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Justice Should Be Done, but Where? The Relationship Between National and International Courts

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JUSTICE SHOULD BE DONE, BUT WHERE? THE RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL COURTS

The panel was convened at 10:45 a.m., Friday, March 30, by its moderator, Naomi Roht-Arriaza of the University of California, Hastings College of the Law, who introduced the panelists: Laura Dickinson of the University of Connecticut School of Law; Christopher K. Hall of Amnesty International; Paul Seils of the Office of the Prosecutor, the International Criminal Court; and Kimberly Theidon of Harvard University.*

NAOMI ROHT-ARRIAZA:[†]

It has been 14 years since the UN Security Council first set up the International Criminal Tribunal for the Former Yugoslavia (ICTY), followed the next year by the International Criminal Tribunal for Rwanda (ICTR). Since then there has been an explosion of activity around international justice for the worst crimes: genocide, crimes against humanity, and war crimes. We have now seen the creation of the International Criminal Court (ICC), a range of hybrid, internationalized, and UN-created tribunals, highly publicized prosecutions by national courts other than those of the territorial state under universal jurisdiction, as well as other forms of jurisdiction, and an increasing attention to the role of local processes more or less rooted in traditional dispute resolution. How do these pieces fit together, and how are we to decide which modality will be best in a given situation? That is the subject of our panel this morning.

We have a distinguished group of panelists with us: to my left is Paul Seils, Head of the Situation Analysis Section, Jurisdiction, Cooperation and Complementarity Division, Office of the Prosecutor, International Criminal Court. Next to him is Kimberly Theidon, Assistant Professor of Anthropology at Harvard University. On my right is Laura Dickinson, Professor at the University of Connecticut School of Law and a Visiting Scholar at Princeton this year. Next to her is Christopher Keith Hall, Senior Legal Adviser, International Justice Project, Amnesty International.

Let me start with Paul Seils. The Rome Statute of the International Criminal Court establishes that, unlike the Tribunals for the former Yugoslavia and Rwanda, the ICC's jurisdiction is complementary, as specified in Article 17 of the Rome Statute. How has the Office of the Prosecutor understood what complementarity means?

PAUL SEILS:[‡]

The issue being discussed today concerns the most appropriate place for justice to be done. The phrasing of the question itself is rather daring. It takes as a given the view that justice must be done, asking only where should this happen. I am fully in agreement that this is the correct question to ask, but less sure that we would find unanimous support for our view that justice must be done.

One of the key issues that confronts the International Criminal Court, especially in Uganda, is the so-called debate of peace versus justice. The debate is real enough at a certain level,

* Professor Theidon did not contribute remarks to the *Proceedings*.

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but it is such a superficial level it beggars belief that it has gained so much credence in relatively sophisticated circles. In its starkest terms it argues that the ICC warrants for the arrest of four commanders of the Lord's Resistance Army (LRA) presents the only significant obstacle to peace. The LRA tell us that if the warrants are withdrawn, a conclusive peace deal will be implemented.

There are almost too many comments that can be made about this proposition that render it less than persuasive, but the focus of this discussion is to consider not the stark trade-off between peace and justice but the concept of complementarity as established by the Rome Statute. Only belatedly has the issue of complementarity become a feature of the debate in northern Uganda, but it is welcome nonetheless. Whether or not any implementation of an accountability process meets the standards suggested by the Rome Statute will, of course, be a matter for the judges of the ICC and no one else.

What has been surprising is the length of time it took for the concept of complementarity to be taken seriously in the discourse in northern Uganda. The Rome Statute makes it clear that states parties can challenge admissibility up until the beginning of a trial and even after that in exceptional circumstances. The fact that the same state referred the case does not in any way appear to bar such a challenge.

