

Improving Hybrid Tribunal Design: Domestic Factors,
International Support, and Court Characteristics

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Executive Summary

This paper explores the strengths and weaknesses of hybrid tribunals as a mechanism for administering justice in post-conflict societies. International cooperation in prosecution of war criminals can help a state rebuild its domestic legal infrastructure, strengthen the rule of law, and ensure transparency and due process in the judicial proceeding. However, these tribunals require adequate human resources, staffing, funds, and expertise, along with adequate detention and trial facilities, all of which are difficult to acquire. After discussing these difficulties, this paper compares the different types of tribunals that have been established and identifies best practices and lessons learned from each. The paper then analyzes the different legal factors that must be considered when establishing a hybrid tribunal: the choice and extent of its jurisdiction, the rules of procedure it will follow, and the substantive law that will be applied, all of which are difficult choices in a multinational environment where the judge, lawyers, defendants, and witnesses may come from different legal backgrounds. The paper then discusses choices in structure and staffing, and closes with preliminary conclusions regarding the effective establishment of hybrid tribunals for criminal prosecutions in the future.

I. Introduction

The enormous costs incurred by nations sponsoring the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have spurred the international community to consider so-called “hybrid tribunals” as an inexpensive, viable alternative for ending the cycle of impunity after atrocity situations. “Hybrid” refers to the mixed local and international components of these ad hoc judicial bodies: they rely on both domestic and international law, local and international jurists and prosecutors, and are generally located in the country where the atrocity took place. No single feature makes such a tribunal “hybrid.” Instead, hybrid tribunals sit on a continuum between fully domestic court systems—that is, a state’s regular justice system—and fully international courts, such as the International Criminal Court (ICC). This white paper breaks hybrid tribunals down into their constituent components and analyzes the effectiveness of various approaches to blending international and domestic substantive law, criminal procedure, and staff. It appends a set of précis categorizing and describing various historical examples of hybrid tribunals, offering best practices from each to inform future tribunal design.

Hybrid tribunals do not offer a silver bullet for international criminal justice. While they have an important role to play in ending the cycle of impunity for perpetrators of the worst crimes, they can do no more than complement robust, independent domestic judiciaries and a strong International Criminal Court (ICC).[3] Alongside strong domestic criminal justice systems, however, hybrid tribunals offer two major advantages—proximity to the crimes, and local ownership of the criminal justice process—that make them both powerful and effective units in the cooperative administration of justice.

II. Advantages of Hybrid Tribunals

Hybrid tribunals offer several advantages over international tribunals due to their proximity to the atrocity situation and the influence of international staff on a domestic judiciary. The following represent commonly cited advantages to hybrid tribunals, but they might also represent priorities to optimize when designing a tribunal. Framers will want to focus on institutional design elements that will increase respect for rule of law and ensure that the tribunal's facilities help rebuild the judicial infrastructure of a post-conflict country.

A. Building Respect for Rule of Law

Many post-conflict societies face a cycle of impunity, in which perpetrators of war crimes and crimes against humanity go unpunished. Such societies may also feature a judiciary rendered toothless either by a hostile regime's political maneuvering, or by simple corruption, that will fail to bring war criminals to justice. Hybrid tribunals have the potential to end this cycle of impunity by enforcing international law against perpetrators and demonstrating to would-be criminals that illegal actions have consequences. In addition, the interaction between domestic jurists and professionals from external judiciaries with robust legal infrastructures may inculcate a sense of respect for the rule of law in a domestic judiciary. Finally, the opportunity for a post-conflict society to witness an effective judicial process may create demand—and, thus, political pressure on post-conflict officials—for a more independent domestic judiciary.

B. Capacity-Building for Nascent Justice Systems

Hybrid tribunals have the potential to leave behind a legacy of a functioning judicial infrastructure and a thriving legal profession with a healthy respect for rule of law in a society that urgently needs to reestablish order. Conflicts frequently leave public buildings in ruins—in East Timor, up to 80 percent of public buildings were destroyed by violence—and in genocide situations certain ethnic groups may be precluded from the legal profession, as in Kosovo under

Milosevic. By establishing hybrid tribunals, the international community can help solve these two issues by funding new infrastructure and by seconding international staff to help train new judges and lawyers. While the hybrid tribunal has a target end date, its facilities and resources, including legal libraries and technology, will outlive its operations. Constructing a hybrid tribunal might contribute to an effective, functioning court system by underwriting at least part of the start-up costs. Advocates of hybrid tribunals also tout opportunities for training and mentoring: international jurists can orient their domestic counterparts to international criminal law and model impartial judging. On the other hand, the potential for cultural insensitivity or for patronizing here requires caution, lest the relationship between international and domestic jurists break down, as happened in East Timor. Formal structures for training and exchange would make capacity building more effective.

