Hybrid Tribunals at Ten
How International Criminal Justice's Golden Child became an Orphan

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I. Introduction

In the decade that has passed since their foundation in 2000, the popularity of hybrid criminal tribunals as an avenue for transitional criminal justice has declined dramatically. While six such tribunals were created in the first half of the decade, none were created subsequently. Those that are completed or ongoing have generally been subject to strident criticism by scholars who initially hoped, or expected, that the combination of international and domestic law and expertise would cause the tribunals to

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appear more legitimate to the survivor populations concerned, and to leave a lasting legacy by strengthening national domestic justice systems. This article examines the nature of these claims by revisiting the circumstances and drafting history that gave rise to each tribunal. It identifies a divergence of expectations between those who assumed an inherent 'promise' in this novel structure to leave a legacy in the long-term, and those who actually negotiated the founding agreements for such tribunals with more short-term, security-driven concerns. It then goes on to contrast the optimistic and holistic assessment of their inherent potential with the dominant impetuses in international criminal justice policy of retributivism and non-impunity, which have marginalized the longer-term concerns supported by the hybrid model's initial advocates.

Employing a comparative perspective to examine how and why the six hybrid tribunals established to date in East Timor, Kosovo, Sierra Leone, Cambodia, Bosnia and Lebanon fell so far short of initial hopes, this article reviews the performance of hybrid courts in the past decade to urge a re-evaluation of their potential. After briefly contextualizing the present day position of hybrid courts in Part I, Part II summarizes the claims initially posited about the potential of hybrid tribunals to improve on the national/international dichotomy. Part III goes on to argue that the tribunals have not developed from reasoned application of such theories or a conscious process of experimentation to these ends; rather, they have been implemented as the result of forced compromises and haphazard bargains to fill pressing impunity gaps in emergency situations. It argues that wider, more holistic, rule of law development has been an afterthought at best. In effect, the cart was put before the horse. Arguments based on the potency of hybrid tribunals to have greater legitimacy before the affected public or to develop judicial capacity were idealized post-hoc rationalizations of what, in truth, were politically contingent compromises concerned more with expedient punishment than the reconstruction of justice systems. Part IV examines the experience of the tribunals in the intervening years. Particularly, it observes how these hopes of a publicly legitimate, capacity-building, and norm-promoting institution went unrealized in courts whose paramount concern was the fight against impunity. Part V, by contrast, re-evaluates the underestimated success of the tribunals in providing accountability as a core rule of law value and a necessary precursor to stability in the post-conflict period. The article concludes that the hybrid tribunal remains worthy of the enthusiasm it once attracted, but not in idealized terms under which it can only disappoint. Instead, such tribunals should be re-evaluated in light of their role as versatile and complementary stopgap measures to fill impunity gaps occasioned by the politics of international tribunals and the inevitable weaknesses of the justice systems in post-conflict States, where they have hitherto found their greatest success.

II. Background

The advent of the complementarity regime outlined in Article 17 of the 1998 Rome Statute appears to have cemented the choice of either the

International Criminal Court or purely domestic trials as the primary avenues for criminal accountability in the wake of war or gross human rights violations.[1] The effect of the Statute's complementarity regime is that responsibility for investigation and prosecution of human rights abuses and breaches of international humanitarian law is delegated to ostensibly willing and able States on the rebuttable presumption that such efforts will be genuine. The ICC only steps in as a last resort when national justice mechanisms fail. International criminal justice policy is now dominated by a binary (some would argue antagonistic) choice between domestic and international prosecution. Where domestic prosecutions are impossible, the ICC has become the "definitive model" for the implementation of international criminal justice.[2] The Court does not so much "add another layer to the geometry of transitional justice"[3] as smother other institutional alternatives. While the Court has begun to develop a varied praxis and jurisprudence on issues of complementarity, animated by an ICC Prosecutor jealous of his jurisdiction, States like Sudan have made forceful assertions of the sovereign right to punish. The binary distribution of responsibility for punishing war crimes and gross breaches of human rights between national courts and The Hague is becoming ever more entrenched.

This re-enforcement of the national/international dichotomy—a dichotomy that has animated debates on international criminal justice since Nuremberg—is the predictable consequence of extensive efforts by sovereignty-anxious States to limit the intrusive powers of the ICC. It may nonetheless have surprised many commentators, who saw the innovation of the hybrid tribunal model as a preferable option to purely domestic or purely international jurisdiction when it emerged in the interregnum between the adoption of the Rome Statute in 1998 and its entry into force in 2002. As recently as 2005, former ICTY judge Patricia Wald could extol the virtues of hybrid tribunals as "a phenomenal development" towards which international tribunals for trying war crimes and crimes against humanity were likely to evolve.[4] The hybrid character of the tribunals Wald so admired

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[1] Subsection 1 provides:
"Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(*a*) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(*b*) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(*c*) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(*d*) The case is not of sufficient gravity to justify further action by the Court."
Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

[2] Lindsey Raub, "Positioning Hybrid Tribunals in International Criminal Justice" (2009) 41 NYU J Int'l L & Pol 1013 at 1015.

[3] Carsten Stahn, "The Geometry of Transitional Justice: Choices of Institutional Design" (2005) 18 Leiden J Int'l L 425 at 459.

[4] "Wald Sees International Tribunals Evolving Toward 'Hybrid' Courts", Remarks made at the award of Thomas Jefferson Foundation Medal in Law from University of Virginia (15 April

stemmed from the features they all share, in contradistinction to the Rome Statute's apparent binary choice. Both the institutional mechanism and the applicable law consist of a combination of international and domestic components. There is no single or monolithic model of hybrid tribunals, and all manifestations enjoy a diverse nomenclature.[5] All hybrid tribunals are to a greater or lesser extent grafted onto the national legal order, though the degree to which they are primarily national or international has generated interesting case law on questions of amnesty and jurisdiction.[6] Foreign prosecutors, judges and sometimes defence counsel work side-by-side with domestic equivalents, with the composition of the blend dependent on the political and legal exigencies of the State in question.[7] The law applied is usually a mix of international criminal law modelled on definitions contained in the Rome Statute and domestic law reformed to include international standards. The domestic crimes are usually those not included or covered differently in the Rome Statute on account of qualitative differences (such as murder or rape), plus crimes with additional resonance in the aftermath of repressive rule, such as kidnapping minors in Sierra Leone, or cultural crimes in Cambodia. The seat of the tribunal can alternate between the *locus delicti* State and a neutral location, but is usually located in the former.

At the time of Wald's comments in 2005, the ICC Prosecutor was still casting his net forlornly for suitable initial cases to fight an incipient crisis of relevance.[8] On the other hand, the novel hybrid structure was on the ascent: the East Timor Special Panels, the Special Court for Sierra Leone (SCSL), Kosovo's Regulation 64 Panels, Bosnia's War Crimes Chamber (BWCC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were

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2005), online: University of Virginia School of Law <http://www.law.virginia.edu/html/news/2005_spr/wald.htm>.

[5] Internationalized courts/tribunals and mixed courts/ tribunals have proven the most popular labels. Indeed, Stahn differentiates between hybrid tribunals, internationalized domestic courts and internationally-assisted courts (Stahn, *supra* note 3 at 436).

[6] *Prosecutor v Morris Kallon and Brima Bazzy Kamara*, SCSL-2004-15&16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber); *Prosecutor v Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara*, SCSL-04-15, 14 & 16-PT-032, Decision on Constitutionality and Lack of Jurisdiction (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber)*Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004) (Special Court, Appeals Chamber); E216, *Prosecutor v Kang Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTCO1), Decision on Appeal Against Provisional Detention Order of Kang Guek Eav, alias Duch (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, 3 December 2007).

[7] The East Timorese, Lebanese, and Sierra Leonean hybrid tribunals provided for international majorities. The Kosovo hybrid allowed for both domestic and international majorities. The Cambodian Extraordinary Chambers have a domestic majority, while the BWCC began with a 2:1 international-domestic ratio before switching to a domestic majority in its third year.

[8] Schabas convincingly argues that the ICC's first proceedings against the conveniently-captured Thomas Lubanga on lesser charges than those for which he was to be tried in the DR Congo's own courts may be seen as mirroring the ICTY's self-justifying initial prosecutions of the low-level Nikolic and Tadic. He argues the indictment was the product of impatience where "we had to get an indictment quickly." William A Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts" (2008) 19 Crim L F 5 at 32-33.

underway. A Special Tribunal for Lebanon (STL) was soon to be created. For a brief period between 2002 and 2006 before the ICC became truly effective, it was widely believed that the hybrid tribunals could leave a legacy of holistic rule of law reform in the subject State above and beyond the broad sociological impact of trials. This legacy would be one of development of the judicial capacity of national judges and lawyers involved in the process, the incorporation of fair trial norms, and fostering cultural commitment to the courts in the reconstruction of the national judicial system. These gains would be made feasible by their more legitimate appearance in the eyes of the affected population. This 'promise' of the hybridized model made them, for some, a superior option for the trial of serious crimes than distant international tribunals like the ICTY or ICC.[9] At the time it was no by means unusual to view the hybrid tribunal as superior to purely international criminals courts on the basis of how their structure "collapsed" the "artificial distinction between the international and domestic."[10] Though many argued that hybridized tribunals and the ICC should operate in a complementary fashion, in this period it even appeared reasonable to posit that a future proliferation of the model could create damaging overlaps of jurisdiction and duplication of work to the detriment of the ICC.[11] The future of hybrid tribunals as a primary institution in international criminal justice seemed secure.

In the five years since, hybrid tribunals appear to have fallen into both practical obsolescence and theoretical disfavour. The apparent obsolescence may be explained by the relative lack of post-conflict situations occasioning intrusive UN involvement in the likes of East Timor, Sierra Leone and Kosovo at the turn of the century that acted as a prelude to the hybrid tribunals. Additionally, the effective functioning of the ICC has presented an alternative means of international criminal accountability that did not exist when they were being formed. The Lebanese hybrid tribunal is the only new one to have been established in the last six years, while proposed or potential hybrid tribunals in Burundi and Iraq have fallen by the wayside.[12] An academic community once voluble in its support for new hybrid structures in Afghanistan,[13] Colombia,[14] Liberia,[15] Iraq,[16] and Palestine[17] now

[9] See for example Estelle R Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform" (2006) 23 Ariz J Int'l & Comp L 347 at 417; Brady Hall, "Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal" (2005) 13 Mich St J Int'l L 39.
[10] Frédéric Mégret, "In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice" (2005) 38 Cornell Int'l LJ 725 at 747.
[11] Stahn, *supra* note 3 at 465.
[12] A hybrid court was mooted by the UN Secretary-General in *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, UNSCOR, 2005, UN Doc S/2005/158, at para 60.
[13] Laura Dickinson, "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals" (2002) 31 Denv J Int'l L & Pol'y 23 [Dickinson, "Transitional Justice"].
[14] Antonio Cassese, "The Role of Internationalized Courts in the Fight Against Criminality" in Cesare P R Romano, Andre Nollkaemper & Jann K Kleffner, eds, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004) 3 at 10 [Cassese, "Fight Against Criminality"].

concentrates on the merits of ICC prosecutions and national initiatives. The once-forceful or even "quasi-euphoric"[18] advocacy for this model of international criminal justice as a first port of call for international criminal justice on a par with, or superior to, purely international or domestic trials, is nowadays largely muted.

This marginalization is perhaps best explained by the perceived betrayal of earlier hopes by the failure of the existing tribunals. The hybrid Special Panel process in East Timor has been completed with widespread condemnation.[19] The Khmer Rouge Trials before Cambodia's Extraordinary Chambers have been dogged by corrosive and credible accusations of corruption and bias.[20] Though "significant progress" had been made in putting together a case against Rafik Hariri's assassins since its foundation in March 2006, the Special Tribunal for the Lebanon has (at the time of writing) yet to hold a hearing of a suspect despite costing over US$50 million per year.[21] The Special Court for Sierra Leone is correctly deemed to be the most successful of the hybrid tribunals but, in trying its most important suspect Charles Taylor in the Netherlands, has shed critical elements of its hybrid form and moved further towards the international ad hoc court paradigm.[22] The last of Kosovo's Regulation 64 Panels' twenty-three prosecutions for war crimes occurred in 2006. The performance of the Panels was deemed to have been "so flawed that the example in Kosovo cannot serve as a model for internationalizing national judicial systems."[23] The Bosnian War Crimes

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[15]Chernor Jalloh & Alhaji Marong, "Ending Impunity: The Case for War Crimes Trials in Liberia" (2005) 1 African J Leg Stud 53.

[16] David M Gersh, "Poor Judgment: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law" (2004) 33 Ga J Int'l & Comp L 273; Sylvia de Bertodano, "Were There More Acceptable Alternatives to the Iraqi High Tribunal?" (2007) 5 J Int'l Crim Justice 294.

[17] Cassese, "Fight Against Criminality", *supra* note 14 at 11.

[18] Mégret, *supra* note 10 at 746.

[19] Megan Hirst & Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (2005), online: International Center for Transitional Justice <http://www.ictj.org/images/content/1/2/121.pdf>; Kelly Askin, Sonja Starr & Stefanie Frease, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor* (2004), online: Open Society Justice Initiative and Coalition for International Justice, <http://www.globalpolicy.org/intljustice/tribunals/timor/2004/1104unfulfilled.pdf>.

[20] Anne Barrowclough, "Corruption Fears Cast Shadow Over Khmer Rouge Trial" *The Times* (16 February 2009), online: The Times <http://www.timesonline.co.uk>.

[21] For the first year of operations, the 2009 approved budget was USD 51.4 million. *Special Tribunal for the Lebanon Annual Report 2009/2010*, at 42, online: Special Tribunal for Lebanon <http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf>.

[22] Pádraig McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to the Netherlands to The Hague Defeats the Purpose of Hybrid Tribunals" (2008) 55 Neth Int'l L Rev 365.

[23] Amnesty International, "Serbia – Kosovo: The Challenge to Fix a Failed UN Justice System" (2007) at 5, online: ReliefWeb <http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SODA-7BBALA-full_report.pdf/$File/full_report.pdf>. See also Tom Perriello & Marieke Wierda, "Lessons Learned From the Deployment of International Judges and Prosecutors in Kosovo" (2006), online: International Center for Transitional Justice <http://www.ictj.org/static/Prosecutions/Kosovo.study.pdf> [Perriello & Wierda, "Lessons"].

Chamber has been more successful than the others, but, as will be examined, it enjoys significant advantages that are denied to its counterparts. Overall, it might be said that the hybrid tribunal structure has slipped from the parity of esteem with international tribunals it briefly enjoyed because of the gap between the early theory and disappointing practice.

International criminal law has seen similar periodic bouts of enthusiasm for innovations like ad hoc tribunals and universal jurisdiction, which were followed by disappointed hopes and later marginalization.[24] However in the case of hybrid tribunals, enthusiasm was not so much misguided as misdirected. Hybrid tribunals were created as expedient stopgaps to plug holes the national/international jurisdiction dichotomy could not fill, but were evaluated on the basis of their legitimacy in the eyes of the local population, contribution to capacity-building, and inculcation of fair trial norms. In retrospect, these standards proved quite unsuitable.

III. Idealizing the Hybrid Tribunal

In the years 2000 and 2001, when hybrid tribunals were established in East Timor and Kosovo and became the basis of negotiations in Cambodia, the novel hybrid structure was presented in evolutionary terms in the history of international criminal justice. It was posited as the last stop in a progressive trail of enforcement of international justice that led naturally from the supranational agreements to prosecute crimes at Nuremberg and Tokyo, to the ICTY and ICTR, to the ICC, then to domestic trials through the exercise of universal jurisdiction, and finally to mixed tribunals. For example, Dickinson placed hybrid tribunals as a fifth stage in accountability mechanisms.[25] Higonnet, on the other hand, saw hybrids as a third generation of international criminal tribunals after Nuremberg and the ad hoc international tribunals.[26] Burke-White contextualized the hybrid tribunal historically as an example of the evolutive delegation of authority; just as the international community delegated authority to prosecute international crimes first to international tribunals and then to international courts by Conventions, now both the international community and domestic States jointly delegate the authority to hybrid structures.[27]

Analysis of the hybrid tribunals followed an almost dialectic process revealed through critique of international tribunals in terms of axes of legitimacy, capacity-building and norm penetration, which were then contrasted with the benefits of local participation and location in the State where the crimes occurred.[28] The idea that additional benefits, above and

[24] Luc Reydams, "The Rise and Fall of Universal Jurisdiction" in William A Schabas and Nadia Bernaz, eds, *Handbook of International Criminal Law* (London: Routledge, 2010) at 337.
[25] Laura Dickinson, "The Promise of Hybrid Tribunals" (2003) 97 Am J Int'l L 295 at 295 [Dickinson, "Promise of Hybrid Tribunals"].
[26] Higonnet, *supra* note 9 at 352.
[27] William W Burke-White, "A Community of Courts: Towards A System of International Criminal Law Enforcement" (2002) 24 Mich J Int'l L 1 [Burke-White, "Community"].
[28] In this, it built on trenchant contemporaneous criticisms of the ad hoc tribunals in Jose

beyond the paramount concern with accountability that animated earlier tribunals from Nuremberg to the ICC, should be associated with hybrid tribunals was in one sense opportunistic. Simply put, the mixed nature of hybrid courts offered possibilities which hitherto had not existed. Speculation about the model's potential was perhaps inevitable. However, the argument about hybrid courts' potency acquired a sense of urgency from the very contexts in which the first hybrid tribunals arose, namely the transitional nature of the state in which they were deployed. As will be examined later, Sierra Leone, Kosovo and East Timor were subject to highly intensive peacebuilding missions engaged in precarious processes of transitional governance, including significant measures of judicial reconstruction. Indeed, so weak were the latter two territories that they were subject to direct territorial administration by UN transitional authorities empowered to exercise all legislative and executive authority, including the administration of justice. Arguments about hybrid court potential outlined below were arguably born out of a sense of necessity. Hybrid tribunals were argued to serve a different purpose than other international criminal tribunals because it was felt that they needed to. It was not merely enough for these tribunals to try suspects—their practice and jurisprudence should catalyze wider response to make precarious transitions more sustainable. Though the BWCC came later, it was obvious in the earliest years of the century that the ICTY could not be sustained indefinitely, and that some war crimes function would have to be incorporated into the ongoing processes of judicial reform in the transition to democratic rule in Bosnia-Herzegovina.

This sense of necessity was perhaps compelled by the recognition that purely domestic proceedings in the States where hybrid tribunals emerged were precluded by the fact that the administration of justice had broken down, while the prospects for a fair and competent trial were far from promising.[29] In areas where hybrid tribunals were founded, societies were emerging from prolonged periods of repression or conflict. Such conditions were typified by "an abundance of arms, rampant gender and sexually-based violence, the exploitation of children, the persecution of minorities and vulnerable groups, organized crime, smuggling, trafficking in human beings

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Alvarez, "Crimes of States/Crimes of Hate: Lessons From Rwanda" (1994) 24 Yale J Int'l L 365; David Tolbert, "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings" (2002) 26 Fletcher F World Aff 5; and Marieke L Wierda, "What Lessons Can be Learned from the Ad Hoc Tribunals?" (2002-2003) 9 UC Davis J Int'l L & Pol'y 13.

[29] For an examination of the state of the courts in Kosovo East Timor in 2000, see Hansjoerg Strohmeyer, "Making Multi-Lateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" (2001) 25 Fletcher F Wld Aff 107; on Sierra Leone, see Niobe Thompson, *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone* (2002), online: Commonwealth Human Rights Initiative <http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf>, while Human Rights Watch's report entitled *Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Trial Agreement* (2003) summarizes the various problems attaching to the Cambodian court system, online: Human Rights Watch <www.hrw.org/en/reports/2003/04/30/serious-flaws-why-un-general-assembly-should-require-changes-draft-khmer-rouge-tr>.

and other criminal activities."[30] Though it is at these times that the need for law, order, and stability is greatest, the essential conditions for a fair and effective judiciary were rarely present. Where the transitional State was in the developing world or emerging from colonization, institutions of justice may never have been very strong to begin with, as in Sierra Leone and Cambodia. Many judges and lawyers may have been killed in conflict or fled from it, while legal education may have ground to a halt under repression, as in Cambodia and East Timor. The complexities of international criminal law were such that domestic judges and lawyers ran serious risk of misapplying it.

In the States where hybrid tribunals were established, the legitimacy of the national judiciaries and legal professions were greatly diminished. Justice was tainted by association with the former regime, a microcosm of the social and political divisions in each country. This had two main consequences. First, justice may have operated either as an instrument of the prior rulers in vindicating and upholding persecutory and discriminatory laws, or in failing to prevent them. Inclusion or promotion of judges may have depended on subservience, complicity in crimes, or loyalty to a party or junta. Ethnicity may have been determinative, as in the occupied courts in Kosovo and East Timor which were dominated by Serbs and Indonesians. If judges propped up the prior regime, there was little prospect that their decisions would enjoy legitimacy in the eyes of the local population. Where the judiciary operated in the narrow interests of ruling elites rather than the population as a whole, there existed no expectation that justice could be done through the courts. The second main consequence was that in the aftermath of repressive regimes, the public generally had little or no conception of what justice fairly administered meant, with predictable results for public trust in the judicial system:

> When it is the state that is complicit in persecution, fundamental notions of criminal justice are turned on their head; state complicity, cover-up, and other obstructions affect the very possibility of justice.[31]

The transitional State frequently knows neither democracy nor justice. Law may mean little more than discriminatory emergency decrees or is unknown to the people. The political machinery may have broken down, while there may be little technical or financial capacity to remedy the situation. Justice was the product of political distortion and contrived weakness, reflecting neither human rights norms nor procedural fairness. Ideas of judicial independence are frequently anathema in illiberal rule. Thus, while international tribunals offend against sovereignty and are unaccountable to the population they are working for, domestic courts were too weak and compromised to make full complementarity a workable

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[30] UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, 2004, UN Doc S/2004/616, at para 27 [UN Secretary-General, *Rule of Law Report*].

