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Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions

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SEEKING THE BEST FORUM TO PROSECUTE INTERNATIONAL WAR CRIMES: PROPOSED PARADIGMS AND SOLUTIONS

Milena Sterio*

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I. INTRODUCTION

Are international tribunals always a better alternative to national prosecutions of international war crimes? Some members of the international community appear to be moving towards legitimizing the idea of international criminal tribunals as the appropriate fora for such prosecutions.1 The most recent example is the U.N. Security Council referral to the International Criminal Court (ICC) of the case against Sudan for violations that occurred in the Darfur region.2 Notwithstanding this acceptance of international criminal tribunals, a recent case, Ademi/Norac, at the International Criminal Tribunal for the former Yugoslavia (ICTY) demonstrates the willingness of international prosecutors to transfer cases

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back to national tribunals. This paradox begs the question—are international prosecutions the appropriate alternative to national prosecutions? Once we resort to national prosecutions, how do we ensure that they will proceed in accordance with international criminal law standards? Finally, are hybrid tribunals, that is, tribunals created through an agreement between a host country and an international body, such as the Special Court for Sierra Leone (Special Court), yet a better alternative as compared to purely national courts?

The debate regarding the relative value of international, hybrid and national tribunals mostly centers around theoretical issues, such as deterrence, retribution, and national reconciliation. For example, scholars wonder about the best deterring effect on future Saddams or Milosevices—in other words, which type of prosecution creates the strongest deterring effect and has the most impact on the conduct of future leaders prone to committing atrocities? Moreover, which type of prosecution provides the strongest sense of retribution to the local population? Finally, in terms of national reconciliation, which type of prosecution is the most prone to bringing about healing and closure to a war-torn country? Nonetheless, besides the theoretical issues, practical problems also affect the validity of each type of tribunal and warrant additional attention. In other words, the decision to resort to a particular type of prosecution cannot be examined in purely theoretical terms because practical considerations often dictate a particular outcome.

This Article will focus on some of the practical considerations underlying the decision to resort to a particular type of prosecution: international, hybrid, or national. Part II of this Article will describe the ICTY's referral of the Ademi/Norac case to Croatian national courts, focusing on the reasons underlying the referral, as well as on the


4. See, e.g., Wippman, supra note 1, at 474 (noting that supporters of international prosecutions argue that such prosecutions are important because of their deterrence value, their considerations of justice, their respect for international law, retribution, avoidance of personal vengeance, de-legitimation of indicted war criminals as political leaders, and national reconciliation). For a discussion of the relative value of the ICC versus ad hoc international criminal tribunals, such as the ICTY and the ICTR, see Philippe Kirsch, The International Criminal Court: A New and Necessary Institution Meriting Continued International Support, 28 FORDHAM INT’L L.J. 292, 293-94 (2005). For a discussion on the deterrence value of international criminal prosecutions, see generally Varda Hussain, Note, Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals, 45 VA. J. INT’L L. 547 (2005). See also Akhavan, supra note 1, at 12-13.
appropriateness of the referral in light of international criminal law. Part III will then focus on the Special Court, in an effort to assess whether such a hybrid tribunal is a better form of international justice. Finally, Part IV will outline certain paradigms in an effort to propose solutions for certain types of cases and to determine which type of prosecution, international, hybrid or national, is best for each situation.

II. ICTY REFERRAL OF THE ADEMI/NORAC CASE TO CROATIA

In 2001, the ICTY issued indictments against Rahim Ademi and Mirko Norac, charging them with crimes against humanity and violations of the laws or customs of war. They were charged on the basis of both their individual responsibility and their command responsibility, that is, their responsibility as superiors for acts committed by their subordinates. On September 14, 2005, the ICTY’s Referral Bench issued a decision referring the case against Rahim Ademi and Mirko Norac back to the Republic of Croatia. The ICTY referred the Ademi/Norac case to Croatia as part of its completion strategy, which calls for the ICTY to complete all first-instance trials by 2008 and all related work by 2010. However, this is an unusual case because it is the first case in which persons indicted by the ICTY for such serious violations of international humanitarian law have been referred to the Republic of Croatia, and it is the only case that the ICTY’s Prosecution requested a transfer to the Republic of Croatia. The ICTY has begun transferring a small number of other cases to the other republics of the former Yugoslavia, in particular, to Serbia and to Bosnia and Herzegovina, where special tribunals have been created to prosecute offenders of war crimes. Nonetheless, the ICTY has only

5. Referral Bench, supra note 3, ¶¶ 15-16.
6. Id.
transferred cases involving mid- and lower-level offenders, and is still seeking to prosecute higher-ranked offenders of genocide and war crimes.

In its findings in the Ademi/Norac case, the Referral Bench found that all requirements according to Rule 11bis of the ICTY’s Rules of Procedure and Evidence were satisfied. These requirements include the protection of witnesses, a fair trial for the accused, and the assurance that the death penalty would not be imposed. In addition, the Referral Bench maintained the authority to recall the case to the ICTY, and required the ICTY Prosecutor to provide an initial status report after six weeks, and a report every three months thereafter. The Referral Bench ordered the ICTY Prosecutor to hand over all materials supporting the indictment and other appropriate evidentiary materials to the Prosecutor of the Republic of Croatia.

