NATIONAL AND HYBRID TRIBUNALS

Benefits and Challenges

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INTRODUCTION

The origins of modern international criminal law date back to the military tribunals established after World War II.[1] Although the Nuremberg and Tokyo trials have been largely criticised for the fact that they operated without precedent,[2] the trials' legacies have endured and their jurisprudence aided in the further development of international criminal law norms. To be sure, the lasting legacy of the Nuremberg and Tokyo trials is the assertion that individuals are subjects of international law and can be held criminally responsible for perpetrating war crimes and crimes against humanity. However, following the conclusion of the trials, there is a large gap in time between the Nuremberg and Tokyo military tribunals of the 1940s and the civilian ad hoc tribunals of the 1990s.[3] The creation of these tribunals, under the auspices of the UN Security Council, was in response to atrocities that took place in the Balkans and Rwanda respectively. Their emergence ushered in a new era in international law and international criminal justice, whereby once again the international community has sought to hold individuals accountable for the violation of international crimes.

The trials at the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) have not only held individuals accountable for

1 See: Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 59 Stat. 1544, 82 U.N.T.S. 279, E.A.S. No. 472, 5 August 1945; Charter for the International Military Tribunal for the Far East, 19 January 1946.

2 There was no separation between lawmakers, prosecutors and judges; new norms were applied that previously did not exist; they failed to examine crimes committed by Allies; and defence rights were limited, particularly with regard to their access to documents and investigations. See: M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 1998, 30.

3 UN Security Council Resolution 827, 25 May 1993, which contained the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY), S/RES/827 (1993); and UN Security Council Resolution 955, Establishing the International Tribunal for Rwanda (with Annexed Statute), November 8, 1994, S/RES/955 (1994).

international crimes, which arguably has helped to decrease tensions between opposing groups by steering clear of collective blaming, but have helped to build an historical record, thereby combating denialism and promoting truth. Furthermore, the jurisprudence from the international tribunals has helped to shape the future interpretation of violations of international criminal law. Some commentators argue that by virtue of their externality, international tribunals provide for an objective distance between those judging and those being judged, which allows for a normative message to be expressed.[4]

Following the establishment of the ICTY and ICTR in July of 1998 states drafted the Rome Statute, establishing the International Criminal Court (ICC). The Statute entered into force on 1 July 2002 and today one hundred and twenty-three countries have ratified the treaty. The ICC, which prosecutes individuals alleged to have committed the most serious crimes of concern to the international community, is the only international criminal court that is permanent and whose jurisdiction is potentially universal.[5] Nevertheless, the notion that domestic prosecutions should take precedence over international prosecution can be found in the principle of complementarity underlying the creation of the Rome Statute of the ICC. The principle of complementarity holds that national jurisdictions should be the first choice to investigate, prosecute and punish individuals suspected of committing crimes falling under the Court's jurisdiction. Only if the national jurisdiction is unwilling or unable should the ICC step in. Therefore, if the ICC is satisfied that a national jurisdiction is genuinely willing and able to carry out domestic prosecutions then the Court should not intervene.[6] However, if national prosecutions have the purpose of shielding the person concerned from criminal responsibility or if proceedings lack impartiality or independence the Court can exercise its jurisdiction.

Despite the advantages of pure international criminal proceedings, there are also a number of limitations. These drawbacks include the overwhelming costs of international trials, the lengthy proceedings which add to the costs, and the limited caseload that the courts are able to handle. The courts must account for translation costs, protection measures and greater costs for investigations because usually the courts do not operate in the same location as where the crimes took place. Moreover, the salaries of international staff are usually higher than would

4 F. Mégret, 'In Defense of Hybridity: Towards a Representative Theory of International Criminal Justice', in: *Cornell International Law Journal*, 38 (2005) 725–751, 728.

5 The ICC does not have universal jurisdiction. Instead, its jurisdiction is limited to the nationals or territories of the State Parties or of States that have accepted the jurisdiction of the Court on an ad hoc basis. In addition, the UN Security Council may also refer a situation to the Court pursuant to its Chapter VII powers thereby giving the Court jurisdiction.

6 Article 17 of the Rome Statute sets out the criteria for determining the admissibility of a case, emphasising the primacy of national jurisdictions; See: Rome Statute of the International Criminal Court, 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, UN Doc. A/CONF.183/9 [hereinafter Rome Statute].

be the salaries of local staff in a local judicial system. With the exception of the trials following World War II, most international criminal proceedings take place far from the site of the conflict. Because the international courts are not located in the countries directly affected by the conflict local populations often find it difficult to have meaningful access to the courts. As a result, local populations do not work closely with the courts and often are insufficiently informed of court activities and developments. Finally, there is no guarantee that international trials are free from corruption or bias.

The creation of international criminal courts was without a doubt a huge achievement in the quest to end impunity for serious violations of international criminal law. All of the international criminal courts have contributed to the development and widespread acceptance of international humanitarian law and the need to enforce such law. Nevertheless, the drawbacks of these courts have led states and the international community to look for other accountability mechanisms, namely through domestic and hybrid criminal trials.

DOMESTIC CRIMINAL PROSECUTIONS FOR INTERNATIONAL CRIMES

The notion of individual criminal responsibility for war crimes originated at the domestic level. During the nineteenth and twentieth centuries states began codifying rules for the conduct of war and simultaneously began prosecuting individuals for serious violations of these rules. The benefits of domestic prosecutions for war crimes, crimes against humanity and genocide are numerous. First, there are many practical benefits. Most domestic prosecutions can claim the benefits of proximity to the evidence or proximity to the witnesses. The proximity to either the evidence needed to prove the guilt of the accused or proximity to the victims and witnesses needed to secure a conviction often prove invaluable for efficiently and effectively proving a case. Moreover, the state often already has a suspect in custody and does not have to deal with extradition requests or issues over jurisdiction, furthering a speedy trial process. In addition, domestic prosecutions are usually more cost-effective. Investigators, lawyers, judges and other participants are familiar with the system, and infrastructure is already in use. Second, from a legal perspective, domestic prosecutions promote the rule of law and the notion of individual criminal responsibility at the local level. Finally, there are symbolic advantages. The local community affected by the crime, including the victims, usually has better access to domestic courts, both in terms of proximity as well as in understanding the procedures applied. Local engagement with the court often provides legitimacy to the process.