[31] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 65.

proposition.

The obvious response in such cases was once thought to be a fully international tribunal. However, the shortcomings of the ad hoc tribunals in The Hague and Arusha made apparent the reality that "as the benefits of supranational adjudication are realized, those of domestic adjudication are lost."[32] Hybrid tribunals were considered to represent a mid-point between the two jurisdictions, "collapsing" their distinctions in an attempt to utilize the positive aspects of both.[33] Constituted as a response not only to the shortcomings of domestic courts outlined above, but also to the problems that emerged from the ad hoc tribunals (outlined below), hybrid tribunals supposedly merged the best elements of both systems as a more successful and sustainable means of transitional accountability.[34] This approach was adopted in very influential and widely cited articles by Laura Dickinson in 2002 and 2003, with the critique therein refined and developed by a number of subsequent commentators.[35]

1. Legitimacy

The primary advantage claimed for hybrid tribunals was the fact that they avoided the legitimacy deficit that impaired the expected progress of the ad hoc courts in advancing reconciliation in Yugoslavia and Rwanda. Dickinson saw the question not as a formal one of political or democratic legitimacy. Instead, she looked at perceived legitimacy in a more observable sense, namely "which factors tend to make the decisions of a judicial body acceptable to the various populations observing its procedures."[36] It should be pointed out that it was never simply a matter of saying that international courts do not enjoy the legitimacy domestic courts would. Significant portions of the Yugoslav and Rwandan societies supported the formation of purely international tribunals, and the ad hoc tribunals were in many respects effective. However, by the time UNMIK and UN Secretariat negotiators were cobbling together the Regulation 64 and Extraordinary Chambers structures, much of the initial goodwill towards the ad hoc

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[32] William W Burke-White, "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration" (2003) 38 Texas Int'l L J 729 at 734 [Burke-White, "Regionalization"].
[33] Mégret, *supra* note 10 at 747.
[34]Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 Harv Hum Rts J 245 at 245.
[35] Most notably Higonnet, *supra* note 9; Jenia Iontcheva Turner "Nationalizing International Criminal Law" (2005) 41 Stan J Int'l L 1; Hall, *supra* note 9; and serving as the critical point of reference for Sarah MH Nouwen, "'Hybrid courts': The hybrid category of a new type of international crimes courts" (2006) 2 Utrecht L Rev 190. Dickinson's analysis is followed to a lesser extent, or referred to approvingly, in David Cohen, "'Hybrid' Justice in East Timor, Sierra Leone and Cambodia: 'Lessons Learned' and Prospects for the Future" (2007) 43 Stan J Int'l L 1 [Cohen, "Hybrid Justice"]; Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan" (2006) 106 Colum L Rev 182; Danielle Tarin, "Prosecuting Saddam and Bungling Transitional Justice in Iraq" (2005) 45 Va J Int'l L 467; Olga Ortega-Martin & Johanna Herman, "Hybrid Tribunals and the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia", online: (2010) JAD-PbP Working Papers Series No 7 <http://www.uel.ac.uk/chrc/documents/WP7.pdf>; and Gersh, *supra* note 16.
[36] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 301. Hall uses the same definition, *supra* note 9 at 46-47.

tribunals had been lost. Far from assuming that popular disenchantment with the tribunals was the inevitable product of the intractable problems of the radically imperfect context of transitional trial for mass atrocity, observers instead ascribed it to problems hybrid tribunals seemed uniquely placed to remedy.

The primary problem identified in the ad hoc tribunals was their perceived democratic deficit. The legitimacy of any court is undermined in the eyes of the population if it operates outside the normal domestic system of checks and balances, and is accountable only to an unaccountable international mission. With purely international courts enjoying no domestic input or control, it became all too easy for the likes of Slobodan Milosevic to invoke the jurisdictional imperialism critique that trials are "illegal" political instruments,[37] and thereby prejudice domestic opinion.[38] It had become apparent that too much international control or insensitivity to local needs could see legitimacy tainted by perceptions of imperialism, or claims that the tribunal was the instrument of big powers. These fears were easily stoked up by certain parties in States such as Rwanda or Yugoslavia with historic experiences of imperialism or manipulation by larger States. For example, a Croatian survey found that a "high percentage of Croatians believed that The Hague was biased," 52 per cent believed it wanted to "criminalize the Homeland War," and 78 per cent believed it should not extradite citizens to it.[39] The top-down imposition of international courts unattuned to the needs of the local population (which were at best an afterthought in the creation of the ad hoc tribunals) incurred local enmity, especially when the local courts were given no opportunity to pronounce as to the legitimacy of the trials. The perception of illegitimacy or victors' justice made it difficult for the domestic government to cooperate, as was seen in Serbia and Croatia.

Notwithstanding the fact that the international community had committed itself only a few years earlier to an ICC based in The Hague, much was made of the physical and psychological distance between the sites of the atrocities in Yugoslavia and Rwanda and the courts in the Netherlands and Tanzania. This dislocation meant there was little or no connection between the affected population and the trials.[40] As more ethical concerns about the interests of victims came to the fore, holding the trials in a different

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[37] *Prosecutor v Milosevic*, IT-02-54, Transcript of Initial Appearance (3 July 2001) (International Criminal Tribunal for the former Yugoslavia), online: United Nations <http://www.un.org/icty/transe54/010703IA.htm>.

[38] Sandra Coliver, "The Contribution of the International Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina" in Dinah Shelton, ed, *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, New York: Transnational Publishers, 2000) 19 ("[m]ost Croats and Serbs View the Tribunal as utterly biased against their communities, and more than willing to turn a blind eye to atrocities committed by Bosniaks" at 20).

[39] Burke-White, "Regionalization", *supra* note 32 at 736.

[40] Alvarez, *supra* note 28 ("[t]o many surviving members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they can understand, subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty" at 403).

country was deemed to deny both the immediate victims of the crime, and the victim community as a whole, the restorative justice element of the trials. It was argued that when victims could not attend the trials and see justice done with their own eyes, perceptions of justice were damaged.[41] Connections with the ICTY were at best piecemeal rather than the type of consistent constructive engagement that would have made the trials relevant to the local population. Studies confirm that remoteness engenders negativity and apathy towards trials. For example, a highly influential study of Bosnians from every ethnic group in the legal professions and their perceptions of the ICTY found that though they were generally supportive of the Tribunal's work, the distance did little to ameliorate their self-confessed ignorance of the procedures and rules of evidence and suspicions of perceived political biases.[42] Similar apathy (and indeed antipathy) was noted in Rwanda.[43] Turner drew a negative comparison between how closely domestic trials in France, Argentina, South Korea and Israel were followed by the local people with how the more distant trials at the ICTY and ICTR were observed.[44] The capacity for restorative justice where the local communities were unaware or uninterested in the trials was obviously diminished. These problems were exacerbated by failure to adequately publicize the tribunals' work. This omission was all the more unfortunate as the unfamiliar law and proceedings were frequently reported by self-interested third party sources, and lead to "gross distortions and disinformation."[45]

Those who argued that legitimacy is a prerequisite for the effectiveness of any transitional justice mechanism in advancing punishment and reconciliation found in the hybrid tribunal structure a means for importing legitimacy to successor trials in politicized and hostile environments, for three main reasons. First, the presence of international judges and prosecutors (and defenders, where provided) in either a majority or minority would alleviate fears of partiality or lack of independence in relation to national judges on the part of the local population. International prosecutors could moderate extremely dilatory or zealous prosecutions initiated by local prosecutors. Transitional criminal trials are inherently politically transformative, but legality demands independence from political pressure. It was posited that the presence of international actors in the units of the

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[41] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004) at 166-187.
[42] The Human Rights Center and International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors" (2000) 18 Berkeley J Int'l L 102 at 136-40 [Berkeley & Sarajevo].
[43] Pernille Ironside, "Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation" (2002) 15 NY Int'l L Rev 31 at 31.
[44] Turner, "Nationalizing", *supra* note 35 at 27-28.
[45] Tolbert, *supra* note 28 at 11. See also Kingsley Chiedu Moghalu, "Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda" (2002) 26 Fletcher F World Aff 21, where it is argued that the African dependency on frequently negative or disinterested international media coverage of the ICTR has impaired its legitimacy.

hybrid tribunals, especially when in a majority or in leadership positions, would suffice to insulate the court from domestic political factors, the most obvious of which is governmental interference.[46] Because international personnel were removed from domestic politics, and because they were to be paid by the UN in whole or in part, the process was predicted to be infinitely less likely to be manipulated by governments and other factions. Given that most domestic transitional trials try either political enemies or estranged allies of the new polity, the presence of a foreign honest broker would be welcome. The supposition is that the bench, being the ultimate arbiter in criminal proceedings, would be the most likely to attract (if not the most susceptible to) such interference or pressure. It is for this reason that there was so much wrangling over the makeup of the Extraordinary Chambers in Cambodia, while the necessity of international judges became apparent in Kosovo and acknowledged by the Government of Sierra Leone. An international majority would serve to refute allegations of ethnic or victor's bias.

Second, though internationalization was required for the perception of impartiality, it was assumed that the trials would enjoy greater legitimacy in the eyes of the local population because judges "of their own kind are present as actors in the tribunal."[47] Because of the presence of local judges, the courts would become tied into the national polity.[48] It was argued that this sense of ownership flowing from a defined degree of national responsibility for the judicial process that would increase the relevancy of the court for the survivor populations.[49] Furthermore, it would accord with the emerging consensus that nationally-led strategies were more conducive to sustainable peacebuilding.[50] Furthermore, the foreign counterparts of the domestic contingent could confer with them and gain a greater sensitivity to local attitudes, history, and culture. This cooperation would help create a "framework for consultation that may have enhanced the general perception of the institution's legitimacy."[51]

Third, the problem of remoteness would be avoided. Victims could travel to the trials, facilitating restorative justice and possibly some degree of emotional catharsis. The media could attend with greater ease to help transmit the lessons and history revealed in court.[52]

2. Capacity-Building

At the time hybrid courts were created, the ad hoc courts had no

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[46] Burke-White, "Regionalization", *supra* note 32 at 742.
[47] Hall, *supra* note 9 at 58.
[48] Similarly, Alvarez argued in the Rwandan context that "[i]f Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may itself be determinative of the legitimacy of these processes" (Alvarez, *supra* note 28 at 416).
[49] Philip Rapoza, "Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?" (2006) 21 Am U Intl L Rev 525.
[50] UN Secretary-General, *Rule of Law Report*, *supra* note 30 at para 15.
[51] Dickinson, "Promise of Hybrid Tribunals", *supra* note 32 at 306.
[52] Higonnet, *supra* note 9 at 362-367.

capacity-building or training remit for the domestic courts. Any contact between the ad hoc courts and the domestic courts was more about the pursuit of accountability in the former than development of the latter.[53] The lack of any sort of sustainable connection meant that Rwandan prosecutors played no part in investigating the crimes with their international colleagues; Bosnian judges played no role in adjudicating the trials of their countrymen, while the Tribunals were staffed and administered almost exclusively by foreigners. This was considered particularly unfortunate given that the sheer size and complexity of the cases, allied to the qualifications of the staff involved, could have trained domestic actors in almost all conceivable skills that a domestic criminal court requires. Tolbert, in a review of the ICTY, states that the tribunal suffered from "a strategic failure in that [it] has not had much impact on the development of courts and justice systems in the region…"[54] It was not that the capacity-building function was sidelined or pushed down the agendas of the ICTY and ICTR. Counter-intuitively, the mandate of the ad hoc courts to develop the long-term security and stability of two post-conflict societies was construed as narrowly as possible. The focus remained primarily on ending impunity for leading criminals in the war, with no specific role in judicial reconstruction for the self-evidently shattered domestic systems.

Hybrid tribunals were posited as a response to this failure.[55] Trials in transition would not only serve as a catalyst for further domestic successor trials, but also instruct the domestic court system in how high-quality trials should be operated generally. Mixed panels of judges and lawyers could help develop the abilities of judges, prosecutors, defence counsel and administrators who might gradually be empowered to assume full responsibility.[56] It was argued that by comparison with the ad hoc tribunals, hybrid courts theoretically had much to offer to the nascent justice system in terms of institutional legacy. This would either flow as an inherent consequence of the collaborative relationships involved, or would constitute a pedagogical spill-over effect from the proceedings.[57] To adopt a time-worn development cliché, while ad hoc tribunals fished for justice, hybrids could teach how to fish. Perhaps most forcefully, Cohen argued that hybrid composition:

> [O]ffers unique opportunities for capacity-building in all areas of the court.

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[53] Jane Stromseth, Michael Wippman & Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006) at 273.
[54] Tolbert, *supra* note 28 at 10.
[55] For example, Jann K Kleffner & André Nollkaemper, "The Relationship Between Internationalized Courts and National Courts" in Romano, Nollkaemper and Kleffner, eds, *supra* note 14, 359 at 378; Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York: United Nations, 2008), online: OHCHR <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> [OHCHR]; Parinaz Kermani Mendez, "The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International [Humanitarian] Law or an Idealistic Solution With Empty Promises?" (2009) 20:1 Crim LF 53 at 94.
[56] Higonnet, *supra* note 9 at 377.
[57] Cassese, "Fight Against Criminality", *supra* note 14 at 6.

> Training court actors and administrators, introducing best practices and modern systems in case and document management, and providing a model for the domestic legal system and for the operation of the rule of law, represent some of the most important contributions that a 'hybrid' tribunal can make.[58]

A cooperative working environment was envisaged that could develop the skills of domestic actors. Local judges would deliberate and draft decisions in consultation with international judges who had knowledge of international standards and procedural norms. Local prosecutors and defence lawyers would work with international prosecutors, forensic analysts and researchers. Defence lawyers would cooperate with international defenders. It was argued that this on-the-job training was more likely to be effective than "abstract classroom discussion," or merely observing a purely international mission.[59] Even if there was no formal mentoring component, it was presumed that on conclusion of hybrid tribunals, local staff returning to the domestic system would have learned valuable lessons and skills from the process. It was furthermore argued that links could be formed between the domestic and hybrid institutions that would influence domestic law reform.[60] If the local government had experience of the practical running of a fair and competent special court, it appeared to follow that it could use these lessons in operating an international-standard domestic system.

3. Norm-Penetration

It was initially argued that having local judges and lawyers participating in high-profile, foundational trials in their own country would have a beneficial 'demonstration effect' on emerging local legal systems. The trial process would offer exemplary standards of independence, impartiality and norms of fair trial that could inculcate a cultural commitment to (and expectation of) such yardsticks among the public. The location of the hybrid tribunal within the domestic political infrastructure would provide the quality of trial visible at the ad hoc tribunals but in a manner less abstracted from local conditions. At a time when advocates of transitional justice were arguing with some force that actions in trials could have beneficial communicative effects in the field of politics and community, it was blithely accepted that trials could similarly have a demonstrative effect on public attitudes to legal processes. As Higonnet put it, "translation and cultural mediation can be an integral part of the tribunal rather than an afterthought or a bureaucratic detail."[61] In treating the successor trials as legitimate, the population might also treat the institution of courts generally as legitimate. For example, in relation to a trial of a Rwandan colonel indicted on genocide charges, Alvarez argued,

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[58] Cohen, "Hybrid Justice", *supra* note 35 at 36-37.
[59] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 307.
[60] OHCHR, *supra* note 55 at 37-39.
[61] Higonnet, *supra* note 9 at 365.

> A local trial for Bagasora, even one subject to extensive international observation or even the possibility of appeal to the ICTR, would have affirmed to the world, and most importantly to all Rwandans, that Rwanda's institutions, including its judiciary, were capable of rendering justice even with respect to formerly exalted public officials.[62]

The collaborative structure of hybrid tribunals integrating local laws and personnel was predicted to resolve these problems. The process would exchange the insularity from local opinion and chauvinism of the ad hoc tribunals for consultation with, and involvement of, local people, easing the permeation of these norms.[63] Writers in the field proposed that hybrid tribunals would allow greater opportunities for public debate,[64] construct networks between international experts and the local judiciary,[65] and encourage cross-fertilization of international and domestic norms.[66] The model would go beyond the ad hoc tribunals' concern with crimes against humanity and war crimes, and go on to illustrate how a court system should approach issues like equality of arms, detention, due process and defendants' rights. Hybrid trials would serve as a platform on which the local people "absorb, apply interpret, critique and develop" international norms in the national criminal justice system.[67] Turner posited a relationship between hybrid composition and norm penetration as follows,

> Encouraging national communities to supplement these broad international norms with more concrete rules and interpretations of their own is consistent with ideals of autonomy and self-determination. It provides those communities with the opportunity to influence, in accordance with their core values, the laws and institutions that govern them.[68]

While the idea of foreign experts inculcating legality on a step-by-step basis seems almost paternal, inviting and participating in a hybrid tribunal could equally be considered a reclamation by the State of its responsibility and duty to live up to its international commitments to a fair trial, most notably under Article 14 of the ICCPR. It was furthermore argued that the application of domestic procedural and substantive law amended to international standards in high profile cases would not only undermine allegations of victors' justice; rather, such practices could fundamentally alter the people's expectations of their rights in court, and make less likely the reversion to the unfair and politicized practices of the past. The very example of these trials—accessible in their home territory—would construct what

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[62] Alvarez, *supra* note 28 at 402.
[63] Higonnet, *supra* note 9 at 358, quoting Ivana Nizich, "International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal" (2001) 7 ILSAJ Int'l & Comp L 353 at 364, observes: "If donor countries or the UN are to succeed in changing a country for the better, they 'cannot display and elitist, paternalist attitude' toward war crimes victims and national judiciaries, 'i.e., viewing local participation as inherently biased, tribal, inexperienced and inept.'"
[64] Burke-White, "Regionalization", *supra* note 32 at 737.
[65] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 304.
[66] *Ibid* at 307.
[67] *Ibid* at 304.
[68] Turner, "Nationalizing", *supra* note 35 at 22.

Mani calls a "shared political and civic commitment to justice and rights, in terms that are both embedded in local culture/s and imbued with universal norms."[69] For example, Horsington suggested that Cambodian citizens seeing international trial standards at the ECCC may be more inclined to expect courts generally to be "stable trustworthy, competent, credible and reliable."[70] Whereas ordinarily, transitional trials are approached in a retributivist manner aimed towards condemnation and non-impunity for past acts, in the hybrid trial the domestic inculcation of exemplary fairness and due process standards would be equally determinative of success. Hybrid tribunals would cross a psychological Rubicon—where something like the right to counsel is seen as law in one context within a State, it would assume a validity and force of its own in analogous contexts.

4. Hybrid Tribunal Advocacy in Context

The principles underlying these ambitious claims about the promise of hybrid tribunals to remedy the problems in the domestic justice systems which compelled their creation were fundamentally sound. Arguments that "it is maintaining effective judicial systems and stabilizing the rule of law, not ending impunity, that enables nations emerging from conflict to establish orderly systems that ... prevent nations sliding back into conflict,"[71] are normatively and intuitively satisfying. The contention by another hybrid court advocate that "[i]t is only when a state 'accepts the challenges and responsibilities associated with enforcing the rule of law' on its own terms, that the rule of law is strengthened and a barrier to impunity is erected,"[72] finds support in the UN's doctrinal reform of peacebuilding operations.[73] By the time of the UN Secretary General's seminal 2004 Report on Transitional Justice and the Rule of Law (formulated to strengthen United Nations support of transitional justice as a peacebuilding tool), hybrid tribunals had been mainstreamed as a policy choice. The Report repeated many of the academic arguments in favour of hybrid structures that emerged after their formation, arguing that "specially tailored measures for keeping the public informed and effective techniques for capacity-building, can help ensure a lasting legacy in the countries concerned."[74] The Report, imbibing the academic advocacy of hybrid structures, assumed throughout that internationalization of trials would guarantee their independence and impartiality.[75] By 2008, a Report by the Office of the United Nations High

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[69] Rama Mani, *Beyond Retribution – Seeking Justice in the Shadows of War* (Cambridge, UK: Polity Press, 2002) at 172.
[70] Helen Horsington, "The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal" (2004) 5 Melbourne J Int'l L 462 at 480-482.
[71] Lipscomb, *supra* note 35 at 184.
[72] *Ibid* at 199, quoting US Undersecretary for Political Affairs, Marc Grossman, "American Foreign Policy and the International Criminal Court", Remarks given at the Center for Strategic and International Studies (6 May 2002), online: CSIS <http://csis.org/files/media/csis/events/020506_grossman.pdf>.
[73] UN Secretary-General, *Rule of Law Report*, *supra* note 30.
[74] *Ibid* at para 44.
[75] *Ibid.*

Commissioner for Human Rights on hybrid tribunals as a peacebuilding tool was a little more cautious, realizing that little flowed automatically from the structure and that any wider rule of law legacy needed to be planned for.[76] It identified many of the problems with hybrid tribunals' practice in the past and counselled that "too much emphasis on legacy may give rise to unrealistic expectations."[77] However, it still found that "substantive legal framework reform, professional development ... and raising awareness of the role of courts as independent and well-functioning rule-of-law institutions" remain at the core of their remit.[78]

However, what such claims ignore is the degree to which any aspirations towards integrating successor trials with holistic rule of law reform have historically remained at the margins of policy when negotiating internationalized judicial responses to gross human rights violations. Those who negotiated the Nuremberg and Tokyo trials, the ad hoc tribunals, and the ICC were more concerned with creating a global culture of accountability or non-impunity as goals in themselves than fostering domestic rule of law. Hybrid tribunals were expected to engage with peacebuilding dynamics that international tribunals had hitherto assiduously avoided. International criminal tribunals have, by comparison with the perceived "promise" of hybrid tribunals, been more circumscribed in terms of ambition, concerned more with the immediate dangers to peace than long-term rule of law development. Since Nuremberg, all fully- or partly-internationalized criminal tribunals were tied to the UN, but this has meant they were closely linked to the aspirations of the world organization, whose paramount purpose has been the maintenance of peace and security.[79] This was stated in the ICTY's very first trial of *Prosecutor v Tadic*, where the Tribunal noted that the Security Council may resort to establishing international criminal tribunals as "instrument[s] for the exercise of its own principal function of maintenance of peace and security."[80] This concern with peace and security has manifested itself in a retributive prioritization of ending impunity for egregious crimes against the peace. In transition, the dominant assumption is that justice must be pursued. The argument is usually posed as a counterfactual—what if there is no justice? Where the crimes concerned are as reprehensible as crimes against humanity, they must be prosecuted.