Critics of the ICTY argue that such transfers, as well as the completion of the tribunal’s work, are long overdue. These critics maintain that the ICTY and other international tribunals have stifled the growth of national judiciaries in an area where war crimes occurred, by substituting themselves for national justice systems. However, such criticism fails to appropriately evaluate the state of national judicial systems that have been shattered by war and dictatorships. Croatia is a prime example.

Croatian courts have prosecuted hundreds of war crimes cases; however, the majority of them have been in absentia cases against Serbs. International monitoring agencies have noted inadequacies, such as the lack of specificity in indictments, instances of overcharging the potential defendants, significant delays, and inadequate establishment of facts to support convictions. According to a 2002 Organization for Security and

12. Referral Bench, supra note 3, at 12.
13. Id.
14. Jolic & Lochary, supra note 7, at 10. See also Transitional Justice in Iraq, supra note 7, at 513.
15. Transitional Justice in Iraq, supra note 7, at 516 (citing Allison Marston Danner, Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel, 55 STAN. L. REV. 1633, 1662 (2003) (noting the difficulties that a national court may face, such as the mono-ethnic composition of a court, the difficulty of protecting victims and witnesses effectively, the court personnel’s lack of training and the backlog of cases at such courts)).
Co-operation in Europe report, out of 18 war crimes verdicts issued in Croatia in 2002, 15 were against Serbs and 3 were against Croats. Unsurprisingly, all 15 Serbs were convicted while all 3 Croats were acquitted.\textsuperscript{17}

Croatia has nonetheless made good faith efforts to address these issues. For example, the state prosecutor general ordered a review of 1850 pending war crimes cases to determine whether there is sufficient evidence to proceed; many in absentia convictions were reversed by the Croatian Supreme Court; and in 2003 Croatia passed a new law to implement the ICC statute which created four special courts with jurisdiction to hear these types of cases and to receive evidence gathered by the ICTY and the ICC.\textsuperscript{18} Nonetheless, the question remains whether cases that involve hundreds of victims and witnesses, international cooperation and understanding of complex international law issues, can be tried appropriately by national courts in countries in which the national judiciary may be biased, lacks personnel and fiscal resources, and where many still consider the accused as national heroes.\textsuperscript{19}

The following examples will illustrate the potential problems that a national judiciary, such as in Croatia, might face when prosecuting perpetrators of international war crimes.

First, problems and questions may arise in the event there is concurrent jurisdiction between the ICTY and Croatian national courts. Rule 11bis of the ICTY Rules of Procedure and Evidence raises the possibility of concurrent jurisdiction and the Referral Bench required concurrent jurisdiction by expecting periodic reports from the Croatian prosecutor and by maintaining the power to recall the case to the ICTY.\textsuperscript{20} Once a case is referred, however, what power does the ICTY have over the referred case? Can the ICTY order the Croatian court to implement measures to address any concerns the ICTY may have? Can the ICTY order Croatian courts to call certain witnesses at trial or demand that an indictment be amended? Can the ICTY demand Croatian authorities to apply certain legal provisions to a case, or even require them to directly apply international law, as opposed to domestic law? Can the ICTY play the role of a mediator between Croatia and other countries in the region, facilitating international cooperation to successfully pursue these cases? For example,

\begin{itemize}
\item \textsuperscript{17} Organization for Security and Co-operation in Europe, Status Report No. 11, Nov. 18, 2002, at 10.
\item \textsuperscript{18} Jolic & Lochary, \textit{supra} note 7, at 10.
\item \textsuperscript{19} For a general criticism of national courts, see \textit{Transitional Justice in Iraq}, \textit{supra} note 7, at 515-18.
\item \textsuperscript{20} See Rule 11bis, \textit{supra} note 11; see also Referral Bench, \textit{supra} note 3, at 12.
\end{itemize}
can the ICTY demand that relevant evidence held by one state be turned over to the Croatian authorities? Rule 11bis arguably gives the ICTY the power and authority to do many, if not all, of the above. Yet, how can the ICTY truly enforce these powers, given its limited resources and its limited temporal jurisdiction?

Second, witness protection may be problematic for a country as small as Croatia. To give better context to this issue, if a witness is relocated from the cities of Zagreb to Split in an effort to protect him or her, the witness would be moved only two hundred miles. Rule 11bis and the Referral Bench specifically conditioned the referral to Croatia on satisfactory witness protection.21 Although Croatia has created a witness protection law, the witness protection program itself has never been tested and the ICTY may be reluctant to share information on protected witnesses.22

