

Justice in Post-Conflict Societies: Fostering Local Capacity-Building through
Hybrid Courts
MA: Major Research Paper
Graduate School of Public and International Affairs
University of Ottawa

Anna Borotko (5735528)
aborotko@gmail.com
613-286-5688

Abstract

Since the end of the cold war, policy leaders have struggled to develop a functioning model of international criminal justice to deal with genocide, war crimes, and crimes against humanity in post-conflict societies. A number of initiatives have been attempted – ad-hoc tribunals, truth commissions and special national courts – but all face the same problem, rigid jurisdiction over definitions of crimes and a lack of perceived legitimacy in the process, whether it is the absence of local ownership in international proceedings, or the need for international human rights and legal standards in national commissions. However, the recent use of a new form of accountability, mixed international-national tribunals or hybrid courts, hopes to resolve this legitimacy challenge in order to provide local populations with accountability, aid in national reconciliation efforts, and most importantly foster local capacity-building.

Based on past failures of purely national and international justice mechanism, along with an exploration of the hybrid tribunals in East Timor, Kosovo, Sierra Leone, Cambodia and Lebanon, this paper will suggest a set of criteria for hybrid tribunals that have the potential to encourage capacity-building on three inter-related levels, individual, institutional and social. Hybrid courts can offer unique advantages over purely national or international initiatives. If policy makers can incorporate the lessons learned and best practices from past experiences with national and international judicial mechanisms, along with the necessary capacity-building criteria, this may help to leave a lasting legacy by developing norms criminalizing human rights violations and mass atrocities, encouraging accountability for past crimes, and assisting with national reconciliation efforts in post-conflict societies

Table of Contents

Introduction

Background

I. Hybrid Tribunals

- A. Kosovo
- B. East Timor
- C. Sierra Leone
- D. Cambodia
- E. Lebanon

II. Capacity Building Criteria

National Mechanisms

- A) Local ownership
- B) In-theatre proceedings
- C) Cooperation from local governments

International Mechanisms

- D) Funding from international actors
- E) International rule of law
- F) Presence of international actors

III. Key Challenges and Conclusion: International Criminal Justice Policy

INTRODUCTION

The massacre of millions of people over the last sixty years in civil conflicts, at the hands of governments, and in ethnic wars has prompted the creation of a new system of international criminal justice to ensure accountability, reconciliation, and to maintain international peace and security. Since the early 1990's attempts by policymakers to experiment with a number of rule-of-law policy tools have included establishing ad-hoc tribunals, the International Criminal Court (ICC), and special national courts. However, recent efforts have included the developed of a new series of "experimental"¹ courts, mixed international-national courts or "hybrid" tribunals, to deal with post-conflict challenges.

The hybrid process blends international and national components in proceedings, these latest criminal courts are said to hold great promise² by addressing the weaknesses and limitations of both purely international and purely national mechanisms of justice.³ The Office of the United Nations High Commissioner for Human Rights (OHCHR) characterizes hybrid courts as "one of the most important policy developments in transitional justice."⁴ Moreover, the hybrid process has the potential to produce advantages for the victim population,⁵ to provide legitimacy to courts, encourage capacity-building, and

¹ David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STAN. J. INT'L L. 1, 1 (2007).

² Laura A. Dickinson, Note, *The Promise of Hybrid Courts*, 97 (2) AM. J. INT'L L. 295, 296 (2003).

³ *Id.*, at 310. See also Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1016 (2008-2009). See also Etelle R. Higonet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice*, 23 ARIZ. J. INT'L & COMP. L. 347, 349 (2005-2006), here the author argues that hybrid courts, "draw upon the strengths of international justice and the benefits of local prosecutions."

⁴ Office of the U.N. High Commissioner for Human Rights (OHCHR), *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES* at 1, U.N. Doc. HR/Pub/08/2, U.N. Sales No. E.08.XIV.2 (2008).

⁵ See Raub, *supra* note 3, at 1016.

ensure norm penetration.⁶ Hybrid tribunals offer a potential new model of international criminal justice that has a greater focus on victims' rights, than previous judicial accountability mechanisms such as national courts that have often lacked legitimacy in post-conflict societies or ad-hoc tribunals that are seen as disengaged from affected communities. They also have a greater potential to contribute to the national peacebuilding process over other mechanisms, such as the ICC that has a limited mandate and jurisdiction. Given that these courts promise an approach that is more victim-centric and focused on the reconciliation process in post-conflict societies, it is essential to look at past and current experiments with hybrid courts to determine the elements that contribute to the success of hybrid courts.

While the emergence of hybrid tribunals as a rule-of-law policy tool is very recent, this paper will examine the existing body of literature on past international and national initiatives. It will also examine current hybrid tribunals to determine what components foster local capacity-building and contribute to the reconciliation process in rebuilding post-conflict societies and leaving a lasting legacy, including developing norms criminalizing human rights violations and mass atrocities.

Beginning with the atrocities of the Second World War, the international community implemented accountability measures against the individuals involved in the mass killings and human rights violations; tribunals to prosecute those responsible for war crimes included the Nuremburg trials, which began on November 20, 1945, and the Tokyo war crimes trials, that opened on May 3,

⁶ See Dickinson, *supra* note 2, at 310.

1946. The legal response signaled a shift in international politics, employing justice over military aggression. New definitions of international crimes established a precedent for individual accountability and ushered in a human rights movement; including the creation of institutions to protect those rights. However, since then rule-of-law policymakers have struggled to implement a model of international criminal justice that offers accountability and reconciliation to local populations, meets international legal standards, and that leaves a lasting positive legacy on affected communities.

This paper will critically analyze the establishment of mixed international-national tribunals, and their potential to build local capacity in post-conflict societies as outlined in the existing body of literature. It will address the question: What capacity-building standards contribute to a positive legacy of hybrid tribunals, making it a potential model for international criminal justice in post-conflict societies? First, key concepts and framework for the development of the hybrid process will be discussed, including the lack of local ownership and capacity-building elements in pure international proceedings, as well as the absence of international human rights standards and neutrality in national courts. Next, five examples of hybrid tribunals will be examined in East Timor, Kosovo, Sierra Leone, Cambodia and Lebanon to assess their function and effectiveness as a reconciliation and accountability mechanism, and as a means to build local rule of law capacity.

After a close examination of the literature of the five hybrid tribunals, alongside the failures and successes of purely international proceedings, six key

criteria stand out that may contribute to a more successful judicial process that brings accountability to victims, and contributes to local capacity building on an individual, institutional and societal level. Three national mechanisms are explored to understand what important features from the national systems have been shown to have a positive effect on the success of hybrid courts. The first and foremost national element is local ownership of the justice process. Post-conflict situations present a unique opportunity for the population to participate in rebuilding the justice system.⁷ When citizens have the opportunity to be engaged in the process, either through direct participation, as court personnel, or through indirect participation, by listening to or reading media reports, it becomes more likely that the affected communities will accept the process and view it as legitimate.

The next national element is locating the court in the country where the human rights violations and mass crimes occurred. Locating courts inside the country helps to engage the population, build professional capacity, and leave the physical structure of the court, helping to establish human and physical capacity in the justice institutions. Finally, the last national element that is required to increase the success of hybrid courts is cooperation from local and sometimes regional governments. Cooperation from local governments and/or neighbouring governments involved in mass crimes is critical during both the negotiation stage and operational stages of the tribunal, the absence of this

⁷ See Giles Bianchi, *Some Methodological Issues with Reconstructing Justice in Pos-Conflict Situations: Training Judges in Afghanistan, Congo and Timor Leste*, in THE CHALLENGES OF CONFLICT: INTERNATIONAL LAW RESPONDS 231, 232 (Ustinia Dolgopol & Judith Garda eds., 2006).

element can slow down the process of establishing the court, it can prevent justice from being implemented in a timely and efficient manner, and it can prevent the prosecution of perpetrators.

Next, international elements are examined to present three additional features that have been shown to make the process more accountable and legitimate to both the international community and to local populations. First, financial support from external actors, such as the United Nations or donor countries, is required so that the court can function effectively. Oftentimes post-conflict societies, that have endured mass crimes, lack the physical infrastructure and human resources to administer justice. Lack of funding is also the most cited reason for the failure of hybrid tribunals. Without adequate funding and resources, the court cannot properly function, as all other elements, such as the recruitment of personnel, the infrastructure and outreach initiatives, are affected by the budget. The next international element is the use of the international rule of law in tribunals. Implementing international law standards fills gaps in the national legal process and helps to build and strengthen the rule of law domestically. Finally, the last element is the presence of international actors, as they provide impartiality to proceedings, and help to build human capacity by providing training to local staff.

In the final section of the paper, the strengths and weaknesses of hybrid tribunals are examined to assess key policy consideration in establishing hybrid tribunals as a model for international criminal justice. The goal is to establish a system that is accountable to and seen as legitimate by both the affected

population and the international community, that develops norms criminalizing human rights violations and mass atrocities, and that supports national reconciliation efforts.

Background: Rule-of-Law and Peacebuilding

Peacebuilding can be defined as “strategies designed to promote and secure and stable lasting peace in which the basic human needs of the population are met and violent conflicts do not occur or recur.”⁸ Establishing the rule-of-law⁹ is an important component of national reconciliation, of ensuring lasting peace and security, and for rebuilding a cohesive community.¹⁰ Although some have argued that justice can hinder the peace process, characterized as the “peace vs. justice debate,”¹¹ much of the literature now focuses on balancing peacebuilding with transitional justice mechanisms.¹² Payam Akhavan in his

⁸ Wendy Lambourne, *Justice in the Aftermath of Mass Crimes: International Law and Peacebuilding*, in THE CHALLENGES OF CONFLICT: INTERNATIONAL LAW RESPONDS, *supra* note 7, at 269.

⁹ See The Secretary General, *Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict states*, ¶ 5, U.N. Doc S/2004/616*0439529 (Aug. 23, 2004) [hereinafter Report of the Secretary General], on establishing a common language of justice, which is essential for, “understanding the international community’s efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict.” What is more, in ¶6 the rule-of-law is defined as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

¹⁰ See Jane E., Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law*. 38 (2) GEO. J. INT’L L. 251, 252 (2007), where she argues that, “establishing a credible and functioning justice system that serves the goals of the rule of law is central to moving forward after violent conflict.”

¹¹ Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political realism*, 31 HUM. RTS. Q. 624 (2009).

¹² See *Peace versus Justice: A False Dilemma*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, available at <http://ictj.org/news/peace-versus-justice-false-dilemma>. See also Chandra Lekha Sriram, Olga Martin-Ortega, Johanna Herman, *Transitional Justice and Peacebuilding Strategies: Considerations for Policymakers*, JUST AND DURABLE PEACE

article, *Are International Criminal Tribunals a Disincentive to Peace?*, goes as far as to argue that recent examples demonstrate that judicial intervention is more likely to prevent atrocities.¹³

Not reconciling past atrocities in post-conflict societies can have significant consequences on international interests, on the relationship between local populations and government authorities, and on the state-building process. For policy makers interstate interests to consider include, “the flow of refugees across international borders,” appearing to encourage impunity when national governments fail to prosecute those responsible, and the threat that these crimes will spill over to neighbouring states jeopardizing international peace and security as defined under Chapter VII of the UN Charter.¹⁴ Moreover, consequences for local populations include a lack of accountability to address trauma and injustices and the absence of national reconciliation that may impede the democratization process and fail to establish norms of prevention. Economic and social instability may lead to weak government policies and civil unrest. For instance, in the case of Kosovo, the UN Secretary-General (UNSG) cited the absence of law and order as a major contributing factor to a volatile security situation in the area.¹⁵

Administering Justice in the aftermath of widespread, large-scale atrocities can play an important role in preserving peace and security. The use of tribunals as a transitional justice mechanism can act to promote stability and peace in

POLICY BRIEF, July 2009 (no.2), available at http://www.uel.ac.uk/CHRC/documents/TJ_PB_Policybrief.pdf

¹³ See Akhayan, *supra* note 11, at 625.

¹⁴ Raub, *supra* note 3, at 1018.

¹⁵ See U.N. Security Council, *Report Of The Secretary-General On The United Nations Interim Administration Mission In Kosovo* article, ¶6, S/1999/779 (12 July 1999).

affected regions, some academics argue that, “the introduction of legitimacy can shape incentives to end or prevent human rights abuses.”¹⁶ Many believe that establishing the rule-of-law in post-conflict societies is a necessary condition to achieve national reconciliation, to promote a culture that does not tolerate impunity, and to build norms of prevention. Mr. Jeremy John Durham Ashdown, former High Representative for Bosnia and Herzegovina, reflects on the U.N. mission and the importance of establishing the rule-of-law in post-conflict societies:

In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts.¹⁷

In its 2011 *World Development Report*, the World Bank concluded that commitments to transitional justice at the national level – including truth and reconciliations commissions, criminal prosecutions, and reparation programs for victims – “send powerful signals about the commitment of the new government to the rule of law.”¹⁸

What is more, the duty to prosecute perpetrators for crimes against humanity is defined both indirectly and directly in a number of international treaties. Indirectly in Article 2(3) of the Covenant on Civil and Political Rights, referring to effective judicial remedies to violations of rights and freedoms that shall be enforced by authorities. Also in the 1967 Declaration on Territorial

¹⁶ See Akhavan, *supra* note 11, at 625.

