Beyond Good Intentions: Can Hybrid Tribunals Work after Unilateral Intervention

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By John Dermody

I. Introduction

In 1982, Saddam Hussein ordered Iraqi security forces into al-Dujail, a town sixty kilometers north of Baghdad, as reprisal for a failed assassination attempt.\(^1\) Hundreds of townspeople were detained and tortured while buildings and crops in the town were destroyed.\(^2\) One hundred and forty-eight people were allegedly executed.\(^3\)

In the 1988 Anfal campaigns against the Kurds in northern Iraq, Iraqi army commander Ali Hassan al-Majid, or “Chemical Ali,” set out “to solve the Kurdish problem and slaughter the saboteurs.”\(^4\) At the behest of Hussein, thousands of noncombatants were abducted or killed, 2,000 villages were destroyed, and chemical weapon attacks on the town of Halabja killed thousands.\(^5\)

In the wake of the United States invasion of Iraq and the subsequent capture of Hussein, it was paramount to hold Hussein and the members of the ruling Ba’ath party legally accountable for their

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\(^2\) Id.

\(^3\) Id.


\(^5\) Id.
atrocities. A variety of transitional justice mechanisms were available for the Coalition Provisional Authority (CPA) to choose from. Instead of adopting an international tribunal mirroring the mechanisms employed in Yugoslavia and Rwanda, the CPA opted for a domestic tribunal that, while receiving United States support, would allow the Iraqis themselves to try Hussein and members of the Ba'ath party. The adoption of a domestic model has been heavily criticized, with many critics suggesting that a hybrid tribunal, one employing both domestic and international elements, should have been employed. While the hybrid model has been somewhat successful in Kosovo, East Timor and Sierra Leone, it has yet to be employed in the context of a unilateral intervention such as Iraq. Although hybrid models are theoretically superior in post-conflict circumstances to both domestic and international tribunals, significant challenges and shortcomings have emerged in their implementation.

This note assesses whether the hybrid tribunal is a viable model for post-conflict accountability in the aftermath of unilateral intervention. Drawing from the experiences of the tribunals in Kosovo, East Timor, and Sierra Leone as well as the challenges facing the Iraqi Special Tribunal (IST), this note identifies how the unique challenges of unilateral intervention impact the potential of hybrid tribunals. Part II of this paper sets out the context and demands of unilateral intervention and the need for legal accountability mechanisms. Part III describes the various mechanisms available for legal accountability and explains why the hybrid model has emerged as the preferred approach. Part IV determines whether, and in what form, the hybrid model is possible after unilateral intervention. Finally, Part V examines whether the promised advantages of hybrid

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6. Due to the temporal restriction, the International Criminal Court is not able to hear issues prior to July 2002.


Beyond Good Intentions

II. Unilateral Intervention

Failed states and ethnic conflict have given rise to an alarming number of mass atrocities in the last two decades. From the ethnic cleansing in Yugoslavia to the genocide in Rwanda and the atrocities committed in Iraq, the toll of human suffering has demanded the attention of powerful nations. Unfortunately, coordinated international efforts to prevent these atrocities have, at times, proven woefully inadequate. In the absence of effective coordinated international efforts, unilateral humanitarian intervention has been posited as a necessary alternative. However, the prospect of humanitarian intervention carries with it the fear that powerful states will use the language of human rights to justify actions motivated primarily by self-interest. The debate over humanitarian intervention, whether unilateral or not, is a hotly contested issue that divides the human rights community. While the United States intervention in Iraq has forced many to revisit and reconsider the utility of humanitarian intervention, such an examination falls outside the scope of this note. Despite the normative value of humanitarian intervention, the increased prevalence of human rights in international relations ensures that unilateral interventions will include the rhetoric of human rights even in actions motivated solely by narrow state interests. The recent interventions in Kosovo, Afghanistan and Iraq demonstrate that unilateral intervention is likely motivated by some combination of humanitarian and strategic interests.

15. President Clinton justified intervention in Kosovo on three grounds: to avert a humanitarian catastrophe, preserve stability in a key part of Europe, and maintain the credibility of NATO. Morton, supra note 12, at 78. Intervention in Afghanistan against the Taliban was based on claims of retribution, security, and liberating the
Whether the motivation for unilateral intervention is altruistic or self-interested, abusive former regimes must be held responsible through legal accountability mechanisms. These mechanisms serve several purposes: symbolic regime transfer, rule of law promotion, justification of the intervention, and warning other despot leaders that human rights violations will not go unpunished. At their core, post-intervention tribunals are show trials subject to both pejorative and positive assessments. In the negative sense, they serve as legal theater for the victor’s justice, demonizing the accused and bestowing suspect legitimacy upon the victor. In the positive sense they allow a society to condemn, and distance itself from the actions of the former regime, and transition to a new regime guided by the rule of law. “[H]olding the prior regime accountable presents the first real test for the establishment of the rule of law” because of the spectacular nature of the crimes, the figures involved, and the complexity of the process.

The presence of a strong rule of law is essential to stability and security. Tribunals are often the most visible measures taken to establish the rule of law even though other extensive developments are required. Unilaterally intervening actors are likely to employ a tribunal because of the tremendous legitimacy a tribunal can confer in the domestic arena. Taped proceedings and courtroom declarations provide tangible evidence of transitional progress that is easily viewed on the evening news. Similarly, tribunals create a historical record of the former regime’s actions that can justify the intervention. Tribunals also demonstrate to the international community that the intervening actor is dedicated to the rule of law, which may dispel

Afghan people, particularly women, from the oppressive Taliban regime.

