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From Aspirational to Prescriptive Capacity Building: Post-Conflict States, Rule of Law, and Hybrid International Justice

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FROM ASPIRATIONAL TO PRESCRIPTIVE CAPACITY BUILDING: POST-CONFLICT STATES, RULE OF LAW, AND HYBRID INTERNATIONAL JUSTICE

Daimeon Dean Shanks*

Mass-atrocity crimes present unique accountability challenges, challenges that are often exacerbated by the social and political conditions that facilitated the commitment of the crimes in the first place. International accountability mechanisms were developed to address these obstacles by providing a means of holding individuals accountable for international crimes when their host states were incapable of doing so or unwilling to do so. The first iteration of these tribunals, the international military tribunals, gained prominence following World War II, and a second-generation of non-military international tribunals were created in response to the mass atrocities committed in the former Yugoslavia and Rwanda. A third generation—hybrid international tribunals—began to emerge in the 2000s as a means of addressing the shortcomings of the purely international tribunals that had preceded them.

This Comment explores the benefits and drawbacks that are inherent in hybrid international tribunals; specifically, the issues of legitimacy that are prevalent in judicial cultures that suffer from rule of law deficiencies, and the promises of what I have termed “aspirational capacity building.” Aspirational capacity building refers to the idea that post-conflict states, whose judicial systems have been weakened by conflict, may rebuild their judicial capacities through interactions with hybrid international tribunals. These benefits are meant to be accrued merely by exposure to international ac-

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tors and institutions, hence the term “aspirational.” This Comment argues that requiring certain rule-of-law initiatives in a hybrid-tribunals constitutive agreement—moving from aspirational to prescriptive capacity building—would have the twofold benefit of ameliorating legitimacy issues and improving the host-state’s judicial culture.

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INTRODUCTION

When a domestic court is unwilling to bring or incapable of bringing to justice the perpetrators of mass-atrocity crimes, the constitution of an international hybrid tribunal may be the best

means of holding those responsible accountable.¹ Hybrid international tribunals—defined by their admixture of international and domestic legal processes—build on the legacy of the international ad hoc tribunals and complement the role played by the International Criminal Court (ICC) to deliver accountability that provides many of the assets of international justice while simultaneously providing local ownership of the judicial process. However, hybrid tribunals are susceptible to flaws inherent to their design, with issues of legitimacy being chief among them. This Comment argues that requiring a post-conflict state to accept certain rule-of-law initiatives as part of the constitution of a hybrid tribunal would result in enhanced perceptions of legitimacy for the tribunal itself and benefit the host state's local judicial culture.

The first generation of international criminal courts—the military tribunals of Nuremburg and Tokyo—were a response to the horrors and devastation of World War II. They were created as a means of holding individual actors accountable for the atrocities they committed on behalf of the Axis powers.² The lasting legacy of these tribunals is the notion that individuals cannot escape accountability for “extraordinary crimes” by resorting to the refuge of state sovereignty.³ The international tribunals that emerged after World War II fulfilled a role that purely domestic judicial systems were incapable of fulfilling or unwilling to fulfill—largely due to the national and political circumstances that gave rise to the events that necessitated international justice.

After the international military tribunals of Nuremberg and Tokyo came a second generation of international criminal tribunals that were created to address instances of mass atrocity and ethnic cleansing that arose in the 1990s.⁴ These international ad hoc tribunals, the International Criminal Tribunal

1. Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS 3, 5 (Cesare P. R. Romano et al. eds., 2004).

2. Beth Van Schaack, *Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 177 (2016).

3. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 3–6 (2007); Frank Dame, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, 24 MICH. ST. INT'L L. REV. 211, 216–24 (2015).

4. Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1022–23 (2009).

for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR),⁵ were modeled on the postwar military tribunals. They gained widespread acceptance because they not only held individual actors responsible for violations of international law but were also a means of achieving interrelated goals, such as reconciliation and norm-penetration in the affected states.⁶

However, these purely international *ad hoc* tribunals suffered from many deficiencies and were heavily criticized, largely because of the circumstances that led to the crimes they were constituted to address. Issues such as exorbitant cost, glacial pace, and the perception of meting out “imperialistic justice” plagued the ICTY and the ICTR. Moreover, the ICC, established by multilateral treaty in 2002 and meant to address many of the shortcomings of the *ad hoc* international tribunals, suffers from limitations of jurisdiction and mandate, meaning that it cannot adequately function as a complete backstop when domestic judicial systems break down.⁷

To fill these gaps and deficiencies in international criminal law, a third generation of international tribunals, called hybrid tribunals, have gained popularity and prominence over the past two decades.⁸ The object and purpose of these tribunals is to echo the form, substance, and international legitimacy of the *ad hoc* tribunals, while simultaneously respecting the affected nation’s “vision of justice, its choice of means of bringing it about, and its ownership, at least in part, of the judicial process.”⁹

These courts are considered “hybrid” because they distort the binary division between domestic and international courts;

5. U.N. SCOR, 3217th mtg., U.N. DOC. S/RES/827 (May 25, 1993) (establishing the ICTY); U.N. SCOR, 3453d mtg., U.N. DOC. S/RES/955 (Nov. 8, 1994) (establishing the ICTR).