Third, the application of satisfactory law raises one of the biggest concerns for the ICTY. The ICTY was established to prosecute persons responsible for grave violations of international humanitarian law committed in the territory of former Yugoslavia since 1991.23 It has codified for its use customary international and treaty law specific to these crimes.24 Croatia’s national legal system, however, was not specifically established to hear such cases. Furthermore, Croatia has a dual system of criminal codes, which was inherited from the former Yugoslavia and was in force during most of the armed conflict.25 The dual system was abolished in 1998 by merging the two codes into one, and the “new” code was further expanded in 2004 to include new criminal offenses, including command responsibility.26 Because much of the war in Croatia took place from 1991 to 1995, the prevalent legal position is that the domestic laws from 1991 to 1995 must be applied to these cases, which also appears to be the position of the Croatian government in arguments in the Ademi/Norac transfer hearings in the ICTY.27 However, international observers and the ICTY prosecutorial office fear that the “old” dual criminal code does not provide a sufficient legal basis upon which these crimes can be tried. They would prefer Croatia to either directly apply

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25. Id. at 11.
26. Id.
27. Id.; see also Referral Bench, supra note 3, ¶ 35.
international substantive law to these cases, or retroactively apply the new sophisticated criminal code.\textsuperscript{28}

For example, take command responsibility. Command responsibility is accepted as customary international law and codified in Article 7(3) of the ICTY statute, as an omission mode of criminal liability.\textsuperscript{29} It holds commanders responsible when they fail to prevent or punish subordinates in circumstances where the commanders knew or should have known that the subordinates were about to commit or had committed crimes. If a court charged with jurisdiction over war crimes does not have this theory of liability available to it, then subordinates in such circumstances are liable, whereas their superiors have impunity. Similarly, international treaty and customary law, including Protocol I of the Geneva Convention, recognizes criminal liability for commanders who fail to prevent or punish.\textsuperscript{30} In contrast, the old Croatian criminal code does not contain a provision on command responsibility.\textsuperscript{31} Thus, the ICTY prosecutor has urged Croatian authorities to directly apply international law.\textsuperscript{32} The ICTY prosecutor points out that Croatia, as a successor state to the former Yugoslavia, is a party to all treaties and conventions signed by the former Yugoslavia.\textsuperscript{33} Furthermore, Croatia's constitution allows for direct application and supremacy of treaty law by its courts.\textsuperscript{34} Yet in practice, national courts are reluctant to directly apply international law in their courts if the international law in question has not been introduced as national legislation. Another problem is that Protocol I of the Geneva Convention applies to international armed conflict and given the internal nature of the Balkan wars, it could be argued that applying international law directly in these cases is inappropriate.\textsuperscript{35}

An alternative solution would be to retroactively apply the new Croatian criminal code, including the 2004 amendments that provide for command responsibility, to cases that occurred in the early 1990s.\textsuperscript{36} While

\begin{itemize}
\item \textsuperscript{28} Referral Bench, \textit{supra} note 3, \textsection 34.
\item \textsuperscript{29} Statute of the ICTY, art. 7(3), \textit{available at} http://www.un.org/icty/legaldoc-e/index.htm (last visited on Dec. 21, 2005).
\item \textsuperscript{30} See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.
\item \textsuperscript{31} Referral Bench, \textit{supra} note 3, \textsection 33.
\item \textsuperscript{32} \textit{Id.} \textsection 34.
\item \textsuperscript{33} \textit{Id.} \textsection 33.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} \textsection 34.
\item \textsuperscript{36} The Croatian government cautioned against this approach but stated that ultimately its courts would decide the issue of retro-active application of its "old" criminal code. Referral Bench, \textit{supra} note 3, \textsection 35.
\end{itemize}
retroactive application of international criminal law is anathema to most legal professionals, article 7(2) of the European Convention for the protection of Human Rights provides an exception to the general retroactive application of criminal law. Importantly, there is authority for the proposition that article 7(2) was included specifically to ensure that war crimes were treated appropriately by national courts. Croatia, as a State Party to the European Convention for the protection of Human Rights would therefore be obligated under article 7(2) to apply its new criminal code retroactively, to ensure that war crimes are appropriately addressed in its courts.37

Croatians seem willing to accept the concept of command responsibility as codified in article 7(3) of the ICTY statute. However, in order to meet the prongs of the test for command responsibility of article 7(3), they suggest a fragmented approach, consisting of pulling out individual disparate sections of the Croatian old criminal code.38 For example, article 28 of the old criminal code declares that when an accused is charged with a duty to act and failure to act results in a crime, the accused is guilty of the crime of omission.39 The Croatians also argue that other legal theories, such as the theory of complicity, can be found in their old criminal code. By putting together unrelated sections, Croatians hope to meet the standards of command responsibility without directly applying international law, or having to retroactively apply their subsequent law.40 However, it is not clear whether this approach can adequately address the issue of command responsibility. For example, some argue that article 28 of the old Croatian code only applies to those with de jure rather than de facto control. Thus, only military commanders would be liable, and not commanders of paramilitary groups.41

At the hearings before the Referral Bench on the transfer of the Ademi/Norac case, the ICTY prosecutor and the Croatian authorities were in disagreement over the issue of how Croatia should deal with command responsibility.42 Because both Ademi and Norac are facing charges for crimes against humanity and war crimes on the basis of both individual and command responsibility, this is very significant.