However, depending upon the specific circumstance of the country, the limitations of domestic prosecutions for international crimes can also be numerous. Often after years of violent conflict there is little to no physical

infrastructure. Moreover, the legal profession, needed to hold criminal trials, may be inexperienced. Local populations may lack the necessary skills and training needed to carry out complex litigation. After changes in a power structure it is common that the group in power had previously been discriminated against in previous regimes, excluding them from ever acquiring the needed legal expertise. In addition, another limitation is the simple fact that states may be unwilling to carry out investigations and prosecutions. This unwillingness frequently arises when it is alleged that state agents have committed crimes or when a delicate power sharing balance has been negotiated. Finally, another limitation to domestic prosecutions for international crimes is the fact that when political or ethnic tensions persist, purely domestic prosecutions may not be viewed as legitimate. There is a danger that segments of the population will view the trials as show trials or as being biased towards one side. Two prominent examples of domestic prosecutions for international crimes highlight the array of problems encountered. These examples span over sixty years but the limitations faced by both are telling.

Following World War I the Allied Powers included provisions for the establishment of military tribunals, including international military tribunals where the accused was charged with crimes against the nationals of more than one of the Allied and Associated Powers.[7] The domestic weaknesses of the Weimar government, however, caused the Allied Powers to forgo a hard stance on the war crimes clauses. Instead, the Allies agreed to demand the surrender of a limited number of Germans for trial, conceding that the Germans could try to the accused themselves.

Those Germans suspected of war crimes would therefore stand trial under the domestic jurisdiction of the *Reichsgericht* in Leipzig. The Allies could submit potential cases and evidence, but it would be the Germans themselves who thereafter had discretion of whether or not to proceed. Due to political factors and strong feelings of German nationalism, leaving the decisions of who to prosecute and for which crimes to the Germans proved a major problem in securing convictions. Undoubtedly, much of the German National Assembly viewed the trials as further humiliation after the war and sought to curtail the process. The Court itself expressed its dismay at having to try German officers, with one judge exclaiming, 'In my forty years as public prosecutor and judge my office has never been as difficult, as today, when I must proceed against two German officers, who fought bravely and faithfully for the Fatherland (…)'.[8] Of the forty-five cases submitted by the Allies to the Germans, only twelve trials took place

[7] Treaty of Peace between the Allied and Associated Powers and Germany [Treaty of Versailles], Articles 228–229: http://avalon.law.yale.edu/imt/partvii.asp [accessed 5 May 2014].

[8] J.F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, London: Greenwood Press, 1982, 137.

and only six individuals were convicted.[9] Those convicted received sentences ranging from six months to four years.

Shortly after the trials took place an Inter-Allied Commission condemned the trials as highly unsatisfactory, but it was clear that there was no political will in Germany to prosecute its own soldiers for alleged war crimes. Indeed, German reverence for its military and its strong nationalism prohibited impartial and effective trials from taking place. The weak domestic criminal processes that took place following World War I failed to hold many of those responsible for war crimes accountable.

Unlike the Leipzig trials, where no major power structure changed following the conflict, the trials following the American invasion of Iraq of Ba'athist leaders were undertaken by former enemies of Saddam Hussein's regime. From October 2005 to July 2006, the Iraqi High Tribunal (IHT) carried out its first trial, prosecuting Saddam Hussein and seven co-defendants for crimes against humanity in the first of several planned trials.

The IHT was created by the Iraqi Interim Governing Council in December 2003, and was later approved by the democratically elected Iraqi National Assembly on 11 August 2005.[10] The IHT has sometimes been referred to as an 'internationalised domestic court' due to the fact that its statute, elements of crimes and rules are modelled, in part, on those of international courts,[11] and that Iraqi judges and prosecutors were assisted by foreign experts, most notably from the United States. Nevertheless, these particulars should not detract from the fact that the IHT is, in fact, a domestic court. It was established by domestic legislation, it is located in Iraq, its procedural rules derive from the Iraqi Code of Criminal Procedure and its prosecutor and judges are Iraqi.[12] Due to the nature and scope of the crimes alleged, the NGO community was critical of a purely domestic approach, favouring international trials instead, whereas American politicians initially favoured a hybrid court based on cooperation between the UN and the government of Iraq.[13] However, it became clear that Iraqis preferred a domestic criminal approach given their proud legal tradition, with great emphasis on prosecutions, accountability and punishment.[14]

The trials have been viewed as 'a novel attempt to blend international standards of due process with Middle Eastern legal traditions'.[15] In this sense,

9 R.K. Woetzel, *The Nuremberg Trials in International Law*, New York, London: Preager and Steven and Sons Ltd., 1960, 34.

10 M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal' in: *Cornell International Law Journal*, 38 (2005) 327–390.

11 M.P. Scharf, 'The Iraqi High Tribunal', in: *Journal of International Criminal Justice*, 5 (2007) 258–263, 258–259.

12 The Statute of the Court allows for international judges to be appointed on the request of the Court and approval of the Council of Ministers, but none have been appointed.

13 Cherif Bassiouni, 'Post-Conflict Justice in Iraq', 343; M.P. Scharf and M. Newton, *Enemy of the State: The Trial and Execution of Saddam Hussein*, New York: St. Martin's Press, 2008, 40, 43.

14 Scharf and Newton, *Enemy of the State*, 40, 43, 45.

15 Scharf, 'The Iraqi High Tribunal', 259.

the first trial handled by the Court, concerning the atrocities that took place in Dujail, was the first ever televised criminal proceeding in the Middle East; thus, allowing millions of people in the region to watch the legal process unfold. The judges provided the defendants ample opportunities to address the court and present their case. Perhaps most importantly, the Court issued a 298-page judgment, applying the 'beyond a reasonable doubt' standard and meticulously detailing their findings on facts and law, with a great deal of reference to previous decisions by international courts.[16] Ultimately, in the Dujail trial, one defendant was acquitted, three defendants were given fifteen year sentences; one defendant was given a life sentence and three defendants, including Saddam Hussein, were sentenced to death. In subsequent trials, individual judgments and sentences ranged from full acquittals to death.

Despite these accomplishments, the trials in Iraq have also been heavily criticised.[17] The Dujail trial alone witnessed the assassination of a defence counsel, judges resigning, and defendants often interrupting trial proceedings in disruptive outbursts.[18] Two days before the Arabic version of the trial judgment was published Human Rights Watch issued a report concluding that the proceedings were 'fundamentally unfair'.[19] In addition the final judgment has been criticised for failing to provide in-depth reasoning related to the mitigating and aggravating circumstances that influenced the various sentences. Finally, at this time, it is not certain that the Court has contributed to reconciliation in the country. To the contrary, the way in which the authorities carried out Saddam Hussein's death penalty further inflamed domestic tensions.