C. Local Ownership of the Justice Process

Post-conflict societies have an interest in seeing perpetrators of human rights abuses and war crimes brought to justice, and courts located in The Hague or elsewhere in Europe cannot as easily convey important milestones in a high-profile trial to the affected population. A tribunal staffed by domestic legal professionals and jurists can help a post-conflict society come to terms with past atrocities, especially when the jurists have high profiles in the country. Victim participation in the proceedings can also allow victimized groups to reclaim their dignity in the wake of a genocide, and of course allowing victims to face perpetrators gives a meaningful opportunity for affected populations to see justice done. Finally, public proceedings in country mean that the court can publicize its work broadly, giving post-conflict societies an illustration of an impartial judicial proceeding. These benefits are more difficult to achieve with an ad hoc

court located in The Hague, where distance and cost precludes the same extent of local participation.

Of course, local control can also confuse proceedings, especially where post-conflict governments and the international community do not clearly apportion responsibility for judicial appointments and staffing. In East Timor, for example, the Special Panels were delayed by confusion about how judicial appointments would proceed. Cultural insensitivities, language barriers, and salary differentials between domestic and international jurists could further exacerbate tensions between a post-conflict society expecting to control proceedings and an international community seeking justice for violation of international law. Achieving the correct balance between local control and international participation in the process poses significant challenges.

D. Lower Costs as Compared to Ad Hoc International Criminal Tribunals

One attractive feature of hybrid tribunals is their low cost as compared to ICC proceedings or to international ad hoc tribunals like ICTY and ICTR. Hybrid tribunals keep costs low due to the availability of local staff, lower costs for investigation (since prosecutors live in-country), and lower operational costs for facilities. While ICTR cost some \$700 million dollars, and ICTY cost even more than that, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was slightly more economical, costing \$237 million over ten years. The Special Court for Sierra Leone (SCSL), similarly, averaged about \$50 million per year for each year of its existence. Counterintuitively, however, lower cost does not mean funds are easier to obtain, and in fact may mean the opposite: SCSL, for example, was severely underfunded because it had to rely on voluntary contributions from UN member nations. This hat-in-hand approach may be less effective when each member nation assumes another can afford the

relatively minor financial burden. Additionally, the Special Panels for East Timor cost very little to run but experienced severe difficulties with staffing, facilities, and retaining defense counsel-- to the extent that international observers accused the court of depriving defendants of due process. East Timor serves as an object lesson that hybrid tribunals do require an investment, and their relatively lower costs should not justify undermining due process for justice on the cheap.

III. Baselines: Assessing the Domestic Situation

While the international community plays a prominent role in designing and staffing hybrid tribunals, human resources capacity shortfalls in the host country can compromise the tribunal's work. Particularly if the tribunal's design plan does not account for human resources and facilities needs, with reference to gaps on the ground in the host country, a dearth of resources can delay the tribunal's opening and undermine due process. A tribunal plan should account for the following features of the host country's legal profession and existing criminal justice system when planning for domestic participation and necessary investment in judicial infrastructure.

A. Adequate Human Resources

Since local staff will make up a large part of any hybrid tribunal, the domestic legal community must be large enough to staff a large-scale tribunal and practiced enough to ensure the proceedings meet adequate standards of process. The need for attorneys can pose quite a challenge in post-atrocity countries, particularly those that suffered ethnic violence. In Kosovo, for example, the Milosevic regime barred Kosovar Albanians from many kinds of professions, meaning very few Kosovar lawyers had practice in criminal proceedings, and ethnic Serbs refused to participate in the nascent Kosovar judiciary, which they believed exhibited bias

against Serbs. The lack of prosecutors and defense counsel brought many courts to a standstill, without personnel to meet due process standards.

Moreover, the availability of legal training and the legal community's level of expertise will shape the institutional design. Lawyers in civil law countries may struggle with common law-style procedural rules, and vice versa. The place where many domestic lawyers were trained may also have an impact. In Cambodia, many attorneys attended Russian law schools, and so the court eventually agreed to translate legal documents into Russian to accommodate lawyers trained in that language. This, however, raised costs in a tribunal that was already spending a large percentage of its budget on translations into English, French and Khmer.

Finally, courts require an array of support staff, from reporters and administrators to paralegals and security guards. War-torn countries often lack experienced staff to meet a court's basic administrative needs, and training can take some time. Without sufficient security staff to protect defendants from victims and witnesses from intimidation, for example, the court cannot function fairly or efficiently.