The issues that Croatian courts face, as briefly illustrated above, are similar to those that other national courts face when international tribunals

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37. Jolic & Lochary, supra note 7, at 12.
38. Referral Bench, supra note 3, ¶ 37.
39. Id. ¶ 36.
40. Id. ¶ 37.
41. See, e.g., id. ¶ 41.
42. See generally id. ¶¶ 33-37.
phase out and contemplate turning over jurisdiction of grave violations of international humanitarian law to national courts. In countries where perpetrators are considered national heroes and where issues of applicable law remain unclear, one thing is certain—it will take courage and creativity on behalf of the national legal professionals to see that justice is done.

If such justice cannot be done, or if the form of justice achieved does not meet the standards of the international community, the question that remains to be answered is whether hybrid regional tribunals, such as the Special Court for Sierra Leone,43 are the "better" solution?

III. SPECIAL COURT FOR SIERRA LEONE—A BETTER ALTERNATIVE?

Before discussing the Special Court, some background on the ICC is warranted, as this tribunal came into existence approximately six months after the Special Court was established. Understanding the issues underlying the ICC is crucial to understanding why the Special Court was established.

The ICC is the first permanent treaty-based international criminal court.44 The first negotiations on the substance of the future Statute of the ICC took place in Rome in 1998, and the ICC Statute entered into force on July 1, 2002.45 Currently, there are four cases pending before the ICC.46 99 countries are parties to the Rome Agreement of the ICC, including many of the countries where horrible human rights violations occurred, and whose nationals include many of the potential defendants.47 For example, all former Yugoslav republics are state parties to the ICC, and so are Nigeria and Sierra Leone. Many western European countries have ratified the Rome Statute, and so has Canada.48

Nonetheless, the ICC cannot handle more than a tiny percentage of genocide, war crimes, and crimes against humanity cases, as it faces many problems, including lack of necessary budget and staff, jurisdictional hurdles, and lack of political support from powerful countries such as the

43. Hybrid tribunals, beside the Special Court for Sierra Leone, exist in Kosovo and East Timor. Transitional Justice in Iraq, supra note 7, at 519. The Special Court for Sierra Leone will nonetheless be discussed in Part III as an example of hybrid tribunals.
44. Kirsch, supra note 4, at 294.
45. Id. at 295.
46. For a description of the pending cases before the ICC, see http://www.icc-cpi.int/cases.html (last visited on Dec. 19, 2005).
47. Id.
48. Id.
United States. In fact, the United States has never ratified the Rome Statute and has always been an outspoken opponent of the ICC.\textsuperscript{49} Instead, the United States prefers regional tribunals that are country-specific, exactly like the Special Court for Sierra Leone.\textsuperscript{50}

In 2000, Sierra Leone President Ahmad Tejan Kabbah requested the U.N. Security Council to establish an international tribunal to try those most responsible for the atrocities that occurred during the decade-long civil war in Sierra Leone.\textsuperscript{51} An agreement between the United Nations and the government of Sierra Leone resulted in the Special Court for Sierra Leone.\textsuperscript{52} The Special Court’s offices and detention facilities are located in Freetown, the capital of Sierra Leone, and the Special Court is composed of a mix of international and local personnel.\textsuperscript{53} The question to be examined is whether such a hybrid regional body, located in the country where the atrocities occurred, is a better alternative to national and international tribunals, and whether such a hybrid tribunal will ultimately foster the growth of the local judiciary in Sierra Leone?

The Special Court has a number of advantages over an international tribunal.\textsuperscript{54} Many potential witnesses have remained in Sierra Leone and are more easily available to testify. Much of the desired evidence for the office of the prosecutor lies within Sierra Leone’s borders. Although some of the judges come from foreign countries, many are nationals of Sierra Leone and might be more sensitive to the country’s political situation, and are

\textsuperscript{49. Wippman, supra note 1, at 484-85; David J. Scheffer, U.S. Policy and the International Criminal Court, 32 CORNELL INT’L L.J. 529 (1999).}

\textsuperscript{50. See, e.g., U.S. abstention from the vote of the U.N. Security Council regarding the referral of a case against Sudan to the ICC, U.N. Press Release SC/8351, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, Mar. 31, 2005, available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm (last visited on Dec. 21, 2005) (noting that the United States believed that a better mechanism than the ICC would have been a hybrid tribunal in Africa). One of the main “neutral” arguments toward the necessity to create on-site ad hoc tribunals is that such tribunals foster the growth of the local judiciary by rebuilding the domestic legal culture. See Hussain, supra note 4, at 569.}

\textsuperscript{51. It should be noted that the United States has been a strong supporter of the Special Court and contributes most of its funding. See Peter Penfold, Limits to Transitional Justice, STANDARD TIMES/ALL AFR. GLOBAL MEDIA, Mar. 15, 2005.}

\textsuperscript{52. Hussain, supra note 4, at 569.}

\textsuperscript{53. Id.}

\textsuperscript{54. See Transitional Justice in Iraq, supra note 7, at 518-19 (describing the advantages of hybrid tribunals).}
more educated about the nature of the civil war.\textsuperscript{55} The Sierra Leone government specifically sought the establishment of the Special Court\textsuperscript{56} and presumably has been cooperating with the prosecution, thereby facilitating the prosecutor’s task.\textsuperscript{57} As the prosecutions are local, the people of Sierra Leone are more aware of them, leading to a sense of justice for the victims and providing a stronger sense of moral education to the local population.\textsuperscript{58}