The Leipzig and IHT examples are but two instances where domestic prosecutions for mass crimes have attracted criticism. Despite the advantages of generally providing for faster and cheaper trials, the shortcomings of domestic prosecutions of international crimes become all too obvious. In particular, the post-World War I trials exposed the extent to which international justice can be compromised for the sake of political convenience and the IHT highlights the difficulties of holding impartial proceedings from the investigation stage through to carrying out the sentence even with efforts to implement international standards. In response to many of the criticisms facing both purely domestic prosecutions for international crimes and international proceedings, a new approach was developed in the form of hybrid or mixed criminal trials.

16 *Ibid*., 260.
17 See generally: Cherif Bassiouni, 'Post-Conflict Justice in Iraq'.
18 Scharf, 'The Iraqi High Tribunal', 259.
19 Human Rights Watch, Report on the Dujail Trial, 20 November 2006: www.hrw.org/en/news/2006/11/19/iraq-dujail-trial-fundamentally-flawed [accessed 5 May 2014].

HYBRID MODELS

The hybrid model attempts to take the best from both worlds, valuing the need for sovereign states to be the primary adjudicators of these crimes while at the same time acknowledging their limitations in doing so. This model is now commonly referred to as mixed or hybrid courts because they often combine specific domestic laws and/or staff with international laws and staff. The branding of a court as 'mixed' or 'hybrid' depends on a variety of criteria, ranging from the court's legal basis, its location within or outside of a domestic court system, its subject matter jurisdiction and the composition of the court's personnel.[20] The hybrid tribunals discussed in this section include the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes in East Timor (SPSC), the United Nations Interim Administration Mission in Kosovo (UNMIK) / European Union Rule of Law Mission in Kosovo (EULEX) established panels in Kosovo, and the Extraordinary Chambers in the Courts of Cambodia (ECCC). All of these tribunals were designed because the purely domestic and purely international approaches were viewed as inadequate for some reason or another. However, assessments of the courts' operations indicate that the hybrid model has many drawbacks of its own and does not in itself guarantee a successful accountability process.

SPECIAL COURT FOR SIERRA LEONE

The SCSL was established in early 2002 to prosecute those believed to be the most responsible for crimes committed during the ten-year conflict in that country in the 1990s.[21] The conflict was brutally violent and left the country and its people devastated. In 1999 the government of Sierra Leone and the rebel movement known as the Revolutionary United Front (RUF) signed the Lomé Peace Accord, bringing an end to the violence and prompting calls for accountability and reconciliation.[22]

The conflict in Sierra Leone left the domestic justice system ill-equipped to investigate and prosecute individuals accused of serious humanitarian law violations. Thus the domestic system would not have been able to meaningfully

[20] See: J. Cerone and C. Baldwin, 'Explaining and Evaluating the UNMIK Court System', in: C.P.R. Romano, A. Nollkaemper and J.K. Kleffner, eds., *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford: Oxford University Press, 2004, 41–58, 41 (note 2).

[21] For background information on the establishment of the SCSL, see: P. Mochochoko and G. Tortora, 'The Management Committee for the Special Court for Sierra Leone', in: Romano, Nollkaemper and Kleffner, eds., *Internationalized Criminal Courts*, 141–156.

[22] Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 7 July 1999, UN Doc S/1999/777 (1999) [hereinafter Lomé Peace Accord].

carry out trials. At the same time, however, President Ahmed Tejan Kabbah opposed purely international proceedings like those modelled on the ICTY or ICTR. He believed that domestic involvement was critical. Therefore, in 2000 he sought assistance from the UN in setting up a new accountability model. In 2002, the UN and the government of Sierra Leone signed an agreement establishing the Court, marking the first time that a court has been established between the UN and a domestic government.[23] And although the Lomé Peace Accord included a broad amnesty provision for all warring sides, it was later agreed that this amnesty would not bar prosecution at the SCSL.[24]

The SCSL was a 'treaty-based (…) court of mixed jurisdiction and composition', which sat in the country where the crimes occurred.[25] The national government had the ability to appoint individuals to staff positions and indeed many of the positions at the Court were filled by Sierra Leoneans. Although the SCSL operated outside of the local court system it had primacy over national courts and could give binding orders to the government. The Statute of the SCSL further provided that the Rules of Procedure and Evidence were to be those of the ICTR as amended for the particular circumstances for the Special Court.[26]

Designed to avoid some of the pitfalls of predecessor courts and envisaged as a cost effective and more efficient model, the Court

> has been rightfully hailed as having created a new model of international criminal justice. It has shown that it is possible to have an international court that is directly accessible to the population affected by the crimes committed, both by locating the Court in the country where the crimes took place and by developing a very effective outreach program. Likewise, the establishment of the Defence Office to provide an institutional counterbalance to the Prosecution has been widely viewed as a creative advance that should be considered in all future courts.[27]

The SCSL indicted twenty individuals, three died before their trials could be completed, one is still at large and sixteen individuals, including Charles Taylor, the former President of Liberia, have been convicted and sentenced. All of the

23 Statute of the Special Court of Sierra Leone [hereinafter SCSL Statute], attached to the Agreement between the United Nations and the government of Sierra Leone on the Establishment of the Special Court for Sierra Leone [hereinafter Special Court Agreement], UN Doc S/2002/246 (2002).

24 SCSL Statute, Article 10, attached to the Special Court Agreement.

25 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., 915th Mtg., U.N. Doc. S/2000/915 (2000), par. 9; the one exception to holding proceedings in Sierra Leone is the trial of Charles Taylor, which is carried out in The Hague due to security concerns.

26 SCSL Statute, Article 14; Special Court for Sierra Leone, The Rules of Procedure and Evidence, adopted by the judges in plenary on 7 March 2003, last amended 27 May 2008.

27 A. Cassese, *Report on the Special Court for Sierra Leone*, Submitted by the independent expert [appointed by the UN Secretary-General], 12 December 2006, 1: www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=& [accessed 5 May 2014].

trial proceedings took place in Sierra Leone except for those of Charles Taylor. His trial was moved to The Hague in The Netherlands due to fears of potential instability in the region.