The issue of complementarity is one of the keystones of the Rome System. It was born both of principle and experience. States did not want to create a super court with primary jurisdiction over national courts because of long-standing and deeply felt beliefs about sovereignty. Likewise, experience with the ICTY and ICTR had demonstrated clearly that however effective those institutions had been in doing justice, a significant deficit had been the lack of relationship that victims and victim communities felt with the actions of remote institutions in other lands. One of the immediate reactions to this realization was the creation of the hybrid tribunal in Sierra Leone, which Laura Dickinson will discuss. At the same time, the principle of complementarity had been adopted in Rome. The principle sought formally to recognize that, not only were there old issues of sovereignty at stake, but it just made much more sense for justice to be done where the crimes were committed if this is at all possible.

There are many reasons for this. Taking the most prosaic first, it tends to be a lot cheaper to run courts and deal with witness expenses if they are established in the venues where the crimes occurred. More significantly, however, the impact on victims and the country generally will be greater if legitimate trials are carried out in a way that helps both to restore the dignity of the victims that has been violated in some way, but that also restores the confidence of the citizens in the institutions charged with protecting and defending the rule of law.

It is sometimes suggested that the aim of justice in post-conflict settings is to tell the story of what happened. This is understandable, but it mistakes the possibilities of criminal justice. The loftiest ambition of criminal justice in these circumstances should be not to distort history, but not to tell it, either. At the same time the goal should not be reduced to the notion that it is no different than the pursuit of justice in normal times and that it seeks only to do justice. The pursuit of justice in the aftermath of atrocities is not normal: it is exceptional. Its aim cannot be to pretend that we have business as usual. Rather, it must be part of a counter-revolution to those events which overturned the rule of law in the first place. Its role in that counter-revolution is to re-establish the rule of law, and to restore confidence and trust in the system. Such trials may have a deterrent effect on future crimes, and that is certainly to be earnestly desired. It is perhaps more likely that such trials will have a persuasive effect on institutions in creating a sense of confirmed and shared values enunciated formally

and socially through the courts rather than deterring individuals otherwise minded to commit atrocities. It is not difficult to see, therefore, why if trials meeting a reasonable standard of legitimacy can be held, they should be held at home.

If it cannot be done there, it does not mean that there is no value in justice being done elsewhere. Justice that restores dignity of individuals and confidence in institutions as well as persuading police forces, armies, and insurgents of core values and deterring individuals from crimes is the ideal that is to be hoped for. If not all can be achieved, it is still worth the pursuit of some of these goals.

The genius of the complementarity principle is that it is a long-term guarantee of all of these goals. While it cannot restore confidence in states that are unwilling or unable to carry out genuine proceedings, the very presence of the Court and its ability to act in such situations serves as the most potent warning, especially to those that are unwilling to act. The Court serves as a constant encouragement to those that are unable but would strive to do justice; that if they fail, the Court will do what it can do to step into the breach to ensure that the days of impunity for serious crimes of international concern are truly over.

PROFESSOR ROHT-ARRIAZA:

Let us make it concrete. Sudan, for example, says it is willing and able to prosecute those individuals involved in killings and ethnic cleansing in Darfur. It has set up courts and actually indicted people. How would you evaluate such a claim?

MR. SEILS:

It is clear that the ICC stands firmly behind the view that if justice can be done at home, so much the better. A more technical matter is how the ICC determines whether or not national authorities are willing and able to carry out genuine proceedings.

The answer to this is relatively straightforward in theory but demanding in practice. The Analysis Section of the Jurisdiction, Cooperation and Complementarity Division of the Office of the Prosecutor is responsible for the assessment of all such matters. The initial decision to open an investigation requires a determination under Article 53(1)(b) that the cases arising from the investigation will be admissible. Since there are no specific cases at that point, the assessment of admissibility considers whether or not there is any indication of a genuine investigation into crimes likely to concern the Court. In addition, the Office gathers information on the institutions of justice in the state in order to be able to understand the circumstances in which they operate and, as far as it is relevant, the degree to which there is independence and impartiality and a genuinely functioning judicial system. This is not to say that the national justice system is what is being assessed. Rather, this is information necessary to understand the context in which national proceedings take place. The concern of the Office is the proceedings themselves, and while the general state of the justice system may, of course, have a bearing in some circumstances, it is not the focus of the analysis.

