with Montenegro: see "U.S. Montenegro Sign Defense, Troop Immunity Pacts," Agence France Presse (1 May 2007).

Council and bilateral exemptions, preventing U.S. nationals from enjoying blanket immunity.

A. Limiting Security Council Exemptions

Just before the ICC opened its doors in July 2002, state supporters found themselves collectively defending the Court from U.S. opposition. The day before the ICC became operational, the U.S. vetoed the renewal of the UN mission in Bosnia and Herzegovina (UNMIBH), announcing the campaign would not be reauthorized until U.S. peacekeepers were exempted from the ICC's jurisdiction.[79] In response, the ICC's members collectively moved to oppose U.S. efforts, believing that the American campaign jeopardized the Court's functionality and future. Some ICC members publicly accosted the U.S. for such a brazen political move.[80] Other states, particularly those on Council at the time, initiated a series of closed-door negotiations with the U.S., brokered by U.K. representative Jeremy Greenstock.[81] Through these negotiations, ICC supporters won a number of concessions.

After the UNMIBH veto, the U.S. circulated a draft Council resolution that exempted all UN personnel from the ICC.[82] Paragraph 1 of the draft resolution asked "that the ICC for a twelve-month period… not commence or proceed with any investigations or prosecutions" involving UN personnel.[83] The draft resolution noted this request was consistent with Article 16 of the ICC Statute, which allows for the Council to request the ICC delay an investigation for up to one year.[84] Paragraph 2 of the U.S. resolution, however, proposed that "on July 1 of each successive year, the request not to commence or proceed with investigations or prosecutions as

---

[79] *Agenda of the 4563rd Meeting of the Security Council*, UN SCOR, 57th Sess, 4563rd Mtg, UN Doc S/PV.4563 ((30 June 2002) (voting on *Draft resolution [on extention of the mandate of the UN Mission in Bosnia and Herzegovina for an additional period terminating on 31 Dec. 2002]*, SC Res 712, UN SCOR, UN Doc S/2002/712 (30 June 2002) (vetoed by U.S.A 13-1-1)). Matthew Price, "UN 'Not Planning' Bosnia Pull-Out," BBC News (1 July 2002), online: BBC News <http://news.bbc.co.uk/2/hi/europe/2078002.stm> (reporting the Council temporarily extended the mission while negotiations continued); Murphy, *supra* note 77 at 710-711; *Agenda of the 4564th Meeting of the Security Council*, UN SCOR, 57th 2002, 4564th Mtg, UN Doc S/PV.4564 (30 June 2002) (extending UNIMBH authorization until 3 July 2002); *Security Council resolution 1421 (2002) [on continuation of provisions of Council resolution 1357 (2001) on Bosnia and Herzegovina until 15 July 2002]*, SC Res 1421, UN SCOR, 57th Sess, 4566th Mtg, UN Doc S/RES/1421(2002) (3 July 2002) (extending UNIMBH authorization until July 15, 2002).

[80] The European Parliament, for instance, passed a resolution "deeply deploring the fact that on 30 June 2002 the U.S. vetoed in the Security Council the extension." European Union, *European Parliament resolution on the draft American Servicemembers' Protection Act* (ASPA), EP Res B5-0386/2002 (27 June 2002).

[81] Martin Boer, "U.S. Troops Set for Immunity from New Court," Financial Times [London Edition] (13 July 2002) 6.

[82] The draft is reprinted in Mokhtar, *supra* note 3 at 309 n50. An earlier draft had been circulated that exempted all UN peacekeepers from all international tribunals. See Murphy, *supra* note 77 at 167-168.

[83] Mokhtar, *supra* note 3 at 309 fn 50.

[84] *Rome Statute*, *supra* note 73 at art 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

set forth in paragraph 1 shall be renewed and extended during successive twelve-month periods thereafter unless the Security Council decides otherwise…."[85] This language made the general exception for UN peacekeepers continuous until the Council passed another resolution ending the exemption (and, given the U.S. veto in the Security Council, until the U.S. agreed). In this manner, the draft language skirted Article 16's limitation on Council-requested delays to one year, language that drafters at Rome had included explicitly to limit the Council's control over investigations.

Upon receiving the U.S. draft resolution, ICC proponents refused to support an open-ended exemption.[86] Protesting states pointed out that the draft resolution would undermine the nascent Court by creating "one law for the goose and another for the gander."[87] Others echoed Secretary General Annan, who concluded that the draft resolution, if passed, would "fl[y] in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty."[88] Adding weight to these arguments was the fact that the ICC supporters held a significant bloc in the Security Council, with six of the fifteen Security Council members in 2002 being state parties to the Court. ICC supporters also gained some political high ground during negotiations by holding a public Council debate in which more than thirty states condemned the U.S. position as an abuse of its power.[89] The combination of these factors affected the United States' position, and during the course of negotiations the hegemon agreed to limit the duration of the exemption to one year. At the conclusion of the year, the resolution would have to be renewed by a Council vote.[90] With all Council members satisfied by this concession, Resolution 1422, requesting a general exemption for all UN peacekeepers for one year, was passed unanimously.[91]

The consequence of the change from an open-ended to temporal exemption was felt in 2004, when the U.S. tried to renew Resolution 1422 a second time (Resolution 1422 was renewed in 2003 on a 12-0-3 vote, with

---

[85] Bryan MacPherson, "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings," *ASIL Insights* (June 2002), online: ASIL <http://www.asil.org/insigh89.cfm#_edn8>.

[86] *Agenda of the 4568th Meeting of the Security Council*, UN SCOR, 59th Sess, 4568th Mtg, UN Doc S/PV.4568 (10 July 2002).

[87] Paul Heinbecker, "The Changing International Stage" (Presentation delivered at the Chumir Foundation, Calgary, May 2004), online: <http://www.heinbecker.ca/Speeches/ChumirSymposiumMay2004.pdf>. Heinbecker was the Canadian ambassador to the United Nations during the 2002 negotiations.

[88] Letter from Kofi Annan to Colin Powell (3 July 2002), online: AMICC <http://www.amicc.org/docs/SG_to_SS.pdf>.

[89] See *Agenda of the 4568th Meeting of the Security Council*, *supra* note 86.

[90] For a discussion of this debate from the EU's perspective, see Thomas, *supra* note 64 at 381-83.

[91] The compromise took the first paragraph of the U.S. draft proposal but reduced the language that automatically renewed the request for ICC exemption to a statement merely expressing the "intention to renew the request." *Security Council resolution 1422 (2002) [on suspension for 12 months of investigation or prosecution cases involving personnel from States not parties to the Rome Statute of the International Criminal Court]*, SC Res 1422, UN SCOR, 57th Sess, 4572nd Mtg, UN Doc S/RES/1422(2002) (12 July 2002) at para 2.

France, Germany, and Syria abstaining[92]). By June 2004, seven states indicated they would abstain on a resolution that renewed the exemption, presenting a coalition that prevented the U.S. from obtaining the requisite nine 'yes' votes needed to pass a Council resolution. Though the whip count was not officially released, media accounts reported the nations signalling an intention to abstain were France, Spain, Germany, Brazil, Chile, Benin and Romania—all members of the ICC.[93] As resistance grew to the U.S. position, non-ICC members also voiced their opposition to the continuation of exemptions.[94] Chinese officials indicated that China would veto any quick vote offered by the U.S. without debate and also abstain on any other vote.[95] The confluence of opposition was insurmountable for U.S. diplomats. In late June, the U.S. circulated a revised proposal to Council members that would have made the one-year extension explicitly non-renewable.[96] When this compromise found no suitors, the U.S. dropped the issue and merely pulled a handful of U.S. peacekeepers from UN missions in protest.[97]

Though one explanation for the U.S. failure may be that ICC members became increasingly indignant at the ICC exemption and, therefore, increasingly willing to oppose the U.S., two other factors more likely account for the change of U.S. fortunes in 2004. One was the expanding foreign policy agenda of the United States during the 2000s and central role the Security Council played in this agenda. Despite its trouble in securing Council approval of the invasion of Iraq in 2003, the U.S. had nonetheless used the Security Council as an international "legislature" to pass resolutions in connection with its "Global War on Terror."[98] Moreover, by 2004 the United Nations had established the assistance mission in Iraq through Security Council Resolution 1500, but the resolution was due for renewal in August 2004.[99] As the U.S. global campaign on terrorism and the war in Iraq both intensified, the U.S. likely believed its political stores needed to be rationed, and the issue linkages that were necessary to secure exemptions in 2002 were too costly in 2004.

Secondly, the ICC's increasing membership in its first years strengthened the power of its coalition, both globally and within the Security Council.

---

[92] See *Resolution 1487*, *supra* note 67.
[93] Mark Turner, "U.S. Struggles to Win Immunity for its Troops," Financial Times (9 June 2004); "U.S. puts forward compromise proposal on war crimes court," Xinhua (23 June 2004).
[94] To reiterate, these states are not members of the ICC coalition, as defined by this article.
[95] Chinese officials linked their new position to efforts to refuse the U.S. military a "blank check." Turner, *supra* note 93; "China Will Not Back U.S. on Immunity from New Court," *Reuters* (18 June 2004). Media accounts also linked the new Chinese position to its displeasure with Taiwanese attempts to achieve observer status in the World Health Organization. Evelyn Leopold, "Opposition Growing to U.S. Exemption on Global Court," Reuters (27 May 2004).
[96] Jonathan Birchall, "Washington Seeks Compromise over ICC Immunity," *Financial Times* (23 June 2004) at 8.
[97] U.S. Defense Department, Press Briefing, "Defense Department Operational Update Briefing," (1 July 2004), online: <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2741>.
[98] Stefan Talmon, "The Security Council as World Legislature" (2005) 99 Am J Int'l L 175.
[99] *Security Council resolution 1500 (2003) [on establishment of the UN Assistance Mission for Iraq]*, SC Res 1500, UN SCOR, 58th Sess, 4808th Mtg, UN Doc S/RES/1500 (14 August 2003).

While ICC members occupied six Council seats in 2002 and five in 2003, the election of Benin, Brazil, and Romania to rotating non-permanent seats on the Council in 2004 gave the ICC a quorum of seven seats, sufficient to block renewals without any one state having to either: use a veto or directly vote against a U.S. proposal. With seven votes on the Council, ICC members could form a coalition to block exemptions and publicly expressed intent to do so early on during discussions. This broad-based opposition, moreover, was effective because it distributed the costs of opposition among multiple members. While the ICC could have technically halted U.S. proposals before obtaining this quorum of seats—both the U.K. and France have vetoes but use them rarely[100]—such a strategy would have placed these costs on a single state. By contrast, the passive opposition by collective abstention in 2004 made it significantly more difficult for the U.S. to coax support.

The ICC coalition's ability to end general ICC exemptions in 2004 was prefaced by the concessions obtained during the 2002 negotiations with the U.S.. The adjustment of the 2002 agreement, in turn, reflects a common method by which states find a mutually agreeable framework for cooperation.[101] Realists and neoliberals alike have noted that terms of international agreements reflect the distribution of resources and power in the international system.[102] Given that the U.S. was willing to make a significant compromise on its initial proposal, one can infer that, as early as 2002, the coalition of pro-ICC supporters was a force capable of making demands, even from the system's superpower. Moreover, given that the trend of exemption agreements has leaned towards the pro-ICC position of late, one can also infer the coalition's power is growing in relation to U.S. power. Since 2003, the Security Council has not granted a general exemption from the ICC's jurisdiction.

At the same time, the ICC coalition found it necessary to compromise with the U.S., falling back to a secondary position in accepting the temporary exemption in 2002. Similarly, members in 2003 accepted one more extension. The U.K. and Spain, both ICC members on the Council in 2003, voted for the renewal resolution; even France, which chose to abstain on the vote, did not exercise its veto. During both the 2002 and 2003 votes, this compromise was almost necessary, as the coalition was too weak on the Council to press the issue. When these negotiations began, many states were horrified at the prospect of having to compromise with the U.S.; ICC parties claimed that the

---

[100] The connection of political power to latent and material capabilities likely also explains why states that nominally have the same political tools at its disposal use them with varying frequencies. France and the U.K.'s hesitancy to use their Security Council vetoes, for instance, may be explained by their decline since the formation of the Council. See Steve Chan, "Power, Satisfaction and Popularity: A Poisson Analysis of UN Security Council Vetoes" (2003) 38 Cooperation & Conflict 339 at 347 (analyzing the varying frequencies of states' exercise of vetoes).

[101] Barbara Koremenos, "Loosening the Ties that Bind: A Learning Model of Agreement Flexibility" (2001) 55 Int'l Org 289.

[102] See e.g. Barbara Koremenos, Charles Lipson & Duncan Snidal, "The Rational Design of International Institutions" (2001) 55 Int'l Org 761 at 761; Richard H Steinberg & Jonathon M Zasloff, "Power and International Law" (2006) 100 Am J Int'l L 74.

U.S. was "hijacking" the ICC Statute, and that a resolution "would effectively kill the Court before it is born."[103] After negotiations, however, ICC states would acknowledge they were "very pleased" or at least "satisfied" with the compromise for the moment.[104]

While this flexibility paid dividends in only two years, it remains unclear whether the ICC coalition would have fared similarly well had it refused to compromise with the U.S. in 2002 and 2003. While it is difficult to estimate counterfactuals, one can note that European nations believed the U.S. would continue its strong-arm tactics if the ICC coalition did not compromise. One European official argued that the U.S. was completely willing to "kill peacekeeping and the ICC with one stone."[105] Had the U.S. pressure continued, the totality of hegemonic pressure may have in fact strangled the court at its birth. Even if the Court had survived, however, relations between the U.S. and the ICC coalition certainly would have soured beyond the state that existed in the first years of operation. Instead, the two sides remained cordial during discussions, allowing negotiations to continue. This cordiality probably minimized the minimal U.S. retaliation in 2004 when it could not renew the temporary exemption. This cordiality was even more important in 2005 during negotiations over the Darfur referral, explored later in this article.

B. Limiting Bilateral Exemptions

Like the Security Council strategy, the U.S. Article 98 exemption campaign has not been an absolute success. The campaign, begun after the compromise on Resolution 1422, has largely relied upon the United States' ability to offer material sticks and carrots to coerce agreements.[106] One main stick for the U.S. was the *American Servicemembers' Protection Act*, passed by Congress in 2002. This legislation prohibited U.S. military aid to any ICC member that had not signed a bilateral agreement with the U.S.[107] Congress

---

[103] Fiji Representative to the Preparatory Commission for International Criminal Court, Statement, (7 July 2002), online: United Nations Information Service <http://www.unis.unvienna.org/unis/pressrels/2002/l3008.html>.

[104] Martin Boer, "U.S. Troops Set for Immunity from New Court," Financial Times (London Edition) (13 July 2002) at 6.

[105] Carola Hoyos, "U.S. Takes Chance to Target Peacekeeping," Financial Times (2 July 2002) at 11.

[106] In certain limited cases, the U.S. has employed non-traditional forms of leverage. Macedonia, for instance, agreed to a bilateral agreement after the U.S. agreed to refer to the former country as "Macedonia" rather than the "Republic of Macedonia" in the text of the agreement (the Balkan state is currently in a dispute with the Greek region of Macedonia over the country's proper name). See U.S. House of Representatives, 108 Cong Rec H7513 (23 July 2003) (statement of Rep Carolyn Maloney); See also Rep Carolyn Maloney, Press Release, "Bush Administration's November Surprise to Unilaterally Recognize FYROM as Macedonia: Maloney Blasts Decision As 'Harmful to Greece & U.S. Interests in Balkans'" (5 November 2004), online: U.S. House of Representatives <http://maloney.house.gov/press-release/bush-administration%E2%80%99s-november-surprise-unilaterally-recognize-fyrom-macedonia> (referring to the Congresswomen's earlier condemnation of the Bush administration's policy of permitting Article 98 to be signed using the name "Macedonia").

[107] *American Servicemembers' Protection Act of 2002*, §2001, Pub L No 107-593 (2002), Amdt 3597, HR 4775. (The Act exempted certain U.S. allies.).

also later passed an amendment that prohibited ICC members that had not signed Article 98 agreements from receiving humanitarian aid from the U.S. "Economic Support Fund."[108] Even when the U.S. does not directly threaten another state via explicit legislative provisions, its massive economic and military influence gives it substantial negotiating leverage. McGoldrick has connected many of the Article 98 agreements to economic and military relationships between the U.S. and the other signing state:

> [I]n August 2002 Romania received the first installment of substantial financial assistance from the US for flood aid/disaster relief…. Kyrgyzstan has been a base for US anti-terrorist operations. Gambia has a traditional role of sending peacekeepers…. A small group of US military personnel maintain an emergency airfield in Tajikistan. Israel is a major US ally and receives massive financial support from it. Pakistan has become a particularly important ally in the war against terrorism….[109]

U.S. efforts, however, have been curtailed when ICC proponents apply their own economic leverage to nations considering a pact with the U.S.. After the U.S. signed its first agreement with Romania in August 2002, for instance, EU nations (all of which are ICC members) announced an intention to develop a common position on the U.S. campaign. In addition, they advised states aspiring to join the EU to refrain from signing agreements until the EU position had been announced.[110] On September 30, 2002, the EU released its "Guiding Principles" on Article 98(2) of the ICC Statute. In this document, the EU concluded that the U.S. Article 98 agreements were inappropriately broad and that EU states should not sign them as drafted.[111] In light of EU pressure, ten states scheduled to accede to the EU announced in July 2003 that they would subscribe to the EU's common position and reject U.S. overtures to sign Article 98 agreements.[112]

In some ways, the success of the U.S. exemption campaign has been successful only when the EU has refused to employ its own economic strength. During the Article 98 campaign, for instance, the U.S. threatened many members of the African, Caribbean and Pacific Group of States (ACP) with promises to withdraw aid if they refused to sign Article 98 agreements. Some of these nations approached members of the ICC coalition, particularly the EU, begging for the coalition to compensate them for lost aid.[113] While

---

[108] *Foreign Operations, Export Financing and Related Programs Appropriations Act, 2005*, §574, Pub L No 108-447, Amdt 706, HR 4818. (Note that for fiscal year 2006, the stipulation jeopardized $326.6 million of U.S. economic assistance for twelve nations.).

[109] Dominic McGoldrick, "Political and Legal Responses to the ICC," in Dominic McGoldrick, Peter Rowe & Eric Donnelly, eds, *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004) 389 at 427-28.

[110] Elizabeth Becker, "European Union Urges Aspirants to Rebuff U.S. on World Court," *New York Times* (14 August 2002) at A11; see also Thomas, *supra* note 64 at 383-87 (discussing EU responses to U.S. bilateral campaign).

[111] Council of the European Union, Press Release, "Conclusions of the Council of the European Union on the ICC," (30 Sept. 2002).

[112] McGoldrick, *supra* note 109 at 394. The EU subsequently stated that it would not consider EU applicants' position on the ICC in connection with their EU application.

[113] Parliamentarians for Global Action, Memorandum, "ACP-EU Joint Parliamentary Assembly

some ICC states supported the idea of compensation, the EU eventually came to the official position that it would not compensate ACP states for the lost aid.[114] The reason for refusing compensation, interestingly, was not a lack of resources. As one EU Council representative explained, the EU ultimately decided it "'simply didn't want to play the same game as the U.S..'"[115] While this decision was principled, the ICC coalition's decision to remain above the realpolitik fray afforded the U.S. a greater opportunity to push its campaign. Subsequently, 51 of the 79 ACP states reportedly signed Article 98 agreements with the U.S..[116]

From another perspective, however, the U.S. bilateral campaign was only initiated after earlier strategies were blocked by ICC supporters; therefore, U.S. exposure relates directly to its compromise with ICC supporters in earlier negotiations like that over Resolution 1422. Being forced to resort to bilateral negotiations, in turn, has left the U.S. exposed to ICC prosecution in certain critical areas. Public records show the United States has signed no Article 98 agreements with OECD states and only 10 of the 50 largest GDPs.[117] The U.S. has also failed to secure agreements where ICC jurisdiction would appear to have the greatest security externalities (i.e. where a U.S. military campaign might likely take place in the near future)—for instance, in North Korea, Iran, Libya, and Syria.[118] Some of these states are unlikely to ever sign an Article 98 agreement with the U.S., not because they support the ICC in principle but because they believe the tribunal can be used "as a tool against domination by militarily superior powers."[119]

3. The Expansion of the ICC: Resolution 1593

Even with the exemptions obtained by the United States, the ICC's influence continues to grow. One major step came in 2005, when the Security Council referred it the situation in Darfur, Sudan.[120] The Sudan referral was both the first time the ICC investigated a case involving a state not party to the Court and the first time the Council made use of a permanent, rather than *ad hoc*, forum for judicial referrals.[121] It also confirmed the nascent court

---

Affirms Principle of Compensation for Developing Countries Suffering Consequences of Bilateral Non-Surrender Campaign," (16 October 2003), online: AMICC <www.amicc.org/docs/ACP_EU10_03.pdf>.

[114] Sibylle Scheipers & Daniela Sicurelli, "Empowering Africa: Normative Power in EU-Africa Relations" (Paper delivered at the European Union Studies Association, May 17 2007), online: <http://aei.pitt.edu/8035/>.

[115] *Ibid*.

[116] Georgetown Law Library, "International Criminal Court—Article 98 Agreements Research Guide," online: Georgetown University Law Centre <http://www.ll.georgetown.edu/intl/guides/article_98.cfm>.

[117] *Ibid*.

[118] *Ibid*. Even though those nations are not party to the ICC, Article 12(3) of the ICC Statute would allow these nations to refer incidents to the ICC.

[119] Hirad Abthani, "The Islamic Republic of Iran and the ICC" (2005) 3:3 J Int'l Crim Justice 635 at 643; see also Steven C Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Lanham, MD: Rowman & Littlefield Publishers Inc, 2006) at 146.

[120] *Resolution 1593*, *supra* note 67.

[121] Prior to Darfur, the ICC had received three cases self-referred to the ICC by State Parties—one

as a genuinely global tribunal, raising it to an echelon above multilateral and regional courts. Even as late as fall 2004, however, the likelihood of the ICC receiving a case via Security Council resolution was doubted by scholars and diplomats alike. One commentator in late 2004 lamented, "[t]he prospect of Security Council referral of cases to the ICC, once lauded as the most viable and likely 'trigger mechanism' to bring cases before the Court, now seems unthinkable because of resistance from the United States."[122] The ICC's sudden reversal of fortunes was in large part due to the size, diversity, and tactical strategy of its core supporters.

From Rome until Darfur, ICC proponents and the U.S. remained in deadlock. During this period, the self-interested play for both groups was to defect from the other such that ICC members independently developed the Court without any support from (and sometimes under heavy opposition applied by) the U.S.. In foreign affairs, however, changes in the international system often arise in the wake of an event that serves as a "political shock" that changes either the distribution of power or the interests of states.[123] In the case of the ICC, Darfur served as that shock by presenting the first situation since the ICC's birth in which states felt politically obligated to support a referral of an international situation to a judicial tribunal. The United States, in particular, had committed itself to supporting such a referral; in September 2004, U.S. Secretary of State Powell had publicly labelled Darfur a case of "genocide" and stated the local *janjaweed* should "bear responsibility" for the atrocities. [124] Though a few Council members were hesitant to refer the situation, international support was great enough that the pertinent issue quickly became not whether to refer Darfur to a tribunal, but what type of tribunal the Security Council would select to adjudicate the situation.[125]

Even with Darfur bringing states back to the negotiating table, the relevant parties still differed over what tribunal would best serve as the organ for investigating and possibly prosecuting the referred cases. ICC advocates favoured referral of the Darfur situation to the ICC, which would accept jurisdiction under Article 13(b) of the ICC Statute.[126] The U.S., fearing the prospect of setting a precedent and adding to the legitimacy of the ICC,

---

by Uganda in 2003, one by the Democratic Republic of Congo in 2004, and one by the Central African Republic in 2005.

[122] William A Schabas, "United States Hostility to the International Criminal Court: It's all about the Security Council" (2004) 15 Eur J Int'l L 701 at 702.

[123] Paul F Diehl, Charlotte Ku & Daniel Zamora, "The Dynamics of International Law: The Interaction of Normative and Operating Systems" (2003) 57 Int'l Org 43.

[124] John R Crook, "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC" (2005) 99 Am. J Int'l L 501 at 501.

[125] Under game theory terminology, Darfur suddenly turned the "Deadlock" scenario into a game known as "Battle of the Sexes." For a description of the ICC debate analyzed through game theory, see Atkinson, *supra* note 65.

[126] See *Rome Statute*, *supra* note 73 at art 13(b) ("The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if...[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

favoured any of a number of non-ICC forums taking the case.[127] In early 2005, for instance, U.S. officials circulated a proposal for the creation of a new regional "Sudan Tribunal" based in Arusha, Tanzania, to be jointly administered by the UN and the African Union (AU).[128] Most Council members, however, remained uninterested in any options other than the ICC.[129] By early February 2005, a coalition of nine states—a majority large enough to block U.S. proposals—had taken the position that an ICC referral was the only acceptable solution.[130] By mid-February, press reports stated twelve of the fifteen members in the Security Council preferred the ICC option over any other.[131]

Just as the increasing number of ICC members influenced the exemption debate in 2004, the large coalition proved critical in settling the Darfur dispute. By 2005, ICC membership in the Security Council grew to a supermajority—nine states—such that bloc voting gave it the requisite nine votes necessary to pass a resolution without any additional support.[132] Whereas the seven-member group of ICC states had merely been a blocking coalition in 2004, the additional members gave the group the positive power to undertake its own initiatives in 2005.[133] The coalition was still unable to override the U.S. veto. Nevertheless, ICC proponents could deliberately force a vote in order to impose the costs of a veto—those associated with appearing to publicly condone atrocities—on the United States.[134] U.S. leaders were conscious of this new risk, and Ambassador Prosper warned early in the Darfur debate that the U.S. did not want to be forced into a "thumbs-up or thumbs-down" vote on the ICC.[135] Many ICC members on the Council, however, began to do exactly that, stating that the ICC was the only appropriate forum to receive the Darfur referral.[136]

After the U.S. proposals failed to garner support, the ICC coalition made

---

[127] Crook, *supra* note 124 at 501.
[128] Warren Hoge, "U.N. Finds Crimes, Not Genocide in Darfur," *New York Times* (1 February 2005), online: NYT <http://www.nytimes.com/2005/02/01/international/africa/01sudan.html>; Judy Aita, U.S. Department of State – Bureau of International Information Programs, "African Union Tribunal Proposed for War Crimes in Darfur" (9 February 2005), online: ReliefWeb <http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-169236.pdf>; John R Crook, "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC" (2005) 99 Am J Int'l L 501 at 501-502.
[129] *Agenda of the 5158th Meeting of the Security Council*, UN SCOR, 60th Sess, 5158th Mtg, UN Doc S/PV.5158 (1 April 2005).
[130] "Highlights of new US draft on Sudan at UN," *Reuters* (15 February 2005) (noting "at least nine other council members prefer[] the International Criminal Court that Washington opposes….").
[131] "UN Council Deadlocked over Court for Darfur Trials," *Reuters* (18 February 2005).
[132] The ICC members on the Council in 2005 were Argentina, Benin, Brazil, Denmark, France, Greece, Romania, Tanzania, and the United Kingdom.
[133] Chan, *supra* note 100 at 358.
[134] *Ibid* at 344.
[135] Quoted in Colum Lynch, "U.S., Europe Debate Venue for Darfur Trials," Washington Post (21 January 2005) at A11.
[136] See Mark Turner, "US Urges UN Oil Sanctions over Darfur," *Financial Times* (2 February 2005) (quoting Jean Marc de la Sabliere, French ambassador to the UN, as suggesting that referring Darfur to the ICC would mark "progress in civilization" and that no proposed alternatives was a "good option"); *Agenda of the 5158th Meeting of the Security Council*, *supra* note 129 at 7 & 9.

the next move. On March 23, France circulated a formal draft resolution to other Council members that referred Darfur to the ICC.[137] French officials claimed they had assurances of support from eleven Council members[138] and announced it would call for a public vote, which would force the U.S. into the awkward position of vetoing the only referral proposal that had sufficient support among Council members.[139] Faced with the mounting pressure, the U.S. employed a series of last minute strategies to delay the vote and win more concessions. On March 24, U.S. Secretary of State Condoleezza Rice called French Foreign Minister Michel Barnier and reportedly implied that the U.S. would veto the French proposal as drafted.[140] The French delegation subsequently delayed the vote, and leaders from France, the U.K., and the U.S. began a series of negotiations to construct a resolution the U.S. would not oppose. On March 31, the U.S. finally dropped its opposition to the ICC referral, agreeing to abstain on the vote.[141] Resolution 1593, referring the Darfur situation to the ICC, passed 11-0 with four abstentions.[142]

A. The Language of Resolution 1593

Through the last-minute negotiations, the U.S. obtained a number of concessions that limited the jurisdiction of the ICC. Most notable was Article 6 of Resolution 1593, which decided that

> …nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan.[143]

The French draft proposal, circulated in late March, had included an ICC exemption, but one much more limited in scope. In the last hours of negotiations, the scope of the persons covered by this exemption expanded from the "nationals and members of the armed forces"[144] in the draft to "nationals, current or former officials or personnel" in the final version.[145] The change in language increased the exemption's scope to one similar to that of Article 98 agreements. This scope, which exempted NGOs,

---

[137] Warren Hoge, "France Asking U.N. to Refer Darfur to International Court," New York Times (24 March 2005) at A3.
[138] *Ibid*.
[139] *Ibid*.
[140] Nicholas Kralev, "France Puts Off War-Crimes Vote," Washington Times (25 March 2005) at A13.
[141] *Resolution 1593*, *supra* note 67; Hans-Peter Kaul, "Construction Site for More Justice: The International Criminal Court After Two Years," (April 2005) 99:2 Am J Int'l L 380.
[142] United Nations, Press Release, SC/8351, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court,"(31 March 2005) (U.S., Algeria, China, and Brazil abstained from the vote.)
[143] *Resolution 1593*, *supra* note 67 at para 6.
[144] See Draft resolution [on referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court], UN Doc S/2005/199 (31 March 2005).
[145] *Resolution 1593*, *supra* note 67 at para 6.

contractors, intelligence officers, and other nationals of non-ICC states, had been the EU's main objection to U.S. bilateral exemptions.[146] Agreeing to the same scope in a Security Council resolution was a bitter pill for some states to swallow; Brazil, despite being a heavy proponent of the ICC referral, abstained on the final vote on Resolution 1593, claiming the Resolution's exemption was "inconsistent [with] international law."[147]

In addition to the exemption, other smaller but still substantive concessions were made to the U.S. in exchange for its acquiescence on Resolution 1593. The resolution's preamble took note "of the existence of agreements referred to in Article 98-2 of the Rome Statute"— a political concession to the U.S. effectively acknowledging its bilateral campaign.[148] Incorporating U.S. demands that it not underwrite the ICC in any way, Article 7 stipulated ICC members, and not the UN, would bear the costs of the Darfur investigation and trials. Similarly, Article 2 included a clause "recognizing that States not party to the Rome Statute have no obligation under the Statute."[149] These concessions ensured that the U.S. retained the majority of its bargaining chips for later negotiations with the ICC, including material and tactical public goods that the Court supporters had desired since Rome.

B. Resolution 1593 in Perspective

Like many descriptions of U.S. exemptions from the ICC, commentary about these last-minute concessions has largely characterized them as victories extracted by a hegemon.[150] However, an examination of the Resolution 1593 negotiations can also lead to a different conclusion. Namely these negotiations seem to demonstrate that, by 2005, the coalition in support of the ICC was strong enough to successfully balance the hegemonic power of the U.S. on the issue of the Court, itself. The strength of the ICC coalition appears even stronger when one considers the relative trade-off of Resolution 1593. On one side of the scale, Darfur was an "historic" step for the ICC.[151] Resolution 1593 established the ICC as an organ of the "international atrocities regime"—beyond its capacity as a simple multilateral institution—backed by the Chapter VII authority of the Security Council.[152] Moreover, the referral was even more significant for the

[146] Council of the European Union, Press Release, "Conclusions of the Council of the European Union on the ICC" (30 September 2002).
[147] Statement of Brazilian delegation: *Agenda of the 5158th Meeting of the Security Council*, *supra* note 129 at 11.
[148] *Resolution 1593*, *supra* note 67 at Preamble; see also Heyder, *supra* note 3 at 659; Luigi Condorelli & Annalisa Ciampi, "Comments on the Security Council Referral of the Situation on Dafur to the International Criminal Court" (2005) 3 J Int'l Crim Justice 590 at 598.
[149] *Resolution 1593*, *supra* note 67 at para 2.
[150] See e.g. Robert Cryer, "Sudan, Resolution 1593, and International Criminal Justice" (2006) 19:1 Leiden J Int'l L 195.
[151] Human Rights Watch, Press Release, "U.N. Security Council Refers Darfur to the ICC Historic Step Toward Justice; Further Protection Measures Needed" (31 Mar 2005), online: HRW <http://hrw.org/english/docs/2005/03/31/sudan10408.htm>.
[152] Antonio Cassese, "Is the ICC Still Having Teething Problems?" (2006) 4 J Int'l Crim Justice 434 at 436.

reputation of the ICC. At least one EU official argued that the Council's failure to refer Darfur to the ICC would have been a huge blow to the Court in its early years and undermined its credibility as a global institution.[153] Compared to these gains, ICC supporters sacrificed relatively little. The U.S. exemption appears largely symbolic, given that even without the exemption, should the ICC ever try a U.S. national, the U.S. would likely apply such pressure that the Court continued association with the case would jeopardize the very existence of the institution.[154] Similarly, while the ICC failed to garner funding and resource support from the UN on the Darfur referral, the ICC had never relied upon such support for its functioning (as noted above, the non-necessity of external resources was one of the unique circumstances about the coalition and a critical component of its strength).