17. Id.
18. Id.
19. Id. at 460-61.
22. For example, the Central Criminal Court of Iraq (CCCI) operates at a level below the IST. There has been significant international assistance, with a great degree of United States assistance from the Department of Justice’s Office of Overseas Prosecutorial Development Assistance and Training.
23. Id.
lingering concerns about the motivation of an intervention. This is even more important locally, where the presence of occupying forces can spur significant suspicions as to the supposedly benevolent nature of an intervention. It is highly likely that tribunals will be a part of any future unilateral intervention due to the advantages that such tribunals offer.

III. Available Tribunals

Although a variety of mechanisms are available for legal accountability in the post-intervention context, each has distinct shortcomings that negatively impact their efficacy. The recent use of the hybrid model, which employs both domestic and international elements, is an attempt to overcome the disadvantages of purely domestic and purely international tribunals. The International Criminal Court (ICC) has been criticized for its limited jurisdiction, inability to develop local legal capacity, and removal from the situs of the transgressions. Additionally, the ICC cannot address any actions that occurred prior to 2002 because of its temporal restrictions.

International tribunals like the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been heavily criticized for similar reasons. Commonly referred to as “ad hoc” tribunals, international tribunals are located outside of the country concerned and use international judges to apply international law. Their visibility and impact on the local populations has been less than ideal, which raises the question of whether the trial benefits those who suffered the offenses or the conscience of the international community. Ad hoc tribunals have also been incredibly expensive and slow, causing “ad hoc fatigue” and disfavor among diplomats and donor governments.

The alternative to expensive and removed international tribunals is to use the legal mechanisms of the society where the offenses were

26. See generally, Cockayne, supra note 9.
27. Dickenson, supra note 9, at 1067.
28. “Where ‘never again’ was once the catch-cry of anti-impunity activists, it has now become the under-the-breath muttering of Permanent Representatives on their way to approving another tribunal budget at U.N. Headquarters in New York.” Cockayne, supra note 9, at 616-17.
committed. However, limitations on the structure and legitimacy of the domestic systems often preclude any transitional justice efforts. The conflict that gave rise to the offenses often destroys the physical infrastructure of the legal system and decimates personnel necessary for any legal proceedings. Moreover, even if some measure of the domestic legal system survives, it may lack the laws and experience to adequately prosecute such widespread and egregious offenses. The legitimacy of the domestic legal system is vital to any attempt at accountability, but may be absent either because it was employed as a mechanism for repression or because its personnel were complicit in the offenses committed. Transitional justice inherently implicates divisive political interests. Left to its own devices, a domestic legal system may not have the impetus to undertake such a daunting task. The temptation to forgive and forget, an often counter-productive strategy, is particularly strong when a widespread portion of the society was complicit in the atrocities.

The hybrid model has been used in Kosovo, East Timor, and Sierra Leone as an inexpensive alternative to the costly ad hoc tribunals. The hybrid model employs international personnel and law side by side with domestic personnel and law. The prosecution and defense are comprised of local lawyers working with international lawyers, and the judges apply domestic law that has been adapted to incorporate international norms and standards. The potential of the hybrid model is to:

[M]arry the best of two worlds — the expertise of the international community with the legitimacy of local actors; but the risk is to intermix the worst of both — the externality of international actors with the weakness of local institutions which produced the violence in question.

Although the Kosovo tribunals were implemented to deal with security and legitimacy issues, the motivation for implementing the

30. The court in Cambodia is also likely to employ the hybrid model, but structural and funding problems have prevented the court from becoming operational. Human Rights Watch, World Report 2001, http://www.hrw.org/wr2k1/intro/intro15.html (visited Sept. 6, 2006)
31. Dickenson, supra note 9, at 1059.
32. Cockayne, supra note 9, at 618-19.
other hybrid tribunals was to build the capacity of the domestic system while doling out international justice cheaply. The promise of hybrid tribunals, according to Laura Dickenson, lies in their ability to garner greater legitimacy, develop the capacity of local legal system and to incorporate international norms into local legal systems. These measures allow a country to address egregious crimes and provide its people with a stronger, more developed legal system to provide stability in the future.

In practice, however, the theoretical potential of hybrid tribunals has been somewhat less than forthcoming. Although preferable to purely international or domestic tribunals, hybrid tribunals’ promise of cheap, legitimate justice that advances the domestic legal system has not been fully realized. Lack of funding continues to be a chronic issue, and the impact upon legitimacy, capacity, and international norm diffusion remains unclear. East Timor and Kosovo have had significant personnel and infrastructure issues, and Sierra Leone, perhaps the most successful to date, has had continued issues with funding and delay.

A hybrid tribunal has not yet been used in the wake of an unilateral intervention. The NATO involvement in Yugoslavia, the British involvement in Sierra Leone, and the Australian involvement in East Timor do not reach the level of unilateralism that occurred in Iraq. Although NATO acted without U.N. authorization in Kosovo, it was comprised of regional actors that could lay claim to legitimacy. Further, the hybrid tribunal in Kosovo was not the primary mechanism of legal accountability, but served as a supplemental mechanism to the ICTY. The involvement of troops from the

33. Kosovo employs a different model than either Sierra Leone or East Timor. The Kosovo hybrid model is much more a supplement to the domestic legal system than a conscious integration of domestic personnel into an international war crimes tribunal. While in some cases this has increased the interaction of international and domestic personnel, it has also resulted in international personnel being assigned to mundane cases unrelated to significant crimes.