The situation is a little different when it comes to the issue of admissibility in respect to specific cases, that is, after a warrant specifying the particular case has been issued. At this point, the matter becomes specific: the only issue of concern to the Office is whether or not there are or have been genuine proceedings in relation to the same suspects for the same conduct which is the subject of the case before the Court (although the criminal acts in question do not necessarily have to be defined in the same way). At this point, the focus is

much narrower and looks only at the investigations or trials that are said to have taken place and which may have some relevance for the ICC.

At the pre-investigation stage, most of the information is gathered through open source information, from nongovernmental organizations (NGOs) and international organizations working in the country. Some of this may be supplemented by more detailed follow-up with the state itself or with other institutions or organizations. At the more specific phase when the investigation has reached the stage of completion sufficient to seek a warrant, it is important, if at all possible, to obtain the information directly from the national authorities themselves.

In some situations under analysis but which have not been opened for investigation, the Office has sought detailed information from states on the nature of their efforts to address credible allegations of war crimes or crimes against humanity. In situations where an investigation has been opened, we have monitored ongoing developments ourselves and liaised directly with national authorities.

It is important to understand the different tests involved in this area, and the particular impact of the decision of the Pre-Trial Chamber in the decision of the warrant application for Thomas Lubanga in the DRC situation. I have already indicated the specific nature of the test above. The test has two aspects. The first is an empirical question: are the national proceedings in relation to the same case that has been brought before the Court? If not, the issue of whether the national proceedings are genuine or not is irrelevant: they cannot constitute a ground for inadmissibility. This is the clear position taken by the Court in this matter.

In the DRC, despite the fact that it was President Kabila who referred the situation to the Office, there have been developments in certain parts of the country where some criminal justice now seems more possible than it was before. This demonstrates the organic nature of the assessment of admissibility. It is necessary for the Office to be satisfied that whatever specific case it intends to bring has not been the subject of genuine national proceedings.

A different set of circumstances prevails in relation to the situation of Darfur. Since the referral of the situation by the UN Security Council, the government of Sudan has argued that it is able and willing to prosecute all relevant crimes. In February 2006 the Office spent a week in Khartoum, interviewing senior Justice ministers and other officials on the wide array of initiatives that appeared to have been created to address the crimes in the region of Darfur. In January 2007 the Office returned for another week-long mission. In December 2006 the Office had received information from the government that certain suspects had been detained in relation to serious crimes in Darfur. The focus of the mission was to understand all that we possibly could about those initiatives in order to ascertain if they in any way affected the considerations of the case that had been developed by the Office in its own investigations. These inquiries were extremely extensive and included a five-day interview of the three legal advisers of the Judicial Investigations Commission responsible for the investigation of crimes for the Special Courts of Darfur. Indeed, the members of the Commission confessed that the inquiries we made had been much more detailed than they had expected.

The thoroughness of these inquiries is not simply a matter of due diligence on the part of the Office: there is also an issue of fairness to the state in question—every opportunity should be given to allow for the full explanation of all relevant steps taken and to ensure that there is no misunderstanding about the nature, focus, or plans of the national investigations.

Another issue that is sometimes raised is the role the Office or the Court can play in making complementarity work. It is important to realize that neither the Court nor the Office is a capacity-building agent as such. Nor can the Office work as a legal advisory service in helping to develop a state's national legislation incorporating the crimes of the Statute or developing cooperation legislation. In any event, there are plenty of able people and organizations who can provide meaningful assistance in this regard.

The Office has indicated that it believes that the Court can be considered a success every time national proceedings take place rendering ICC proceedings unnecessary. This means that it does not see itself in competition with national authorities. If they appear willing and able to do the same case that is being prosecuted by the Office, the Office will defer.

The Prosecutor has indicated his support for a concept of positive complementarity. The practical manifestations of this are not always immediately obvious to the public. When the Prosecutor lets it be known to a state that the Office is seriously monitoring the situation of crimes and complementarity in its territory and it has an effect either in deterring crimes or in promoting and consolidating accountability efforts, these should be understood as elements of a positive approach to complementarity—that is, maximizing the complementary nature of the Court's jurisdiction. However, it is not always easy to speak in detail or at all about such matters in public. Likewise, while the Office cannot be a legal adviser to states, it emphasizes to states, especially where investigations are ongoing, that implementation of relevant laws for effective cooperation are indeed very much a priority. It is therefore quite wrong to suggest that the concept of complementarity has been abandoned. It is simply that experience is demonstrating how this concept can best work in practice.