¹⁷ See Paddy Ashdown, *What I learned in Bosnia*, N.Y. Times, Oct. 28, 2002, available at <http://www.nytimes.com/2002/10/28/opinion/what-i-learned-in-bosnia.html>.

¹⁸ See *World Development Report 2011: Conflict, Security and Development*, A REPORT OF THE WORLD BANK 125-126 (April 2011), available at http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR2011_Full_Text.pdf

Asylum, urging parties not to grant asylum to those suspected of committing a crime against peace, a war crime, or a crime against humanity. Moreover, directly, the duty to prosecute perpetrators for mass crimes is defined in Articles 5, 7, 12 and 14 of the Torture Convention; Articles 4 and 6 of the Genocide Convention; and in the 1949 Geneva Convention.¹⁹ The re-emergence of judicial accountability mechanisms in the early 1990s built international support for mechanisms to deal with past atrocities and mass crimes. These efforts created momentum for prosecuting crimes against humanity, war crimes and genocide, and identified a need for a more coordinated, effective and efficient judicial measures.

Capacity Building for the Justice System:

For the reasons examined above, institution building is an important peacebuilding initiative and is a necessary element for capacity development in weak or fragile states. The United Nations (UN) first proposed the theory behind capacity building as a development objective in the early 1990s. The UN defines capacity-building on three inter-related levels, first on the individual level, which refers to establishing the necessary conditions for public servants to build and enhance their knowledge and skills base, to adapt to change, and to apply those skills in new and innovative ways. Next, on the institutional level that entails building on and modernizing existing mechanisms, including their systems and mechanisms, and avoiding creating new “western” institutions. Finally, the

¹⁹ Geoffrey Robertson, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 289-291 (1999).

societal level that requires “a more interactive public administration” that involves the public and that welcomes feedback.²⁰

In the early 1990’s the resurgence of International justice, led to the establishment of a new academic field, transitional justice (TJ), which examines how governments should address past human rights abuses after the reign of an authoritarian regime or after civil war. It focuses on what type of TJ mechanism should be adopted by governments, including judicial and non-judicial mechanisms, which include the use of restorative forms of justice, such as Truth Commissions, and retributive forms, such as tribunals and international courts. TJ literature focuses on what forms of accountability mechanism should be used to assist in consolidating democracy, and to address human rights abuses by “uncovering the truth of events, providing accountability for crimes, and promoting individual and societal reconciliation.”²¹

Transitional Justice and Hybrid Courts

Mixed national-international tribunals are most commonly referred to as “internationalized courts” or “hybrid” courts or tribunals.²² After the Second World War tribunals, cold war politics and the lack of political will amongst UN member states stalled efforts to create institutions to reconcile and hold those accountable

²⁰ See Section 5 on Capacity Development in U.N. ECOSOC, Definition of basic concepts and terminologies in governance and public administration, U.N. Doc. E/C.16/2006/14 (5 January 2006) available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf>

²¹ See Steven Roper & Lilian Barria, *Mechanisms of Transitional Justice*, in THE DEVELOPMENT OF INSTITUTIONS OF HUMAN RIGHTS: A COMPARATIVE STUDY³ (Lilian Barria and Steven Roper eds., 2010).

²² See Raub, *supra* note 3, at 1015 note 14. For the sake of uniformity, in this paper such institutions will be referred to as “Hybrid tribunals” or “Hybrid courts”

for mass crimes, including genocide, war crimes, and crimes against humanity.²³

Examples of the failure of national legal systems to prosecute political leaders and military personnel can be found in all regions of the world, including in Uganda, North Korea, Ethiopia, Indonesia, Chile, France, and the United States.²⁴

However, with the end of the Cold War the international community could no longer ignore widespread, large-scale atrocities. The massacre of 250,000 civilians in the territories of the former Yugoslavia, and the slaughter of 500,000 to 800,000 people in Rwanda²⁵ prompted the U.N. Security Council, under a Chapter VII mandate, to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.²⁶

Spurred by the ICTY and ICTR the proliferation of international criminal justice meant that, impunity would not be tolerated and that accountability and reconciliation was necessary for victims of such crimes. However, the ICTY and ICTR ad-hoc model was not intended to be a permanent solution for dealing with

²³ Eileen Skinnider, *Experiences and Lessons from "Hybrid" Tribunals: Sierra Leone, East Timor and Cambodia*, PAPER FOR SYMPOSIUM ON THE INTERNATIONAL CRIMINAL COURT, INT'L CENTRE FOR CRIMINAL L. REFORM & CRIMINAL JUSTICE POLICY 6 (2007).

²⁴ Yves Beigbeder, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 15 (2005).

²⁵ Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 366 note 10 (1999). The author notes: "By most accounts it appears that some 250,000 civilians have been killed, perhaps 20,000 women raped, and another 2 million driven from their homes in the course of the recent breakup of the former Yugoslavia while, over an even shorter period of some 100 days in 1994, a staggering 500,000 to 800,000 people have been massacred in the Hutu/Tutsi killings of Rwanda."

²⁶ See U.N. SCOR. Res. 827, 3217th mtg, U.N. Doc. S/RES/827 (May 25, 1993), available at <http://www.un.org/Docs/scres/1993/scres93.htm>. See also U.N. SCOR. Res. 955, 3453rd mtg., U.N. Doc S/RES/955 (Nov. 8, 1994), available at <http://www.un.org/ict/english/Resolutions/955e.htm>

atrocities in post-conflict states.²⁷ These tribunals were said to suffer from donor 'tribunal fatigue,'²⁸ and were plagued by structural and operational challenges, such as high costs and a timely process.²⁹ A model of international criminal justice was required that would confront the weaknesses of ad-hoc tribunals, that was victim-centric, and that was adaptable to a country's individual needs and complex jurisdiction and to their unique political and social histories.

The U.N. responded by creating hybrid courts to deal with genocide, war crimes, and crimes against humanity in post-conflict states.³⁰ Generally hybrid courts are understood as, "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred."³¹ Most often academics classify such courts as "second-generation"³² or "third-generation"³³ international criminal tribunals, after the Second World War criminal courts and ad-hoc tribunals. Laura Dickson, a proponent of hybrid tribunals, goes as far as to characterize them as a

²⁷ See Cohen, *supra* note 1, at 1.

²⁸ "Tribunal Fatigue" is a term first coined by David Scheffer, former advisor to the United States Permanent Representative to the U.N., see Skinnider, *supra* note 21, at 6 footnote 15. See also Report of the Secretary General (2004), *supra* note 9, at ¶ 42, where the report discusses the costs:

The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization's total regular budget. Although trying complex legal cases of this nature would be expensive for any legal system and the tribunals' impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.

See also Cockayne, *supra* note 31, at 616-617.

²⁹ See Cockayne, *supra* note 31, at 630-632.

³⁰ See Cohen, *supra* note 1, at 1.

³¹ See OHCHR (2008), *supra* note 4, at 1.

³² Daphna Shraga, *The Second Generation UN-Based Tribunals: A Diversity of mixed Jurisdiction*, in INTERNATIONALIZED CRIMINAL COURTS, SIERRA LEONEE, ESAT TIMOR, KOSOVO, AND CAMBODIA (Cesare P.R. Romano ed., 2004).

³³ See Higonnet, *supra* note 3, at 352.

“fifth, newly emerging, form of accountability and reconciliation”³⁴ after international criminal justice bodies, such as the ICTY, ICTR and the International Criminal Court (ICC), truth commissions, “transnational accountability efforts,” such as the Pinochet prosecution, and finally Alien Tort Claims Act in the United States.

Hybrid tribunals are established in post-conflict societies when there is insufficient domestic capacity to establish national justice mechanisms that can provide accountability and reconciliation to the affected population. Generally, the literature does not provide an in-depth definition of hybrid tribunals, but two common characteristics often cited include, first, the presence of international judges and lawyers working alongside one another, and second the application of domestic laws and international criminal law.³⁵ A number of authors note that the inherent flexible nature of hybrid tribunals is an important defining feature; these courts can evolve to incorporate the strengths from their predecessors, while avoiding their weaknesses, and they can be tailored to the needs of the affected community.³⁶ Hybrid courts, as an accountability mechanism, have the ability to contribute to capacity-building in post-conflict states by providing on the job training for individuals, by working with local institutional structures to improve on the systems and processes of national mechanisms, and finally on the societal level through norm penetration and outreach initiatives. Jane Stromseth, David

³⁴ See Dickinson, *supra* note 2, at p. 295.

³⁵ *Id.* See also Cockayne, *supra* note 31, at 648. See also Sarah M.H. Nouwen, ‘Hybrid Courts:’ *The hybrid category of a new type of international crimes courts*, 2 ULTRECHT L. REV. 190,193 (2006). See also Cohen, *supra* note 1, at 2. See also Higonnet, *supra* note 3, at 356.

³⁶ See Raub, *supra* note 2, at 1017, 1037, and 1043. Raub even goes as far as to claim that “the primary benefit of hybrid tribunals is their flexibility.” See also Higonnet, *supra* note 3, at 411.

Wippman, and Rosa Brooks (2008) conducted studies in many post-conflict societies, including in Sierra Leone, Kosovo, and Bosnia, and have found that rule-of-law building requires a multi-layered approach, “that focuses not only on strengthening institutions but also on building cultural and political support for the rule of law. Indeed, without a widely shared commitment to the idea of the rule of law, courts are just building, judges are just bureaucrats, and constitutions are just pieces of work.”³⁷

TJ is both “forward-looking and backward-looking,” meaning that its role is to punish crimes of the past but also to have a positive effect on society in order to assist in rebuilding its future.³⁸ For post-conflict justice to be effective and efficient as a reconciliation, accountability and preventative mechanism it needs to first involve an inter-linked capacity-building approach that works on an individual level by strengthening and building the human resources of a country. Next, on an institutional level by creating new modern courts that can have a presence long after the courts have wrapped up, and to build their systems and processes by incorporating new international elements alongside national ones. Finally, on a societal level that is based on the Stromseth et al. multi-layered approach, and builds cultural and political commitments to the rule of law and engages the local population. Hybrid courts are being asked to do more than their ad-hoc cousins, they are not only intended to send a normative message

³⁷ See Jane Stromseth, *Post-conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443 (2008). Here the author provides a brief overview and main findings of the book she co-wrote with David Wippman, and Rosa Brooks, see JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 3 (2006).

³⁸ Ellen E. Stensrud, *Mixed Justice, Mixed Legacy: The Special Court for Sierra Leone*, in THE DEVELOPMENT OF INSTITUTIONS OF HUMAN RIGHTS: A COMPARATIVE STUDY, *supra* note 25, at 150.

about political violence, but they are designed to accomplish greater capacity-building in post-conflict states. Hybrid courts have an important capacity-building function; they need “to build the diminished or non-existent capacity of the domestic courts to try criminals, to inculcate a cultural commitment to the rule of law and human rights, in addition to aiding the transition to a more liberal order through trials of prior political wrongdoers.”³⁹

The primary goals of TJ are to achieve “justice, truth, reconciliation, deterrence and prevention. However, these goals are all part of a larger picture of establishing the rule of law in post-conflict states: “strengthening domestic legal institutions and capacities often is essential to achieve any meaningful accountability for past atrocities and to prevent future abuses [...] and international assistance – including hybrid and joint judicial mechanisms – has played a critical role in building domestic capacities for justice.”⁴⁰ The aim of TJ and a goal for prosecuting mass crimes is to establish long-term and sustainable solutions that will aid in national capacity-building.⁴¹ What is more, much of the literature on hybrid courts incorporates the legacy component of these judicial mechanisms in their analysis.⁴² In the context of international justice, the Office of the High Commissioner for Human Rights (OHCHR) defines legacy as a “hybrid

³⁹ See Padraig McAuliffe, *Rebuilding Judicial Capacity with Enchanted Tools*, 15 L. ELECTRONIC JOURNAL 1, 2 (2009).

⁴⁰ Jane Stromseth, *Introduction: Goals and Challenges in the Pursuit of Accountability*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES, 1, 11 (Jane Stromseth ed., 2003).

⁴¹ See Report of the Secretary General, *supra* note 9, at Summary: “The United Nations must therefore support domestic reform constituencies, help build the capacity of national justice sector institutions, facilitate national consultations on justice reform and transitional justice and help fill the rule of law vacuum evident in so many post-conflict societies.”

⁴² James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT’L L.J. 616, 659-663 (2004-2005).

court's lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the hybrid court is complete. The need to leave a legacy is now a firmly accepted as part of UN policy."⁴³ The tools used to assist with capacity building helps to ensure a lasting legacy in post-conflict states.⁴⁴

Many academics argue that understanding the features that form successful hybrid tribunals will prevent them from falling victim to problems faced by their predecessors. A lot of weight is put on these tribunals to outperform their ad-hoc cousins; James Cockayne, author of a notable paper on the challenges of hybrid tribunals, argues that these types of courts are being asked to do more but with fewer resources. Policy makers are at risk of blending the worst of both the international and national components, more specifically "the externality of international actors with the weakness of local institutions," with the end-result causing more harm than good to victims and to society, and can pose a threat to peace and security for the transitioning country.⁴⁵ This paper hopes to clearly define the features and techniques of hybrid tribunals that contribute to capacity-building in post-conflict societies, that have the potential to contribute to a more efficient and effective process, to help build a lasting legacy, and to establish cultural and political acceptance of the rule-of-law.