It is unclear whether the U.S. would have abstained if it had not received the last-minutes concessions earned before the Resolution 1593 vote. At minimum, without agreeing to the concessions, the coalition would have risked forcing a mutually detrimental deadlock, with the U.S. vetoing the only offer on the table. A more fundamentalist coalition, one that refused to any compromises, would have had a significantly smaller probability of earning a referral. There were protests from members within the coalition about the concessions given in the final moments of the Resolution 1593 negotiations; however, the coalition's flexibility and ability to acknowledge the political realities of negotiating with the hegemonic were likely critical its ultimate success in obtaining the referral. The newfound power of the coalition, would possibly have been all for naught without the willingness demonstrated by the majority of the coalition to compromise.

IV. The Power of the ICC Coalition

The ICC's evolution leading up to the Darfur referral reveals the role of power and security interests in the formation of international law and regimes. It is unlikely power politics will ever be absent from the ICC. On the final day of the Rome Conference, M. Cherif Bassiouni, chairman of the ICC's drafting committee, claimed that "[t]he ICC reminds governments that realpolitik, which sacrifices justice as the altar of political settlements, is no longer accepted."[155] Six years after proclaiming realpolitik's death in Rome, Bassiouni wrote,

---

[153] See e.g. Daniel Dombey & Mark Turner, "Solana Voices Doubts on Darfur Case Going to ICC," *Financial Times* (17 February 2005) at 6 (reporting that the EU's foreign policy representative feared "EU could fail in its bid to refer the Darfur massacres to the International Criminal Court, a development that would cast doubt on the court's future").

[154] A slightly sensational expression of this U.S. sentiment is the infamous "Invade the Hague clause" of the *American Servicemembers' Protection Act* (ASPA), which grants the U.S. executive authority to use "all means necessary and appropriate to bring about the release of any person… who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." *American Servicemembers' Protection Act of 2002*, *supra* note 107.

[155] Bassiouni, *supra* note 60 at 121.

> The principal obstacles to the effectiveness of the ICC will always be realpolitik and states' interests. Thus, it must be acknowledged that the ICC is not the decisive word on international criminal justice over states' interests and realpolitik—the tensions between the two will always be present.[156]

Such a lesson, while disheartening for some, is not a novel one. As Maurice Bourquin notes, "[i]nternational law is a legal crystallization of international politics."[157]

That said, the progress made by the ICC coalition in the face of hegemonic opposition suggests that international law can remain a progressive force even under realpolitik conditions. In general, the ICC's development has strengthened international criminal law. The International Criminal Tribunal for the former Yugoslavia noted that the Rome Statute "may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law."[158] While the U.S. has obtained certain exemptions and loopholes, these are relatively narrow.[159] The ICC case study highlights two important themes that will likely become more prevalent in future years. First, in today's world the United States does not possess of position of such hegemonic influence that it can unilaterally dictate the outcome of a legal regime.[160] While the United States still remains capable of dominating bilateral negotiations and extracting large concessions in multilateral settings, these powers are limited.

---

[156] M Cherif Bassiouni, "The ICC – QuoVadis?" (2006) 4 J Int'l Crim Justice 421 at 427; Also see M Cherif Bassiouni, "The Perennial Conflict Between International Criminal Justice and Realpolitik" (2006) 22 Ga St L Rev 541 at 549 ("However morally compelling these arguments about individual human rights [are], it remains necessary to induce states to recognize and enforce such rights. The need for such an inducement arises because outcomes from an international legal system . . . are likely to be detrimental to state interests and may limit the waning Westphalian concept of state sovereignty.").

[157] Cited in David Davenport, "The New Diplomacy: The ban on land mines, the International Criminal Court, and beyond" (2002/2003) 116 *Policy Review* 18.

[158] *Furundzija*, *supra* note 2 at para 227.

[159] One legal scholar helpfully ascertained two countervailing trends in international law:

> [O]n the one hand [one sees] a broadening trend, in that the various prosecutorial means used to hold individuals accountable for violations of certain international crimes has expanded; and on the other hand a narrowing trend, in that the protection from prosecution afforded by international law to certain individuals, that once seemed to falter, has been reinstated.

Olivia Swaak-Goldman, "Recent Developments in International Criminal Law: Trying to stay afloat between Scylla and Charybdis" (2005) 54 Int'l & Comp L Q 691 at 691. Again, however, the trend of exemptions has been rather narrow, in part due to the efforts of the ICC coalition to limit the efforts of the United States.

[160] The weight of the U.S. in the international system is, in itself, a hotly contested issue in IR. *Compare* Robert Knowles, "American Hegemony and the Foreign Affairs Constitution," (2009) 41 Ariz St L J 87 (arguing the U.S. remained a hegemonic power) and Susan Strange, "The Persistent Myth of Lost Hegemony" (1987) 41 Int'l Org 551, with Helen V Milner & Jack Snyder, "Lost Hegemony?" (1988) 42 Int'l Org 749, (arguing U.S. was no longer hegemonic). This paper, however, agrees with Nye's assessment that while the U.S. is the uncontested predominant power in the international system, its hegemony does not extend to the point that it unilaterally dictates the "rules and arrangements by which international relations are conducted." Joseph S Nye, Jr, *Soft Power* (New York: PublicAffairs, 2004) at 16.

The costs of bilateral negotiations are such that developing universal legal regimes through bilateral negotiations is largely not possible. This forces the United States into certain multilateral institutions, in which it must make concessions. These concessions can be quite important, both immediately (as in the referral of Sudan to the Court) and in the long-term (as in the acceptance of a non-permanent immunity agreement in 2002 and 2003).

Second, the ICC case study emphasizes the existence many of the different sources of power that are available to groups of smaller states in context of multilateral negotiations. While these are all derivative of commonly understood sources of power in international relations, the ICC's history puts flesh on the bone to help us understand the mechanism by which a coalition's collective strength can be operationalized. This section extrapolates two variables—size and diversity—that underpin the strength of a coalition and promise to shape the future of international law. It ends by briefly discussing the influence of U.S. power on the ICC's institutional form.

1. The Power of Size

One of the remarkable features of the ICC coalition is the sheer size of its support, despite the U.S. effort to minimize its impact. The speed with which the Court reached the sixty-member threshold needed to bring the Statute into force, for instance, exceeded many predictions, and the Court's membership continued to grow in its first years. As the membership grew, the number of state parties seated on international organizations—particularly the Security Council—increased to the point where a supermajority of states on the Council were ICC members, despite only two of the five permanent members being state parties. And increasing ICC membership, in turn, correlated with more states that were willing to champion a "strong" ICC that would serve as a focal point within the domain of international criminal justice.

A few scholars have suggested that coalitional size is a source of power. Fen Olser Hampson and Holly Reid, for instance, have argued that coalitions rely on their size for legitimacy.[161] Legitimacy, in turn, lowers uncommitted states' opposition to institutions and the norms the institutions promote—what Hampson and Reid term a "halo effect."[162] The ICC coalition's success is evidence, the authors claim, "that new norms and principles are taking root and slowly reshaping the international landscape," a process that relates back to the broad-based support for the regime.[163]

While the legitimating effect described by Hampson and Reid may occur, the ICC coalition's size provided more tangible sources of power, particularly of the compulsory and institutional variety. In terms of

---

[161] Hampson & Reid, *supra* note 62 at 11 ("The larger the size of the coalition that subscribes to a new set of norms, principles, and institutions, the greater the sense of legitimacy that is accorded to those norms and the institutions on which they are based.")
[162] Political elites, Hampson and Reid suggest, are drawn by the "'halo effect'… [of] appearing to be on the morally 'right' side of the issue." *Ibid* at 35.
[163] *Ibid* at 8.

compulsory power, increasing membership gave the ICC financial support that weaned it off the United States' chequebook—one of the U.S.' most commonly invoked sources of compulsory power. Since the days of the Rome Conference, a number of affluent middle powers like Germany and Canada were willing to bear the financial burdens of the Court. With the ICC's annual budget around U.S. $100 million, these financial commitments are not insignificant.[164] As early as Rome, ICC supporters have recognized that, if the ICC was avoid being held hostage by the United States' economic power, it would need to gain broad support to finance the Court. One commentator explicitly linked broad-based membership with financial independence: "If all the like-minded sign on, that's virtually all of Europe, with the exception of France. That's Canada, Australia, much of Africa and Latin America, all sorts of other countries—there's funding there, support, resources, a definite start."[165] After Rome, even more financially stable members, like France and Japan, joined the court and provided the court with dues that helped finance the ICC.[166]

The compulsory power gained from the ICC coalition's size generally has not been used offensively, in the sense of imposing direct pressure on a state to support the Court. The EU's "Guiding Principles" in response the U.S. bilateral exemption campaign—using access to EU markets as a direct bargaining chip—have been the exception rather than the general rule for the ICC coalition. Generally the financial strength of the ICC coalition has been expressed as what Lloyd Gruber terms "going it alone" power.[167] In a going it alone scenario, a certain group's earlier agreements can affect multilateral negotiations by altering payoffs such that preferred options of certain players are taken off the table through path-dependence. Essentially, Gruber's model explains how state entrepreneurship in forming multilateral negotiations is actually a source of power.

---

[164] See generally Georg Witschel, "Financing Regulations and Rules of the Court" (2002) 25 Fordham Int' L J 665 (discussing the financial considerations of the ICC).

[165] *Ibid*. The recent history of the ICC also suggests a collection of middle powers is capable of serving as a substitute for the U.S. in terms of both resources and leadership in legal regimes. Questions about the logistical and financial support have largely been answered in the first years. Though inducing states and other parties to help with investigations and prosecutions may have been easier with the U.S. as a supporter, the court has been able to launch investigations and prosecutions. From an operational perspective, the Court has not been perfect, but it has remained on its feet without the U.S. It has thus far survived the growing pains any international tribunal encounters.

[166] Using the varying rates of UN dues, Broomhall estimates that Japan's new membership will reduce the financial burden of the EU from 78.17% of the total ICC budget to approximately 54.14%. Broomhall, *supra* note 59 at 164.

[167] Lloyd L Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton: Princeton University Press, 2000) at 29. Gruber notes that in a multi-player game, a coalition of actors can first make a smaller compromise while ignoring the demands of other players with which it ultimately still wishes to cooperate. If states A, B, and C are all trying to agree upon an institutional design, A and B may first come to an agreement, which then changes the payoff matrix for state C. The agreement of A and B suddenly makes the prospect of cooperation more beneficial (or defection more costly) than it was previously, inspiring C to join. In this way, A and B may induce an ultimate solution different than that which would have been arrived at if all three actors negotiated simultaneously.

But states can only be entrepreneurial under Gruber's model if states left out of early negotiations are non-vital to the institution. Traditionally, the U.S. has been critical to any institution's success, providing the institution with both financial support and the additional legitimacy of having the world's superpower on board (it was no coincidence that U.S. negotiators made allusions to the League of Nations at Rome).[168] The ICC experience, however, indicates how broad state support can make U.S. participation non-vital, giving future coalitions evidence that "going it alone" without the U.S. is a viable option.

The ICC coalition's institutional power, which has been gained through increasing membership, has been on display at different stages of negotiations.[169] Given the voting scheme of the Rome Conference—one nation, one vote—the LMG's bloc of sixty-plus states accounted for more than forty percent of the 160 participating states. The strength was enhanced by the particular voting rules implemented at the Rome Conference; only a simple majority, with no geographic representation or agreement from the great powers, was necessary to pass the draft treaty.[170] Simple majority voting was also the rule in procedural decisions, which further served the LMG. In the final moments of the conference, for instance, the U.S. attempted to forward amendments to the treaty that would satisfy some of their strategic objections, particularly about jurisdiction. The amendments, however, were procedurally blocked from further consideration by the tabling of motions by Norway on behalf of the LMG.[171] These parliamentary tactics helped to marginalize the U.S. during negotiations.[172]

After Rome, size continues to afford the ICC coalition a source of institutional power. The most common examples of this leverage have come from negotiations conducted within the UN Security Council. Under Article 27 of the UN Charter, a supermajority of nine of the fifteen members must

---

[168] Lawrence Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 85 at 103. The need for the U.S., in turn, has given the U.S. control over the parameters of the organization in question—a form of compulsory power analogous to that described by realist variants of hegemonic stability theory. See *supra* notes 40-41 and accompanying text.

[169] Coalition size, of course, also relates back to the latent power of any set of states; the larger the coalition, the better chance that coalition can avoid be dictated to by more powerful individual states.

[170] *Ibid* at 24.

[171] See Weschler, *supra* note 168 at 107; Bassiouni, *supra* note 60 at 90.

[172] Size also permitted the LMG to assert informal methods of control over the Rome negotiations. Ambassador David Scheffer, who headed the U.S. negotiation party at Rome, complained that the "treaty text was subjected to mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 AM on the final day of the conference, July 17." David J Scheffer, "The United States and the International Criminal Court," (1999) 93 Am J Int'l L 12 at 20. While Scheffer described the group as small, the size of the coalition allowed the LMG to occupy the driver's seat over the ICC treaty, and only from this position were closed-door sessions productive for the group.

support a resolution for it to pass.[173] In addition, for a given vote to pass the permanent five members of the Council—China, France, Russia, the U.S., and the U.K.—must refrain from exercising their respective vetoes, meaning they must either support the resolution or abstain from voting. Given these Council rules, size comes into play in two distinct respects, which Steve Chan helpfully refers to as negative and positive power.[174] Negative power is the ability to defeat a draft resolution offered.[175] Given Council rules, negative power can be exercised via a veto, but it can also come from a coalition of seven states that abstain or vote against the resolution as a bloc. Positive power is the ability to pass a resolution without conceding to other countries' demands in order to gain the necessary nine votes to pass a resolution.[176] No state can unilaterally exercise positive power on the Council; a bloc of nine votes, by contrast, can be sufficient to avoid more concessions.[177]

Since the number of ICC members correlates to the size of the coalitional bloc, the number of states party to the ICC is an important determinant of the coalition's power.[178] Based on simple probability, a larger coalition increases the total number of ICC members that will likely serve on the Council at any one time.[179] In the case of the ICC, for instance, the increasing number of states parties translated first to the possession of negative power (including the ability to block the U.S. renewal of Security Council-obtained exemptions) and then to positive power (such as the events of the Resolution 1593 vote).

2. The Power of Diversity

In addition to size, another remarkable feature of the ICC coalition is its diversity. The Court's current membership span all five continents and

---

[173] See Sidney D Bailey, "New Light on Abstentions in the UN Security Council" (1974) 50 Int'l Affairs 554.
[174] Chan, *supra* note 100 at 341-42.
[175] *Ibid*.
[176] *Ibid*.
[177] Others have noted that the two types of power are actually entwined; Winter, for instance, has noted that through repeated vetoes a single state could significantly alter the content of a Council resolution compared to that which was offered in drafts. Eyal Winter, "Voting and Vetoing" (1996) 90:4 Am Pol Sci Rev 813 at 815.
[178] In theory the veto power of the Permanent Five makes positive power largely a null point when negotiating with a permanent member. However, in practice the costs of vetoing a resolution—both normative and strategic—sometimes make positive power an important consideration. Costs relate to issue linkage and the risk of leading to deadlock across multiple issues. See *supra* note 98 and accompanying text (discussing costs of deadlock).
[179] Historically, however, bloc voting on the Council has rarely become a significant source of power for a coalition. In the Cold War era, the three contemporaneous coalitions at play in the Council—the Western bloc, the Soviet bloc, and the Southern bloc—could rarely pass resolutions without significant compromise with non-coalition members. See James E Todd, "An Analysis of Security Council Voting Behavior" (1969) 22 Western Political Q 61. In more recent years, the NATO and the "coalition of the willing" have negotiated collectively inside the Council, but both have been similarly unsuccessful given their limited presence on the Council. Size, therefore, only becomes a significant source of power, at least as the Council is concerned, for the largest and most popular coalitions.

exhibits significant balance: 32 are African States, 15 are Asian States, 18 are from Eastern Europe, 26 are from Latin American or the Caribbean, and 25 are "Western" states.[180] There is also significantly more socioeconomic diversity within the Court's membership than with many other international coalitions. ICC state parties range from some of the most affluent states in the world to some of the poorest.[181]

Like coalition size, coalitional diversity has been determined to be a source of power. Like size, Reid and Hampson argue that diversity correlates with legitimacy:

> International coalitions which have memberships that span the North-South, East-West divide… typically enjoy greater levels of political legitimacy and credibility than coalitions that have a narrower membership and are formed along more partisan (i.e., North-South or East-West) lines.[182]

Reid and Hampson offer a variety of mechanisms by which diversity increases a coalition's negotiating leverage, including increasing the "coalition's capacity to 'name and shame,' to bring different resources and bargaining skills to the negotiating table, to take risks, and, most importantly, to secure support from civil society and a wide array of non-governmental actors in order to leverage governments."[183]

Like size, the ICC example shows diversity has a more tangible effect on power than those described by Reid and Hampson. In the context of the Security Council, for instance, geographic diversity becomes an important source of institutional power, because non-permanent seats are allocated regionally.[184] Under the Council's formula, one seat is allocated to Eastern European states, two to Latin American states, two to Western European and other Western states (such as Australia, New Zealand, and Canada), and five seats to African and Asian states.[185] The greater a coalition's geographic diversity, therefore, the greater the maximum number of seats a coalition can occupy at any single time. The ICC's history bears this relationship out: as the number of state parties from various regions increased, members increasingly filled the regionally allocated seats on the Security Council.

Geographic diversity also imposes additional costs on negotiating partners. Such diversity, for instance, reduces the ability of the United States to pressure states to establish regional organizations. By imposing these transactional costs, geographic diversity channels negotiations towards universal organizations like the United Nations, thereby limiting the United States' ability to choose a forum—a classic form of institutional power.[186]

---

[180] "The States Parties to the Rome Statute," *supra* note 63.
[181] Hampson & Reid, *supra* note 62 at 12.
[182] *Ibid* at 34.
[183] *Ibid* at 11.
[184] See *Question of equitable representation on the Security Council and the Economic and Social Council*, GA Res 1991(XVIII)[A], UN GAOR, 18th Sess, 1285th Mtg, UN Doc A/Res/1991(XVII)[A] (17 December 1963).
[185] *Ibid*. The resolution formally still combines these groups; however, under current practice, the election of African and Asian states is now conducted separately.
[186] See *supra* note 39 and accompany text.

As the examples show, the institutional form of the ICC is a product of coalitional power, particularly compulsory and institutional power. Because the ICC now plays such a central role in the greater international criminal justice movement (what Caroline Fehl has termed the "international atrocities regime"[187]), the experience chronicled here also documents how coalitional power has influenced the form of international criminal law. At the same time, coalitional power has not been the only force to shape the ICC's form. The U.S. campaign has had obvious effects, though the exercise of American power has not been as decisive as some theories would predict.

3. The United States' Not-So-Hegemonic Power

In its early years, the U.S. campaign against the ICC was not a subtle use of power. The use of its veto in the Security Council and the threat of ending aid to exemptions from the Court were classic examples of institutional and compulsory power. Since the Darfur referral, U.S. power is less obviously employed, but has been employed nonetheless. The U.S., for instance, continued to use the ICC's price tag as a way to pressure the coalition by forcing them to bear the costs of the Darfur investigations and prosecutions).[188]

The effects of U.S. power are also fairly apparent. The combination of bilateral exemptions and Security Council resolutions has limited the scope of the Court's jurisdiction. The U.S. campaign did not simply utilize exemptions built into the ICC constitution; rather, it created large exemptions from small ambiguities in the Rome Statute. The year-long exemptions passed by the Security Council in 2002 and 2003 were decried by ICC supporters as illegitimate and larger than what was envisioned by Article 16 of the Rome Statute;[189] however, they resolutions containing the exemptions were still passed and honoured by all states. Similarly, the Article 98(2) bilateral agreements have been attacked as illegitimate and contrary to the Rome Statute; nevertheless, state practice and Security Resolution 1593 (recognizing the Article 98(2) agreements) provide strong indicate that these agreements may be enforceable. U.S. power, therefore, has created jurisdictional loopholes within the ICC. While its impact perhaps has not followed the traditional role that U.S. power has had on institutional form, but it has been an influential force nonetheless.

At the same time, the ICC experience reveals the limits of U.S. power in shaping institutional form. Moreove, the ICC experience undermines claims that the U.S. can still effectively dictate any international organization's form. As discussed above, the compulsory power of the United States—exercised during negotiations over bilateral exemption—had limited success in the ICC

---

[187] Caroline Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches" (2003) 10 Eur J Int'l Rel 357 at 381 (reviewing new diplomacy literature).
[188] See *supra* notes 148-149 and accompanying text.
[189] Markus Benzig, "U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties" (2004) 8 Max Planck UN Y B 181 at 187-188.

context. Nationals of the U.S. remain exposed to the ICC's jurisdiction should it ever engage in a campaign against most of the more affluent states. In addition, the lack of bilateral agreements with states commonly deemed the gravest risks to American security (such as Cuba, Iran, Sudan, and Libya, the four "state sponsors of terrorism" identified by the U.S. State Department) means that the U.S. has a realistic chance of being investigated by the ICC in the future.[190]

Similarly, the ICC case study reveals the limits of U.S. institutional power, even in an organization—the United Nations, and more specifically, the Security Council—where it is identified as enjoying a privileged position. The results of Security Council negotiations over Darfur, for instance, indicate that negotiations conducted in the Security Council may no longer privilege the U.S. as much as traditionally believed.[191] The U.S.'s association with the United Nations often benefits the country in other contexts (as discussed above, for instance, the Security Council provided the U.S. with a useful forum to negotiate international counterterrorism efforts[192]); thus, the U.S. is deterred from engaging in extreme behaviour which might ossify the Security Council. The interest of the U.S. in avoiding a deadlocked Council impose costs on the use of its veto, to the extent that forcing issues into the Security Council may lead the U.S. to compromise in unexpected ways.[193] Future coalitions may take heart in the fact that the veto is in practice not the trump card—and ultimate source of institutional power—one might predict in theory.

V. Conclusion

This article identifies the various sources of power which have influenced the development of the form of the International Criminal Court and content of international criminal law. Still, many have refused to accept that power can so strongly influence international law. Indeed, many trumpeted the creation of the ICC as the end of power politics and deemed the Rome Conference as an era of "new diplomacy."[194] Power politics, some

---

[190] See *supra* notes 116-119 and accompanying text.

[191] This observation supports the claims of Benvenisti and Downs, who suggest that fragmentation actually favours the larger states in the system. Eyal Benvenisti & George W Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60 Stan L Rev 595.

[192] See e.g. *Security Council resolution 1526 (2004) [on improving implementation of measures imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000) and paragraphs 1 and 2 of resolution 1390 (2002) on measures against Al-Qaida and the Taliban]*, SC Res 1526, UN SCOR, 59th Sess, 4908th Mtg, UN Doc S/RES/1526 (30 January 2004) (strengthening sanctions regime for suspected terrorist organizations and supporters); *Security Council resolution 1617 (2005) [on international cooperation in the fight against terrorism]*, SC Res 1617, UN SCOR, 60th Sess, 5244th Mtg, UN Doc S/RES/1617 (29 July 2005) (formalizing procedure to place individuals on sanctions list); also see *supra* note 39 and accompanying text (discussing Security Council in context of Global War on Terrorism).

[193] The United States' unwillingness to veto a peacekeeping mission in 2004 in order to extract another exemption and its acquiescence on the Darfur referral in 2005 both question the traditional wisdom that the U.S. does not care about the UN and would celebrate its demise.

[194] See Fehl, *supra* note 187 at 381 (reviewing new diplomacy literature). William Pace, for

argued, had given way to a new chapter in commonality and principled debate.[195] Perhaps the most extreme proclamation of new diplomacy came from Bassiouni, who declared, "sacrific[ing] justice at the altar of political settlements is no longer accepted."[196]

Such pronouncements of the end of power politics reflect a mindset Peter Wallensteen once described as idealpolitik—the notion that state behaviour is dictated by "principles of legitimacy" such that normative principles are privileged over simple power politics.[197] Idealpolitik is not merely a mindset shared by commentators; many states pronounced at different points in the ICC debates that they would not allow the ICC to be forged by exercises of compulsory or institutional power. In some cases, idealpolitik is a useful mindset, because it can increase coalitional cohesion and reduce the chances of a bloc fracturing.[198] Overly idealistic coalitions, however, can ultimately become inhibited by their idealism; coloured by such idealism, coalitions will refuse to compromise at critical moments and come away from the negotiating table empty-handed.[199]

Occasionally, supporters of the ICC have been so moved by normative considerations that they have ended up unwilling to engage in power politics. The EU's unwillingness to compensate states for aid that would be lost by refusing to sign bilateral agreements ended up backfiring, with many less affluent nations eventually acquiescing to the carrots and sticks employed by the U.S.[200] While some may applaud the coalition's refusal to "play the same game as the U.S." as a principled stand, from a consequentialist perspective the decision is ultimately self-defeating.

---

instance, argues that LMG states eschewed old Cold War principles of "lowest common denominator" agreements, instead concluding that an effective treaty lacking the support of some important countries is preferable to an inefficient regime with universal support. William R Pace, "The Relationship between the International Criminal Court and Non-Governmental Organizations" in Herman AM von Hebel, Johan G Lammers & Jolien Schukking, eds, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) 189 at 206.

[195] David Wippman, "International Criminal Court" in Christian Reus-Smit, ed, The Politics of International Law (Cambridge: Cambridge University Press, 2004) 151 at 152-153 ("To some extent, the Rome treaty was motivated by a desire to solve collective action problems and to reduce the transaction costs inherent in establishing ad hoc tribunals. But the Rome treaty was driven even more fundamentally by a desire on the part of many participants in the negotiations to develop and stabilise norms of legitimate behaviour by states and non-state actors.").

[196] Bassiouni, *supra* note 60 at 121.

[197] Peter Wallensteen, "Incompatibility, Confrontation, and War: Four Models and Three Historical Systems, 1816-1976" (1981) 18 J Peace Research 57 at 75; see also Stanley Kober, "Idealpolitik" (1990) 79 Foreign Policy 3 (discussing *idealpolitik's* role in the Cold War).

[198] See Amrita Narlikar & Diana Tussie, "The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO" (2004) 27 World Economy 947 at 957 (describing the strengths of principled coalitions).

[199] For example, inflexibility defined the largely unsuccessful Third World coalitions formed in the 1980s: *Ibid* at 957. Similarly, the Group of Ten coalition formed during the GATT's pre-negotiations stages of the Uruguay Round remained cohesive to a point of fault. After drafting its proposed agreement for the Round's language, the coalition refused to even consult with other nations on the issue. They believed they had effectively achieved the "right" answer as far as they were concerned. As a result, the coalition lost steam, giving way to larger, more flexible coalitions such as the Cairns group on agriculture: *Ibid* at 958.

[200] See *supra* notes 113-116 and accompanying text.

Refusing to recognize the role of power does not lessen power's influence, rather it simply minimizes a coalition's chance to employ its own sources of power.

In general, however, the impact of idealpolitik has been relatively muted. The ICC coalition has remained principled—committed to a strong, independent judiciary—which has allowed it to maintain a firm line against U.S. pressure and bear the costs of its defiance.[201] At the same time, the ICC coalition has not shied away from deploying its own power strategically. And even more critically, the coalition has recognized its own limited power and consequently compromised at critical moments with the U.S. and other states when it lacked the power to push through its ideal position. Had the coalition not accepted that power plays a role in negotiations, the negotiations would have most likely ended in stalemates, and inhibited the Court's growth during its first years.

In sum, the ICC experience demonstrates that appreciating the fact that power dictates form is often as important as possessing power. Heeding predictions that international politics has entered an era of new diplomacy—where persuasion or normative principles dictate form—can be extremely harmful to a state. Appreciating the role of power, therefore, remains vital for states.

* * *

The first years of the ICC shows that power politics is alive and well in the international system and continues to dictate the form of international legal regimes. At the same time, there are lessons to be learned from the success of the ICC coalition in shepherding and sheltering the young Court for the entirety of the Bush Administration. Specifically, the coalition's success demonstrates that development international law and international institutions can potentially be the product of a democratic movement when the legal regime has a deep and wide-ranging support base.[202] The ICC case indicates that power-centric explanations of the international system need not be as pessimistic as some often suggest they are.[203] In addition, the ICC experience reveals some of the mechanisms by which smaller states may

---

[201] These costs are not limited to footing the ICC's bill; the U.S. has targeted individual states and offered significant sticks and carrots to encourage defection. Some individual targets have conceded to the pressure, but others have not. The U.S., for instance, has signaled that its opposition to Germany holding a permanent Security Council seat stems in part from Germany's fervent support of the ICC; despite this pressure, Germany has not tempered its fervent support for the Court. Bertrand Benoit & Guy Dinmore, "U.S. Backs Japan but not Germany for UN Place," Financial Times (17 June 2005) at 11.

[202] Indeed, the success of the ICC coalition was conceded by American diplomats as early as 2005. After the Darfur referral, the U.S. abandoned their description of the ICC as "fatally flawed" and conceded that the Court was now a fixture in the international system. See Jess Bravin, "U.S. Warms to Hague Tribunal," *Wall Street Journal* (14 June 2006). The Obama administration has voiced support for the Court.

[203] See also Charles L Glaser, "Realists as Optimists" (1994) 19 Int'l Sec 50 (discussing non-fatalistic predictions in realism).

exercise power in international negotiations concerning international law.

Above all, the success of the ICC coalition indicates that international law is not a handmaiden to any one state, in spite of old theories that speak of regimes being nothing more than the will of the strong. Rather, international law reflects the distribution of power in subtle and sophisticated ways in which coalitions, negotiations, and other processes can shape the determinative rules of the international system.

Murky Waters: Prosecuting Pirates and Upholding Human Rights Law

SAOIRSE DE BONT

I. Introduction

In May 2010, Russian forces stormed a hijacked oil tanker in a rescue attempt that culminated with the arrest of ten pirates. The pirates were subsequently set adrift without navigational equipment in a small vessel in the Gulf of Aden (an area covering approximately 205,000 square miles) and are now considered dead. Some ambiguity remains regarding what happened to the pirates. Somalia's Transitional Federal Government (TFG) demanded an explanation and an apology from Russia regarding the treatment of its citizens, while the Russian officials reported that the pirates were released in a boat due to the lack of legal options for prosecution.[1]

[1] See e.g. Abdiaziz Hassan, "Somalia Calls for Russian Explanation on Pirates", *International Business Times* (14 May 2010), online: International Business Times

Vol. 7, pp. 104-145. ISSN: 1712-2988.

The case above illustrates two important issues that converge, allegedly clash with, and most certainly shape counter-piracy operations. The first is the legal framework that exists to prosecute pirates. The second is the human rights obligations of states that engage in tackling piracy. This article addresses the intersection of these two issues, with special reference to piracy off the coast of Somalia.[2]

Modern piracy has been a growing phenomenon in recent years, resulting in a flurry of international counter-piracy activities such as the adoption of United Nations Security Council Resolutions (UNSCRs) and the increase in international naval forces patrolling high-risk waters—particularly those near Somalia. Despite these attempts to address the issue, piracy attacks have multiplied rapidly, from 239 in 2006 to 445 in 2010.[3] Moreover, the financial rewards of piracy are increasing. In November 2010, a South Korean oil tanker, Samho Dream, was released, reportedly after a record ransom of $9.5 million was paid.[4] It is estimated that in 2010, the cost of ransoms for ships hijacked by pirates was approximately $238 million.[5] Simultaneously, prosecution for these attacks is unlikely. The US Navy reports that the counter-piracy operation Combined Task Force 151, with cooperating international naval forces, encountered more than 1,129 pirates between 2008 and June 2010. Of those, 638 were disarmed, while 478 were

---

<http://www.ibtimes.com/articles/23729/20100514/somalia-calls-for-russian-explanation-on-pirates.htm>; Alisha Ryu, "Somalia Says Relations With Russia May Be Harmed Over Pirates' Treatment", *VOA News* (21 May 2010), online: VOA News <http://www1.voanews.com/english/news/europe/Somalia-Says-Relations-With-Russia-May-Be-Harmed-Over-Pirates-Treatment-94592344.html>. It is unclear what exactly occurred regarding the pirates in question. See e.g. "Russia Says Pirates Who Held Tanker are Freed", *The Associated Press* (9 May 2008), online: InsideSomalia.org <http://insidesomalia.org/201005093038/News/Travel/Russia-says-pirates-who-held-tanker-are-freed.html> (reporting that Mikhail Voitenko, editor of the Russian online Maritime Bulletin, said that the account of the pirates being released sparked suspicions that the pirates were in fact killed).