While these advantages are important, there are also many disadvantages to this “hybrid” tribunal. As with Croatia, witness protection programs are difficult to implement in a relatively small country. The evidence might not be easily obtainable despite the geographic proximity of the prosecution office, if local authorities are not willing to cooperate with the Special Court, despite the fact that the national government requested the Special Court to be established. Sierra Leone judges may be biased, unwilling to judge their own people, or simply not knowledgeable about international law. The local population, like in Croatia, may still consider those charges with the crimes as heroes, and may blame the government for unnecessarily imposing foreign justice.\textsuperscript{59} The mere fact that people are in tune with the existence and the workings of the Special Court might create problems. For example, the Court’s headquarters are in new air-conditioned buildings, which are in stark contrast to the shacks and dilapidated buildings of Freetown where the “locals” live. Thus, perpetrators of presumably heinous crimes are housed better than the local population, have more to eat, have better medical help, as well as access to international television, such as CNN and BBC News. The local population might begin to wonder if foreign money, which could be used to rebuild Sierra Leone, is being spent on idealistic goals of international

\textsuperscript{55} Id. at 519-20 (noting that out of eight trial and appeals judges, three were appointed by Sierra Leone and five by the U.N. Secretary-General). The current composition of the Special Court includes one judge from Sierra Leone in the Appeals Chamber and one judge from Sierra Leone in the Trial Chambers. See http://www.sc-sl.org/chambers.html (last visited on Dec. 21, 2005).

\textsuperscript{56} Transitional Justice in Iraq, supra note 7, at 519.

\textsuperscript{57} International tribunals situated outside of the country where the atrocities were committed, such as the ICTY and ICTR, face problems because national governments of relevant countries will not cooperate. See Wippman, supra note 1, at 481-82 (noting the lack of cooperation by Croatia, the Federal Republic of Yugoslavia, and Republika Srpska in the case of the ICTY, and the lack of cooperation by Rwanda in the case of the ICTR).

\textsuperscript{58} Id. at 518-19.

\textsuperscript{59} Transitional Justice in Iraq, supra note 7, at 509 (noting that a tribunal which is perceived as a foreign agent quickly loses credibility, as the local population starts questioning international actors and wondering whether they really understand the local needs and custom).
justice that have nothing to do with the grim reality that the local population faces every day.  

Finally, legal and practical problems plague the Special Court’s mere existence.

With regard to the legal problems, the Special Court was established approximately at the same time as the Sierra Leone Truth and Reconciliation Commission, which purported to grant amnesty to the same persons who were then indicted by the Special Court. The Special Court’s biggest failure, however, has been its inability to bring to justice those individuals perceived to be the most responsible for the civil war. The prime example is Charles Taylor, the former President of Liberia who lived in exile in Nigeria until 2006, when Nigeria finally agreed to transfer him to the Special Court’s authorities. The Special Court’s former chief prosecutor, David Crane, indicted Charles Taylor to stand trial in the Special Court, based on allegations that Charles Taylor supported the rebel movement responsible for most of the atrocities in Sierra Leone. For several years, Crane’s indictment was of little value, as Nigeria seemed unwilling to extradite Charles Taylor to Sierra Leone. Even after Charles Taylor was transferred to the special court, problems seemed to persist, especially due to the political instability within Sierra Leone. Thus, it was quickly decided to move Charles Taylor’s trial to the Hague, thereby undermining all the “proximity” linked arguments in support of hybrid tribunals, like the special court. Moreover, while awaiting Charles Taylor’s extradition, David Crane was forced to indict other individuals over whom he could effectively exercise the Special Court’s jurisdiction. These individuals, however, include several members of warring factions other than the rebel movement, such as the Civil Defence Force, who are widely seen in Sierra Leone as the “good guys” who tried to prevent genocide and violence by combating the rebels.

60. Id.
61. On the consideration of the amnesty issue by the Special Court and the TRC, see William A. Schabas, Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone, 11 U.C. DAVIS J. INT’L L. & POL’Y 145, 158-65 (2004), On the relationship between the Special Court and the TRC, see generally Abdul Tejan-Cole, The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, 6 YALE HUM. RTS. & DEV. L.J. (2003); see Penfold, supra note 51 (noting problems related to the co-existence of the Special Court and the TRC); but see Transitional Justice in Iraq, supra note 7, at 521 (arguing that the Special Court and the TRC have been working well together despite the fact that their subject matter jurisdictions overlap).
63. Transitional Justice in Iraq, supra note 7, at 520.
64. Penfold, supra note 51 (arguing that not even Norman’s opponents accept the fact that Norman is the person most responsible for the atrocities that happened in Sierra Leone); but see
The Special Court is also plagued by practical problems. For example, its funding remains troublesome and has only been secured through the end of 2005. Its main personnel have already changed once, as Chief Prosecutor David Crane and Chief Defender Simone Monasebian both resigned earlier this year.