Currently, there are five hybrid tribunals: 1) the Special Panels for Serious Crimes (SPSC) in Dili, East Timor; 2) the Regulation 64 Panels in the Courts of

⁴³ See OHCHR (2008), *supra* note 4, at 4-5.

⁴⁴ See Report of the Secretary General (2004), *supra* note 9, ¶ 44.

⁴⁵ See Cockayne, *supra* note 31, at 619.

Kosovo (Regulation 64 Panels); 3) the Special Court for Sierra Leone (SCSL) in Freetown; 4) the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh; and, 5) the Special Tribunal for Lebanon (STL). This paper hopes to explore the international benchmarks along with the required national components that are necessary to leave a lasting imprint on post-conflict states. Stromseth (2007) in her exploration of the rule of law, looks at capacity building in terms of norm penetration, arguing that over a period of time accountability norms, established through indicting perpetrators, and through fair and impartial proceedings, will become embedded into the social fabric of post-conflict countries. Moreover, she argues that the presence of some accountability measures will increase human capacity and will help to educate the public.⁴⁶ The next chapter will present five examples of hybrid tribunals. In each case I will explore under what circumstances was the hybrid model chosen, how it operated, and what capacity-building elements have been incorporated to build up the individual, institutional and societal capacities in these post-conflict states.

I. Five Examples of Hybrid Tribunals

A) East Timor

For twenty-four years, Indonesia occupied East Timor. The Armed Forces of Indonesia (TNI) ruled with an iron fist over East Timor, often waging violent campaigns against separatists who fought for the independence of East Timor, and against the civilian population; it is estimated that in the early years approximately 60,000 people were killed and many more displaced. In 1998, when Indonesian President Suharto resigned the new administration agreed for

⁴⁶ See Stromseth (2007), *supra* note 10, 265.

the UN to administer a referendum in East Timor, allowing citizens to choose either independence or autonomy. On 30 August 1999, overwhelmingly 78% of voters chose to separate from Indonesia. However, shortly after the referendum, violence escalated; approximately 2000 people were killed, 250,000 people were displaced to neighbouring West Timor, and over 70% of the buildings and infrastructure were destroyed.⁴⁷ In response to the violence, the UNSC authorized a multinational force, the International Force for East Timor (INTERFET)⁴⁸ with a mandate to restore peace and security. On 25 October 1999, authorized by resolution 1272, the United Nations Transitional Administration for East Timor (UNTAET) was established to assist the country to transition to independence.

The capacity of the local judiciary in East Timor was exceptionally weak. There was a lack of justice system infrastructure, no human resources, as most civil servant posts had previously been reserved for Indonesians and almost no East Timorese were trained as lawyers or judges, and no domestic court system existed.⁴⁹ Consequently, UNTAET issued provisions for the creation of hybrid judicial mechanisms for the administration of justice. Regulation 2000/11 established The Special Panels of the Dili District Court (SPSC) that gave the District Court in Dili jurisdiction over “serious crimes” including genocide, war

⁴⁷ Steven Roper and Lilian Barria. *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* 50 (2006).

⁴⁸ U.N. SCOR, RES. 1264, S/RES/1264 (15 September 1999), article 3: “Authorizes the establishment of a multinational force under a unified command structure [...]with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to take all necessary measures to fulfill this mandate.”

⁴⁹ See Dickinson, *supra* note 2, 298.

crimes, crimes against humanity, murder, sexual offences, and torture committed between the period of 1 January 1999 and 25 October 1999.⁵⁰ Regulation 2000/15, which works in accordance with Regulation 2000/11, further established that two international judges and one East Timorese judge shall preside over cases, and that both international law and the law of East Timor will have jurisdiction in the panels.⁵¹

On 20 May 2005, the court concluded its work. Fifty-five cases were completed, with eighty-four individuals convicted and three acquitted. Because of the lack of cooperation with Indonesian authorities, mostly low-level perpetrators were convicted.⁵² With 514 investigative files remaining open, many believe that the decision by the United Nations Security Council (UNSC) to close the court was premature.⁵³ Overall, the SPSC has received a rather lukewarm evaluation. From the beginning, proceedings were hampered by funding, linguistic and staffing difficulties, a lack of cooperation from Indonesia authorities, and a lack of ownership from both the UN side and the domestic side.⁵⁴ These limitations seriously restricted the impact of the tribunal to assist with the reconciliation

⁵⁰ See Section 10 of UNTAET Regulation No.2000/11, On the Organization of Courts in East Timor (6 March 2000) *available at* <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg11.pdf>

⁵¹ See ¶ 22 (Composition of panels) of UNTAET/REG/2000/15, ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES, (6 June 2000) *available at* <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf>. *Also see* ¶ 3 on Applicable Law.

⁵² Jame Rae, *Promoting Human Rights through Hybrid Courts: The Serious Crimes Process in East Timor*, in THE DEVELOPMENT OF INSTITUTIONS OF HUMAN RIGHTS: A COMPARATIVE STUDY, *supra* note 25, at 191.

⁵³ See Cohen, *supra* note 1, 9.

⁵⁴ See *id.* 9-10.

process, to provide accountability for crimes, and to assist with capacity-building in the country.⁵⁵

Located within the national court system, the court was situated in a way to have the greatest positive impact on society, and on a very superficial level, it did. For instance, in 1999, only a few Timorese had law degrees, and no one had worked as a judge and only one person had been a prosecutor.⁵⁶ The direct exposure to working in the Special Panels had been a professional building experience since many of the judges who served on the SPSC also served in the national justice system, with their experience translating to the domestic court system.⁵⁷ However, many scholars argue that this is as far as the courts impact on assisting with capacity building would go, and many more have even argued that the reconstruction of the judiciary through the hybrid process failed completely in East Timor. Some critics argue that UNTAET was more concerned with prosecuting a large number of cases than implementing a careful process that focused on fair trials that would then act as a good example of a functioning justice system for the domestic judiciary.⁵⁸

Generally, the literature points to three primary culprits for the courts failures. First, it consistently struggled with operational challenges, which were in part a result of resource shortages⁵⁹ that contributed to language barriers,

⁵⁵ See Stromseth, *supra* note 10, 286.

⁵⁶ For a detailed break-down of how many professionals could practice law and the types of trainee programs see Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, for THE INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE 24 (2005), available at <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf>.

⁵⁷ See Stromseth, *supra* note 10, 290-291.

⁵⁸ See McAuliffe, *supra* note 28, at 1.

⁵⁹ See Hirst and Varney, *supra* note 56, at 19.

unequal resource distribution between international and national judges, a lack of well-planned education plans for legal staff, and a lack of equipment and resources.⁶⁰

Second, the Indonesian government has been pointed to as the primary culprit for the lack of success of the SPSC, not only did it not cooperate with the court, but what is more, the SPSC even with warrants, was unable to secure the presence of high level Indonesian officials accused of human rights violations.⁶¹ Finally, “dual-ownership of the process” was also cited as a problem of the court, meaning that there was never a clear mandate that divided the responsibilities between the Timorese government and the UN, allowing both sides to avoid responsibility, and resulting in serious consequences.⁶² The dual ownership problem directly contributed to the previous two problems of resources shortage and the court’s inability to arrest top Indonesian officials, as well as to other problems such as recruitment, management, and accountability.⁶³ Overall, these three culprits resulted in severe shortcomings of the hybrid model, including the lack of accountability for serious crimes and reconciliation for Timor-Leste, and institutional and societal capacity-building.

B) Kosovo

⁶⁰ See Stromseth, *supra* note 10, 290-291.

⁶¹ See Megan Hirst and Howard Varney, *supra* note 56, at 16. The authors describe the lack of cooperation from Indonesia as “the most fundamental obstacle to the effective functioning of the serious crimes regime..” Also see Caitlin Reigner, *Hybrid Attempts at accountability for serious crimes in East Timor*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 163 (N. Roht-Arriaza and J. Mariezcurrena, eds., 2005). The author notes that, “although the Special Panels and the SCU enjoyed some important “successes” in identifying and punishing a small handful of those East Timorese perpetrators responsible for the atrocities during 1999, the “fragmented accountability” that sees the high-level organizers and planners of the destruction remain out of the court’s reach in Indonesia was an ongoing frustration for all involved.”

⁶² See Cohen, *supra* note 1, at 9.

⁶³ See Cohen, *supra* note 1, at 9-10.

In 1999, the United Mission in Kosovo (UNMIK) was established after Serbia withdrew from Kosovo⁶⁴ leaving a devastated population with no functioning state authority. The war had overwhelming humanitarian consequences; nearly half of the 1.7 million residents were expelled to neighbouring Albania and another 500,000 people were internally displaced.⁶⁵ UNMIK was facing a serious security and accountability crisis; not only had the national judicial system completely collapsed, but there was a considerable rise in violence and serious crimes, in the first six months there was an estimated 500 murders, an increase in political violence, and illegal appropriation of Serb property.⁶⁶ Additionally, UNMIK had to decide how to deal with those who had committed war crimes in the Former Yugoslavia. The ICTY, established in 1993, only had the capacity to prosecute those “most responsible” and those who did not bear that level of responsibility were to be dealt with by national mechanisms.⁶⁷ Nevertheless, the national legal system was too weak to

⁶⁴ UNSC Resolution 1244, 10 June 1999, *available* at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>. Resolution 1244 established the presence of UNMIK and the complete withdrawal of Federal Republic of Yugoslavia (¶3).

⁶⁵ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 15, at ¶ 8.

⁶⁶ See Rachael Kerr and Erin Mobekk, PEACE & JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR 97 (2007). See also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 15, at ¶66, where on 12 July 1999, the UNSG issued a report that maintained that, “[t]here is an urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary [...] The daily arrests of criminals by KFOR and the need to bring to justice those who are suspected of having committed the most serious crimes, including war crimes, amplifies the urgency of these issues. This is a fundamental challenge for UNMIK. Only a fully functioning independent and multi-ethnic judicial system will address the existing security concerns in Kosovo and build public confidence.

⁶⁷ See Statute of the International Criminal Tribunal For The Former Yugoslavia (ICTY), UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 57 (September 2009). The Statute recalls and reaffirms the statement of 23 July 2002 made by the President of the UN Security Council that confirms that the work of the ICTY must concentrate “on the prosecution and trial of the most senior leaders suspected of being

prosecute those responsible; specifically, there was a lack of capacity and independence in the judiciary, the physical infrastructure was destroyed, and there was a lack of experienced personnel to prosecute cases.⁶⁸

UNMIK had to establish quickly some form of judiciary capacity; first, it adopted regulation 2000/6 allowing for the appointment and removal from office of international judges and prosecutors in Mitrovica,⁶⁹ and later regulation 2000/34 that extended the jurisdiction to Kosovo.⁷⁰ What is more, regulation 2000/64, or ‘Regulation 64 panels,’ recognized the responsibility of the international community to “maintain civil law and order to protect and promote human rights,” and to ensure “independence and impartiality of the judiciary and the proper administration of justice.”⁷¹ These regulations allowed international judges to sit alongside domestic judges and for international lawyers to work with their domestic counterparts on the judicial panels anywhere in Kosovo,⁷² and to apply a blend of international and domestic law.⁷³ The UN believed that incorporating the international component to proceedings in Kosovo would help to build local capacity and independence in the local judicial process.⁷⁴ In June 2008, the UNSG announced the reconfiguration of the structure and operations

most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.” See also ICTY Press Release, PR/P.I.S/437-E, 29 September 1999, available at <http://www.icty.org/sid/7733>.

⁶⁸ See Dickinson, *supra* note 2, 297.

⁶⁹ UNMIK/REG/2000/6, ON THE APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS, 15 February 2000.

⁷⁰ UNMIK/REG/2000/34, AMENDING UNMIK REGULATION NO. 2000/6 ON THE APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS, 27 May 2000.

⁷¹ UNMIK/REG/2000/64, ON ASSIGNMENT OF INTERNATIONAL JUDGES/PROSECUTORS AND/OR CHANGE OF VENUE, 15 December 2000.

⁷² *Id.* at Section 1.

⁷³ See Dickinson, *supra* note 2, at 297.

⁷⁴ See Higonet, *supra* note 3, at 381.

of the international civil presence in Kosovo.⁷⁵ Later that same year in November, the UNSG announced that the European Union Rule of Law Mission in Kosovo (EULEX) would “assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella headed by my Special Representative, and in accordance with resolution 1244 (1999).”⁷⁶

In the early stages of UNMIK’s operations, a main problem included the recruitment, funding and hiring of international personnel, which resulted in the hiring of international staff that had inadequate skill levels, poor English language proficiency, and a lack of cultural sensitivity,⁷⁷ with many critics concluding that the Regulation 64 Panels was a disappointment.⁷⁸ However, the court did have some successes, including prosecuting several perpetrators who were unable to be tried in the ICTY,⁷⁹ as well as, trying “hundred cases involving war crimes, ethnic violence, terrorism, weapons smuggling, human trafficking and organized crime.”⁸⁰ Moreover, although there were significant problems with the international personnel, the presence of international judges did serve to impart an air of

⁷⁵ See U.N. Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶14-16, S/2008/354 (12 June 2008).