PROFESSOR ROHT-ARRIAZA:

Christopher Hall, how does Amnesty International look at this question of when the ICC should defer?

CHRISTOPHER HALL:*

The Rome Statute makes clear in Article 17 that the International Criminal Court will only act when states are unable or unwilling genuinely to investigate and prosecute genocide, crimes against humanity and war crimes, and those crimes are of sufficient gravity for the Court to exercise its concurrent jurisdiction.

It is not sufficient for a state simply to open an investigation and prosecution concerning the same suspect and matter under consideration by the Court. It is a bit troubling that the Prosecutor has not made this point clear. For example, in a briefing for states on March 9, 2007, explaining why the Prosecutor was seeking to prosecute a Sudanese government minister and a leader of the Janjaweed militia, a senior official in the Office of the Prosecutor said that the investigations by the Sudanese authorities do not cover the same persons and the same conduct in the prosecution's case.

That is not the test. Even if Sudanese authorities were investigating and prosecuting the same persons for the same conduct, that would be insufficient if the investigation or prosecution was not genuine. At that time the Sudanese authorities were not investigating or prosecuting the two suspects for the same conduct, but they may very well decide to adjust their strategy,

* Senior Legal Adviser, International Justice Project, Amnesty International.

and then the Court will have to determine whether the investigation or prosecution was genuine.

It is important to remember that what was envisaged in Rome in 1998 was that the Court would be part of a global system of justice involving national and international investigations and prosecutions of all crimes under international law, which would also ensure full reparations to victims and their families. Indeed, as Paul Seils indicated, the Prosecutor originally agreed with Amnesty International and civil society that positive complementarity would be a key component of his prosecution strategy. The Prosecutor would act as a catalyst for investigations and prosecutions by police, prosecutors, and investigating judges so that there would be no impunity gap. This approach would include pressing states to implement the Rome Statute effectively by defining genocide, crimes against humanity, and war crimes as crimes under national law and incorporating principles of criminal responsibility and defenses which were consistent with international law.

However, it appears that the Office of the Prosecutor has abandoned this concept of positive complementarity and replaced it with what some observers would consider as something radically different and perhaps disturbing.

In the same statement on March 9, 2007, by the senior official in the Office of the Prosecutor, the official said with regard to the decision to issue arrest warrants for five leaders of the Lord's Resistance Army (LRA) on charges of crimes against humanity and war crimes, "We acknowledge that other complementary solutions are satisfactory for other LRA members." What that means is that the families of victims and victims who survived would be left to junk justice as their remedy. The Prosecutor will not be pressing Ugandan authorities or authorities of other states where the perpetrators are abroad to fulfill their obligations under international law to investigate and prosecute crimes and provide effective procedures to obtain reparations in proceedings that meet the strict requirements of fair trial. Instead, they would be left to alternative methods—not of justice—but alternatives to justice. That is very disturbing and certainly not what the drafters of the Rome Statute had in mind.

PROFESSOR ROHT-ARRIAZA:

Christopher, what about the due process concerns raised by these "traditional" processes—there are no defense lawyers, no appeals, etc. Are there other types of concerns you would raise?