B. An Independent Judiciary

Ad hoc tribunals handle politically sensitive cases. If a domestic judiciary has close connections to a ruling party, it may both deprive defendants of fair trials before impartial arbiters as well as cast doubt on a court's legitimacy. While a politicized judiciary may not make a fair tribunal impossible—the judiciary in Cambodia, for example, did have close ties to Cambodia's government—it may necessitate greater procedural protections, such as requiring the vote of one international judge before convicting. On the other hand, a politicized judiciary might benefit from participating in the tribunal and seeing how an independent judicial system operates. In short, a judiciary with close ties to the government necessitates some additional

considerations, such as how to ensure due process, how to monitor the tribunal's activities, and how to publicize the tribunal's work if there is national distrust of the judiciary's decisions.

C. Suitable Court and Prison Facilities

An ad hoc tribunal requires basic facilities to operate: courtrooms, judge's chambers, rooms for deliberation, legal libraries, offices for prosecutors and defense counsel, and detention facilities. While the point seems obvious, in several ad hoc tribunals the facilities have been inadequate, or even in violation of international human rights standards for detentions. And in post-conflict situations, the international community will frequently have to step in to pay for the reconstruction of judicial buildings destroyed during the period of violence, increasing the logistical complexity. In Kosovo and in East Timor, the UN missions faced pressure to address atrocities at the same time as they rebuilt civil society and prepared post-conflict countries for self-governance. Without legal libraries to conduct research or chambers for private deliberations, however, the court cannot function at all. The need for adequate detention facilities bears even greater emphasis. A tribunal designed to promote respect for human rights and rule of law will fail in that mission if it subjects defendants to over-long detentions in substandard facilities. Obviously, prisons that meet international human rights standards as laid out in human rights instruments are an absolute requirement.

IV. Types of Tribunals and Negotiations

Hybrid tribunals exist on a continuum between fully international judicial bodies, such as the ICC, and fully domestic court systems. The degree of hybridity depends on a range of factors, including staffing and choice of law, which are somewhat dependent on the tribunal's founding instrument and the local legal infrastructure. The perennial struggle in all these models

has been balancing local ownership of the tribunal process with the need for international intervention to ensure minimum standards of due process.

The affected country is often (though not always) uncomfortable ceding sovereignty to international entities, and the domestic legal community may be reluctant to support proceedings they view as punitive. This can frustrate the provision of adequate defense counsel, for while the contributing nations often provide prosecutors (to ensure the alleged war criminal is not tried by someone friendly to his regime), the role of defense is often left to the domestic bar. On the other hand, the less international bodies, including the special prosecutorial cell in Guatemala and the tribunals in Bangladesh, often lack strong enforcement power or fail to meet minimum due process standards.

Different types of tribunals come with different priorities and different stakes for international and domestic actors. The international community must meet a basic due process threshold, and its involvement lends a degree of legitimacy to any proceeding. The United Nations has pulled out of negotiations when dissatisfied with due process safeguards in the past, for example in negotiations for the ECCC. And given the reputational stakes, greater international involvement means that the international community must ensure that everything from prisons to sentencing comports with human rights standards. These concerns sometimes clash with the demands of domestic civil society and legal professionals, who want to see justice done or who expect ownership of the process. The following section details various methods of establishing a tribunal and how that dynamic affects negotiations with the affected state.

A. Chapter VII Ad Hoc International Tribunal

Established by the Security Council unilaterally pursuant to its Chapter VII authority, ad hoc international tribunals do not legally require the consent of the affected state. Instead, the

international community intervenes by establishing a judicial body with limited jurisdiction over recognized international crimes—such as genocide, war crimes and crimes against humanity—committed during a particular period in a particular conflict situation. The U.N. has created two such tribunals, at massive expense: ICTY in 1993 and ICTR 1994. Due to their location outside the affected state, however, these tribunals created a set of other problems: additional expense to bring in witnesses and defendants, focus on the highest-level perpetrators to the exclusion of many other rank-and-file suspects, limited participation from the affected state, and difficulties communicating their progress to victimized groups. Moreover, post-conflict societies often need assistance rebuilding their judiciary to prosecute lower level perpetrators who escape the international tribunal's attention. The ICTY did little to enhance domestic capacity. At the same time, these bodies adhered to the strictest standards of due process and promoted the development of a body of jurisprudence around war crimes that has served as a foundation for subsequent tribunals.