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[76] OHCHR, s*upra* note 55.
[77] *Ibid* at 5.
[78] *Ibid* at 2.
[79] Article 1 of the UN Charter outlines the purposes of the organization states that its first purpose is:
"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (*Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7 (entered into force 24 October 1945)).
[80] *Prosecutor v Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 38 (International Criminal Tribunals for the former Yugoslavia, Appeals Chamber).

Though no punishment can be equal to the crime itself, only the sentencing power of prosecution is deemed to guarantee a penalty of sufficient severity. As Crocker puts it, "ethically defensible treatment requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment."[81]

While other more restorative or rectificatory goals of prosecution like pedagogy, rehabilitation, or incapacitation have obvious forward-looking social benefits, the more readily-attainable retributive goal of punishment as an end in itself tallies best with the emergency-driven impetus of international criminal justice in unstable societies. By contrast with the capacity-building or norm inculcation predicted of the hybrid tribunal model, a more limited utilitarian justification attaches to retribution, namely its contribution to shoring up the emergent peace. This aspiration is perhaps best described by Bassiouni who argued that prosecution is necessary "if peace is not intended to be a brief interlude between conflicts."[82] Similarly, Teitel notes that "[t]he leading argument for punishment in periods of political flux is consequentialist and forward-looking. ... At these times in a variant of the conventional "utilitarian" justification for punishment, the basis for punishment is its contribution to the social good."[83] From such prosecutions may stem some related security-based goals such as deterrence, based on the argument that "failure to punish invites repetition,"[84] and containment of destabilizing violence by incapacitating revanchists[85] or "channelling" public demand for vengeance.[86] However, deterrence theory is problematical in that most perpetrators initially presume their cause will win out, or that they will never be held to account.[87] Serbia's perpetration of the war in Kosovo while the ICTY was underway is but the most obvious example of deterrence theory's limitations in the context of war.[88] Though the logic of containment was expressly accepted by the ICTY,[89] indictment of the

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[81] David A Crocker, "Reckoning With Past Wrongs: A Normative Framework" (1999) 13 Ethics & Int'l Affairs 43 at 53.
[82] M Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59 Law & Contemp Probs 9 at 15.
[83] Teitel, *supra* note 31 at 28.
[84] Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice Vs. Peace in Times of Transition* (London: Frank Cass, 2004) at 7.
[85] "The first step is security. A secure environment is the sine qua non of the new beginning of peace. It preceded new courts, human rights, property, laws, democracy and so forth," in Michael W Doyle & Richard Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton: Princeton University Press, 2006) at 338.
[86] Miriam J Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice" (2002) 15 Harv Hum Rts J 39 at 60. Similarly, Cassese notes that international trials "establish individual responsibility over collective assignation of guilt" and in so doing counteract calls for vengeance against a whole community (Antonio Cassese, "Reflections on International Criminal Justice" (1998) 61:1 Mod L Rev 1 at 5-6).
[87] Mark A Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005) 99:1-2 NW L Rev 539 at 589-590.
[88] In establishing the Tribunal, the UN Security Council opined that the work of the ICTY "will contribute to ensuring that such violations are halted" (UNSCOR, 47th Year, 3217th Mtg, UN Doc S/RES/827 (1993) at Preamble).
[89] *Prosecutor v Momir Nikolic,* IT-02-60/1-S, Sentencing Judgment (2 December 2003) at para 60

likes of Milosevic, Al-Bashir and Mladic have had little success in suppressing criminal acts.

Because deterrence and containment have proven inadequate as justifications for international criminal justice, the thrust of international criminal justice has coalesced around the relatively limited but more readily attainable goal of combating impunity for serious offenders against the international criminal legal order. This is a goal positioned somewhere between a purely retributive theory of *lex talionis* ("an eye for an eye and a tooth for a tooth") and a belief in deterrent effect. Simply put, punishment is just and avoidance of such punishment is intolerable. To the extent that some perpetrators, often the most serious, are tried and punished, impunity can be said to have been combated, if not entirely defeated. This emphasis is more principled than a purely security-based realpolitik—Zacklin forcefully argues that this concern is synonymous with "a new culture of human rights and human responsibility, in which there can be no impunity for such crimes."[90] This is, however, a less ambitious conception of human rights' relationship to transitional trial than those who would argue for hybrid tribunals as a vehicle for justice sector reconstruction. The more readily attainable opportunity to demonstrate immediate progress in relation to criminal accountability for human rights abuses has trumped more long-term institutional concerns. This is a phenomenon that has been exacerbated by the noted tendency of the Security Council and donor countries to put pressure on UN missions to demonstrate that objectives are being fulfilled quickly and that substantial improvements on the ground are being made.[91]

This limited ambition of international criminal justice has frustrated many scholars. As noted above, the ad hoc tribunals were criticized for their failure to contribute to the development of the rule of law domestically, but this is merely symptomatic of a wider marginalization by international justice policy-makers of purposes not immediately related to retribution. Others criticize international criminal justice's limited focus on non-impunity for its failure to engage with wider issues that underpin peace. Mani, for example, is a trenchant critic of the sacrifice of distributive justice in the pursuit of retribution, in the light of the connection between political and economic inequalities with conflict.[92] Other critics argue that the adversarial nature of a vigorously contested trial can undermine potential for reconciliation in the long-term,[93] while some are sceptical of the value of trials in recovering the truth and historical context on which a future polity can be built.[94] Wider social functions beyond non-impunity have historically

(International Criminal Tribunals for the former Yugoslavia, Appeals Chamber).

[90] Ralph Zacklin, "The Failings of Ad Hoc International Tribunals" (2004) 2 J Int'l Crim J 541 at 541. See also Diane F Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Legal Regime" (1991) 100 Yale LJ 2537.

[91] Joel C Beauvais, "Benevolent Despotism: A Critique of UN State-Building in East Timor" (2001) 33 NYUJ Int'l L & Pol 1101.

[92] Mani, *supra* note 69 at 126-157.

[93] Jenia Iontcheva Turner, "Defence Perspectives on Law and Politics in International Criminal Trials" (2008) 48 Va J Int'l L 529 at 568-569.

[94] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass*

appeared low on the hierarchy of purposes for those involved in international tribunals.[95]

If the more holistic "promise" of hybrid tribunals was prioritized, it could have represented a welcome attempt to integrate the traditional emphasis on accountability justice with more long-term concerns related to weak domestic rule of law. However, it would have swum very much against the historical tide. Two years before the establishment of the first hybrid tribunals, the Rome Statute's strategic prioritization of non-impunity over all else became visible in its Preambular affirmation that "the most serious crimes of concern to the international community as a whole must not go unpunished." Similarly, it was evidenced in the stated determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." These priorities should have made apparent that, on the ground, the normative framework of international criminal justice had not shifted sufficiently far from its historic moorings.

Projects such as capacity-building have always been most ancillary to the requirement to secure convictions.[96] Though the arguments advocating hybrid tribunals had "intuitive logic,"[97] international criminal justice policy-makers remain more focused on punishment in the immediate case than institution-building in the long-term, and are at best agnostic as to whether it has a beneficial impact on the national justice system and domestic legitimacy:

> But while other sectors have paid more attention to the idea of building domestic capacity and creating exit strategies, war crimes tribunals have remained largely unconcerned with these projects. ... The human rights community has concerns about whether it is even normatively desirable to elevate the goal of capacity-building to the level of other goals of accountability mechanisms. This position assumes that certain important principles intrinsic to fully achieving accountability will be sacrificed if collaboration increases with domestic institutions and people.[98]

Violence (Boston: Beacon Press, 1998) (arguing that "if the goal to be served is establishing consensus and memorializing controversial, complex events, trials are not ideal" at 47).

[95] Daniel Joyce, "The Historical Function of International Criminal Trials: Re-thinking International Criminal Law" (2004) 73 Nord J Int'l L 461 at 465. As Fletcher and Weinstein point out: "Criminal trials single out intellectual authors and actual perpetrators of atrocities while leaving to broader initiatives in rule of law, humanitarian assistance, democracy building, and economic development the task of resuscitating a 'sick society'….. such an approach that does not integrate these trials with these other capacity-building measures is insufficient to attend to social repair. If we do not comprehend the processes of civil destruction in a broader, ecological context, how can we identify and address crucial aspects of civic reconstruction?" (Laurel E Fletcher and Harvey M Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24 Hum Rts Q 573 at 580).

[96] Varda Hussain, "Sustaining Judicial Rescues: The Role of Judicial Outreach and Capacity-Building Efforts in War Crimes Tribunals" (2005) 45 Va J Int'l L 547 at 551.

[97] Mariana Goetz, Book Review of *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* by Cesare P Romano, Andre Nollkaemper & Jann K Kleffner, eds, (2006) 69 Modern L Rev 672 at 673.

[98] Hussain, *supra* note 96 at 551.

Similarly, Mégret notes that most of the justifications of international criminal justice such as deterrence and retribution flow from the verdict more than the process itself, relegating communicative or exemplary functions of trials to a diminished standing in the hierarchy of priorities:

> The problem with much of the rhetoric surrounding international criminal justice is that it has been focussed on outcome (the repression of given criminals, the fight against impunity, the establishment of the foundations of a new legal regime) rather than process. ... Typically the emphasis has been on the ability of any given mechanism to achieve successful prosecutions that would lead to those desired results.[99]

As such, while it was reasonable to argue that a holistic rule of law reconstruction legacy could be tacked on to the traditionally minimalist goals of international criminal law institutions, this would constitute more a revolution in the priorities of the UN and wider international community than a creative adaptation of existing attitudes. Section IV goes on later to show that in the era of the ICC, no less than the era of the ad hoc tribunals, it is still the case that the more immediate goals of combating impunity, containment and deterrence remain the dominant motivations behind the formation of institutions of international criminal justice. Domestic rule of law development, like the harmonious development of international criminal law, rehabilitation of offenders, or creation of a historical record, remains a mere secondary aspiration of those who negotiate international criminal tribunals by comparison with the overriding retributive impulse of international criminal justice. This remains so regardless of how pressing the need to reform the institutions of justice domestically is in a given case.100 As Section III now demonstrates, the circumstances that gave rise to the hybrid tribunals served to prioritize traditional emergency-driven, short-term judicial responses concentrated primarily on retribution at the expense of more long-term, holistic planning. There was never intended to be a revolution in the policies that had hitherto guided international criminal justice.

IV. The Unpromising Emergence Of Hybrid Tribunals

Hybrid tribunals have been presented thus far as a natural evolution of international criminal justice. However, such a perspective elides the extent to which the tribunals themselves were more the product of the politics of international criminal justice, happenstance, and idiosyncratic national contexts than a conscious improvement on old models or a new departure from the purposes that previously animated the internationalization of criminal justice. Far from tempering claims about the promise of hybrid

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[99] Mégret, *supra* note 10 at 741-742.

[100] As Condorelli and Boutrouche note, "[a]s the international community is increasingly worried about impunity, there is a need to establish a system that will enable us to avoid impunity, when the national domestic systems do not work at all or work badly" (Luigi Condorelli & Théo Boutruche, "Internationalized Criminal Courts and Tribunals: Are They Necessary?" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 427 at 429).

tribunals, the context-specific bargains that gave rise to them were either overlooked or explained away as a process of trial and error in pursuit of the optimum response to the conditions of post-conflict States.

Observers such as Cohen,[101] Hussain,[102] and Linton[103] have suggested that hybrids were developed "experimentally" as a response to the shortcomings of the ad hoc tribunals. However, there is little evidence on the part of the UN Secretariat or Transitional Administrations tasked with forming or negotiating the new tribunals of any conscious process of experimentation, at least in the conventional sense of a test or trial of a principle or supposition in the pursuit of a hypothesized outcome. Nor, it is submitted, is there much evidence of any fundamental critique of the predominant aims of international criminal justice. Certainly, the negotiators of the structure in East Timor were aware of simultaneous processes in Kosovo[104] and Cambodia,[105] while the Cambodian negotiations fed into the Sierra Leonean process.[106] It may be presumed that the architects of the BWCC were familiar with the neighbouring 64 Panels. However, far from being primarily a tailored application of a general concept of hybrid tribunal or a conscious improvement on the shortcomings of international and domestic mechanisms, early hybrid tribunals were usually a process of "quick decisions and tough compromises."[107] The various iterations of the model were creative adaptations in response to pressing transitional security imperatives, "the product of on the ground innovation rather than grand institutional design."[108]

What was overlooked in early analyses, or acknowledged merely in passing, was that hybrid tribunals did not emerge from reasoned critiques of purely international tribunals on the one hand, or of domestic trials on the other. In the first two hybrid tribunals, purely international tribunals were outside the realms of possible UN policy choice given the simultaneous existence of the ICTY in the Kosovo context and the absolute refusal of the Cambodian Government to countenance any type of internationally-dominated process. In East Timor, it was expediency more than idealism which motivated the creation of the Special Panels. In each State, purely domestic court processes were precluded by histories of ethnic exclusion (East Timor and Kosovo), destruction of the judicial system (Sierra Leone,

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[101] Cohen, "Hybrid Justice", *supra* note 35 at 1 and 4.
[102] Hussain, *supra* note 96 at 557.
[103] Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 Crim LF 185.
[104] *Ibid* at 203.
[105] Press Briefing by Deputy Legal Adviser, UN Mission in East Timor (19 April 2000): "The credibility of these trials would be insured because the model under consideration for Cambodia was being used in East Timor", cited *ibid* at 186 (footnote 1).
[106] Cambodian Deputy Prime Minister Sok An announced in Parliament on debates on the Law on the Extraordinary Chambers that the Cambodian model was the basis for the SCSL (Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts" (2008) Singapore YB Int'l L 81 at 85).
[107] Dickinson, *supra* note 18 at 27. They "have been created on an ad hoc basis to respond to special situations" (Condorelli and Boutrouche, *supra* note 100 at 429).
[108] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 296.

East Timor, and Bosnia to a certain degree), the danger of bias by the surviving community of judges (Lebanon, Kosovo, Cambodia, and Bosnia to a certain degree) and fears over the security of judges (Lebanon and Sierra Leone).[109] These circumstances spurred internationalization, but this internationalization was not immediately concerned with the ameliorating the circumstances that gave rise to the transfusion of foreign influence.

1. More Emergency than Experiment

After the ICTY Prosecutor made it clear that she intended to try about twenty senior criminals from the Kosovo conflict who committed the worst atrocities on the greatest scale,[110] it became apparent that responsibility for trying potentially thousands of less high-profile criminals would rest with a locally-based process.[111] However, the emergence of a mixed tribunal in Kosovo owed more to emergency than design by the transitional UN Mission in Kosovo (UNMIK), which enjoyed wide legislative and administrative powers.[112]

The impetus for what became known as the Regulation 64 Panels came from both the bias evident in the initial trials of Serb suspects by the Albanian judiciary,[113] and frustration over the continued detention of Kosovars suspected of committing atrocities;[114] both of which ran the risk of sparking violence. A series of UNMIK Regulations progressively increased the potential number of international judges and prosecutors as expedient stopgaps to mitigate the bias. UNMIK introduced Regulation 2000/6 which permitted the appointment of international judges and prosecutors to the Mitrovica Court.[115] Later, Regulation 2000/34 allowed for the appointment of international judges to any court or prosecutor's office in Kosovo after Serb rioting in response to unjust trials.[116] However, because it did not ensure a majority of international judges in trial, questionable decisions persisted. In a

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[109] *Ibid*.
[110] Carla Del Ponte, Prosecutor of the ICTY, "Statement on the Investigation and Prosecution of Crimes
Committed in Kosovo," The Hague (29 September 1999), cited in Carsten Stahn, "The United Nations Transitional Administrations: A First Analysis" (2001) 5 Max Planck YB UN L 105 at 174.
[111] For example *Milutinovic et al* (IT-99-37), *Milosevic et al* (IT-99-37-1), *Limaj et al* (IT-03-66), *Pavkovic et al* (IT-03-70), *Haradinaj et al* (IT-04-84).
[112] *Resolution 1244*, SC Res 1244, UNSCOR, 4011th Mtg, UN Doc S/RES/1244 (1999).
[113] As two UNMIK officials put it: "Reports came in that the courts, predominantly staffed with ethnic Albanians (who constitute 85 per cent of Kosovo's residents) were releasing ethnic Albanians charged with crimes against Serbs, even where the evidence was strong. Conversely, Serbs were often placed in indefinite pre-trial detention without any apparent will to bring their cases to trial." Jean-Christian Cady & Nicholas Booth, "Internationalized Courts in Kosovo: An UNMIK Perspective" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 59 at 59.
[114] Hansjoerg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" (2001) 95 Am J Int'l L 46 at 49.
[115] Special Representative of the Secretary-General, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/6.
[116] Special Representative of the Secretary-General, *Amending UNMIK Regulation 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/34.

sense, things were even worse as the presence of internationals served as "window dressing" to justify unjust decisions.[117] Eventually, Regulation 2000/64 was passed which recognized the danger of bias and gave the accused, defence, prosecutor, or Department of Justice the right to ask UNMIK to intervene in a case and assign international judges or prosecutors to it.[118] In such circumstances, UNMIK could designate a three-judge panel of whom at least two would be international, one of whom would preside.[119]

The real mistake was allowing trials to go ahead in the first place without international supervision in a climate of such hostility. An international judicial presence was imperative from the moment UNMIK arrived. Instead, as will be seen, the most discriminatory of victor's justice was rampant. Rather than being the first phase of a strategic plan of judicial reconstruction, the 64 Panels were an emergency design to plug holes caused by earlier inertia.