Although meritorious in many respects, the SCSL has nevertheless failed to fully live up to its initial expectations, particularly from the standpoint of expeditiousness. In his expert report on the Court Cassese notes that the (i) the financial insecurity resulting from funding based on voluntary contributions; (ii) the lack of strong judicial leadership; and (iii) the initial failure to draw fully upon the available experience in international criminal proceedings have contributed to the Court's challenges.[28] In addition, negative reaction to the Court has been exacerbated by perceived prosecutorial insensitivity to local culture. Critics argue that the prosecutorial narrative only offered a politically skewed reading of the conflict,[29] alienating much of the population. For example the indictment of Deputy Defense Minister Samuel 'Hinga' Norman, a 'war hero' whose militia during the civil war had supported the government against Sankoh's rebels, was particularly controversial amongst Sierra Leoneans given that the overwhelming amount of atrocities were committed by RUF.

SPECIAL PANELS IN EAST TIMOR

In response to a vote rejecting a special autonomous status within Indonesia, in 1999 the Indonesian National Army and various Timorese militias violently attacked the people of East Timor, killing thousands, displacing an estimated five hundred thousand civilians, and destroying much of its infrastructure.[30] Following the violence, the UN Security Council created the United Nations Transitional Administration in East Timor (UNTAET), which became responsible for the administration of justice in East Timor.[31]

Due in part to the fact that Indonesia opposed an international court,[32] UNTAET established a hybrid court in the capital, Dili, to try those suspected of committing crimes associated with the conflict, called the Special Panels for Serious Crimes in Dili. The SPSC had exclusive jurisdiction over serious criminal offences, including crimes against humanity and war crimes as well as

28 *Ibid*., 2.

29 See: J. Cockayne, 'Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies', in: *Journal of Human Rights*, 4 (2005) 455–473.

30 M. Cherif Bassiouni, *Introduction to International Criminal Law*, Ardsley: Trans National Publishers, 2003, 559; M. Othman, 'Peacekeeping operations in Asia: Justice and UNTAET', in: *International Law Forum du Droit International*, 3 (2001) 114–126, 114–115.

31 Establishment of the United Nations Transitional Administration in East Timor (UNTAET), UN Doc S/Res/1272 (1999).

32 P.K. Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises', in: *Criminal Law Forum*, 20 (2009) 53–95, 67.

the domestic crimes of rape and murder if committed between 1 January and 25 October 1999.[33] The SPSC were created as part of the domestic Dili District Court and were composed of both local and international judges. Thus, the SPSC were 'the first specially constructed internationalised courts which have tried serious crimes within a local justice system'.[34] The SPSC's applicable procedural law came from UNTAET Regulation 2000/30,[35] and many of the procedural provisions are similar to those found in the ICC Statute. The SPSC were usually comprised of one East Timorese judge and two international judges. Because of the complete breakdown of the judiciary and serious lack of qualified personnel,[36] most personnel at the Panels were international. Those Timorese who remained had previously been largely excluded from legal or judicial appointments and therefore often lacked crucial practical experience.

From 2000 until its closure in 2005, the SPSC issued approximately four hundred indictments and handled fifty-five trials involving eighty-seven accused, with a total of eighty-four convictions. Despite these convictions, it is doubtful, however, whether a hybrid court should have been created in East Timor in the first place. The infrastructure was abysmal, the local criminal justice system was devastated, and the local people themselves wanted an international tribunal. However, an international tribunal was simply not an option; Indonesia made its opposition to an international tribunal clear to the UN and the UN was not interested in upsetting the Indonesian government. Instead, a hybrid court, with little support and little prospect for substantial impact was created. Indeed, a process mirrored on the ICC was overly ambitious and costly. Ultimately the lack of political will and lack of adequate funding and staff greatly damaged the process. Moreover, there was very little local participation either because of poor outreach efforts or because of a true lack of interest in the court as a whole.[37]

The SPSC were closed in May 2005. Despite numerous unfinished investigations and incomplete indictments and appeals the national judicial system could not take up the work. Efforts to extend the judicial process failed, leaving many East Timorese disappointed by the process.[38] In early 2005 UN

33 UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET/REG/2000/15, 6 June 2000.

34 See: S. de Bertodano, 'East Timor: Trials and Tribulations', in: Romano, Nollkaemper and Kleffner, eds., *Internationalized Criminal Courts*, 79–98; See: UNTAET Regulation 2000/11, UNTAET/REG/2000/11, 6 March 2000, and Regulation 2000/15.

35 See: UNTAET Regulation 2000/30, UNTAET/REG/2000/30, September 25, 2000, on Transitional Rules of Criminal Procedure (as amended by UNTAET Regulation 2001/25, September 14, 2001). On January 1, 2006, a new Code of Criminal Procedure of Timor-Leste, Law No. 15/2005 of 16 September 2005 replaced UNTAET Regulation 2000/30.

36 Othman, 'Peacekeeping operations in Asia', 116.

37 S. Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', in: *Harvard Human Rights Journal*, 16 (2003) 245–278, 246, 258.

38 See: C. Reiger and M. Wierda, *Serious Crimes Process in Timor Leste: In Retrospect*, International Center for Transitional Justice, March 2006: http://ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf [accessed 5 May 2014].

Secretary-General Kofi Annan appointed a Commission of Experts to review the work of the SPSC along with the Indonesian Ad Hoc Human Rights Court on East Timor in Jakarta, and in May 2005 the Commission issued its Report.[39] While the report is generally favourable of the SPSC due to the number of convictions and number of witnesses interviewed, it also highlights important deficiencies. Many of the challenges the SPSC encountered had to do with the seriously low level of institutional capacity and the inadequate and irregular funding.[40] In fact, the level of funding was simply not enough for the Panels to fully meet their mandate.[41] The progression of trials was slow and because of extradition issues with Indonesia many of the trials focused on low-level perpetrators. Nevertheless, in comparison with the Indonesian Ad Hoc Human Rights Court on East Timor, the hybrid model fared better than the Indonesian domestic proceedings. With no political will behind the domestic prosecutions in Indonesia, impunity has prevailed.[42]

UNMIK / EULEX COURT SYSTEM

Following a Serb-led attack on Kosovar Albanians, which left approximately ten thousand dead and one million displaced, and a seventy-eight-day NATO campaign ending the attack in 1998,[43] the UN was tasked with governing the region through UNMIK. Having a broad mandate and deriving its authority from the Security Council's Chapter VII powers, the UN Administration Mission in Kosovo soon established a Kosovo court system, which included the maintenance of civil law and order and the protection and promotion of human rights.[44] The administration was to be exercised through the Special Representative of the Secretary General. Accordingly, UNMIK regulations became the governing law in Kosovo and one of UNMIK's tasks included the apprehension and prosecution of those believed responsible for war crimes.[45]

39 Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999, UN Doc. S/2005/458 (Annex), 26 May 2005 [hereinafter East Timor Commission Report].