[2] When commenting on operations "off the coast of Somalia," the author is referring to the area where Somali pirates are operating, which covers a vast stretch of sea incorporating the Gulf of Aden, the Red Sea, parts of the Indian Ocean, the Gulf of Oman and the Arabian Sea. See International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report, 1 January – 31 December 2010* (London: International Maritime Bureau, January 2011) at 19 [IMB 2010 Report].

[3] See IMB 2010 Report, *supra* note 2 at 6. Note that the problem of piracy is greater than figures suggest, as it is estimated that approximately 50 per cent of attacks are not reported. See e.g. Elizabeth Andersen, Benjamin Brockman-Have & Patricia Geoff, *Suppressing Maritime Piracy: Exploring the Options in International Law* (2009) at 2, online: The Academic Council on the United Nations System <http://www.acuns.org/programsan/suppressingmaritimepiracyexploringtheoptionsininte>; Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* (Santa Monica: RAND Corporation, 2008) at 7.

[4] See e.g. "Somali pirates get hefty ransom", *Al Jazeera* (07 November 2010), online: Al Jazeera <http://english.aljazeera.net/news/africa/2010/11/201011623162443l468.html>; "Somali pirates receive record ransom for ships' release", *BBC News* (06 November 2010), online: BBC News <http://www.bbc.co.uk/news/world-africa-11704306>.

[5] One Earth Future, "The Economic Cost of Maritime Piracy", One Earth Future Working Paper (December 2010), online: One Earth Future <http://oneearthfuture.org/images/imagefiles/The%20Economic%20Cost%20of%20Piracy%20Full%20Report.pdf>.

transferred for prosecution.[6] Similarly, of the 275 alleged pirates captured by EU naval forces between March and April 2010, reportedly only forty are to be prosecuted.[7] These figures indicate that around 60–85 per cent of the pirates encountered are simply let go.

One may question why so many alleged pirates are released without being charged. Addressing piracy is challenging, not least due to the nexus of laws that are applicable to counter-piracy operations, and which incorporate customary law, United Nations Security Council Resolutions, treaty law, national law, and human rights law. Moreover, at times human rights law is perceived as limiting the ability of international forces to combat piracy.[8]

It appears that fear of violating human rights obligations plays a role in states' prosecution of suspected pirates. This raises the question of whether a trade-off exists between prosecution of pirates and protecting and promoting human rights. This article discusses various aspects of human rights law that apply to counter-piracy operations, to contribute to the current literature that elucidates the human rights obligations of states addressing the problem of piracy, and to emphasize the rights of pirates to ensure that they are treated in accordance with the principle of due process and that efforts are made to prevent incidents like the one cited in the opening paragraph.[9]

The article proceeds as follows: Part I gives an overview of international law as it pertains to maritime piracy. It examines the concept of universal jurisdiction and the legal framework that regulates the fight against piracy. Part II discusses international law that protects pirates, focusing on jurisdiction. It addresses the extraterritorial application of human rights treaties, as well as their application to states acting as part of international bodies. Part III considers aspects of international human rights law as applied to combating piracy off the coast of Somalia. Specifically, it looks at issues such as detention, right to asylum, non-refoulement, and the transfer of pirates to third parties. Part IV considers the political side of the

---

[6] Navy Office of Information, "Rhumb Lines, Combined Maritime Forces" (28 June 2010), online: Navy Office of Information <http://www.navyreserve.navy.mil/Rhumb%20Lines/Combined%20Maritime%20Forces%2028%20Jun%2010.pdf>.

[7] See Mariama Diallo, "Nations Prove More Willing to Combat Piracy than Prosecuting Pirate Suspects", *VOA News* (8 June 2010), online: VOA News <http://www.voanews.com/english/news/africa/east/Nations-Prove-More-Willing-to-Combat-Piracy-than-Prosecuting-Pirate-Suspects-95861284.html>.

[8] See e.g. Justin Stares, "Pirates Protected from EU Task Force by Human Rights", *The Telegraph* (UK) (1 November 2008), online: Telegraph.co.uk <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html>; J Peter Pham, "Anti-Piracy, Adrift" (2010) 18 Journal of International Security Affairs, online: The Journal of International Security Affairs <http://www.securityaffairs.org/issues/2010/18/pham.php> (stating that international human rights and humanitarian law were restricting the actions of armed forces combating piracy).

[9] Importantly, human rights obligations are just one factor perhaps limiting the prosecution of pirates. Options fully compatible with human rights law exist to combat piracy; however, financial costs, expediency, domestic laws and politics also play an important role, as discussed further in Part IV.

discussion, and the trade-offs between the protection of human rights and expediency.

The focus is specifically on Somalia for three main reasons. First, the increase in piracy in recent years can be attributed largely to Somali pirates.[10] Second, the Gulf of Aden, an area under attack by Somali pirates, is one of the most heavily trafficked maritime regions in the world. Situated at the crux of major shipping lanes, approximately 33,000 ships pass through the gulf every year.[11] Third, the waters off Somalia boast one of the largest anti-piracy flotillas in the world—a conglomeration of states and multinational organizations engaged in counter-piracy operations.[12] In addition, since civil war broke out in 1992, Somalia has suffered from protracted conflict and economic collapse, and violence in the country is widespread. It is described by many as a failed state, which is incapable of offering robust protection against human rights violations to its citizens.[13] In such a situation, international human rights obligations, and their application, gain even greater significance.

II. Piracy in International Law

Piracy occupies a unique position in international law. Described as *hostis humani generis*, "enemies of all mankind," pirates commit the original crime under universal jurisdiction.[14] The principle of universal jurisdiction holds that certain crimes are of such a serious nature that any state is entitled, or even required, to apprehend and prosecute alleged offenders regardless of the nationality of the offenders or victims, or the location where the offense took place.[15] It differs from other forms of international

[10] In 2005, there were a total of 276 attacks, of which 48 were carried out by suspected Somali pirates. Conversely, of the 445 reported attacks worldwide in 2010, 219 incidents were attributed to suspected Somali pirates. See IMB 2010 Report, *supra* note 2 at 6 and 19.

[11] See e.g. Navy Office of Information, *supra* note 6; US, Congressional Research Service, Lauren Ploch et al, *Piracy off the Horn of Africa* (7-5700) (Washington, DC: Congressional Research Service, 2009) at 9.

[12] Rubrick Biegon, "Somali Piracy and the International Response" *Foreign Policy in Focus* (29 January 2009), online: Foreign Policy in Focus <http://www.fpif.org/articles/somali_piracy_and_the_international_response> (reporting that the Gulf of Aden is being patrolled by one of the largest anti-piracy fleets in modern history).

[13] See e.g. "The Failed State Index 2010", *Foreign Policy* (21 June 2010), online: Foreign Policy <http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings> (listing Somalia as the primary failed state in the world for 2010). See also Ken Menkhaus, "Stabilisation and Humanitarian Access in a Collapsed State: The Somali Case" (2010) 34 Disasters 320 (discussing Somalia's state failure).

[14] See e.g. Michael Bahar, "Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations" (2007) 40 VJTL 1 at 11; Michael P Scharf, "Application of Treaty-Based Universal Jurisdiction To Nationals of Non-Party States" (2001) 35 New Eng L Rev 363 at 369. Now universal jurisdiction applies to a wider range of crimes, such as genocide, war crimes and crimes against humanity.

[15] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Utrecht: Intersentia, 2005); Stephan Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004), for an analysis of universal jurisdiction.

jurisdiction because it is not premised on notions of sovereignty or state consent.[16]

Dating back to the sixteenth century, universal jurisdiction over piracy has been an established principle of customary international law;[17] today, customary law and international agreements govern jurisdiction over piracy.[18] Notably, customary international law is binding on all states, unlike international agreements, which only govern the actions of the states that are party to them.[19] The relevant international agreements that apply to piracy are the United Nations Convention on the Law of the Sea (UNCLOS)[20] and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA, or the SUA Convention).[21]

> The 1982 United Nations Convention on the Law of the Sea[22] defines piracy as:
>
> (*a*) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> > (*i*) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

---

[16] See e.g. Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" (2004) 45 Harv Int'l LJ 183 at 184 [Kontorovich, "The Piracy Analogy"]. Notably, other forms of jurisdiction, such as the flag state principle, the nationality principle or the passive personality principle, could also apply to piracy on the high seas, which explains why universal jurisdiction is not always invoked. Note that all of these principles have limitations in application. See e.g. Jon D. Peppetti, "Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats" (2008), 55 Naval L. Rev. 101-104.

[17] Note that there is some disagreement regarding the customary nature of universal jurisdiction over piracy, due to the lack of consistent state practice regarding prosecution. See e.g. Kontorovich, "The Piracy Analogy", *supra* note 16 ("[U]niversal jurisdiction over pirates was more a matter of theory than of practice" at 192); Eugene Kontorovich & Steven Art, "An Empirical Examination of Universal Jurisdiction for Piracy" 104:3 Am J Int'l L 436 at 445 (calculating that universal jurisdiction was used in prosecuting only 0.53% of clearly universally punishable piracy cases between 1998 and 2007, with the figure increasing to 3.22% between 2008 and June 2009, and reporting that Kenya accounts for all but four cases of invoking universal jurisdiction over piracy in the past 12 years, with responsibility for 76% of cases). The reasons for this rare usage are manifold but include the lack of domestic legislation to facilitate the prosecution of pirates under universal jurisdiction, as well as the fact that states are often reluctant to act as "world police," bearing the costs of prosecution without a direct nexus to the crime. See e.g. Peppetti, *supra* note 16 at 110-112 (discussing the limitations of universal jurisdiction).

[18] See e.g. M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) 42 VAJIL 81 at 113 (describing the evolution of the international crime of piracy over centuries through declarative prescriptions and enforcement proscriptions); Peppetti, *supra* note 16 at 105.

[19] See e.g. Peppetti, *ibid.*

[20] *United Nations Convention of the Law of the Sea,* 10 December 1982, 1833 UNTS 397 [*UNCLOS*].

[21] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221, 27 ILM 668 (1998) [*SUA Convention*].

[22] As of April 2011, there were 161 State Parties and 157 signatories to the Convention. See *UNCLOS*, *supra* note 20, online: United Nations Treaty Collections <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en>.

> (*ii*) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (*b*) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (*c*) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[23]

Although UNCLOS is not ratified by all states (a notable non-signatory being the United States), there is general acceptance that the definition of piracy in the Convention is a codification of international customary law.[24] Moreover, some states not party to UNCLOS, such as the US, are party to the 1958 High Seas Convention, which contains similar provisions.[25]

The relevant articles of UNCLOS (Articles 100-107 and Article 110; particularly Article 105) outline the definitions of piracy and pirate ships or aircrafts, as well as delineate some processes of seizing and boarding a ship. However, there are a number of limitations to the Convention.

First, according to UNCLOS, piracy can only occur on the high seas, and not in territorial waters.[26] Approximately 60 per cent of successful attacks on ships occur within territorial waters,[27] so UNCLOS does not apply to a large number of armed robberies on ships.[28]

Second, although Article 105 reiterates the concept of universal jurisdiction—stating that on the high seas, any state can seize a pirate ship,

---

[23] *UNCLOS*, *supra* note 20 at Art 101.

[24] See e.g. Bahar, *supra* note 14 at 10; Erik Barrios, "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" (2005) 28 BC Int'L & Comp L Rev 149 at 153; Douglas Guilfoyle, "Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts" (2008) 57 Int'l & Comp LQ 690 at 693 [Guilfoyle, "Piracy off Somalia"]. But see Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press, 1988) (reporting on the difficulties of codifying piracy and pointing out that decisions regarding the definition of piracy split the International Law Commission while it was drafting the Convention).

[25] See *Geneva Convention on the High Seas*, 29 April 1958, 450 UNTS 82, 13 UST 2312. See also Bahar, *supra* note 14 at 10; Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia" (2009) 20 Eur J Int'l L 399 at 401 [Treves, "Piracy, Law of the Sea, and Use of Force"] (stating that UNCLOS Articles 100–107 and 110 are nearly identical to Articles 14–22 of the High Seas Convention and that, either as a matter of conventional or customary law, UNCLOS states the law as currently in force).

[26] *UNCLOS*, *supra* note 20 at Art 101. See also Eugene Kontorovich, "A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists" (2010) 98:1 Cal L Rev 243 at 263 [Kontorovich, "A Guantanamo on the Sea"] (noting that as universal jurisdiction specifically applies to piracy on the high seas, at times when suspected pirates are caught, they claim to be fishermen). Territorial waters extend up to twelve nautical miles from a coastal state's baseline, while the contiguous zone stretches for a further twelve nautical miles. The exclusive economic zone exists up to 200 nautical miles from the baseline, and thereafter there are international waters. In accordance with Article 58 of UNCLOS, the exclusive economic zone is equivalent to the high seas under the laws of piracy.

[27] See International Maritime Organization, *Report on Acts of Piracy and Armed Robbery Against Ships: Annual Report - 2010*, Annex 2, MSC.4/Circ.169, (2011) at 1 (reporting that 171 of the 276 successful attacks committed against ships in 2010 occurred within territorial waters or port areas. If attempted attacks are included, the number of attacks in international waters rises to 60% of the total [294 out of 489 attacks].

[28] The SUA Convention, which will be discussed below, was developed partly in response to this limitation.

arrest the pirates, seize the possessions on board, and prosecute the suspects—there is no *obligation* on states to exercise jurisdiction, or to prosecute pirates.[29] The language used is permissive, as opposed to prescriptive. Therefore, although many states could prosecute pirates, few ultimately do so, as the prosecution of pirates rests not only on legal structures but also on the attitudes of decision-makers operating within these structures.

Third, Article 105 is unclear regarding the transfer of suspected pirates from the seizing state to another state for prosecution. Munich Re, a German insurance company, claims that Article 105 only grants prosecution or punishment rights to the state that seized the vessel, while Lanham reports that transferring suspects to third-party states for prosecution falls outside universal jurisdiction as delineated in UNCLOS.[30] Similarly, Kontorovich argues that this Article restricts states other than the seizing state from prosecuting suspected pirates. Kontorovich draws on the Report of the International Law Commission's comments on Article 43, which he alleges indicate that the provision was intended to prevent transfers to other states.[31] However, in further discussion, Kontorovich muses that the article may have meant to preclude admiralty courts or prize courts in foreign countries, or that at least the text is unclear on the point.[32]

Conversely, Azubuike states that nothing in Article 105 makes it exclusive to the seizing state; rather, the language is permissive. Moreover, he points out that UNCLOS codified customary law of universal jurisdiction, and stipulates that if it intended to depart from universal jurisdiction, it would have been much clearer in its provisions.[33] Furthermore, Azabuike's argument is supported by the current practice of utilizing transfer agreements to transfer suspected pirates, thus indicating that Article 105, as interpreted by different parties, does not preclude third-party jurisdiction. Notably, to date no court has ruled on the stipulations present in Article 105.

Fourth, and finally, there is some debate surrounding the "private ends" provision in the UNCLOS definition of piracy. Barrios reports that UNCLOS excludes attacks that are politically motivated. For example, he claims that

---

[29] *UNCLOS*, *supra* note 20 at Art 105.
[30] Honor Lanham, *Walk the Plank: Somali Pirates and International Law* (LLB dissertation, University of Otago, 2009) at 33, online: University of Otago <http://www.otago.ac.nz/law/oylr/2009/Honor_Lanham.pdf> [unpublished]; Munich Re Group, Knowledge Series, *Piracy – Threat at Sea: A Risk Analysis* (Munich: Münchener Rückversicherungs-Gesellschaft, 2006) at 26.
[31] See Eugene Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia" (2009) 13:2 Am Soc Int'l L, online: American Society of International Law <http://www.asil.org/insights090206.cfm> [Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia"]. See also Eugene Kontorovich, Blog Posting, "Why the Piracy Police Isn't Working", *Opinion Juris* (18 February 2009), online: Opinio Juris <http://opiniojuris.org/2009/02/17/one-solution-to-piracy-try-pirates-in-kenya/> [Kontorovich, "Why the Piracy Police Isn't Working"].
[32] See Kontorovich, "Why the Piracy Police Isn't Working", *supra* note 31.
[33] Lawrence Azubuike, "International Law Regime Against Piracy" (2009) 15 Ann Surv Int'l & Comp L 43 at 54-55.

maritime terrorism, such as environmental attacks with hijacked oil tankers, do not fall within the realm of UNCLOS.[34] Guilfoyle challenges this, asserting that "private ends" must be interpreted broadly to mean any action that lacks state sanction. He draws on the Belgian Court of Cassation's ruling in *Castle John v NV Mabeco* (1986), wherein Greenpeace protestors boarded and damaged two ships on the high seas, reportedly to draw attention to the environmental damage caused by ships discharging waste into the sea. The court ruled that violence by the occupants of one private vessel against another vessel, even as a form of political protest, furthered private ends and constituted piracy. A non-private act must directly relate to the interests of, or impinge upon, the state or state system.[35] As Lanham points out, this ruling counters the earlier Harvard Draft Convention on Piracy.[36] Moreover, it rests on a highly subjective determination of what affects the interests of the state system.

What is clear is that the "private ends" provision lacks clarity. Regarding piracy off the coast of Somalia, to the author's knowledge there has been no attempt to argue against a piracy charge using the "private ends" provision, and evidence indicates that the attacks are privately motivated.[37] Guilfoyle reports that Somali pirates even declare that they are operating for private ends, which makes commercial sense, since some ransoms cannot be paid under anti-terrorism regulations.[38]

The SUA Convention addresses a number of perceived gaps in UNCLOS, although it was drafted primarily to combat maritime terrorism.[39]

---

[34] Barrios, *supra* note 24 at 156.

[35] Guilfoyle, "Piracy off Somalia", *supra* note 24 at 693-4. See also Bahar, *supra* note 14 at 30 (stressing that what is critical is "not the actor's intent, but whether a state can be held liable for the actor's actions").

[36] Lanham, *supra* note 30 at 16-20. See Harvard Research in Int'l Law, "Draft Convention and Comment on Piracy" (Supp 1932) 26 Am J Int'l L 739 at 857 [Harvard Draft Convention] (noting that forcible acts for political ends should not fall under the common jurisdiction of all states as piracy).

[37] Note that a number of reports have alleged that the first hijackings were by fishermen acting as a self-appointed coastguard. See e.g. Andrew Mwangura,"Somalia: Pirates or Protectors", *Pambazuka News* (20 May 2010), online: AllAfrica.com <http://allafrica.com/stories/201005200856.html>. However, piracy has transformed since then into a multi-million dollar industry, transcending continents. See e.g. Robert I Rotberg, "Combating Maritime Piracy: A Policy Brief with Recommendations for Action" (2010), online: World Peace Foundation <http://www.worldpeacefoundation.org/WPF_Piracy_PolicyBrief_11.pdf> at 3. There has been no evidence of a link between terrorism and piracy off Somalia to date. But see e.g. Bahar, *supra* note 14 (discussing the potential connection); Sandeep Gopalan, "Put Pirates to the Sword: Targeted killings are a necessary, justified and legal response to high-seas piracy", *The Wall Street Journal* (18 January 2010), online: Wall Street Journal <http://online.wsj.com/article/SB10001424052748703652104574651962659622546.html> (stating that Somali pirates have links to al Qaeda elements).

[38] Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights" (2010) 59 Int'l & Comp L Q 141 at 143 [Guilfoyle, "Counter-Piracy Law Enforcement"]. Another alleged shortfall of UNCLOS is that it indicates that there must be two ships involved for an act to be regarded as piracy. This issue is not immediately relevant to the present paper but for further information see Yvonne M Dutton, "Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court" (2010) 11 Chi J Int'l L 201.

[39] The SUA preamble expresses concern about the increase in terrorist acts (*SUA Convention*,

However, it differs from UNCLOS in that it is binding only on those states that are signatories.[40] For the purposes of this article only selected aspects of SUA are discussed. SUA covers attacks that are carried out in territorial waters, providing that attacked ships are on course to navigate outside that territory.[41] It permits jurisdiction by any signatory state that has a connection to the offense; for example if the act is carried out in a state's territory, is against a ship flagged to that state, is committed by a state national, or, alternatively, if a state national is a victim of the offense.[42] In addition, Article 8(1) of SUA provides for the transfer of a suspected pirate to any other State Party. Moreover, SUA Article 10 mandates prosecution or extradition of suspects by states. To date, SUA has rarely been invoked as a basis for prosecution,[43] although it has been presented in various UNSCRs as grounds for establishing jurisdiction to prosecute pirates.[44]

In addition to the above conventions, the UN Security Council has passed resolutions to complement the existing law on piracy, specifically with regard to Somalia.[45] Beginning with UNSCR 1816 in 2008, there have been a series of resolutions, the most recent being UNSCR 1976 in April 2011.[46] Developed under the authorization of Chapter VII of the UN Charter, these resolutions sanction states to use "all necessary means" to repress piracy.[47] They also allow states to enter Somali territorial waters,[48] while

---

supra note 21). See also Jill Harrelson, "Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry" (2009-2010) 25 Am U Int'l L Rev 283 at 286 (stating that the Convention's main purpose is to combat terrorism).

[40] As of May 2010 there were 156 signatories to SUA. Signatories include the majority of states with a nexus to piracy, although Somalia is a notable exception. See Center for Nonproliferation Studies, Inventory of International Nonproliferation Organizations and Regimes, "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platform [sic] Located on the Continental Shelf, SUA 2005 Protocol and the Montreal Convention" (2010), online: Nuclear Threat Initiative <http://www.nti.org/e_research/official_docs/inventory/pdfs/apmsuamontreal.pdf>.

[41] *SUA Convention*, *supra* note 21 at Art 4.

[42] *Ibid* at Art 6.

[43] See Kontorovich, "A Guantanamo on the Sea", *supra* note 26 at 254, n 83 (reporting that, to date, the only case of prosecution solely under SUA is *United States v Shi* 525 F 3d 709 (9th Cir 2008)).

[44] See Resolution 1851, UNSC, 2008, UN Doc S/RES/1851 at preamble [Resolution 1851]; Resolution 1897, UNSC, 2009, UN Doc. S/RES/1897 at preamble, para 14 [Resolution 1897].

[45] Notably these resolutions are not customary law, neither are they applicable to any situation other than piracy off Somalia. See e.g. Resolution 1816 (2008), SC Res 1816, UNSCOR, 2008, UN Doc S/RES/1816, at para 9 [Resolution 1816].

[46] See Resolution 1816, *supra* note 45; Resolution 1838 (2008), SC Res 1838, UNSCOR, 2008, UN Doc S/RES/1838; Resolution 1846 (2008), SC Res 1846, UNSCOR, 2008, UN Doc S/RES/1846 [Resolution 1846]; Resolution 1851, *supra* note 44; Resolution 1897, *supra* note 44; Resolution 1918 (2010), SC Res 1918, UNSCOR, 2010, UN Doc S/RES/1918 [Resolution 1918]; Resolution 1950 (2010), SC Res 1950, UNSCOR, 2010, UN Doc S/RES/1950 [Resolution 1950]; Resolution 1976 (2011), SC Res 1976, UNSCOR, 2011, UN Doc S/Res/1976 [Resolution 1976].

[47] See e.g. Resolution 1816, *supra* note 45 at para 7(b).

[48] See Resolution 1816, *supra* note 45 at para 7(b); Resolution 1846, *supra* note 46 at para 10.

UNSCR 1851 permits counter-piracy activities on Somali soil.[49] However, this authority to enter Somali territory is available only to cooperating states, operating with the permission of the Somali TFG, as notified to the Security Council in advance. As Guilfoyle points out, this provision makes the resolutions appear redundant, as Chapter VII authorization is not required for consensual operations.[50] Nonetheless, the resolutions do contain some novel powers; for example, UNSCRs 1846, 1851, and 1897 permit states to seize and dispose of equipment that could be used in piracy activities.[51] Notably, the European Union Naval Force (EU NAVFOR) recently began using more proactive tactics, destroying equipment and skiffs suspected of being used in piracy, a technique which, according to reports, has been highly effective.[52] The above-mentioned resolutions expressly authorize such action by international organizations.[53]

In addition, a series of agreements have been signed among regional states and some states engaging in counter-piracy operations, as well as the European Union (EU). These Memoranda of Understanding between Kenya and the US, UK, Denmark, Canada, China, and the EU (now no longer valid),[54] and between Seychelles and the EU and the US, govern the transfer

---

[49] Resolution 1851, *supra* note 44 at para 6; renewed in Resolution 1897, *supra* note 44 at para 7.
[50] Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 147. Note also that the language in Resolution 1851 is not specific, and at the request of Indonesia, specific terms such as "ashore" and "including in its airspace" were removed from the final resolution, due to Indonesia's fear that the draft resolution could be generalized and used in other jurisdictions in future. See Ecoterra International, "81st Press Release Update" (17 December 2008), online: Buzzle.com <http://www.buzzle.com/articles/ecoterra-criticism-of-un-security-council-members-homo-cro-magnon-approach.html>.
[51] See e.g. Resolution 1851, *supra* note 44 at para 2. See also Resolution 1846, *supra* note 46 at para 9; Resolution 1897, *supra* note 44 at para 3.
[52] See European Union Naval Force Somalia (Northwood), "EU NAVFOR's Seek, Disrupt and Destroy Policy Continues It's [sic] Success" (2 May 2010), online: EU NAVFOR Somalia <http://www.eunavfor.eu/2010/05/eu-navfors-seek-disrupt-and-destroy-policy-continues-its-success/>. Note that the effectiveness of such proactive techniques has yet to be confirmed through robust research.
[53] See e.g. Resolution 1851, *supra* note 44 at para 2.
[54] In April 2010 Kenya announced that it was unwilling to accept more suspected pirates for prosecution. See Galgalo Bocha, "Kenya urged to change stance on piracy trials", *Daily Nation* (17 December 2010), online: Daily Nation <http://www.nation.co.ke/News/regional/Kenya%20urged%20to%20change%20stance%20on%20piracy%20trials%20%20/-/1070/1074450/-/9d06ai/-/index.html> and <http://www.nation.co.ke/News/Kenya cancels piracy trial deals/-/1056/1021740/-/u7eds2z/-/.It(stating that Kenya terminated the agreement with the EU to try captured pirates in the country, effective as of September 30, 2010); International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report For The Period Of 1 January – 31 March 2010* (London: International Maritime Bureau, April 2010) at 28. Although it continued to accept some suspects thereafter, in November 2010 Kenyan Judge Mohammed Ibrahim ruled that the country does not have the jurisdiction to try pirates if the attacks occur beyond Kenyan waters. As a result, the seven cases at different levels of trial in Kenya were stopped indefinitely. See The Associated Press, "Somali Piracy Outpacing UN Efforts" *CBS News* (10 November 2010), online: CBS News <http://www.cbsnews.com/stories/2010/11/10/wor ld/main7039911.shtml>; Philip Muyanga, "State accused of delaying piracy trials", *Daily Nation* (8 March 2011), online: Daily Nation <http://www.nation.co.ke/News/State+accused+of+delaying+piracy+trials+/-/1056/1121466/-/m7f5ivz/-/>.

of pirates to Kenya and Seychelles for prosecution. Notably, the North Atlantic Treaty Organization (NATO) Standing Maritime Group has no common legal framework to transfer pirates to third-party states for trial;[55] hence, states operating under its command revert to domestic laws and decisions when they take suspected pirates into custody.

Despite these international treaties, agreements, and resolutions, adequate domestic laws are required to ensure the prosecution of pirates, and many states encounter barriers to combating piracy within their domestic legislation. For example, some countries, such as Germany and France, do not confer police powers on the military.[56] Moreover, Denmark and Germany can only prosecute pirates if they have impacted national interests or citizens,[57] and some states have no definition of piracy in domestic law.[58] To address this, UNSCRs 1851 and 1897 highlight the lack of domestic legislation, and UNSCR 1897 explicitly calls on states to enact laws to criminalize piracy.[59]

III. Laws Protecting Pirates

Alongside (and often integrated with) the legal instruments supporting counter-piracy operations exists an international human rights system that was developed to protect the rights of all individuals. Although the doctrine of human rights is premised on philosophical and moral arguments—in that it is based on the notion that there exists a certain rational, moral order, or universalism—this article will not turn to philosophical or ethical reasoning. Rather, it is firmly situated within a legal perspective, examining the system of reputable behaviour that has developed, been codified in legal instruments, and been supported by states.

Prominent conventions that are particularly relevant to the issue of piracy, and that will be discussed throughout the article, are the 1984 Convention Against Torture (CAT), the 1966 *International Covenant on Civil and Political Rights* (ICCPR or the Covenant), and the 1950 European Convention on Human Rights (ECHR).[60] Such conventions place positive

---

[55] See "High Time for Piracy Tribunal, experts say", *Radio Netherlands Worldwide* (20 May 2009), online: Radio Netherlands Worldwide <http://www.rnw.nl/international-justice/article/high-time-piracy-tribunal-experts-say>.

[56] See Assembly of the Western European Union, European Security and Defence Assembly, *The Role of the European Union in Combating Piracy*, Document A/2037 (2009) at 65, online: European Security and Defense Committee <http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2009/2037.php> [*Combating Piracy*].

[57] Roger Middleton, "Pirates and How to Deal With Them" (2009) Chatham House Africa Programme/International Law Briefing Note: AFP/IL BN 2009/01 at 4, online: <http://www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf>.

[58] See *Combating Piracy, supra* note 56 at 65.

[59] Resolution 1851, *supra* note 44 at preamble; Resolution 1897, *supra* note 44 at preamble.

[60] Note that although the ECHR is a regional instrument it merits significant scrutiny in this paper, partly due to the number of member states that engage in counter-piracy activities off Somalia and partly because it presents one of the most detailed or rigorous human rights protection mechanisms. In addition, a number of its provisions have equivalents in customary international law.

and negative obligations on states to ensure that individuals' rights are protected. In addition, the UNSCRs relevant to piracy off the coast of Somalia make specific references to human rights law. For example, UNSCR 1918 calls on states to criminalize piracy in domestic law, and to "consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law."[61] Additionally, UNSCR 1851, which authorizes operations in Somalia to suppress acts of piracy and armed robbery at sea (upon request of the TFG), requires states to comply with applicable international humanitarian law as well as international human rights law.[62] According to Kontorovich, the specific reference to international humanitarian law limits the scope of operations, as pirates are civilians, not combatants, and, in accordance with international humanitarian law, may not be specifically targeted except in self-defense.[63] Guilfoyle counters Kontorovich, claiming that pirates are neither civilians, immune from targeting, nor combatants, who may be subject to lethal force, but rather criminals who can be captured using reasonable force.[64] Importantly, UNSCR 1851 refers to "applicable" international humanitarian law, meaning that not all humanitarian law is considered relevant.