The Bosnian War Crimes Chamber also exists in the shadow of the ICTY. As with Kosovo, fears over the loss of skilled judges since the war, bias, unfair arrests, and ethnic prosecutions motivated the internationalization of domestic processes of accountability.[120] However, it is widely accepted that it was "born primarily as a result of a drive to ensure the completion of the work of the ICTY ... it would appear that, were it not for the ICTY Completion Strategy, national capacities such as those which are now in existence may never have been created."[121] Security Council Resolution 1503 (2003) urged the Tribunal to complete all trial activities by the end of 2008 and all of its work in 2010. The process was to be facilitated by focusing "on the prosecution and trial of the most senior leaders suspected of being responsible for crimes" while "transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions."[122] Specifically, the Resolution provided, cases would be heard by a "special chamber within the State Court of Bosnia-Herzegovina."[123] Rule 11*bis* of the ICTY's amended Rules of Procedure and Evidence enabled the transfer of ICTY cases to national authorities by ICTY judges after considering the

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[117] Michael E Hartmann, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping" (October 2003) at 10, online: United States Institute of Peace <http://www.usip.org/files/resources/sr112.pdf>.
[118] Special Representative of the Secretary-General, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIKOR, 2000, UN Doc UNMIK/REG/2000/64.
[119] *Ibid* at section 2.1(c).
[120] See for example Organization for Security and Co-operation in Europe–Mission to Bosnia and Herzegovina, "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles" (2005), online: OSCE <http://www.oscebih.org/documents/1407-eng.pdf >, and Human Rights Watch, "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro" (2004), online: Human Rights Watch <http://www.hrw.org/en/node/11965>.
[121] Tarik Abdulhak, "Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina" (2010) 9 Int'l Crim L Rev 333 at 335.
[122] *Resolution 1503 (2003)*, SC RES 1503, UNSCOR, 2003, UN Doc S/RES/1503 (2003), Preamble and para 7.
[123] *Ibid* at Preamble.

gravity of the crimes and whether the individual involved constituted a "lower- and intermediate-rank accused." A War Crimes Chamber was created within the State Court, while a Special Department for War Crimes was established within the State Prosecutor's Office. Until 2008, there were five trial panels and two appellate panels containing two international judges and one domestic judge. The Special Department for War Crimes was also of mixed composition. After 2008, the composition switched to include two Bosnian judges and one international,[124] with the ultimate aim of becoming fully national by 2009 (later extended to 2012).[125]

Though it is clearly of mixed composition, it is worth remembering that the BWCC is merely one of three Chambers of mixed-international composition operating within the Criminal Division of the State Court of Bosnia, the others being Organized Crime and General Crime Chambers. Indeed, the judges may sit simultaneously in the different chambers. Each project is intended to be fully absorbed into the national courts. Therefore, though hybrid in structure, the BWCC might best be conceptualized as a regional project of strengthening the rule of law and creating national capacity,[126] as occurs in other jurisdictions such as national courts in the Caribbean and Africa. As one observer points out, "although it contains a significant international component, the WCC is essentially a domestic institution operating under international law."[127] This difference is worth remembering when later examining its superior performance relative to the other hybrid courts. Bosnia-Herzegovina has existed as a *de facto* protectorate of the EU's Office of the High Representative, whose policy objective is "a stable, viable, peaceful and multiethnic BiH, cooperating peacefully with its neighbours and irreversibly on track towards EU membership."[128] To the extent it has performed better than other hybrid tribunals, it may be as a result of the significant advantages it enjoys. Though generally enthusiastic about the Chamber, Ivanisevic warns that the Bosnian model may not be applied easily elsewhere because "[t]he creation of the War Crimes Chamber has taken place ten years after the end of the war, in a country with a functioning infrastructure and administration, skilled human resources, [and] a strong and powerful international presence under the political authority of the OHR [Office of the High Commissioner]."[129]

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[124] Office of the High Representative, *War Crimes Chamber Project: Project Implementation Plan. Registry Project Report* (2004) at 8, online: <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf >.
[125] Office of the High Representative, *Decision Enacting the Law on Amendment to the Law of the Court of Bosnia and Herzegovina* (2009), online: <http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=44283> , Article 1 [OHR, *Law on Amendment*].
[126] Ortega-Martin & Herman, *supra* note 35 at 10.
[127] Human Rights Watch, "Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina" (2006) at 2, online: Human Rights Watch <http://www.hrw.org/en/reports/2006/02/07/looking-justice-0>. [HRW, "Looking for Justice"].
[128] *Council Joint Action 2008/130/CFSP of 18 February 2008, Extending the Mandate of the European Union Special Representative in Bosnia and Herzegovina*, article 2, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:043:0022:0025:en:PDF>.
[129] Bogdan Ivanisevic, "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court" (2008) at 39, online: International Center for Transitional Justice

A Group of Experts created to explore various legal avenues for holding the Khmer Rouge accountable initially rejected the hitherto unprecedented concept of a hybrid tribunal in Cambodia. The rejection was based, *inter alia*, on the concerns of possible Governmental interference, the low level of professional competence of domestic jurists, and delay.[130] However, the UN Secretariat negotiators ultimately agreed upon a mixed tribunal structure, but only as a very reluctant compromise between the UN's desire for a fully international process and the Government's aim of retaining as much control as possible.[131] In 2002, the UN even withdrew from negotiations (ongoing since 1998) because the proposed structure departed too far from international control, stating that "as currently envisaged ... [the structure] would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have."[132] The hybrid structure that was agreed upon only emerged after a Group of Interested States used a General Assembly vote to force a very reluctant UN to capitulate.[133] Uniquely, the ECCC became a hybrid tribunal that mixes a minority of international judges with a majority of domestic equivalents to try those "most responsible" for crimes under international and domestic law committed between 17 April 1975 and 6 January 1979. Responsibility for prosecution and investigation was allocated between equal Cambodian and international co-prosecutors and co-investigating judges.[134] The Extraordinary Chambers only became fully operational in 2007.

In East Timor too, the hybrid structure that emerged was considered a second or even third choice alternative to an international tribunal (as in Cambodia) and as an emergency response to post-conflict exigencies (as in Kosovo). In December 1999, a report by Special Rapporteurs of the Commission on Human Rights recommended that an international tribunal commencing in "a matter of months" might be the most appropriate mechanism for prosecution of crimes surrounding the independence referendum if the Jakarta Government did not undertake a credible investigation and prosecution process.[135] While there was initially some support for such a tribunal, it diminished in the light of Indonesian

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<http://www.ictj.org/images/content/1/0/1088.pdf >.

[130] *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135*, UNGAOR, Annex, UN Doc A/53/850-S/1999/231 (1999) at paras 185-97.

[131] Craig Etcheson, "'A Fair and Public Trial': A Political History of the Extraordinary Chambers" in Stephen Humphreys and David Berry, eds, *The Extraordinary Chambers* (New York: Open Society Justice Initiative, 2006) 7 at 16-19.

[132] United Nations, Press Briefing, "Negotiations between UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders, Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York" (8 February 2002) online: United Nations <www.un.org/News/dh/infocus/cambodia/corell-brief.htm>.

[133] *Khmer Rouge Trials*, GA Res 57/228, UNGAOR, 57th Sess, UN Doc A/RES/57/228, (2003).

[134] *Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea* (6 June 2003) at Articles 5 and 6, online: Extraordinary Chambers in the Courts of Cambodia <www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf> [*ECCC Agreement*].

[135] *ECCC Agreement*, *ibid* at Articles 5 and 6.

reassurances that it would pursue justice fully in its own courts.[136] These reassurances were accepted by the UN Secretary-General.[137] A later Commission of Inquiry then recommended a bi-locating internationalized tribunal,[138] but what ultimately transpired was a dual-track process of an Indonesian Ad Hoc Human Rights Court for East Timor which would sit in Jakarta, while the UN Transitional Administration in East Timor (UNTAET) would establish a parallel process in Dili. Unfortunately, the former become the paradigmatic example of biased domestic proceedings and ultimately convicted only one relatively low-level Timorese.[139] The widespread reluctance to upset the fragile state of Indonesian democracy meant that no serious pressure was ever applied to Indonesia to accept an international tribunal.[140] The onus of justice would fall on the UN.

The greatest impetus for the creation of a tribunal in East Timor came not from the parlous state of the Timorese legal system, but rather INTERFET's application of its mandate in Security Council Resolution 1264 to restore peace and security by arresting individuals caught in the act or accused of committing serious offences and by initiating preventive detention.[141] As many as forty Timorese militia members were held in UN custody and needed to be charged or released promptly, precluding any resort to the lengthy process of establishing an international tribunal.[142] However, the East Timorese legal profession was in no fit state to deal with such cases. Necessity was the mother of this judicial invention. UNTAET Regulation 2000/15 of 6 June 2000 created international-majority Special Panels in the Dili District Court to deal specifically with accountability for the crimes against humanity and war crimes.[143] UNTAET Regulation 2000/16

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[136] *Letter Dated 26 January 2000 from the Minister of Foreign Affairs of Indonesia to the Secretary-General, in Identical Letters dated 14 March 2000 from the Secretary-General Addressed to the president of the General Assembly, the President of the Security Council, and the Chairperson of the Commission on Human Rights*, UNGAOR, 54 Sess, Annex, Agenda Item 96, UN Docs A/54/727 and S/2000/65 (2000).

[137] UN Secretary-General, *Situation of Human Rights in East Timor: Note by the Secretary-General* (1999) UN Doc A/54/660, at para74.6.

[138] *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UNGAOR, 54th Sess, Annex, UN Doc A/54/726 (2000), at para 153.

[139] On the prevalence of bias, see Stefanie Frease, "Playing Hide and Seek with International Justice: What Went Wrong in Indonesia and East Timor" (2004) 10 ILSA J Int'l & Comp L 283 at 287-88. On the final conviction statistics for the Indonesian ad hoc tribunal, see *Report to 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*, UNSCOR, Annex II, UN Doc S/2005/458 (25 May 2005) at paras 48 and 120 [*Commission of Experts*]

[140] Herbert D Bowman, "Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor" (2004) 18 Emory Int'l L Rev 371 at 381-382.

[141] *Resolution 1264 (1999)*, SC Res 1264, UNSCOR, 1999, UN Doc S/RES/1264 at para 3.

[142] Michael Kelly, *INTERFET Detainee Management Unit in East Timor* (2000), online: Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20(e).pdf>.

[143] Special Representative of the Secretary-General, *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, UNTAET, UN Doc UNTAET/REG/2000/15 (2000), s 1.1. Prior to this, another UN regulation provided for the establishment courts exercising exclusive jurisdiction in East Timor: Special Representative of the Secretary-General, *Regulation 2000/11 on the Organization of Courts in East Timor*, UNTAET, UN Doc UNTAET/REG/2000/11 (2000), s 10(3).

established an internationally-led Serious Crimes Unit (SCU) to investigate and prosecute the resulting cases.[144] Geopolitical marginalization, more than idealism, motivated the preference for a mixed tribunal over an international one. As Bassiouni noted, "East Timor is yet another case where national trials are insufficient and an ad hoc international tribunal is legally and morally justified but politically improbable."[145]

Of the earliest hybrid tribunals, only in Sierra Leone could the establishment of such a structure be said to be the product of a shared preference of both the UN and the Government. The latter resisted a fully-fledged international tribunal on the basis of a legitimacy argument that Sierra Leonean participation in the trial process was imperative.[146] The Security Council Resolution requesting the Secretary-General to negotiate with the Government to establish the SCSL appeared to accept arguments about the potency of hybrid courts to develop capacity and legitimacy. The Resolution made specific reference to the need to address "the negative impact of the security situation on the administration of justice and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone."[147] Nevertheless, the Preamble to Security Council Resolution 1315 left no doubt that the primary objective of the international community in establishing the Court was to reduce the threat to international peace and security that the impunity there presented.[148] With between 50,000 and 73,000 ex-combatants in camps "more familiar with a life of violence and impunity than of schooling or job training,"[149] the risk of a resumption of war in a country where a small band of rebels could convulse society in war for a decade was ever present.[150] In such a precarious and hostile peacebuilding ecology, there was a clear short-term need to make the peace process irreversible. Accountability was a key tool in doing so: "[t]he consensus among policy-makers was that peace would remain fragile until

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[144] Special Representative of the Secretary-General, *Regulation 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET, UN Doc UNTAET/REG/2000/16 (2000), s 14.6.

[145] M Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational Publishers, 2003) at 566.

[146] Tom Perriello and Marieke Wierda, "The Special Court for Sierra Leone Under Scrutiny" (2006) at 4, online: International Centre for Transitional Justice <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf > [Perriello & Wierda, "Special Court for Sierra Leone"].

[147] *Resolution 1315 (2000)*, SC Res 1315, UNSCOR, 2000, UN Doc S/RES/1315, at 2.

[148] The very first paragraph of the Preamble expressed deep concern at the prevailing situation of impunity in Sierra Leone, while the eighth Preambular paragraph recognized "that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace" (*ibid*).

[149] Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE) & International Center for Transitional Justice (ICTJ), *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone* (2002) at 13, online: International Center for Transitional Justice <http://www.ictj.org/images/content/0/9/090.pdf>.

[150] The PRIDE and ICTJ report quotes one ex-combatant: "Foday Sankoh, a single individual, started a war that caused so much mayhem. Imagine what harm fifty disgruntled ex-combatants could do with support from anybody" (*ibid* at 11).

certain individuals (and, by implication, factions) were neutralized."[151]

Unlike the Special Panels and Regulation 64 Panels which were the result of legislative action by transitional administrations, the SCSL was established by treaty between the Government of Sierra Leone and the UN on 16 January 2002.[152] The SCSL was hybrid in terms of the law applied (international and domestic) and the personnel. Two out of five Chamber judges were to be appointed by the Government of Sierra Leone with the other three appointed by the UN.[153] The SCSL was, in Cassese's words, "conceived as a new type of judicial body, designed to avoid the pitfalls of two ad hoc international criminal tribunals."[154] However, the pitfalls it was primarily concerned with were delay and cost more so than the failure to develop judicial capacity or inculcate human rights norms. Though there was a loosely defined aspiration to leave a legacy (a legacy officer was appointed in the Registry and a white paper was produced in late 2005),[155] no systematic capacity-building initiatives were agreed in the treaty. A Management Committee responsible for advising and funding the Court instead prioritized the completion of operations "within tight budgets and timeframes."[156] The primary aim, as stated by its independent assessor, remained "to dispense justice expeditiously, in a cost-effective manner and with a direct impact on the population amongst which crimes had been perpetrated," and indeed was welcomed as such.[157]

The Special Tribunal for Lebanon was established to prosecute persons responsible for the attack on 14 February 2005 that resulted in the death of Prime Minister Rafik Hariri and in the death or injury of other persons.[158] It has jurisdiction only over domestic crimes under the Lebanese Penal Code.[159] International judges are appointed by the UN Secretary-General in consultation with the Beirut Government and constitute a majority, while an international Prosecutor appointed in the same fashion is served by a Lebanese Deputy Prosecutor, with a similarly mixed staffing structure beneath.[160] Even with the STL, the primary motivation for establishing it was the impunity-based "if not" argument: to fail to punish assassinations would

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[151] Perriello & Wierda, *supra* note 146 at 12.
[152] *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, UNSCOR, Appendix II, UN Doc S/2002/246 (16 January 2002). The Statute of the Court is annexed to the Agreement.
[153] *Statute of the Special Court for Sierra Leone*, art 12.1(a).
[154] Antonio Cassese, *Independent Expert Report on the Special Court for Sierra Leone* (2006) at 65, online: SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> [Cassese, *Report on the SCSL*].
[155] Perriello & Wierda, *supra* note 146 at 39.
[156] OHCHR, *supra* note 55 at 8.
[157] Cassese, *Report on the SCSL*, *supra* note 154 at 65.
[158] *Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Annex, UN Doc S/RES/1757 (2007) [*Lebanon Agreement*].
[159] *Statute of the Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Attachment, UN Doc S/RES/1757 (2007), at Article 2.
[160] *Lebanon Agreement*, *supra* note 158 at Articles 2-4.

only allow future assassinations "to materialize with impunity."[161]

2. Finance

Though Katzenstein and Mendez have argued that hybrid tribunals were designed partly or wholly in response to criticisms of the ad hoc tribunals,[162] it seems the most pressing of the lessons of The Hague and Arusha were more financial than normative. If the need for domestic ownership and judicial emergencies can be said to have partially motivated the formation of hybrid tribunals, the financial attractiveness of cheaper hybrid tribunals relative to the ICTY and ICTR (which at the time amounted to 15 per cent of the UN budget with costs between 1995–2003 of US$22.5 million and US$45.5 million per conviction respectively[163]) may with greater certainty be said to have been determinative of the structure.[164] Indeed, Cassese identifies the lack of will by major powers to fund an international tribunal as one of two prime motivating factors for the creation of hybrid tribunals.[165] Even the UN Secretary General admitted that the genesis of the hybrid innovation was a response to "tribunal fatigue."[166] The biggest savings hybrid tribunals offer is in terms of salaries—local actors are paid at local rates while international staff can be paid salaries to reflect the cost of living in the area, which are far less than those in The Hague. Collection of evidence and day-to-day operation of the court were anticipated to be much cheaper, one of the few predictions about hybrid tribunals that proved unimpeachably accurate.[167] Most notably, the BWCC's €13–14 million annual budget,[168] funded jointly and sustainably[169] by EU-American donor states and the Bosnian Government, was at one stage estimated to cost about 6 per cent of the funds

[161] Nadim Shehadi and Elizabeth Wilmshurst, "The Special Tribunal for Lebanon: The UN on Trial?", online: (2007) Chatham House Middle East/International Law Briefing Paper MEP/IL BP 07/01 at 9 <http://www.chathamhouse.org.uk/files/9408_bp0707lebanon.pdf>.
[162] Katzenstein, *supra* note 34; Mendez, *supra* note 55 at 62.
[163] George S Yacoubian, "Evaluating the Efficacy of the International Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law" (2003) 165 World Affairs 133 at 136.
[164] "Realists would argue that the rise of the 'special panel model' and the 'hybrid tribunal model' is not the result of the international community wringing its hands over the best way to foster the growth of domestic legal culture. Rather, it is simply a result of funding constraints as a by-product of donor country fatigue after the establishment of tribunals like the ICTY and the ICTR" (Hussain, *supra* note 96 at 560).
[165] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 334.
[166] As the UN Secretary-General admitted: "Partly in reaction to the high costs of the original tribunals, the financial mechanisms of the mixed tribunals for Sierra Leone and for Cambodia have been based entirely on voluntary contributions." UN Secretary-General, *Rule of Law Report*, *supra* note 30 at para 43.
[167] For example, a total of US$213,000 per annum funded two judges on a Special Panel. See e.g. Thordis Ingadottir, "The Financing of Internationalized Criminal Courts and Tribunals" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, 271 at 286.
[168] The Prosecutor's Office of Bosnia & Hergegovina and The Registry, *The General Budgets for the Judicial Institutions of BiH*, cited in Ivanisevic, *supra* note 129 at 23.
[169] The budget was deliberately designed to be sustainably based on national justice sector wages and ultimately is to be absorbed entirely into the national budget (Ivanisevic, *supra* note 129 at 23 and 1).

considered essential for the operation of the ICTY.[170]

Though hybrid tribunals were welcomed by policy-makers (but criticized academically) as "shoestring justice"[171] and "justice on the cheap,"[172] one caveat that should have been readily apparent is that, as in many legal systems, the quality of justice rendered would be proportional to resources provided. While the ICC, ICTR and ICTY are funded by assessed contributions in accordance with a pre-defined scale of assessment of costs, the funding of the hybrid tribunals has been more precarious. The 64 Panels and Special Panels processes were primarily funded from the stretched UN administration budgets. The Special Panels budget hit a maximum of US$7-8 million in its final year,[173] while the usual US$6 million budget proved woefully inadequate for the needs of even the most rudimentary trial in the previous years.[174] The ECCC is funded primarily by voluntary contributions with the Government making up the balance. Similarly, voluntary contributions from States make up 51 per cent of the STL's budget, with the Beirut Government financing the remainder.[175] The SCSL's annual budget was to be entirely funded by voluntary international contributions from donors but fell short. In its concluding phase, annual budgets hovered at the US$25–30 million mark[176] and led to shortcomings in the quality of trial.[177] All tribunals at some stage lacked equipment and struggled to recruit qualified international personnel. Even before hybrids began, the absence of assessed contributions and their justification as cheaper alternatives to international tribunals should have checked some of the more optimistic assessments of their potential. As Cohen notes, hybrid tribunals by their nature tend to be under-funded, because important court functions like outreach, legacy and training have "not appeared essential."[178] If hybrid tribunals enjoyed an inherent promise, the inescapable inference is that the

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[170] HRW, "Looking for Justice", *supra* note 127 at 2.
[171] Avril McDonald, "Sierra Leone's Shoestring Special Court" (2002) 84:845 Int'l Rev Red Cross 121.
[172] David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" online: (2002) 61 Analysis from the East-West Center, <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>.
[173] David Cohen, "'Justice on the Cheap' Revisited: The Failure of the Serious Crimes Trials in East Timor" (Analysis from the East-West Center, Asia Pacific Issues No. 80), online: (2006), 5 < http://www.eastwestcenter.org/fileadmin/stored/pdfs/api080.pdf>.
[174] In 2002, the budget saw a meagre increase to US$6.3 million (Ingadottir, *supra* note 167 at 283). Things improved little in the 2003 to May 2005 period, where the operating cost of the units was US$14.4 million (*Commission of Experts*, *supra* note 139 at para 99).
[175] *Lebanon Agreement*, *supra* note 158 at Article 5.
[176] The voluntary contributions consistently fell short so the budget for the first three years was halved to US$57 million and even then voluntary contributions fell short, with the budget subsidized by UN subventions. The Court's Management Committee estimated in the completion budget approved on 15 May 2007 that the Special Court for Sierra Leone needed US$89 million to conclude its operations US$36 million for 2007, US$33 million for 2008 and US$20 million for 2009 (European Union, Parliament, *Official Journal of the European Union*, C187E (24 July 2008)at 243, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:187E:0242:0244:EN:PDF>.
[177] James Cockayne, "The Fraying Shoestring: Rethinking War Crimes Tribunals" (2005) 28 Fordham Int'l L J 616; McDonald, *supra* note 171.
[178] Cohen, "Hybrid Justice", *supra* note 35 at 13.

tribunals were "being asked to do more than their *ad hoc* cousins, but with fewer resources."[179]

3. Lack of Legacy Planning

The different hybrid tribunals established were the result of different bargains and were given very different mandates, which in turn resulted in differing structures. In this context, any wider rule of law legacy was an afterthought. Apart from the unique circumstances of the BWCC which will be discussed later, the "legacy ideal" was never specifically incorporated into the mandates of the tribunals, and so was marginalized as a priority: "Without an explicit mandate on the issue, the interpretation of legacy is, to a large extent, left to the discretion of individual actors. Many will automatically gravitate to an approach which focuses on the efficient disposing of cases.[180] The point made here is in a sense similar to one made by Nouwen, who, at an early stage in scholarly analysis of hybrid tribunals, outlined the fundamentally different legal foundations, history, staffing, and applicable law of the tribunals. She doubted that any uniform promise could be ascribed to a category of court that had only the very marginal common defining characteristic of mixed staffing.[181]

Given these highly compromised origins of the tribunals and the palpable lack of sufficient financial and diplomatic support to enable them to realize any potential beyond closing impunity gaps, why did such exaggerated and wishful hopes attach to them? One possible answer may lie in David Kennedy's theory of tool enchantment which posits that presumptions, biases, blind spots, and professional vocabularies of humanitarians lead them to attach an "inherent humanitarian potency" to a particular tool such as the hybrid tribunal model, which might explain the gap between the promise anticipated and the conditions on the ground.[182] He notes a tendency of academics and policymakers in the human rights community to attach to their ideas and institutions a humanitarian potential abstracted from the context of its application. International criminal law, with its noted tendency towards "judicial romanticism" about what trials can achieve, may be particularly susceptible in this regard.[183] Kennedy argues that the particular peacebuilding ecology of the area is overlooked as myths of progress are substituted for reasoned application of tools to contexts and the evaluation of consequences.[184] The gaps between theory and practice in the hybrid tribunals may bear out such an hypothesis, and provide an explanation for the recent diminution in advocacy.