40 East Timor Commission Report, para. 93–104; 112–119; 127–138.

41 Othman, 'Peacekeeping operations in Asia', 121; L.A. Dickenson, 'The Promise of Hybrid Courts', in: *American Journal of International Law*, 97 (2003) 295–310.

42 See: M. Othman, 'The Framework of Prosecutions and the Court System in East Timor', in: K. Ambos and M. Othman, eds., *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Freiburg: Max Planck Institute for International Law, 2003, 85–112, 107.

43 Cherif Bassiouni, *Introduction to International Criminal Law*, 553.

44 See: UN Security Council Resolution 1244, 10 June 1999, par 10.

45 See: W.S. Betts, S.N. Carlson and G. Gisvold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law', in: *Michigan Journal of International Law*, 22 (2001) 371–389.

During the conflict much of the physical infrastructure of the judicial system had been destroyed or damaged. The number of available local judges or lawyers was low because Serbian judges and lawyers fled or refused to take part, and many of the non-Serbians lacked the necessary experience due to the fact that ethnic Albanians had been barred from the judiciary for years.[46] In addition, many of the Albanian judges did not have the required independence and impartiality to oversee such trials. Nevertheless, sending the cases to the ICTY was not an option because the then Prosecutor made clear that the ICTY would only prosecute the worst cases.[47]

For the above reasons, UNMIK issued regulations that allowed for the appointment of international judges to work alongside domestic judges and international prosecutors to work together with domestic lawyers. In this sense, the Kosovo court system has no fixed internationalised court or panel. Instead, the international judges sit on panels throughout Kosovo on a case-by-case basis.[48] In addition, unlike the SCSL and SPSC, the Kosovo court system is not required to directly apply international law. Rather, the courts apply the law in force in Kosovo prior to 22 March 1989, but only to the extent that it does not conflict with international legal standards and human rights norms.

Initially the international judges comprised the minority on the bench. However, when it became apparent that the international judges had a minimal impact and legal standards were being disregarded, UNMIK issued a regulation determining that in cases of war crimes international judges must comprise the majority of judges. These changes have been important because many early convictions for genocide and other serious offenses were highly controversial. Later, when international judges played a larger role these convictions were reversed and remanded for new trials.[49] A report issued by the Organization for Security and Cooperation in Europe (OSCE) suggests that the presence of the international judges and lawyers did in fact improve the quality of justice delivered in these types of cases.[50]

46 H. Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', in: *American Journal of International Law*, 95 (2001) 46–63, 49–50, 53.

47 See: C. del Ponte, Prosecutor of the ICTY, Statement on the Investigation and Prosecution of Crimes Committed in Kosovo, The Hague, PR/P.I.S./437-E, 29 September 1999.

48 For the background to this development and resulting problems, see: Cerone and Baldwin, 'Explaining and Evaluating the UNMIK Court System'; J.C. Cady and N. Booth, 'Internationalized Courts in Kosovo: An UNMIK Perspective', in: Romano, Nollkaemper and Kleffner, *Internationalized Criminal Courts and Tribunals*, 59–78.

49 Organization for Security and Co-operation in Europe (OSCE), Department of Human Rights and Rule of Law, *Legal Systems Monitoring Section, Kosovo's War Crimes Trials: A Review*, 15 September 2002, 12–27, [hereinafter OSCE Kosovo Report]: www.osce.org/kosovo/12549?download=true [accessed 5 May 2014].

50 See: OSCE, Kosovo Report.

In April 2009, EULEX took over the operational role of UNMIK with regards to the area of rule of law.[51] EULEX is now fully responsible for all war crimes and related cases.[52] To date, thousands of war crimes cases have been investigated and numerous trials before international judges have taken place. Additionally, EULEX continues to assist local institutions in establishing and strengthening the rule of law because the need for international prosecutors and judges remains.

Because of partiality among domestic judges, the system set up in Kosovo required a majority of international judges sitting on war crimes cases. It also allowed international judges to intervene and take over cases from local courts at their discretion. These practices have led to discord amongst the local courts and the international judges. The local judges often feel that they are in the minority position and do not share the same standing as their international counterparts.[53] These feelings of inferiority are understandable but are largely unavoidable until impartiality can be secured. Despite these grievances, the Kosovo court system has largely been viewed as successful, in part because it operates within the domestic court system and strives to build up the local capacity. In addition, the large amount of funding pumped into the system, first through UNMIK and now through EULEX, contributes to its many achievements. More recently, in 2016, following consultation between the EU, Kosovan and Dutch authorities, it was announced that a special court, the Kosovo Relocated Specialist Judicial Institution, will be established in The Hague, the Netherlands to try individuals for crimes committed during the Kosovo War. The court will be made up of international judges and established under Kosovan law. Once again, another hybrid system will be tested.

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

It is estimated that between 1975 and 1979 roughly one and a half to two million people perished under the control of the Khmer Rouge. A serious international push for accountability, however, began only after the negotiated withdrawal of Vietnamese troops from Cambodia, eighteen months of UN administration, and UN sponsored elections. During this time, the UN presence greatly marginalised the Khmer Rouge as a political and military force. Therefore, beginning in 1997,

51 Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO; Law No. 03/L-053 'On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo'; Law No. 03/L-052 'On the Special Prosecution Office of the Republic of Kosovo'.

52 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149, 17 March 2009: www.un.org/en/peacekeeping/missions/unmik/reports.shtml [accessed 5 May 2014].

53 I. Risch, 'Kosovo: Practical Issues on the Development of the Judicial System', in: Ambos and Othman, eds., *New Approaches in International Criminal Justice*, 61–69, 65.

the United Nations and the Royal Cambodian Government began a decade-long diplomatic discussion to establish a tribunal. It was clear from the outset that key officials from the Cambodian government and UN had very different views of how to organise any accountability process. Cambodian officials waffled back and forth between trials and truth commissions and with regard to trials, they tended to favour a smaller number of trials and a greater role for the local judicial system. UN officials pushed heavily for trials and generally favoured an international process with a larger number of defendants – similar to what had been established for the former Yugoslavia and Rwanda.