34. Dickenson, supra note 10, at 296.
35. Id. at 306.
36. Id. at 296-300; Cockayne, supra note 9, at 630-31.
38. Dickenson, supra note 9, at 1060.
39. Id. at 1062-63. Although the actual interaction between the hybrid tribunals and the ICTY have been very limited, there is no formal mechanism for referring cases and interaction between the two levels is sparse.
Economic Community of West African States (ECOWAS), a regional body, and the United Nations preceded the British intervention in Sierra Leone. In contrast, the war and reconstruction in Iraq were largely executed under U.S. control, even though the United States established a so-called “coalition of the willing.”

The context of unilateral intervention presents a variety of challenges for transitional justice: questionable legitimacy, instability, lack of international participation, and ulterior motives. However, unilateral intervention also offers some advantages over collective action: decisive action, military strength, and singular responsibility. This note addresses the issue of whether, in the unique circumstances of unilateral intervention, hybrid tribunals can fulfill their promise.

IV. Are Hybrids Feasible After Unilateral Intervention?

Although many called for a hybrid tribunal in Iraq, it is not clear whether a hybrid model would have been a feasible or even preferable option for accountability. The international reluctance to become involved in the war was likely matched only by the unwillingness of the United States to give up predominant control of the effort. While the Security Council Resolution 1483 gave the United States some international authority, the U.S. postwar strategy was to govern Iraq directly as a belligerent occupant rather than cede power to the United Nations. The lack of international participation made the use of a hybrid tribunal unlikely.

A. Legitimacy

The first hurdle a hybrid tribunal faces in the aftermath of a unilateral intervention is the de facto illegitimacy of the entire project. Though not fatal to the project of transitional justice, a lack of U.N. approval greatly impairs whether the international community and the local population will see the action and any subsequent accountability measures as legitimate.

A crucial element of the hybrid tribunal is its mixed international aspect, which provides legitimacy and expertise. For example, the

40. O’Connell, supra note 37, at 221. In 2000, the United Kingdom sent troops to Sierra Leone after the Revolutionary United Front captured 500 U.N. peacekeepers.
41. Gersh, supra note 8, at 288-89.
42. UNGA Resolution 1483, 20 May 2003, S/res/1483.
United Nations Mission in Kosovo (UNMIK) incorporated international judges into the domestic system to combat the risk of bias and violent reaction to ethnically controversial cases.\textsuperscript{44} If an unilateral intervention is seen as illegitimate, this will curtail participation by other international actors in the post-conflict situation. Hybrid tribunals with established international legitimacy already have difficulty attracting and retaining experienced international personnel.\textsuperscript{45} Without U.N. or regional legitimacy, attracting the international personnel necessary for the hybrid model to be effective will be even more difficult. Gaining the services of qualified international personnel willing to work in an unstable environment for an extended period of time is a much greater task than cobbling together a coalition of the willing to contribute to a military campaign. As the situation in Iraq keenly demonstrates, winning the peace is far more difficult than wining the war.

Countries and organizations whose experiences would be vital to the successful use of the hybrid model could withhold their support out of fear of post hoc legitimatization of the unilateral intervention. Some countries may withhold support in an effort to punish the unilateral actor for its intervention. Less cynically, countries and organizations may demonstrate that they cannot “pick up the pieces” in an effort to dissuade future unilateral interventions and impress upon the unilateral actor the difficulty of going it alone. Without international legitimacy, there is a strong likelihood that instead of a hybrid model, the post-conflict tribunal will appear more like the IST: locally operated, with the United States providing significant behind the scenes help.

Although countries and organizations may be willing to offer their support after the intervention despite the lack of legitimacy, such efforts may not be feasible. Though post-intervention participation may be motivated by genuine concern for the local population, the significant danger of being associated with the unilateral actor remains. As Iraq tragically demonstrated, this association can have dire consequences. On August 19, 2003, Sergio Viera de Mello, the U.N. Special Representative to Iraq, was killed.


\textsuperscript{45} Cockayne, supra note 9, at 632-634.
along with many others when insurgents bombed the U.N. headquarters in Iraq. De Mello was widely respected for his expertise and passion for transitional justice for playing a significant part in the U.N. efforts in Kosovo, Cambodia, and East Timor. His death and the subsequent attacks on U.N. personnel led to the U.N. withdrawal from Iraq. The attacks suggest that even a legitimate organization cannot operate in the aftermath of an unilateral intervention without being negatively associated with the intervener. The post hoc involvement of legitimate international actors, while crucial to the success of a hybrid tribunal, may not be possible in the aftermath of an illegitimate unilateral intervention.

A failure to attract international legitimacy may also make it difficult for the local population to accept the hybrid tribunal. However, broad international support could influence the local population to perceive the tribunal as more legitimate. For example, Sierra Leone’s initial resistance to the U.S. involvement with the Special Court has been attributed to the United States’ unilateral actions in Iraq.