B. Agreement with Affected State: Hybrid Tribunal Within the Domestic Judiciary

The UN has entered into treaties with affected countries seeking to establish tribunals for perpetrators of atrocities, such as Cambodia. These agreements structure the terms of international participation and require extensive negotiations with the host country to determine issues of staffing, salary, and choice of law. The international community has several important levers in these negotiations to ensure that the court's structure and law will ensure impartial trials:

- Withdrawal from the process, thus de-legitimizing any purely domestic tribunal, as happened in Cambodia;

- Ensuring that the international community has some say in the international jurists selected to serve on the tribunals;
- Withholding certain kinds of aid—say, certain defense funding—in order to ensure that the affected state agrees to international demands.

These agreements should clearly allocate responsibility between the domestic government and international community. Confusion about appointments, choice of law, or other matters have unnecessarily delayed operations in the past. Some best practices of these tribunals, discussed in greater detail below, include:

- Requiring a “supermajority” to convict, essentially necessitating the vote of at least one international judge when the panels are evenly split between domestic and international jurists
- Including both a domestic court administrator along with an international deputy administrator, giving the latter the power to handle voluntary donations to limit corruption, to ensure both local ownership and international accountability
- Tailoring the subject matter and personal jurisdiction to focus on those most responsible (who will not be prosecuted by the ICC) to prosecute individuals responsible for the most grievous crimes
- Drawing on precedent from prior hybrid tribunals, especially ICTY and ICTR, to shape the tribunal’s legal interpretation and ensure maximum efficiency by benefitting from established best practices and lessons learned.

As compared with other kinds of hybrid justice mechanisms, the ECCC and SCSL have been regarded as greater successes than, for example, the Special Panels in East Timor. But the relative success of these tribunals does not insulate them from all criticism. The ECCC

experienced significant delays, meaning that several Khmer Rouge leaders died before proceedings began and the reparations available through the court's decisions left many victims dissatisfied. But insofar as these mechanisms proved less expensive and effective in prosecuting war criminals, they outshone other types of hybrid courts and have provided an important accountability mechanism in the affected countries.

C. U.N. Mission-Run Domestic Courts with International Judges and Staff

The UN has a unique opportunity in post-independence countries where it runs a transitional administration to establish hybrid tribunals to prosecute low- and mid-level perpetrators of human rights abuses. In Kosovo and East Timor, the UN transitional administration used its unilateral executive/legislative authority to create special tribunals within the regular domestic court system to try genocide, war crimes, and other international law crimes. These tribunals also tried crimes under domestic law, such as murder and rape, but provided for longer statutes of limitation so that even perpetrators of dated crimes could face justice.

Where the tribunal forms part of the domestic judiciary, there is some need for accommodation, since international judges likely have no familiarity with the domestic legal system. Moreover, in this setup building capacity is a particularly critical part of the work, so best practices suggest that a formal system for training new judges will benefit the country in the long term. Other best practices include:

- Aligning existing domestic law with international human rights standards, and providing explicit guidance to judges and prosecutors to ensure that there is no confusion on this front

- Integrating international judges into the domestic judiciary quickly to ensure that defendants receive impartial trials
- Rebuilding judicial infrastructure to ensure a functioning court system and avoid docket backlogs

The major challenge with this type of court lay in the difficulty of establishing a largely domestic court to try complicated crimes under international law.

D. Embedded International Staff Within a Domestic Legal System

Where political obstacles prevent the creation of an entire, independent court, the UN has entered memoranda of understanding with countries to insert domestic staff into an extant domestic judicial system. The most innovative example is the Comision Internacional Contra la Impunidad en Guatemala (CICIG), which established a special prosecutorial cell within the Guatemalan prosecutor's office. The agreement mandates the group to fight corruption and organized crime, and it gives the prosecutor certain investigative powers to undertake that mission. The agreement does not, however, give CICIG authority to bring cases on its own; instead, it must cooperate with the regular Guatemalan prosecutor's office in a variation of the civil law *action civile*. Despite its lack of prosecutorial power, the office does have the power to compel documents and testimony from government officials. It has maintained records of its investigations independent of the prosecutor's office in order to preserve documented corruption from potential tampering, although is charged with handing evidence over to Guatemalan prosecutors.

The challenge with embedding international staff within a domestic judiciary lies in the scope of powers allocated to the special cell. In the case of CICIG, its inability to bring suits of its own accord, coupled with its outsider status, meant that it had difficulty forcing officials to

cooperate. Moreover, Guatemalans who worked for or cooperated with the cell had no diplomatic immunity, and neither did the international staff. There essentially was no protection in place for those who aided the organization's mission. The Guatemalan government, for its part, resisted any expansion of the cell's powers.