⁷⁶ See United Nations Security Council, *Report of the Secretary-General on the UNMIK*, ¶23, S/2008/692 (24 November 2008).

⁷⁷ See Higonnet, *supra* note 3, at 382.

⁷⁸ *Id.* at 382.

⁷⁹ See Raub, *supra* note 3, at 1028.

⁸⁰ Robert F. Carolan, *An Examination of the role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17TRANSNAT’L. & CONTEMP. PROBS 9, 19 (2008).

credibility to proceedings⁸¹ and consequently alleviate a massive legitimacy crisis.⁸²

A notable study was released by the Organization for Security and Co-operation in Europe (OSCE) assessing Kosovo's War Crimes Trials over a ten-year period from 1999-2009.⁸³ The study found that, "there has been a systemic failure to adjudicate war crimes cases," due to a lack of funding and that, prosecuting war crimes has not been given top priority.⁸⁴ The study offer a number of recommendations including that the remaining war crimes cases should be given top priority, that adequate support and resources from both the Kosovo budget and international donors are needed, due to the lack of lack of overall competence in this area of law, training and capacity building for personnel should be provided. Finally, that the formation of a specialized "department for serious crimes should remain on the agenda through the passage of the draft law on courts."⁸⁵ The purpose behind these policy recommendations is to investigate and try these cases to a "just conclusion."⁸⁶ The report concludes by focusing on the importance of justice system on the reconciliation process of Kosovo:

All communities in Kosovo have been affected and none will be able to fully close this difficult chapter in their lives and move forward until the remaining war crimes cases have been properly dealt with by the justice system. [...] not to adequately address these matters will reflect poorly on the judicial system in Kosovo. Not to do so will be a grave breach of the

⁸¹ See Raub, *supra* note 3, at 1028.

⁸² See Higonet, *supra* note 3, at 383.

⁸³ See Organization for Security and Co-operation in Europe (OSCE), *Kosovo's War Crimes Trials: An assessment ten years on 1999-2009*, (May 2010), available at <http://www.osce.org/kosovo/68569>.

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 6-7.

⁸⁶ *Id.* at 7.

trust that the justice system has been given, and it will negatively impact both the history and the future of all communities in Kosovo.⁸⁷

C) Sierra Leone

The conflict in Sierra Leone reads like a Hollywood movie, children recruited into armies to serve as soldiers, rebel groups fighting over conflict or “blood” diamonds, and gross human rights violations being committed against civilian populations. However, for the people of Sierra Leone, the horrific events of the civil war that lasted from 1991 until 2002 had not only devastated their lives, but had damaged the social and economic fabric of their country. There are a number of key things to note about the conflict. First, because of the involvement of former President of Liberia, Charles Taylor,⁸⁸ there is a regional dimension to the conflict. Next, that a number of peace processes were attempted in 1991, 1996, and 1999, and were unsuccessful, and finally, although the Revolutionary United Front (RUF) has been accused of most of the human rights abuses, all sides are said to be involved in grave human rights violations.⁸⁹ It is estimated that the conflict resulted in tens of thousands of deaths, mass displacement of people, and widespread atrocities with a large portion of the civilian population falling victim to human rights abuses. The civil war was

⁸⁷ *Id.*

⁸⁸ On 4 June 2003, the court indicted Taylor for his involvement in the civil conflict where he provided training and financial support to the RUF (see Beigbeder, *supra* note 22, at 121). Charles Taylor has been described by Human Rights Watch as “one of the single greatest causes of spreading wars in West Africa” (See *West Africa: Taylor Indictment Advances Justice – Liberian President must be Arrested*, HUMAN RIGHTS WATCH, 4 June 2003, available at <http://www.hrw.org/node/67932>). On 29 March 2006, almost three years after the initial indictment, Taylor was transferred to the Special Court where he was charged with eleven counts of war crimes and crimes against humanity (See International Centre for Transitional Justice, *Sierra Leone: Submission to the Universal Periodic Review of the UN Human Rights Council 11th Session: May 2011*, ¶19, (1 November 2010).

⁸⁹ Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, WAR, CONFLICT AND HUMAN RIGHTS 84, 95-96 (2010).

primarily defined by the horrific crimes waged against civilians, including limb amputation, sexual slavery, and decapitations, amongst many other horrific violations.⁹⁰ The conflict also involved the widespread use of child combatants, who were often kidnapped and drugged, and identified as both the perpetrators and victims.⁹¹

In 2000, with the capture of RUF leader Foday Sankoh, the government of Sierra Leone asked the UN to help set up a court to prosecute those who "bear the greatest responsibility for the commission of crimes against humanity, war crimes, and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996."⁹² On January 26, 2002 an agreement was signed between the government of Sierra Leone and the UN to create the SCSL to prosecute three broad classes of crimes, defined under Articles 2,3, and 4 of the Statute of the SCSL. These included crimes against humanity, violations of Article 3 and Additional Protocol II of the Geneva Conventions, and other serious violations under international humanitarian law.⁹³

The courts hybrid nature is evident in its very structure and funding mechanisms. The court is located in Freetown, Sierra Leone, and all personnel

⁹⁰ Tim Kelsall. CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONEE 27 (2009).

⁹¹ See *id.* at 92. It is estimated that a total of 6,845 child soldiers were demobilized following the end of the war in 2002, and that children as young as 8 years old were being recruited. But many speculate that these numbers are much higher.

⁹² See U.S. Department of State, *Sierra Leone, Country Reports on Human Rights Practices 2001*, March 4, 2002, available at <<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8402.htm>>

⁹³ Statute of the Special Court for Sierra Leone arts. 2, 3, and 4, available at <http://www.scs-l.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=70> [hereinafter Statute of the Special Court].

are a mix of domestic and international actors.⁹⁴ The applicable law is a mix of international and national laws,⁹⁵ where the court is guided by the decisions of the ICTY and the ICTR, as well as by the Supreme Court of Sierra Leone.⁹⁶

The SCSL is deemed more successful as accountability and a capacity-building mechanism than its Kosovo or East-Timor predecessors. It includes the prosecution of some “big fish” including the trials of former RUF leaders, and former head of state, Charles Taylor. It had extensive capacity-building initiatives, including on a societal level, wide-ranging public outreach initiatives to encourage norm penetration, and professional building measures. The SCSL also had an extensive outreach strategy, working with the Non Governmental Organization (NGO) community, in order to have a greater ripple effect on society writ large in disseminating human rights principles.⁹⁷

David Cohen in his in-depth analysis of the “lessons learned” from hybrid tribunals argues that one of the biggest distinguishing factors between the process in East Timor and Sierra Leone was the narrow mandate of the SCSL. Unlike the SPSC, which issued 391 indictments, the mandate of the SCSL was

⁹⁴ See Statute of the Special Court, *supra* note 93, arts. 12, 15, and 16. The court consists of two trial chambers and an appeal chamber. Each trial chamber is composed of three judges, one national appointed by the Government of Sierra Leone, and two international appointed by the Secretary General of the UN (hereinafter SGUN) The Appeals Chamber will consist of five judges, with two appointed by the local government, and three by the SGUN. Under Article 15 the Prosecutor will be appointed by the SGUN, and the deputy by the government.

⁹⁵ See *id.* Article 1 (1). The provisions specify that the court will prosecute those “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”

⁹⁶ See *id.* Article 20 (3).

⁹⁷ See Stromseth, *supra* note 10, at 306-307.

limited to persons “who bear the greatest responsibility,” which meant that resources were focused on a few cases.⁹⁸

Cohen identifies four other factors that contributed to the relative success of the SCSL over the SPSC process in East Timor. First, the SCSL enjoyed independence from the UN mission to Sierra Leone, meaning that it only had to fight for resources within its management committee and not with mission resources, which in the case of the mission to East Timor had many other priorities. This also allowed for greater clarity of the question of ownership, which meant that roles were better defined making the process more efficient and effective.

As of 2011, the court has achieved some notable successes. According to the Centre for Transitional Justice (ICTJ) submission to the Universal Periodic Review (UPR) the SCSL has conducted fair trials that have resulted in the conviction of eight people that are serving fifteen to fifty-two year jail sentences in Rwanda. The ongoing trial of Charles Taylor reaffirms that impunity will not be tolerated and strengthens “the principle of individual criminal responsibility for the most serious crimes on the basis of the reasons for fighting (just cause)”. What is more, it has contributed to the body of international criminal law by establishing that as early as 1996, conscripting children under the age of 15 into army groups is contrary to customary international law, and that “forced marriage can constitute a separate and distinct crime against humanity as an inhumane act.”⁹⁹

D) Cambodia

⁹⁸ See Cohen, *supra* note 1, at 12.

⁹⁹ See ICTJ UPR, *supra* note 88, ¶ 9.

Not since the atrocities of the Second World War has the world witnessed such brutality as the reign of the Khmer Rouge over the Cambodian people from 1975-1979. It is estimated that approximately 1.7 million people were systemically murdered under the command of Pol Pot and the rest of the Khmer Rouge leadership. The Khmer Rouge government had a deliberate strategy, their goal, to achieve “a sovereign, self-reliant, and pure Khmer nation.”¹⁰⁰ Targeted Cambodians were tortured and killed through mass execution, starvation, and disease. In December 1979 Vietnam invaded Cambodia, defeated Pol Pot and established a new government, the People’s Republic of Kampuchea (PRK). This would end the genocide but begin a new conflict lasting for the next thirty years, from 1979 to 1999.¹⁰¹

In 1997, negotiations were held for the creation of an international tribunal to prosecute members of the Khmer Rouge regime. Talks between the Secretary-General's Special Representative for Human Rights in Cambodia and the two Cambodian Prime Ministers allowed for the introduction of Resolution 52/135 through the General Assembly “condemning the Khmer Rouge genocide and requesting that the Secretary-General provide assistance to Cambodia.”¹⁰² In July 2001, Cambodia’s National Assembly and Senate established the Extraordinary Chambers in the Courts of Cambodia (ECCC) that would prosecute the Khmer Rouge leadership, and in March 2003, an agreement was enacted

¹⁰⁰ Jason Abrams and Steven Ratner, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 238, 230-231 (1997).

¹⁰¹ Jack C. Plano, Robert E. Riggs, And Lawrence Ziring, THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS 307 (2005).

¹⁰² Stephen Heder and Brian Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, WAR CRIMES RESEARCH OFFICE 1, 39 (2001), available at <http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1>.

between the UN and the government of Cambodia supporting the judicial mechanisms of the ECCC.¹⁰³ The jurisdiction of the court extends from April 17, 1975 to January 6, 1979, and has authority over crimes of genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and crimes against Humanity, as defined in the 1998 Rome Statute of the ICC. It also includes grave breaches of the 1949 Geneva Conventions and other crimes as outlined in Chapter II of the Law on the Establishment of the Extraordinary Chambers enacted on the 10 August 2001.¹⁰⁴

On 26 July 2010, the court issues its first verdict in case 001, which found Kaing Guek Eav, alias Duch, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh, guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949.¹⁰⁵ After an appeal of the co-prosecutor, on 3 February 2012 the Supreme Court overturned the thirty-five year sentence imposed by the Trial Chamber, and sentenced Kaing Guek Eav to life imprisonment.¹⁰⁶ Opening statements in Case 002 were held before the chambers 27-30 June 2011,¹⁰⁷ which include four most senior surviving Khmer Rouge leaders. However, the biggest controversy to date surrounds Cases 003 and 004. In October 2011, German judge, Siegfried Blunk, resigned after rights group accused him of failing to conduct impartial investigations. He cited

¹⁰³ See Skinnider, *supra* note 21, at 15- 16.

¹⁰⁴ See United Nations Assistance to the Khmer Rouge Trials (UNAKRT), available at http://www.unakrt-online.org/01_home.htm.

¹⁰⁵ See Extraordinary Chambers in the Courts of Cambodia, Case 001, available at <http://www.eccc.gov.kh/en/case/topic/1>.