MR. HALL:

The starting point is that the very basis of human rights is that these rights are inherent in every human being, as reaffirmed in the Universal Declaration of Human Rights more than six decades ago. We would all agree that each of us has a right to a fair trial before a competent, independent, and impartial court, and there is little doubt about the content of this right, which is common to all national and international legal systems. That is it. It means any proceeding, whether criminal or civil, must be fair. There are no exceptions. Under international humanitarian law, the right to a fair trial is non-derogable. Indeed, if one is responsible for an unfair trial concerning armed conflict, one may have committed a war crime. The right of each human being to reparations for crimes under international law has recently been reaffirmed without any significant dissent in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law (Van Boven-Bassiouni

Principles) and the UN-updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Joinet-Orentlicher Principles). Both instruments are conservative, as they are intended to reflect existing international law. Each victim of a crime under international law, or that person's family, has a right to full reparations, including restitution, rehabilitation, compensation, satisfaction (including judicial determinations of guilt and innocence), and guarantees of non-repetition. This right, of course, does not mean that traditional procedures cannot be used to complement ordinary legal procedures, but it does mean that such procedures must not replace proceedings that meet international standards. It is that simple.

It would not be correct to say that it is impossible to prosecute all those against whom there is sufficient admissible evidence. Ethiopia has tried thousands of persons for genocide, crimes against humanity, and war crimes under the Dergue. If Ethiopia, a country with limited economic resources, can conduct prosecutions on such a scale, any country can do so. In any event, such crimes are crimes against the entire international community and, as reaffirmed in the Preamble of the Rome Statute, the responsibility to investigate and prosecute such crimes and to ensure reparations is a shared responsibility of the entire international community.

PROFESSOR ROHT-ARRIAZA:

If it is true that international prosecutions will only deal with a small sub-group of those committing international crimes including genocide and crimes against humanity, then national processes, including courts to some extent, will have to make sure there is no "impunity gap." But are they the only way to do so? Could transnational prosecutions, by national courts of countries other than those where the events took place, play a role? Christopher, what is the current state of play regarding universal jurisdiction? We had an upsurge of activity in the late 1990s, then what seemed to be a retrenching with the reform of the Belgian law, the ICJ Arrest Warrant decision, and the like. Could you describe where we are now? And perhaps, where we are going?

MR. HALL:

Universal jurisdiction is anything but dying. There has been undue interest in the weakening of the Belgian legislation and the refusal of the German Federal Prosecutor to exercise universal jurisdiction over U.S. soldiers and their civilian superiors accused of war crimes in Iraq, in both instances in response to threats by the United States. In the past decade, the number of universal jurisdiction cases in national courts is considerably greater than in the International Criminal Court, which has one person in custody and four arrest warrants that are not being enforced.

In fact, despite these isolated setbacks, universal jurisdiction is enjoying a resurgence. There are 104 states that have ratified the Rome Statute, and almost every one of these states that have enacted or drafted implementing legislation has included universal jurisdiction, although some of those provisions are flawed. What was envisaged in Rome, and what is emerging, is a global system of international justice at the international and national level. We are at the beginning of a great adventure in international justice. There is a long way to go, but Belgium, Canada, Denmark, France, Netherlands, Norway, Spain and, significantly, a country in the South, Senegal, have all exercised universal jurisdiction over such crimes in the past few years. Mexico has extradited a former Argentine naval officer to Spain to

exercise universal jurisdiction, although that accused person may eventually be extradited to Argentina. Other countries in the South are now enacting the necessary universal jurisdiction tools being put into place to enable prosecutors and victims to open criminal cases. These developments build upon the Geneva Conventions Acts in more than thirty Commonwealth countries, the increasing implementation of universal jurisdiction requirements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the drafting of implementing legislation for the new International Convention for the Protection of All Persons from Enforced Disappearance. Moreover, the exercise of universal jurisdiction has had a catalytic effect on the exercise of jurisdiction by states where the crimes have been committed, as in Chile and Argentina after Spanish investigations and prosecutions were commenced. The world is a very different place from the way it was a decade ago, and a lot of people around the world in what they think are safe havens are soon going to be very surprised finding themselves behind bars.

PROFESSOR ROHT-ARRIAZA:

Paul, how does the Office of the Prosecutor see these third-party state prosecutions?