To deal with the impasse, members of the international community began to consider the hybrid model. In late 1999, it was decided that special chambers within the Cambodian court system would be established with Cambodian and international judges. Over the next five years, disputes raged over the 'balance of influence' between UN and Cambodian officials at the Tribunal, the scope of the Tribunal's jurisdiction, the defendants to be charged, and the laws and procedures to be applied. Finally, in 2003, the UN and the Cambodian government hammered out an agreement to establish the ECCC.[54] Also, between 2004 and 2007, further negotiations continued over issues concerning funding for the Tribunal, establishing a physical site for the trials, and staffing at the Court. The result of all of these negotiations is that the ECCC is a hybrid criminal tribunal, established and operated by officials of the UN together with the Cambodian government. It is located in a former military building on the outskirts of Phnom Penh and applies national and international law.

In 2007, the ECCC began prosecuting individuals accused of serious crimes committed during the Khmer Rouge regime.[55] Proceedings were started against five former top Khmer Rouge officials. In the first trial, Kaing Guek Eav, better known as 'Comrade Duch', the former chief of the notorious Tuol Sleng (S-21) prison in Phnom Penh, was convicted and sentenced. In the second trial, two of

[54] The following year, the Cambodian National Assembly passed a law further governing the tribunal proceedings (the 'ECCC Law'), which has a great deal of overlap with the Framework Agreement. See: Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [hereinafter: ECCC Law], with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006): www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [accessed 5 May 2014].

[55] The Court has personal jurisdiction over senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia that were committed between 17 April 1975 and 6 January 1979. See: 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 (hereinafter UN-Cambodia Agreement), 6 June 2003, Articles 1–2: www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf [accessed 5 May 2014]; On the history of discussions between Cambodia and the United Nations see: D.K. Donovan, 'Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal', in: *Harvard International Law Journal*, 44 (2003) 551–576.

the remaining four have been convicted and sentenced, including former head of state Khieu Samphan and former chairman of the Democratic Kampuchea National Assembly Nuon Chea. Ieng Sary died while in the custody of the Court and his wife and sister-in-law of Pol Pot, Ieng Thirith, was found to be mentally unfit to stand trial, due to Alzheimer's disease, and was released. The second trial against the convicted accused began in October 2014 and it is still unclear whether new accused will stand trial in future trials.

The ECCC is the first hybrid court that employs two co-prosecutors, one Cambodian and one international, which jointly have exclusive competence to initiate prosecution of crimes. It also has two co-investigating judges, one Cambodian and one international, which are jointly responsible for investigating the facts as laid out in the Introductory Submission. The five-judge Pre-Trial Chamber, five-judge Trial Chamber and seven-judge Supreme Court Chamber constitute the Chambers of the ECCC, with the majority of judges in all of the chambers being Cambodian, including the presiding judge of each chamber.[56] However, decisions are based on a super-majority formula, meaning that at least one of the international judges must agree in every decision.[57]

The most important achievement of the Court likely relates to the role afforded to victims in the proceedings. The procedural framework allows victims to participate as Civil Parties and seek collective reparations from a convicted defendant. In the first case to go to trial, ninety-three Civil Parties participated and were represented by four legal teams made up of Cambodian and international lawyers. Thousands of Civil Parties have participated in the second trial against the remaining accused, represented in Court by two Lead Co-Lawyers, one international and one Cambodian. Furthermore, the outreach activities of the Court, which previously had been carried out by NGOs, have finally taken shape and great strides are being taken to inform Cambodians about the Court's activities.

Despite the importance of the trials in Cambodian society, evidenced, in part, by the number of victims who have chosen to participate in the proceedings, a number of critical challenges continue to dog the Court. Most notable among these challenges are problems with corruption and funding. Corruption in Cambodia is a systemic problem and allegations of corruption at the Court have been widespread.[58] In June 2007 the UN's Office of Audit and Performance Review carried out a special audit of the Court. Their findings were extremely critical of

56 ECCC Law, Article 9.

57 See: S. de Bertodano, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers', in: *Journal of International Criminal Law*, 4 (2006) 285–293.

58 M.M. Calavan, S. Diaz Briquets and G. O'Brien, *Cambodian Corruption Assessment*, report prepared for USAID/Cambodia, 19 August 2004, 2–3: www.globalsecurity.org/military/library/report/2004/cambodian-corruption-assessment.pdf [accessed 5 May 2014]. See also: S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', in: *Criminal Law Forum*, 12 (2001) 185–246, 199.

the Cambodian side of operation and recommended that if the situation did not improve the UN should consider withdrawing from participation all together.[59] In addition, a separate assessment team hired by the international side of the Court criticised the significant administrative problems created by the division of the Court into distinct national and international sides.[60] Response to the many corruption allegations has been mixed. Most agree that steps to address corruption have been inadequate.[61] The Cambodian government will not allow a thorough and independent investigation into the allegations to be carried out, arguing that it is their prerogative to investigate allegations involving Cambodian staff. Sadly, it does not seem to be doing much to curb nepotism, bribes, and payoffs, which clearly affect independence, quality of staff and even the right to a fair trial.

In addition, problems with corruption go hand-in-hand with issues of funding.[62] In the early stages donors were put off by allegations of corruption and since the ECCC funding scheme is based exclusively on voluntary contributions the allegations caused considerable problems for the future of the Court. On more than one occasion national governments have provided emergency financial assistance, allowing the Court to continue operating. However, such bailouts by national governments have undermined efforts by the UN to press the Cambodian government into adopting more stringent anti-corruption measures.

The issues with corruption, including government influence over proceedings, and funding have had a direct impact upon the Court's operation. The Court struggles to employ an adequate number of qualified personnel and disagreements over future prosecutions have arisen.[63] In this regard, issues over the direction of the prosecutions came to a head when the international Co-Prosecutor and the Cambodian Co-Prosecutor disagreed over whether or not to open new judicial investigations that would bring charges against six additional individuals.[64] The national Co-Prosecutor, together with the Cambodian government, argued that there was no need for additional prosecutions; whereas, the international Co-Prosecutor argued that it was crucial for the Court to carry out further

59 UN Development Program, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, Report No. RCM0172, 4 June 2007, 5 [hereinafter UNDP Audit]: www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf [accessed 5 May 2014].

60 Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the courts of Cambodia*, February 2008, Update, 16: www.opensocietyfoundations.org/sites/default/files/eccc_20080303.pdf [accessed 5 May 2014].