1. *Legal Status of Pirates*

There are dissenting opinions regarding the treatment of pirates, not least due to the confusion over their status as criminals, combatants, and/or civilians. Rivkin and Casey argue that pirates should be prosecuted in admiralty courts, as opposed to a criminal-justice model, because under international law, common criminals cannot be targeted with military force.[65] Meanwhile, Gopalan argues that lethal force should be used against piracy.[66]

Until the twentieth century, pirates were similar in status to unlawful combatants, in that they could be tried as civilians or attacked and killed on the high seas.[67] However, modern international law, as articulated in the Harvard Draft Convention, iterates the rights to a formal, fair trial.[68]

---

[61] Resolution 1918, *supra* note 46 at para 2. See also Resolution 1816, *supra* note 45 at para 11; Resolution 1846, *supra* note 46 at para 14; Resolution 1851, *supra* note 44 at paras 6-7; Resolution 1897, *supra* note 44 at paras 11-12.
[62] Resolution 1851, *supra* note 44 at para 6, renewed in Resolution 1897, *supra* note 44 at para 7. Note that Resolution 1851 has been criticized as likely to cause civilian casualties. See Lolita C. Baldor and Anne Gearan," Navy commander questions land attacks on pirates" (13 December 2008), online: Navyseals.com < http://www.navyseals.com/navy-commander-questions-land-attacks-pirates>.
[63] Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia," *supra* note 31.
[64] Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 148.
[65] David B Rivkin Jr & Lee A Casey, "Pirates Exploit Confusion about International Law", *Wall Street Journal* (19 November 2008) A21.
[66] Gopalan, *supra* note 37.
[67] See Kontorovich, "A Guantanamo on the Sea", *supra* note 26 at 257 (describing how international law permitted summary shipboard executions, and claiming that pirates had the disabilities of both criminals and combatants, and the immunities or privileges of neither party).
[68] See Harvard Draft Convention, *supra* note 36 at 853 (stating that summary proceedings on

Moreover, pirates operating off Somalia today are generally not considered combatants engaged in a war but rather civilians.[69] Bahar links the status of combatants to the private ends requirement of piracy; piracy involves acts that are not sanctioned by states, therefore they cannot be dealt with using the laws of war and diplomacy—they are criminal attacks to be addressed accordingly.[70] As such, although Article 110 of UNCLOS provides the legal basis for the use of force against pirates, its use is within a policing, as opposed to a military, role.[71]

In the case of Somalia, the UNSCRs permit the use of force, but they do not specifically define the nature of that force or the manner in which pirates can be seized.[72] Thus, it is necessary to revert to general international law, which establishes rules regarding the use of force in maritime policing actions. Namely, warships may use reasonable force, where necessary, in policing operations.[73]

2. The Extraterritorial Application of Human Rights Law

All of the human rights treaties under analysis in this article have applicability beyond state territory, although the extent of jurisdiction is not always clear. As suspected pirates are seized extraterritorially, the issue of whether suspected pirates are under the jurisdiction of seizing states for the purposes of relevant treaties is of prime importance. The relevant articles are

---

board a ship would be "inconsistent with the spirit of modern jurisprudence". Note that this point was not clear-cut, as the Harvard Draft recognized that some commentators claimed that summary execution of pirates was permitted under the law of nations).

[69] See Douglas Guilfoyle, "The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?" (2010) 11 Melb J Int'l L 141 (commenting on why the laws of armed conflict do not apply to Somali piracy); NATO, Parliamentary Assembly, *The Growing Threat of Piracy to Regional and Global Security*, 169 CDS 09 E rev 1 (2009) at 39, online: *NATO Parliamentary Assembly* <http://www.nato-pa.int/default.asp?SHORTCUT=1770> (stating that pirate acts are not considered acts of war); Treves, "Piracy, Law of the Sea, and Use of Force", *supra* note 25 at 412 (commenting that force is not used against pirates in accordance with the law of armed conflict, as there is no armed conflict). But see Kontorovich, "A Guantanamo on the Sea", *supra* note 26 (noting that it could be difficult to deny POW protections to pirates under the Third Geneva Convention, and stating that although Article 4's conditions may not strictly be fulfilled, countries may, nonetheless, feel that some Geneva protections should be accorded to pirates); Eugene Kontorovich, "Piracy and International Law", Global Law Forum (2009), online: Global Law Forum <http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96> (proposing that the operations against Somali pirates could possibly be described as an "armed conflict not of an international character," which would entitle pirates to protection under common Article 3 of the Geneva Conventions); Michael H Passman, "Protections Afforded to Captured Pirates under the Law of War and International Law" (2008) 33 Tul Mar L J 1 at 4, 20-22 (claiming that the Third Geneva Convention applies to a select group of Somali pirates who are either members of armed forces but engaging in piracy for private ends, or fighting as part of an organized resistance movement).

[70] Bahar, *supra* note 14 at 31.

[71] See Middleton, *supra* note 57 at 2-3; NATO Parliamentary Assembly, *supra* note 69 at para 39.

[72] See Treves, "Piracy, Law of the Sea, and Use of Force", *supra* note 25 at 412 ("It is well known that in the parlance of the Security Council 'all necessary means' means 'use of force'").

[73] See Douglas Guilfoyle, "Piracy off Somalia: A Sketch of the Legal Framework" (20 April 2009), online EJIL Analysis <http://www.ejiltalk.org/piracy-off-somalia-a-sketch-of-the-legal-framework/> (discussing, more comprehensively, the use of force during interdiction at sea) [Guilfoyle, "Piracy off Somalia: Legal Framework"].

Article 2(1) of CAT, Article 2(1) of the ICCPR, and Article 1 of the ECHR.[74]

3. The International Covenant on Civil and Political Rights

In the case of the ICCPR, the Human Rights Committee consistently separates the notions of territoriality and jurisdiction when deciding on obligations under the Covenant. In other words, a person does not have to be within the territory of a specific ICCPR member state to be within the jurisdiction of the Covenant. For example, in the 1979 case of *Sergio Euben López Burgos v Uruguay*, the Committee applied the ICCPR to the arrest and mistreatment of the plaintiff by Uruguayan agents in Argentina.[75] On the interpretation of the phrase "within its territory," one member of the Human Rights Committee, in an individual opinion, stated that to not hold states responsible for conduct abroad would lead to "utterly absurd results."[76] Furthermore, General Comment No 31 issued by the Human Rights Committee reaffirms the extraterritorial reach of the ICCPR, and has special relevance for any state acting as a member of multinational operations in the Gulf of Aden. It states that:

> [A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... [The] enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[77]

Thus, when establishing extraterritorial jurisdiction under the ICCPR,

---

[74] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 39th Sess, Supp No 51, Annex, UN Doc A/39/51 (1984) at 197 [*Torture Convention*]; *International Covenant on Civil and Political Rights*, UNGAOR, 21st Sess, Supp No 16, Annex, UN Doc A/6316 (1966) at 52 [*ICCPR*]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, ETS 5, at Art. 1 [*CHRFF*].

[75] *Sergio Euben Lopez Burgos v Uruguay*, Communication No R.12/52, Supp No 40, UN Doc A/36/40 (1981) 176. See also Michal Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?"(2005) 52 Netherlands International Law Review 349 at 377, 379.

[76] See Rick Lawson, "Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights" in Fons Coomans & Menno T Kamminga eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 83 at 94 (reporting the opinion of Mr Chr Tomuschat).

[77] Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UNHRC, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 10. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 at paras 107-13 (endorsing the Human Rights Committee jurisprudence); Gondek, *supra* note 75 at 379-80 (offering further analysis of the issue). Notably, General Comments are not binding on state authorities, but they act as an important source for interpretation of the ICCPR.

what is important is whether a person is under the effective control of a State Party.

4. The Convention Against Torture[78]

It is clear that jurisdiction in the case of CAT applies to a flagged ship. For example, Article 5(1) explicitly states that a State Party should put measures in place to establish its jurisdiction over acts of, complicity in, or attempts to commit torture that are carried out on vessels registered in that state.[79] The Committee Against Torture's General Comment No 2 indicates that jurisdiction also applies to agents of the State in control of suspected pirates on the high seas, even if they are not on board the flagged ship, if it is considered that they have *de facto* effective control.[80]

The territorial scope of CAT, particularly Article 3, is debated. The US, for example, upholds that human rights treaties apply to persons living on US territory, and not necessarily to persons who interact with state agents in the international community.[81] As such, the US State Department informed the Committee Against Torture that the US did not regard Article 8 as applicable to individuals outside US territory, although it was claimed that as a matter of policy, it did accord Article 3 protection to individuals in US custody. Importantly, the Committee Against Torture disagreed with the US on its restricted interpretation of the extraterritorial application of CAT.[82]

5. The European Convention on Human Rights

Extraterritorial jurisdiction under the ECHR is rather more ambiguous, with judgments tending to focus on the specifics of individual cases. Hence, it is essential to take a more detailed look at existing jurisprudence, which demonstrates the various interpretations of the European Court of Human Rights (ECtHR) to date.

The ECtHR Grand Chamber's ruling in *Banković v Belgium* (2001) is one of the most important and influential decisions to date.[83] The plaintiffs were

---

[78] As of May 1, 2011, there were 147 parties to the Torture Convention. Notably, India has signed but not ratified the Torture Convention, and some states, including Singapore and Malaysia, are not parties. *Chapter IV Human Rights: Section 9*, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en>.

[79] *Torture Convention*, *supra* note 74 at Art. 5(1)(a). See also Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008) at 308-10 (commenting that the member state's duty to establish jurisdiction on ships applies regardless of the location where the offence is committed).

[80] Committee against Torture, *General Comment No. 2: The Implementation of Article 2 by States Parties*, 39th Sess, UN Doc CAT/C/GC/2/CRP. 1/Rev.4, (2007), at para 16. See also *ibid* at para 17; Committee against Torture, *Conclusions and recommendations of the Committee against Torture: United States of America*, 36th Sess, UN Doc CAT/C/USA/CO/2, (2006) at para 15 [Committee against Torture, USA Report].

[81] See Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, Congressional Research Service (8 September 2009) at 14.

[82] See Committee Against Torture, USA Report, *supra* note 80 at para 15.

[83] *Banković v Belgium* [GC] (dec), No 52207/99, [2001] XII ECHR 333 [*Banković*].

relatives of people killed when a NATO missile hit a media station in Belgrade, Yugoslavia. They claimed that certain European Convention on Human Rights (ECHR) signatories who participated in the bombing were responsible for violations of Articles 2, 10, and 13 of the Convention.[84] In its judgment, the Court stressed a restricted view of jurisdiction largely based on territory. The Grand Chamber noted that:

> ... Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.[85]

It declared the case inadmissible, commenting on the regional nature of the ECHR and stating that Yugoslavia, a country that was not previously covered by the ECHR, did not enter the "legal space" of the Convention. In addition, the Court commented that Article 1 does not encompass a "'cause-and-effect' notion of jurisdiction"[86] and disagreed with the applicants' submission, claiming that it was

> ... tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[87]

The *Banković* case stressed the territorial nature of the Convention and ruled that obligations arising from the Convention could not be divided and applied commensurate to the level of control exercised, because if jurisdiction were recognized in such cases any person in the world who is affected by a member state's actions could be brought under the Convention's jurisdiction. Critiques of the *Banković* decision have pointed out that the Court thus created "a gap in the protection afforded by the Convention," indicating that jurisdiction applies in cases of military occupation, such as *Loizidou v Turkey* (1995),[88] but not when member states engage in extraterritorial action short of military occupation.[89]

---

[84] *Ibid*. For a comprehensive analysis of *Banković* and the meaning of jurisdiction under Article 1, see Lawson, *supra* note 76. See also Sarah Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention" (2009) 20 EJIL 1223 at 1226.

[85] *Banković*, *supra* note 83 at para 61.

[86] *Ibid* at para 75.

[87] *Ibid* at para 75.

[88] *Loizidou v Turkey* (preliminary objections) (1995), 310 ECHR (Ser A) 2216 at para 62.

[89] See Tarik Abdel-Monem, "How far do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights" (2005) 14 J Transnat'l L & Pol'y 159 at 194. Note that the *Banković* ruling has been widely criticized. See e.g. Gondek, *supra* note 75 at 353 ("This seems to be at odds with the current reality of globalization, creating a danger that the Convention will not be able to respond to challenges to human rights in that reality."); Marko Milanović & Tatjana Papić, "As Bad as it Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law" (2009) 58 ICLQ 267. However, there are other authors who argue that *Banković* was consistent with previous jurisprudence, and should not be seen to undermine it. See e.g. Dominic McGoldrick, "Extraterritorial Application

Subsequent decisions of the ECtHR have expanded upon some of these comments from *Banković*, and provide further insight into the important question of the degree to which the ECHR accords responsibility to member states for human rights violations abroad. In 2005, the Grand Chamber issued its judgment on the case of *Öcalan v Turkey*.[90] Abdullah Öcalan, a Kurd of Turkish nationality who was head of the Worker's Party of Kurdistan, was arrested by Turkish agents in the international area of Nairobi airport in Kenya. Subsequently forced to return to Turkey, he was imprisoned and interrogated, put on trial and sentenced to death. In the ECtHR, he sued Turkey for a variety of Convention violations; Turkey in turn alleged that it did not exercise its jurisdiction in Kenya. The Court ruled that Turkey was bound by its Convention obligations, stating that:

> [A]fter he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.[91]

This judgment indicates that member states making arrests abroad (for example, of suspected pirates) should accord the arrestees the protections of the ECHR.[92] In *Öcalan*, as opposed to *Banković* above, the Court placed greater importance on the factual analysis of control, rather than on the territorial nature of the Convention. It indicates that exceptional situations of extraterritorial applicability include times when there is no territorial control, but a person is under the physical control of member state agents.[93] The issue that remains unclear is what degree of control is needed in order for obligations under the Convention to extend to extraterritorial acts of member states.

In *Issa and others v Turkey* (2004), the ECtHR declared admissible a case brought by Iraqi women alleging that Turkish military forces abused and killed shepherds in Northern Iraq, which was not a country previously within ECHR jurisdiction.[94] Although the Court did not find the plaintiffs within the jurisdiction of Turkey, this was due to insufficient evidence that Turkish troops had operated in the area, as opposed to finding that the case

---

of the International Covenant on Civil and Political Rights" in Fons Coomans & Menno T Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 41 at 41, 72; Michael O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'" in Fons Coomans & Menno T Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 125.

[90] *Öcalan v Turkey* (GC), No 46221/99 [2005] IV ECHR 282 [*Öcalan*].

[91] *Ibid* at para 91.

[92] Well-established case law further supports the point that if authorities arrest an individual then they are responsible for his or her well-being. See e.g. *Salman v Turkey*, No 21986/93 [2000] VII ECHR 357 at para 99; *Salmouni v France,* No 25803/94 [1999] V ECHR at para 87.

[93] *Öcalan v Turkey*, No 46221/99 (12 March 2003) at para 93. See also Abdel-Monem, *supra* note 89; Gondek, *supra* note 75 (offering further analysis of the case).

[94] *Issa and others v Turkey*, No 31821/96, [2004] 41 ECHR 27 [*Issa*].

did not fall within ECHR jurisdiction.[95] Although *Issa* confirmed that the ECHR applies if a member state holds effective control of an area outside state territory, it simultaneously set a high evidentiary threshold to demonstrate such effective control.[96]

Issa and *Öcalan* clarify two important points. First, they challenge the *Banković* legal space argument, and indicate that acting in the "legal space of the Convention" is not a requisite for the extraterritorial application of the Convention's obligations. Second, in both *Issa* and *Öcalan* the Court refers to the degree of "authority and control," thus emphasizing the control of the *person* as opposed to the *territory*.[97] In *Issa*, the Court highlights that there is a need for such accountability to prevent a State party from perpetrating violations abroad that would be forbidden in its own territory.[98]

Despite the above clarification, the influence of the *Banković* decision is paramount. The impact on national-level cases is evident in the case of *Al-Skeini v Secretary of State for Defence* (2007), wherein the UK House of Lords, drawing on *Banković*, held that a person, Mr Baha Mousa, who died in military prison in Iraq after allegedly being tortured was within UK jurisdiction. However, five other cases of civilian deaths allegedly at the hands of British soldiers, occurring in more obscure situations such as in people's homes, were dismissed on the grounds that the cases were outside the legal space of the ECHR.[99] The case was originally heard in the English High Court before proceeding to the Court of Appeal and the House of Lords. Notably, the Court of Appeal pronounced that any individual whose liberty was restricted by British forces was protected by the ECHR and the Human Rights Act.[100] .

The case was brought to the Strasbourg Court, and in July 2011, the Grand Chamber held that all of the applicants were within the jurisdiction of

---

[95] See Gondek, *supra* note 75 at 359 (stating that "[h]ad such [sufficient] evidence been provided, the outcome of the case could have been quite different").

[96] For further analysis see Tarik Abdel-Monem, "The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey" (2005) 12 Human Rights Brief 9 at 11, online: American University Washington College of Law <http://www.wcl.american.edu/hrbrief/12/2abdel.pdf?rd=1>.

[97] See *Issa, supra* note 94 at para 71; *Öcalan, supra* note 90 at para 93.

[98] *Issa, supra* note 94 at para 71 ("Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory").

[99] *R (on the application of Al-Skeini) v Secretary of State for Defence*, [2007] UKHL 26, [2007] 3 WLR 33 at para 91 [*Al-Skeini HL*]; *The Queen (on the application of Mazin Mumaa Galteh Al-Skeini and Others) v Secretary of State for Defence*, [2005] EWCA Civ 1609 [*Al-Skeini CA*]; *The Queen (on the application of Mazin Mumaa Galteh Al-Skeini and Others) v Secretary of State for Defence*, [2004] EWHC 2911, [2005] 2 WLR 1401 [*Al-Skeini HC*]. See also European Court of Human Rights, Press Release, 27021/08, "Grand Chamber Hearing Al-Skeini and Others and Al Jedda v. the United Kingdom" (9 June 2010), online: <http://cmiskp.echr.coe.int>.

[100] *Al-Skeini CA, supra* note 99 at para 110 (explaining why five of the six incidents were not considered within the jurisdiction of the ECHR. It was stated that, "None of them were under the control and authority of British troops at the time when they were killed… If troops deliberately and effectively restrict someone's liberty he is under their control").

the ECHR, although reiterating that extraterritorial jurisdiction remains exceptional. In fact, the Court held that the UK exercised authority and control over the individuals killed, but only in the context of the UK exercising some form of public powers:

> [T]he United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[101]

In making the concept of authority and control over individuals dependent on the exercise of public powers, the Court did not overrule the *Banković* judgement, although it has somewhat altered its interpretation. Moreover, following *Issa* and *Öcalan*, it quite clearly did not uphold the "legal space" argument provided in the *Banković* judgment.

Piracy, as defined by UNCLOS, is a specific type of case because it occurs on the high seas; however, analogies can be drawn from the case law discussed above. It is more or less uncontested that a flagged vessel falls under ECHR jurisdiction. As Lanham states, "a ship is essentially construed as a floating island for the purposes of jurisdiction."[102] This interpretation is reiterated in ECHR case law.[103] Hence if a member state takes suspected pirates on board its own vessel, it is bound by its obligations under the Convention. However, obligations are less clear regarding operations on board a pirate skiff.

Nonetheless, there is relevant jurisprudence that specifically relates to the high seas. In the 2010 case of *Medvedyev v France*, the ECtHR Grand Chamber Authority established that if a State party to the ECHR exercises coercive law enforcement jurisdiction over a foreign vessel on the high seas, then the vessel and its occupants come under ECHR jurisdiction. The French authorities had intercepted a Cambodian flagged vessel, the *Winner*, on suspicion of narcotics smuggling. The Court judged that the French navy, under order of the French authorities, had full and exclusive control over the Cambodian vessel in a continuous and uninterrupted manner from its interception until it reached France. Hence it was considered within France's

---

[101] See *Al-Skeini and Others v. The United Kingdom* (GC), No 55721/07 (07 July 2011) at para 149 [*Al-Skeini GC*], online: European Courts of Human Rights <http://cmiskp.echr.coe.int>. For further analysis of the Grand Chamber judgment, see Marko Milanović, "European Court Decides Al-Skeini and Al-Jedda" (7 July 2011), online: EJIL: Talk! Blog of the European Journal of International Law <www.ejiltalk.org>.

[102] Lanham, *supra* note 30 at 25.

[103] *Banković*, *supra* note 83 at paras 59 and 73. See also *Medvedyev and others v France* (GC), No 3394/03 (29 March 2010) at para 65 [*Medvedyev 2010*], online: European Courts of Human Rights <http://cmiskp.echr.coe.int>.

jurisdiction for the purposes of Article 1.[104]

Guilfoyle writes that it is now firmly established that jurisdiction under Article 1 applies when coercive law enforcement jurisdiction is exercised over a foreign vessel on the high seas.[105] However, as Guilfoyle himself notes, the *Medvedyev* judgement does not clarify by what process the Court, after stressing the ordinary rule of exclusive flag-State jurisdiction, concluded that the act of placing State party forces on a foreign vessel brings it within ECHR jurisdiction.[106] Elsewhere, Guilfoyle also argues that if a State exercises powers under UNCLOS Article 105, the disarmed suspects would be within the state's effective control and, hence, within the ECHR's.[107] Although the *Medvedyev* judgement appears to support this argument, it is less clear whether suspected pirates, who are disarmed and deterred but not taken for prosecution, would come under ECHR jurisdiction. To date, there is no ECHR jurisprudence that specifically relates to piracy to elucidate this point. Nonetheless, if suspected pirates are under the physical control of member state agents, they could be found to be within ECHR jurisdiction.

The *Al-Skeini* judgment provides further analysis. Referring to the cases of *Öcalan*, *Issa* and *Medvedyev* the Court stated that it:

> [D]oes not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.[108]

As such, it emphasises that these cases are not only about control over an area, but also about the exercise of physical power and control over a person. The extent of physical power and control required is not clear, however, drawing on the above-mentioned cases, if a suspected pirate is physically compelled by state authorities to either stay in one place or to travel to a certain location, then it appears he would be under the state's control for the purposes of ECHR jurisdiction.

As can be ascertained from the above, the issue of jurisdiction remains ambiguous. As O'Boyle points out, in its judgments to date, the ECtHR has been rather cautious and has focused its interpretations of case law to the specific cases under judgment; hence, no general theory of extraterritorial jurisdiction has been developed. Thus, he purports that "law on jurisdiction is still in its infancy."[109] However, ECHR jurisprudence to date makes a number of important points. Significantly, although jurisdiction is primarily

---

[104] European Court of Human Rights, Press Release, 3394/03, "Grand Chamber Judgment Medvedyev and Others v. France" (29 March 2010), online: European Courts of Human Rights <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Medvedyev&sessionid=70460153&skin=hudoc-pr-en >.

[105] Douglas Guilfoyle, "ECHR Rights at Sea: Medvedyev and others v. France" (19 April 2010), online: EJIL: Talk! Blog of the European Journal of International Law <http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/> [Guilfoyle, "ECHR Rights at Sea"].

[106] *Ibid*.

[107] Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 155.

[108] *Al-Skeini GC*, *supra* note 102 at para 136.

[109] O'Boyle, *supra* note 89 at 139.

territorial, extraterritorial jurisdiction occurs in exceptional circumstances. It has been firmly established that an individual on board a flagged vessel comes under Article 1 jurisdiction. From *Öcalan, Issa* and *Al-Skeini,* it appears that control of a person, as opposed to a territory, merits jurisdiction, under the 'authority and control' argument. However, the extent of control that is required remains to be clarified. The Al-Skeini judgment indicates that the extraterritorial control of a person can occur only in exceptional circumstances, such as when the state in question assumes the exercise of some public powers in that territory. Finally, the judgment in *Medvedyev* indicates that if a foreign ship comes under the control of a state through coercive law enforcement, the situation falls under the jurisdiction of the Convention.[110]

Warships attempting to fight piracy operate under a range of national and international mandates with a decentralized legal framework. Thus, before proceeding, it is important to briefly outline ECHR jurisdiction with regard to forces operating under international mandates.[111] In general, the ECtHR appears reluctant to establish jurisdiction over the actions of multinational forces operating under UNSCR mandates. The ECtHR's admissibility decision in the joined cases of *Behrami and Behrami v France* (2007) and *Saramati v France, Germany, and Norway* (2007), which was widely criticized, held that the actions of state armed forces operating under UN Security Council authorization are attributable to the UN, as opposed to the individual states.[112] This decision was made even though the forces were not seconded to the multinational organization but rather acting, to some extent, as an organ of the individual state, as is the case in current anti-piracy operations off the coast of Somalia. The International Law Commission provides clear guidance on attribution of responsibility in such a situation, declaring that effective control over the conduct in question is the sole criterion for establishing attribution.[113] Draft Article 6 states that:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that

[110] A question remains regarding the level of protection that states acting extraterritorially should accord to individuals within their jurisdiction. It would be impossible for a state to accord individuals outside its national boundaries the entire range of rights and freedoms as set out in the ECHR. See e.g Lawson, *supra* note 76 at 105 (arguing that the level of protection is directly relative to the extent of control).

[111] See *Part II, The Extraterritorial Application of Human Rights Law, for a short analysis of ICCPR and its application by state parties acting as part of international peace-keeping or peace-enforcement operations.*

[112] *Behrami v France* [GC] (dec), No 71412/01, [2007] 45 EHRR SE 10. *Behrami* and *Saramati* were cases taken by individuals of Albanian origin living in Kosovo against states operating as part of the Kosovo Force. See Milanović & Papić, *supra* note 89 (analyzing the Court's admissibility decision).

[113] International Law Commission, *Report of the International Law Commission,* UNGAOR, 64th Sess, Supp No 10, UN Doc A/64/10 (2009).

conduct.[114]

Thus, when attributing actions, the International Law Commission stresses the necessity of examining what entity—the state or international body—exercised *factual* control over the conduct in question, as it is *operational* control, as opposed to *ultimate* control, which should be the prime criterion for gauging *effective* control.[115] The Venice Commission discussed the Kosovo Force, a NATO-led operation mandated by a UNSCR, stating that in international law its acts are not attributed to the UN; the acts of Kosovo Force troops should be attributed to either NATO or their country of origin.[116] The question, according to the International Law Commission and the Venice Commission, is, as Milanović and Papić point out, "who is giving the orders – the State or the organization?"[117]

Recently, the ECtHR's judgment in *Al-Jedda v. UK* found that the acts of UK troops operating within the Multi-National Force in Iraq were attributable to the troop-contributing nation.[118] The case involves the detention of an individual in Iraq under UNSCR 1546, and the UK argued that it could not have exercised Article 1 jurisdiction over Al-Jedda as the acts of UK soldiers were not attributable to the UK, but rather to the UN. Referring to the guidance of the International Law Commission in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, the ECtHR stated:

> [T]he Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.[119]

Rather, as the internment took place within a detention facility controlled exclusively by British forces, the Court stated that "the applicant was therefore within the authority and control of the United Kingdom throughout".[120] Notably, the Court emphasised the different roles of the UN to differentiate *Al-Jedda* from *Behrami and Saramati*, and it did not provide any

---

[114] *Ibid* at 62 [emphasis added].
[115] See *ibid* at 63, Article 6 Commentary (3) ("The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 6 on the factual control that is exercised over the specific conduct taken by the organ or agent"); *ibid* at 67, Article 6 Commentary (9) ("One may note that, when applying the criterion of effective control, 'operational' control would seem more significant than 'ultimate' control, since the latter hardly implies a role in the act in question."). The latter point was made specifically referring to the judgment in *Behrami*.
[116] Council of Europe, European Commission for Democracy Through Law (Venice Commission), 60th Plenary Sess, *Opinion on Human Rights in Kosovo:Possible Establishment of Review Mechanism*, 280/2004 (2004), online: Council of Europe Venice Commission <http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp>.
[117] Milanović & Papić, *supra* note 89 at 282.
[118] See *Al-Jedda v. The United Kingdom* (GC), No 27021/08 (07 July 2011) [*Al-Jedda*], online: European Courts of Human Rights <http://cmiskp.echr.coe.int>.
[119] *Ibid* at para 84.
[120] *Ibid* at para 85.

further explanation of whether factual control or ultimate control is the critical factor in such cases.[121]

In addition to independent state forces, there are three multinational bodies conducting counter-piracy operations off the coast of Somalia: the Combined Task Force 151, the NATO Maritime Group, and EU NAVFOR.[122]

The Combined Task Force 151 (CTF 151), a task force of the US-commanded Combined Maritime Forces, is a multinational task force established in January 2009. Operating in the Gulf of Aden and off the coast of Somalia in an area of approximately 1.1 million square miles, it has the aim of deterring, disrupting, and suppressing piracy. At the time of writing, CTF 151 is under the command of a New Zealand Naval Officer, Captain Jim Gilmour.[123] NATO's Operation Ocean Shield is mandated until December 2012 and is being undertaken by Standing NATO Maritime Group 2. It currently consists of five ships belonging to the Netherlands, the US, Denmark, and Turkey, as well as one aircraft from Portugal.[124] Operation Ocean Shield is under the overall responsibility of Joint Command Lisbon (Portugal) but day-to-day tactical control is exercised by the Allied Maritime Component Command, Headquarters Northwood, UK. When ships operating as part of Ocean Shield or the Combined Task Force 151 encounter pirates, they revert to national authority in the decision on how to deal with them; at times national authorization may be in accordance with a request by the multinational force's Operational Commander.[125] Thus, the individual states clearly have effective control over the situation, and are responsible for upholding their obligations under international human rights law.

The European Union Naval Force Somalia runs Operation Atalanta, which is currently mandated until December 2012. The naval force operates in a zone that includes the Gulf of Aden, the southern Red Sea, and part of the Indian Ocean. Its military personnel can arrest, detain, and transfer

---

[121] *Ibid* at para 83. In addition, importantly, in the *Al-Jedda* judgment, the Court clearly iterates that it should be presumed that the Security Council does not intend to impose an obligation on Member States to breach human rights, and that in the event of any ambiguity, the Court will interpret a Security Council Resolution in the manner in which it corresponds most closely to the requirements of international human rights law. See *ibid* at para 102. For further analysis see Milanović, *supra* note 102.

[122] These are supported by vessels from other nations such as Russia, India, Japan, and China. There are also other international task forces such as Combined Task Forces 150 and 152, but their primary tasks do not entail engagement in counter-piracy operations.

[123] See "New Zealand Captain To Lead Piracy Task Force" (5 June 2011), online: Combined Maritime Forces < http://combinedmaritimeforces.com/2011/06/05/new-zealand-captain-to-lead-us-piracy-task-force-source-voxy-co-nz/>.

[124] See Allied Maritime Command Headquarters Northwood, Press Release, "NATO's latest counter piracy weapon strikes early blow" (29 April 2011), online: NATO-OTAN <http://www.manw.nato.int/page_press_release_2011.aspx>. Previous operations were Operation Allied Provider and Operation Allied Protector, the latter of which ended in August 2009. See NATO-OTAN Allied Command Operations, "Operation Allied Protector" (2010), online: NATO-OTAN <http://www.aco.nato.int/page13974522.aspx>.

[125] E-mail from Lieutenant Commander Jacqui Sherriff, Chief Public Affairs Officer, Allied Maritime Command Headquarters Northwood (1 November 2010, 17.35 GMT) (on file with author); E-mail from Commander Andrew Murdoch, Former Legal Advisor to CMF, Bahrain, 2008-09 (27 September 2010, 02.26 CST) (on file with author).

persons who are suspected of, or who have committed, piracy or armed robbery in the area where the force is operating, and the suspects can be prosecuted either in a third state (Seychelles, or previously Kenya), or by an EU member state.[126] The EU Political and Security Committee oversees the political control and strategic direction of the operation under the overall responsibility of the Council, while the EU Military Committee controls the execution of the military mandate, which is under the command of an Operation Commander, a Deputy Commander, and a Force Commander.[127] In his discussion with the House of Lords, Rear Admiral Philip Jones, RN, Operation Atalanta, Ministry of Defense, stated that the ships of contributing member states are under EU operational command and operate under EU rules of engagement.[128] However, in the same discussion, he stated that EU ships also operate under national operational command, as in the case of France transferring suspected pirates to Puntland.[129]

The issue is where effective control of the conduct under scrutiny lies. Guilfoyle highlights that the transfer of pirates to a third state for prosecution requires the agreement of the national authorities of the capturing warship as well as of the EU NAVFOR Operation Commander.[130] Hence, he argues, any transfer decision cannot be considered only an act of the EU and in relation, responsibility for upholding human rights obligations also rests with the State party.[131] In the case of France transferring suspected pirates to Puntland, it appears that effective control lies with the French authorities, which means that France could be held liable for any human rights violations occurring as a result of the transfer.[132]

Therefore, any State party to the ECHR operating as part of an

---

[126] EU NAVFOR Somalia, "Mandate", online: EU NAVFOR Somalia <http://www.eunavfor.eu/about-us/mission>.

[127] See EC, *Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention, and repression of acts of piracy and armed robbery off the Somali Coast*, [2008] OJ, L 301/33 at 35. See also EU NAVFOR Somalia, Chain of Command, http://www.eunavfor.eu/chain-of-command/ (providing further information regarding the command of EU NAVFOR).

[128] Notably, the EU is not party to the ECHR. However, Article 6 of the 2007 Treaty of Lisbon stipulates that the EU should accede to the Convention and official talks regarding the accession commenced in July 2010. See EC, *Accession of the European Union to the European Convention on Human Rights* (17 February 2010) Note 6581/10.

[129] UK, House of Lords, European Union Committee, "Combating Somali Piracy: the EU's Naval Operation Atalanta: Report with Evidence", 12th Report of Session 2009–10, HL Paper 103 (2010) Appendix: Minutes of Evidence, Taken before the Select Committee on the European Union (Sub-Committee C) (12 February 2009) at 11, online: <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/103/103.pdf> [HL, European Union Committee, "Combating Somali Piracy"].

[130] Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 158.