MR. SEILS:

On the issue of universal jurisdiction: It is clear that this can still play an important role in the fight against impunity. It may also be true that more people have been brought to justice by this means than have been brought before the ICC, but this is to miss the point. In the first place, the ICC is not in competition: if perpetrators can be prosecuted by this means, well and good. What is important is that not too much hope is placed in it as an effective means of reducing the impunity gap. It will only be able to deal with a small number of people. It can serve as a useful and important means of complementary justice, especially in those cases where the Court does not have jurisdiction, but even where it does. The exercise of universal jurisdiction will generally be more opportunistic than systematic. Third states will tend to be reactive. There is always the chance that mid- or low-level suspects can come on the radar and their prosecution may be of great assistance to the ICC. There are many ways in which all of these strands can work together. The important thing is that we work together in these endeavors, and understand each other's limits, so that together we can really create a world where there is no prospect of impunity for serious crimes.

PROFESSOR ROHT-ARRIAZA:

As the ICTY and ICTR wind down their work, one set of weaknesses that many observers have noted is the tribunals' remoteness from the country and lack of effect on the populations of the "target" countries. For example, researchers at the University of California at Berkeley found that most people in Rwanda knew nothing about the ICTR, and that in the former Yugoslavia, peoples' views of the Tribunal depended on their ethnicity. Do hybrid tribunals—those combining international and national law, personnel and authority—solve the problem? What can we learn from experiences to date in Sierra Leone, Kosovo, and East Timor? Laura, have hybrid courts lived up to their promise?

Laura Dickinson:*

Some scholars have suggested that, in the wake of mass atrocity, hybrid domestic-international courts may offer advantages over purely domestic or purely international courts. Such hybrid courts are tribunals composed of both domestic and international judges, prosecutors, and other personnel. These tribunals are typically located in the country where the atrocities occurred, and they try defendants for atrocities under both international and domestic law. In my remarks I will consider recent research that addresses whether three of these hybrid courts have lived up to their potential. The results are decidedly mixed, but in my view there is at least some ground for guarded optimism about the efficacy such courts.

What are the potential advantages of hybrid courts? There are at least four.¹ First, such courts may have greater legitimacy than a purely domestic or purely international approach to post-conflict justice. I use the term “legitimacy” here to mean the degree to which various affected communities, both domestic and international, accept the court as impartial or fair and feel some sense of ownership of the court. Particularly in a country riven by ethnic or political conflict, those within the country may feel more connection to a locally based court than they would to an international tribunal; yet they might consider the presence of at least some international actors as necessary to inject needed impartiality into decision-making, impartiality that might be threatened in a purely domestic proceeding. A second advantage is capacity building. In contrast to purely international courts, hybrid courts tend to channel resources to the affected country. And in contrast to purely domestic courts, hybrid courts generally attract more outside assistance. Third, because domestic actors participate in such courts, hybrid courts may offer more possibilities for international law norms to penetrate locally. At the same time, because of domestic participation and the use of domestic law, hybrid courts may offer greater opportunities for local sensibilities to refine international norms, allowing for bottom-up as well as top-down norm development. Finally, hybrid courts are potentially cheaper than international tribunals.

How well have hybrid courts lived up to their potential? Recent research, including a series of case studies conducted by the International Center for Transitional Justice, for which I served as a consultant, sheds light on this question. The case studies consider hybrid courts in Kosovo, East Timor, and Sierra Leone, and are based on interviews with hundreds of actors involved in the hybrid court system, including lawyers, judges, and other participants. To be sure, results are mixed, but it seems clear that the Sierra Leone Court has been the most successful of the three. Moreover, even in the East Timor and Kosovo cases, there have been important gains from using hybrid courts despite some major disappointments.

First, with respect to legitimacy, the Sierra Leone court seems to have garnered the most domestic “buy-in” across multiple constituencies. Support may stem from the Sierra Leonean government’s active role in creating the tribunal. When government forces took rebel leader Foday Sankoh into custody, President Kabbah sought help from the international community to create a court that included some international judges so as to avoid accusations that his government was treating Sankoh in a biased way. In the end, the United Nations and the government of Sierra Leone partnered to set up the court through an agreement permitting both entities to appoint court personnel (though a majority of the judges and other positions were reserved for international actors appointed by the United Nations). In addition, the first

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¹ For an expanded discussion of these potential advantages, see Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. OF INT’L L. 295 (2003).

prosecutor, David Crane, conducted widespread outreach to civil society groups across the country. That effort may have paid off, as a survey reports that 61% of the population supports the court. Some legal elites in Freetown are more skeptical, in part because the government appointed non-Sierra Leoneans to posts, such as the deputy chief prosecutor, that could have been filled with Sierra Leonean nationals. Nonetheless, the sense of the on-the-ground legitimacy of the court is reasonably strong.