Participation by international states and states with “similar cultures” could potentially relieve some of the colonial tension associated with intervention. However, international legitimacy does not necessarily translate to domestic legitimacy. A study conducted by the International Center for Transitional Justice and the Human Rights Center at the University of California, Berkeley (ICTJ), suggests that international and regional support would not have increased local acceptance of a tribunal in Iraq. The ICTJ study

47. Id. at n.172.
48. Id. at 391.
49. Although the ICTJ study suggests a distrust of the United Nations: Suspicion and distrust of the U.N. was most evident among respondents from the north (both Kurdish and Turkoman), who believed the U.N.’s actions entrenched the regime’s grip on power through the Oil for Food Program. In the central and southern regions, some criticized the U.N. for its inaction concerning human rights abuses. The U.N. is also responsible for our suffering. (Shi’a man, Baghdad).
51. ICTJ, supra note 29, at 29-30 (emphasis in original).
found that most respondents felt that other Arab states profited from the suffering of the Iraqi people.\textsuperscript{52} Accusations of unjust profit were also leveled at the United Nations:

The U.N. was representing the Iraqi government .... In my opinion, [in] these areas, which were out of the Iraqi government's reach since 1991, the U.N. repressed our people in different ways; they were just here for the money.\textsuperscript{53}

This distrust presents both a challenge and potential advantage for hybrid tribunals in the unilateral context. Although distrust of international organizations and regional neighbors will limit the potential pool of international personnel available to the tribunal, the unilateral intervention frees the tribunal from the pressure of employing personnel representative of the international community. At the Special Court for Sierra Leone, seven of the judges are appointed by the U.N. Secretary-General, while only four are appointed by the Sierra Leone government.\textsuperscript{54} A unilateral intervener would have far more leeway to choose personnel with greater appeal to the local population. In East Timor, the wider pool of personnel made available by U.N. support was irrelevant because the Timor-Leste Minister of Justice only considered international candidates who spoke Portuguese and were from civil law jurisdictions.\textsuperscript{55} However, this seems to be only a minor advantage in the unilateral context, where it is unlikely that a large pool of available and willing personnel would be available and acceptable to both the intervener and the local population.

A failure to garner the support of international actors prior to intervention may preclude any involvement after the intervention. Although international legitimacy makes implementing a hybrid tribunal more feasible, it does not ensure a stable environment in the wake of unilateral intervention. Whether a hybrid tribunal or any other tribunal can be implemented successfully in a violently unstable environment is doubtful. While the inherent lack of legitimacy of

\textsuperscript{52} Id.  
\textsuperscript{53} Id. at 30.  
unilateral interventions does not preclude implementation of the hybrid model, it exacerbates the problems that the hybrid model is designed to solve.

**B. Security Concerns**

The local population is more likely to resist unilateral intervention, a fact that exacerbates security concerns. However, cooperative action, particularly the efforts of the United Nations, has had great difficulty effectively intervening prior to the development of a crisis.\(^{56}\) In contrast, unilateral actors may be able to avoid the slow process of consensus building and pursue an intervention with greater military urgency and strength. This may halt a crisis before it matures into widespread conflict, but can have negative ramifications for stability and hybrid tribunals. Opposing parties and the domestic population will not be so exhausted from the conflict that the unilateral intervention appears amenable.\(^{57}\) The tenuous security situation in Sierra Leone after the Lomé Peace Agreement led its government to request the international community’s assistance in trying those most responsible for human rights violations.\(^ {58}\) The government of Sierra Leone would not have had the opportunity to request international legal assistance if an actor had intervened, established its presence, and taken control of the security situation prior to the major cessation of the conflict. The subtle difference between requesting and merely receiving international legal assistance has a significant impact on the domestic acceptance of the tribunal.

Unilateral intervention is not a gradual, grassroots development, but a sudden, cataclysmic event that causes social turmoil. The local people who suddenly find themselves in a war zone will inevitably focus some degree of their frustration and anguish on the occupying forces. They will not see a tribunal as a means of addressing and preventing abuse, but as a product and tool of an intervention that brought with it conflicting messages of violence and liberation. These difficulties are evident in Iraq. The IST has been the target of many attacks, and several court personnel have been killed.\(^ {59}\) These

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56. Rwanda is a prime example.
security issues have curtailed the tribunal's efficiency and have led valuable staff members to leave the IST.60 The domestic and international personnel needed to implement the hybrid model will be less likely to participate due to this instability. The hybrid model must distance itself from both the prior regime and the liberating forces in order to be successful. However, critics have commented that in Iraq, "[a]ny tribunal established on behalf of the Coalition Provisional Authority will not be able to rid itself of the perception and fact that it is an instrument of American power."61

Moreover, the intervener is faced with the difficult dilemma of providing security while trying to provide the transparency necessary for a hybrid tribunal to be effective. "Extreme public insecurity in Iraq not only pushes the rule of law agenda to the backburner; it actively undermines the privileging of justice over order."62 The United Nations faced similar tensions in East Timor, trying to control security in the short term and establish a viable system of self-governance in the long term.63 The recent violence in East Timor highlights the challenge of establishing and maintaining the security necessary for effective transitional justice mechanisms in post-conflict environments.64 The security threats in the context of unilateral intervention are likely to be much more serious because of resistance to the occupation. It will be difficult for the occupying authority to commit to a tribunal model that involves and exposes its personnel when the risk of harm is so prevalent. In a highly unstable situation, the needs of security will undoubtedly be privileged over the needs of the hybrid model.

C. Regime Change

Unlike the hybrid tribunal in Sierra Leone, the target country does not usually invite unilateral intervention.65 Instead, the unilateral

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63. Katzenstein, *supra* note 9, at 249.


intervention will have goals of preventing human rights violations and regime change. This is problematic for the hybrid model, which relies on the some domestic legal system, inadequate as it may be, that it can interact with and develop.

International law requires occupying states to maintain the status quo of political and legal systems. However, there is often a push to completely overhaul the domestic legal system in the context of unilateral intervention and regime change. As was the case in Iraq, legal systems under tyrannical leaders are liable to be corrupt or defunct. "When no elected officials exist to give advice, and civil society has been badly damaged by years of oppression and conflict, there is no easy answer to the question of who should be consulted, without creating an impression of bias."