¹⁰⁶ See *Kaing Guek Eav alias Dutch Sentenced to Life Imprisonment by the Supreme Court Chamber*, ECCC NEWS, 2012, available at <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-alia-duch-sentenced-life-imprisonment-supreme-court-chamber-0>

¹⁰⁷ See *Opening Statements in Case 002 on 21 November 2011*, ECCC NEWS, November 2011, available at <http://www.eccc.gov.kh/en/articles/opening-statements-case-002-21-november-2011>

pressure from the local government for the lack of new cases.¹⁰⁸ Later in March 2012, Swiss Judge Laurent Kasper-Ansermet resigned from the court accusing his Cambodian counterpart, You Bunleng, of interference in the investigation of the two cases. In a statement, Mr. Kasper Ansermet said: "You Bunleng's active opposition to investigations into cases 003 and 004 has led to a dysfunctional situation," he further added that he "considers that the present circumstances no longer allow him to properly and freely perform his duties".¹⁰⁹

Although a number of controversies have plagued the court, it has achieved some notable successes. The court has included a number of capacity-building strategies, including extensive outreach initiatives, training programs, and legacy building programs. Some of these include training courses for Cambodian lawyers on topics such as International Criminal Law and Defending Complex Crime, ongoing internal experts seminars, and mentoring initiatives. In addition, outreach programs include collaborating with the NGO community, media, legal and academic communities to reach a larger audience in informing them about proceedings and the rule of law.¹¹⁰ The ECCC's Public Affairs Section (PAS), through outreach efforts, was responsible for bringing more than 27,700 visitors to the Court during the trial. They also provide access to proceedings through "live feeds, distributing DVDs, posting transcripts in a timely

¹⁰⁸ See Sopheng Cheang, *German judge resigns from Cambodia Trial*, 10 October 2011, BOSTON GLOBE, available at http://www.boston.com/news/world/asia/articles/2011/10/10/german_judge_resigns_from_cambodia_tribunal/

¹⁰⁹ See *Judge quits Cambodian UN-backed Khmer Rouge Trial*, BBC NEWS, 19 March 2012, available at <http://www.bbc.co.uk/news/world-asia-17432484>

¹¹⁰ See ECCC website, LEGACY, available at <http://www.eccc.gov.kh/en/dss/legacy>.

manner, and launching an ECCC page on Facebook, Flickr and Twitter.”¹¹¹

Moreover, the ECCC’s weekly radio programme presenting highlights from the week’s hearings and features guest speakers to discuss and explain major developments in court proceedings.¹¹²

The verdict in Case 001 is a major accomplishment for the court. A survey completed after the verdict on knowledge and perception of justice found that attitudes towards the ECCC remained positive: “A vast majority of respondents believed the Court would respond to the crimes committed by the Khmer Rouge (84%); help rebuild trust in Cambodia (82%); help promote national reconciliation (81%); and bring justice to the victims of the Khmer Rouge regime (76%).”¹¹³ In the same study, respondents recommended to the ECCC to “speed up trials, be fair, and to punish the accused.”¹¹⁴

E) Lebanon

Lebanon has a long history of human rights violations. The war that lasted for more than fifteen years, from 1975-1991, was responsible for killing over 100,000 civilians, with 17,000 more disappeared in the conflict.¹¹⁵ From 1991 to 2005, human rights violations and abuses continued, with parts of Lebanon remaining occupied by Israeli and Syrian forces.¹¹⁶ In 2004, a number of leading Lebanese political and media figures became targets of assassinations, with the most

¹¹¹ See Phuoung, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* 11 (2011), available at <http://escholarship.org/uc/item/0n22238c>.

¹¹² See ECCC, ECCC’S WEEKLY RADIO PROGRAMME, available at <http://www.eccc.gov.kh/en/media-center/weekly-radio>.

¹¹³ See Phuoung, *supra* note 111, at 5.

¹¹⁴ *Id.*

¹¹⁵ See International Center for Transitional Justice (ICTJ), *LEBANON*, available at <http://ictj.org/our-work/regions-and-countries/lebanon>.

¹¹⁶ See *id.*

prominent attack in 2005 on former Prime Minister Rafiq Hariri.¹¹⁷ This attack led to the establishment by the UNSC of the Special Tribunal for Lebanon (STL) in 2007, with a mandate to prosecute those responsible for the attack of the former Prime Minister, as well as, similar crimes committed between 1 October 2004 and 12 December 2005.¹¹⁸ The court finally opened on 1 March 2009, and due to security concerns, it is located in The Hague, the Netherlands. It is composed of eleven judges, of which four are Lebanese, and it is designated to address crimes in Lebanese Law.¹¹⁹ Fifty-one per cent of the costs of the STL are voluntary contributions, while the Lebanese government finances forty-nine percent of the costs.¹²⁰

For a number of reasons, the creation of the STL has been very controversial in nature. First, critics have pointed to the courts limited mandate, covering only assassinations between 2004-2005, and for failing to acknowledge abuses and violations of human rights and humanitarian law that occurred during and after the civil war. Next, there are concerns over the location of the court in the Hague, and away from the affected population, and finally that the use of only Lebanese law, ignores international human rights standards. All these concerns have had many questioning the courts ability to bring accountability to victims and society, and to develop norms criminalizing human rights violations.¹²¹ There have also

¹¹⁷ See Raub, *supra* note 3, at 1038.

¹¹⁸ See UN SCOR, *Statute of the Special Tribunal for Lebanon*, art 1 U.N. Doc. S/RES/1757, May 30, 2007, available at <http://www.un.org/News/Press/docs/2007/sc9029.doc.htm>

¹¹⁹ Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *Justice delayed? Internationalised criminal tribunals and peace-building in Lebanon, Bosnia and Cambodia*, 11 (3) CONFLICT, SECURITY & DEVELOPMENT, 335, 341 (2011).

¹²⁰ The Special Tribunal for Lebanon, Factsheet: About the tribunal, available at <http://www.scribd.com/doc/55621646/Factsheet-About-the-Tribunal>.

¹²¹ See Sriram et al. (2011), *supra* note 119, at 341-342.

been widespread security concerns both for the tribunal and in Lebanon, with fears that the court is creating divisions in Lebanon and inciting political fallout.¹²² Although fingers have pointed at Syria for the assassinations, in July 2011, the court issued four arrest warrants naming senior members of the Shiite Hezbollah group. However, the group has not only denied the claims but have refused to cooperate with the court calling it part of a “US-Israeli conspiracy’ aimed at targeting the resistance group and inciting sectarian strife in the country.”¹²³ The lack of support from the government has affected the financing of the court, the ability of the court to arrest the accused, and public perceptions of the STL.¹²⁴ The ongoing debate over the STL has created discontent amongst the Lebanese public, with a recent poll showing that 63.5% of Lebanese did not consider the STL credible, and a mere 36.8% believed in the independence of the Tribunal.¹²⁵

However, the STL has also contributed to the development of international justice through the introduction of a number of unique features.¹²⁶ The STL is the first war crimes tribunal to prosecute the crime of terrorism, it allows for trials in absentia, meaning that the trial can take place without the accused being in the custody of the court, and includes an autonomous pre-trial judge.¹²⁷ What is more, with trials set to take place in mid 2012, it is hard to predict exactly how this process will play out. Some still are optimistic for the STL; according to a

¹²² See Q&A: *Hariri Tribunal*, BBC NEWS, June 30, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-12182326>.

¹²³ See Daisy Mohr, *Hezbollah and the Lebanon Tribunal – paying for your pariah*, INT’L JUSTICE DESK, Nov. 8, 2011, available at <http://www.nw.nl/international-justice/article/hezbollah-and-lebanon-tribunal—paying-your-pariah>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Special Tribunal for Lebanon, Unique Features, available at <http://www.stl-tsl.org/en/about-the-stl/unique-features>.

¹²⁷ *Id.*

Lebanese judge, “the creation of the STL indicates the determination of the international community to recognize the extreme gravity of terrorist crimes, and constitutes a prologue . . . to subjecting such crimes to international criminal law.”¹²⁸ The same judge goes on to say that he hopes that the STL will rebuild Lebanon’s judicial capacity, after the Lebanese civil war.¹²⁹

II) Capacity Building Criteria

Post-conflict societies often face a number of difficulties in implementing justice mechanisms for past crimes, including a collapsed judicial system, destroyed physical infrastructure, a lack of legal expertise, and in some cases continued outbursts of violence, leaving local governments with little capacity to prosecute crimes. The experiences with ad-hoc tribunals have proven that these mechanisms are not an effective or efficient way to administer justice or to aid in reconciliation efforts. The blending of international and national elements in hybrid tribunals is meant to address three problems of purely international and purely domestic tribunals, including problems of perceived legitimacy, capacity building, and norm penetration.¹³⁰

In studying the five cases of hybrid courts, the following section will explore the capacity-building techniques and tools that if put in place may create the conditions to provide greater legitimacy to courts and ensure greater success in leaving a lasting legacy on society by developing the rule of law in post-conflict societies. First, national mechanisms are explored to understand what important features from the national systems have been shown to have positive effects on

¹²⁸ See Raub, *supra* note 3, at 1040 (footnote 167).

¹²⁹ See Raub, *supra* note 3, at 1040.

¹³⁰ See Dickinson, *supra* note 2, at 300.

the success of bringing justice to affected populations. Then the international elements are examined to present three additional features that are required to make the process more accountable and legitimate to both the international community and to affected populations.

National Mechanisms

A) Local ownership

The first and foremost component of achieving successful local capacity-building is local ownership of the justice process. Post-conflict situations present a unique opportunity for the population to participate in rebuilding the justice system,¹³¹ and this participatory aspect is critical for the peacebuilding process, and for norm penetration of rule of law standards. The national ownership of the process¹³² refers to two forms: First, to the extent that the citizens will accept the hybrid court and its work.¹³³ Meaning, the way in which the population will feel connected to the trials by direct participation with their fellow community members in the courts as prosecutors, judges, and staff, or through coverage by the local media.¹³⁴ The second refers to the ownership that the international and national actors bear for the process of the court.¹³⁵ Chief Justice Rapoza in his work in East Timor asks three important questions: who owns the nuts and bolts

¹³¹ See *Blanchi*, *supra* note 7, at 232.

¹³² See Chief Justice Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?*, 21 AM.U. INT'L. REV. 525, 528-39 (2006-2006). Here the author uses his experience in East Timor to describe the concept of ownership.

¹³³ See *Id.* at 526, 528-530.

¹³⁴ See *Cohen*, *supra* note 1, at 5-6.

¹³⁵ See *Rapoza*, *supra* note 132, at 526, 530-37.

of the process? Who owns the difficult decisions of the court? And who owns the legacy of the court?¹³⁶

The local ownership aspect alongside holding trials in-country where the atrocities occurred are important elements in supporting both the individual and institutional components of capacity-building. Reconstruction of the judicial sector requires rebuilding of the judicial infrastructure, training of administrative personnel, and “entails the re-creation of a qualified, reliable and corrupt-free judiciary.”¹³⁷

A primary goal of TJ is to aid national reconciliation efforts and to help the affected population deal with the past in order to rebuild their future. The justice process should be first for the victims, and ensuring local ownership in the process allows the affected population to be directly engaged in the process. For instance the SCSL, as the name would suggest, is a court for Sierra Leone. The primary objective should be to bring justice and accountability to the victims of these crimes and to aid national reconciliation measures, meaning that perceptions of the judicial process amongst the local populations are an important aspect on the success of the tribunal. During the Stromseth et al. study, it was found that it was especially important “to focus on the perceptions of ordinary citizens and to strengthen cultural commitments to the very idea of the rule of law.”¹³⁸ As previously discussed, the main drawback from using ad-hoc tribunals, as experienced with the ICTY and ICTR, was the courts disconnect from the affected population. An empirical study of perceptions of the ICTY in

¹³⁶ *Id.* at 530-37.

¹³⁷ See Blanchi, *supra* note 7, at 231.

¹³⁸ See Stromseth (2008), *supra* note 44, at 1450.

Bosnia-Herzegovina amongst judges and lawyers indicated that they were ill informed and suspicious of the work of the ICTY. This was a result of the proximity of the court to the country, and the failure of the ICTY to publicize its work.¹³⁹

The perception of the justice process by local populations is a vital component for the success of the court, and acts as an important element in national reconciliation and in developing norms of prevention by criminalizing human rights violations and mass atrocities. For instance in Kosovo, the UNSG noted that, “[w]here justice can be seen to be done; it will also make an important contribution to reconciliation in Kosovo.”¹⁴⁰ On the other hand, as mentioned earlier, the public perception of the STL in Lebanon is significantly low, with a staggering 63.5% of Lebanese seeing the STL as not credible.¹⁴¹ The local population needs to have confidence in the judicial process and feel that they can fully engage in unbiased proceedings without fear of persecution. In post-conflict societies “strengthening the rule of law depends on people’s confidence that they will be protected from predatory state and non state actors, that they can resolve disagreements fairly and reliably without resorting to violence, and that legal and political institutions will protect rather than violate basic human rights.”¹⁴²

The participation of domestic judges, lawyers and staff builds confidence in the process, but citizen participation in the decision making process is important for

¹³⁹ See Dickinson, *supra* note 2, at 303.

¹⁴⁰ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 15.

¹⁴¹ See Mohr, *supra* note 123.

¹⁴² See Stromseth (2007), *supra* note 10, at 252.

the victims connection to the outcome of proceedings.¹⁴³ Rule-of-law policy makers have recognized the importance of local perceptions of the process; Indeed, the court needs to not only fulfill its immediate obligations of bringing perpetrators to justice in a fair and impartial manner, but the court needs to meet its long-term goal of promoting peace and security in the country. Legacy building has become a compulsory aspect of hybrid courts, including substantial outreach initiatives and keeping a historical record of events.