[131] *Ibid.*

[132] HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 11. See also "Postcard from Somali Pirate Capital", *BBC News* (16 June 2009), online: BBC News <http://news.bbc.co.uk/2/hi/africa/8103585.stm> (reporting that Puntland authorities have tried and convicted approximately 90 pirates, most of whom were handed over by foreign navies, over three months in 2009. The convicted pirates are reportedly kept in stone prisons described as "sweltering cages.").

international force off Somalia (if in factual control over conduct, as appears to be the case when dealing with suspected pirates even under multinational agreements) must ensure that its forces act in accordance with the Convention.[133]

IV. International Human Rights Law and its Application to Piracy off the Coast of Somalia

It remains necessary to examine the specific obligations that arise from international human rights law. There are particular circumstances that merit detailed scrutiny—from the stages of detention, to transfer, to trial—as they are situations encountered regularly by naval forces and state authorities engaging in counter-piracy operations off Somalia.

1. Detention of Suspected Pirates

The authority or legal basis for detention can be found in the relevant UNSCRs, which authorize states to use "all necessary means" to repress piracy.[134] It appears likely that the phrase "necessary means" encompasses necessary detention, particularly as more recent resolutions call for prosecution of pirates, express concern regarding the release of pirates without having to face justice, and discuss the detention of suspected pirates due to operations conducted under the resolution.[135]

Once a suspected pirate is detained, that person has a right to be brought before a judicial authority, according to Article 5(3) of the ECHR and Article 9(4) of the ICCPR. When examining the application of these articles at sea, particularly ECHR Article 5(3), there is merit in examining case law on maritime narcotics smuggling, namely *Medvedyev v France* (2008), and *Rigopoulos v Spain* (1999). *Medvedyev* involved the interdiction by French authorities of a Cambodian vessel suspected of drug smuggling, while *Rigopoulos* entailed interdiction on the high seas by Spanish authorities, again for narcotics smuggling.

Article 5(3) of the ECHR states that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

For warships apprehending suspects on the high seas, it often takes a considerable amount of time to bring the suspects in front of a judicial authority. In the cases of *Medvedyev* and *Rigopoulos*, where transfer took fifteen to sixteen days[136] and sixteen days[137] respectively, the ECtHR

---

[133] Ideally, the forces should act in accordance with the Convention at all times.
[134] See e.g. Resolution 1816, *supra* note 45 at para 7(b).
[135] See e.g. Resolution 1918, *supra* note 46 at para 1; Resolution 1897, *supra* note 44 at preamble.
[136] *Medvedyev 2010*, *supra* note 104 at paras 13-20.
[137] Tullio Treves, "Human Rights and the Law of the Sea" (2010) 28:1 Berkeley J Int'l L 1 at 7

accorded that there was no violation of Article 5(3), or the requirement of promptitude, because it was not possible to physically bring the suspects before a judicial authority any sooner.[138] Importantly, the Court noted that such long detention was justified by "wholly exceptional circumstances."[139] Existing jurisprudence appears to indicate that a member state would not be in violation of Article 5(3) if there were a delay in bringing suspected pirates in front of a judicial authority as a result of the voyage to port.[140]

However, *Medvedyev* and *Rigopoulos* are both relatively straightforward cases regarding the interdiction of vessels that are subsequently escorted to port. Many of the cases in relation to piracy are less clear-cut. In January 2009, the Danish warship *Absalon* picked up five suspected pirates who had been forced to jump into the water after their boat went on fire during an attempted attack. The pirates were held on board *Absalon* for over a month while the Danish and Dutch authorities deliberated the transfer of the pirates to Dutch custody.[141] It is unclear whether a member state would be in violation of Article 5(3) in a case like this, when the delay was not due to the length of voyage but rather the unwillingness of various states to prosecute the suspected pirates.

Alternatively, there are multiple reports of pirates being detained by international forces only to be released without prosecution.[142] Some

---

[Treves, "Human Rights and the Law of the Sea"].

[138] *Medvedyev 2010, supra* note 104 at para 105; *Rigopoulos v Spain*, No 37388/97, [1999] II ECHR 437 [*Rigopoulos*]. Note that in the case of Medvedyev the sea voyage to Brest took 13 days, and the suspects waited another 2 to 3 days to be brought before a judicial authority.

[139] *Medvedyev 2010, supra* note 104 at para 130.

[140] See Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38. See also Treves, "Human Rights and the Law of the Sea", *supra* note 138 at 7-10 (commenting on *Medvedyev* and *Rigopoulos*); J Craig Barker & Efthymios Papastavridis, "European Court of Human Rights Medvedyev et al v. France (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010" (2010) 59 Int'l & Comp L Q 867 (analyzing the case of *Medvedyev*).

[141] See "Amnesty Demands Dutch and Danish Take Care of Pirates", *Politiken* (4 February 2009), online: NRC Handelsblad <http://www.nrc.nl/international/article2141530.ece/Amnesty_demands_Dutch_and_Danish_take_care_of_pirates>; Corey Flintoff, "Prosecuting Pirates: No More Walking The Plank", *NPR* (9 January 2009), online: NPR <http://www.npr.org/templates/story/story.php?storyId=99169738&sc=emaf>. Note that this case is not isolated. See e.g. Mike Corder, "Nations Look to Kenya as Venue for Piracy Trials" *The Associated Press* (17 April 2009), online: Law.com <http://www.law.com/jsp/article.jsp?id=1202429986132> (reporting that a US warship held a pirate on board for seven months); "Politics Influences the Jurisdiction for Somali Pirate Trials" *Deutsche Welle* (22 April 2009), online: Deutsche Welle <http://www.dw-world.de/dw/article/0,,4198300,00.html> (stating that a German frigate allegedly held suspected pirates for 12 days while the EU and Kenya arranged for prosecution in Kenya).

[142] See e.g. "German Navy Foils Somali Pirates", *BBC News* (25 December 2008), online: BBC News < http://news.bbc.co.uk/go/em/fr/-/1/hi/world/africa/7799796.stm> (stating that in December of 2008 the German navy released six pirates); "Pirates rule on high seas as international law lacks clarity", *TV-Novosti* (7 May 2010), online: RT TV <http://rt.com/Politics/2010-05-07/pirates-somalia-law-international.html> (noting that in May of 2010 the Russians released ten pirates, stating there were no legal rules to prosecute them); Craig Whitlock, "Navy Releases Accused Somali Pirates Held on Warship for Six Weeks", *The Washington Post* (28 May 2010), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804108.html> (revealing that, in May of 2010, the US released ten Somalis having

suspected pirates are released immediately, while others are held for a period of time, which could again be regarded as a violation of ECHR Article 5.[143]

Apart from the legal act of detaining a pirate, there are human rights obligations regarding the process of detention. If a suspected pirate is prosecuted under the SUA Convention, due process rights are automatically entailed, including the right of the defendant to inform his state immediately and the right to be visited by a representative of his state.[144] Moreover, Bahar points out that a court could hold that basic minimum procedural standards apply to all detained individuals, in accordance with humanitarian principles of international law.[145] This is not necessarily the case in practice. For example, reports allege that Somalis being prosecuted in the US after attacking the USS *Nicholas* in April 2010, were held naked, blindfolded, handcuffed, and without access to an interpreter for days.[146]

Both the ICCPR and the ECHR contain stipulations regarding the treatment of persons in detention, such as the right to be informed of the reasons for arrest and judicial supervision of detention.[147] The ECtHR also affirms that detained suspects should be afforded certain rights, such as the notification of family members and access to legal advice.[148] Thus, it appears that if member states do not wish to risk being found in violation of international human rights law, suspected pirates who are detained on ships should be held in appropriate conditions and accorded certain standards or procedures of detention. As Guilfoyle points out, to some extent the ECtHR needs to be realistic regarding the procedures of maritime interdiction on the high seas; however, he notes that some judges will strictly apply the relevant case law, which could be problematic for states that do not comply with the correct procedures.[149]

---

held them on board a warship for six weeks, after failing to find a location in which to prosecute the alleged pirates).

[143] See e.g. Middleton, *supra* note 57 at 5.

[144] *SUA Convention*, *supra* note 21 at Art 7.

[145] Bahar, *supra* note 14 at 46.

[146] Steve Szkotak, "Attorneys: Accused Pirates Blindfolded, Handcuffed", *The Associated Press* (19 July 2010), online: Seattle Times <http://seattletimes.nwsource.com/html/nationworld/2012397208_apusprosecutingpirates.html>.

[147] *ICCPR*, *supra* note 74 at Art 9; *CHRFF*, *supra* note 74 at Art 5.

[148] In 2008 the Court judged that the detention of the suspects in *Medvedyev and others v France* was arbitrary, as the invoked provisions of law did not "regulate the conditions of deprivation of liberty on board ship, and in particular the possibility for the persons concerned to contact a lawyer or a family member. Nor do they place the detention under the supervision of a judicial authority." *Medvedyev and Others v. France*, No. 3394/03 (10 July 2008) at para 61 [*Medvedyev 2008*], online: European Courts of Human Rights <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=medvedyev&sessionid=57185656&skin=hudoc-en>. Similarly, the 2010 Grand Chamber judgment's joint partly dissenting opinion of Judge Tulkens et al (eight judges in total) distinguished *Medvedyev* from *Rigopoulos*, highlighting the procedures that were followed in *Rigopoulos*, such as the judicial supervision, and the acts of advising the detained suspects of their rights and informing their family members of their detention. See *Medvedyev 2010*, *supra* note 104, Annex: Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančić, Fura, Spielmann, Tsotsoria, Power and Poalelungi, at para 5.

[149] Guilfoyle, "ECHR Rights at Sea", *supra* note 106.

Hence, as articulated in Andersen *et al.*, there is a need for a clear framework for the capture and detention of pirates that is in accordance with applicable human rights law.[150] As of now, that framework remains ambiguous. The problem lies partly in the various legal frameworks that intersect in the fight against piracy: domestic laws, international treaties, UNSCRs, customary law, and human rights law. Hence, EU Recommendation 840 suggests that each nation-state involved in the fight against piracy needs to determine, domestically, the conditions for detaining suspected pirates on board ships, the means of transfer to judicial authorities, and the means of monitoring the detention before transfer, including which judges should oversee the proceedings.[151] Similarly, Jack Lang recommends the development of a legal framework for detention at sea, which complies with international human rights law and is compatible with operational constraints.[152] However, creating domestic legal norms in line with international law can be problematic. For example, as international law does not stem from a democratic process, one can question whether it is right to allow its influence to translate into norms applicable in domestic law.[153]

2. *Claims of Asylum, and Non-Refoulement*

A related worry repeatedly articulated by different states engaging in counter-piracy operations off the coast of Somalia has been that if they bring suspected pirates within their jurisdiction for prosecution, either on a flagged ship or to the state, they will be unable to remove these suspects afterward due to claims of asylum or non-refoulement obligations.[154] The UK navy was reportedly told by British authorities not to detain suspected pirates, due to fears of asylum claims and allegations of human rights violations.[155] The first piracy conviction to occur in Europe in modern times happened in the

---

[150] Andersen et al., *supra* note 3 at 14.
[151] See *Combating Piracy, supra* note 56 (arguing that there is no comprehensive international criminal procedure to prosecute pirates, meaning that the legal framework for carrying out policing activities must be defined by individual states at 67).
[152] United Nations Security Council, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, S/2011/30 (2011).
[153] See e.g. Ximena Fuentes Torrijo, "International Law and Domestic Law: Definitely an Odd Couple" (2008) 77 Rev. Jur. U.P.R. 483.
[154] See e.g. Corder, *supra* note 142; "Duel at the Suez Canal: World Scrambles to Deal with Pirate Threat", *Der Spiegel* (24 November 2008), online: Der Spiegel <http://www.spiegel.de/international/world/0,1518,592433,00.html>; Rivkin & Casey, *supra* note 65 (noting that the British Foreign Office told its forces not to detain pirates for fear they would claim asylum); "Somali Pirates Embrace Capture as Route to Europe", *The Telegraph* (UK) (19 May 2009), online: The Telegraph <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html> (stating that two pirates on trial in the Netherlands in 2009 had declared their intention to stay in the country as residents thereafter).
[155] See UK, HOL EU Sub-Committee C (Foreign Affairs, Defence, and Development Policy), *Operation Atalanta and Somali Piracy* (19 May 2009), online: Parliament.uk <http://www.parliament.uk/visiting/online-tours/virtualtours/transcripts/committee-rooms/hol-eu-sub-committeepiracy-/>; Marie Woolf, "Pirates Can Claim UK Asylum" *The Sunday Times* (13 April 2008), online: TimesOnline.co.uk <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>.

Netherlands in June 2010, and reportedly one of those pirates has already applied for asylum there.[156]

According to then-Lord Chancellor Jack Straw, no pirate would receive asylum in the UK, as Article 1(f) of the UN's 1951 Refugee Convention places anyone who has committed a serious crime outside the country of refuge beyond the protection of the Convention.[157] The likelihood of a convicted pirate achieving refugee status is indeed slim; however, this does not mean that it would be easy to deport a suspected or convicted pirate to Somalia if he is under the UK's (or another state's) jurisdiction.

A number of human rights treaty provisions, most notably CAT Article 3(1), ICCPR Article 7, and ECHR Article 3, protect individuals from being returned to a country where they are at risk of torture, inhuman or degrading treatment, or punishment, based on the principle of non-refoulement.[158] Crucially, the prohibition of refoulement is non-derogable, which means that regardless of what crime a suspected pirate has committed, the individual should not be returned if he or she would be at risk of torture or cruel, inhuman, or degrading treatment or punishment.[159] Moreover, the prohibition of torture, which includes the principle of non-refoulement, is a peremptory norm of international law, which means that it is binding on all states regardless of whether they are party to the relevant instruments.[160]

The applicability of non-refoulement on the high seas is subject to debate

---

[156] See Henry Foy, "Somali Pirates Jailed by Dutch Court", *The Guardian* (17 June 2010) online: The Guardian <http://www.guardian.co.uk/world/2010/jun/17/somali-pirates-jailed-netherlands>.

[157] UK, HC, *Parliamentary Debates*, col 220 (4 Dec 2008), online: UK Parliament <http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm081204/debtext/81204-0017.htm> (Jack Straw). See *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 at Art 1(f).

[158] The principle of non-refoulement is also stated in other regional treaties such as Article 5(2) of the American Convention on Human Rights.

[159] The non-derogable nature of non-refoulement has been laid down by various courts and committees pertaining to the different international treaties. See Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, UNGAOR, 72nd Sess, UN Doc CCPR/C/21/Rev1/Add11, (2001) at para 11; UN Committee against Torture, *Gorki Ernesto Tapia Paez v Sweden*, Communication No 39/1996, UNGAOR, 18th Sess, UN Doc CAT/C/18/D/39/1996 (1997) at para 14.5; *Chahal v United Kingdom* (1996), [1996] ECHR 54, 23 EHRR 413; *Saadi v Italy* [GC], No 37201/06 (28 February 2008). For an analysis of the Grand Chamber's decision in *Saadi v Italy* see Fiona de Londras, "*Saadi v Italy*: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases", online: (2008) 12 ASIL Insights <http://www.asil.org/insights080513.cfm>.

[160] See Office of the High Commissioner for Human Rights, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UNHCR, 52nd Sess, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) (commenting that no state may apply reservations to peremptory norms). Note that although CAT, ECHR and ICCPR offer protection from refoulement they do not confer upon those protected individuals any status or residence in the host state. Note also that states interpret these treaties, and the obligations arising from them, differently. See Yvonne M Dutton "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Get Away with Murder?" (2011) 34 Fordham Int'l LJ 236 (for further analysis of the refoulement obligations and the interpretations of states).

(see the discussion in Part II above). However, if an individual is found to be under the jurisdiction of a member state, regardless of location, then the prohibition on refoulement is absolute. As stated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with regard to Italy, the state

> is bound by the principle of *non-refoulement* wherever it exercises its jurisdiction, which includes via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory. Moreover, all persons coming within Italy's jurisdiction should be afforded an appropriate opportunity and facilities to seek international protection.[161]

In May 2010, the United Nations High Commissioner for Refugees issued a briefing reiterating that no person should be involuntarily returned to central and southern Somalia and calling on all states to uphold their obligations regarding non-refoulement.[162] As the insecurity in Somalia continues, it appears unlikely that states will be able to forcibly return individuals to it in the near future without potentially violating their own obligations under international law.[163] Notably, at present, pirates appear to be voluntarily returning to Somalia rather than remaining detained. Moreover, issues of expediency play a role in states' decisions to detain and hand over pirates for prosecution. This factor is further discussed in Part IV.

3. Transfer of (Suspected) Pirates to a Third State

States engaging in counter-piracy operations have been eager to find a regional solution to prosecuting pirates. Hence, the EU, the UK, Denmark, and the US signed agreements to transfer suspected pirates to Kenya for trial (now no longer effective), and the US and the EU have agreements with Seychelles. In addition, in 2011 Seychelles signed a Prison Transfer Accord with the TFG and MOUs with Somaliland and Puntland relating to the transfer of sentenced pirates to Somalia to serve their sentences.[164]

---

[161] Council of Europe, European Committee for the Prevention of Torture, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, CPT/Inf (2010) 14 at para 49.

[162] United Nations, Press Release, "Appeals on Somalia for international obligations on non-refoulement to be observed" (21 May 2010), online: UNHCR <http://www.unhcr.org/>. Note that the recommendations and guidelines of UNHCR are not binding on states.

[163] *Ibid*. This is not to say that refoulement of asylum-seekers to Somalia is not occurring. See e.g. *"Welcome to Kenya": Police Abuse of Somali Refugees* (New York: Human Rights Watch, 2010), online: Human Rights Watch http://www.hrw.org; *Kenya: Refoulement of Somali asylum seekers* (3 April 2009), online: UNHCR <http://www.unhcr.org>; United Nations High Commissioner for Refugees, Briefing Notes, "Kenya: Refoulement of Somali Asylum Seekers" (3 April 2009), online: UNHCR <http://www.unhcr.org/49d5d9c16.html>. Note that there are also alternative options for states who have suspected pirates within their jurisdiction, such as transferring pirates to a safe third country or relying on diplomatic assurances that torture or prohibited treatment will not occur. See Section c) "Transfer of Suspected Pirates to a Third State" below. For a more in-depth analysis of non-refoulement and asylum with regard to piracy, see Dutton, *supra* note 161.

[164] See "Seychelles signs historic accord on transfer of jailed Somali pirates", *Seychelles Nation* (12 February 2011), online: Nation.sc <http://www.nation.sc/index.php?art=22405>; "Seychelles finalises agreements on transfer of pirates to Puntland and Somaliland", *Seychelles Nation* (21

The various agreements reportedly contain assurances regarding the protection of human rights.[165] Similarly, the UK iterated that it will not transfer suspected pirates to third states unless the UK is satisfied that they will not be subject to torture or to cruel, inhuman, or degrading treatment or punishment, to a death penalty, or to an unfair trial, and it presented assurances from Kenya that this does not occur.[166] However, existing jurisprudence indicates that diplomatic assurances are not necessarily enough.[167]

The ECtHR held in *Saadi v Italy* (2008) that assurances or accession to treaties do not suffice if reliable sources report that the state conducts or tolerates activities prohibited by the Convention.[168] Moreover, the Court has an obligation to examine whether such assurances, in their practical application, provide sufficient guarantee that the individual would be protected from prohibited treatment.[169] Similarly, the Committee Against Torture proclaims that a state should only accept diplomatic assurances from other states that do not systematically engage in prohibited behavior, and even then only following a complete examination of the merits of each case. The Committee notes, "[t]he State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements."[170]

States have handed over suspected pirates to countries such as Seychelles, Kenya, Somalia, and Yemen,[171] and there are reports of

---

April 2011), online: Nation.sc <http://www.nation.sc/index.php?art=23226>.

[165] In the EU-Kenya and EU-Seychelles Exchanges of Letters, there are provisions in place to protect transferred suspected pirates from human rights violations. See *Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer*, European Union and Kenya, 6 March 2009, OJ (L79) 49 at 51, Provision 3(a) [EU-Kenya Exchange of Letters]; *Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer*, European Union and Seychelles, 26 October 2009, OJ (L315) 38 [EU-Seychelles Exchange of Letters]. Moreover, as stated in the EU-Kenya Exchange of Letters, termination of the agreement does not negate the benefits or obligations arising out of the agreement before termination, which includes the benefits to suspected pirates for as long as they are held in custody or prosecuted in transferee states. (Please note that the other agreements are confidential and therefore are not available to the author.)

[166] HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 14.

[167] See Committee Against Torture, USA Report, *supra* note 80 at para 21; *Saadi v Italy*, *supra* note 160 at para 147.

[168] *Saadi v Italy*, *supra* note 160 at para 147.

[169] *Ibid* at para 148.

[170] Committee Against Torture, USA Report, *supra* note 80 at para 21.

[171] See e.g. Corder, *supra* note 142; "Dusting Off Ancient Laws to Deal With 21st-Century Piracy", *NRC Handelsblad* (22 April 2009), online: NRC Handelsblad <http://www.nrc.nl/international/Features/article2220357.ece/Dusting_off_ancient_laws_to_deal_with_21st-century_piracy?service=Print>; "French Warship Thwarts Pirate Attack", *National Public Radio* (6 January 2009), online: NPR <http://www.npr.org/templates/story/story.php?storyId=99036159&sc=emaf>; "Kenya, US Agree to Deal on Piracy", *VOA News* (27 January 2009), online: VOA News

discussions to sign agreements between the EU and Mauritius, Mozambique, South Africa, Tanzania, and Uganda.[172]

None of those African states has an excellent human rights record. To cite Kenya as the first example, in 2009 the Committee Against Torture highlighted the "numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody." It also noted the challenges "in providing people under arrest with the appropriate legal safeguards, including the right to access a lawyer, an independent medical examination and the right to contact family members."[173] The Committee raised its concern regarding the terrible conditions of detention, in particular the high levels of violence, the shortage of appropriate health services, and the overcrowding, and pointed out the lack of independent monitoring of detention centres.[174] Moreover, in a shadow report by non-governmental organizations, it was revealed that 54 per cent of complaints of torture were presented before judges or magistrates, but that action was taken only in nineteen per cent of cases.[175] A 2010 Human Rights Committee report, while acknowledging Kenya's overstretched prison system, indicates that the government is attempting to address some of the issues; for example, by revamping the service with increased focus on human rights protection, and with a development program to improve prison infrastructure.[176] In addition, UNODC has conducted extensive refurbishment of Shimo La Tewa prison (and basic refurbishments in five other prisons), improving medical facilities, water supply, sanitation, and providing educational facilities, among other activities.[177] Nonetheless, in its 2010 report, the US State

---

<http://www1.voanews.com/english/news/a-13-2009-01-27-voa16-68710907.html?CFTOKEN=50615770&jsessionid=88301ba97b9ffc25c8715741371a6546f201&CFID=289525164>; "Seychelles and the USA Sign Piracy Agreement", *African Press Organisation* (14 July 2010), online: African Press Organization <http://appablog.wordpress.com/2010/07/14/seychelles-and-the-usa-sign-piracy-agreement>; Rivkin & Casey, *supra* note 65; "Russian Navy Transfers Detained Somali Pirates to Yemen", *RIA Novosti* (18 February 2009), online: RIA Novosti <http://en.rian.ru/world/20090218/120209688.html>; Sophie Hardach, "France Rejects Appeal by Suspected Somali Pirates", *Reuters* (6 April 2009), online: Reuters UK <http://uk.reuters.com/article/2009/04/06/uk-france-somalia-trial-sb-idUKTRE5354Z820090406>;

[172] See EC, EU Naval Operation Against Piracy (EUNAVFOR Somalia – Operation ATALANTA), [April 2010] EUNAVFOR/17 at 2 (25 April 2010); HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 14.

[173] UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Kenya*, 41st Sess, UN Doc CAT/C/KEN/CO/1 (2009), at para 13.

[174] *Ibid* at paras 14-15.

[175] See Independent Medico Legal Unit, *Torture and related Violations in Kenya: Alternative Report to the United Nations Committee Against Torture, 41st Session, 3rd to 21st November 2008* (Kenya: The Independent Medico- Legal Unit, 2008).

[176] Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kenya*, UNHRC, UN Doc A/HRC/WG.6/8/Ken/1 (2010) at paras 40, 41, 46.

[177] United Nations Office on Drugs and Crime, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects* (February 2011, Issue 5) online: UNODC <http://www.unodc.org/documents/easternafrica/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf>.

Department reports that prison and detention centre conditions were life threatening, describing torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding as endemic.[178]

Similarly, Freedom House reports that torture and police brutality are widespread in Yemen while abuses persist in both state and private prisons, which operate with limited outside monitoring or control.[179] The US State Department has outlined the poor conditions and treatment, including torture, in prisons, as well as the widespread denial of fair public trial and the weak and corrupt judicial system in the country.[180] Moreover, in Yemen the punishment for piracy is crucifixion, and in May 2010 six pirates tried in Yemen were given the death sentence.[181] Notably, a large number of states are prohibited under international law from transferring persons to another state that may impose the death penalty.[182] Meanwhile, the US State Department reports poor prison conditions and an inefficient and politically influenced court system as problems in Seychelles.[183]

At the same time, Somalia continues to be highly unstable. Fighting increased in the first three months of 2010, swelling the total number of people displaced by the civil war to 1.4 million to date, while intense fighting in Mogadishu in June and July led to an increase in civilian casualties.[184] Civilians in South and Central Somalia live under continuous threat from armed groups, with reports of stoning, amputations, flogging, and other corporal punishment.[185] There are also numerous reports of summary executions and mutilations by group al-Shabaab.[186] Similarly, the US

---

[178] US, Department of State, Bureau of Democracy, Human Rights and Labor, 2010 *Human Rights Report: Kenya* (8 April 2011), online: State.gov <http://www.state.gov/documents/organization/160127.pdf >.

[179] Freedom House, *Countries at the Crossroads 2010: Country Report - Yemen* (Washington, D.C.: Freedom House, 2010), online: Freedom House <http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=9&ccrpage=43&ccrcountry=207>.

[180] US, Department of State, Bureau of Democracy, Human Rights and Labor, *2010 Human Rights Report: Yemen* (8 April 2011), online: State.gov <http://www.state.gov/documents/organization/160081.pdf>.

[181] See e.g. "Dusting Off Ancient Laws to Deal with 21st-Century Piracy", *supra* note 172; "Second Conviction for Somali Pirates in Week", *Yemen News Agency* (19 May 2010), online: <http://www.sabanews.net/en/news214831.htm>.

[182] See e.g. *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances*, 3 May 2002, Eur TS 187, online: European Court of Human Rights <http://www.echr.coe.int/library/annexes/187E.pdf> (abolishing the death penalty in all circumstances, and which is binding on acceding states). See also *Al-Saadoon and Mufdhi v United Kingdom*, No 61498/08 (2 March 2010) at paras 118, 120 and 123, online: European Court of Human Rights <http://cmiskp.echr.coe.int>.

[183] US, Department of State, Bureau of Democracy, Human Rights and Labor, *2010 Human Rights Report: Seychelles* (08 April 2011), online: State.gov < http://www.state.gov/documents/organization/160142.pdf >.

[184] *Report of the Secretary-General on Somalia*, UNSC, UN Doc S/2010/234 (May 11, 2010) para 19 [UNSC May Report]; *Report of the Secretary-General on Somalia*, UNSC, UN Doc S/2010/447 (Sept. 9, 2010) para 12 [UNSC September Report].

[185] UNSC May Report, *supra* note 185 at para 20; UNSC September Report, *supra* note 185 at para 29.

[186] UNSC May Report, *supra* note 185 at para 23.

Department of State reports that,

> [h]uman rights abuses included arbitrary killings, kidnappings, torture, rape, amputations, and beatings; official impunity; harsh and life-threatening prison conditions; and arbitrary arrest, deportation, and detention ... Denial of a fair trial and limited privacy rights were problems ....[187]

However, as described by Guilfoyle, the existence of human rights violations does not prohibit outright the transfer of suspected pirates to these countries.[188] Rather, the Committee Against Torture stresses the need for an in-depth examination of the merits of each case. Simultaneously, in order for diplomatic assurances to be acceptable, states must:

- Establish and implement clear procedures for obtaining such assurances;
- Arrange adequate judicial mechanisms for review; and
- Ensure effective post-return monitoring arrangements.[189]

The procedures available for obtaining assurances from Kenya and Seychelles are evidenced in the respective Exchanges of Letters with the EU, which assure humane treatment of transferred persons.[190] Similarly, both documents outline monitoring arrangements. Specifically, they provide for EU and EU NAVFOR representatives to gain access to any transferred persons. These representatives are also assured that they will receive accounts of the prisoners, including information on their physical conditions, their places of detention, and the charges against them. The agreement also guarantees permission for humanitarian agencies to visit persons who are transferred.[191]

However, judicial review mechanisms are not so clearly delineated, and in practice range from no review to judicial scrutiny. For example, in May 2009, two days after a Spanish judge ordered seven suspected pirates to be brought from a Spanish navy ship to Madrid, a second Spanish judge ordered that the pirates be freed, stating that they should not be brought to Spain nor surrendered to Kenya.[192] The Spanish ship was part of the EU flotilla operating off Somalia, which means that it could have utilized the, then valid, Exchange of Letters to transfer to Kenya. This lack of clarity and consistency regarding the legal procedures surrounding transfer, combined with the human rights situation in the receiving countries, could be

---

[187] US, Department of State, Bureau of Democracy, Human Rights and Labor, *2010 Human Rights Report: Somalia* (8 April 2011), online: State.gov <http://www.state.gov/documents/organization/160144.pdf>.
[188] Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 163.
[189] See Committee Against Torture, USA Report, *supra* note 80 at para 21.
[190] See EU-Kenya Exchange of Letters, *supra* note 166 at 51, at 2(c); EU-Seychelles Exchange of Letters, *supra* note 166 at 38.
[191] See EU-Kenya Exchange of Letters, *supra* note 166 at 52; EU-Seychelles Exchange of Letters, *supra* note 166 at 43.
[192] See Daniel Woolls, "Spain: About Face on Piracy Suspects" *Chicago Defender* (8 May 2009), online: Chicago Defender <http://www.chicagodefender.com/article-4353-spain-about-face-on-piracy-suspects.html>.

problematic for transferring countries.

Moreover, Seychelles has asserted that, although the country will prosecute suspected pirates, it does not have the capacity to house them as they serve their prison terms, and has indicated that convicted pirates will eventually be transferred to Somalia for their imprisonment.[193] In February and April 2011, agreements were signed between Seychelles and the TFG, Somaliland and Puntland to govern the transfer of sentenced pirates to these entities to serve their sentences. Hargeisa prison, refurbished by the UN, was officially opened in March 2011, and is reportedly equipped to receive prisoners transferred internationally.[194] In addition, UNODC is currently refurbishing Bossasso prison, and the UN plans to build two more 500-bed prisons in Somalia to house convicted pirates.[195]

It is important to note that if pirates are to be transferred to these prisons, both the arresting state and the sending state must be satisfied with the conditions and treatment afforded in the facilities, since the original arresting state could be liable if Seychelles' transfer of a pirate results in prohibited treatment.[196] A state's responsibility under the ECHR and ICCPR, when extraditing or removing individuals who may be at risk of exposure to torture or cruel and inhuman treatment, is set out in existing case law.[197] Hence, the EU—Seychelles Exchange of Letters explicitly states "the Seychelles will not transfer any transferred person to any other State without prior written consent from EU NAVFOR."[198] Whatever the outcome of transfer, it is imperative that the merits of each individual case be determined to ensure that the process meets the minimum requirements as set out by international human rights treaties.

4. Fair Trial

When transferring suspected pirates to a nation for trial, the transferring state must also take into account the likelihood that the suspects will receive a fair trial. The obligation on transferring states is detailed by the Human

---

[193] See "Seychelles convicts 11 Somali Pirates to 10 years", *CNN* (27 July 2010), online: INSIDESOMALIA <http://insidesomalia.org/201007273087/News/Human-Rights/Seychells-convicts-11-Somali-pirates-to-10-years.html>; "Somali Pirates Sentenced to Ten Years in Seychelles", *BBC News* (26 July 2010) online: BBC News <http://www.bbc.co.uk/news/world-africa-10763605>.

[194] See "Somalia Opens First Prison for Pirates", *Associated Press*, (30 March 2011) online: military.com <http://www.military.com/news/article/somalia-opens-first-prison-for-pirates.html>.

[195] See "Somalia Opens First Prison for Pirates", *supra* note 195; United Nations Office on Drugs and Crime, *supra* note 178.

[196] John Knott, "United Kingdom: Piracy off Somalia: Prosecutions, Procrastination and Progress" *Mondaq* (21 January 2010) online: Mondaq Business Briefings <http://www.mondaq.com/article.asp?articleid=92442&login=true>.

[197] See *Soering v The United Kingdom* (1989), 11 EHRR 439; *Chitat Ng v Canada*, Communication No 469/1991, UNGAOR, 49th Sess, UN Doc CCPR/C/OP/5 (1991) at para 14.2; Human Rights Committee, *supra* note 77 at para 12.