Given that the Special Court faces problems similar to those already faced by international and national prosecutions of international war crimes, and also faces other problems, it is questionable whether such a hybrid tribunal was necessary and warranted in the first place. The main argument for the creation of hybrid tribunals has been the proposition that such tribunals foster the growth of the national judiciaries, because they function in the host country, with the local judges and with the local judicial systems. However, the creation of hybrid tribunals is not the only way to rebuild local judiciaries, and other types of international help can certainly be made available. The international community has created a specific forum to address human rights violations—the ICC. Should resources be diverted from the ICC to establish a hybrid tribunal, when such resources could be used to rebuild a war-torn country? International justice does not necessitate the establishment of an ad hoc regional tribunal to prosecute perpetrators of heinous human rights violations, when an appropriate international tribunal already exists (ICC), and when national courts could possibly try such perpetrators.

Eric Pape, *Sierra Leone's War Crimes Tribunal Defied History by Going After the Victors, Not Just the Losers, of the Country's Civil War, Rebuilders of Iraq Are Taking Notice*, 2003 Legal Aff. 69 (2003) (noting the indictment of Sam Hinga Norman, which demonstrated that even “victors” could risk standing trial like the defeated).


68. It should be noted that there could be cases where the ICC cannot prosecute a certain offender because it does not have temporal jurisdiction over such an offender (the ICC only has prospective jurisdiction to try offenders for violations that happened after its establishment). The problem arises in such situations where in addition, the offender’s home country is not willing or not capable to prosecute, and where no other national judicial system is willing and capable to prosecute. Arguably, such offenders slip through the cracks and find a safe haven in the mere fact that nobody is capable of prosecuting them. Proponents of hybrid tribunals would argue that it would be appropriate to set up a hybrid tribunal in such a case. Although such a solution may be
Does one type of tribunal fit all situations? It appears that certain paradigms call for one or a combination of international tribunals, such as the ICC, ICTY, and the International Criminal Tribunal for Rwanda (ICTR), hybrid tribunals, such as the Special Court, and national courts. However, because international or hybrid tribunals cannot prosecute everybody, national courts will most likely end up with the highest number of defendants. Thus, the real issue becomes how to bring national courts to an internationally acceptable level. In other words, because national courts will face the highest number of prosecutions for international crimes, how does one make sure that their judges are aware of international law, that their procedures respect international law, and that the substantive law that they apply is in accordance with international law?

First, the creation of hybrid tribunals is not always warranted, and there are other ways of fostering the national judiciary’s growth and promoting the development of local law. It is true that hybrid tribunals located in the host country have certain advantages over international tribunals. For example, proceedings can be conducted in the local language and the local population may be more aware of the proceedings, thereby getting a better moral education and awareness of international law. For example, hybrid tribunals help build the local judicial capacity, by hiring local judges and educating them about international law.

appropriate in very limited cases, the international community can react in different ways to assure that such offenders are prosecuted. In most cases, the international community can encourage the offender’s home country to prosecute him by helping that country set up appropriate judicial bodies that can function in compliance with international criminal law standards. For example, the international community can send monitoring agencies, international judges, international legal materials, and logistical tools to countries that are willing to prosecute international offenders. In reality, situations where the offender’s home country is not willing or capable to prosecute him are rare. Furthermore, for any prospective violations, the ICC will have jurisdiction and will be able to prosecute, so that the real need for further hybrid tribunals will be minimized in the future.

69. See Mundis, supra note 7, at 613 (noting that the biggest hurdle for the ICTY and the ICTR will be “to ensure that national judiciaries can be entrusted to provide trials that meet international due process standards so that cases can be transferred for prosecution.”).

70. For examples of problems that national courts face, see Transitional Justice in Iraq, supra note 7, at 518 (noting many inadequacies of national courts).

71. Id. at 518-19 (noting advantages that hybrid courts have over national and international courts).

72. Id.
Nonetheless, hybrid tribunals are not always the appropriate solution.\textsuperscript{73} Such tribunals undermine the validity of the ICC. Instead of encouraging countries to ratify the Rome Statute and to respect the ICC, they send the message that the ICC might not be the best forum and that other international prosecutions are possible.\textsuperscript{74} Furthermore, simply in terms of resources, they take away funds that could be spent to rebuild a war-torn country in order to establish an ad hoc tribunal, which is always very expensive, and which does not necessarily result in a form of better justice than the one that the ICC could provide.\textsuperscript{75} Moreover, such regional tribunals send another message in the form of selective justice, namely that if a powerful country, such as the United States, cares about a particular country, such as Sierra Leone, then everything will be done to create a specific forum which will address human rights violations.\textsuperscript{76} But what about other countries, equally war torn and equally in need of some kind of remedies—are they not as important? By sending cases to the ICC, a more global message is sent that international justice requires prosecution in a global forum.\textsuperscript{77}