B) In-theatre proceedings

Another important and distinguishing feature of hybrid courts is that they are “in theatre” tribunals, meaning that more often than not they are established within the walls of the country where the atrocities occurred so that the local population can be engaged and national ownership in the process can be established. Because both the ICTY and ICTR were located outside the countries in question, they were highly criticized for being disconnected from victims and for failing to build local capacity. When courts are located outside the country where atrocities took place, and when judges, lawyers and other personnel are not recruited from the local population, “there is little opportunity for domestic legal professionals to absorb, apply, interpret, critique and develop the international norms in question.”¹⁴⁴ The in-theatre feature contributes and is a complimentary feature to the ownership component.

The first four hybrid courts studied in this paper, including the Regulation 64 Panels, SPSC, SCSL, and ECCC, are all located in their respective countries

¹⁴³ See Nouwen, *supra* note 42, at 214.

¹⁴⁴ See Dickinson, *supra* note 2, at 305.

where the atrocities occurred, oftentimes at the request of the government. For instance when discussing what form of accountability mechanism would be implemented in Sierra Leone, the use of an ad-hoc international tribunal was dismissed by incoming Sierra Leonean President Ahmed Tejan Kabbah, because he deemed citizen participation in and ownership of the legal process as a critical element of the reconciliation process.¹⁴⁵ Similarly, the Cambodian government in establishing the ECCC insisted that the court be *locus delicti* for the benefit of the Cambodian people: “The trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel.”¹⁴⁶

In their study of the Special Court in Sierra Leone, Christopher Warburton and Richard Culp examine if domestically seated war crimes tribunals generate positive externalities.¹⁴⁷ They found that seating hybrid tribunals in countries where the crimes occurred not only acted as a deterrence mechanism by holding perpetrators accountable, but it contributed to post-conflict reconstruction “through the revitalization of physical and human capital.”¹⁴⁸ Positive externalities from domestically seated hybrid courts were found to have a direct effect on “education, economic recovery, and health ... [and] inure to the benefit of policing, legal infrastructure, the correctional system, and general welfare.”¹⁴⁹

¹⁴⁵ See Dickinson, *supra* note 2, 299.

¹⁴⁶ Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, *available at* <http://www.eccc.gov.kh/en/about-eccc/introduction> [hereinafter ECCC Introduction]

¹⁴⁷ Christopher E.S. Warburton and Richard F. Culp, Can Domestically Seated War Crimes Tribunals Generate Positive Externalities? A case study of the Special Court for Sierra Leone.

¹⁴⁸ See *id.* at 184.

¹⁴⁹ See *id.* at 184.

A notable success of prosecuting perpetrators in country is its contribution to public discourse of the affected societies.¹⁵⁰ Implementing strong outreach efforts should be an important element of the TJ strategy in any post conflict community. For instance, the strong outreach efforts at the ECCC helped to build perception of rule of law and trust in legal institutions.¹⁵¹ A study on the lessons learned from the Kosovo experience argues that not enough attention was given to outreach efforts, and recommends that, “greater attention needs to be given to working with the local media and informing the local population of the work of the court and its impact upon the community.”¹⁵² Locating courts in the country where crimes occurred fosters a more conducive environment to public engagement in the justice process as it allows the community that witnessed the crimes to experience justice firsthand.¹⁵³ Domestically seated hybrid courts encourage stronger domestic participation, and can help to build a lasting legacy.¹⁵⁴ This goal can be accomplished by leaving the physical structure of the court, so that local proceedings can be carried out, discrediting the “political ideology that led to genocide and crimes against humanity,” and by making “as complete a record as possible to minimize the rewriting of history.”¹⁵⁵

C) Cooperation from local governments

Cooperation from local governments or neighbouring governments involved in mass crimes is essential for the success of the hybrid justice process.

¹⁵⁰ See Cohen, *supra* note 1, at 644.

¹⁵¹ See Martin-Ortega & Herman (May 2010), *supra* note 89, at 21.

¹⁵² See Carolan, *supra* note 80, at 23 (para. 9).

¹⁵³ See Carolan, *supra* note 80, at 23 (para.11).

¹⁵⁴ See Stromseth (2007), *supra* note??, 267

¹⁵⁵ See Carolan, *supra* note 80, at 20.

The struggle against impunity and the use of amnesties has been one of the most important fights for international justice since the use of World War II tribunals to prosecute those accused of mass crimes and human right violations.¹⁵⁶ Proponents have argued that this notion of holding individuals responsible is not only a great moral and legal achievement, but it also acts to “pierce the veil of sovereignty.”¹⁵⁷ The recognition in human rights law that certain crimes are so egregious that no person, regardless if they are a government or military official, is above the law is a fundamental weapon in the fight against impunity and amnesties, it asserts that accountability is an important ingredient in ensuring international peace and security.

Cooperation from local governments is critical during the negotiation and operational stages of hybrid courts. In the case of Sierra Leone, the commitment of the government to ensure justice is pursued and seen by the local population was the primary factor for successful negotiations to establish the court.¹⁵⁸ However, this was not the case in establishing the ECCC. Initially in 1997, co-Prime Ministers Hun Sen and Prince Norodom Ranariddh approached the UN to request assistance in establishing a tribunal to prosecute those responsible for

¹⁵⁶ See INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE) CHARTER, art 5 (1946), available at <http://www.icwc.de/fileadmin/media/IMTFEC.pdf> (16 November 2010). Also, see CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG TRIAL PROCEEDINGS Vol. 1 art 6. *The Avalon Project: Documents in Law, History and Diplomacy* (1945. Yale Law School: Lillian Goldman Law Library)

<<http://avalon.law.yale.edu/imt/imtconst.asp#art7>> (9 November 2010). Article 7 of the Tokyo Charter and Articles 7 and 8 of the Nuremberg Charter, implicates “Heads of State or responsible officials in Government Departments” for crimes against peace, war crimes, and crimes against humanity, they also hold those individuals responsible who acted on orders from their superiors.

¹⁵⁷ See David Luban, *The Legacies of Nuremberg*, in LEGAL MODERNISM: LAW, MEANING, AND VIOLENCE 336, 337 (1997).

¹⁵⁸ Shraga, *supra* note 39, at 21.

mass crimes committee during the reign of the Khmer Rouge regime.¹⁵⁹

However, both the UNSC, because of threats of China using their veto against the establishment of a court, and the UNGA were unwilling to act leaving the UNSG to work with the Cambodian government. In addition to the international constraints, the Cambodian government was facing its own political instability, stalling negotiations between the UN and Cambodian officials for several years. Finally, in 2003, an agreement was reached, yet trials did not begin until 2009, with the long delay due in large part to the long-drawn-out negotiations between UN and Cambodian officials.¹⁶⁰ As previously discussed, throughout the four years of the courts operations, the court has been consistently plagued by reports of cronyism and political interference by Cambodian officials.

Similarly, there was also a lack of cooperation from the Indonesian government during the SPSC process, which was ultimately seen the most fundamental obstacle to the effective functioning” of the SPSC.¹⁶¹ This lack of support from the Indonesians effected the ability of the court to bring perpetrators to justice, although warrants were issued, the SPSC failed to secure the presence of the accused because the Indonesian government would not make arrests, shockingly, of the 392 persons indicted, 304 were reported to be Indonesian.¹⁶² This also meant that only “small fish” were prosecuted consisting of mostly low-level Timorese militants.¹⁶³ The cooperation of local or

¹⁵⁹ Raub, *supra* note 3, at 1031.

¹⁶⁰ Raub, *supra* note 3, 1032.

¹⁶¹ See Hirst and Varney, *supra* note 56, at 16.

¹⁶² *Id.*

¹⁶³ *Id.* at 16-17.

neighbouring governments is a necessary ingredient for the overall success of the hybrid court.

International Mechanisms

The experimentation with ad-hoc tribunals in the early 1990s called into question the effectiveness and efficiency of these mechanisms in bringing justice to victims of mass crimes and for aiding national reconciliation efforts. As previously discussed criticisms of the ICTY and ICTR have include both structural and operational challenges, including financial problems and communication failures making it unlikely that such a mechanism would be used again as an accountability mechanism in post-conflict states.¹⁶⁴ Resistance from governments to give up sovereignty over individuals to an international process, coupled with donor fatigue were primary contributors to a move towards the use of hybrid courts, by the mid 2000s the UN had spent \$4.5 billion through Chapter VII financing on these two tribunals, becoming a major source of conflict for member states.¹⁶⁵

Scholars have also argued that, “a purely international process that largely bypasses the local population does little to help build local capacity.”¹⁶⁶ However, international components still need to be incorporated into the court structure and into legal proceedings in order to ensure an international standard of justice, to provide legitimacy to the process through the presence of international actors, to provide financial and human capital, and to function as a deterrence mechanism. In his report on TJ, the UNSG notes that the presence of international personnel,

¹⁶⁴ See Higonnet, *supra* note 3, at 347.

¹⁶⁵ See Roper and Barria, *supra* note 25, at 29.

¹⁶⁶ See Dickinson, *supra* note 2, at 304

combined with local participation and effective strategies for capacity building, “can help ensure a lasting legacy in the countries concerned.”¹⁶⁷

D) Funding from international actors

Post-conflict societies transitioning to democracy that have been subject to mass crimes and human rights violations require funding from donor countries to assist in peacebuilding efforts. In studying the literature on international justice mechanisms, funding is the most often quoted source of contention between the international and national sides of the hybrid process, and the lack of financial resources has proven to have serious consequences on building local rule of law capacity.

Under funding causes donor countries to, “dilute their brand of international justice and work less effectively, slashing the outreach efforts so necessary to affect the local culture and justice.”¹⁶⁸ Adequate resources and sufficient funding are a critical element contributing to the proper functioning of hybrid courts and in ensuring that the court meets an international standard of justice.¹⁶⁹ Some have even suggested that the international community needs to find “creative, but ethical, methods of funding these judicial institutions,”¹⁷⁰ including private donations, as such was the case with Microsoft Singapore donating to the ECCC. Adequate funding facilitates capacity-building by contributing to the physical infrastructure of the court, aiding the recruitment of staff, and by supporting local outreach and legacy efforts.

¹⁶⁷ See Report of the Secretary General (2004), *supra* note 9, at ¶ 44.

¹⁶⁸ See Higonnet, *supra* note 3, at 410.

¹⁶⁹ See Raub, *supra* note 3, at 1045.

¹⁷⁰ *Id.* at 1046 footnote 197.

As discussed earlier, ad-hoc tribunals are a very expensive process that eventually resulted in ‘tribunal fatigue’ amongst donor countries.¹⁷¹ With the shift in 2000 to the use of hybrid tribunals, the international community saw this new mechanism as a low-cost alternative;¹⁷² however, each court has individual financial needs, and this false-belief amongst donor states contributed to some serious setbacks and failures of hybrid courts. In East Timor, the biggest challenge faced by the court was a severe lack of funding to carry out its mandate.¹⁷³ The Independent Commission of Experts that was mandated to review the prosecution of serious violations of human rights in Timor-Leste concluded that, “the Special Panels and DLU have not received sufficient resources to meet the minimum requirements of the respective mandates of these bodies.”¹⁷⁴ The courts in Kosovo were also underfunded, which contributed to the recruitment of unqualified international judges, and to a lack of security for staff and victims.¹⁷⁵ A study on the lessons learned from the hybrid process in Kosovo recommends that in order to improve the functioning of the court, ample resources and funding should be devoted to witness protection procedures and to the protection of both international and domestic personnel.¹⁷⁶ Likewise, in Sierra Leone, the 2003 audit of the Special Court concluded that, “the Special

¹⁷¹ See *supra* note 35, for a detailed explanation of ‘tribunal fatigue’

¹⁷² See Cockayne, *supra* note 31, at 617.

¹⁷³ Timor Leste and the Special Panel for Serious Crimes, AUSTRALIAN RED CROSS RESEARCH PAPER, 2007, available at http://www.redcross.org.au/files/2007_Timor_Leste_Research_Paper.pdf. See also Hirst and Varney, *supra* note 56, at 19.

¹⁷⁴ UN SCOR, *Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UN Doc 5/2005/458, 24 June 2005, 8 [hereinafter Commission of Experts Report]

¹⁷⁵ See Higonnet, *supra* note 3, at 382.

¹⁷⁶ See Carolan, *Supra* note 80, at 22 (¶ 3 and 4).

Court has not received sufficient contributions and pledges to cover its future operations.”¹⁷⁷ It is dangerous to attach a low cost sticker to these courts, as they differ significantly in their mandates and social, political and economic circumstances. Some have argued that these courts are in fact being asked to do more than their ad-hoc predecessors do, but with less funding and resources.¹⁷⁸

The UNSG in his report argues that in cases where funding is voluntary, such as with the hybrid courts in Sierra Leone, Cambodia and Lebanon, “financial mechanisms must provide the assured and continuous source of funding that is needed to appoint officials and staff, contract services, purchase equipment and support investigations, prosecutions and trials and do so expeditiously. The operation of judicial bodies cannot be left entirely to the vagaries of voluntary financing.”¹⁷⁹ In order to build national systems of accountability, consistent support is necessary to provide for political incentives, legal assistance, investigative and analytical support, security sector reform, training and education, and for outreach initiatives.¹⁸⁰

E) International rule of law

Since the Second World War tribunals, concerns over mass atrocities at the hands of the state and the need to establish principles of international humanitarian law are present in various international initiatives and addressed in various UN agreements and treaty monitoring mechanisms. Including in the 1945 Charter of the UN, and the Universal Declaration of Human rights, a monumental

¹⁷⁷ See Cockayne, *supra* note 31, footnote 24 (at 1).