By comparison with the more optimistic claims of their potential legacy

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[179] Cockayne, *supra* note 177 at 618.
[180] OHCHR, *supra* note 55 at 7.
[181] Nouwen, *supra* note 35 at 190-214.
[182] David A Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: New Jersey: Princeton University Press, 2004) at 119.
[183] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 Am J Int'l L 7 at 31.
[184] Kennedy, *supra* note 182 at 141.

at the emergence of the hybrid model, the more realistic position may have been that of Condorelli and Boutrouche who took a noticeably circumspect look at the purposes of the internationalized courts. They succinctly argued that "[such tribunals] aim to accomplish a certain objective and are bound to disappear once they do so."[185] The lack of legacy planning tends to vindicate this position.

V. Expectations Dashed

With the cessation of the hybrid tribunals in East Timor and Kosovo by the middle of the decade, the impending completion of the Sierra Leonean process with the Charles Taylor trial, and observation of a combined eight years of investigation, prosecution and trial in Cambodia and Bosnia, one can assess how far short of initial hopes they have fallen. First, it is necessary to summarize the performance of each tribunal under each of the areas where they were deemed to have added value over purely national and purely international trials, bearing in mind that while individual studies are abundant, comparative study has lagged behind. The heterogeneity of approaches evident in the six hybrid tribunals is a testament to the flexibility the hybrid structure lends. What is apparent is that notwithstanding financial shortcomings and diplomatic weakness, each tribunal struggled when it came to making the predicted cultural, normative, and institutional impacts on domestic rule of law. It is these particularized dissatisfactions that appear to have led to a general dampening of enthusiasm for hybrid tribunals.

1. Capacity-Building

Take for example the failure to build capacity and the related phenomenon of "misplaced ownership" for which all hybrid tribunals have been criticized. Hopes for local ownership fell short of expectations in all three hybrids. Though it was argued that local ownership imported by the hybrid model should be maximized to the extent compatible with fair and competent trial in the pursuit of legitimacy and capacity-building, the reality at the time was that: UN officials were vetoing negotiations with Cambodia because local participation was too great, UNMIK was forcefully overturning decisions of Kosovar-only courts, and the Sierra Leone Government was relinquishing ever-greater control over the bench and prosecution to internationals. The great danger, overlooked for the most part in scholarly analysis, but readily apparent in the affected States, was that international dominance, even where tempered by local participation, could be perceived as imperialism little different to the ad hoc tribunals. This danger was heightened where international judges served in a majority, or where domestic prosecutors and defence counsel served merely as deputies to international figures who controlled proceedings.[186]

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[185] Condorelli & Boutrouche, *supra* note 100 at 428.
[186] It should be pointed out that Dickinson was one of the few to note this danger (Dickinson,

Though it was assumed that hybrid tribunals would be genuinely cooperative, the tendency of both controlling partners (the UN and the domestic governments) in each tribunal has been to transfer as much responsibility to international actors as possible, with the exception of the BWCC. The Timorese Government considered the Special Panels to be a purely international project, given their preference to move on in their relations with Indonesia and focus on development.[187] Ambiguity over ownership and allocation of responsibility in the process allowed both sides to avoid responsibility.[188] The Sierra Leone Government gave the UN almost full responsibility for the SCSL, and played little or no part in trials. It even deliberately scuppered opportunities for involvement, choosing to appoint only three national judges out of the possible four appointees they could make to the Trial and Appeals Chambers.[189] Indeed, they even went so far as to amend the Agreement to replace the words "Sierra Leone judges" with "judges appointed by the government of Sierra Leone."[190] The Government also chose to appoint a foreign Deputy Prosecutor when it was expected they would appoint a national.[191]

In Kosovo, Regulation 2000/64 gave international actors the opportunity to take over entire cases without any domestic involvement. Contrary to the logic of progressive development where international involvement is phased out over time, each phase in UNMIK's judicial response to insecurity was marked by an increase in the presence of international judges and international control. This phenomenon ran counter to intuitions and early expectations among theorists in the area that as the domestic system is strengthened, international involvement would be decreased. Instead, what occurred was a reactive "linear reverse model" that initially gave responsibility to Kosovars only to then wrest it back.[192] Naarden and Locke argue that international prosecutors "often had a negative impact on the institutional development of local prosecutorial services, as the decision by an [international prosecutor] to assume a case frustrated the opportunity to

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"Promise of Hybrid Tribunals", *supra* note 25 at 306).

[187] "[The serious crimes program], which has been largely internationally operated is clearly perceived by the Government as the responsibility of the international community. It is also reasonably clear that it is politically and financially convenient to the Government of Timor-Leste for the responsibility for the SCP
to rest with the international community, particularly in the context of Timor- Leste's continued reliance upon the international community for financial support, and in the face of the emerging realities of the politics of the Indonesian- Timor-Leste bilateral relationship"
(UNMISET, "Strategic Plan for the Justice Sector" cited in Caitlin Reiger & Marieke Wierde, "The Serious Crimes Process in Timor-Leste: In Retrospect", online: (2006) International Centre for Transitional Justice Prosecutions Case Studies Series, at 33 <http://www.ictj.org/static/Prosecutions/Timor.study.pdf>.

[188] Cohen, "Hybrid Justice", *supra* note 35 at 9.

[189] *Statute of the Special Court for Sierra Leone*, *supra* note 153 at art 12.1.

[190] Abdul Tejan-Cole, "The Special Court for Sierra Leone: Conceptual concerns and alternatives" (2001) 1 African Hum Rts L J 107 at 119.

[191] *Statute of the Special Court for Sierra Leone*, *supra* note 153 at art 15(4). The first two were British and Australian, but a Sierra Leonean was appointed in 2008 and even served as Acting Prosecutor in 2009.

[192] Hartmann, *supra* note 117 at 14.

'test' the hypothesis that local prosecutors were unable or unwilling to take on that case."[193] Instead of responding to widespread dismay over ongoing impunity, over time international prosecutors moved from ethnically sensitive prosecutions of war crimes to those organized crime cases that local prosecutors were too fearful to take.

The reluctance of each State (bar Cambodia and Bosnia) to assume ownership of the process increased the likelihood of marginalizing national judges and prosecutors into minor assistance positions, which could only serve to further diminish any sense of ownership in the process the local legal community had. The approach of the Dili, Freetown and UNMIK/Prishtina Governments reinforced what Perriello and Wierda call "the spaceship phenomenon"— where the court is seen by the people as an irrelevant, alien anomaly.[194]

While domestic authorities were largely marginalized or disengaged in each Tribunal, international staff that dominated the process focused almost exclusively on the traditional goal of closing the impunity gap. Mooted schemes of instruction or skills transfer to domestic actors were left by the wayside.[195] The focus at all times was on securing convictions at the expense of integrating local professionals or leaving a legacy of competence. Mentoring and professional development played little role in any of the mixed tribunals, which were hybrid in form but never in ethos. This suggests that professional development and mentoring may invariably suffer diminished roles where successor justice is conceptualized primarily as a matter of combating impunity. Given the weaknesses of the Kosovar, Sierra Leonean and Timorese judicial systems after years of ethnically or politically motivated exclusion, it was expected by some commentators that every advantage for collaboration and development would be maximized. However, even in Sierra Leone, which arguably planned the most ambitious approach to engaging in holistic judicial reconstruction through the Special Court's embryonic legacy and outreach programmes, capacity-building was minimal because so few nationals were involved. This, in addition to the language problems that affected each tribunal, exacerbated the disconnection local legal professionals felt from the SCSL.[196] The Court has been criticized for its failure to integrate Sierra Leoneans in positions of high responsibility,[197] and for its minimal impact on the national judiciary overall.[198]

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[193] Gregory L Naarden and Jeffrey B Locke, "Peacekeeping and Prosecutorial Policy: Lessons From Kosovo" (2004) 98 Am J Intl L 727 at 729.
[194] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 2.
[195] For example in the Timorese context, see Katzenstein, *supra* note 34 at 265-66.
[196] OHCHR, *supra* note 55 at 10.
[197] Thierry Cruvellier, "From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test" (2009) at 30-33, online: International Center for Transitional Justice at <http://ictj.org/static/Publications/ICTJ_SLE_TaylorTrialtoLastingLegacy_pb2009.pdf >.
[198] "At this stage, I do not think that it is realistic to expect that the Court's legacy will directly: (a) ensure greater respect for the rule of law in Sierra Leone; (b) promote or inspire substantive law reforms; (c) improve the conditions of service and remuneration of judges in Sierra Leone; or (d) alleviate corruption allegedly existing in the judiciary. The Court may contribute to these

In Kosovo, the 64 Panels had no capacity-building remit whatsoever because the hundreds of previously marginalized ethnic Albanian judges and prosecutors were already deemed to be sufficiently competent. It was the possibility of ethnic bias, not lack of competence, which was the primary motivation for introducing international assistance. Consequently, international and local prosecutors had little contact as the former simply appropriated cases for themselves, resulting in the separation of Kosovar and international actors.[199] The presence of international judges became "unfortunately reminiscent of the 'parallel system' the Kosovar Albanian community had struggled so long against."[200]

In East Timor's atmosphere of alternating Governmental indifference and hostility, international actors took control of all major units and marginalized Timorese involvement. Initially, there were no plans to integrate Timorese professionals or to leave a legacy of prosecutorial competence. Given the rushed and overworked nature of the Special Panels, more time was spent clearing the docket than mentoring. East Timorese began to migrate from Serious Crimes to the exclusive practice of ordinary crimes, while the Special Panels became a fiefdom of international lawyers only. As one-time international defence mentor Caitlin Reiger put it, "[t]hey feel that [the tribunal] has nothing to do with them."[201] Because there was no Timorese capability to conduct investigations and prosecutions after independence, the work of the SCU continued to be dominated by international staff. By the close of the trials in 2005, there were only thirteen Timorese trainees in the Unit, yet they were never given responsibility for appearing in court and were confined to preparation work.

Far from catalyzing domestic assumptions of responsibility, in both East Timor and Kosovo the hybrid tribunals built dependence over time rather than competence. Independent observers of the Timorese justice system, which remains dominated by international judges and prosecutors in the years after the Special Panels, have consistently warned against the dangers of a "dependency syndrome."[202] This is notably similar to the position of international authorities in Kosovo, where even today forty international judges "tend to handle the more challenging cases, including politically charged crimes and ethnically divisive disputes."[203] Though the structure of

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goals, but they will only materialise as an indirect effect, in the long run, and thanks to other concomitant factors" (Cassese, *Report on the SCSL*, *supra* note 154 at para 279).

[199] Julie Chadbourne, "Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004", online: (2006) 18:4(D) Human Rights Watch at 11 <http://hrw.org/reports/2006/kosovo0506/kosovo0506web.pdf>.

[200] Wendy S Betts, Scott N Carlson & Gregory Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons-learned in Efforts to Establish a Judiciary and Rule of Law" (2001) 22 Mich J Int'l L 371 at 379.

[201] Quoted in Katzenstein, *supra* note 34 at 263.

[202] UNDP Mid-term Evaluation Team, *UNDP Strengthening the Justice System in Timor- Leste Programme: Independent/External Mid-Term Evaluation Report September 2007* (2008) at 59, online: NORAD <http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109793>.

[203] International Crisis Group, "The Rule of Law in Independent Kosovo", online: (2010) Europe

the ECCC reflected an explicit lack of confidence on the part of the UN in the Cambodian justice system,[204] no systematic effort is being made through the process to improve it.

As noted above, the BWCC constituted the exception to this trend. Though conceived as a joint initiative of the ICTY and OHR, the organizing principle of the Chamber was that accountability should remain the responsibility of the Bosnian people.[205] This principle had both a positive and a limiting effect on national capacity-building. It was positive in that the BWCC was to be a permanent national structure with a six-phase plan to transition from international dependence to fully-functioning national court. It was limiting in the sense that the capacity it sought to develop was entirely limited to war crimes, and as such could make a finite contribution to the wider Bosnian criminal law on which the stability of the Chamber will ultimately depend. Certainly by comparison to the other hybrid courts generally (and the neighbouring 64 Panels particularly), the BWCC model was a more appealing example of sustainability and ownership. As noted earlier, the trial and appellate panels initially consisted of two international members to one domestic, a ratio which was reversed after 2008. It was intended that by 2009 the Chamber would be fully domestic, but this has been extended to 2012.[206] Nevertheless, progress has been significant—in 2010, there were forty-one national judges compared to seven international ones. Commendably, international judges and prosecutors have deliberately played a "behind-the-scenes role," deferring to their national counterparts in all but the initial Rule 11*bis* referrals.[207] One judge claims, "[i]t is good that nationals take responsibility. … In the long-term it is the only way to restore public confidence in the judiciary."[208] Indeed, the mentoring relationship in Bosnia has been reversed, with international judges being assigned local mentors.[209] Criminal defence has mostly been by Bosnians, spurring an extraordinary amount of training by the OKO—within the first two years, it had trained approximately 350 lawyers.[210] After the overall Bosnian Criminal Procedure Code was revolutionized in 2003 to switch from an accusatorial system to a more common law adversarial process, international staff in the Chamber were commended for contributing to the capacity of local legal professionals in applying it.[211]

On the other hand, the Chamber has been criticized for the merely

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Report No 204 at 15 <http://www.crisisgroup.org/~/media/Files/europe/balkans/kosovo/204%20The%20rule%20of%20Law%20in%20Independent%20Kosovo.ashx>.

[204] OHCHR, *supra* note 55 at 24.

[205] Office of the High Representative, "War Crimes Chamber Project: Project Implementation Plan–Registry Progress Report" (2004) at 4, online: <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf >.

[206] OHR, *Law on Amendment*, *supra* note 125 at Article 1.

[207] Ivanisevic, *supra* note 129 at 11-12.

[208] *Ibid* at 11.

[209] *Ibid* at 40.

[210] HRW, "Looking for Justice", *supra* note 127 at 24.

[211] *Ibid* at 10. Ivanisevic notes: "A Bosnian judge insisted that the experience of foreigners from the common law tradition was of great use to the domestic practitioners who were adapting to the adversarial system" (Ivanisevic, *supra* note 129 at 42).

"sporadic" nature with which it interacted with the cantonal and district courts of federalized Bosnia, where most ordinary and war crimes will be tried in future.[212] Expectations expressed initially, that the BWCC could strengthen the capacity of the Bosnian legal system overall,[213] are likely to be disappointed. While standards of trial have been high, most cases have dealt with war crimes and crimes against humanity, which will have limited application to the other branches of the Bosnian legal system in an era of peace and stability. As Ortega and Herman note, "[t]his makes it less important that the WCC or State Court, in general, participate in direct capacity-building to the rest of the members of the judiciary."[214] The sustainable domestic capacity which the BWCC will undoubtedly generate will be ring-fenced in war crime trials indefinitely. The ICTY is due to end in 2013, meaning the BWCC will take full responsibility for trying the most serious intermediate suspects left over from the conflict. There is an intention to prosecute as many perpetrators as possible—the National War Crimes Prosecution Strategy states that around 8,000 people remain under investigation.[215] Bosnian prosecutors lack the discretion to discard cases, as they are obliged by law to initiate a prosecution if evidence exists that a criminal offence has been committed.[216] While developing this competence is undoubtedly useful for a Bosnian justice system, and is undoubtedly more aggressive than its comparators in punishing war crimes in the long-term, this approach is perhaps less ambitious than the hopes many advocates entertained for the capacity-building potential of hybrid tribunals.

While hybrid structures temporarily filled the extant skills and trust gaps in each situation, they could not repair them. In none of the first three hybrid tribunals (East Timor, Kosovo, and Sierra Leone) could it be said that "solidarity" won out at the expense of "substitution."[217] In fact, it can be argued that the hybrids replicated the tendency of internationally-driven courts to move issues of justice away from politically accountable actors to less accountable international ones in States where such accountability needed to be inculcated. The later Bosnian and Cambodian tribunals witnessed something of a swing towards domestic control over time, but only the former took responsibility for developing the local justice system. It is as yet too early to assess how the international-domestic dynamic will function in the Special Tribunal for Lebanon, but its remote location in the Netherlands and international majority may replicate the remoteness of the

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[212] *Ibid* at 29.
[213] Lillian Barria and Stephen Roper, "Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY" (2008) 9 Hum Rts Rev 317 at 327-328.
[214] Ortega-Martin & Herman, *supra* note 35 at 20.
[215] Morten Bergsmo et al, "The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina" (2009) Annex 2 at 183, online: International Peace Research Institute <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=106723>.
[216] Criminal Procedure Code, Official Gazette of BiH, No 36/2003 (21 November 2004) atArticle 17.
[217] Rule of Law Report, *supra* note 30 at para 17.

Charles Taylor trial. One can excuse the failure to build capacity by the evident need to process case backlogs. However, this ultimately begs the question of whether it is realistic in the first place to expect a relatively superficial process of mentoring by international actors and observation by domestic personnel to significantly develop professional competence. OHCHR's review of hybrid tribunals suggest that more careful planning and consultation can make skills transfer a reality;[218] however, the imperative to prosecute, try, and defend as many cases as possible in the shortest period of time is not consistent with the type of patient, on-the-job integration successful mentoring requires. The experiences of the hybrid tribunals counsel the need to be realistic about their capacity-building potential. The idea that a self-sufficient criminal justice system could arise in such difficult post-conflict conditions from a mentoring process in courts with other, more pressing, short-term requirements is, in retrospect, overly optimistic and finds little support in judicial reconstruction literature. Given that justice system reconstruction in the fullest sense of the word could take over a generation to take shape,[219] it is inappropriate to judge hybrid tribunals by this standard. A decade's experience suggests it is possibly utopian to expect significant impact from an unavoidably superficial process of cooperating and/or mentoring. In Sierra Leone, Kosovo, Bosnia, and eventually in East Timor, professional development was ultimately entrusted to legal training centres.[220]

2. *Legitimacy*

The second main contention about the promise of hybrid tribunals was that their trials would be more legitimate in the eyes of the domestic population relative to purely international or purely domestic trials, because of their location and the impartiality international involvement would guarantee. The argument that domestic location would encourage greater attendance than if a cross-border odyssey to a foreign-based court was required is belied somewhat by the fact that "often, the only people who attended Special Panel hearings were monitors and the occasional journalist; few members of the public were ever present."[221] Kendall and Staggs note that sometimes at the SCSL there were as little as two people in the gallery, though this figure improved when witnesses testified openly.[222] Studies of popular attitudes to the tribunals show a lack of interest, and in some cases

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[218] OHCHR, *supra* note 55 at 23.
[219] Thomas Carothers, "The Rule of Law Revival" (1998) 77 Foreign Affairs 95 at 105.
[220] For example, the Kosovar Judicial Institute (KJI) was established in February 2000. In Bosnia, a number of specific institutions have taken responsibility for development of the judiciary and prosecution. East Timor created a Legal Training Centre in 2005.
[221] Reiger and Wierda, *supra* note 187 at 31.
[222] Sara Kendall and Michelle Staggs, *From Mandate to Legacy: The Special Court for Sierra Leone and a Model for "Hybrid Justice"* (2005) online: War Crimes Studies Centre, University of California, Berkeley <http://www.hrcberkeley.org/download/BWCSC_Interim_Report.pdf> at 29. The BWCC represents an improvement, at times attracting only three or four (Ivanisevic, *supra* note 129 at 36).

hostility, towards the processes.[223] It is far from clear that the actual trials met the aforementioned minimal Dickinson test of acceptance by those observing its procedures.[224] It would appear that the case for national location was overstated to begin with. Security-driven considerations have overridden any commitment to domestic location as the Charles Taylor trial and the Special Court for Lebanon returned to the spiritual home of international criminal law in The Hague.

Outreach has, over time, become recognized as central to the legacy of international tribunals. Ivanisevic argues that in the battle against bias and lack of knowledge, "a well-designed outreach strategy, rather than the presence of internationals, is of decisive importance."[225] Outreach was non-existent in East Timor[226] but is relatively successful in the ECCC's Public Affairs Office[227] and was particularly rewarding in Sierra Leone.[228] Perhaps surprisingly given its strength in other areas, the BWCC's Public Information and Outreach Section has been understaffed and has underperformed, especially with regard to outreach in perpetrator communities and engaging media interest.[229]

Nevertheless, it appears that issues like location and outreach are less significant in terms of public satisfaction than the prosecution policy adopted. Attending trial, or being better-informed about it, ultimately matter far less than whether the population disagrees with the prosecution policy or the manner in which trials are conducted. An examination of national attitudes to the hybrid tribunals show that neither of the divergent policies in East Timor (widespread accountability for physical perpetrators) or Sierra

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[223] Stanley notes that "few survivors knew about the judicial processes established in Jakarta (the Ad Hoc Court) and Dili" but of those aware of the latter, survivors took "a uniformly negative view with regard to the Dili process" (Elizabeth Stanley, "Torture Survivors: Their Experiences of Violations, Truth and Justice" (2007) at 4, online: Judicial System Monitoring Programme <http://www.jsmp.minihub.org/Reports/2007/Tortura/JSMP%20Torture%20Survivors%20and%20Transitional%20Justice%20(Final).pdf>). See also Piers Pigou, "Law and Justice in East Timor – A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor" (2004), online: Asia Foundation <http://www.asiafoundation.org/pdf/easttimor_lawsurvey.pdf>, which notes general lack of interest. On the other hand, Artzt notes a general receptiveness domestically to the SCSL (Donna E Artzt, "Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone" (2006) 603 Annals Am Acad Pol & Soc Sci 226 at 233). Cambodian attitudes towards the ECCC are quite positive at present, but surveys find a general lack of awareness about the trials (Phuong Pham et al, *So We Will Never Forget: A Population-Based Survey On Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Centre, University of California Berkeley, 2009), online: University of California, Berkeley, Human Rights Center <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>).