Instead, the local judiciaries can be rebuilt with other types of help from the international community that do not include the creation of hybrid tribunals. Developed countries can establish educational programs for local judges by sending human resources, learning tools and logistical help to war-torn countries. For example, a number of American judges recently went to Kosovo to work on U.N.-sponsored judicial panels, set up to try war crimes cases, \textit{inter alia}, and consisting of a mix of international and local judges.\textsuperscript{78} The American judges will not be needed in Kosovo forever—the idea is that the Kosovar judges will soon become sufficiently educated and will be able to handle prosecutions involving international crimes. For example, instead of creating a hybrid tribunal with western

\begin{itemize}
  \item \textsuperscript{73} See supra note 68 (discussing limited situations in which hybrid tribunals may be appropriate).
  \item \textsuperscript{74} See, e.g., Kirsch, supra note 4, at 293 (arguing that ad hoc tribunals are limited in their deterrent effect).
  \item \textsuperscript{75} Id. (noting the costs linked to the establishment of a new tribunal).
  \item \textsuperscript{76} Authors have already noted that the creation and functioning of international tribunals are influenced by powerful countries. See, e.g., Christopher C. Joyner, \textit{Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability}, 26 DENV. J. INT’L. L. & POL’Y 591, 609 (1998) (noting that international tribunals are often influenced by the Great Powers on the Security Council and that such political considerations can undermine their effective operation).
  \item \textsuperscript{77} See, e.g., Kirsch, supra note 4, at 292 (noting that the ICC will function on a “global scale” and that it will work toward “overcoming impunity and creating a culture of accountability”).
  \item \textsuperscript{78} Marilyn Justman Kaman, \textit{Justice Following War}, INT’L L. NEWS, Summer 2005, at 13.
\end{itemize}
judges and “international” statutes, developed countries can help set up purely domestic tribunals, that would function under international supervision and that would possibly report to an international organ. This model has already been adopted in Croatia, where local authorities will have to report to the ICTY prosecutor under Rule 11bis of the ICTY Rules of Procedure and Evidence. For example, developed countries can send international legal materials to war-torn countries, in order to educate local judges about the appropriate law to apply to international crimes. All these solutions may help the growth of national judiciaries without imposing the need to create more hybrid tribunals.

Second, certain heinous crimes, such as genocide and crimes against humanity require that offenders be prosecuted in some forum, be it international or national, and that the prosecution be in accordance with international law, even if the offender’s home country refuses to prosecute.79 Thus, let one assume that the weight of the evidence supports the conclusion that a certain defendant is guilty of genocide, and let one assume that his home country has refused to prosecute him. He should be prosecuted in a forum capable of applying international law, or at least capable of applying national law that is in compliance with international law. Thus, such a defendant could be prosecuted in the ICC, in a hybrid body, such as the Special Court, or in a country other than his home country capable of conducting a prosecution in accordance with international law. Which would be the best forum? Such a defendant should be prosecuted either in an international forum, such as the ICC, or in a national forum in a country that is willing and capable to prosecute, that is, a national forum that can acquire some form of jurisdiction over him, for example, universal jurisdiction.80 Such a defendant should not be prosecuted by a hybrid tribunal, such as the Special Court, mainly because the creation of such ad hoc regional tribunals undermines the validity of the ICC, and from a more pragmatic point of view, because resources in a country like Sierra Leone could be better spent on other efforts, such as judicial education, infrastructure, medicine, and so forth. Thus, whether such a defendant should be prosecuted in an international forum or a national forum would depend on a variety of factors.


80. For a discussion of universal jurisdiction, see, e.g., Ryan Rabinovitch, Universal Jurisdiction In Absentia, 28 FORDHAM INT’L L.J. 500 (2005).
The fundamental question is whether there is a country that is willing and capable to prosecute such a well-known defendant, and if so, whether practically it makes more sense for such a country to prosecute him?\textsuperscript{81} For example, to determine if a national prosecution is warranted, we should look at the following factors: the geographic location of the evidence and witnesses needed to testify; the feasibility of a witness protection plan; the competence of the local judiciary; the existence of a national criminal code in compliance with international law; the presence of an appropriate infrastructure, as well as the country's physical capability to exercise jurisdiction over such a defendant.\textsuperscript{82}

Yet, even if a country is capable and willing to prosecute a well-known defendant, in particularly heinous cases involving well-known offenders, or in situations involving countries such as Sierra Leone, Sudan, or the former Yugoslavia, where horrible human rights violations occurred, it would be warranted to have the prosecution take place in the ICC, mainly because such a prosecution sends a stronger message to the rest of the world that this type of behavior will not be condoned and that the international community will act to stop such behavior.\textsuperscript{83}

Third, in some cases where the home country of the offender is capable and willing to prosecute, and where the offender is less known, or where the violation involved is a lesser offense, such as aggression or kidnapping, it is appropriate to permit national courts to prosecute.\textsuperscript{84} There are numerous reasons for this. For one, the international tribunals cannot prosecute everybody and are forced to choose their indictments carefully.\textsuperscript{85} The ICC Statute specifically embraces the principle of complementarity, which cedes ICC jurisdiction to member states when member states are

\textsuperscript{81} See, e.g., Kirsch, supra note 4, at 299 (discussing whether a certain state is willing to investigate or prosecute offenders).


\textsuperscript{83} Kirsch, supra note 4, at 293 (noting that “only a permanent international criminal court can most effectively deal with the gravest offenses known to humankind”); Payam Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, 20 Hum. RTS. Q. 737, 749 (1999) (arguing that through punishment of particular individuals we can achieve an instrument through which respect for the rule of law is instilled into the popular consciousness).