¹⁷⁸ *Id.* at 618.

¹⁷⁹ See Report of the Secretary General, *supra* note 9, at ¶ 43.

¹⁸⁰ David Kaye, *Justice Beyond the Hague: Supporting the Prosecution of International Crimes*, COUNCIL SPECIAL REPORT No.61m 15-16 (June 2011).

international agreement that guarantees a wide range of human rights to all people. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, and the International Convention on the Rights of the Child, among others.¹⁸¹ Moreover, the Geneva Convention, including protocol II, and Common Article 3, a breakthrough agreement that includes provisions that regulate non-international conflicts,¹⁸² are laws of war that are established within International Humanitarian Law (IHL). The adoption of these international norms and standards builds consensus amongst the international community about a minimum standard of protection of individuals and their basic human rights, and aids in the adoption of these norms into national laws.

The use of international law fills gaps in the national legal process and helps to build and strengthen the rule of law domestically, helping to build legal standards for crimes in international law in emerging post-conflict or post-authoritarian societies.¹⁸³ International rule of law contributes to the individual

¹⁸¹ See Plano et.al, *supra* note 101, at 410-411. Also, see Paul G. Lauren. *From Impunity to accountability: Forces of transformation and the changing international human rights context*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 21 (2004).

¹⁸² International Committee Of The Red Cross , The Geneva Convention Of 1949, *available at* <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/genevaconventions>>

¹⁸³ See Stromseth (2003), *supra* note 29, at 11.

and societal levels of capacity building. On the individual level, it contributes by applying international legal standards to proceedings, where local lawyers and judges are then trained on standards of international law. On a societal level as norm penetration, the use of these standards legitimizes these crimes in local laws. For instance during the establishment of the court in Sierra Leone the UNSG emphasized that, “the hybrid court should be guided by the jurisprudence of the ICTY and ICTR ...[because then] the international humanitarian law norms are thus more likely to penetrate into Sierra Leonean legal culture than norms applied in a remote tribunal by foreigners.”¹⁸⁴ Purely international or purely national courts “may have little impact on the application and development of substantive norms criminalizing mass atrocities in transitional countries.”¹⁸⁵ Consequently, hybrid courts, in being located in the country where crimes were committed, along with the involvement of local personnel, outreach initiatives, and victim participation, are more likely to create an environment for national judges and lawyers to apply and interpret such laws and to “develop norms addressing these issues.”¹⁸⁶

A primary goal of tribunals is its ability to function as a deterrence mechanism, studies have shown that, “the introduction of legitimacy can shape incentives to end or prevent human rights abuses.”¹⁸⁷ Including international law in hybrid courts helps to establish norms criminalizing mass atrocities, build local

¹⁸⁴ See Dickinson, *supra* note 2, at 307.

¹⁸⁵ *Id.* at 304.

¹⁸⁶ *Id.* at 304.

¹⁸⁷ See Akhavan, *supra* note 11, at 652.

trust in legal institutions, and acts as a deterrence mechanism against future human rights violations.

F) Presence of international actors

The presence of international actors in the hybrid process is a necessary element to provide an air of impartiality and expertise to the judicial process. Oftentimes, post-conflict countries are plagued by corruption, and feelings of mistrust amongst the population of local authorities. For instance, in Cambodia, local authorities attempted on a number of occasions to bring to justice perpetrators involved in the Khmer rouge genocide,¹⁸⁸ ultimately the Cambodian government asked for assistance from the international community “due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice.”¹⁸⁹ Similarly, in Sierra Leone, when talks of what type of accountability mechanism would be implemented, the incoming President expressed reservations over the ability of the national legal system to independently prosecute Foday Sankoh, because of fears of retaliation against government officials and national judges.¹⁹⁰

Impartiality and independence of the judicial process is a critical element of providing legitimacy and authority to proceedings. In theory, the presence of international actors should foster an environment for fair and legitimate trials to take place. However, when international actors become entangled in the internal

¹⁸⁸ See Extraordinary Chambers of the Courts of Cambodia, An Introduction to the Khmer Rouge Trials. In 1979, the People’s Revolutionary Tribunal was held to try crimes of genocide. Ieng Sary and Pol Pot were both found guilty of the crime of genocide but neither of them served any sentence.

¹⁸⁹ See ECCC Introduction, *supra* note 146.

¹⁹⁰ See Dickinson, *supra* note 2, 299

political turmoil of the state, this can severely hamper the administration of justice; when international staff is accused of negligence and/or violating judicial independence, this destroys the independence and legitimacy of the court. In the case of Kosovo, issues with the international personnel, including inadequate skill levels and language barriers, led some observers to argue that, “these judges failed to increase the capacity of the domestic court system and were unable to achieve sufficient independence from the UNMIK executive.”¹⁹¹ Most recently, widespread reports of political interference at the ECCC resulted in two judges resigning.¹⁹²

Besides providing impartiality, the presence of international actors is also necessary to build professional expertise in the country. The intention of the hybrid process is to marry the expertise of the international community with the authority of local actors.¹⁹³ The purpose is to build human capacity to have a lasting positive effect on society.

For these reasons, the recruitment of competent and experienced international personnel is critical to the success of the hybrid court. Leadership and effective management are required to ensure that the court functions effectively and efficiently and that the benefits of having an international presence are fully realized.¹⁹⁴ For instance, the administrative expertise made the judicial process in Sierra Leone more successful than in East Timor. At the SPSC a Registrar was not established, resulting in decisions about resources being made

¹⁹¹ See Raub, *supra* note 3, at 1028.

¹⁹² Guy De Launey, *Cambodia's Khmer Rouge Tribunal in Disarray*, BBC NEWS, available at <http://www.bbc.co.uk/news/world-asia-pacific-13905436>

¹⁹³ See Cockayne, *supra* note 31, at 619.

¹⁹⁴ See Cohen, *supra* note 1, at 23.

“by bureaucrats who lacked the necessary knowledge and commitment to the institution.”¹⁹⁵ Robin Vincent, former Registrar, brought his thirty years of experience in British court administration to the SCSL; he was fully committed to the court, from selecting the very location of the court to ensuring that the court met international standards of justice.¹⁹⁶ A centralized court administrative structure never existed in East Timor, meaning that from the very start it lacked “effective leadership and oversight.”¹⁹⁷

The experience in Kosovo and East Timor shows that the quality of international personnel is a critical component to the success of the court. The recruitment and training of international staff is vital to making the process more effective. The OSCE study on the lessons-learned from the Kosovo experience targets the staffing of international personnel as one of its main policy recommendations, it urges for greater effort “to train international jurists to serve on short notice in peacekeeping operations.”¹⁹⁸ As well as, it recommends increased training and screening of candidates, including greater focus on the candidates mentoring and training skills, and greater training of judges and prosecutors on international conventions and international human rights conventions, on the history, cultures, customs, and court systems of the country in question.¹⁹⁹ The presence of international staff in hybrid courts is crucial to provide impartiality and expertise to trials. However, efforts must be made to

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Carolan, *supra* note 80, at 22 (para. 7).

¹⁹⁹ *Id.*

recruit experienced personnel that are committed and engaged in the process, in order to make the court as effective and efficient as possible.

III) Key Challenges and Conclusion: International Criminal Justice Policy

Societies that have experience mass atrocities and human rights violations face a number of challenges during the peacebuilding process. Studies have shown that bringing justice to affected communities aids with national reconciliation efforts and with the peace process in societies ravaged by war and massive human rights abuses. However, as examined in this paper, post-conflict societies face a number of serious challenges in implementing accountability mechanisms that will bring perpetrators to justice, respect victim's rights, and build local rule of law capacity. These societies often lack a functioning legal system, have few, if any, skilled professionals, have limited financial resources, and there is a general mistrust amongst the population of local authorities and institutions.

TJ is a relatively young and under-analyzed scholarly field, but an important one in studying post-conflict justice and development. The potential of hybrid courts to contribute to capacity building efforts is academically underdeveloped and rarely addressed by policy makers.²⁰⁰

The capacity-building potential of hybrid courts occurs at the intersection of the fields of rule of law reform and transitional justice [...] To date, the two fields have been treated mostly as two separate areas of interest in both academic coverage and under UN transitional administration. As a result, the full potential of accountability proceedings to ground rule of law and institutional reform has not been met.²⁰¹

²⁰⁰ See McAuliffe, *supra* note 28, at 3.

²⁰¹ *Id.*

The use of accountability mechanisms to end impunity and bring accountability to victims has been proven to be a necessary process for transitioning societies. The Report of the Secretary-General outlines the objectives for establishing such tribunals, these include:

Bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.²⁰²

Similar tribunals have been proposed in Kenya, to prosecute crimes committed following the December 2007 elections,²⁰³ and in Burundi,²⁰⁴ amongst others. The appeal of hybrid courts lies in their flexibility to adapt to the individual history, culture, language, customs and laws of the affected communities, while maintaining standards of international law and allowing for impartiality in proceedings.²⁰⁵ However, finding the right mix of elements to create a hybrid courts remains one of the greatest challenges. Greater analysis of the elements of international and national justice systems that will make positive contributions to rebuilding affected communities may mitigate the potential of incorporating the worst elements of both the international and national sides.²⁰⁶

In examining the hybrid courts in East Timor, Kosovo, Sierra Leone, Cambodia and Lebanon, it is clear that each tribunal presents its own complexities, challenges, and successes. The experience in East Timor was

²⁰² See Report of the Secretary General, *supra* note 9, ¶ 38.

²⁰³ See Raub, *supra* note 3, at 1051.

²⁰⁴ See Cohen, *supra* note 1, at 2.

²⁰⁵ See Higonnet, *supra* note 2, at 411.

²⁰⁶ *Id.*

severely restricted by three culprits, a lack of funds, a lack of support from the Indonesian government,²⁰⁷ and the dual-ownership problem,²⁰⁸ resulting in severe shortcomings that affected the perceived legitimacy of the court, reconciliation efforts in East Timor, and institutional and societal capacity-building. The hybrid experience in Kosovo experienced many problems, but the two main weaknesses included severe lack of funding and problems with recruiting qualified international personnel.²⁰⁹ In Cambodia, political interference and a lack of judicial independence have caused disarray in the court and have received unfavourable media attention.

However, the policy lessons from each tribunal can be applied to the next. For instance, some TJ scholars argue that the hybrid model implemented in Kosovo represents an improvement on the model used in East Timor.²¹⁰ Then the model used in Sierra Leone was an improvement on the one used in Kosovo, as the STL proved to be “more efficient, less costly, more accessible to local populations, and less politically inflammatory with groups of former low-level perpetrators than either ad hoc tribunal or the other two hybrids.”²¹¹

To be fully effective as a reconciliation mechanism more attention and commitment is necessary to exploring the connection between transitional justice, rule of law reform, and capacity building. Although hybrid courts are unique in that they can be built to fit each individual case, adapting to the culture and history of the affected communities, their composition and general principles

²⁰⁷ See *Timor-Leste Research Paper*, *supra* note 173.

²⁰⁸ See Cohen, *supra* note 1, at 9.

²⁰⁹ See Higonet, *supra* note 3, at 382.

²¹⁰ *Id.* at 384.

²¹¹ *Id.* at 386.

of reconciliation, respect for victim's rights, and fair and expeditious trials are the same. The six principles discussed are meant to ensure greater success of hybrid court in achieving these goals. Ideally, the use of the three national techniques – local ownership, in-theatre proceedings, and local laws – alongside the international ones— international criminal law, the presence of international actors, and funding from donor countries – would ensure a greater link between transitional justice, rule of law reform and capacity building, ensuring a more efficient and effective justice process. However, as with any measures implemented by the international community, these processes require political will and commitment from both international and domestic actors. For instance, as discussed earlier, hybrid courts need to be more than just a low-cost alternative to ad-hoc courts, adequate resources and funding are necessary to properly staff and administer justice. Another example is the presence of international staff, for hybrid tribunals to be more successful it is not enough to have the presence of international personnel, but these individuals need to be properly trained and committed to the process. The six capacity-building elements when implemented accordingly, with an eye on past performances by hybrid courts and with full political commitment from both the international and national sides of the process, have the ability to contribute to human and institutional judicial capacity building. What is more, it can also contribute to building a positive legacy in affected communities, making it a potential model for international criminal justice in post-conflict societies.