61 J.A. Hall, 'Court Administration at the ECCC', in: J.D. Ciorciari and A. Heindel, eds., *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: Documentation Centre of Cambodia, 2009, 172–213, 190.

62 UNDP, *Audit*, 8, noting that funding at the Court is divided into an international trust fund managed by the UN under UNAKRT and a national fund, which includes government funds, bi-lateral assistance and international funds. The national funds are managed by UNDP.

63 Hall, 'Court Administration at the ECCC', 203.

64 A. Heindel, 'Jurisprudence of the Extraordinary Chambers', in: Ciorciari and Heindel, eds., *On Trial*, 125–170, 155.

investigations. When the disagreement went to the Pre-Trial Judges, the three Cambodian judges voted against additional investigations while the two international judges voted in favour. Because no international judge agreed, the request by the international Co-Prosecutor moved forward by default. But in October 2010 Prime Minister Hun Sen interfered by informing UN Secretary-General Ban Ki-moon that no further investigations would be allowed; an announcement that in April 2011 was followed by a decision of the ECCC's two Co-Investigating Judges to close investigations into two senior Khmer Rouge officials (known as case 003) without ever genuinely investigating the allegations. Shortly afterwards, the much criticised international Co-Investigating Judge, Siegfried Blunk, resigned, citing 'perceived (…) attempted interference by [Cambodian] government officials' as the reason for his resignation.[65] Despite continuous attempts by the Cambodian government to thwart case 003/004, the fourth international Co-Investigating Judge has moved forward with the cases.

Although the exact reasons for why the Cambodian government seeks to limit further investigations is not clear, with many believing it has to do with the high number of former Khmer Rouge individuals in the current government's administration, the official reason given by Prime Minister Hun Sen is that additional prosecutions could potentially affect the peace and stability of the country. Regardless of the reasons, this continuous stand-off between the Cambodian and international staff highlights the underlying tensions at the Court and the divisions between Cambodian and international personnel.

NATIONAL AND MIXED TRIBUNALS. BENEFITS AND CHALLENGES

Since World War II, a variety of accountability mechanisms have been created to address impunity for international crimes. International criminal tribunals, while an important development, simply cannot deal with all cases and must target their resources to tackle only a handful of situations and prosecutions. Understanding this inherent limitation of international criminal proceedings, the ICC requires states to enact implementing legislation that would allow states to carry out their domestic obligations in accordance with the Rome Statute. In this sense, states have certain international obligations, including the duty to investigate, prosecute or extradite individuals suspected of committing international crimes. Indeed, states are the primary avenues for criminal prosecutions, and in fact national prosecutions for international crimes occur throughout the world.

Nevertheless, the examples of the Leipzig trials following World War I and the IHT following the invasion of Iraq suggest that pure domestic proceedings

[65] Press release by the international co-Investigating Judge, 10 October 2011, available at: www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge [accessed 5 May 2014].

can have a number of drawbacks, which make them questionable options for accountability mechanisms following periods of conflict or unrest. The lack of political will in Germany at the time to prosecute its own soldiers for war crimes is indicative of many domestic criminal proceedings where the government seeks to shield suspects from prosecutions. This unwillingness on the part of states to hold perpetrators responsible is unfortunately quite common. The failure to hold Indonesian military personnel accountable following the violence in East Timor is another example. On the other hand, the problems surrounding the IHT highlight problems with inability, more than with any reluctance, to fairly and effectively prosecute individuals suspected of committing international crimes. Despite notable attempts to reference international criminal law norms and standards, the trials could still not provide for impartial prosecution and punishment.

The shortcomings associated with pure domestic criminal proceedings and international criminal proceedings have led to the creation, and indeed, the proliferation of a different model of criminal justice: the hybrid model. The examples touched upon in this chapter clearly show that the hybrid model is an attractive option for states when deciding upon a post-conflict accountability mechanism. Without a doubt the benefits of the hybrid model are numerous. First, there is a clear practical advantage of having the criminal court located in the country where the crimes occurred. The close proximity of witnesses and victims coupled with easier access to evidence collection are only a few of the advantages. Having domestic judges, lawyers and clerks working at the court is another advantage. Domestic staff has a greater understanding of the cultural context of the crimes, the perpetrators and the victims. Although local staff may also carry biases, the presence of international judges should help safeguard concerns of overt partiality and help ensure more fair and impartial trials.[66] This has certainly been the case in Kosovo.

Additionally, for domestic jurisdictions, international involvement can help off-set the high costs of prosecuting these types of crimes with the help of international funders. All the examples discussed above benefited from international funding. While problems with funding arose at all of the courts, the trials could not have taken place without the funds received. This additional source of resources is important because the costs of investigation, prosecution, defence and legal aid for victims (not to mention possible reparations for victims) can quickly add up. Furthermore, with regard to capacity building, the infusion of international staff can help with training and improving the local legal system.

Moreover, there are legal justifications for creating hybrid courts. As mentioned above, there is a presumption in favour of domestic prosecutions.

[66] Ch.L. Sriram, 'Review Article: New Mechanisms, Old Problems? Recent Books on Universal Jurisdiction and Mixed Tribunals', in: *International Affairs*, 80 (2004) 971–979, 977; P.M. Wald, 'Accountability for War Crimes: What Role for National, International and hybrid Tribunals?', in: *Journal of International Law*, 98 (2004) 192–195, 194.

However, when domestic authorities are either unwilling or unable to effectively prosecute individuals for international crimes, but are equally unwilling to turn over jurisdictions to a purely international court, a hybrid model may be an attractive option. In fact, hybrid courts could arguably work alongside the ICC and/or domestic courts.[67] Opting for a hybrid court, with domestic and international stakeholders, advances the notion of complementarity and the preference for domestic prosecution of international crimes. Further, the 'international community' is assuaged because the inclusion of international judges arguably helps ensure the enforcement of international humanitarian law and human rights law in accordance with existing international legal standards. Additionally, the cross-fertilisation of international norms and domestic norms is important. Dickenson notes that if domestic courts are not somehow involved, 'there is little opportunity for domestic legal professionals to absorb, apply, interpret, critique, and develop the international norms in question, let alone for the broader public to do so'.[68]

Finally, there is a symbolic advantage of opting for a hybrid model, particularly when the court operates in the country where the crimes occurred. Local citizens and those most affected by the crimes will have greater physical access to the court. Local news sources will be in a better position to report upon the progress of the court. These advantages often lend themselves to providing greater legitimacy for court proceedings in the minds of the local population. Perceived legitimacy is also important amongst international and domestic constituencies.[69] Domestic governments want to retain their sovereignty, particularly over criminal matters. The hybrid model generally allows the domestic authorities some influence over court operation. An additional symbolic reason why hybrid courts may be an attractive option is the fact that they may be in a better position to cater to the needs of victims and affected communities. By being located in the proximity of where the crimes occurred and having closer contact with affected groups the courts can better explain the process of the proceedings, the rule of law with regards to international criminal law, and procedures for seeking reparation.