\textsuperscript{84} Accordingly, both the ICTY and the ICTR have now begun focusing only on the most senior perpetrators while ensuring that cases involving minor perpetrators are transferred to appropriate national jurisdictions for trial. See Mundis, supra note 7, at 591.

\textsuperscript{85} See, e.g., Kritz, supra note 82, at 133 (noting that the ICTY and ICTR have limited their prosecutions to a relatively small number of people for both practicality and policy reasons).
willing to prosecute.\textsuperscript{86} Thus, it is better for international tribunals to prosecute people like Slobodan Milosevic and Charles Taylor, because such prosecutions are often the most difficult, require a large amount of resources and sophisticated judges, and because such prosecutions send the strongest message to the rest of the world that heinous crimes committed by dictators will not be tolerated. Moreover, it is important to let national courts prosecute lesser offenders. National jurisdictions, especially in war-torn countries, have to grow, so that allowing them to prosecute offenders of important crimes might help them rebuild their criminal codes and their judiciary.\textsuperscript{87} Prosecutions might also be necessary as part of the country’s healing process, and prosecutions in the country that suffered a civil war are going to be a lot more effective than ICC prosecutions taking place at the Hague. As previously noted, the advantages of prosecution in the home country include: the proximity of the evidence and the witnesses; the judges’ awareness of the nature of the conflict that occurred; the government’s cooperation; as well as the fact that such national prosecutions might be part of the home country’s healing process. Thus, it seems that a national prosecution would be warranted in some cases, and that the ICTY’s transfer of the \textit{Ademi/Norac} case was well decided, provided that the Croatian tribunals are able to appropriately apply domestic law in compliance with international law.

Fourth, in reality, the decision to resort to any type of prosecution—international, hybrid, or national—is often influenced by political pressure coming from different levels. International, regional, and national powers often collide in their conception of the best form of justice. Thus, whether an international or a hybrid tribunal \textit{can} be established often depends on whether international, regional, and national powers come to a conclusion about the appropriate forum and the appropriate body of law that it should apply. For example, the Special Court for Sierra Leone was established through an \textit{agreement} between the national government of Sierra Leone (a national body) and the U.N. Security Council (an international body).\textsuperscript{88} For example, the South African Truth and Reconciliation Commission, which was a form of national redress for human rights violations, was established by the country’s government, specifically because the South African government did not

\textsuperscript{86} Kirsch, \textit{supra} note 4, at 293 (noting that complementarity affords primacy to national legal systems and that the ICC “will not become involved where national systems genuinely investigate or prosecute [international human rights offenses]”).

\textsuperscript{87} See Hussain, \textit{supra} note 4, at 570 (noting that one of the purposes of the Special Court is to help rebuild a strong national judicial system).

\textsuperscript{88} \textit{Id.} at 568-69.
want other regional countries to meddle in its own justice system. For example, negotiation over the establishment of a regional tribunal in Burundi collapsed in 1995. The United Nations began negotiating the establishment of an internationally-supported tribunal in Burundi, which would address the human rights violations that occurred within Burundi and that were in reality part of the Rwandan civil war. Such negotiations collapsed over the death penalty. Nearly all European countries opposed the creation of an international or regional tribunal which would provide for the imposition of the death penalty. Nearly all Burundi representatives present at the negotiations were adamant about being able to impose the death penalty on human rights offenders. The tribunal was never established. Similarly, a war crimes tribunal is only now being established in Cambodia, despite the atrocities committed by the Khmer Rouge regime, simply because the current government encompasses some former Khmer Rouge members and has been recently unwilling to let anybody stand trial in fear of inculpating itself.

In other cases, the creation of an international tribunal was a direct consequence of the international pressure and determination to do so, despite the national government’s unwillingness to participate in international proceedings. For example, the ICTY and the ICTR were established despite the former Yugoslavia’s and Rwanda’s protests. In both of these cases, The U.N. Security Council exercised its powers and decided to trump these countries’ sovereignty, because the international community decided that it was in the interest of global peace and justice to establish such tribunals. Similarly, the U.N. Security Council recently referred a case against Sudan to the ICC, against Sudan’s consent. The above cases illustrate that the best theoretical solution might not be possible in reality, and that political pressure coming from the international, regional, and national levels often dictates the final solution.

91. Private conversation between the author and one of the negotiators, held on Oct. 15, 2005.
92. Clinton Should, supra note 90.
93. Transitional Justice in Iraq, supra note 7, at 516-17.
94. Id. at 511, 514.
V. Conclusion

Which prosecution—international, hybrid, or regional—is best for which country? In light of all of the above, the conclusion that imposes itself is that nearly all situations require a case-by-case examination of all the surrounding circumstances. In other words, theoretical values, such as deterrence, retribution, and national reconciliation need to be combined with practical considerations in order to reach a conclusion as to which type of prosecution might be best for a particular country or a particular conflict. The above paradigms should provide some guidelines as to which solution might be theoretically best for which country or conflict, despite real problems stemming from politics and policy, which always underlie the creation of any treaty-based tribunal.