[198] EU-Seychelles Exchange of Letters, *supra* note 166 at 38.

Rights Committee,[199] while the right to, and requirements of, a fair trial are set out in various conventions and declarations, and include Article 10 of the Universal Declaration of Human Rights and ECHR Article 6. According to Article 6, the basic requirements of a fair trial include the presumption of innocence until proven guilty according to law; the entitlement of a fair and public hearing by an independent and impartial tribunal established by law; the right to defend oneself or to have legal assistance; to have the assistance of an interpreter if needed; and to be clearly and promptly informed of the nature and cause of the charge.[200] Notably, there is a very high threshold when determining the criteria for a violation of ECHR Article 6, namely that there is a flagrant denial of a fair trial.[201] Rulings have provided little clarity regarding the conditions required for a flagrant denial of a fair trial; however, the partly dissenting opinion of Judges Bratza, Bonello, and Hedigan (supported by Judge Rozakis) in *Mamatkulov and Askarov v Turkey* (2005) implies that "'flagrant' is ... a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."[202]

In the Kenyan and Seychellois trials that have been conducted, there appear to be little indication of violations amounting to a 'flagrant denial' of a fair trial as defined in *Mamatkulov*. Trials have been run relatively promptly, with pirates receiving legal assistance and translation services, and, in the case of Kenya, compulsory oral testimony.[203] Moreover, the trials have been run with the financial and legal support of transferring states and often have been conducted in the presence of international observers.[204] The

---

[199] See e.g. *Chitat Ng v Canada*, *supra* note 192 at para 14.2; *Kindler v Canada*, Communication No 470/1991, UNGAOR, 48th Sess, UN Doc CCPR/C/48/D/470/1991 (1993) at para 13.1.

[200] See *CHRFF*, *supra* note 74 at Art 6.

[201] See, for example, *Soering v The United Kingdom, supra* note 198 at para 113, wherein the Court stated that it "does not exclude that an issue might exceptionally be raised under Article 6 (Art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country." See also *Mamatkulov and Askarov v Turkey* [GC], No 46827/99 (4 February 2005) at para 91, in which the Court based itself on the precedent set by Soering, and stated that while "there may have been reasons for doubting at the time that they would receive a fair trial in the State of destination, there is not sufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of paragraph 113 of the aforementioned Soering judgment."

[202] *Mamatkulov and Askarov v Turkey*, *supra* note 202, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan at para 14.

[203] See Middleton, *supra* note 57; United Nations Office on Drugs and Crime, *supra* note 178 (reporting that it ensures the attendance of witnesses, provides translation services for suspects and provides for defence lawyers [in the case of Kenya UNODC provided defence lawyers where it was requested to do so by the courts and no other defence assistance was present]). Note that there have been accounts that claim that suspected pirates held in Kenya are being denied basic human rights, including the right to a fair trial and adequate medical care. See e.g. "Paris-based Group Says Accused Somali Pirates Denied Rights", *VOA News* (27 August 2009), online: VOA News <http://www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html>.

[204] See "EU pledges more support to Kenya for piracy trials", *Xinhua News*, (27 July 2010), online: Xinhua News <http://news.xinhuanet.com/english2010/world/2010-07/27/c_13417882.htm>; United Nations Office on Drugs and Crime, *supra* note 172. However, there are allegations that

Exchange of Letters contain provisions assuring that transferred suspects will have a fair trial, including the entitlement to a fair and impartial public hearing, the right to legal assistance, and the presumption of innocence.

Seychelles conducted its first piracy trial in March 2010, with the first conviction in July,[205] and, as more trials are conducted, the veracity of the proceedings can be further examined. However, there are also other states in that region that are trying pirates. In May 2010, a Yemeni court sentenced six pirates to death, despite claims by the convicted that no witnesses testified and no evidence was presented.[206] Russia has reportedly transferred suspected pirates to Yemen, which, with the application of the death penalty and the allegations of unfair trial, could be held as a violation of the ECHR.[207]

As discussed above, there are multiple human rights considerations that states engaging in counter-piracy operations must take into account to ensure that they do not act in breach of their obligations under international law, with processes surrounding detention, transfer, and return being just three areas of concern.[208] Moreover, these human rights concerns do not exist in isolation from issues related to expediency and political considerations.

V. The Politics of Counter-Piracy and the Trade-Off between Human Rights and Expediency

Although the international legal apparatus required to prosecute pirates is available, more focus needs to be placed on domestic legislation, or the lack thereof, and in the application of the international framework.[209] Importantly, the application of law is a political, as much as a legal,

---

the defense attorneys of suspected pirates are not getting compensated, and that there is much international pressure on Kenya to ensure convictions. See e.g. Matthias Gebauer, "Attorneys File Suit in Germany on Behalf of Alleged Pirates", *Der Speigel* (15 April 2009), online: Der Spiegel <http://www.spiegel.de/international/europe/0,1518,619103,00.html>; Sarah Childress, "Legal Limbo Awaits Somali Pirates", *The Wall Street Journal* (6 May 2010), online: The Wall Street Journal <http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703961104575225810196963690.html>; Nick Wadhams, "Who Wants to Try the Captured Pirates? (No One)", *Time* (2 June 2010), online: Time <http://www.time.com/time/world/article/0,8599,1993444,00.html>.

[205] See e.g. "Somali Pirates Sentenced to Ten Years in Seychelles", *supra* note 194.

[206] See e.g. "Yemen Court Sentences Somali Pirates to Death", *VOA News* (18 May 2010), online: VOA News <http://www1.voanews.com/english/news/middle-east/Yemen-Court-Sentences-Somali-Pirates-to-Death-94137894.html>; "Yemen Sentences Somali Pirates to Death", *BBC News* (18 May 2010), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/8689129.stm>.

[207] See RIA Novosti, *supra* note 172.

[208] There are further issues related to the human rights obligations of seizing states that are beyond the scope of this paper. See e.g. Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 167 (examining whether some instances of transferring pirates violates the right to an effective remedy).

[209] The need for adequate domestic legislation has been discussed above (see Part I); hence, this section will focus on the utilization of the legal framework. Note that in addition to the above-mentioned issues it can be problematic for prosecuting and seizing states to secure evidence, or to provide eyewitness testimony. See e.g. Andersen et al., *supra* note 3 at 3; Middleton, *supra* note 57 at 7; Andrew J Shapiro, "Counter-Piracy Policy: Delivering Judicial Consequences" (Keynote Address delivered at the American University of Law Review Symposium, 31 March 2009), online: US Department of State <http://www.state.gov/t/pm/rls/rm/139326.htm>.

consideration. Each state authority engaging in counter-piracy activities operates under both resource constraints and normative or strategic constraints. It tends to make decisions regarding the treatment of suspected pirates based on the specificities of the situation, and generally holds national interests paramount.

One significant consideration is the cost involved. One Earth Future estimates that trials within the East Africa region cost on average $52,000, while trials in North America cost approximately $335,733.[210] Kenya, which up to recently was a key venue for prosecution, requires witnesses to attend court, which is both expensive and entails opportunity costs, as it occupies warships that could be deterring more pirate attacks. Furthermore, if a ship does detain suspected pirates, it cannot engage in military patrols until it has transferred those suspects off the ship. More than the cost of the trial, the housing of convicted pirates as they serve their sentences is an expense that many states are reluctant to bear, and, as discussed above in the article, states are reluctant to be burdened with pirates who cannot be returned to their countries of origin after trial or serving their sentence. The result is that many states place an emphasis on finding a regional solution for prosecuting pirates, and remain hesitant to initiate trial proceedings on home ground. This is not to say that trials do not occur in states within the EU or countries such as the US, but it is often the case only when national interests have been directly harmed.[211]

However, cost is not the only deterrent, as nations appear willing to spend money on naval operations as opposed to prosecutions. One Earth Future estimates that $2 billion is spent annually on the three major naval forces and the independent operations from different countries. In comparison, the cost of prosecutions in 2010 stood at $31 million.[212] In relation, one can question what are the motivations, or priorities, for various states that are patrolling the waters off Somalia. For example, EU NAVFOR, the first European Security and Defence Policy (ESDP) naval operation, was put forward by many of its advocates as a chance to make the EU more visible on the world stage and as an opportunity for the EU to promote its values.[213] It also fulfilled the objectives of various states, such as the French government's desire to strengthen the ESDP. As such, it was described by the then French Defence Minister, Hervé Morin, as a "marvellous symbol" of steps towards a Euro-military and defence policy.[214] Moreover, although the

---

[210] One Earth Future, *supra* note 5 at 19.
[211] See e.g. "German Navy Foils Somali Pirates", *supra* note 143; Craig Whitlock, "Lack of prosecution poses challenge for foreign navies that catch Somali pirates" *The Washington Post* (24 May 2010), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303893.html?referrer=emailarticle>.
[212] One Earth Future, *supra* note 5 at 16 and 20.
[213] Basil Germond & Michael E Smith, "Re-thinking European Security Interests and the ESDP: Explaining the EU's Anti-Piracy Operations" (2009) 30:3 Contemporary Security Policy 573 at 583.
[214] Bruno Waterfield, "UK to lead EU anti-piracy force off Somalia", *The Telegraph* (UK) (10 November 2008), online: Telegraph.co.uk <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3418448/UK

UK was initially hesitant to promote the EU's naval operation, it eventually played a leading role, allegedly partly so that France could not claim sole credit for the EU operation.[215] Meanwhile, British Conservative MEP Geoffrey Van Orden questioned the motives behind EU NAVFOR, stating that "the EU is desperate to find military operations that it can stick its flag on in order to give credibility to its defence pretensions."[216]

Moreover, when EU NAVFOR was launched in December 2008, there were questions surrounding the rules of engagement, in particular regarding what should be done with suspected pirates. The EU—Kenya Exchange of Letters was signed the following March, but this gap indicates that EU NAVFOR's first priority was to deter and disrupt, as opposed to engage in law enforcement. As mentioned in Part I, more than 60 per cent of suspected pirates that are encountered are released without charge, which provides impetus to the argument that the priority of many states operating in the waters off Somalia is not to prosecute pirates.

Decisions regarding piracy can also be used as a political tool. In 2010, Kenya declared that it would not accept more suspected pirates for prosecution, allegedly partly in response to the announcement by ICC Prosecutor Luis Moreno Ocampo that he would investigate the 2007 post-election violence.[217] Moreover, following a parliamentary committee report that criticized the signing of the agreements permitting the transfer of suspected pirates, various players, including the Vice-President Kalonzo Musyoka, Minister for Justice Mutula Kilonzo, Attorney General Amos Wako, and the Minister for Defence Yusuf Haji, tried to distance themselves from being involved with the agreements and blamed their counterparts in different departments for the MoUs.[218] In particular, despite evidence that the Attorney General's office and the Foreign Affairs ministry were in consultation throughout the drafting and signing of the MoUs, Wako reportedly denied that his office was involved in their formulation. Moreover, the trials have been portrayed as an unfair burden on Kenya which exacerbated the problems of the judicial and prison systems, and politicians have claimed that the international community has failed to provide the financial, judicial, and technical support to the extent that was promised.[219] However, with a self-reported prison population of more than 45,000, the approximately 100 pirates detained in Kenya represent only 0.2 per cent of the prison population.[220] Furthermore, Kenya has received

-to-lead-EU-anti-piracy-force-off-Somalia.html >.

[215] Germond & Smith, *supra* note 214 at 585-588; Waterfield, *supra* note 215.

[216] Waterfield, *supra* note 215.

[217] See Kristen Rau & Jordan Shepherd, Blog Posting, "AMICC Representative Participates in University of Minnesota Law School Debate on US Involvement in the ICC" *AMICC* (28 March 2011), online: AMICC <http://amicc.blogspot.com/> (citing Professor Kontorovich).

[218] See Oscar Obonyo, "Blame game over 'secret MoUs' on pirates' trials", *The Standard* (7 November 2010), online: standardmedia.co.ke <http://www.standardmedia.co.ke/entertainment/InsidePage.php?id=2000013665&cid=4&>.

[219] See Jeff Davis, "Country cancels piracy trial deals", *Daily Nation* (30 September 2010), online: Daily Nation < http://allafrica.com/stories/201010010009.html>.

[220] See Bocha, *supra* note 54; Kenya Prisons Service, "About Us", online:

assistance from the UNODC in the form of training and equipment for police and prosecutors, support for judicial proceedings, and renovation of courts and prison facilities, in particular the renovation of Shimo La Tewa Prison.[221] In fact the officer in charge of Shimo La Tewa prison reportedly described the pirates as "a blessing in disguise" because of the corresponding international support given to Kenya for upgrading the judiciary and prison system.[222]

Thus, expediency and political will are issues that cannot be disregarded in any discussion about piracy. Certain factors take precedence over others, as evidenced by the fact that the vast majority of pirates are released without any judicial proceedings as states exercise their prosecutorial discretion, focusing on immediate determent as opposed to prosecution. Similarly, turning to regional states to prosecute, despite worries about potential human rights violations, indicates a triumph of expediency over human rights concerns. It leads Kontorovich to claim that states are "[a]uctioning prosecution to the lowest bidder,"[223] which, while perhaps understandable, is not ideal.

VI. Conclusion

This article outlined a number of pertinent issues pertaining to human rights law and the prosecution of pirates. After summarizing the laws regarding piracy, the article proceeded to delineate the applicability of different human rights treaties to states' counter-piracy activities. Thereafter, it discussed various aspects of detaining and prosecuting suspected pirates, including procedures for arrest and detention, and human rights obligations surrounding transfer and prosecution.

It is evident that there is ambiguity regarding the human rights obligations of states but this is not to say that it is impossible for states to prosecute pirates while acting in accordance with international human rights law. Important factors need to be taken into consideration to ensure that human rights obligations are fulfilled, but these need not act as a deterrent to prosecution. The issue that is perhaps most pertinent is the political will of states to engage in such prosecutions. It is essential for states to take steps to ensure that the necessary procedures are followed to fulfil their human rights obligations, for example by ensuring that adequate guidelines, including a legal framework for detention, are in place. In addition, further steps can be taken to facilitate prosecutions, for example by criminalizing intention to commit piracy in domestic legislation.[224]

<http://www.prisons.go.ke/about_us.htm>.

[221] United Nations Office on Drugs and Crime, *supra* note 178.

[222] Tristan McConnell, "Kenyan courts on legal front line in battle to stop Somali pirates", *The Sunday Times* (10 December 2009), online: TimesOnline.co.uk <http://www.timesonline.co.uk/tol/news/world/africa/article6950951.ece>.

[223] Kontorovich, "A Guantanamo on the Sea", *supra* note 26 at 272.

[224] United Nations Security Council, *supra* note 153 (recommending different steps that can be taken to facilitate prosecutions, including the development of an international model case

Ultimately, there are competing pressures on state authorities, including legal obligations, resource limitations, and strategic constraints. As such, it is necessary to take a practical approach to ensure that a viable solution is found. One such approach is to focus on developing a regional solution to prosecution and detention, that simultaneously satisfies human rights obligations and the constraints of political will. In this light, in a January 2011 report to the UN Security Council, Jack Lang recommended a plan to address piracy, of which the jurisdictional/correctional component targets Somalia, and particularly the entities Somaliland and Puntland. He proposes the establishment of three specialized courts (one in Puntland, one in Somaliland, and an extraterritorial Somali court) and three prisons.[225] This approach, currently under consideration by the UN Security Council,[226] would allegedly strengthen the rule of law in Somalia, while addressing the issue of where to prosecute pirates.[227] In addition, it would bypass some of the problems related to relying on a regional approach, such as neighbouring states' hesitations to upset Somalis by prosecuting their people, and inadequate domestic legislation to prosecute under universal jurisdiction, which recently halted trials in Kenya.

Importantly, such action alone will not solve the problem of piracy. Despite the more proactive techniques adopted by EU NAVFOR, the increase in the number of pirates detained and deterred and equipment destroyed, and the prosecution of pirates—regionally, in Europe, and the US—piracy around Somalia (and elsewhere) continues, and even grows.[228] Furthermore, it is widely acknowledged that the lack of a functioning government and the lawlessness and poverty in Somalia are crucial contributing factors to the problem of piracy off its coast.[229] Additionally, commentators have repeatedly highlighted the role that poverty plays in fuelling piracy and the need to promote alternative means of income for pirates.[230] It is worth noting that piracy around Somalia allegedly originated

---

report, encouraging testimony by videoconference, and the compilation of a database of fingerprints).

[225] *Ibid*.

[226] Resolution 1976, *supra* note 46.

[227] United Nations Security Council, *supra* note 153.

[228] See IMB 2010 Report, *supra* note 2 (indicating that attacks in 2010 increased from 2009).

[229] Andersen et al, *supra* note 3 at 9; Peter Chalk, "Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses" (2010) 16:2 Brown Journal of World Affairs 89 at 94-95; Jeffrey Gettleman, "Pirates Outmaneuver Warships off Somalia", *The New York Times* (15 December 2008), online: The New York Times <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html?_r=1&sq=piracy&st=cse&s>; James Kraska, "Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea" (2009) 28 Comparative Strategy 197; HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 16; FOI Swedish Defence Research Agency, Karl Sörenson, "State Failure on the High Seas – Reviewing the Somali Piracy" (2008) FOI Somalia Papers: Report 3, online: FOI Swedish Defence Research Agency <http://www.foi.se/upload/projects/Africa/FOI-R--2610.pdf>. See also Resolution 1918, *supra* note 46 at preamble.

[230] See e.g. Chalk, *supra* note 230 at 94; International Expert Group on Piracy off the Somali Coast, "Piracy off the Somali Coast" (Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, 10-21

in the 1990s with attacks on illegal fishing vessels, and some suspected pirates continue to claim that they are protecting Somali waters from illegal fishing and toxic dumping.[231]

Regardless of the relevance of such claims to piracy in Somalia at the current time,[232] the underlying causes of piracy must be addressed. The problem in the Gulf of Aden and elsewhere cannot be dealt with simply through prosecution and deterrence tactics. Moreover, some of the problems encountered by prosecuting states, such as the policy of non-refoulement to Somalia, would be solved if Somalia had a legitimate, functioning judicial and prison system. Thus, it is essential that attention be paid to building capacity and restoring law and order on land in Somalia.[233]

To conclude, addressing piracy is a complicated affair, all the more so with the lack of clarity regarding human rights obligations. However, pirates, who may be regarded as "enemies of all mankind," are also members of mankind, and this position means that they should be accorded all the rights and protections that correspond to that membership.[234] Commenting on the problem of piracy, Hillary Clinton stated that "[w]e may be dealing with a 17th-century crime, but we need to bring 21st-century solutions to bear."[235] Those twenty-first century solutions must encompass, and uphold, international human rights law.

November 2008) at 15 [Nairobi Report]; United Nations Security Council, *supra* note 153.

[231] See e.g. Julio Godoy, "Questions Abound about EU's 'Combating' of Piracy", *Inter Press Service* (16 June 2010), online: Inter Press Service News Agency <http://ipsnews.net/news.asp?idnews=51841>; Mwangura, *supra* note 37; Nairobi Report, *supra* note 231 at 14-15; Sörenson, *supra* note 230. See also Resolution 1950, *supra* note 46.

[232] Note that even if its origins were to protect Somali waters from illegal fishing and dumping, piracy off Somalia has developed into a huge industry, involving organized cartels spanning continents. See e.g. Chalk, *supra* note 230 at 91-92; Rotberg, *supra* note 37 at 3. See also European Union Naval Force, News Release, "Breakthroughs Along with Challenges During First Month of Swedish Command" (17 May 2010), online: EU NAVFOR Somalia <http://www.eunavfor.eu/2010/05/breakthroughs-along-with-challenges-during-first-month-of-swedish-command/> (reporting that boats are being attacked as far as 1,200 nautical miles off the Somali coast).

[233] It should be noted that the role of the international community in capacity building and state-building in Somalia is unclear and controversial. Previous interventions, such as UNITAF and UNOSOM, had clear negative repercussions, such as an incident on October 3, 1993, which resulted in the deaths of eighteen US servicemen and ultimately led to the withdrawal of troops from the country. See e.g. Rakiya Omaar and Alex de Waal, *Somalia Operation Restore Hope: A Preliminary Assessment* (London: African Rights, 1993).

[234] The fundamental premise of human rights is that they are universal and belong to everyone equally. *Universal Declaration of Human Rights*, GA Res 217A, UNGAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (1948), at Art. 1, 2.

[235] Corder, *supra* note 142.

Is Genocide Different?
Dealing with Hate Speech in a Post-Genocide Society

JENNIFER M. ALLEN* & GEORGE H. NORRIS°

I. Introduction

In January 2010, Victoire Ingabire returned to Rwanda after sixteen years of exile in the Netherlands to campaign for the presidency at the head of the United Democratic Force Party.[1] Her presence was immediately met with controversy, as her campaign touched on the ethnic tensions that sparked

* Former Robina Fellow with the Minnesota Board of Public Defense, Second District.
° Law clerk to the Honorable Myron H, Bright, United States Court of Appeals for the Eighth Circuit.
The authors wish to thank Robert A. Stein, Everett Fraser Professor of Law at the University of Minnesota Law School, for his inspiration and role in this article.
[1] Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda" *Radio Netherlands Online* (21 January 2010), online: Radio Netherlands Worldwide <http://www.rnw.nl/international-justice/article/victoire-ingabire-stirs-ethnic-debate-rwanda>.

Vol. 7, pp. 146-174. ISSN: 1712-2988.

Rwanda's 1994 genocide where the country's majority Hutu population killed approximately 800,000 Tutsi and moderate Hutu.[2] Ingabire has called for prosecuting Tutsi for war crimes and crimes against humanity committed against Hutu during the 1994 conflict and for commemorating Hutu victims.[3] In April 2010, she was arrested on charges of denying the genocide, spreading genocide ideology, divisionism, and collaborating with Rwandan rebels based in the eastern Democratic Republic of Congo (DRC).[4]

Peter Erlinder, an American lawyer and law professor, traveled to Rwanda to assist in Ingabire's defense.[5] After Erlinder arrived, he was also arrested on charges of denying the genocide.[6] Ingabire and Erlinder both adamantly deny the charges against them. Ingabire has consistently maintained that advocating for recognizing and prosecuting crimes against humanity that Tutsi committed against Hutu during the genocide does not constitute a denial that the genocide happened.[7] The government disagrees and finds her talk of Tutsi massacres to be both a violation of Rwandan law and dangerous revisionism that could reignite conflict.[8]

The legal underpinning for the charges against Ingabire and Erlinder originated in 2002, when Rwanda passed a broadly worded law criminalizing "sectarianism."[9] The government later began to charge individuals with crimes associated with "genocide ideology," defined in a 2008 law as dehumanizing a person or group by such vague actions as

---

[2] *Ibid*.
[3] "Rwanda Urged to Ensure Opposition Leader Receives Fair Trial" *Amnesty International* (28 April 2010), online: Amnesty International <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28>.
[4] Scott Baldauf & Max Delany, "Rwandan Opposition Leader Ingabire Released on Bail" *Christian Science Monitor* (22 April 2010), online: Christian Science Monitor <http://www.csmonitor.com/World/Africa/2010/0422/Rwandan-opposition-leader-Ingabire-released-on-bail>; "Rwanda Urged to Ensure Opposition Leader Receives Fair Trial" (28 April 2010), online: Amnesty International <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28> (stating that "Ingabire, was charged with 'genocide ideology' and 'minimising the genocide', 'divisionism' and 'collaboration with a terrorist group', the Democratic Forces for the Liberation of Rwanda (FDLR)").
[5] The Associated Press, "Rwanda Charges American over Articles" *The New York Times* (6 June 2010), online: The New York Times <http://www.nytimes.com/2010/06/06/world/africa/06rwanda.html?scp=9&sq=Erlinder&st=cse>.
[6] *Ibid*; Hereward Holland, "Rwanda Arrests U.S. Lawyer for Genocide Denial" *Reuters* (28 May 2010), online: Reuters <http://www.reuters.com/article/idUSTRE64R4AI20100528> (quoting a police spokesman saying "He was arrested this morning. He said that there was no genocide in Rwanda, that no Tutsis were killed by Hutus."); see also Peter Erlinder, "Rwanda: No Conspiracy, No Genocide Planning . . . No Genocide?" *Jurist* (24 December 2008) ("If there was no conspiracy and no planning to kill ethnic (i.e., Tutsi) civilians, can the tragedy that engulfed Rwanda properly be called 'a genocide' at all? Or, was it closer to a case of civilians being caught up in war-time violence, like the Eastern Front in WWII, rather than the planned behind-the-lines killings in Nazi death camps? The ICTR judgment found the former.")
[7] Baldauf & Delany, *supra* note 4; Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda," *supra* note 1.
[8] Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda," *ibid*.
[9] Amnesty International, *Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (London: Amnesty International, 2010), online: Amnesty International <http://www.amnesty.org/en/library/asset/AFR47/005/2010/en/ea05dff5-40ea-4ed5-8e55-9f8463878c5c/afr470052010en.pdf > at 15-16.

"propounding wickedness," "laughing at one's misfortunes," and "stirring up ill feelings."[10] Ingabire and Erlinder's cases serve as examples of the Rwandan government using these laws to crackdown on opposition voices.

Every nation, in crafting and interpreting its speech laws, must balance the tension between allowing citizens to express themselves and deciding when that expression crosses the line into dangerous threats to others or to the country as a whole. The stakes for getting that balance right, however, are exponentially higher in post-conflict nations such as Rwanda. Rwanda may have erred in overzealously prosecuting Ingabire, Erlinder, and others like them, but the government has a valid concern that failing to identify and act on a legitimate threat has the potential to rekindle a conflict that has already taken hundreds of thousands of lives. So should a country have greater latitude to restrict speech in the aftermath of genocide? Which considerations should it take into account in deciding whether and how to limit speech? How can a nation struggling to establish the rule of law provide effective checks on the potential misuse of speech restrictions?

This article examines these questions by comparing how legal regimes with a broad range of experiences have answered speech questions for themselves, and how their solutions may or may not work for Rwanda. Part I will discuss the 1994 Rwandan genocide, the role that hate speech played in the rise of violence, and the state of the country post-genocide. Part II will provide a comparative analysis of approaches to hate speech in the United States, Germany, Israel, and the European Union (EU) as starting points for a broader discussion on post-conflict speech restrictions. Finally, Part III will expand on elements to consider in crafting post-conflict speech restrictions, explain how different legal regimes have addressed these elements, and suggest ways in which Rwanda could draw on other countries' examples to strike an effective, workable balance between preserving national stability and protecting its citizens' right to free speech.

II. Rwanda, Genocide, and Speech

1. A Brief History of the Rwandan Genocide

On 6 April 1994, the plane of Juvénal Habyarimana, the president of Rwanda, was shot down.[11] President Habyarimana and several other important figures died in the crash.[12] The incident triggered a wave of violence resulting in the death of more than 800,000 people in a little over three months, with most of the victims from the minority Tutsi population.[13]

---

[10] *Ibid* at 13-14.

[11] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999) at 181-82; Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (New York: Carroll & Graf Publishers, 2004) at 220.

[12] Des Forges, *supra* note 11 at 181-82 (noting that Cyprien Ntaryamira, the President of Burundi, and General Nsabimana, the Chief of Staff of the Rwandan army also died in the crash).

[13] *Ibid* at 15. For a detailed analysis of the genocide, see Dallaire, *supra* note 11; Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (New York: Picador, 1998).

A brief discussion of the history leading up to the conflict provides a useful context to understand the current tensions in the country and the rationale used to justify the *Genocide Ideology Law*.

The ethnic categorization and subsequent hostility between the Hutu and Tutsi developed over the course of the 20th century and significantly intensified when Belgium became the colonial power in the 1920s and 1930s.[14] The Belgians cemented an already growing separation between the two ethnic groups by decreeing that only Tutsi could be officials, giving them increased power over the Hutu.[15] The Belgians also registered the entire population and issued ethnic identity cards which all adult Rwandans were required to carry.[16] Domination by the minority Tutsi population, with the support of Belgium, continued until the end of the colonial era in the 1950s. The departure of the Belgians led to the ascendency of the Hutu in the 1960 elections, which were followed by the often-violent expulsion of many Tutsi from regions that had previously been predominately Hutu.[17] Many of the Tutsi fled and became refugees on the margins of neighboring countries.[18]

A generation later, Tutsi who grew up as refugees formed the Rwandan Patriotic Front (RPF) with the goal of overthrowing President Habyarimana and establishing a new government.[19] In 1990, the RPF crossed the border and attacked Rwanda.[20] The RPF attack was followed by years of sporadic fighting between the two sides, with numerous cease-fire agreements signed and broken.[21] Ethnic tensions continued to run very high in the country and racist views were being encouraged by both radio and print media.[22] In 1994, as attempts to implement a peace agreement slowly unwound, the President's death set off a wave of violence.[23] The Hutu targeted and killed approximately 800,000 Tutsi and moderate Hutu in what the International

---

[14] See Des Forges, *supra* note 11 at 32-35 (prior to the Belgian colonization there was some fluidity between the Hutu and Tutsi groups, which had generally split along occupational lines– the Tutsi were pastoralists and the Hutu cultivated the land–but the categories were not completely fixed).
[15] *Ibid* at 35.
[16] *Ibid* at 36-38 (after the registration, approximately 15% of the population identified as Tutsi, 84% as Hutu, and 1% as Twa, a distinct ethnic group).
[17] *Ibid* at 38-40.
[18] More than 300,000 Tutsi fled abroad: *ibid* at 39-40 citing Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995) at 62. By the late 1980s, the population had grown to approximately 600,000: *ibid* at 48 citing André Guichaoua, *Vers Deux Générations de Réfugiés Rwandais?* in André Guichaoua, ed, *Les Crises Politiques au Burundi et au Rwanda, 1993-1994: Analyses, Faites et Documents* (Lille: Université des Sciences et Technologies de Lille, 1995) at 343. Those Tutsi who ended up in Tanzania were the only refugees who were encouraged to integrate into the local population: *ibid* at 48.
[19] Des Forges, *ibid* at 48.
[20] *Ibid* at 49. Many of the Tutsi in Uganda were part of Yoweri Museveni's National Resistance Army (NRA), which put him in power in Uganda in 1986, fueling much of the ethnic tension that led to the creation of the Lord's Resistance Army. Paul Kagame was the deputy head of military intelligence for the NRA: *ibid* at 48.
[21] See e.g. Des Forges, *supra* note 11 at 106, 109, 123, 180; see also Dallaire, *supra* note 11 at 96, 100-10.
[22] See e.g. Des Forges, *supra* note 11 at 68-76.
[23] See e.g. Dallaire, *supra* note 11 at 212, 221-62.

Criminal Tribunal for Rwanda (ICTR) later found to be "a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population"—meeting the definition of genocide.[24] By the end of the conflict, the RPF had taken full control of the country and they have continued to dominate Rwandan politics since.[25] The RPF drove approximately two million Hutu refugees, including many of those who planned and committed the genocide, into neighboring countries.[26] Several thousand still remain in what is now the eastern part of the DRC, acting as a destabilizing force in the region.[27] During the violence, many international humanitarian law violations were committed by both sides.[28]

2. The International Criminal Tribunal for Rwanda and the Media Case

Reports by the UN Special Rapporteur for Rwanda and a Commission of Experts established by the UN Security Council concluded that genocide occurred in Rwanda.[29] These reports led the Security Council to establish the ICTR in November of 1994.[30] The ICTR's mandate 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."[31]

The Tribunal is located in Arusha, Tanzania, and has three Trial Chambers where cases are heard by three-judge panels.[32] The first trial began in January 1997 and the tribunal has heard a number of notable cases.[33] In the

---

[24] *Prosecutor v Karemera et al*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (16 June 2006) at para 35 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case%5CEnglish%5CKaremera%5Ctrail%5C160606.pdf>.

[25] Dallaire, *supra* note 11 at 474-76 (commenting on the RPF victory), *infra* Section II (4).

[26] Dallaire, *supra* note 11 at 465, 488, 493-94, 518; Human Rights Watch, *Renewed Crisis in North Kivu* (2007) at 14, online: Human Rights Watch <http://hrw.org/reports/2007/drc1007/drc1007webwcover.pdf>.

[27] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 14-15.

[28] Des Forges, *supra* note 11 at 13-14, 301-302, 701-735; See e.g. Dallaire, *supra* note 11 at 469.

[29] *Report of the Special Rapporteur on the Situation of Human Rights in Rwanda*, UN GAOR, UN Doc S/1994/1157, A/49/508 (13 October 1994). *Letter dated 94/10/01 from the Secretary-General addressed to the President of the Security Council [Preliminary Report of Independent Commission of Experts]*, UN Doc S/1994/1125 (4 October 1994).