Ruti Teitel notes, "Legal measures during [transitional justice] periods follow a distinctive paradigm, guided by rule of law principles tailored to the goal of political transformation." This is evident in Iraq where the Coalition Provisional Authority, in relation to the IST, sought to radically restructure the legal system by excluding anyone who had been a member of the Ba'ath party. The purported goal of the exclusion was to include only legitimate domestic personnel in the court, but the policy was based on misinformation and political manipulation. A tribunal during a regime change is as much an accountability mechanism as a means to constitute a new political

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68. ICTJ, supra note 29, at 33.

69. Dickenson, supra note 9, at 1069.


72. Ahmed Chalabi was the main proponent of the de-Ba'athification provision, ignoring the advice of the Department of State and the Central Intelligence Agency. See generally, David Reiff, Blueprint for a Mess, N.Y. TIMES, Nov. 2, 2003, at 28.
order. As in Iraq, the intervener wants to formulate its preferred political visions – a goal that could preclude international involvement and domestic development. The actor pursuing regime change will likely involve preferred personnel, not necessarily experts, in the reconstruction and tribunal process. By contrast, cooperative intervention must balance the interest of many actors and will likely default to expertise. The unilateral context makes the process more vulnerable to narrow political interests.

The Oil For Food scandal makes it readily apparent that the United Nations is not above corruption. However, the increased collaboration that collective intervention entails suggests that the process is less susceptible to capture by individual actors. Conversely, unilateral intervention is highly susceptible to influence by narrow political agendas. The recent events in Iraq exemplify this trend. Ahmed Chalabi used his influence with the Bush administration to gain undue control over the transitional planning and political power in Iraq. The resources of the Department of State and the Central Intelligence Agency were ignored in planning for post-intervention accountability in favor of a policy heavily influenced by Chalabi. Chalabi used his position as IST administrator to pressure IST personnel to protect his partner Muqtada al-Sadr, the Shiite militia leader who waged a rebellion against Coalition troops. In 2003, Raed Juhi, the Chief Investigative Judge of the IST, issued a warrant for the arrest of Sadr for his involvement in the assassination of Ayatollah Abdul Majid al-Khoei. In exchange for Sadr’s political support, Ahmed Chalabi has repeatedly threatened to purge Juhi from the tribunal, saying that he would “turn up the heat” on tribunal officials. In response to the de-Ba’athification threats, Juhi was

74. See generally, David Reiff, Blueprint for a Mess, N.Y. TIMES, Nov. 2, 2003, at 28; E-mail from Cherif Bassiouni, President, International Human Rights Institute, Depaul University, to John Dermody (Nov. 4, 2005) (on file with author).
77. Id.
forced to move up the trial against Hussein, adding additional pressure to an already difficult process.\textsuperscript{79} Chalabi's abuse of the IST to foster political alliances has undermined the capability of the Tribunal.

The situation with Ahmed Chalabi demonstrates that, in unilateral intervention, politically motivated actors may be preferred at the expense of qualified personnel. Ironically, the inefficiencies of the U.N. system may actually be beneficial. The bureaucratic, political, and resource difficulties of the U.N.-sponsored hybrid tribunals causes international personnel to work in less than ideal circumstances, often sacrificing more lucrative career options. These difficulties have made recruitment difficult and limited participation to personnel dedicated to transitional justice. In contrast, personnel seeking predominantly political advancement are more likely to participate in the context of unilateral intervention.

\textit{D. Domestic Constraints on Unilateral Actors}

The most significant problem for any hybrid tribunal is a lack of resources and support.\textsuperscript{80} However, the constraints that domestic politics impose on unilateral actors poses a further problem for hybrid tribunals. According to a former prosecutor for Sierra Leone, the ideal length of a hybrid tribunal is five years, but a chaotic security environment can create significant delays.\textsuperscript{81} Because of the economic and political expenses of unilateral intervention, there is increased pressure to provide accountability quickly and cheaply. While hybrid tribunals have been cheaper than ad hoc tribunals, they still entail considerable expense. The budget for the Special Court for Sierra Leone was $34 million in 2003/2004, $29.9 million in 2004/2005 and is projected to be $25.5 million in 2005/2006.\textsuperscript{82} Without support from other international actors, the economic burden may be too great and effective accountability may be sacrificed. Hybrid tribunals do not offer a cheaper kind of justice and their benefits can only be realized

\textsuperscript{80} Katzenstein, supra note 9, at 257-58.
with adequate support.\textsuperscript{83}

Political constraints present a far greater problem. The unilateral actor must act while political capital is available. This does not necessarily translate to a means or timing of intervention best designed to meet the needs of the transitional context. Instead of allowing appropriate time for sanctions or development of local resources and knowledge, the intervention is at the mercy of the domestic political agenda. Instead of garnering support from multiple actors whose varied political structures would allow continual effort, a unilateral intervention reflects only the domestic political timing of the intervener. The international element of the hybrid model requires international participation that may not be feasible if the unilateral intervener is under domestic pressure to cease its presence.\textsuperscript{84} This concern is particularly salient in light of the delays and burgeoning costs that have plagued the tribunal in Sierra Leone.\textsuperscript{85} Shifting domestic politics, without an alternative international presence to rely on, places the feasibility of the hybrid tribunal in doubt.