Briefly summarized, CICIG and Bangladesh show that international staff embedded within a domestic judiciary likely cannot generate the benefits that other, more robust hybrid tribunal models can. They likely will not leave behind any infrastructure or end the cycle of impunity on their own. Instead, their main advantage lies in working closely with domestic staff to build respect for rule of law. Best practices include:

- Giving the special cells power to compel testimony and documents, and providing for punishment if officials do not cooperate
- Structuring the office to allow for maximum contact between the international and domestic prosecutors to optimize the benefits of modeling independent prosecutors
- If politically feasible, allow special prosecutorial cells to bring suits of their own accord to reduce dependence on corrupt or intimidated domestic prosecutors.

V. Tribunal Design: Jurisdiction and Choice of Law

When designing a hybrid tribunal, the international community is forced to work within the framework of whatever constraints the preexisting domestic situation imposes (as discussed in Part III, above). Fortunately, the hybrid tribunal model features many independent design characteristics, each of which may be “toggled” or calibrated as necessary to work best within those baseline constraints. Of course, many of these controllable “toggle” features are themselves interdependent and affect each other. Thus, the success or failure of a hybrid court lies not only in the suitability of its legal and organizational structure to the needs of the

domestic context, but also in the careful consideration of the interplay between the various components of the court's design. Some of the most notable features to consider in designing a hybrid court, as well as their most salient interactions, are outlined in the following sections.

A. Subject Matter Jurisdiction

A court's subject matter jurisdiction encompasses the scope of crimes that will fall within the court's authority to adjudicate. It is a crucial yet inevitably political consideration. Most transitional justice contexts have seen such an array of human rights abuses as to make total justice against all perpetrators practically unfeasible. Designers of a court must thus weigh the practical and political realities of the domestic context in question against the demands of those petitioning for total justice when deciding the limits of the tribunal's subject matter jurisdiction.

i. Scope of the criminal jurisdiction:

Some hybrid tribunals, like the Extraordinary African Chambers (EAC), have limited their jurisdiction to well-enshrined international crimes such as genocide, war crimes, and crimes against humanity. Others have extended it to include more domestic crimes as well, like the ECCC, which has jurisdiction over the aforementioned crimes as well as homicide, torture, and religious persecution under Cambodian law. Finally, some tribunals have jurisdiction over a narrow subset of their domestic criminal law, like the Special Tribunal for Lebanon (focusing solely on the crime of terrorism), or over all crimes under their domestic penal code, as the UNMIK does.

ii. Defining crimes within the court's jurisdiction:

For any mandated subject matter jurisdiction, the court must then decide how to define the crimes within its jurisdiction. Though this process is often straightforward, as for example when the mandate explicitly calls for definitions based on international treaties, it can become

murky when terms are left undefined. Thus, in the DRC mobile courts, military tribunal judges decided to apply Rome Statute definitions for crimes within their mandate even though they arguably were legally required to apply the older definitions from their domestic penal codes. The judges reasoned that the Rome Statute provided clearer and more comprehensive definitions in regards to crimes which their international donors expected them to address. However, some commentators have claimed that importing definitions from a non-binding statute is a violation of due process for the defendants, based on the legal maxim of “no crime without law” (*nullem crimen sine lege*), which holds that you can only prosecute a defendant for a crime clearly laid out in the law.

iii. Complementarity with other accountability mechanisms

Furthermore, it is helpful to ensure that the subject matter jurisdiction of the hybrid court is complementary to that of any other accountability mechanisms involved in that arena. Not only can concurrent and tiered justice mechanisms handle different categories of perpetrators (from the few “most responsible,” to their many “followers”), but they can also agree to share resources and evidence, if they have the foresight to include such an arrangement in their founding documents, as ICTY did with the WCC in Bosnia-Herzegovina.

B. Personal Jurisdiction

What personal jurisdiction a hybrid tribunal can exercise is another highly political consideration. For some courts, like the ECCC and the EAC, personal jurisdiction is limited to those “most responsible” for the crimes committed under the court’s jurisdiction. For other courts, jurisdiction extends to all perpetrators who are on the territory of a nation. In some rare cases (the STL being the only notable example), personal jurisdiction is solely tied to subject matter jurisdiction and can be exercised against alleged perpetrators even in absentia. The

decision of the scope of personal jurisdiction of the court will inevitably be contentious, and will be intertwined with the scope of subject matter, temporal, and geographic jurisdiction, as well as the financial considerations in deciding what volume of work the court will undertake.