In Kosovo and East Timor, the legitimacy of the courts is more open to question, but the Kosovo courts seem to fare better on this score than the Timorese. In both cases, UN authorities created hybrid courts with little involvement of domestic actors. For example, the United Nations Mission in Kosovo simply added foreign judges to existing courts. In East Timor, the United Nations Transitional Administration in East Timor created special hybrid domestic-international panels for serious crimes cases. Compounding this lack of local involvement, in both settings court officials have not conducted sufficient public outreach, and in the Timorese case especially, public involvement with, and support for, the special panels (which have now concluded their work) was quite weak. The lack of enthusiasm may also be due to the fact that UN and Timorese authorities were unable to get custody over the Indonesians accused of atrocities, though support for the court improved somewhat after authorities issued indictments for General Wiranto and other Indonesian military officials implicated in abuses. Not surprisingly, given these difficulties, the trials conducted by the special panels were sparsely attended, and the general public was not made aware of the court or its activities.

The Kosovo hybrid courts have fared better. To begin with, the trials before hybrid panels have been better attended. In addition, Serb lawyers and judges are strongly supportive of the hybrid panels because they believe adding foreign judges has injected needed impartiality into the proceedings. (Before the United Nations added a majority of foreign judges to the panels trying war crimes cases, a number of Serb suspects were convicted on virtually no evidence.) And even Albanian judges and lawyers within Kosovo, though far more skeptical of the United Nations, regard the addition of foreign judges to the hybrid panels as adding needed impartiality in war crimes cases. Thus, there has been a measure of "buy-in" across different ethnic groups involved in the courts.

With respect to capacity building, again the Sierra Leonean court fares best. Donors funded the construction of a \$6 million state-of-the-art courthouse equipped with modern computers that Sierra Leone will still be able to use after the hybrid court concludes its work. The lasting impact of the court on human resources is less certain. While the court recruited distinguished international judges, these judges have done little beyond their work at the court and have not engaged in extensive training of local lawyers. Apart from the experience that the (also quite distinguished) Sierra Leonean judges themselves have gained in applying international humanitarian law and sitting alongside the international judges, it is unclear that any Sierra Leonean judges beyond the court have gained expertise in international law. Foreign nationals in the Office of the Prosecutor, while talented, have dominated the work rather than engaging in real partnerships with Sierra Leoneans. The defense attorneys have done a somewhat better job, but the broader impact of the relationship is less clear. On the plus side, the creation of an administrative bureaucracy of the court (the registry) has likely made a lasting contribution by giving Sierra Leoneans opportunities to learn case management skills. And perhaps the greatest success has been among the investigators. Experienced Sierra Leonean criminal investigators have rotated in and out of the court staff, giving much-needed local expertise to the foreign nationals who have partnered with them in gathering evidence.

At the same time, they have learned a great deal about complex war crimes cases, expertise that can be more broadly disseminated as investigators rotate back to their domestic cases.

The Kosovo and Timorese experiences have been much less successful. Donors have contributed fewer resources to long-term infrastructure development, and both courts have had difficulty recruiting experienced international judges. Particularly galling to the Kosovo judges, who have extensive judicial experience, is the fact that the judicial training that has occurred has been unidirectional. Thus, while local judges have learned much about international law, in many cases the international judges could have used training as well, and in both local and international law. Moreover, communication between international judges and domestic judges has been very poor, with virtually no interaction beyond the formal proceedings and very little even there. In East Timor, judicial interaction was similarly limited. Turning to the attorneys, in Kosovo the prosecutors and investigators for the cases brought before hybrid panels are primarily international, and they have collaborated hardly at all with domestic actors. In contrast, the defense bar in Kosovo has played a major role representing defendants before the Kosovo hybrid panels. In Timor, the experience has been the opposite. Thus, very talented foreigners have staffed the prosecutor's and investigator's offices and have partnered with Timorese nationals in a way that, like the Sierra Leonean investigator partnerships, is more likely to have a lasting impact in East Timor. On the other hand, the defense office for the Timorese special panels, woefully understaffed and underfunded, has not had the same legacy.