\textbf{E. Pursuit of Suspects}

The inability of the hybrid tribunals to bring those most responsible before them significantly impacts accountability. However, the recent transfer of Charles Taylor to the custody of the Special Court for Sierra Leone suggests that a hybrid tribunal can gain custody of high profile criminals despite lacking U.N. Chapter VII powers.\textsuperscript{86}

A great number of individuals suspected of committing atrocities in East Timor fled to Indonesia. Unfortunately, the tribunal in East Timor was unable to prosecute these suspects because Indonesia refused to turn them over to the tribunal.\textsuperscript{87} This is attributable both to the desire of East Timorese leadership to re-establish ties with Indonesia and a reluctance by Indonesian authorities to address the

\textsuperscript{83.} Cockayne, \textit{supra} note 9, at 663.
\textsuperscript{84.} \textit{Id.} at 632.
\textsuperscript{85.} \textit{Id.} at 626.
\textsuperscript{87.} Katzenstein, \textit{supra} note 9, at 251-52.
atrocities.\textsuperscript{88} The decision not to imbue the Special Court with Chapter VII powers shows that the United Nations has lacked the strength and desire to force compliance with the tribunals.\textsuperscript{89} The United Nation’s lack of power has negatively impacted the effectiveness of the tribunals as “[t]he impunity by which these warlords move about a region unmolested, or with little accountability, breeds a lack of respect by the populace for the rule of law.”\textsuperscript{90} Unilateral intervention has a distinct advantage in this regard. If the unilateral actor has the strength to pursue an intervention, it can likely pressure states harboring suspects in whom the tribunal is interested. A hegemonic actor will have significantly more ability to exert pressure than the United Nations, constrained by political and institutional reluctance.

Prior to recent events, the Special Court for Sierra Leone was unable to gain custody of Charles Taylor because Nigeria, a managing partner for the court, harbored him and prevented his extradition.\textsuperscript{91} However, the United States, the largest donor to the Special Court, exerted significant political pressure in an attempt to bring Taylor to justice. The election of Liberian president Ellen Johnon-Sirleaf in January of 2006 presented an opportunity for the region to adopt a new approach towards extraditing Taylor.\textsuperscript{92} In a decision likely influenced by political pressure and promises of aid from the United States, Taylor was successfully transferred to the custody of the Special Court.\textsuperscript{93}

It remains to be seen whether the Taylor example will become the rule or exception with regard to the ability of hybrid tribunals to gain custody over high-level suspects. Regardless, the significant influence of the United States in apprehending Taylor highlights the potential advantages of unilateral action and makes the failure of the East Timor tribunal to prosecute significant suspects even more glaring. Successful prosecution of those most responsible for atrocities appears to come about where a hybrid tribunal is supported

\textsuperscript{88} ICTJ-TL, supra note 55, at 2.

\textsuperscript{89} Although the alternative may have been no tribunal at all. The lack of Chapter VII enforcement powers was likely a significant factor in the negotiations that created the Special Court.

\textsuperscript{90} Crane, supra note 81, at 4.

\textsuperscript{91} Id. at 7.


by a global hegemon rather than a multilateral body such as the United Nations.

V. Can the Promise of Hybrid Tribunals be Realized?

If, a hybrid tribunal can be implemented despite the significant impediments of the unilateral context, will it be able to realize its theoretical advantages? A hybrid model after unilateral intervention will likely not feature the degree of international involvement present in Sierra Leone, East Timor, and Kosovo. Although it is possible that, despite the difficulties, a U.N.-sponsored hybrid tribunal could be employed in the wake of unilateral intervention, it is more likely that a model similar to the IST will be used. While the IST is not a hybrid tribunal, the United States has provided significant technical, evidentiary, and legal support. The United Kingdom has also performed several training sessions for court judges and staff. Were a hybrid model employed, it would likely be comprised of select international and domestic staff reflecting the interests of the intervening state. If the hybrid tribunal assumes a less than ideal hybrid structure, can the hybrid model’s promise of increased legitimacy, capacity development, and international norm diffusion still be realized?

A. Legitimacy

The advantages of locating the tribunal domestically may be less effective in the context of unilateral intervention, particularly during regime change. National identities are in flux during this period and a local court may operate as a symbol of divisive ownership rather than local control. As attacks on the IST demonstrate, a court associated with an occupying power will be a target of resistance. A tribunal that is forced into chaos by instability and attacks will suffer a decline in both international and domestic legitimacy.

96. The lawyer of one of Hussein’s co-defendants was killed in October and the body was found in the Shiite enclave in the Ur district of Baghdad, an area controlled by the militia loyal Moqtada al-Sadr Aamer Madhani, *Kidnapped Lawyer Found Dead in Iraq*, CHICAGO TRIBUNE, Oct. 22, 2005, at 3, available at 2005 WLNR 23446827.
A tribunal located abroad would sacrifice the tenuous pursuit of local ownership in favor of a more stable but removed process. However, a study of the ICTY concluded that its removal from the local population had a significant negative impact on awareness and legitimacy. Surveys of Iraqis suggest that the presence of a domestic or hybrid tribunal is desirable even in the context of unilateral intervention. As one Iraqi commented, “The trials should be public, in front of the people, so that they feel that they have truly been liberated and that their rights have been returned to them by those who stole them.”

While a local tribunal provides the benefit of local ownership, this interest must be balanced with the legitimacy lost if security concerns prevent the tribunal from functioning efficiently. The Special Court for Sierra Leone has opted to try Taylor in The Hague using Special Court laws and personnel due to the security threat that Taylor poses. It remains to be seen what impact removing Taylor from Sierra Leone will have on the legitimacy of the Special Court. Taylor’s removal may further isolate the Special Court from a local legal community that already perceives the court as a largely international institution. Moving towards a model that institutionalizes the less than ideal relationship between the ICTY and the Kosovo tribunals could be detrimental for the Special Court’s legitimacy. However, if the trial against Taylor is successful and widely accepted in Sierra Leone, it may signal the evolution of a new transitional justice system where major perpetrators of human rights violations are tried in The Hague in conjunction with satellite tribunals located in the country of conflict.