C. Temporal and Geographic Jurisdiction

Like all the jurisdictional choices, limitations on the court's temporal or geographic jurisdiction also have political dimensions. Conflicts often stew and evolve over decades and cross international borders. Yet courts, for political and practical purposes, must limit the scope of their jurisdictions somehow. For instance, the ECCC has jurisdiction over crimes committed during a four-year window in the 1970s which crucially excludes many of the crimes allegedly committed by intervening foreign governments. On the more practical side, the suggested Specialized Mixed Chambers in the DRC would have temporal and geographic jurisdiction over crimes committed in the Congo going back to 1990. Of course, countless atrocities were committed in the Congo prior to that period as well. However, the origins of the most recent conflicts in Africa's Great Lakes region can reasonably be traced to around 1990, and pursuing all colonial and Cold-War era crimes would be unfeasible for even the most well-resourced court.

D. General conclusions about jurisdiction

Defining these multiple aspects of the court's jurisdiction—subject matter, personal, and geographic jurisdiction—is a method of casting a wider or more restricted net over potential defendants. Since none of these tribunals will have access to unlimited resources, casting a wider net can lead to two outcomes. The court can publicly claim to pursue its mandate against all potential defendants in a methodical but indiscriminate manner, and will then inevitably accrue an immense caseload that will prove unmanageable in the long term. In the alternative, the court

and prosecution can decide to exercise discretion in choosing cases to investigate and bring to trial, and this discretion, in turn, will inevitably be construed as politically motivated by some observing parties.

On the other hand, if the court is set up with a narrower jurisdictional net, eschewing “total” justice, victim communities and justice advocates are more likely to disown and disengage from the tribunal, labeling it a “farce” or such. In the absence of substantial victim and advocate support, the court then risks losing its lasting legitimacy and potential for aiding community healing.

In any case, when making these difficult foundational choices, the tribunal’s creators should consult with local actors on whom the court will depend for its effective functioning and make sure their priorities are reflected in the court’s jurisdiction. Likewise, the expectations of local victim communities should be considered so that the limited extent of personal jurisdiction does not become a betrayal of their hopes for justice.

E. Rules of Procedure

The specific procedural rules that will govern the tribunal’s operation, and the legal tradition whence they are drawn, are also crucial decision points.

i. Civil or common law tradition

Generally, the tribunal will be largely modeled on either civil or common Law traditions of criminal procedure.¹ Thus, if the drafters of the tribunal’s founding rules and the lawyers, judges, and tribunal staff tasked with implementing them come from different legal traditions, it can severely harm the court’s efficiency. Such was the case for the Bosnian WCC, where

¹ Grossly generalizing, much of the former British empire follows the common law, and most continental European nations and their former colonies follow the civil tradition.

common law lawyers drafted the rules for a court where the legal staff were largely from civil law backgrounds. This caused much delay and frustration.

ii. Procedural rules that match the legal professionals' experience

Beyond the chosen legal tradition, there are countless procedural rules, most notably those of evidence, that the court requires to function properly. If the domestic legal system has adequate judicial resources and well-founded procedural rules, the ideal situation might simply be to have the court adopt those rules, and to integrate the tribunal directly within the domestic judiciary through its founding legal charter. Of course, conversely, if circumstances require that substantial numbers of international staff be integrated into the court, it may be inefficient for them to operate under legal rules with which they are unfamiliar.

iii. Rules for victim participation

The extent to which the court provides victims with the right to participate in its proceedings can lead to proportional increases in the court's legitimacy and adequacy in the eyes of local communities. Unfortunately, heavy victim participation usually then reduces the speed of the proceedings in inverse proportion.

The work of some tribunals—notably in Sierra Leone and East Timor—has been questioned by many local, affected communities who felt they were watching proceedings they should have been integral to unfold from afar. Until the Rome Statute of the ICC, no international or hybrid tribunal followed the widespread civil law practice of allowing aggrieved persons to be “civil parties” in a criminal prosecution. The Rome Statute did not grant complete civil party status to victims; however, it did set the precedent of direct victim representation and advocacy before the court, separately from the prosecution. The ECCC and the STL then

followed suit, with the ECCC granting broad civil party status to victims who petitioned for it and met the legal requirements therefor.

However, both in the ICC and the ECCC, the management of massive groups of “victim participants” caused headaches that eventually led the courts to set limits on the procedural rights afforded to victims. Furthermore, some critics have argued that giving multiple victim parties a role in the proceedings, especially at the investigatory stage, violates the defendant’s due process right to face only one prosecution in court.

iv. Rules of due process for the defendants

From the outset, hybrid tribunals should carefully consider the due process rights afforded to their defendants. Some tribunals simply integrate former international courts’ procedural rights into their charters, while others use international treaties like the International Covenant on Civil and Political Rights as their baseline. If a hybrid court has chosen more domestically-grounded procedural rules, advocates for the tribunal might want to ensure that these include adequate due process rights that will keep the tribunal from being portrayed as a “kangaroo” court or an exercise in victors’ justice.