[30] *Security Council Resolution 955 (1994) [on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal]*, SC Res 955, UN SCOR, 49th Sess, 3453rd Mtg UN Doc S/Res/955 (1994) *[UNSC Resolution 955]*; Des Forges, *supra* note 11 at 737-78.

[31] *UNSC Resolution 955 – Annex: Statute of the International Tribunal for Rwanda*, at art 1.

[32] *Ibid* at art 11 (Composition of the Chambers*); Security Council resolution 1512 (2003) [on the amendment of articles 11 and 12 quarter of the Statute of the International Criminal Tribunal for Rwanda]*, SC Res 1512, UN SCOR, 58th Sess, 4849th Mtg, UN Doc S/RES/1512 (2003) (amending art 11).

[33] Erik Møse, "Main Achievements of the ICTR" (2005) 3 Int'l Crim Just 920 at 920 (containing a detailed history of the accomplishments of the Tribunal divided into its separate mandates and describing some of the difficulties in establishing the Tribunal). The Court's mandate has been extended five times as of 2010: see *Security Council resolution 1932 (2010) [on extension of the terms of office of permanent and ad litem judges to the International Criminal Tribunal for Rwanda (ICTR) and on amending article 12 of the Statute of the International Tribunal]*, SC Res 1932, UN SCOR, 64th Sess,

case of Jean-Paul Akayesu, the tribunal was the first to interpret the definition of genocide and obtained the first conviction since the adoption of the Genocide Convention in 1948.[34] The Akayesu case was also the first time rape was found to be an element of the crime of genocide.[35] With his guilty plea, Prime Minister Jean Kambanda also became the first head of state to be convicted of genocide and the first accused to acknowledge his or her guilt for acts of genocide.[36]

On 28 November 2007, the ICTR Appeals Chamber released its opinion in the appeal of three leading members of the Rwandan media in another well-known case, unsurprisingly nicknamed the Media Case. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze were convicted of various crimes including direct and public incitement to commit genocide and persecution.[37]

Ferdinand Nahimana and Jean-Bosco Barayagwiza established a radio station called *Radio télévision libre des mille collines* (RTLM), that started broadcasting in July 1993 and became very popular.[38] Nahimana and

---

6349th Mtg, UN Doc S/RES/1932 (2010); *Security Council resolution 1955 (2010) [on authorization of the judges to complete cases notwithstanding the expiry of their term of office at the International Criminal Tribunal for Rwanda (ICTR)]*, SC Res 1955, UN SCOR, 66th Sess, 6447th Mtg, UN Doc S/RES/1955 (2010). On 22 December 2010, the Security Council also set up the International Residual Mechanism for Criminal Tribunals to try fugitives who are captured after the current tribunals have completed their work and to handle any appellate work not completed when the Mechanism goes into effect: *Security Council resolution 1966 (2010) [on establishment of the International Residual Mechanism for Criminal Tribunals with two branches and the adoption of the Statute of the Mechanism]*, SC Res 1966, UN SCOR, 66th Sess, 6463rd Mtg, UN Doc S/RES/1966 (2010). As of November 2010, the Tribunal completed the cases of sixty accused in the first instance, including six acquittals: *Letter dated 2010/11/05 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council [Report on the Completion Strategy of the International Criminal Tribunal for Rwanda]*, UN Doc S/2010/574 (5 November 2010), at Annex I(a) [*ICTR Completion Strategy Report*]. Fifteen other accused are awaiting judgments in four cases and five are still involved in ongoing trials: *ICTR Completion Strategy Report*, at Annex I(b)-(d). An additional two accused are waiting for trial and ten fugitives remain at large: *ICTR Completion Strategy Report*, at Annex II-IV.

[34] *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

[35] *Ibid* at 7.7.

[36] *Prosecutor v Kambanda*, ICTR-97-23-S, Trial Judgment and Sentence (4 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>. Kambanda was sentenced to life in prison. Notably, Slobodan Milosevic of the former Yugoslavia and Charles Taylor of Liberia were the first sitting heads of state charged with war crimes. President Al Bashir of Sudan was the first sitting head of state to be charged with genocide: see *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>. Ratko Mladić and Radovan Karadžić, wartime leaders of the Bosnian Serbs, have also been charged with genocide by the International Criminal Tribunal for the former Yugoslavia.

[37] *Nahimana, Barayagwiza, Ngeze v Prosecutor*, ICTR-99-52-A, Appeal Judgment (28 November 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf> [*Media Case Appeal*].

[38] *Prosecutor v Nahimana, Barayagwiza, Ngeze*, ICTR-99-52-T, Trial Judgment and Sentence (3 December 2003) at paras 5-6, 342 (International Criminal Tribunal for Rwanda, Trial Chamber),

Barayagwiza supervised RTLM's activities, controlled its finances, and were considered the top two individuals in charge.[39] The ICTR Appeals Chamber found that RTLM's broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide.[40] The radio station broadcast statements about "exterminating the *Inkotanyi* [enemy][41] so as 'to wipe them from human memory', and exterminating the Tutsi 'from the surface of the earth . . . to make them disappear for good.'"[42] The Appeals Chamber also found that Nahimana had effective control over RTLM's journalists and employees both before and after 6 April and therefore upheld his conviction under command responsibility for direct and public incitement to genocide.[43]

Hassan Ngeze founded the newspaper *Kangura* in 1990 and was its owner and editor-in-chief.[44] The tribunal found that Ngeze "controlled the publication and was responsible for its content" during 1994 and convicted him of direct and public incitement to commit genocide based on several articles in the paper, including two that he had written.[45] One of the inflammatory articles, signed by Ngeze, stated,

> Let's hope the *Inyenzi* [cockroaches][46] will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice.[47]

Ngeze was also convicted of aiding and abetting the commission of genocide for his involvement in setting up and supervising roadblocks in the province of Gisenyi.[48]

---

online: ICTR <http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf> [*Media Case Trial*]. Barayagwiza was also convicted of genocide because of his activities with the Coalition pour la défense de la République party. *Media Case Appeal*, *supra* note 37 at p 346-47.

[39] *Media Case Appeal*, *supra* note 37 at paras 359, 627-30, 794. The Appeals Chamber, however, found that Barayagwiza did not have superior responsibility at RTLM after April 6, 1994, and that only broadcasts after that date instigated acts of genocide: *ibid* at para 513. Therefore, the chamber overturned Barayagwiza's convictions based on his involvement with RTLM: *ibid* at para 636.

[40] *Ibid* at paras 514-17.

[41] *Ibid* at para 53 ("The Appeals Chamber observes that the assimilation between *Inkotanyi*–recognized explicitly as the 'enemy' in the interview–and the Tutsi ethnic group was frequent in the pro-Hutu media and, more particularly, in RTLM broadcasts.").

[42] *Ibid* at para 756 quoting the *Media Case Trial*, at para 483.

[43] *Ibid* at paras 822, 834.

[44] *Ibid* at paras 884-86.

[45] *Ibid* at para 885 (quoting the Trial Chamber). The Appeals Chamber discusses the specific articles in paragraphs 771-75. *Ibid.* The Appeals Chamber also overturned the conviction of Ngeze for instigating genocide in connection with articles in *Kangura* due to insufficient evidence that the publication "substantially contributed to the commission of acts of genocide . . . ." *Ibid* at para 519.

[46] *Media Case Trial*, *supra* note 38 at para 90 (*Inyenzi*, meaning cockroach); *Media Case Appeal*, *supra* note 37 at para 412 ("*Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority." quoting *Media Case Trial* para 837); see also, Des Forges, *supra* note 11 at 73-74.

[47] *Media Case Appeal*, *supra* note 37 at para 771.

[48] *Media Case Appeal*, *supra* note 37 at paras 670-72.

3. *Mere Hate Speech? Nahimana's Conviction for Persecution*

The convictions for direct and public incitement to commit genocide for the broadcasts from RTLM and articles in *Kangura* were not particularly contentious decisions as they were clearly linked to statements rising to the appropriate level of incitement.[49] Nahimana's conviction for persecution, however, elicited a sharp dissent from Judge Theodor Meron, arguing that the conviction crossed the line by criminalizing "mere hate speech" and failing to directly link Nahimana to widespread and systematic attacks—the unique element needed to sustain a persecution conviction.[50]

Persecution, under the jurisprudence of the ICTR, consists of "an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[51] The Appeals Chamber found that the cumulative effect of speeches made after April 6 on RTLM, in the context of "a massive campaign of persecution directed at the Tutsi population of Rwanda . . . also characterized by acts of violence," were of sufficient gravity to support the conviction for persecution.[52]

In his dissent, Judge Meron first argued that mere hate speech is not a criminal offense under customary international law or the statute of the Tribunal. Looking at the applicable treaties, he noted that article 20 of the *International Convention on Civil and Political Rights* and article 4 of the *Convention on the Elimination of all Forms of Racial Discrimination* both require states to prohibit certain forms of hate speech.[53] He then looked at the various reservations with respect to these provisions from countries such as France and the United States and found that the "number and extent of the reservations reveal that profound disagreement persists in the international community . . ." and "[s]ince a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech."[54] He went on to look at the drafting history of the *Genocide Convention*, noting that a draft article on hate speech was not included in the final convention[55] and found nothing supporting the idea in the jurisprudence of the ICTR or the International Criminal Tribunal for the Former Yugoslavia.[56]

Judge Meron's main concern was that "criminalizing speech that falls

---

[49] *Supra* Section II (2).
[50] *Media Case Appeal*, *supra* note 37 at pp 375-76, 379-80 (Judge Meron dissenting).
[51] *Media Case Appeal*, at para 985 citing *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Appeal Judgment, (17 September 2003) at para. 185 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf>; and several other cases.
[52] *Media Case Appeal, ibid* at para 988.
[53] *Media Case Appeal*, *supra* note 37 at p 376 (Judge Meron dissenting).
[54] *Ibid.*
[55] *Ibid* at p 377.
[56] *Ibid* at p 377-78.

short of true threats or incitement chills legitimate political discourse . . . ."[57] This is especially a problem in emerging democracies where the "threat of criminal prosecution for legitimate dissent is disturbingly common . . . ."[58] The Open Society Justice Initiative filed an amicus brief in the case and noted that repressive regimes, such as Ethiopia, the DRC, and Chad, have also explicitly used the example of RTLM to clamp down on legitimate criticism of the government.[59]

In the case of Nahimana, the only connection drawn by the Appeals Chamber between Nahimana's actions and the widespread and systematic attacks was the hate speech.[60] The majority in the Appeals Chamber argued that the underlying acts of persecution did not have to amount to crimes in international law, and therefore, did not address the argument that "mere hate speech" is not a crime.[61] Judge Meron's issue with this approach was that "it fails to appreciate that speech is unique—expression which is not criminalized is protected," and "[t]he Appeals Chamber, even without deciding whether hate speech alone can justify a conviction, nevertheless permits protected speech to serve as a basis for a conviction for persecution."[62]

4. Rwanda After the Genocide

At the end of the fighting in 1994, over a million Hutu refugees from Rwanda crossed the border into eastern DRC.[63] Many of the Hutu responsible for the genocide were among the refugees and they began to re-group and re-arm in the eastern DRC, sparking three cross-border attacks in the subsequent decade by the new Rwandan government.[64] Over the last decade, depending on the political climate, Congolese governments have fluctuated between attempting to eliminate the Hutu militias to fighting alongside or supporting them.[65] The most recent military action started in

---

[57] *Ibid* at p 379.
[58] *Ibid* at p 378 citing *Brief for Open Society Justice Initiative as Amicus Curiae on Nahimana, et al v Prosecutor*, at 5-8.
[59] *Brief for Open Society Justice Initiative as Amicus Curiae on Nahimana, et al v Prosecutor*, at 5.
[60] *Media Case Appeal*, *supra* note 37 at paras 988, 995.
[61] *Ibid* at para 985.
[62] *Media Case Appeal*, *supra* note 37 at p 380 (Judge Meron dissenting).
[63] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 14 (the country was known as Zaire at the time).
[64] *Ibid.* The third military operation started in January 2009: Stephanie McCrummen, "Rwandan Troops Enter Congo to Find Hutu Militia Leaders" *The Washington Post* (21 January 2009), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/20/AR2009012001045.html>.
[65] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 15; "Rwanda and the Great Lakes Region: A Pioneer with a Mountain to Climb" *The Economist* (25 September 2008), online: The Economist <http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=12304755>; "UN 'Accuses Rwanda and DR Congo'" *BBC* (11 December 2008), online: British Broadcasting Corporation <http://news.bbc.co.uk/2/hi/africa/7776309.stm>; *Letter dated 2008/12/10 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council,* UN Doc S/2008/773 (12 December 2008) at Section VI (finding violations of the arms embargo by both Rwanda and the DRC for supplying

January 2009, with the Rwandan and Congolese militaries attempting to eradicate both Hutu and Tutsi militia operating in the area.[66] However, the militias continued to commit atrocities even after the governments declared success and Rwandan troops withdrew.[67]

As recently as 1998, the government of Rwanda also did not exercise full control over the internal territory of the country.[68] Large areas in the west and north were still controlled by Hutu rebels.[69] Many genocide survivors, who could be witnesses against the killers, were targeted and murdered and thousands of Hutu were sprung from jail.[70] Over time, the Rwandan army has regained control over its internal affairs and the militias in the DRC no longer pose an existential threat to the current government.[71]

The Rwandan judiciary was also devastated by the genocide. The number of judges fell from around 600 before April 1994 to only 237 in August of that year.[72] There were also similar losses in the ranks of prosecutors, judicial officers, police officers, clerks, and lawyers.[73] While the ministry of justice began recruiting hundreds of new employees it was only able to provide them with minimal training.[74] The war also seriously damaged the judicial ministry building and other court buildings around the country were stripped of furniture and electrical fixtures.[75] It took significant amounts of time to begin getting the judiciary up and running again.[76]

The RPF has remained in power since the end of the genocide.[77] Paul Kagame was the leader of the RPF forces during the civil war between 1990 and 1994, and he was reelected to a second seven-year term as president in 2010 with 93 per cent of the vote.[78] Tension still runs high in the country

---

arms to various militias).

[66] McCrummen, *supra* note 64. U.S. State Department, Report, *2010 Country Reports on Human Rights Practices (Rwanda),* (8 April 2011), online: State Department <http://www.state.gov/documents/organization/160139.pdf>.

[67] "35,000 Flee Renewed Clashes in East DR Congo" *Radio Netherlands Worldwide* (25 July 2009), online: Radio Netherlands Worldwide <http://www.rnw.nl/int-justice/article/35000-flee-renewed-clashes-east-drcongo>; Stephanie McCrummen, "Congo, Rwanda Call Joint Offensive a Success" *The Washington Post* (28 February 2009), online: The Washington Post < http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022702873.html?wprss=rss_world>.

[68] Mark A Drumbl, "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials" (1998) 20 Colum Hum Rts L Rev at 545-8.

[69] *Ibid.*

[70] *Ibid*; Philip Gourevitch, "The Life After, Fifteen Years After the Genocide in Rwanda, the Reconciliation Defies Expectations" *The New Yorker* (4 May 2009) at 39.

[71] *Ibid*; "The Genocide in Rwanda: The Difficulty of Trying to Stop it from Ever Happening Again" *The Economist* (8 April 2009), online: <http://www.economist.com/node/13447279>.

[72] Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda,* (New York: Human Rights Watch, 2008), online: Human Rights Watch <http://www.hrw.org/en/node/62097/section/1> at 12.

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

[77] Central Intelligence Agency, *The CIA World Factbook* (Washington, DC: Central Intelligence Agency, 2008).

[78] *Ibid* (noting that the RPF political party received 78.8% of the vote in the legislative election).

today, as victims and perpetrators of the genocide have to live side-by-side in communities.[79] The community-led *gacaca* courts have, according to official statistics, adjudicated over a million cases related to the genocide, but those who confessed received short prison terms and many perpetrators have already served their time.[80] Many more have been returning from exile in the eastern DRC under an amnesty program.[81] Some veil of normality exists, but only because there has to be.[82] People are still afraid of the perpetrators who live in their communities and perpetrators still remember what it felt like to kill and, at times, seem to express little remorse. However, there is little alternative: Hutu and Tutsi have to coexist.[83]

5. Speech in Rwanda: Genocide Ideology and Divisionism

Rwanda's government has actively limited speech concerning the genocide and ethnic tensions.[84] It has been especially sensitive to accusations that it has not done enough to prosecute war crimes committed by the RPF during the genocide.[85] In addition to the 2002 law criminalizing "sectarianism," Rwanda's 2003 Constitution included a commitment to "fight[ ] the ideology of genocide and all its manifestations" and to the "eradication of ethnic, regional and other divisions and promotion of national unity."[86] Starting around 2007, the government began prosecuting people for the crimes connected to "genocide ideology."[87] It was not until the

---

[79] Gourevitch, *supra* note 70 at 36.
[80] *Ibid* at 39.
[81] Stephanie McCrummen, "For Rwandans, Fragile Acts of Faith: Returning From Years in Congo's Bush, Hutu Rebels Seek Their Place in a Homeland Struggling to Forge a New Unity" *The Washington Post* (24 February 2008), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/23/AR2009022302990.html>.
[82] Gourevitch, *supra* note 70 at 42 ("It's our obligation, and it's our only way to survive, and I do it every day, and I still can't comprehend it."); 43 ("Well, President, I manage because you ask us to manage.")
[83] *Ibid* at 42 ("[The Tutsi] expect it. We felled them like cows . . . 'Yes,' he said, 'For me, it became a pleasure to kill'"). Some stated: "[i]f ever the occasion arose, if there was an opportunity, they would kill again. . . . They only asked pardon because of *gacaca*. Why didn't they ask forgiveness before *gacaca*? It's because of the President that they don't kill. Forgiveness came from a Presidential order." *Ibid* at 41.
[84] See Human Rights Watch, *Law and Reality*, *supra* note 72 at 34-43.
[85] U.S. State Department, Report, *2007 Country Reports on Human Rights Practices (Rwanda),* (11 March 2008), online: State Department <http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm> ("[d]uring the year the government continued to claim that calls by human rights groups or opposition figures for investigations of alleged RPF war crimes constituted attempts to equate the genocide with abuses committed by RPF soldiers who stopped the genocide"). One of the international community's main criticisms of the ICTR and the Rwandan government has been the lack of serious prosecutions for war crimes committed by the RPF during the genocide. Kenneth Roth, "Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes" (26 May 2009), online: Human Rights Watch <http://www.hrw.org/en/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c>; see also Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee – Rwanda, *Report of the UN Human Rights Committee*, UN HRCOR, 95th Sess, UN Doc CCPR/C/RWA/CO/3 (7 May 2009) at para 13.
[86] *Constitution of the Republic Of Rwanda*, OG No Special Of 4 June 2003, as amended by OG No special of 13 August 2008 at art 9.
[87] Amnesty International, *Safer To Stay Silent*, *supra* note 9 at 17 (citing a government report that

following year that the government passed its law defining "genocide ideology" and provided marginal clarification on the charges.[88]

In its 2007 Country Report on Human Rights Practices in Rwanda, the U.S. State Department stated, "[w]hile the press regularly published articles critical of senior government officials and government policy, there were increased instances in which the government harassed, convicted, fined, and intimidated independent journalists who expressed views that were deemed critical of the government on sensitive topics . . . ."[89] The State Department also documented three cases where the government prosecuted or expelled members of the press for articles that were found in violation of the divisionism statute, the press law, or some other article of the criminal code.[90] In particular, Agnes Nkusi-Uwimana was charged with divisionism and minimizing the genocide for publishing an article equating revenge killings by the victorious Rwanda Patriotic Army at the end of the 1994 genocide with the genocide itself and being critical of senior members of the government.[91] Nkusi-Uwimana eventually pled guilty to divisionism, among other charges. According to the State Department, "[t]he case was widely interpreted as demonstrating that, while the government tolerated wide-ranging criticism of its policies, explicit ethnic attacks and genocide denial or minimizing of the genocide would be prosecuted."[92]

At the time of the *Media Case*, the Open Justice Society Initiative stated that the initial law was used to intimidate independent journalists, leading to several fleeing the country fearing for their safety.[93] The Human Rights Committee has also noted that journalists critical of the government are being intimidated and that international press agencies have reportedly been threatened with losing their licenses because they employ certain journalists.[94]

The 2010 election was also marred by restrictions on speech and accusations of vote rigging, harassment, and intimidation.[95] The three political parties that were openly critical of the RPF were not allowed to participate.[96] Erlinder and Ingabire were arrested in the lead up to this election. And, according to Human Rights Watch, "[m]ost independent

---

listed 1,034 trials as connected to "genocide ideology").

[88] *Ibid* at 13; see also Human Rights Watch, "Rwanda: Country Summary" in Human Rights Watch, *World Report 2009: Events of 2008*, (New York: Human Rights Watch, 2009).

[89] U.S. State Department, *supra* note 85.

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid*

[93] *Brief for Open Society Justice*, *supra* note 59 at 8.

[94] Concluding Observations – Rwanda, *supra* note 85 at para 20.

[95] "Rwanda: Silencing Dissent Ahead of Elections," *Human Rights Watch* (2 August 2010), online: Human Rights Watch <http://www.hrw.org/en/news/2010/08/02/rwanda-attacks-freedom-expression-freedom-association-and-freedom-assembly-run-presi>; Jeffrey Gettleman and Josh Kron, "Doubts Rise in Rwanda as Election is Held," *The New York Times* (8 August 2010) A4, online: The New York Times <http://www.nytimes.com/2010/08/09/world/africa/09rwanda.html?src=un&feedurl=http%3A%2F%2Fjson8.nytimes.com%2Fpages%2Fworld%2Fafrica%2Findex.jsonp>.

[96] "Rwanda: Silencing Dissent," *ibid.*

journalists [were] silenced, and the two main independent newspapers suspended."[97]

Rwanda has had difficulty differentiating between speech that constitutes legitimate dissent and speech that rises to a level of incitement that could undermine the nation's stability. Drawing the lines on what speech should be criminalized, however, is not easy—as the ICTR's divided opinions in the *Media Case* illustrate. Moreover, Rwanda is far from alone in struggling with how to handle issues of hatred, violence, and speech.

III. Approaches to Hate Speech

Like Rwanda, nations the world over continue to work to strike a balance between citizens' expression and adequately containing speech that calls for violence.[98] But different countries have given these competing concerns different weights in striking their balances, leading to a range of legal regimes governing hate speech. Each nation's unique experiences inform its priorities and the risks it is willing to take in allowing its citizens to speak. And experience with hate speech and genocide understandably exerts major influence on speech laws going forward.

Germany committed a genocide across Europe during the Holocaust of the 1930s and 1940s. Its speech laws reflect active efforts to rein in words and attitudes that Germany's own government once broadcast to the point of saturation. Germany occupies a rare position as a developed state with firsthand knowledge of the power words have to fuel genocide. Its speech laws can be seen, at least in part, as reactions to that power.

In the aftermath of the Holocaust, Israel, and later the European Union, each developed speech laws fueled by those who survived it. Their experiences are distinct from each other in critically important ways. Israel is, in many ways, a nation born of the Holocaust, with a population that included over 400,000 Holocaust survivors by 1951, three years after declaring statehood.[99] Europe includes countries and individuals who orchestrated, complied with, resisted, and were victims of that genocide. But each has emerged with an understanding of the atrocities committed, and

---

[97] *Ibid.*

[98] For example, the United Nations' *Universal Declaration of Human Rights* guarantees the right to "freedom of opinion and expression": *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) at art 19. The *Declaration* also, however, contains numerous provisions protecting a person's right to dignity, security, and a life free from discrimination: see e.g. arts 1, 2, 3, 5, 12. These provisions create tension and raise questions of hierarchy and interpretation when one person's expression could be seen as infringing on another's dignity or equality: see Elizabeth F Defeis, "Freedom of Speech and International Norms" (1992) 29 Stan J Int'l L 57 at 76-78.

[99] See Matthew J Gibney and Randall Hansen, eds, *Immigration and Asylum: from 1900 to the Present* (Santa Barbara: ABC-Clio Inc, 2005) at 327 (placing the number of Holocaust survivors who illegally immigrated to Palestine between 1939 and 1945 at 80,000); Jonathan Kaplan, *The Mass Migration of the 1950s Jewish Agency for Israel*, online: Jewish Agency for Israel <http://www.jafi.org.il/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Society/4%29+The+Mass+Migration+of+the+1950s.htm> (providing the number of immigrants to Israel between 1948 and 1951 by country).

their speech laws have been actively informed by their respective experiences with genocide.

Though it has its own prejudices and history of discriminatory actions, the United States has no firsthand experience of genocide within its borders or population. Its attitude toward hate speech is based largely on guessing at how to avoid harm in the future, rather than reacting to known catalysts from the past. The speech laws developed absent genocidal experiences represent an extreme on the spectrum of permitted violent speech, and serve as a touchstone for evaluating the extent to which nations risk violence in the name of protecting free expression.

The summary that follows provides a snapshot of hate speech laws and freedom of expression in these nations and regions with markedly different experiences of genocide. Looking at them carefully, each of these regimes can serve as a lens through which to view and evaluate Rwanda's genocide ideology legislation.

1. Germany

In Germany, the *Grundgesetz*, or *Basic Law*, serves as the nation's constitution.[100] Among its guarantees is the freedom "freely to express and disseminate . . . opinions in speech, writing, and pictures and to inform [one]self without hindrance . . . ."[101] But under the *Basic Law*, this freedom can be limited by "the provisions of general laws . . . and . . . the right to personal dignity."[102] Personal dignity is particularly important under the *Basic Law*. Article 1, the Law's first provision, provides that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[103]

In accordance with its Basic Law, Germany has enacted criminal provisions to punish hate speech. Section 130 of the *Strafgesetzbuch* (StGB), or *Penal Code*, criminalizes "incit[ing] hatred against segments of the population or call[ing] for violent or arbitrary measures against them"[104] or, more generally, "assault[ing] the human dignity of others by insulting, maliciously

---

[100] The Basic Law was promulgated in the aftermath of World War II, intended as a temporary measure to govern the Western Sector until a constitution was drafted for a newly unified Germany. Ronald J Krotoszynski, Jr, "A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany" (2004) 78 Tul L Rev 1549 at 1553. Upon Germany's reunification in 1990, the Basic Law came to serve as the country's constitution. President Roman Herzog, *Foreword* to *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) [*Grundgesetz*].

[101] *Grundgesetz, ibid* art 5(1).

[102] *Ibid* at art 5(2).

[103] *Ibid* at art 1(2)-(3); see also Sionaidh Douglas-Scott, "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" (1999) 7 Wm & Mary Bill Rts J 305 at 321 (discussing the preeminence of human dignity under German law).

[104] *Strafgesetzbuch* [Penal Code] 13 November 1998, *Bundesgesetzblatt* 3322, as amended, at s 130(1) [*Strafgesetzbuch*].

maligning, or defaming segments of the population."[105] The *Penal Code* also includes provisions which limit hate speech forms and messages of particular salience in Germany. Basic Law sections 84 through 86a allow the government to declare certain political parties illegal, to ban their propaganda, and to prohibit symbols associated with such parties.[106] Sections 86 and 130 mention the National Socialist Party by name.[107] Under German law, denying the Holocaust is also a crime if done "publicly or in a meeting approv[ing] of, den[ying] or downplay[ing] an act committed under the rule of National Socialism . . . in a manner capable of disturbing the public peace . . . ."[108]

It is important to note that these statutes do not contain intent and violence requirements. While inciting hatred toward segments of a population is a crime,[109] so too is simply assaulting human dignity or denying the Holocaust.[110] These latter crimes do not require a finding that the speech has created harm or led to violence. Nor do they require any evidence that the speech is likely to do so. Merely speaking is enough—evincing a focus on means rather than ends.[111]

Germany's high court, the *Bundesverfassungsgericht*, or Federal Constitutional Court, has upheld these crimes based upon the primacy Germany affords personal dignity. In 1994 the court considered the case of a conference at which David Irving, a well-known Holocaust-denier, was to speak.[112] The conference organizers were ordered to take steps to ensure that the conference not include content denying Jewish persecution during the Third Reich, including providing warnings about the possibility of this content and immediately stepping in to end such discussion if it occurred.[113] In assessing whether the orders were appropriate, the court looked to the distinction between opinions, which are generally protected, and facts, the protection of which depends on their truth.[114] If a fact is untrue, said the court, it is protected only to the extent opinion is.[115] Because the court found

---

[105] *Ibid* at s 130(2).
[106] *Ibid* at ss 84-86a.
[107] *Ibid* at ss 86(4), 130(4).
[108] *Ibid* at s 130(3).
[109] *Ibid* at s 130(1).
[110] *Ibid* at ss 130(2)-(3).
[111] It is interesting to compare the German and United States approaches in how they take into account a speaker's identity and viewpoints in protecting and restricting speech. United States law focuses on content-neutrality (e.g. treating all messages and speakers similarly), while one could argue that German law affords individuals varying levels of "dignity" based on their viewpoints. Though German Penal Code section 130(1) on its face applies to speech aimed at any segment of the population, provisions in sections 130(3) and eighty-four through 86a apply only to citizens espousing specific messages—the citizen who subscribes to the Jewish faith would almost certainly have a greater right to be free from defamation than a citizen who subscribes to socialist political views. See *ibid,* at ss 84-86a, 130(1)-(4); *R.A.V. v City of Saint Paul*, 505 US 377 (1992); Krotoszynski, *supra* note 100 at 1584.
[112] *Bundesverfassungsgericht* [Federal Constitutional Court] 13 April 1994, 90 Entscheidungen des Bundesverfassungsgerichts 241.
[113] *Ibid* at 242.
[114] *Ibid* at 248-49.
[115] *Ibid* at 249.

that Holocaust was a proven fact,[116] it upheld the orders under the general principle that "the protection of the personality will, as a rule, prevail over freedom of opinion in relation to statements of opinion which are to be regarded as 'insult' . . . or abuse."[117] According to this decision, it is clear that under German *Basic Law* even the threat of speech which might insult dignity is proscribable, representing a substantial incursion on freedom of expression.

2. Israel

Similar to Germany, Israel governs and organizes itself according to a set of Basic Laws that comprise its constitution.[118] Israel's civil rights provisions stem from both these *Basic Laws*[119] and the *Declaration of the Establishment of the State of Israel*'s assertions that

> [t]he state of Israel . . . will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice[,] and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture . . . and it will be faithful to the principles of the Charter of the United Nations.[120]

Notably, however, neither the *Declaration of the Establishment of the State of Israel* nor Israel's *Basic Laws* include a right to freedom of speech or expression.[121]

This does not mean that Israel does not value or protect speech. The Israeli Supreme Court has "established freedom of expression as a

---

[116] *Ibid*. In making this determination, the court relied in part on a previous decision by the *Bundesgerichtschof* (Federal Court of Justice), which had held that

> [t]he single fact that people were singled out under the so-called Nuremberg laws and were robbed of their identity with a view to their extermination allocates to the Jews living in the Federal Republic [of Germany] a special personal relationship with their fellow citizens . . . . They are entitled, as a matter of their personal identity, to be viewed as belonging to a fatefully selected group, to which others owe a special moral responsibility which is part of their self worth. Respect for their personal identity is for each of them a guarantee against a return to such discrimination and a fundamental condition for their living in Germany.

Bundesgerichtschof [BGH] [Federal Court of Justice] Sept. 18, 1979, 75 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 160 (162) (FRG).

[117] *Ibid* at 248.

[118] The Knesset (State of Israel), Information Release, "Basic Laws - Introduction," (2003), online: Government of Israel <http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm>.

[119] *Basic Law on Human Dignity and Liberty*, 5752-1992 SH 1391 (Israel). While some scholars assert that Israel's Basic Laws do not include civil rights, the *Basic Law on Human Dignity and Liberty* does include provisions protecting liberty, property, and privacy, and disallowing searches without consent. *Compare* Zaharah R Markoe, "NOTE: Expressing Oneself Without a Constitution: The Israeli Story," (2000) 8 Cardozo J Int'l & Comp L 319 at 319, 320 *with Basic Law: Human Dignity and Liberty*; Barak Cohen, "Empowering Constitutionalism With Text From an Israeli Perspective," (2003) 18 Am U Int'l L Rev 585 at 633-36.

[120] *Declaration of the Establishment of the State of Israel* (5708-1948), Official Gazette, No. 1 (14 May 1948) (Israel).

[121] *Ibid*; Basic Law: Human Dignity and Liberty: The Knesset, 5752-1992 S.H. 1391 (Isr.).

fundamental freedom that enjoys 'supra-legal status.'"[122] Speech may be limited, according to the Court, but in determining when limitations are permissible "[t]he guiding principle ought always to be: is it probable that as a consequence of the publication a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fulfill that requirement."[123]

Israel does, however, limit discriminatory speech. Much like Germany's, Israel's *Basic Law on Human Dignity and Liberty* opens by declaring its purpose "to protect human dignity and liberty."[124] The text forbids "violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[125] These provisions, combined with the lack of a written right to free speech, can clearly be read as emphasizing the primacy of dignity over speech. So too can the explicit laws Israel has passed to deal with hate speech.