Varying standards of justice, particularly related to the death penalty, highlight the disparity between international and domestic legitimacy. International and hybrid tribunals have declined to incorporate the death penalty as a punishment. As hybrid tribunals generally try those most responsible, the greatest perpetrators of

98. ICTJ, supra note 29, at 31.
99. Id. at 25.
crimes are granted international levels of due process without having to worry about the death penalty. At the same time, lower level members tried in domestic courts are subject to lower procedural standards and the death penalty. This exacerbates the tension between international and domestic standards which the hybrid model is theoretically designed to mitigate. Further, local populations may prefer the death penalty and see its absence as an illegitimate imposition of international standards. Many Iraqis do not share the international community’s need to provide Hussein and the Ba’ath party with fair trials. Instead, surveys of Iraqi people indicate a preference for Hussein to meet justice via a system commensurate to what he employed. One Iraqi noted, “I would like to say that I support and agree with human rights principles, but not for these criminals.”

A potential advantage of unilateral action is that a tribunal need not necessarily apply international standards. Although a hybrid is dependent upon a mixture of international personnel, a court of international personnel willing to apply the death penalty could conceivably be assembled. The unilateral context enjoys greater freedom from international pressure and could adopt the death penalty where it is likely to promote local ownership.

The competence and impartiality of the international personnel is another source of legitimacy, and is severely complicated by unilateral intervention. As discussed before, finding qualified personnel to work in the aftermath of an unilateral intervention will be difficult. The available personnel will likely lack the necessary independence from the occupying country to provide substantial legitimacy. Judicial impartiality is difficult to establish even in the multilateral context. UNMIK’s executive control over judicial matters in Kosovo has contributed to a detrimental perception of the independence of international judges. Questions of judicial impartiality will only be exacerbated in the context of unilateral intervention.

Adequate management of the tribunal is necessary to protect the

102. An anecdotal example is that Sierra Leonean prisoners at the Pademba prison in Freetown must have their families feed them because they are not provided regular meals. In contrast, the prisoners at the Special Court enjoy modern facilities and not only receive food, but have been sharing that food with their families.
103. ICTJ, supra note 29, at 34-35.
104. Id. at 27.
tribunal’s independence and prevent political pressure from tainting the process. One of the primary reasons for the success of the court in Sierra Leone has been the independent management of the Registrar, which is free from U.N. administrative rules. Similarly, provisions in the IST statute insulate it from the influence of the Iraqi government. However, these provisions did not prevent the United States from placing Chalabi on the court, but instead allow Chalabi to occupy a position of power free from political checks. The presence of personnel preferred by the United States has greatly undercut the legitimacy of the IST.

Although hybrid tribunals have alleviated some impartiality concerns in places such as Kosovo, adopting a hybrid model does not guarantee that there will be sufficient separation between the interests of an unilateral actor and the interests of the tribunal. Each transitional situation offers unique challenges, and structures designed to protect a tribunal’s independence are ultimately counterproductive when unreliable personnel populate the tribunal.

B. Capacity

Perhaps the most lauded promise of hybrid tribunals is their ability to develop domestic legal capability: that “[t]he side-by-side working arrangements allow for on-the-job training that may prove more effective than abstract classroom discussions of formal legal rules and principles.” However, capacity building is not an easy or predictable process and pragmatism should temper expectations. As Iraq demonstrates, the rhetoric used in unilateral intervention is

106. Cockayne, supra note 9, at 629-30.
107. Coalition Provisional Authority, supra note 70, at Statute of the Iraqi Special Tribunal, Article 1 (“The tribunal shall be an independent entity and not associated with any Iraqi government departments”).
110. Dickenson, supra note 10, at 306.
111. Id. at 307.
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not prone to understatement. The goals of the intervention and promise for results are exaggerated to cultivate support, but are not necessarily achieved. A hybrid tribunal, while laudable in its efforts, simply cannot single-handedly reform a domestic legal system. This is exacerbated in a unilateral context. A “military administration relying principally on its monopoly of force to administer [a post-conflict situation] is unlikely to yield robust local institutions capable of maintaining stability or commanding legitimacy.”

Interaction with the domestic legal system has been limited even in Sierra Leone, where the local population has been far more receptive to the tribunal. The Sierra Leone Bar Association expected a high degree of participation in the Special Court, but the limited amount of positions led to disappointment. Several Sierra Leonean lawyers left the Special Court in response to the dynamic of the court, further inhibiting the capacity potential of the hybrid model.

The lack of a functional domestic legal system and the unilateral actor’s desire to control the accountability process will result in less collaboration. Sierra Leone and East Timor demonstrate that interaction between international and domestic staff has had difficulty fostering development even in the non-unilateral context. The heavy involvement of the United States Regime Crime Liaison Office in the operations of the IST suggests that the dominance of international staff will be even more pronounced where international involvement is explicitly mandated.

Moreover, as critics point out, it seems naively optimistic to contend that the experiences of a few people in a trial of limited scope can significantly impact the development of the domestic legal system. A report on the capacity building potential of the Sierra Leone Special Court suggests that “despite verbal commitments that the hybrid tribunal will ‘leave something behind for the people,’ no benefits – aside from a new courtroom and prison facility – will accrue without a strategic implementation of these norms.” While hybrid tribunals may retain a “demonstration effect” by their very presence,

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114. ICTJ-SL, supra note 50, at 38.
115. Id. at 22.
116. Katzenstein, supra note 9, at 256-57.
118. Gersh, supra note 8, at 292-293.
119. Hussain, supra note 112, at 572.
the pressures of unilateral intervention will negatively impact outreach programs and limit the hybrid model's ability to fulfill the promise of increasing the capacity of the local legal system.