Of course, due process is not always expedient or popular. In the DRC mobile courts, swift prosecutions and judgments against military personnel were widely praised for helping build rule of law in an often lawless region, even though they likely ignored some of the defendants’ rights. Conversely, in East Timor, many victim communities were incensed that defendants received free food and lodging when many of them struggled to procure either.

v. Choosing the court’s operating language(s)

Another key aspect of the procedural rules is the operating language(s) of the tribunal. The more a tribunal can find common linguistic ground between its judges, lawyers, and

administrative staff, the smoother and more effective its proceedings will be. It follows that sometimes the correct approach is to prioritize requisite language skills over extensive experience in choosing international legal staff.

vi. Local customs of dispute resolution

Finally, local customs and methods of dispute resolution should be studied and integrated, to the extent possible, in the hybrid tribunal's procedural rules. Thus, for example, some have criticized UNTAET for not including punishments that involved public apologies for convicted defendants when such apologies are in fact a key component of conflict resolution in East Timor.

VI. Tribunal Design: Structure and Staffing Choices

A tribunal can be structured and staffed in many different ways. Columbia Law School's RightsLink project has identified an ideal standard structure. As they explain in their report for the Club des Amis du Droit du Congo,

the most coherent system is three-tiered—comprised of a pre-trial chamber, a trial chamber and an appellate chamber. The pre-trial chamber deals with more administrative matters, such as rulings on the appropriate scope of an investigation. It establishes the point at which the prosecution is adequately ready to proceed with its case, or should abandon it to pursue more viable cases. It can also address pre-trial motions, and ensure that the rights of the defense are respected. If needed, it ultimately serves as a buffer to preserve trial-level personnel and proceedings from political interference. The trial and appellate chamber fulfill the traditional roles one would expect from such institutions in a national court system (59).²

² RightsLink (Columbia Law School), *THE MIXED SPECIALIZED COURT AS A MECHANISM OF REPRESSION OF INTERNATIONAL CRIME IN THE DEMOCRATIC REPUBLIC OF THE CONGO: LESSONS LEARNED FROM CAMBODIA, EAST TIMOR, KOSOVO, AND BOSNIA*, Oct. 2011. Web. Available at <http://www.cad-congo.org/wp-content/uploads/2010/12/CAD-English.pdf> (accessed 10/16/2015).

A. Composition of the judicial panels

Within each chamber, the number and make-up of the judges on each panel will have to be outlined, with most attention going to the question of the ratio (if any) of international to domestic judges. Some tribunals, like the UNMIK panels, have included a majority of international judges, while others have made them the minority, such as in the EAC and the proposed DRC Mixed Chambers. In either case, the composition of the panel interacts with the rules for reaching judgment—specifically, whether a simple majority, or a supermajority, is required for various decisions. In the ECCC, for example, where two out of five judges are international, a supermajority is required for a decision. This gives the international judges a veto power, though not the ability to sideline the domestic judges in a decision.

B. Appointment of judicial staff

Relatedly, who controls the appointment of the judges is key. In many more international courts, the judicial staff have been appointed by the UN or an international commission, as was the case for the UNMIK. However, hybrid courts are beginning to place more authority in the hands of local government actors in this process. The ECCC has its domestic judges appointed by the Cambodian government, and the proposed DRC Mixed Chambers would have the President of the DRC appoint all four domestic judges, while the Prime Minister would appoint the fifth, foreign judge. The tension in balancing these arrangements lies between wanting as independent and transparent a court as possible (which might mean including international judges for highly politicized proceedings), and wanting domestic societal, political, and legal institutions to accept and cooperate with the tribunal (which might demand using domestic judges).

C. Appointment and composition of the prosecutorial staff

Though the precise quota of foreign prosecutors will likely matter less to the court's functioning than that of the judges, their appointment and ratio to domestic prosecutors should still be carefully considered. Creating prosecution teams that integrate international and domestic staff in any proportion is an ideal outcome, particularly when it comes to passing on lasting skills and expertise to local professionals. For ease's sake, tribunals' prosecution teams splinter sometimes splinter into distinct international and domestic units, based on linguistic and legal background uniformity. However, such a cloistering, and the inevitable lack of communication and coordination that results, usually impedes the court's overall efficiency, its transparency for local actors, and the enduring judicial institution-building that these tribunals should contribute to.