[224] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 301.

[225] Ivanisevic, *supra* note 129 at 43.

[226] The Special Panels as a whole never had any dedicated outreach unit.

[227] Ortega-Martin & Herman, *supra* note 35 at 23. It produces a court report every month and publishes materials explaining the work of the Chambers.

[228] Cassese, *Report on the SCSL*, *supra* note 154 at 59. The ECCC website demonstrates a vigorous outreach programme, online Extraordinary Chambers in the Courts of Cambodia <http://www.eccc.gov.kh/english/outreach.aspx>.

[229] Ivanisevic, *supra* note 129 at 1 and 33.

Leone (selective accountability for organizers of violence) were met with public approval. Human Rights Watch noted in Sierra Leone that "local civil society groups … expressed frustration that a limited number of regional or mid-level commanders known for their notorious behaviour, some of whom physically carried out the crimes, have escaped indictment by the Special Court."[230] This was so even though indictments were the result of consultations by the Prosecutor with the general public on who bore greatest responsibility.[231] On the other hand, many Timorese citizens questioned the fairness of only convicting their low-level countrymen when the main organizers of the violence were safe in Indonesia or in West Timor.[232] Bosnian citizens have equally expressed frustration at the lack of "big fish" perpetrators, notwithstanding the ICTY trials and the Rule 11*bis* procedure.[233] Recent studies on international criminal tribunals increasingly show that there are many aspects to justice that criminal trials cannot fulfil for victims. The perceived legitimacy of tribunals is inextricably linked with a plethora of issues at multiple levels such as the progress of social reconstruction and reconciliation, of which location and national involvement are but tangential factors.[234] While foreign location of tribunals does detract from the legitimacy of a trial process, assertions that domestic location would ensure public acceptance have proven somewhat superficial.

The other argument in terms of the legitimacy of hybridized trials was that the international component would import impartiality and undermine the perception (or reality) of victor's justice or politicization of trials. Transitional justice is so inherently political that, historically, the temptation for Governments to interfere has proven irresistible. The biased proceedings in Kosovo prior to Regulation 2000/64 suggest that in very polarized post-conflict States international involvement is necessary to secure the impartiality and independence of the processes. However, the experience of the other tribunals suggests that even significant international involvement is not sufficient to guarantee independence.

In Cambodia, responsibility for initiating prosecutions rests with one international Co-Prosecutor and one Cambodian Co-Prosecutor who both enjoy equal competence to initiate prosecutions. Each may do so by engaging

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[230] Human Rights Watch, "Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings and Needed Support" (2004) at 5, online: Human Rights Watch <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>. See also Chandra Lekha Sriram, "Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone" (2006) 29 Fordham Int'l L J 472 at 493, pointing out that victims "wish to know why it is that a commander is in custody, rather than a man who actually cut off a hand, or burned down a house."

[231] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 27.

[232] Reiger and Wierda, *supra* note 187 at 20-21, 31-33, and 41.

[233] Human Rights Watch, "Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber" (2007) at 9, online: Human Rights Watch <http://www.hrw.org/en/node/11032/section/1>.

[234] Hugo van der Merwe, Victoria Baxter & Audrey R Chapman, eds, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009); Fletcher and Weinstein, *supra* note 95; Jeremy Sarkin and Erin Daly, "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies" (2003-2004) 35 Colum Hum Rts L Rev 661 at 665-66.

in brief preliminary investigation and sanctioning the opening of a judicial investigation by sending an introductory submission and case file to the Co-Investigation Judges.[235] By late 2008, it had become apparent that an internal dispute over the need for further prosecutions had arisen between the international Co-Prosecutor and his domestic counterpart, whose independence has been called into question. A complex mechanism had been put in place to deal with such disputes. Article 6(4) of the Agreement establishing the ECCC provides that where a dissenting party does not wish to proceed, that party can within thirty days call for a hearing before a Pre-Trial Chamber of five judges, of which Cambodians constitute a majority to decide.[236] Here, the supermajority rules applied, requiring at least one international judge to agree that prosecution or investigation should cease—where the Pre-Trial Chamber fails to reach a blocking supermajority of four, the case will proceed.[237] This was much to the chagrin of the Cambodians, who unsuccessfully proposed that a supermajority instead be required for the prosecution to go ahead.[238] In what became known as the "Co-Prosecutors Dispute" over whether or not to charge more suspects beyond the five currently detained, the Pre-Trial Chamber could not reach a supermajority vote on a decision concerning the Disagreement. Internal Rule 74(1) provides that the action of the International Co-Prosecutor to forward the new Introductory Submissions should be executed.[239]

The separate opinions of the judges show a strict division on the basis of nationality, with the three Cambodian judges unanimous in favour of blocking prosecution and their two international colleagues unanimously deciding otherwise. Just over three years into a process which may yet run for another four or five, the predicted divisions that gave rise to the UN's reluctance to participate in a Cambodian-dominated tribunal have become manifest. After the *Considerations of the Disagreement*, the acting International Co-Prosecutor submitted the names of five suspects in two separate cases (Cases 003 and 004) to the Co-Investigating Judges on 7 September 2009.[240] Immediately afterwards, Prime Minister Hun Sen denounced the additional investigations, declaring: "[i]f you want a tribunal, but you don't want to consider peace and reconciliation and war breaks out again, killing 200,000 or 300,000 people, who will be responsible?"[241] The names of the five new suspects are confidential, but credible leaks suggest they include KR air force

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[235] *ECCC Agreement*, *supra* note 134 at Articles 5 and 6.
[236] *Ibid* at Article 7.
[237] *Ibid* at Article 7(4).
[238] Etcheson, *supra* note 131 at 13.
[239] *Prosecutor v Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC-OCIJ (PTCO1), Considerations of the Pre-Trial chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71 (Public redacted version) (18 August 2009) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh>.
[240] Extraordinary Chambers in the Courts of Cambodia, News Release, "Acting International Co-Prosecutor requests investigation of additional suspects" (8 September 2009) online: ECCC <http://www.eccc.gov.kh/english/news.view.aspx?doc_id=310>.
[241] Cheang Sokha and Robbie Corey-Boulet, "ECCC ruling risks unrest: PM", *Phnom Penh Post* (8 September 2009).

commander Sou Met and his naval equivalent Meas Muth.[242] On 29 April 2011, the ECCC's co-investigating judges closed their investigation in Case 003 without ever genuinely investigating the allegations.[243] Independent observers cite received information from confidential sources within the court that the ECCC has allowed its mandate to pursue the case to be undermined by political and financial factors.[244] Perhaps surprisingly, and in contrast to earlier stages in the case, the international co-investigating judge is in agreement with his national colleague that Cases 003/004 should be dismissed on the basis that the five are not "senior leaders" or "most responsible" and therefore do not fall under the court's jurisdiction.[245] It is clear that the investigation falls far short of the standard established in Cases 001 and 002 - the co-investigating judges did not formally notify the suspects they were under investigation, summon and question them or any witnesses, examine crime sites or transfer pertinent evidence available from Cases 001 and 002.[246] Case 004 investigation is officially still ongoing, but no little or no investigation has actually taken place.

Even where international judges are in a majority, assumptions that this would guarantee impartiality and buttress the independence of the process from political interference proved optimistic. Though the Special Panels enjoyed an international majority, the Timorese Government succeeded in interfering to restrain prosecutorial policy whenever it conflicted with their policies of rapprochement with Indonesia.[247] The perceived political dangers emanating from the Special Panels process came not from the judges (because after all, there was little chance of Indonesian figures appearing before them) but from diplomatically embarrassing investigation and indictment of these figures. In February 2003, the internationally dominated SCU issued the indictment of eight high-level figures including Indonesian General Wiranto, who at the time was expected to (and subsequently did) run as Presidential candidate for Indonesia's biggest party. From this point onwards, the Timorese Government subjected the Timorese Office of the Prosecutor-General (to whom the SCU ultimately reported) to interference to

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[242] Douglas Gillison, "Before Charges, Activist Cites Two in a Dormant KR Inquest", *Cambodia Daily* (4 April 2011), 26.

[243] Case File No: 003/07-09-2009-ECCC-OCIJ, Notice of Conclusion of Judicial Investigation, 29 April 2011, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D13_EN.pdf

[244] "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011", online: Open Society Justice Initiative < http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf> at 7.

[245] *Ibid*.

[246] Extraordinary Chambers in the Courts of Cambodia, Press Release, "Statement by the International Co-Prosecutor Regarding Case File 003" (9 May 2011), online: <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003>.

[247] The indifference of the Government to the people's demand for justice might best be explained by then-President Gusmao's declaration that "the relationship between Timor-Leste and Indonesia is far too important for any issue that might arise to discourage us or to derail this relationship" (F D Unidjaja, "Dili Says Relations With RI More Important Than Justice", *The Jakarta Post* (5 March 2003) online: The Jakarta Post <http://www.thejakartapost.com/news/2003/03/05/dili-says-relations-ri-more-important-then-justice.html>).

the degree that pursuit of the indictments to their conclusion was abandoned,[248] a process in which the UN acquiesced. The episode demonstrates that internationalization does not necessarily buttress a process against interference—a UN Commission of Experts Report relayed how the Timorese Prosecutor-General admitted that Government policy made supporting the SCU a challenge at times, notwithstanding UN pressure.[249]

The argument that hybrid tribunals could establish the parameters of a relationship with the rulers of the country similarly based on respect for the independence of judicial institutions proved misguided. Predictions that the international component of hybrid tribunals would serve as a means of externalizing the diplomatic costs of prosecuting powerful States have also proven unduly optimistic, though they were likely premised on a more forceful commitment to justice than that evinced by the UN in the face of Indonesian intransigence.[250] On the other hand, in the politicized environments of the 64 Panels and SCSL, the UNMIK and the Freetown Governments showed an admirable unwillingness to interfere in the successor trials where historically executive interference in the judiciary was prevalent. Internationalization could not even guarantee the perception of independence. While in Bosnia, the participation of international judges "may have bolstered a perception of fairness and independence and helped to address any perceived ethnic bias,"[251] the Chamber has, like the ICTY it replaces, "been the subject of repeated public attacks and allegations (often made by prominent politicians) of ethnic bias, partiality and discrimination."[252]

The international judges that constituted a majority on the Special Panels served only renewable six-month or one-year terms with reappointment dependent on the assent of the Special Representative of the Secretary-General. As Schabas notes, "international human rights law has distinguished between 'independence' and 'impartiality.' While independence is desirable in and of itself, its importance really lies in the fact that it creates the conditions for impartiality." [253] Ultimately, it is impartiality—not simply independence—upon which a fair trial is so dependent. In the Special Panels, the situation was such that the ambition to be reappointed may have influenced the decisions of any given judge.

Obviously, there are no concrete examples of this occurring, but subsequent comments of the judges suggest a conflict between the highest standards of judging and the apparent desire of many to see an expedited process. Chanda quotes one international judge's attitude to the complexities

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[248] The UN Commission of Experts factually established that on issuance of the indictment, the Timorese Prosecutor General was summoned to the office of President Gusmao (Commission of Experts, *supra* note 139 at para 71).
[249] *Ibid* at para 69.
[250] Burke-White, "Community", *supra* note 27 at 47-53.
[251] Ivanisevic, *supra* note 129 at 11.
[252] Abdulhak, *supra* note 121 at 343.
[253] William A Schabas, *The UN International Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, UK: Cambridge University Press, 2006) at 506.

of defence of serious crimes that encapsulates the weariness or hostility with which an accused's assertive defence would be greeted:

> People criticize the process for the weakness of the defence, but 99 percent of the murders took place in broad daylight where witnesses knew the perpetrators by name. What kind of defence can be mounted in such cases? It was not like, for example, in certain countries in South America where people were taken away at night, and nobody knew who did it.[254]

At a 2005 symposium on the Special Panels, Timorese Judge Maria Gumao Perreira expressed concern at "the mass production of judgments" to enhance the Special Panel's statistics.[255] In addition, while an unnamed Special Panels judge alleges that some judges were "unwilling to hear both sides," did "not have an open mind about defence," and ignored the presumption of innocence.[256] Examples from the Kosovar experience perhaps indicate that the issue of contracts potentially dependent on convictions is a recurring problem; NGOs suggested that the threat of non-renewal could diminish prosecutorial independence by causing jurists to favour the Special Representative of the Secretary-General's position in a given case.[257] On the other hand, the decision of the Appeals Chamber in the RUF case to disqualify Justice Robertson on the basis of Statements made about Foday Sankoh and the RUF in his book on crimes against humanity was both the correct decision and laid down an important marker about judicial bias and the importance of public perception of justice.[258] Of course it is questionable whether Robertson should have been appointed in the first place. A better example may have been set by Robertson recusing himself.[259]

3. Norm-Penetration

Advocates of the hybrid structure further contended that the very process of trying cases fairly, meeting procedural requirements, applying clear law, and generating just convictions could contribute to the permeation of these legal and human rights norms in the national courts. This appears to have been the case at the BWCC. The ICTY confirmed that the Chamber was fully capable of providing the defendant Radovan Stankovic with a fair trial in the first referral by the Appeals Chamber to Sarajevo,[260] and subsequent

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[254] Ateesh S Chanda, *Transitional Justice: The Case of East Timor* (Senior Thesis, Brown University, 2004) [unpublished], online: RMIT University, Globalism Institute <http://globalism.rmit.edu.au/files/Timor%20Thesis.pdf> at 84.
[255] Judge Maria Natercia Gusmao Perreira, "The Future of Serious Crimes" (Symposium in Dili, 28 April 2005), cited in David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor* (Honolulu: East-West Centre Special Reports, 2006) at 18 [Cohen, "Indifference and Accountability"].
[256] *Ibid* at 41.
[257] Hartmann, *supra* note 117 at 8.
[258] *Prosecutor v Issa Sesay*, SCSL-04-15-PT-058, Decision on Defence motion seeking the disqualification of Justice Robertson from the Appeals Chamber (13 March 2004) (Special Court for Sierra Leone, Appeals Chamber).
[259] James Cockayne, "Special Court for Sierra Leone: Decisions on the Recusal of Judges Robertson and Winter" (2004) 2 J Int'l Crim Just 1154.
[260] *Prosecutor v Radovan Stankovic*, Case No. IT-96-23/2-AR11bis1, Decision on Rule 11 bis referral, (1 September 2005) at para 30 (International Criminal Tribunal for the former

trials have been generally endorsed as fair.[261] International actors have increased awareness of international human rights instruments and fair trial rights.[262] Judges writing judgments and prosecutors formulating indictments regularly refer to the European Convention on Human Rights, adding force to the Bosnian Constitution's provision in Article 2(2) that the Convention shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law."[263] Judges and prosecutors are deliberately recruited from the three main ethnic groups, helping to draw a line in the sand from the era of biased prosecutions and convictions. However, as with the BWCC's capacity-building successes, Ortega-Martin and Herman remind us that "such impact is diminished by the fact that it is seen as a very specialised court with its own competences and therefore unable to interact on a day-to-day basis with the rest of the judicial domestic system."[264]

The other hybrid tribunals have not been as influential in inculcating and setting an example of fair trial standards. Many of the quintessential elements of due process and fair trial, such as public trial, exclusion of illegally-obtained evidence, or provision of appeal, are far from onerous in any legal system. However, other prerequisites such as avoidance of detention without trial, undue delay, and separation of adults and minors in prison become infinitely more difficult to attain in transitional trials of complex crimes than is the case in normal criminal trials in ordinary times. To add to these problems, the prioritization of non-impunity and punishment over all other goals mean that standards of fair trial were frequently breached. As Jordash and Parker note, "[i]n cases of a political nature, there may well be (undue) pressure to 'get results.'"[265]

In the case of most hybrid tribunals, the objective of prosecuting as many wrongdoers as possible to advance the transition took precedence over the need to secure equality of arms: the provision of defence was often no better than rudimentary. In *Tadic*, the ICTY Appeal Chamber held that "at a minimum, 'a fair trial must entitle the accused to adequate time or facilities for his defence' under conditions which do not place him at a substantial disadvantage as regard his opponent."[266] It also held that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[267] However, in each tribunal, the international community equipped the prosecution unit to a significantly greater degree than the defence. While in keeping with the "shift in human rights law from a defence-based to a prosecution-based perspective," [268] this phenomenon

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Yugoslavia, Appeals Chamber).
[261] Ivanisevic, *supra* note 129 at 1.
[262] HRW, "Looking for Justice", *supra* note 127 at 10.
[263] Ivanisevic, *supra* note 129 at 41.
[264] Ortega-Martin & Herman, *supra* note 35 at 15.
[265] Wayne Jordash and Tim Parker, "Trials in Absentia at the Special Tribunal for Lebanon" (2010) 8 J Int'l Crim Just 487 at 498.
[266] *Prosecutor v Tadic*, Case No. IT-94-1-A (15 July 1999) at para 48 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber)
[267] *Ibid* at para 48.
[268] William A Schabas, "Balancing the rights of the accused with the imperatives of

undermined the potential for tribunals to provide an example of respect for the fair trial rights of the citizens tried before them. While UNTAET passed Regulation 2000/16 governing prosecutors, there was no new legislation to regulate the provision of defence in Special Panel trials.[269] As Cohen noted, "[i]t appears simply not to have occurred to the UN administration that provision had to be made for defense, particularly in the post-conflict situation where no experienced lawyers were available."[270] Inequality of arms was rampant. An under-resourced Defence Lawyers Unit was belatedly created in 2002, more than half-way through the process. The 64 Panels were founded primarily out of concern for defendant's rights to a fair trial and the Panels showed little inclination to try war criminals by comparison to the SCU. Thus, it is perhaps surprising that neither Regulation 2000/64 nor its predecessors provided for international defenders or a specialized hybrid defence office, even in cases related to war crimes.[271] Amnesty International noted,

> While some international judges have made genuine efforts to guarantee this right to equality of arms, overall the defence has been severely impeded by a lack of resources, training, adequate interpretation and translation, access to documents, funding and access to international expertise.[272]

The failure to provide adequate defence tended over time to undermine the persistent rhetoric of international human rights standards and norm penetration. Expedient, cost-efficient trial trumped the possibility of a more considered, defendant-conscious (if not defendant-centred) process.

On the other hand, the SCSL became more than the rote, mechanical punishment seen in Dili, and this is most apparent in the innovative approach to defence. A Defence Office was created to centralize a number of defence functions in one location.[273] However, even here, defence was merely an "afterthought" created after the Sierra Leone/UN agreement to establish the Court.[274] The prosecution budget of US$83 million dwarfed the defence's US$4 million in 2005, demonstrating a greater concern to secure

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accountability" in Ramesh Thakur & Peter Malcontent, eds, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York: United Nations University Press, 2004) 154 at 155.

[269] Mohamed C Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (New York: Springer, 2005) at 103.

[270] Cohen, "Hybrid Justice", *supra* note 35 at 16.

[271] In cases involving international judges and prosecutors, the Kosovar Department of Judicial Administration and the Ministry of Public Services paid defence teams. Sometimes private funds were used in high-profile KLA cases to get high-quality counsel (Perriello & Wierda, "Lessons", *supra* note 23 at 24).

[272] Amnesty International, *supra* note 23 at 58.

[273] Rule 45 of the Rules of Evidence and Procedure provided that the Defence Office was to fulfil the following functions: "In accordance with the Statute and the Rules, provide advice, assistance and representation to suspects questioned by the Special Court and accused persons before the Special Court; provide initial legal advice and assistance, as well as legal assistance ordered by the Special Court to the accused persons; provide adequate facilities for counsel in the preparation of defence; and maintain a list of highly qualified criminal defence counsel and manage the assignment, withdrawal and replacement of counsel acting for accused persons."