Regardless of expertise, effort and good intentions, transitional justice is an inherently difficult process. The goal is not to find a solution to the problem, but to find an approach that is most effective at mitigating the various difficulties. A preferable option in unilateral intervention, where time and resources are scarce, is not to burden the accountability process with the demand of domestic legal development. While a hybrid tribunal may help that process, it should not be the primary mechanism for domestic legal development. Development measures that build upon the tribunal’s work, as well as development measures aimed solely at the domestic legal system, are critical to developing the rule of law. Particularly in the context of unilateral intervention, capacity development should not be a significant factor in choosing a hybrid model.

**C. International Norm diffusion**

Diffusing international norms is the advantage of hybrid tribunals most weakened by unilateral intervention. Although hybrid tribunals potentially represent a “powerful model through which national and international legal systems [communicate and influence] one another,” unilateral intervention significantly undercuts this pathway of influence. Unlike the United Nations, international governance and uniform international law are unlikely to be priorities for un unilateral intervener. It is paradoxical to expect unilateral action in violation of international law to serve as a potent source for international norm diffusion.

It is not apparent that the previous international tribunals have had success in spreading international standards of due process and fairness. Norms can be diffused by directly incorporating international standards into domestic law and practice, and through interaction between elite actors. The reluctance by international staff to learn local languages has likely reduced norm diffusion

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121. Katzenstein, supra note 10, at 253.
through interaction between international and domestic personnel.\textsuperscript{123} While international and domestic personnel will certainly interact in a hybrid tribunal, the unilateral context will likely limit positive aspects of the interaction. The less than ideal relationships between international and domestic personnel in East Timor and Sierra Leone suggest that mere institutionalized interaction is not sufficient. The relationships must be positive and sustained to significantly diffuse international norms and avoid domestic resistance to such norms.

The direct diffusion of international norms is only effective to the extent that there is a legal system available and willing to receive international norms. Tribunals, particularly those in an unresponsive environment, may not be the best mechanism for international norm diffusion. The lack of a fully functioning justice system combined with poor training standards in East Timor led to a poor infusion of international norms, despite a heavy reliance on international standards and practices.\textsuperscript{124} The absence of a staged handover plan in East Timor further limited the impact of international norms.\textsuperscript{125} International norm diffusion will suffer where, like Iraq, there are significant difficulties establishing a new regime and transferring power. International norms will not be inculcated domestically without a stable legal system. Where international norms are transferred, the lack of long term stability and political direction will limit the enduring presence of the standards.

Although the Special Court for Sierra Leone has contributed to international law jurisprudence with respect to head of state immunity,\textsuperscript{126} the impact upon the domestic legal system has been significantly less. Substantive legal reform and the implementation of international standards in the domestic legal system of Sierra Leone has had less to do with the direct effects of the Special Court and is more attributable to the efforts of civil society.\textsuperscript{127} With heightened security concerns in an unilateral intervention, civil society participation will be curtailed. International norm diffusion will suffer without civil society to build upon the work of a hybrid tribunal.

The priority in unilateral intervention will not likely be to spread

\begin{itemize}
  \item \textsuperscript{123} ICTJ-TL, \textit{supra} note 55, at 16.
  \item \textsuperscript{124} \textit{Id.} at 25.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} ICTJ-SL, \textit{supra} note 50, at 18.
  \item \textsuperscript{127} \textit{Id.} at 39.
\end{itemize}
international norms, but to provide for stability and accountability in the fastest and cheapest manner possible. Local law will be used only to the extent that it does not conflict with international human rights norms, as was the case in other tribunals. The compromise will not be between local law and international norms, but rather between local norms and the norms of the unilateral intervener.

VI. Conclusion

Unilateral intervention does not exclude the hybrid model as an option for legal accountability, but it does make it a more tenuous choice. The resources and time needed to employ a hybrid model will likely preclude its use after unilateral intervention. The necessary personnel and resources will be more difficult to acquire without international legitimacy. An unilateral actor may be better able to tailor the hybrid tribunal to meet local needs by incorporating the death penalty or selecting preferable personnel. Additionally, the military strength required to undertake unilateral intervention may the apprehension of suspects and encourage the compliance of the states. However, these advantages cannot compensate for the negative impact that unilateral intervention will have on the purported advantages of the hybrid model. Without a heightened ability to provide legitimacy, capacity build, and diffuse international norms, the advantages of hybrid tribunals over other accountability models are undermined.

No approach to transitional justice can smoothly resolve conflict or eliminate underlying political, economic, and ethnic tensions. Each post-conflict environment presents dynamic and unique challenges that cannot be addressed through a formulaic and rigid approach. The hybrid model is the best form of accountability only when there is long-term financial and political commitment to the success of its efforts. The nature of unilateral intervention, with its needs for expediency and susceptibility to ulterior political interests, limits the effectiveness of the hybrid model. However, this should not be seen as a failure of the hybrid model, but as a failure to pursue unilateral intervention in a manner that will best serve the people it is intended to help. Accountability mechanisms are a necessity for post-conflict stability and development. Although hybrid tribunals may not be feasible after unilateral intervention, they nevertheless represent a significant development in the continual effort to meet the needs of transitional justice.