D. Rigorous standards in international staffing

The court should also maintain high standards for the recruitment of international judicial, prosecutorial, and defense staff. Increasingly, there exists a cohort of judges with expertise in international criminal law. Recruiting from this pool—though still somewhat limited—is idea. However, foreign judges with extensive criminal law experience, who also fit other important criteria mentioned above, should be prioritized over volunteer judges coming from a heavily civil litigation background.

Acquiring the right foreign staff might require providing stipends and funding for them, and working out some bilateral agreement with their domestic jurisdiction about an acceptably long leave of absence from their normal duties. Experienced or respected judges and prosecutors who do not fit the ideal linguistic and legal tradition format of the court, or who are unable to commit to more than a short stint at the court, should not be selected over ones who can better integrate into the proceedings and for longer periods of time. Similarly, if foreign staff are going

to be used, they should be adequately trained in applicable legal customs and rules before they begin their duties at the tribunal.

E. Stipends and funding for tribunal staff

Ideally, if the court is providing pay or stipends to its judicial and prosecutorial staff, it should do so on an equal basis, not contingent upon the staff member's provenance. It has rankled many domestic lawyers and judges at the tribunals that international staff receive higher stipends from the tribunal. If there must exist such pay discrepancy, for whatever reason, it should come from the foreign staff's sending institutions and nation, not from the tribunal itself.

F. Prioritizing domestic staff

For most tribunals, the more domestic administrative, prosecutorial, and defense staff, the better. Being in a severely under-resourced and conflict-ridden region, the DRC mobile courts face many challenges, but one of their most notable successes has been the use of almost entirely domestically-trained legal and judicial staff. Conversely, it has been an enduring critique of several tribunals, like the UNMIK and UNTAET, that more court positions were not filled with domestic practitioners who had the background knowledge and training necessary to be effective in their roles and who would have greatly contributed to the local ownership over those hybrid judicial mechanisms. Furthermore, if domestic staff are not being used in the tribunal, the tribunal can hardly be expected to build up domestic judicial institutions.

G. Providing for a Public Defender's office

It is also crucial to plan for a public defender's office in the tribunal, an oversight which a few tribunals like the UNTAET suffered from in their early years. As a key element of due process, the tribunal should at least plan to coordinate with the domestic defense bar, with perhaps international staff support, for providing legal representation to the defendants. Even

better, though, a Defense unit and its requisite staff can be directly built into the tribunal (as exemplified by the STL).

H. Domestic community outreach and relations office

Finally, from the very start, the tribunals should plan to have an outreach division that is responsible for connecting local communities with the proceedings of the court. Many hybrid tribunals have neglected this outreach, and local victim communities have felt left out, and thus disengaged, from their developments. The more communication, in both directions, between the tribunal and local interested parties, the more likely that those domestic actors will perceive the proceedings as just and “reparatory” in some sense. That being said, tribunal supporters should not underestimate the risk of making promises that cannot be kept to local communities. Hardly anything is more harmful to a justice mechanism than for the victim communities it is meant to vindicate to become skeptical or hostile to the entire operation because of unfulfilled promises. Some textbook examples are the WCC’s public promise that every victim would receive their day in court, or the ECCC’s assurances that civil parties would receive reparations for their suffering. In practice, neither of those well-intended goals was feasible, and both left the victim communities with a bitter taste in their mouths.

VII. Conclusion

While hybrid tribunals offer considerable advantages over either wholly international or wholly domestic criminal justice systems when prosecuting war crimes in a post-conflict society, there are substantial impediments to their successful implementation. Staffing, funding, and choice of law, jurisdiction, and procedural rules should each be carefully considered within the context of the domestic country to ensure success. The hybrid tribunal model is a crucial mechanism for holding accountable those who commit crimes that offend the global conscience,

and for bringing some measure of justice and community healing to the affected societies. A tribunal's quickest path to inefficiency and inconsequence is through failing to carefully consider how all the components of the court mentioned in this paper will interact with each other and with the hopes, constraints, and resources of the affected domestic community. Balancing the ratios and relative roles of domestic and foreign staff, their legal and linguistic backgrounds, the international support and funding for the court, the breadth of its jurisdictional net, domestic ownership over the process, victim representation and expectations, due process rights for the defendants, and all the other factors mentioned above, will always leave some observers and insiders dissatisfied—but thoughtfully and methodically working through that balancing act will at least keep most parties actively engaged in the process and pursuit of justice. Future policy development in this area should pay careful attention to these aspects, to ensure close compliance with principles of due process.