[274] Cohen, "Hybrid Justice", *supra* note 35 at 8-9.

prosecutions.[275] Sufficient candidates were recruited to provide ten defence teams with over twenty counsel, guaranteeing that trials were generally considered fair.[276] However, by comparison with a highly impressive prosecutorial unit, the inequality of arms led to independent observations that "performance of some defence counsel at the Special Court is, not surprisingly, deficient in certain circumstances,"[277] with particular criticism over levels of preparation and professionalism.[278]

Lessons appear to have been learned from the Dili and Kosovar experiences. Provision of defence has progressively improved as each new hybrid court comes online, though problems remain. The BWCC's Criminal Defence Support Section is better known by its Bosnian acronym OKO. Its two main roles are the provision of direct assistance to defendants (such as choice of counsel) and administrative support.[279] It provides legal advice, research, and keeps rosters of over a hundred available lawyers to fill the two defence positions to which each defendant is entitled. However, there is still troubling inequality of arms owing to the significant support the prosecutorial Special Department for War Crimes enjoys from the ICTY. Cooperation is a fundamental component of the relationship between the two courts—after all, the BWCC was established to complete the process of punishment initiated in The Hague. The ICTY furnishes the BWCC prosecutors with background material, pre-trial briefs, witness and exhibition lists, and documentary evidence, which can swamp the defence counsel (for example, 14,000 pages of documentation were forwarded in the *Stankovic* case).[280] Defence counsel have insufficient time to prepare.[281] While the prosecution can make requests for evidence to the ICTY and rely on facts established at The Hague, no specific budget has been allotted to the defence to conduct its own investigations to help establish innocence.[282]

Rule 11 of the Internal Rules of the ECCC outlines the duties of a specialized Defence Support Section (DSS) in supporting the one foreign and one domestic Co-Lawyer each defendant is entitled to. Like the SCSL Defence Office and the OKO, the DSS is responsible for providing indigent accused with a list of lawyers who can defend them. The DSS also provides administrative support to the lawyers, including the payment of fees. DSS lawyers are precluded from giving advice, however. Though the Co-Lawyers have mounted competent defence in the completed *Duch* case and the ongoing Case 002 proceedings, Skilbeck notes a consistent problem of short-staffing, meaning that suspects have been interviewed without the presence

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[275] Cockayne, *supra* note 177 at 671. See generally John R W D Jones et al, "The Special Court for Sierra Leone: A Defence Perspective" (2004) 2 J Int Crim Just 211.
[276] Perriello & Wierda, "Special Court for Sierra Leone", *supra* note 146 at 26.
[277] Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone" (2005) at 5, online: HRW <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105wcover.pdf>.
[278] Thompson & Staggs, *supra* note 174 at 46-48.
[279] HRW, "Looking for Justice", *supra* note 127 at 23.
[280] *Ibid* at 17.
[281] Ivanisevic, *supra* note 129 at 16.
[282] *Ibid* at 17.

of defence lawyers, while the DSS has no role in detention issues.[283] It is noticeable that the DSS and the Bosnian OKO have been far more vigorous in terms of training lawyers than the judicial and prosecutorial sections.[284] It may perhaps be surmised that their relative weakness may have spurred this response out of necessity. Though significant progress was made in the later years of the SCSL and in the more recent Bosnian and Cambodian defence support sections, it is worth noting that the Statute of the Special Tribunal for Lebanon was the first to constitute its Defence Office as an *equal* organ of the Court.[285]

Unduly delayed trial is a factor common to all. The average number of days in pre-trial detention for East Timorese indictees was 477 days, with the longest such detention lasting three years and six months.[286] Extended detentions were an even bigger problem in Kosovo,[287] while in the SCSL delayed trial was widely considered its greatest failing.[288] All hybrid tribunals have been criticized for failing to exemplify the standards of fair trial upheld at the ad hoc tribunals; however, to an extent, this is to be expected given both the lack of resources and the process of incorporating domestic lawyers and judges, whose failure to guarantee such standards previously was the *raison d'être* of the tribunals in the first place.

Nevertheless, most observers generally accept to differing degrees, that the trials in Sierra Leone, Bosnia, Cambodia, and Kosovo were fair. This is particularly true if one accepts Warbrick's sufficiency requirement, that in post-conflict States, the UN "should aim for trials that are 'fair enough' rather than raising expectations of an exemplary or superior level of 'fairest of all' which could never be met."[289] The ongoing Khmer Rouge preliminary motions and trials have surprised many by their competence and fairness, notwithstanding a domestic majority and widespread allegation of corruption and political interference surrounding the process. While adopting the Warbrick "fair enough" standard means one can perhaps be tolerant of the trial delays, mistranslation, and lack of victim support that typically blight internationalized justice in less developed areas, in East Timor the trials did not even achieve this limited level of fairness. Timorese

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[283] Rupert Skilbeck, "Defending the Khmer Rouge" (2008) 8 Int'l Crim L Rev 423 at 440-441.
[284] See for example Ortega-Martin & Herman, *supra* note 35 at 20. The DSS works with the Bar Association of the Kingdom of Cambodia to offer a range of training courses for lawyers who wish to appear before the ECCC (See ECCC Defence Support Section, online: <http://www.eccc.gov.kh/english/defence_office.aspx>.
[285] *Statute of the Special Tribunal for Lebanon*, UNSCOR, 61st year, 5685th Mtg, Attachment, UN Doc S/RES/1757 (2007), at Article 7.
[286] Judicial System Monitoring Programme (JSMP), *Digest of the Jurisprudence of the Special Panels for Serious Crimes* (2007) at 23, online: JSMP <http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf>.
[287] David Marshall & Shelly Inglis, "The Disempowerment of Human Rights-Based Justice in the UN Mission in Kosovo" (2003) 16 Harv Hum Rts J 95 at 111; Adam Day, "No Exit Without Judiciary: Learning a Lesson from UNMIK's Transitional Administration in Kosovo" (2005) 23 Wis Int'l LJ 183 at 191.
[288] Cassese, *Report on the SCSL*, *supra* note 154 at 18.
[289] Colin Warbrick, "International Criminal Courts and Fair Trial" (1998) 3 J Confl & Sec L 45 at 54.

defendants who came before the Dili District Court were liable to face, *inter alia*, illegal detention, inequality of arms, and prejudicial retrospective legislation. These conditions were not a consequence of unfortunate transitional vagaries of a developing legal regime, but were rather the result of a systematic determination to convict them as quickly and cheaply as possible.[290]

As argued earlier, each hybrid tribunal should be commended for establishing accountability as a standard of law and governance where the alternative was systematic impunity. In each instance, the presence of international actors in the hybrid tribunal established a standard of fair or competent trial unattainable, and hitherto unprecedented, in each State. Nevertheless, the international domination of each tribunal, and the perception of each as a transitory "space-ship" phenomenon, can only beg the question to what extent the tribunals can inculcate such standards domestically among the judiciary and the people. Standards of fair trial and professionalism in each State are gradually improving from the parlous conditions that existed at the time their hybrid courts were created. However, it remains impossible to tell how much such improvement is due to the earlier trials and how much is explicable by increasing democratization, training schemes, retention of international actors, or the simple determination of the national leaders and jurists who now run the domestic justice systems to avoid the iniquities of the past. In recent years, scholars from the development, peacebuilding, and political science communities have begun to examine the field of transitional justice, hitherto dominated by lawyers and philosophers. Studies have urged a need to integrate perspectives of rule of law development and reconstruction with transitional justice, which has catalyzed a growth of empirical and interdisciplinary study.[291] As transitional justice scholarship moves from "faith-based" to "fact-based," the theoretical claims that individual measures of transitional justice are a means to strengthen the rule of law domestically have been subject to experiential criticism.[292] As one early critic of the SCSL

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[290] Symptomatic of this is the highly coercive plea-bargaining system in place: "Clients often have no choice but to enter into a plea agreement. Plea agreements occur in the context of high conviction rates. A client is almost certain of being convicted once an Indictment is filed. If he agrees to plea bargain, he can get away with a very low sentence, but if he fights for his rights and innocence, he can be sure of a very high sentence even if he proves his innocence by circumstantial evidence or the prosecution case is riddled with inconsistencies. Furthermore if a client goes to trial and gets a low sentence, the sentence will be increased on appeal if the prosecutor disagrees with it. It has become a highly coercive technique to elicit a plea of guilt and avoid trial and get a lesser sentence." (Ramavarma Thamburan, "The Defence Lawyers Unit", handout accompanying a lecture at the "Future of Serious Crimes" symposium in Dili (28 April 2005), cited in Cohen, "Indifference and Accountability", *supra* note 255 at 39.

[291] Pablo de Greiff & Roger Duthie, eds, *Transitional Justice and Development: Making Connections* (New York: Columbia University Press, 2009) at 250-282; Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2 Int'l J Transitional Just 253.

[292] Oskar Thoms, James Ron & Roland Paris, "Does Transitional Justice Work? Perspectives from Empirical Social Science" (2008), at 7 [unpublished Social Science Research Network paper], online: Social Science Research Network <http://ssrn.com/abstract=1302084>.

noted, "[m]uch of the rhetorical support for 'legacy' creation, both within the Court and from external commentators, appears either not to appreciate the complexity of the notion, or not to translate into a willingness to provide nuanced plans of action for realization of the notion."[293] Comparative studies in the peacebuilding community find little empirical basis for many of the stronger claims made by theorists. Stromseth, Wippman, and Brooks' recent analysis of the impact of transitional trial processes on domestic rule of law found the effects to be mixed and unclear.[294] Similarly, Call finds no clear link between justice for past abuses and the quality and accessibility of justice in the future.[295] Sadly, empirical studies of the impact of the hybrid tribunals on domestic attitudes to fair trials standards or on catalyzing local efforts to establish rule of law institutions are negligible.

4. A Broken Promise

The crucial question that must be asked at this point is whether, and to what extent, the failure of the tribunals to contribute to the holistic development of the national rule of law detracts from the success of the hybrids in fulfilling the primary imperative of accountability as a necessary part of a short-term process of mediating transition from war to peace. In each tribunal, "there has been a risk that instead of incorporating the best of the international and local judicial systems, it may reflect the worst of both."[296] Academic analysis of the Special Panels has not been kind. Behind the impressive statistics, there were very serious shortcomings in the quality of the process. As resources became stretched and international attention waned, law was misapplied, defendants' rights were not protected, judgments were unclear, and a number of bewildering decisions were issued which again call into question the overall fairness of the trials. Reiger and Wierda describe the paradox of the process:

> Had nothing at all been done, it would have been viewed as entirely unacceptable by human rights organizations. At the same time, around $20 million has been spent on a venture that no one in retrospect could seriously have expected to deliver meaningful results, and nor has it much of a lasting legacy in terms of the domestic justice system.[297]

The SCSL has been criticized for excessive length of proceedings, cost, failure to ensure greater respect for the rule of law in Sierra Leone, and failure to promote or inspire substantive law reforms.[298] The 64 Panels have been labelled a failure.[299] The proceedings at the Khmer Rouge trials have

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[293] Cockayne, *supra* note 177 at 661.
[294] Strometh, Wippman & Brooks, *supra* note 53.
[295] Charles T Call, "What We Know and Don't Know About Postconflict Justice and Security Reform" in Charles T Call, ed, *Constructing Justice and Security After War* (Washington, D.C.: United States Institute of Peace, 2007) at 3.
[296] Katzenstein, *supra* note 34 at 246.
[297] Reiger & Wierda, *supra* note 187 at 40.
[298] Cassese, *Report on the SCSL*, *supra* note 154 at 66.
[299] Amnesty International, *supra* note 23 at 1.

manifest the sort of interference and corruption[300] that motivated the inclusion by the UN of a "nuclear option" in Article 28 of the Agreement establishing the ECCC. Article 28 permits withdrawal by the UN participants where the Cambodian Government causes the Chambers to function in a manner that does not conform to the terms of the Agreement.[301] Nonetheless, before condemning the tribunals, it is necessary to consider the contributions they made in the societies where they were established, bearing in mind the states of emergency and ruin that were present, as discussed in Section III.

VI. Qualified Success: Re-Evaluating the Performance of the Tribunals

As noted earlier, the initial expectations of hybrid courts deviate significantly from the standards by which international and domestic processes of transitional criminal accountability have been judged. While it remains valid, as the first hybrid courts advocates did, to criticize the narrowness of this approach, there is a danger of throwing the baby out with the bathwater. The foregoing examination has shown legitimacy to be at best a nebulous (and perhaps unattainable) concept, demonstrated that capacity-building may be better pursued by specialized institutions, and that norm penetration remains a multifaceted process, made particularly difficult by the radically imperfect conditions of post-conflict/repressive societies. Bearing this is mind, it is worth considering how the hybrid tribunals fared in terms of the more traditional retributive calculus, and the enduring value of such a measurement.

1. The Fight Against Impunity

Each tribunal found its greatest success in punishing the most serious offenders within the territory of the State. Given the absence of Indonesian military figures outside the territory, any East Timorese process could only try the numerous Timorese militia figures of relatively minor status in custody within its borders.[302] The Special Panels in East Timor achieved impressive statistics after pursuing a policy of fullest possible accountability. By the time it (prematurely) wound up in 2005 due to insufficient donor support,[303] 391 suspects were indicted (of which 339 remained untouched outside the jurisdiction[304]) and 55 trials were completed in four years involving over eighty convictions, with three acquittals.[305] This marked a

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[300] Barrowclough, *supra* note 20.
[301] *ECCC Agreement*, *supra* note 134 at Article 28, provides: "Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement."
[302] Bowman, *supra* note 140 at 383.
[303] The Timorese process was wound up pursuant to *Resolution 1543 (2004)*, SC Res 1543, UNSCOR, 2004, UN Doc S/RES/1543.
[304] *Commission of Experts*, *supra* note 139 at para 48.
[305] *Ibid* at paras 120 and 142. While four acquittals were originally entered, one was reversed on

milestone in the fight against the impunity which had hitherto been the norm for human rights violations. It furthermore helped incapacitate figures who might destabilize the peace and "discouraged private retributive and vengeful attacks."[306]

The SCSL took a diametrically opposed approach to ending impunity for the series of conflicts that convulsed the State for the prior decade: representative accountability. Security Council Resolution 1315 authorizing negotiations between the Secretary-General and the Government of Sierra Leone on a war crimes court[307] recommended that the Court have a narrow personal jurisdiction over persons "who bear the greatest responsibility" for crimes committed. The Resolution, in fact, made specific reference to leaders who "threatened the establishment of and implementation of the peace process in Sierra Leone," thus, serving to concentrate attention more on immediate sustenance of the peace than on more long-term ambitions.[308] In fulfilling this mandate, the Chief Prosecutor indicted only twelve individuals from the three factions, in addition to Charles Taylor.[309] Three individuals from each faction in the war ultimately went on trial, and all were convicted. The prosecution policy sent a strong message of non-impunity when the widely popular Deputy Minister of the Interior Sam Hinga Norman, viewed by many as a war hero, was prosecuted in addition to those of the vanquished RUF and AFRC. The non-partisan range of indictments sent a message that "the court operates impartially and independently."[310] While many successor trials have been criticized as victor's justice—concerned with punishing the losing side—the Court created in response to a request by the Government ended up trying a member of that Government. This sent an important pedagogical message about the propriety of political violence and the universality of the obligation to punish it. The SCSL is generally considered a success overall, especially in comparison with the contemporaneous Special Panels.[311]

Similarly, the BWCC responded to criticism of the Bosnian legal system before the Chamber's establishment that it was solely focused on ethnic Serbs; the Chamber has ensured the ethnic composition of the accused included Bosniaks and Croats.[312] This marks a significant symbolic change from the pre-war era where justice was an instrument of ethnic discrimination through biased and politically contingent implementation of

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appeal *Prosecutor v Paulino de Jesus*, 6/2002, Judgement (Criminal Appeal No. 2004/29),(4 November 2004) (Special Panels for Serious Crimes (East Timor), Court of Appeal).

[306] *Ibid* at Summary at para 8.

[307] *Resolution 1315 (2000)*, SC Res 1315, UNSCOR, 2000, UN Doc S/RES/1315.

[308] *Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 UNTS 137, art 1.

[309] For a summary of those indicted, who died in custody, who was sentenced and the duration of the sentences. See, "Did Sierra Leone get war crimes justice?" *BBC News* (6 November 2009) online: BBC News <http://news.bbc.co.uk>.

[310] Human Rights Watch, "Bringing Justice", *supra* note 230 at 18.

[311] Cohen, "Hybrid Justice", *supra* note 35 at 26.

[312] Ivanisevic, *supra* note 129 at 34.

the law.[313] The BWCC's jurisdiction casts a wide net, extending to four types of case:

(*a*) Cases transferred by the ICTY with confirmed indictments under Rule 11*bis* of the ICTY Rules of Procedure and Evidence;

(*b*) "Category II" cases investigated, but not prosecuted, by the ICTY Prosecutor;

(*c*) New investigations commenced by the SWDC; and

(*d*) "Rules of the road" cases not processed by local authorities (pre-BWCC cases initiated in Bosnia that were reviewed by the ICTY for evidence of bias).

Between 2005 and 2010, the BWCC had handed down trial verdicts in over sixty cases of war crimes, crimes against humanity, and genocide that arose during the war.[314] The state prosecutor has estimated that anywhere between 10,000 and 16,000 possible suspects may be indicted.[315] It may be arguable that the traditional preoccupation with accountability *simpliciter* is too narrow a conception of a hybrid tribunal's potential in transition; nevertheless, the importance of creating a functioning war crimes accountability process in Bosnia was so significant that it constituted one of the five political and economic objectives set by the Office of the High Representative in Bosnia before its mandate could be completed.[316]

In Kosovo, the Regulation 64 Panels were never a freestanding institution like the others and differed greatly in jurisdiction. While the SCSL and Special Panels could try a restricted number of domestic crimes, the 64 Panels could try any type of crime in Kosovo regardless of how big or small it was, in addition to international crimes:

> The Kosovo system is so unique in that there is no fixed internationalized court or panel. Rather, the international judges permeate the court system, sitting on panels throughout Kosovo on a case-by-case basis.[317]

The 64 Panels' role ultimately turned out to be quite circumscribed in relation to punishing war crimes relative to hybrid tribunals elsewhere. As noted above, the Panels were designed primarily as a response to concerns about bias of ethnic Albanian judges against Serb defendants, and in favour of Albanians, in domestic war crime trials. In terms of dealing with wartime atrocities, the Panels never went far beyond this narrow remit, limiting themselves to reversing and re-trying clearly ethnically biased judgments of

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[313] Michael H Doyle, "Too Little,Too Late? Justice and Security Reform in Bosnia and Herzegovina" in Call, ed, *supra* note 295 at 248-270.

[314] Claire Garbett, "Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina" (2010) 10 Hum Rts L Rev 558 at 558.

[315] Ivanisevic, *supra* note 129 at 9.

[316] Titled "Entrenchment of the Rule of Law", it was deemed achieved in the May 2010 report of the OHR (37th Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations (2010), online OHR <http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=44970>.

[317] John Cerone & Clive Baldwin, "Explaining and Evaluating the UNMIK Courts System" in Romano, Nollkaemper & Kleffner, eds, *supra* note 14, at 41-42.

Kosovar-majority courts. Although extensive investigatory work was done by the ICTY in 1999 and 2000 (600 experts exhumed 4000 bodies from 429 sites), very little made its way into 64 Panels indictments.[318] Once international prosecutors did arrive, in contrast with Bosnia, East Timor, and Sierra Leone, they made little effort to pursue criminal accountability for international crimes. Ultimately, the Panels conducted only twenty-three prosecutions for war crimes in Kosovo since 1999, the majority of which commenced before internationals arrived.[319] It has been suggested that accountability was not prioritized due to a belief that resolving the political status of Kosovo was sufficient to mediate the transition, though the simultaneous existence of the ICTY trying the most senior offenders in the conflict on both sides best explains this relative inertia.[320]

At the Khmer Rouge trials, ambiguous guidance was provided in Article 2 of the ECCC Agreement on *ratio personae*, which limited the personal jurisdiction of the Chambers to those who were "senior leaders of Democratic Kampuchea" and those who were "most responsible" for atrocities committed during the Khmer Rouge period.[321] The distinction between those "most responsible" and "senior leaders" reflects the desire of international drafters that the ECCC not be limited merely to the political leadership of the Khmer Rouge, but instead to include anyone who was significantly responsible, regardless of their position in the hierarchy.[322] At present, two cases at the Extraordinary Chambers in Phnom Penh are underway. The *Duch* case (Case 001), was completed on 26 July 2010 when Kaing Guek Eav was sentenced to thirty years imprisonment for crimes against humanity for his involvement in the mass murder of 15,000 men, women, and children at Tuol Sleng prison.[323] The four most senior surviving leaders in the KR regime are charged in Case 002, which commenced on 27 June 2011.[324] As noted earlier, the pursuit of additional indictments of individuals further down the ranks of the Khmer Rouge has been the cause of bitter disputes between the domestic and international co-prosecutors and co-investigators.[325] It appears highly unlikely that accountability will

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[318] International Crisis Group, "Finding the Balance: The Scales of Justice in Kosovo", online: (2002) ICG Balkans Report No 134 at 18 <http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/134-finding-the-balance-the-scales-of-justice-in-kosovo.aspx>.
[319] Chadbourne, *supra* note 199 at 18.
[320] *Ibid* at 54-55.
[321] *ECCC Agreement*, *supra* note 134 at Article 2, provides *inter alia* that "the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement."
[322] Scott Worden, "An Anatomy of the Extraordinary Chambers" in Jaya Ramji & Beth Van Schaak, eds, *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Lewiston, New York: Edward Mellen Press, 2005) 171 at 179.
[323] *Prosecutor v Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC-OCIJ, Judgement (26 July 2010) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh>.
[324] The Open Society Justice Initiative predicts that *Prosecutor v Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan*, 002/19-09-2007/ECCC-PTC will commence in mid-2011 (Press Release "Khmer Rouge Tribunal Legacy Hinges on Final Cases" online: OSJI (2010) <http://www.soros.org/initiatives/justice/focus/international_justice/news/khmer-rouge-tribunal-20101110>).
[325] See earlier discussion of Co-Prosecutors' Dispute.

advance beyond cases 001 and 002. As noted earlier, the Special Tribunal for the Lebanon has yet to hold a hearing, but Lebanese lawyers have argued the very process of investigating and prosecuting systemic assassinations could "rejuvenate" the domestic legal system.[326]

In punishing these crimes, the various tribunals contributed significantly to international criminal jurisprudence and established a number of legal/jurisprudential "firsts." For example, the SCSL's trial of three former leaders of the Revolutionary United Front (RUF) filled a gap in international humanitarian law by marking the first time an internationalized court convicted defendants on the charge of "forced marriage."[327] The Court provided a precedent for future legal efforts seeking to hold perpetrators to account in its seminal decisions on issues such as whether amnesties granted under domestic law are a bar to the prosecution of serious international crimes before an international criminal court,[328] and whether an incumbent head of State is compellable as a witness before an international criminal court.[329] Similarly, the Bosnian War Crimes Chamber showed considerable leadership in bringing charges for crimes committed against both male victims,[330] and underage persons in the course of warfare.[331] The ECCC Pre-Trial Chamber broke new legal ground in finding that concept of Joint Criminal Enterprise liability would have been sufficiently foreseeable to the Case 002 defendants in 1975.[332] This may be a function of the relatively greater quality of judges in these tribunals by comparison with the 64 Panels and Special Panels, which made little contribution (or even reference) to international jurisprudence.