Bibliography

- Abrams, Jason, and Steven Ratner. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 1997).
- Akhavan, Payam, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political realism," *Human Rights Quarterly* HUM. RTS. Q, vol. 31, 2009.
- Alvarez, Jose E., "Crimes of States/Crimes of Hate: Lessons from Rwanda", *Yale Journal of International Law*, vol. 24 (2), 1999, 365-483.
- Ashdown, Paddy, *What I learned in Bosnia*, N.Y. Times, 28 Oct. 28, 2002, <http://www.nytimes.com/2002/10/28/opinion/what-i-learned-in-bosnia.html>
- BBC News, Q&A: *Hariri Tribunal*, 30 June 2011, <http://www.bbc.co.uk/news/world-middle-east-12182326>.
- BBC News, *Judge quits Cambodian UN-backed Khmer Rouge Trial*, 19 March 2012, <http://www.bbc.co.uk/news/world-asia-17432484>
- Beigbeder, Yves. *Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940-2005)* (Leiden: Martinus Nijhoff Publishers and VSP, 2006).
- Blanchi, Gilles, "Some Methodological Issues with Reconstructing Justice in Post-Conflict Situations: Training Judges in Afghanistan, Congo and Timor-Leste, in D. Dolgopoul and J. Gardam, *The Challenges of Conflict: International Law Responds* (Leiden: Martinus Nijhoff Publishers, 2006).
- Carolan, Robert F., "An Examination of the role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment," *Transnational Law & Contemporary Problems*, vol. 17, 2008.
- Chaeng Sopheng, *German judge resigns from Cambodia Trial*, Boston Globe, 10 October 2011, http://www.boston.com/news/world/asia/articles/2011/10/10/german_judge_resigns_from_cambodia_tribunal/
- "Charter of the international military tribunal: Nuremberg trial proceedings," *The Avalon Project: Documents in Law, History and Diplomacy*, vol.1, 1945 (Yale Law School: Lillian Goldman Law Library), <http://avalon.law.yale.edu/imt/imtconst.asp#art7>.
- Cockayne, James, "The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals," *Fordham International Law Journal*, vol.28, 2004-2005, pp.616-680.
- Cohen, David, "'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future," *Stanford Journal of International Law*, vol. 43, 2007, pp. 1-38.
- Dickinson, Laura A., "The Promise of Hybrid Courts," *American Journal of International Law*, vol. 97, 2003, pp. 295-309.
- ECCC, *Introduction to the ECCC*, <http://www.eccc.gov.kh/en/about-eccc/introduction>.
- ECCC, *Legacy*, <http://www.eccc.gov.kh/en/dss/legacy>.

- ECCC, *Case 001*, <http://www.eccc.gov.kh/en/case/topic/1>.
- Heder, Stephan and Brian Tittmore, "Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge," *War Crimes Research Office*, 2001, <http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1>
- Higonnet, Etelle R., "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice," *Arizona Journal of International Contemporary Law*, vol. 23, 2005-2006, pp.347-435.
- Hirst, Megan and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (New York: ICTJ, 2005)
<http://ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf>
- Human Rights Watch, *West Africa: Taylor Indictment Advances Justice – Liberian President must be Arrested*, 4 June 2003,
<http://www.hrw.org/node/67932>.
- International Committee Of The Red Cross (ICRC), *The Geneva Convention Of 1949*, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/genevaconventions>>
- ICTJ, *Lebanon*, <http://ictj.org/our-work/regions-and-countries/lebanon>.
- ICTJ, *Peace versus Justice: A False Dilemma*, <http://ictj.org/news/peace-versus-justice-false-dilemma>.
- ICTJ, *Sierra Leone: Submission to the Universal Periodic Review of the UN Human Rights Council*, 11th Session (1 May 2011), 1 November 2010.
- ICTY, Press Release, PR/P.I.S/437-E, 29 September 1999,
<http://www.icty.org/sid/7733>.
- ICTY, Updated Statute Of The International Criminal Tribunal For The Former Yugoslavia, September 2009,
http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
- "International Military Tribunal for the Far East (IMTFE) Charter," 1946,
<http://www.icwc.de/fileadmin/media/IMTFEC.pdf>
- Kaye, David, "Justice Beyond the Hague: Supporting the Prosecution of International Crimes," *Council Special Report*, No.61 (New York: Council on Foreign Relations, June 2011).
- Kelsall, Tim, *Culture under cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press: Cambridge, 2009)
- Kerr, Rachel & Eirin Mobekk, *Peace & Justice: Seeking Accountability After War* (Polity Press, 2007).
- Lambourne, Wendy, "Justice in the Aftermath of Mass Crimes: International Law and Peacebuilding," in U. Dolgopol and J. Gardam, *The Challenges of Conflict: International Law Responds* (Leiden: Martinus Nijhoff Publishers, 2006).
- Launey, Guy De, *Cambodia's Khmer Rouge Tribunal in Dissary*, BBC News, 27 June 2011, <http://www.bbc.co.uk/news/world-asia-pacific-13905436>
- Lauren Paul, "From Impunity to accountability: Forces of transformation and the changing international human rights context," in *From Sovereign Impunity To International Accountability: The Search For Justice In A World Of States* (2004).

- Luban, David, "The Legacies of Nuremberg," in *Legal Modernism* (Michigan: The University of Michigan Press, 1997), pp.335-378
- McAuliffe, Padraig, "Rebuilding Judicial Capacity with Enchanted Tools." 15 *Legal Electronic Journal*, vol.15, 2009.
- Mohr, Daisy, "Hezbollah and the Lebanon Tribunal – paying for your pariah," *International Justice Desk*, 8 Nov. 8, 2011, <http://www.rnw.nl/international-justice/article/hezbollah-and-lebanon-tribunal---paying-your-pariah>.
- Nouwen, Sarah M.H., "Hybrid Courts: The hybrid category of a new type of international crimes courts," *Utrecht Law Review*, vol. 2, 2006.
- Office of the U.N. High Commissioner for Human Rights (OHCHR), *Rule-Of-Law Tools For Post-Conflict States* U.N. Doc. HR/Pub/08/2, U.N. Sales No. E.08.XIV.2 (2008).
- Organization for Security and Co-operation in Europe (OSCE), *Kosovo's War Crimes Trials: An assessment ten years on 1999-2009*, <http://www.osce.org/kosovo/68569>
- Pham, Phuoung N., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (University of California, Berkeley Publication Date, 2011).
- Plano, Jack C., Robert E. Riggs, and Lawrence Ziring. *The United Nations: International Organization and World Politics* (Belmont: Thomas Wadsworth, 2005).
- Rae D., James. "Promoting Human Rights through Hybrid Courts: The Serious Crimes Process in East Timor," in L. A. Barria and S. D. Roper, *The Development of Institutions of Human Rights: A Comparative Study* (New York: Palgrave Macmillan, 2010).
- Rapoza, Phillip, "Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?," *American University International Law Review*, vol. 21, 2006-2006.
- Raub, Lindsey, "Positioning Hybrid Tribunals in International Criminal Justice," *N.Y.U Journal of International Law and Politics*, 2008-2009, pp.1013-1053.
- Reigner, Caitlin, "Hybrid Attempts at accountability for serious crimes in East Timor," in N. Roht-Arriaza and J. Mariezcurrena, *Transitional justice in the twenty-first century: beyond truth versus justice*, (Cambridge, UK: Cambridge University Press, 2006).
- Robertson, Geoffrey. *Crimes against Humanity: The Struggle for Global Justice*, 3rd Edition (London: Penguin Book, 2006).
- Roper, Steven D., and Lilian A. Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Hampshire, England: Ashgate Publishing Company, 2006).
- Roper, Steven D. and Lilian A. Barria, "Mechanisms of Transitional Justice," in L. A. Barria and S. D. Roper, *The Development of Institutions of Human Rights: A Comparative Study*, (New York: Palgrave Macmillan, 2010).
- Scheffer, David J., "International Judicial Intervention," *Foreign Policy*, Spring 1996.

- Shraga, Daphna, "The Second Generation UN-Based Tribunals: A Diversity of mixed Jurisdiction," in Cesare P.R. Romano, *Internationalized Criminal Courts, Sierra Leone, Esat Timor, Kosovo, And Cambodia* (2004).
- Skinnider, Eileen. "Experiences and Lessons from "Hybrid" Tribunals: Sierra Leonee, East Timor and Cambodia," 6 (2007). Symposium, *The International Criminal Court* (International Centre For Criminal Law Reform & Criminal Justice Policy, 2007).
- Special Court for Sierra Leone, *Statute*, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3d&tabid=70>
- Special Tribunal for Lebanon, *Factsheet: About the tribunal*, <http://www.scribd.com/doc/55621646/Factsheet-About-the-Tribunal>
- Special Tribunal for Lebanon, *Unique Features*, <http://www.stl-tsl.org/en/about-the-stl/unique-features>.
- Sriram, Chandra Lekha, and Johanna Herman, *Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia*, JAD-PbP Working Paper, No.7, 2010.
- Sriram, Chandra Lekha, Olga Martin-Ortega, and Johanna Herman, *Transitional Justice and Peacebuilding Strategies: Considerations for Policymakers*, Policy Brief, Just And Durable Peace, No.2, July 2009.
- Sriram, Chandra Lekha, Olga Martin-Ortega, and Johanna Herman, *War, Conflict and Human Rights* (Abingdon, Oxon: Routledge, 2010).
- Sriram, Chandra Lekha, Olga Martin-Ortega, and Johanna Herman, "Justice delayed? Internationalised criminal tribunals and peace-building in Lebanon, Bosnia and Cambodia," *Conflict, Security & Development*, vol.11 (3), 2011, pp. 335-356.
- Stensrud, Ellen, "Mixed Justice, Mixed Legacy: The Special Court for Sierra Leonee," in L. A. Barria and S. D. Roper, *The Development of Institutions of Human Rights: A Comparative Study* (New York: Palgrave Macmillan, 2010).
- Stromseth, Jane, "Introduction: Goals and Challenges in the Pursuit of Accountability," in J.E. Stromseth, *Accountability for Atrocities: National and International Responses* (Ardsley, NY: Transnational Publishers, Inc., 2003).
- Stromseth, Jane, "Post-conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach," *William and Mary Law Review*, vol. 49, issue 4, 2008.
- Stromseth, Jane, "Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law," *Georgetown Journal of International Law*, vol. 38, issue 2, 2007, pp. 251-322.
- "Timor Leste and the Special Panel for Serious Crimes," *Australian Red Cross Research Paper*, 2007, http://www.redcross.org.au/files/2007_Timor_Leste_Research_Paper.pdf.
- U.N. ECOSOC, *Definition of basic concepts and terminologies in governance and public administration* U.N. Doc. E/C.16/2006/14 (5 January 2006).
- UNKART, *Kaing Guek Eav alias Dutch Sentenced to Life Imprisonment by the Supreme Court Chamber*, UNKART NEWS, 2012, <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-alias-duch-sentenced-life-imprisonment-supreme-court-chamber-0>

- UNKART *Opening Statements in Case 002 on 21 November 2011*, UNKART NEWS, November 2011, *available at* <http://www.eccc.gov.kh/en/articles/opening-statements-case-002-21-november-2011>
- UNMIK, *On The Appointment And Removal From Office Of International Judges And International Prosecutors*, UNMIK/REG/2000/6 (15 February 2000).
- UNMIK, *Amending Unmik Regulation No. 2000/6 On The Appointment And Removal From Office Of International Judges And International Prosecutors*, UNMIK/REG/2000/34 (27 May 2000).
- UNMIK, *On Assignment Of International Judges/Prosecutors And/Or Change Of Venue*, UNMIK/REG/2000/64 (15 December 2000).
- U.N. SCOR, *Report Of The Secretary-General On The United Nations Interim Administration Mission In Kosovo article*, U.N. Doc S/1999/779 (12 July 1999) *available at* <http://www.unmikonline.org/SGReports/S-1999-779.pdf>.
- U.N. SCOR, *Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict states* U.N. Doc S/2004/616*0439529 (Aug. 23, 2004).
- UN SCOR, *Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UN Doc 5/2005/458 (24 June 2005).
- U.N. SCOR, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2008/354 (12 June 2008).
- U.N. SCOR, *Report of the Secretary-General on the UNMIK*, S/2008/692 (24 November 2008).
- U.N. SCOR. Res. 827, 3217th mtg, U.N. Doc. S/RES/827 (May 25, 1993).
- U.N. SCOR. Res. 955, 3453rd mtg., U.N. Doc S/RES/955 (Nov. 8, 1994).
- U.N. SCOR Res. 1244, 4011th mtg, U.N. Doc. S/RES/1244 (10 June 1999),
- U.N. SCOR, Res. 1264, 4045th mtg, U.N. Doc. S/RES/1264 (15 September 1999).
- U.N. SCOR, *Statute of the Special Tribunal for Lebanon*, Res, 1757 mtg, U.N. Doc. S/RES/1757 (30 May 2007).
- UNTAET, *On the Organization of Courts in East Timor*, UNTAET/REG/2000/11 (6 March 2000)
- UNTAET, *On The Establishment Of Panels With Exclusive Jurisdiction Over Serious Criminal Offences*, UNTAET/REG/2000/15 (6 June 2000).
- U.S. Department of State, *Sierra Leone: 2001 Country Reports on Human Rights Practices* (March 4, 2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8402.htm>
- World Bank, "World Development Report 2011: Conflict, Security and Development," *A Report of the World Bank*, April 2011, pp. 125-126.