The *Israeli Penal Code* defines racism as "persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against the public or parts of the population, merely because of their color, racial affiliation[,] or national ethnic origin."[126] The Knesset has named and criminalized activities involving racism, including: public incitement to racist discrimination, violence, or hatred; public racist insults or threats; and leadership or support of activities carried out by racist groups, political parties, and movements.[127] Other discriminatory activities, including hate speech, criminal offences motivated by hatred, and publicly denying the Holocaust are also crimes.[128]

The Israeli Supreme Court has held that discriminatory speech can also constitute the crime of sedition in certain contexts. In *Kahane v State of Israel*, the Court determined that a Knesset candidate who distributed leaflets calling for the government to bomb an Arab village endangered, to a near certainty, the values of public order by inflaming hostilities and hatred between Jews and Arabs.[129] According to the court, "[w]ords are liable to inflame passions and hatred and to lead to violence, and thereby undermine the minimal level of cohesion society needs."[130] The confluence of this

---

[122] Miriam Gur-Arye, "Can Freedom of Expression Survive Social Trauma: The Israeli Experience," (2003) 13 Duke J Comp & Int'l L 155 at 158.
[123] HCJ 73/53, *"Kol Ha'Am" Co. Ltd. v. Minister of the Interior*, [1953] IsrSC 7(1) 871. Notably, the High Court of Justice refers to several United States cases in setting this standard for speech limitations.
[124] *Basic Law on Human Dignity and Liberty*, *supra* note 119 at s 1.
[125] *Ibid* at s 8.
[126] *Penal Law* (5737-1977), 32 LSI s 144A (1978) (Israel).
[127] Memorandum from Israeli Ministry of Justice to the Foreign Relations and Human Rights Department (Jan. 29, 2008), http://www.justice.gov.il/NR/rdonlyres/339B466D-E50D-4091-B5E8-F89616D8767C/9579/AnswerregardingHateCrimes.pdf.
[128] *Ibid*.
[129] CrimA (FH) 1789/98, *The State of Israel v. Kahane*, [2000] IsrDC 54(5) P.D. 145.
[130] *Ibid*; but see Gur-Arye *supra* note 122, at 189-91 (criticizing the extent of the Kahane decision and its stretching the law of sedition to cover discriminatory speech when hate speech charges were inapplicable).

decision, Israel's lack of written law guaranteeing freedom of expression, and the country's *Basic Laws* and *Penal Code* emphasizing dignity and prohibiting hate speech demonstrates Israel's devotion to social order and decorum over individual opinion.

3. The European Union

The EU has undertaken to develop shared values and legal regulation for speech among its member states. Under the EU's *Charter of Fundamental Rights*, "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . ."[131] EU member nations, however, have previously enacted laws limiting certain forms of hate speech,[132] and, notwithstanding the language in its *Charter of Fundamental Rights*, the EU has adopted legislation which requires its members to criminalize "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin."[133] The EU addresses any tension between these provisions by asserting that "[r]acism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law[.]"[134]

Article 10 of the *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (commonly known as the *European Convention on Human Rights*)[135] guarantees "the right to freedom of expression . . . includ[ing the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[136] The *Convention* allows certain limitations on expression, however, among them restrictions designed to preserve public safety, prevent disorder or crime, or protect others' reputations or rights.[137] In addition, under the *Convention*, no person, group, or State may "engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for . . . ."[138]

The European Court of Human Rights (ECHR), which hears cases

---

[131] EC, *Charter of Fundamental Rights of the European Union,* [2000] OJ C 364/01 2000/C at art 11.
[132] See John J Garman, "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision," (2008) 39 U Tol L Rev 843 at 846 (discussing EU members' hate speech laws ante-dating the EU's framework decision on racism and xenophobia); Douglas-Scott, *supra* note 103 at 317-19 (discussing approaches to hate speech legislation in several European countries).
[133] EC, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, [2008] OJ, L 328/55 at art 1(1)(a).
[134] *Ibid* at art 1(1); see also Garman, *supra* note 132 (providing an overview of European legislation concerning fundamental rights, freedom of expression, and justifications for the framework decision).
[135] See e.g. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, 213 UNTS 222, at art 10(1).
[136] *Ibid* at art 10(1).
[137] *Ibid* at art 10(2).
[138] *Ibid* at art 17.

relating to claims that the *Convention* has been violated,[139] has made a number of determinations about the extent to which member countries can limit expression. Although the ECHR has no set definition of hate speech,[140] it has considered cases dealing with traditional hate speech categories ranging from racist speech[141] to speech critical of religious and political groups[142] to speech dealing with Holocaust complicity and denial.[143] Its case law has established some basic principles and guidelines for the extent to which freedom of speech is protected in such potentially offensive cases.

According to the ECHR, political criticism generally deserves protection for its role in maintaining democracy,[144] and the ECHR takes into account context and the actual likelihood of a threat or violence when judging a speech restriction.[145] But its analysis also parallels Germany's in distinguishing between facts and opinion.[146] In *Garaudy v France*, the ECHR

---

[139] Council of Europe, *Council of Europe in Brief: How We Work?*, online: Council of Europe <http://www.coe.int/aboutCoe/index.asp?page=CommentTravaillonsNous&l=en>.
[140] See Anne Weber, *Manual on Hate Speech* (Strasbourg: Council of Europe Publishing, 2009) at 3.
[141] See e.g. *Jersild v Denmark* (1994), 298 ECHR.
[142] See e.g. *I.A. v. Turkey*, no 42571/98, [2005] VIII ECHR (noting that the Turkish government had convicted a book author because the work "contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. They argued in that connection that the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim."); *Gündüz v. Turkey*, no 59997/00, [2003] XI ECHR (ruling on the speech rights of a critic who advocated shariah law and called government institutions impious on a television program); *Erdogdu v. Turkey*, no 25723/94, [2000] VI ECHR (deciding the issue of a magazine publisher who had been charged with "disseminating propaganda, through the medium of a periodical, against the territorial integrity of the State and the indivisible unity of the Turkish nation" by publishing a piece supporting Kurdish separatists).
[143] See e.g. *Garaudy v. France*, no 65831/01 [2003] IX, ECHR (declaring inadmissible the application of a book author who petitioned the court to consider his conviction for denying crimes against humanity (i.e. the Holocaust) on freedom of expression grounds); *Lehideux and Isorni v. France* (1998), 92 ECHR (dealing with the case of two individuals involved in publishing an advertisement aiding and abetting the crimes of Marshal Philippe Pétain, convicted and sentenced to death for colluding with the Germans during World War II).
[144] See e.g. *Erdogdu*, *supra* note 142 at para 62 ("[T]here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest.").
[145] *Ibid* ("Where a publication cannot be categorised as inciting to violence, contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media." [citation omitted]); *Lehideux*, *supra* note 143 at para 55 ("[T]he events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.").
[146] *Compare Lehideux*, *ibid* at para 52 ("With regard . . . to the content of the publication, the Court notes its unilateral character. Since the text presented Philippe Pétain in an entirely favourable light and did not mention any of the offences he had been accused of, and for which he had been sentenced to death by the High Court of Justice, it could without any doubt be regarded as polemical. In that connection, however, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed" [citation omitted]); and *Garaudy*, *supra* note 143 ("Relying on numerous quotations and references, the applicant questions the reality, extent[,] and seriousness of [the Nazi regime, the Holocaust, and the Nuremberg Trials] that are not the subject of debate between historians, but on the contrary are clearly established."), with *supra* notes 112-117 and accompanying text.

turned down a Holocaust-denier's appeal claiming that French law violated his Article 10 right to expression.[147] It noted that

> [t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does . . . does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.[148]

Both the EU and the ECHR work from foundation documents asserting freedom of expression and speech. At the same time, however, both bodies are willing to curtail these freedoms when they cross a line into hatred or presenting topics in ways that might lead to hatred. As a group of states, then, Europe has embraced an approach to speech that privileges dignity and an agreed truth over debate when violence or offense may result.

4. The United States

In the United States, all speech regulations must be evaluated with reference to the touchstone of the First Amendment to the *Constitution of the United States*. On its face, the amendment's language is absolute: "Congress shall make no law . . . abridging the freedom of speech . . . ."[149] However, the United States Supreme Court has asserted that "the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[150] Among these, according to the Court, are "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[151]

The Supreme Court has further stated that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[152] This declaration, on its face, seems to imply that the Court recognizes a carve-out within the absolutist language of the Constitution for personal dignity, a sort of unspoken protection in keeping with the principles of explicitly declared restrictions in German, Israeli, and European law.[153] However, the Court's decisions have never prioritized or enforced such a protection, instead providing strong safeguards even for speakers who resort to discriminatory and incendiary messages.

---

[147] *Garaudy*, *ibid*.
[148] *Ibid*.
[149] US Const amend I.
[150] *Chaplinsky v New Hampshire*, 315 US 568 at 57-72 (1942).
[151] *Ibid* at 572.
[152] *Cantwell v Connecticut*, 310 US 296 at 309-10 (1940).
[153] See *supra* notes 102-103, 124, 132-134 and accompanying text.

In *Brandenburg v Ohio*,[154] the defendant, a Ku Klux Klan member, spoke at a rally of Klansmen, some of whom were armed,[155] and stated that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[156] The defendant was convicted under a state statute that, *inter alia*, criminalized advocating or teaching "the duty, necessity, or propriety" of violence "as a means of accomplishing . . . political reform."[157] But the Supreme Court reversed his conviction,[158] holding that the First Amendment requires a distinction between advocating a point of view and inciting immediate violent action.[159] The Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except* where such advocacy is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action*."[160]

While *Brandenburg* addresses speech advocating unlawful conduct generally—whether based on discriminatory viewpoints or not—the Supreme Court has also addressed regulations on speech specifically motivated by an intent to attack or disparage a person based on his/her race, gender, religion, etc.—hate speech. In *RAV v City of Saint Paul*,[161] the Court determined that a statute aimed at preventing discriminatory speech was content-based viewpoint discrimination.[162] The City of Saint Paul, Minnesota charged a juvenile who burned a cross on a neighbor's yard under a city ordinance criminalizing "plac[ing] on public or private property a symbol . . . which one knows or has reasonable grounds to know arouses anger, alarm[,] or resentment in others on the basis of race, color, creed, religion[,] or

---

[154] 394 US 444 (1969).
[155] *Ibid* at 447.
[156] *Ibid* at 446.
[157] *Ibid* at 448.
[158] *Ibid* at 445.
[159] *Ibid* at 449.
[160] *Ibid* at 447 (emphasis added); see also *NAACP v Claiborne Hardware Co*, 458 US 886 at 927 (1982) ("This Court has made clear . . . that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.") (emphasis in original). *Brandenburg*'s "Imminent Lawless Action" Test has its roots in the "Clear and Present Danger Test" from Justice Oliver Wendell Holmes' opinion in *Schenck v United States*, 249 US 47 at 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). After *Schenck*, the Court experimented with many other tests for speech advocating violence, including whether the speech in question has a bad tendency or might "kindle a flame" of violence at some point. See e.g. *Frohwerk v United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919); *Abrams v United States*, 250 US 616 (1919); *Whitney v California*, 274 US 357 (1927). The Court eventually adopted a modified and weakened version of the "Clear and Present Danger Test" in *Dennis v United States* before strengthening the test to its current version in *Brandenburg*. *Dennis v United States*, 341 US 494 (1951); *Brandenburg v Ohio*, 394 US 444 (1969). See generally Thomas Healy, "*Brandenburg* in a Time of Terror" (2009) 84 Notre Dame L Rev 655 at 663-68 (2009) (discussing the "Clear and Present Danger Test's" evolution and how hate speech is currently evaluated under United States jurisprudence).
[161] 505 US 377 (1992).
[162] *Ibid* at 391.

gender."[163] However, the Supreme Court held that even if the statute were construed to apply only to proscribable "fighting words,"[164] and even if it's purpose was "to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish",[165] its language still violated the First Amendment.[166] The municipal ordinance's language criminalized placing symbols that arouse anger based on race, color, creed, religion, or gender, while symbols that arouse anger based on other characteristics (e.g., sexual orientation or political affiliation) were not covered.[167] The Court held that this "content limitation" showed "special hostility towards the particular biases . . . singled out"—"precisely what the First Amendment forbids."[168]

Taken together, the First Amendment, *Brandenburg*, and *RAV* essentially eliminate hate speech regulation in the United States. States may punish speakers who intend to and are likely to incite imminent violence, but cannot punish those who merely advocate discriminatory viewpoints. In addition, states may not punish speech differently based on the *reason* it intimidates or incites violence; singling out certain viewpoints as particularly volatile or worthy of punishment is impermissible. Under this regime, the law does not recognize or address discriminatory speech harming a country's social fabric absent any direct call to violence.[169] United States law focuses on the ends

---

[163] *Ibid* at 379-80.
[164] *Ibid* at 391.
[165] *Ibid* at 395.
[166] *Ibid* at 391.
[167] *Ibid*.
[168] *Ibid* at 396.
[169] *Cf.* Kathleen Mahoney, "Hate Speech, Equality, and the State of Canadian Law" (2009) 44 Wake Forest L Rev 321 at 327 (discussing Canadian hate speech laws, specifically the Canadian Human Rights Act, and asserting that "the purpose of human rights limitations on hate speech is not to condemn and punish the person who committed a hate propaganda offence. Its main purpose is to prevent or rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered . . . . [T]he focus of human rights laws is on the effect of the act on the victim and not the intention with which it was performed."). In contrast, United States law evaluates speech on whether it is "directed" to "incite violence" and the ideas that drive speakers to use "fighting words"– specifically turning on the speaker's motive rather than the effect on the hearer. *Brandenburg*, *supra* note 154 at 447; *RAV*, *supra* note at 391 (1992). The Court most recently affirmed the speech classification scheme differentiating between hateful speech and hateful speech that incites violence in *Snyder v. Phelps*, 562 US 09 (2011). In *Snyder*, a slain Marine's father sued members of the Westboro Baptist Church for picketing at his son's funeral. The church "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military, [and] frequently communicates its views by picketing, often at military funerals." A jury found that the congregants had intentionally inflicted emotional distress, that is, "intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." Writing for the Court in an 8-1 decision, Chief Justice John Roberts affirmed the appeals court's decision to reverse the jury verdict, noting that the First Amendment prohibits holding speakers liable for speech on matters of public concern. According to the Court, while Phelps and his followers' "messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." Despite the fact that the setting the church chose to convey its message was "particularly hurtful," the fact that it spoke on public land and did not call for or cause violence

rather than the means—violence rather than the reason for it[170]—and thus protects a broad range of discriminatory speech.

IV. Finding the Right Way for Rwanda

1. Rwanda's Approach: Vague and Overbroad

The government of Rwanda has tended towards the opposite extreme from the United States and has actively limited speech, especially concerning the genocide and ethnic tensions.[171] And it has some legitimate concerns justifying speech restrictions. The country has a history of the media playing a prominent role in violence via outlets such as RTLM and *Kangura*.[172] The government has stated that it wants to allow as much press freedom as possible, but is concerned because "the forces that had sparked the genocide [are] hovering close by in the Democratic Republic of the Congo and even inside Rwanda," and there are still valid concerns over the potential for renewed ethnic violence in the country. [173] The Rwandan government isn't alone in its concerns over the nation's speech—the ICTR acknowledged the gravity associated with genocide-related speech in Rwanda in its *Media Case* decision.

Rwanda's genocide ideology law, however, is too vague and overbroad and the government has been criticized for using it against people with dissenting views. In addition to the concerns the U.S. State Department expressed over freedom of the press and reporters,[174] Human Rights Watch (HRW) has found that the "current definition is vague, requires no link to any genocidal act, and prohibits speech protected by international conventions."[175] HRW has also noted hundreds of cases prosecutors brought involving "genocide ideology" before the charge was actually defined by law in June 2008.[176] Before the 2008 law, not a single judge interviewed by HRW was able to define "divisionism," despite having adjudicated and convicted

---

led the court to protect its right to speak. The Chief Justice stated:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro [. . .].

But c.f. Robert C Post, *Community and the First Amendment*, (1997) 29 Ariz St L J 473 at 479 (asserting that government can limit freedom of speech by balancing the autonomy interests of the speaker and the hearer).

[170] See John C Knechtle, "When to Regulate Hate Speech" (2006) 110 Penn St L Rev 539 at 549.

[171] See Human Rights Watch, *Law and Reality*, *supra* note 72 at 34-43.

[172] See *supra* Section II (2).

[173] UN Human Rights Committee, Press Release, HR/CT/705, "Rwanda's History Stained by Massive Human Rights Violations, but Rule of Law System Painstakingly Constructed to Tackle Forces Seeking to Sow Division, Committee Told," 19 March 2009, online: UN <http://www.un.org/News/Press/docs/2009/hrct705.doc.htm>.

[174] See *supra* notes 89-92 and accompanying text.

[175] Human Rights Watch, "Country Summary: Rwanda," *supra* note 88.

[176] *Ibid.*

defendants on that charge.[177] The law, while protecting against potentially incendiary speech, is too vague and open to abuse to adequately protect legitimate expression and valid differences of opinion.

2. Why the United States' Approach Won't Work

Given the challenges Rwanda continues to face as a result of its genocidal history, attempting to implement a legal regime like the United States', in which freedom of speech is preeminent, could threaten Rwanda's fragile peace just as the overly-repressive genocide ideology law does—albeit in a different way. America's free speech regime is generally considered exceptional among even developed Western democracies.[178] This was not always so. At the time of passage, the *Bill of Rights* and First Amendment were seen to enshrine existing concepts of freedom and liberty[179]—far less important than establishing a working government structure for the fledgling United States.[180] It is only in the ensuing centuries, during which the First Amendment has been applied to state governments as well as the federal,[181] and during which the court has increasingly protected individuals' speech rights[182] that speech in the United States has come to be seen as sacrosanct.

This "free expression theory may be a good fit for the robust democracy of the modern United States, [but] it may be a wholly inadequate model for the more fragile democratic orders of post-conflict democracies."[183] While America has certainly experienced civil war and conflicts driven by discrimination, it has never experienced widespread conflict in which an ethnic, racial, religious, or national group has been systematically targeted for destruction.[184] The "Imminent Lawless Action Test" the United States

---

[177] Human Rights Watch, *Law and Reality, supra* note 72 at 34.
[178] Guy E Carmi, "Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification" (2007) 9 U Pa J Const L 957 at 960-61.
[179] See Robert J Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment" (1993) 66 Temp L Rev 361 at 364-65; see generally George Anastaplo, "Amendments to the Constitution of the United States: A Commentary" (1992) 23 Loy U Chi LJ 631 (providing a historic analysis of Bill of Rights ratification generally, and addressing the amendments contained individually).
[180] See Reinstein, *supra* note 179 at 364-65.
[181] *Gitlow v New York*, 268 US 652 at 666 (1925). *Gitlow* did not explicitly incorporate this right, but "assumed" that "freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" for purposes of the case. Since *Gitlow*, the Court has never refuted this assumption.
[182] See *supra* Section II (1).
[183] Laura R Palmer, "A Very Clear and Present Danger Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo" (2001) 26 Yale J Int'l L 179 at 182.
[184] It is interesting to note that even in the United States' speech-protective legal regime, the Supreme Court has allowed the greatest limitations on speech based on the country's conflicts, See *Frohwerk v United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919); *Abrams v United States*, 250 US 616 (1919) for examples of the Court applying less intensive scrutiny to government regulations on political speech during World War I. *Dennis v United States*, 341 US 494 (1951) shows the Court applying less intensive scrutiny to government regulations on political speech in the Cold War aftermath of World War II. The Supreme Court has also

uses to evaluate speech restrictions is designed to operate on a case-by-case basis. [185] But post-genocide countries are not experiencing isolated incidents of incitement or intimidations—these elements are ever-present. As one scholar has noted regarding speech rights and government in post-genocide Kosovo,

> '[i]ncitement . . . is a contextual matter. Whether an utterance will lead to a more dangerous act depends on the political and social climate as well as the circumstances of a particular setting. The United States, with its history free of true threats from totalitarian alternatives, can adhere to a system of tolerance, confident in its ability to repel threats through open discourse.' . . . . In Kosovo, given the current political situation of an uneasy truce between ethnically-charged elites on both sides, calls for attacks on minorities or revenge against political rivals are not merely fighting words or insults; they are direct threats to the foundation of a post-conflict

---

allowed the government to curtail other civil rights during times of conflict: See e.g. *Korematsu v United States,* 323 US 214 (1944). It is also notable that in the realm of hate speech the Supreme Court has specifically upheld a regulation banning cross-burning with intent to intimidate. *Virginia v Black,* 538 US 343 (2003). The Court held that such a regulation was permissible because, unlike the ordinance at issue in *RAV*, cross burning was outlawed "whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'" *Ibid* at 362. However, the Court's opinion included a specific section on cross burning's history, focused almost exclusively on cross burnings and the Klu Klux Klan, and showing that the Court specifically considered the role cross burning has played in America's history of racial discrimination when upholding the ordinance. *Ibid* at 352-57, see generally Jeannine Bell, "Oh Say, Can You See: Free Expression by the Light of Fiery Crosses" (2004) 39 Harv CR-CLL Rev 335 (analyzing *Virginia v Black* and cross-burning as hate speech).

In addition to less-strictly scrutinizing its own speech restrictions in times of conflict, America has supported and been involved in other countries' needs to restrict speech in the aftermath of genocidal conflict. Following the fall of Germany after World War II, American forces purged libraries and participated with other Allied powers to take command of the German press in order to keep it from being controlled by fascist elements. See Palmer, *supra* note 183 at 198-99. British and American experts implemented a plan to reestablish the German press, which called for publishing only Ally-approved information and United States forces screening publications. In late 1945 the United States determined that sufficient progress had been made to allow Germany to regulate its own press; only at this point did it cease prior restraint on the German press.

More recently, in post-genocide Kosovo, the United States, as a member of the Organization for Security and Cooperation in Europe (OSCE) worked to reestablish a free press in Kosovo by establishing boards and commissions to oversee and set standards for the country's press corps. *Ibid* at 181,184-86; see also Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292. According to the OSCE, the goal was to promote reconciliation, democratization, and law and order in Kosovo. Palmer, *supra* note 183 at 186. But one tool involved in the OSCE's proposal was a Media Monitoring division, responsible for analyzing content. *Ibid.* Following protests, the OSCE withdrew its plans for a Media Regulatory Commission, however, it did create a Temporary Media Commissioner with a mandate to order media outlets to refrain from publishing personal information that "would pose a serious threat to the life, safety[,] or security of any such person through vigilante violence or otherwise." *Ibid* at 186, 194; United Nations Mission in Kosovo, Regulation No. 2000/37, "On the Conduct of the Print Media in Kosovo", (17 June 2000). According to an OSCE report in 2002, "all the premises lying at the foundation of Regulation 2000/37 and the Temporary Code of Conduct for the Print Media are still valid, three years after their promulgation as extraordinary and temporary measures" due to Kosovo's continued instability. The Kosovo Temporary Media Commissioner, *Annual Report 2002*, (Prishtinë/Priština, Kosovo: Office of Temporary, Media Commissioner, 2002) at 6, online: TMC <http://www.osce.org/kosovo/32386>.

[185] See *supra* text accompanying notes 154-160.

representative democracy.[186]

Like Kosovo, Rwanda is still struggling daily with a volatile peace, wherein the government has little control and the population is constantly threatened with the idea that widespread violence may break out again.[187] Under these circumstances, we can understand that there is a *constant* danger of "imminent lawless action." And it is aimed not at individuals, or even a single group, but against Rwandan society and government as a whole. A case-by-case test is unequal to addressing constant threats in a post-genocide society.

Rwanda faces more than threats and the United States's hands-off approach to other dangerous forms of speech would fail to protect Rwanda from the risks of more surreptitiously hazardous speech. In Rwanda's current climate, denying the genocide jeopardizes the country's ability to deal with and move beyond its violent past. Individuals who spout hateful opinions that fall short of direct threats may still foment underlying tensions. Rwanda's experiences demonstrate a need to be mindful that a wider range of ideas and expressions could reignite widespread violence.

3. Finding a Middle Ground

Rwanda's existing genocide ideology law and the United States' absolutist speech protections represent two ends of the continuum of protecting/regulating speech; neither is a workable option for Rwanda. Germany, Israel, and the EU represent more moderate approaches by countries and regions that have also experienced genocide. By drawing on their examples, we can explore the issues of constraining hate speech in the context of Rwanda.

In the wake of their own genocide experiences, both Israel and Germany have criminalized Holocaust denial in their penal codes.[188] The EU's *Framework Decision on Racism* requires members to criminalize "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity[,] and war crimes"[189] or instigating such conduct.[190] The UN General Assembly has also strongly condemned denying the Holocaust.[191]

Given Rwanda's continued ethnic tensions, criminalizing genocide denial represents a strong starting point for Rwanda's hate speech laws. The facts of Rwanda's genocide have been thoroughly adjudicated at the ICTR, and the Tribunal eventually took judicial notice of the genocide, relieving the

---

[186] Palmer, *supra* note 183, at 213 quoting Donna E Artz, "Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal" (1995) 12 NYL Sch J Hum Rts 689 at 753.
[187] *Compare ibid* at 183, with *supra* Section II (5).
[188] *Strafgesetzbuch*, *supra* note 104 at s 130(3); *Denial of Holocaust (Prohibition) Law* (5746-1986), 1187 LSI 196 (1986) (Israel).
[189] EC, Council Framework Decision 2008/913/JHA, *supra* note 133 at art 1(1)(c).
[190] *Ibid* at art 2(1).
[191] "UN Assembly Condemns Holocaust Denial by Consensus; Iran Dissociates Itself," *UN News Centre* (26 January 2007), online: UN News Centre <http://www.un.org/apps/news/story.asp?NewsID=21355&Cr=holocaust&Crl>.

prosecutor from proving that it had occurred in each case.[192] Rwanda is only fifteen years removed from the conflict, with Hutu militias continuing to act as a destabilizing force just over the border in the DRC. Given the short passage of time and the existence of militant groups that deny the genocide, a statute specifically outlawing genocide denial, similar to those found in Germany, Israel, and the EU, would be an important tool to help Rwanda overcome the racist attitudes that have fueled its violent past.

Such a law should include a renewal provision that would prevent the restriction on speech from ossifying. Given that the genocide occurred relatively recently, an initial renewal provision could be set thirty or more years into the future in order to provide sufficient time to heal, with more periodic votes established as needed. The psychological trauma to Rwandans who experienced genocide in their country runs deep, and the continued threat of violence could remain for a long time into the future. President Kagame has noted that "[p]eople's hearts and minds need some time to heal. A very long time indeed. They will need a whole generation, and the memories will keep lingering."[193] Building in a renewal clause would ensure continued public debate on the law, and whether Rwanda still needs to outlaw genocide denial to safeguard peace. The goal is for society to stabilize to the point that an outright ban on a specific category of speech is no longer an existential threat to the country. At that time, Rwanda may be able to embrace and maintain a more open environment for speech.

If Rwanda criminalizes denying genocide, the next logical step is dealing with speech which perpetuates the ideas and ethnic hatred that led to the genocide in the first place. Germany, Israel, and the EU all criminalize incitement to hatred in some contexts.[194] Germany and Israel also criminalize certain insults against personal dignity.[195] In the *Media Case*, the ICTR criminalized mere hate speech uttered in the wider context of the violence and persecution against the Tutsi during the Rwandan conflict.[196] In Rwanda's fragile peace is hate speech alone dangerous enough to warrant prohibition? The answer depends on the context of that speech, so the solution must take context into account. As such a case-law standard is most appropriate for evaluating the danger a speaker's message poses to post-conflict Rwanda. One good option for the court's standard would be to protect expression up to the point that an attack on personal dignity presents a broader danger to the public peace.

Hinging the level of protection for speech on the environment in which

---

[192] *Karemera*, *supra* note 24 at para 35 (recognizing that "[t]he fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge'.").
[193] Gourevitch, *supra* note 70 at 42.
[194] See *supra* notes 104, 127, 133 and accompanying text.
[195] *Strafgesetzbuch*, *supra* note 104 at s 130(2); State of Israel Ministry of Justice, "Memorandum from Israeli Ministry of Justice to the Foreign Relations and Human Rights Department" (29 January 2008), online: Isreali Ministry of Justice <http://www.justice.gov.il/NR/rdonlyres/3C141812-1E86-446D-A393-0B309E228182/19775/%D7%9E%D7%A2%D7%A0%D7%94%D7%91%D7%A0%D7%95%D7%A9%D7%90hatecrimes.pdf>.
[196] *Media Case Appeal*, *supra* note 37 at para 988.

that speech is uttered walks the line between punishing hatred and protecting hateful expression that could destabilize the country. Including language that focuses on human dignity sends a message that the nation respects individuals and will work to avert the danger that personal attacks may spill over into group persecution—a danger that is particularly imminent in Rwanda's post-conflict society. Linking personal dignity and widespread danger works on both micro and macro levels, protecting individuals from persecution and the overall stability of society, in addressing the particularized issues hate speech in Rwanda poses. Over time, courts can adjust the weight of each element in the case-law standard to account for decreased risk that free expression poses to a stronger society. Rwanda's courts can grant its people more freedom to speak as their society makes progress and the danger of a return to violence fades.

Further developing an independent judiciary to implement the rule of law in Rwanda remains one of the most important building blocks for effectively and appropriately restricting dangerous speech—while protecting important freedom of expression and dissent. Effectively implementing a case-law-driven standard requires a strengthened judicial branch with public support and confidence. Given the level of devastation to Rwanda's judiciary and society as a whole, it has taken a long time to rebuild state and judicial institutions to their current level, and they are still weak and potentially open to political influence.[197] The judiciary's role in allowing Rwanda's government to use the vaguely worded genocide ideology law to suppress government criticism[198] is evidence that the country's courts are currently not up to the challenge of providing a meaningful check on other branches of government. They are, instead, typifying the concerns over squelching legitimate dissent that Judge Meron voiced in his *Media Case* dissent.[199] At the same time, the country cannot sit idle on the issue of hate speech while the judiciary improves; enacting speech laws swiftly may be necessary to prevent the return to civil war.

Strengthening Rwanda's constitutional protections for speech would be a further check on the government abusing speech restrictions. Rwanda's constitution currently protects the freedom of the press, but only protects freedom of speech and information to the extent that they "shall not prejudice public order and good morals, the right of every citizen to honour, good reputation, and the privacy of personal and family life."[200] Including a more robust protection would recognize the value of expression in contributing to individual autonomy, available information, and public debate. By recognizing these aims, Rwanda's constitution would guide and act as an important check on laws passed by the legislature and legal standards developed by the courts.

---

[197] See *supra* notes 72-76 and accompanying text.
[198] See *supra* notes 90-92 and accompanying text.
[199] *Media Case Appeal*, *supra* note 37 at 378-79 (Judge Meron dissenting) citing *Nahimana, et al v Prosecutor*, ICTR-99-52-A, "Brief for Open Society Justice Initiative as Amicus Curiae" at 5-8.
[200] *Constitution of the Republic Of Rwanda*, *supra* note 86 at art 34.

V. Conclusion

Freedom of expression is a fundamental human right, but this right is of limited value in a society that is falling apart and where individuals constantly fear for their safety and security. In Rwanda, as in other post-genocide and post-conflict countries, the government must strike a balance—protecting legitimate dissent and opinions while addressing the speech that could lead the nation back into brutal and deadly conflict. Rwanda's current genocide ideology law, however, is too vague and overbroad to protect constructive political speech. Dissenting viewpoints, among them Victoire Ingabire's calls for investigating alleged Tutsi war crimes, need to be heard for a healthy, vibrate democracy to thrive. At the same time, an absolutist law in the mold of the United States runs too high a risk of allowing discriminatory speech that will again foment violence and break down the country's fragile foundation.

In order to rise above its violent history, Rwanda must seek a middle ground for addressing speech that perpetuates hate and encourages violence. Speech laws from other societies that have overcome genocidal pasts can provide guidance for Rwanda in developing its own workable restrictions. Ultimately, however, Rwanda must strike its own balance in dealing with speech as it continues to rebuild its society and attempts to move beyond its tragic and violent past. Criminalizing genocide denial, developing an effective case-law standard to protect freedom of speech, and strengthening constitutional protections would be valuable steps for Rwanda to take towards a more balanced environment for speech. A post-genocide society must be more attuned to the dangers that speech will reignite simmering hatred and return the country to violence. But as a nation rebuilds, government must begin to show that it trusts its people to conquer their past hatred, to preserve themselves and their country. It is by trusting citizens to share an open dialogue and reject intolerant opinions and violence that Rwanda can best ensure its survival.