The impact of the hybrid courts on norm penetration is, of course, difficult to measure, particularly before more time has elapsed. The Sierra Leonean court has issued decisions with significant jurisprudential impact on the development of international law. For example, NGOs, victims, and others encouraged the court to include forced marriage as a crime within the jurisdiction of the tribunal. The inclusion of this offense is an example of the way in which hybrid courts create a space not only for "top-down" incorporation of international law, but also for norms to percolate "upwards." As to top-down impact, the court has made clear that its decisions on international human rights law take primacy over Sierra Leonean law, which may be the first step to incorporating international norms into domestic law. In contrast, the decisions from the Kosovo and Timorese panels are difficult to find, and are not regarded as setting important precedent. In addition, the Timorese jurisprudence lacks significance in part because prosecutors early on chose to charge defendants with ordinary murder, rather than crimes against humanity, because murder is easier to prove. It is also unclear how the jurisprudence of these tribunals will affect norm development domestically, and whether domestic norms have had an impact on the interpretation of international law.

With respect to cost, each of the three tribunals is cheaper than the roughly \$100 million per year that international courts such as the ICTY cost. But the question is whether they are able to deliver fair justice at the low cost. In Kosovo, we do not have good data on the cost of the hybrid panels. But for the Timorese special panels, the prosecutor's office received between six to seven million dollars per year, and the judges only \$600,000 per year. While the prosecutor's office functioned reasonably well, the budget was clearly insufficient to support a functioning judiciary to staff the special panels. The Timorese hybrid court thus seems to be a largely failed effort to do justice on the cheap. At roughly \$25 million per year, the Sierra Leonean court has functioned well, and seems to deliver fair justice with a much lower price tag than the international tribunals. However, there is one important caveat: a breakdown of the cost per case actually brings the cost of the Sierra Leonean court closer

to the cost of the international tribunals. Accordingly, the seemingly lower cost may have more to do with a reduced mandate than with inherent efficiencies of hybrid courts.

Overall, I think the recent research suggests that hybrid courts continue to hold promise. The Sierra Leonean court, in particular, is in many respects a model for such tribunals. While the courts in Kosovo and East Timor fall far short of the Sierra Leonean tribunal and have failed in many respects, they have had some successes as well. We ought not to paint too rosy a picture, of course, but when considering hybrid courts, the question must always be: as compared to what? After all, purely international and purely domestic courts have their flaws too. Thus, hybrid courts are a potentially workable, and sometimes even preferable, alternative to consider in the future.

PROFESSOR ROHT-ARRIAZA:

Christopher, does Amnesty International have a position on these hybrid courts?

MR. HALL:

You will obtain a more full response when Amnesty International publishes its report in the near future on the UN Regulation 64 International Panels for Kosovo. Many of the international judges and prosecutors appointed by the UN Mission in Kosovo (UNMIK) did not know what a civil court looked like, were sometimes selected solely because they were lawyers who could speak English and had no preconceived view about the conflict in Kosovo, rarely cited relevant international criminal law, and were often reversed on appeal. The international prosecutors failed to investigate war crimes or crimes against humanity involving sexual violence. Of the thousands of cases of crimes under international law committed during the conflict in Kosovo, there have been only twenty-one cases. Sadly, it is not a useful model.

The report is being published with a view to making detailed recommendations to the European Union, which is expected to be taking over Kosovo pending a final determination on its status, to correct flaws in the UNMIK program of international prosecutors and judges.

PROFESSOR ROHT-ARRIAZA:

We have run out of time. Thank you all for a stimulating and informative discussion.