Notwithstanding the disparity in the numbers of indictments, prosecutions, and trials, the advanced or completed tribunals have done something revolutionary in each society: they punished egregious breaches of human rights in the State's courts for the first time where impunity was previously the norm. In so doing, they condemned the use of mass violence, murder, and rape as instruments of State policy to achieve political aims as beyond the pale. The various courts did so selectively in terms of the time

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[326] Choucri Sader, "A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusions" (2007) 5 J Int'l Crim Justice 1083 at 1089.

[327] *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-T, Judgment (2 March 2009) (Special Court for Sierra Leone, Trial Chamber I). See also *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-T, Appeal (26 October 2009) (Special Court for Sierra Leone, Appeals Chamber).

[328] *Prosecutor v Allieu Kondewa*, SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome Accord(25 May 2004) (Special Court for Sierra Leone).

[329] *Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Decision on Motion by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testifi candum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone (13 June 2006) (Special Court for Sierra Leone).

[330] *Prosecutor's Office v Kurtovic*, X-KR-06/299.

[331] *Prosecutor's Office v Radic and Others*, X-KR-05/139.

[332] *Public Decision on the Appeals against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE)*, 002/19-09-2007-ECCC/OCIJ(PTC38), (20 May 2010) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber), online: ECCC <http://www.eccc.gov.kh/english/case002.aspx>.

and type of crime, but nonetheless punished a representative number of the most serious criminals within their borders in open trial. Morally justified retribution won out at the expense of impunity, on the one hand, and collective guilt, on the other.

Beyond this punitive imperative, another essential but limited goal was achieved. By processing criminals in East Timor, Cambodia, and Sierra Leone and reversing unjust convictions in Kosovo, the influence of individuals and the potency of certain revanchist appeals based on political allegiance or ethnicity was undermined. This has been interpreted as contributing to decreasing the incidence of destabilizing retributive attacks and reverse ethnic-cleansing. A Commission of Experts appointed to review the Timorese tribunal noted that the "existence of an effective and credible judicial process such as the Special Panels has also discouraged private retributive and vengeful attacks."[333] Due in significant respect to the Special Panels and the concurrent Commission for Reception, Truth and Reconciliation in East Timor, by 2005 there were only 30,000 refugees (from an original figure of 225,000 who fled at the time of the popular consultation) left in West Timor.[334] The containment of conflict entrepreneurs like Foday Sankoh, Sam Hinga Norman, and Charles Taylor has helped increase human security in a State where previous peace agreements from Abidjan, Conakry and Lomé failed completely and presaged escalations of violence. Observers argue that the work of the BWCC "can send the powerful message that new safeguards are in place and old patterns of impunity and exploitation are no longer tolerated."[335]

The 64 Panels, even in tandem with the more heralded ICTY, could not douse all the flames of an ethnic antagonism that goes back centuries. However, a process of accountability in the years before the ICTY Prosecutor could finalize indictments greatly diminished the risk of instability arising out of vindictive prosecutions, and even won support of both Serbs and Kosovars.[336] In Cambodia, the moral and legal imperative to punish the instigators of the greatest genocide since World War II is being executed in a way that has avoided the risk of instability predicted beforehand.[337] The rule of law has been described as "an exceedingly elusive notion" which has given rise to a rampant divergence of understandings,[338] but prime among what many consider to be the rule of law is the notion of accountability for serious and systematic violations of the fundamental rights of others.

In none of the States where hybrid tribunals were active did society lurch back into the violent antagonisms that gave rise to them. However, the extent

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[333] *Commission of Experts*, *supra* note 139 at para 126.
[334] Taina Jarvinen, "Human Rights and Post-Conflict Justice in East Timor", online: (2004) UPI Working Papers at 65 <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=19246>.
[335] Ortega-Martin & Herman, *supra* note 35 at 22.
[336] Perriello & Wierda, "Lessons", *supra* note 23 at 31-32.
[337] Commission on Human Rights, *Situation of Human Rights in Cambodia*, UNESCOR, 2000, UN Doc E/CN.4/1999/101/Add 1, at para 9.
[338] Brian Tamanaha, *On the Rule of Law*: *History, Politics, Theory* (Cambridge; New York: Cambridge University Press, 2004) at 3.

to which this was a result (if at all) of the legacy of these courts becomes impossible to gauge when one considers the wide array of social, political, security, and historical dynamics that will always influence a developing post-conflict society more than a temporary court. None of this is to say that hybrid tribunals cannot effect a post-conflict change in attitudes, but the extent to which they can will always be obscured by other factors that weigh as heavily in the balance. One should be slow, therefore, to draw direct causal links between trials and a peaceable aftermath. Nevertheless, even if their beneficial effect on society cannot be accurately measured, it is credible to contend that in combating impunity, the hybrid courts did not harm the process of reckoning with the legacies of human rights abuses or jeopardize peacebuilding. Insofar as they achieved their initial purposes, such as ending the intolerable situation of indefinite detention in East Timor, reversing the ethnicization of transitional accountability in Kosovo, punishing genocidaires in Cambodia, and containing the figures that might destabilize peace in Sierra Leone, the hybrid tribunals were undoubtedly successful. The trials ended extreme impunity understood as exemption of all from punishment and cooperated effectively with truth and reconciliation processes in East Timor and Sierra Leone,[339] and with the ICTY in the case of Kosovo and Bosnia.[340] The SCSL in particular serves as a strong model for future hybrid tribunals given the successful execution of its primary mandate to end impunity for senior perpetrators of crime under a budget neither too parsimonious to do justice nor too expensive to negate its sustainability.

2. *Re-Evaluating the Hybrid Model*

Notwithstanding the successes of the tribunals in achieving the traditional goals of international criminal justice, for the Dickinsonian "idealist" school, the legacy of each hybrid tribunal in terms of capacity, legitimacy, and norm-penetration remain the normative grounds by which the performance of the structure should be judged.[341] From such a perspective, the failure of the various hybrid tribunals to achieve these aims merits the criticism of the past and the disillusionment of the present.

However, what is noticeable is that the metrics employed by these idealists are not those by which independent experts appointed by the UN to monitor these tribunals judged them. At all stages, the main emphasis remained on the primary mandate of combating impunity. The East Timorese Commission of Experts, though very critical of the Special Panels process generally, judged the process by what they called the Five Core Achievements of the ICTY, namely "spearheading the shift from impunity to accountability, establishing a historical record of the conflict, bringing justice

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[339] William A Schabas, "Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court" (2004) 2 J Int'l Crim Justice 1082.
[340] International Crisis Group, *supra* note 196 at 22; Abdulhak, *supra* note 121 at 349.
[341] The expectation is alive and well is 2011. See for example Ortega-Martin & Herman, *supra* note 35 at 4 and 6.

to victims and giving them a voice, and accomplishments in international law.[342] Issues of capacity-building, norm-penetration and legitimacy played little role in this reckoning. Antonio Cassese's independent Report on the SCSL was often quite critical of the process, but complaints were primarily directed at the inexpedience of the Court in fulfilling its duty to prosecute those most responsible. Once more, issues of capacity-building and norm-penetration were of parenthetical interest, notwithstanding the ostensibly more holistic expectations of the Court initially.[343] A series of UNMIK and OSCE reports on the Regulation 64 Panels were similarly critical of its day-to-day functioning, but eschewed any examination of capacity-building or norm inculcation functions properties.[344] International support for the BWCC came from the ICTY and OHR whose avowed concern was the punishment of war crimes on a sustainable basis, with any wider by-products considered a bonus and delegated to other state-building processes. The endurance by the UN of delays, political interference, and corruption at the Khmer Rouge trials suggests that securing convictions of genocidaires is more central to their expectations of the trials than any role as exemplar of the rule of law in progress. So great was the emphasis on punishment above any exemplary or developmental function, that in all hybrid tribunals outside the former Yugoslavia, there was "a danger that the public begins to perceive the Prosecution and the Court as broadly indistinguishable."[345]

By contrast, those who adopt a more idealistic view of the hybrid tribunal's potential have been less sanguine about their performance. What is notable is that while they have condemned individual tribunals, believers in the model's inherent promise nevertheless retain faith in the mixed model concept as a whole. As a result, a residual hope in the promise of hybrid tribunal structure remains undimmed by actual practice.[346] It remains possible to argue that earlier hypotheses were tested imperfectly, based as they were on the presumption that international support and resourcing would be sufficient to buttress the capacity-building, independence, and outreach that to varying degrees were missing in all of the tribunals. As actors in the SCSL belatedly realized, "a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced."[347] It is clear that

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[342] *Commission of Experts*, *supra* note 139 at para 31.
[343] Cassese, *Report on the SCSL*, *supra* note 154.
[344] For example, Organization for Security and Co-operation in Europe Mission in Kosovo/UNMIK, *Kosovo Review of the Criminal Justice System 1999-2005: Reforms and Residual Concerns* (2006), online: OSCE <http://www.osce.org/documents/mik/2006/03/18579_en.pdf>, at 39-43 especially. By contrast, in a 2007 review, Amnesty International criticizes the 64 Panels for failure to set an example of fair trial and for failure to develop the justice system *(supra* note 23 at 32, 57-89).
[345] Cockayne, *supra* note 177 at 673.
[346] For example, in a 2009 article Jain argues:
"Hybrid tribunals are said to hold out the promise of being able to transcend the problems of both purely domestic as well as purely international prosecutions: they are considered more independent and impartial than a domestic court and can overcome the burden of garnering resources and expertise in post-conflict societies" (Jain, *supra* note 106 at 85).
[347] UN Development Programme and International Center for Transitional Justice, "The 'Legacy' of the Special Court for Sierra Leone", unpublished paper on file with author, also cited by

predictions about the legacy of hybrid tribunals ignored the disjunction between idealized high-standard proceedings and the cultural context which demanded hybrid structures to begin with, and elided the extent to which pressing short-term exigencies motivated their creation. It remains conceivable then to argue that if sufficient resources and support were forthcoming, hybrid tribunals would prove equal to the elevated expectations of them. Notwithstanding the practice of the tribunals and their diminishing popularity in recent years, there remain those who contend that "the theoretical justifications for hybrid tribunals ... suggest that the hybrid approach can be more ethical, practical and sophisticated than alternative IHL accountability mechanisms."[348] As Dickinson argues, the problems endured by the tribunals are those of implementation and not of conception, "stem[ming] more from resource constraints than from structural problems with the hybrid model."[349] Similar arguments have been made by Burke-White,[350] Higonnet,[351] and most recently by Mendez.[352]

This argument retains some force. It is difficult to find flaws in the hybrid model per se—being simply an indistinct and malleable mix of international and domestic apparatus and law. It elastically allows for any number of approaches and priorities, successes and failures, as evidenced by the wide disparities in function and structure of, say, the BWCC and the Special Court for Lebanon. It is in essence a blank canvas—the picture that emerges may be a masterpiece or a travesty, but it reflects more the painter than what it was painted on. While the closure of impunity gaps has been their primary purpose, it remains entirely conceivable that in the future a hybrid tribunal could hire enough international actors to make mentoring a reality, enjoy the support of a domestic Government as constructive as that in Freetown, and strike the right balance with national aspirations for involvement, outreach, and legacy exercises.

One can accept therefore that there is nothing inherent in the hybrid tribunal structure that dooms it to failure in terms of wider rule of law reconstruction, even if the experience of the various hybrids does suggest that earlier arguments about the link between such tribunals and issues of legitimacy and capacity are more complex than previously understood. Furthermore, nothing that has happened under the implementation of the hybrid tribunal model to make the criticisms of purely international and purely domestic tribunals for their failures in these regards any less valid—they merely call into question whether this model is the answer to the

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Higonnet, *supra* note 9 at 368.

[348] Mendez, *supra* note 55 at 55.

[349] Dickinson, "Promise of Hybrid Tribunals", *supra* note 25 at 307.

[350] Burke-White, "Community", *supra* note 27 at 74.

[351] Arguing that any "intrinsic flaws" of the hybrid tribunal model must be analyzed separately from "the failure of existing tribunals on the ground" (Higonnet, *supra* note 9 at 410).

[352] "However, despite the powerful justifications, to date hybrid tribunals have failed to fully live up to their promises and face a number of limitations. Nevertheless, the shortcomings do not imply any inherent weakness in the hybrid model. Rather they suggest that greater efforts are needed to improve their design and implementation so as to unleash the unique benefits they offer to post-conflict societies" (Mendez, *supra* note 55 at 55).

criticisms.

It is submitted that while this dampening of enthusiasm is an understandable reaction to a missed opportunity to re-orient the purpose of international criminal justice, the tendency to dwell more on the failure to catalyze improvement in the domestic justice system than on their actual achievements in combating impunity and deterring violations of the emerging peace risks obscuring their greatest utility. Because the successes of these hybrid tribunals, such as the removal of destabilizing actors, representative prosecutions, or ethnically unbiased judgment, are all equally achievable by purely domestic or purely international courts, hybrid tribunals have not been given credit for them. Attention has instead rested on the wider promise they are deemed capable of realizing, notwithstanding the fact they were not established to achieve these purposes. The success of a hybrid tribunal has not been judged primarily by output in terms of convictions, containment of destabilizing figures, or contribution to the historical record—the primary standards of review for domestic tribunals and international tribunals. Instead, hybrid courts are judged, and consequently criticized, for their limited capacity-building, their failure to inculcate international standards of fair trial norms, and the essentially unascertainable level of legitimacy they enjoy in traumatized societies. These are standards that are not expected of purely international or domestic tribunals, and which no hybrid structure has been adequately resourced to achieve.

The experience of the last decade does not demonstrate the failure of the hybrid tribunal hypothesis. In effect, the failures to resource them adequately as a result of the normative primacy of the retributive, emergency-oriented nature of international criminal justice have compromised the "experiment." However, what the last decade does show is that the mindset that would make the promise a reality does not exist. The holistic impact of a trial process on the domestic justice system and its legitimacy in the eyes of the population remain in a subordinate position in the normative hierarchy of priorities of those at UN and international level tasked with responding judicially to gross breaches of human rights and the laws of war. When hybrid tribunals are primarily designed to fill impunity gaps, any broader or more long-term promise will be neglected. Such tribunals have only ever arisen in post-conflict contexts in weak or failing States where the danger of a rapid lurch back into violence is ever-present, most notably Lebanon, Kosovo, and Sierra Leone. The hypothesis of hybrid tribunal potential may be valid, but only in conditions abstracted from the historic conditions of emergency and international indifference that have given rise to them. It is tempting to agree with the solution identified by the Office of the High Commissioner for Human Rights that "more planning is needed than has been the case to date," but this underestimates the difficulty of turning theory into reality.[353] Hybrid tribunals can only arise in situations where, almost inevitably, there is little time or opportunity to plan for perfect

[353] OHCHR, *supra* note 55 at 9.

solutions, and where the present normative hierarchies and strategic priorities of international criminal justice policy are antipathetic to such deliberation.[354] Though it also has been argued that hybrid tribunals could achieve their more holistic promise through greater investment in resources, a thorough-going re-orientation of purposes is what is most required.

While lessons can be learned from the experience of the last decade, as international criminal justice becomes ever-more dominated by the ICC's relatively circumscribed retributive concern with non-impunity, there is unlikely to arise the sea-change in attitudes that would make hybrid tribunals effective in a holistic sense. If anything, as the hybrid tribunal model approaches its teens, its future function is more likely than ever to be a resumption of its role in closing impunity gaps, this time as a complement or as an alternative to the Rome Statute's complementarity regime in states unwilling or unable to genuinely prosecute.[355] The most likely future role for hybrid tribunals is that of a useful, but largely subordinate, agent in the era of the ICC, in four ways:

(*a*) as a means for a State to create a genuine domestic proceeding to preclude admissibility of a case or situation before the ICC under Article 17 where otherwise it would be unwilling or unable;[356]

(*b*) as a complement to the ICC for the prosecution and trial of suspects further down the criminal hierarchy than those subject to proceedings in The Hague;[357]

(*c*) as a mechanism for trying serious crimes for which the ICC does not have temporal or geographic jurisdiction; or

(*d*) as a mechanism for trying political or *sui generis* crimes not covered, or not covered adequately, in the Rome Statute.[358]

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[354] Richard Goldstone, "Advancing the Cause of Human Rights" in Samantha Power & Graham Allison, eds, *Realizing Human Rights: Moving from Inspiration to Impact* (New York: St. Martin's Press, 2000) 195 at 206-207.

[355] For example, Abdulhak argues that "the cooperation between the ICTY and WCC provides useful tools for developing modes of cooperation between the ICC and national courts, both at the legal and operational level" (Abdulhak, *supra* note 121 at 358).

[356] Bergsmo and Benzing contend that if a State were to discharge their duties under the Rome Statute by engaging the assistance of the international community (and in particular the UN), this would accord with the object and purpose of the Rome Statute (Markus Benzing & Morten Bergsmo, "Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court", in Romano, Nollkaemper and Kleffner, eds, *supra* note 14, 407 at 409).

[357] Broomhall argues that hybrid tribunals can assist the ICC by prosecuting lower-profile cases as part of a co-operative "joint venture" (Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) at 104.

[358] See e.g. the ECCC and SCSL's distinct subject matter jurisdictions over crimes specific to national conflicts such as abuse of young girls (Article 7 of the Statute of the SCSL) or cultural crimes (Article 7 on the Law on the ECCC); as well as, the Special Tribunal for Lebanon's jurisdiction over terror-related crimes (Article 2 of the Statute of the STL).

VII. Conclusion

After being greeted with great scholarly enthusiasm, the predicted "promise" of hybrid tribunals ultimately went unrealized. It is easy to pinpoint what went wrong in Dili, Freetown, or Phnom Penh and to urge financial and doctrinal reform in how such bodies operate. However, it must be remembered that the earliest predictions of their potential were abstracted from the conditions of emergency and insecurity that gave rise to them, and downplayed the dominant emphasis of non-impunity in the field of transitional justice. Thus, while there may be nothing inherent in the hybrid tribunal structure that makes failure inevitable, there may be something innate in the circumstances that have given rise to this halfway house form of accountability in the past that does.

A concern with non-impunity on the one hand, and the sort of holistic approach advocated by hybrid tribunal theorists on the other, are not mutually exclusive goals but could rather be mutually re-enforcing. The criticisms of the ad hoc tribunals as regards ownership and remoteness still apply to the ICC and therefore creative adaptations should not be precluded—hybrid tribunals still "offer at least partial responses to the challenges of legitimacy and capacity in a post-conflict environment."[359] However, pragmatic application of the model may continue to govern the limits of hybrid tribunals. The model has proven successful in fulfilling the task of bringing to justice those responsible for the most serious crimes in a comparatively timely and expeditious manner. This track record aligns better with the purposes envisaged in the Rome Statute Preamble's—"to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"—than the unwittingly revolutionary approach suggested by the hybrid court idealists. Though the ICC can be criticized for its failure to develop capacity, its questionable legitimacy, and likely failure to inculcate norms of fair trial domestically, such concerns remain confined to the margins of policy-making in international criminal law in the era of the ICC. There is a role for hybrid tribunals in responding to the inadequacies of domestic courts, but not necessarily in remedying them. In short, if given renewed opportunities, hybrid courts can be deployed in all sorts of post-conflict and post-repression societies like they have in the past, either as an alternative or complement to the ICC.

There will always be a role for a court model that can mix the expertise of the international community with the legitimacy of domestic actors and situation in the *locus delicti*; nevertheless, it is worthwhile to remain circumspect about what hybrid tribunals can achieve in a climate where non-impunity represents the pinnacle of ambition. The much-trumpeted advantages that hybrid tribunals have over purely international and purely domestic courts are entirely latent. If the support and re-orientation of the priorities of international criminal justice policymakers that would make the "promise" of hybrid tribunals a reality are not forthcoming, expectations

[359] Stahn, *supra* note 3 at 449.

should be dampened. While the manifold problems of the hybrid tribunals have lead to a diminution in popularity among NGOs and the academic community, the better position is that these difficulties are problems that do not rule out their ultimate usefulness. Those disappointed in hybrid tribunals should acknowledge their success in combating impunity. Those who still believe in the wider potential of hybrid tribunals should acknowledge the underlying reasons why it is not a self-fulfilling prophesy. They should, thus, abandon superficial reasoning based on finance and power politics, which are merely symptoms of a wider lack of concern with expansive and long-term conceptions of the rule of law in post-conflict States. Where the opinions of realists and idealists can coalesce is around the idea that hybrid tribunals fail most when they deliver injustice, undue delay, and unfair trial. Limited conceptions of the hybrid tribunal based around non-impunity and more expansive concerns with norm penetration and capacity-building should emphasize that the compromises on due process, equality of arms, judicial independence, and public alienation evident in the past should be limited as much as possible.