The hybrid model is clearly an attractive option when deciding upon an accountability mechanism for international crimes. There are practical, legal and symbolic reasons why the hybrid court can offer a better alternative to pure international or domestic prosecutions. However, the experiences of the above hybrid courts also suggest that the creation of such courts does not necessarily mean that the criminal process will work effectively, efficiently, without bias and leave a lasting impact upon the community most affected by the crimes covered by the court's jurisdiction. For instance, the trials in East Timor failed to fulfil the promises offered by hybrid courts. The close proximity to the location where

67 Dickenson, 'The Promise of Hybrid Courts', 296.
68 *Ibid*., 305.
69 Mendez, 'The New Wave of Hybrid Tribunals', 70.

the crimes occurred and the relatively small amount of time between the crimes and the investigations did not assure success. Instead, the examples touched upon in this chapter highlight that there is no guarantee for success. Rather, it is important to guard against certain problems.

It is important to work out the correct international and domestic balance of responsibilities but at the same time to remain flexible. Finding the appropriate 'balance of responsibilities' can be challenging. For instance, although a number of Sierra Leoneans were employed by the SCSL in administrative, security and professional positions, local communities continued to feel far removed from the Court. This may be because senior positions were still largely held by international staff. The failure to acknowledge the disconnect between the local populations and the Court inhibited acceptance of the Court's importance in local culture, thereby affecting its overall legitimacy.

In Kosovo, finding the right balance of responsibilities took some time. Because local judges would too easily convict defendants on charges of genocide, failing to apply the correct legal thresholds, the UNMIK system was flexible enough to address this issue by requiring greater international involvement. The fact that UNMIK operated in full control over judicial functions certainly helped in this situation. However, that is simply not the case with many hybrid models. For example, in Cambodia, it would likely prove impossible to change any balance of responsibilities, particularly away from the government, in the middle of the process. Nevertheless, because of pre-existing fears of government interference, a super-majority formula had been consented upon whereby at least one of the international judges must agree in every decision in an attempt to guard against impartiality, bias and government interference.

It is equally crucial that the international and domestic partners maintain the political will to carry out fair and effective prosecutions and punishments. When either side of the equation waivers, the success of the court hangs in the balance. And political will is intricately linked with issues of funding. The trials in East Timor are an example of when the international community has little or waning interest in the accountability process. Undoubtedly, the failures of the East Timor hybrid Special Panels can largely be traced back to lack of resources and lack of international interest. In contrast with East Timor, where the 'international community' lost interest in ensuring fair accountability, in Cambodia it is the actions of the Cambodian government that suggests a lack of political will to ensure the success of the Court. For instance, the Cambodian government has continuously tried to hamper any further investigations. In addition, the widespread corruption in the country has contributed to funding emergencies, threatening the very operation of the Court.

Finally, building local capacity and engaging the local population is essential. Initially there was very little emphasis on capacity building, legacy and outreach at the SCSL. However, as the Court matured, an outreach section was created and a legacy officer was appointed. Although the results of the capacity building have

been minimal,[70] the outreach programs are viewed as successful, in part, because the outreach staff was almost entirely from Sierra Leone. Importantly, when the Court completed its last case, it left behind court and detention facilities. This infrastructure will surely prove useful as the country continues to rebuild its domestic judicial system. In East Timor capacity building and outreach efforts were minimal. Trainings were conducted for judges, prosecutors and investigators but most efforts arose too late in the process and language barriers were a particular problem.[71] The local population had little engagement with the SPSC because they initially did not engage in public outreach and the local populations had little access to court documents. Only later did the Panels' Public Prosecution Service attempt to inform local communities about indictments and prosecutions. In Kosovo, Mendez notes that 'A major flaw has been the mere substitution of national legal professionals with international staff instead of enhancing domestic legal capacity'.[72] Although the involvement of international staff is often crucial in order to address issues of impartiality, the mere substitution of national staff fails to address the deeper issues of capacity building. For this reason, it is desirable to incorporate capacity building initiatives into systems where international and national staff work together. Improvements, in this regard, are being made as EULEX focuses more on local capacity building.[73] Nevertheless, the polarisation of the region continues to complicate matters. Albanian Kosovars would likely view Serb capacity building with resentment and Serbs would be distrustful of a process involving too many Albanian Kosovars. In Cambodia, capacity building and outreach have finally begun to take shape, with the Victims Support Section taking a leading role and working together with civil society.

CONCLUSION

International criminal justice has a wide variety of accountability mechanisms, ranging from purely international criminal courts to domestic prosecutions. The hybrid court, which offers a combination of domestic and international elements, has also entered the legal landscape. While there is undoubtedly a preference for domestic prosecutions, often they fail to provide fair and effective justice either due to unwillingness or an inability on the part of the state. For this reason, the hybrid court is an increasingly attractive option for societies confronted with the need to implement an accountability mechanism to deal with violations of international criminal law. The proliferation of hybrid courts throughout the

70 T. Perriello and M. Wierda, *The Special Court for Sierra Leone Under Scrutiny*, International Center for Transitional Justice, March 2006, 38: http://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf [accessed 5 May 2014].

71 Katzenstein, 'Hybrid Tribunals', 265–268.

72 Mendez, 'The New Wave of Hybrid Tribunals', 77.

73 *Ibid*., 78.

world highlights the importance and attractiveness they offer. Nevertheless, the hybrid model, like domestic prosecutions, certainly has a number of flaws, as evidenced by the practice of those tribunals discussed in this chapter. It is not an easy task to mix domestic and international elements and finding an acceptable balance between the two is crucial to successful operation. Success is not guaranteed. Rather, it is important to guard against certain problems. Therefore whether or not domestic or hybrid models are successful depends upon many factors. Indeed, determining what type of approach is most appropriate may have more to do with present political considerations, both externally and internally, than with genuine issues of justice and practicability.

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