6. Stacey M. Mitchell & Henry F. Carey, *Current Issues Confronting International Criminal Prosecutions*, in TRIALS AND TRIBULATIONS OF INTERNATIONAL PROSECUTION 1, 1–2 (Henry F. Carey & Stacey M. Mitchell eds., 2013).

7. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 348–49 (2006).

8. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 295 (2003).

9. Daphna Shrager, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 1, at 15.

typically, they are tribunals positioned within or alongside a domestic judicial system and that employ a mix of international actors, international law, and international procedure to address mass-atrocity crimes in post-conflict situations.¹⁰ Domestic and foreign judges work alongside one another to try cases that are prosecuted and defended by a mix of local and international lawyers, and apply either international law or domestic law that has been reformed to comply with international standards.¹¹

But just as purely international and purely domestic options are often inadequate solutions to complex justice issues, hybrid tribunals are not panaceas and are susceptible to their own inherent pitfalls—typically based in issues of domestic legitimacy.¹² These issues result from the political and sociological conditions that are common in post-conflict states, where hybrid tribunals risk being viewed by the local population as either politically controlled “sham trials” or as a type of “victor’s justice” that only holds those on the losing side of a conflict accountable.¹³ These perceptions, warranted or not, are particularly acute in judicial cultures with weak or deficient rule-of-law traditions.¹⁴ Nevertheless, in many post-conflict states, there will often be little political will to change the judicial culture, either because of a desire for the emergent ruling party to consolidate power and perpetuate the status quo, or because of the conscious choice to emphasize peace and reconciliation over difficult legal reforms and true accountability.¹⁵

Hybrid tribunals can address legitimacy concerns if post-conflict states are required to engage in certain rule-of-law initiatives as a prerequisite to the ratification of the constitutive agreement that establishes the tribunal. Rule-of-law initiatives

10. Dickinson, *supra* note 8, at 295.

11. *Id.*

12. Silje Aambø Langvatn & Theresa Squatrito, *Conceptualising and Measuring the Legitimacy of International Criminal Tribunals*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 41, 41–43 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017).

13. Higonnet, *supra* note 7, at 411–12, 418.

14. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 *GEO. J. INT’L L.* 251, 251–53 (2007); *Rule of Law*, *BLACK’S LAW DICTIONARY* (10th ed. 2014) (summarizing the concept of the “rule of law” as “[t]he doctrine that every person is subject to the ordinary law within the jurisdiction”).

15. See Judge Hisashi Owada, *Some Reflections on Justice in a Globalizing World*, 97 *AM. SOC’Y INT’L L. PROC.* 181, 184–85 (2003).

may take a variety of forms, such as programs intended to provide access to justice for subaltern groups, anti-corruption initiatives, legislative reforms, and many others, depending on the deficiencies present in a domestic system.¹⁶ In post-conflict states, there is often strong political will for reconciliation and accountability that can be bootstrapped to initiatives addressing rule-of-law deficiencies in which a state may be otherwise unwilling to engage. These requirements would be doubly beneficial because enhancing rule-of-law principles would improve perceptions of legitimacy for the hybrid tribunal itself and would have the normative effect of improving the judicial culture of the host state, helping to deter future transgressions and to prevent backsliding into conflict.

Part I of this Comment will provide a brief history of international justice mechanisms, the emergence of hybrid tribunals, and the shortcomings of purely domestic and purely international tribunals. Part II will address the ways in which hybrid tribunals may address these shortcomings and the tribunals' other intended benefits, paying particular attention to the notion of "aspirational capacity building." Part III will identify the most prominent legitimacy issues that are inherent in the hybrid tribunal model and how rule-of-law deficiencies exacerbate those issues. Part IV will argue that requiring a post-conflict state to accept certain rule-of-law initiatives as part of the constitution of a hybrid tribunal would result in enhanced perceptions of legitimacy for the tribunal itself, as well as an improved judicial culture for the host state.

I. INTERNATIONAL TRIBUNALS AND THEIR SHORTCOMINGS

First and foremost, for both practical and normative reasons, it is generally agreed that the best response to mass-atrocity crimes is a resort to domestic courts.¹⁷ As a practical

16. See generally *National Practices in Strengthening the Rule of Law*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/national-practices/> (last visited Nov. 8, 2018) [<https://perma.cc/TR5H-TNDK>] (highlighting initiatives and measures taken by various countries pertaining to attempts to strengthen the rule of law).

17. Cassese, *supra* note 1, at 4. For purposes of this Comment, I use the term "mass-atrocity crime" as a catch-all phrase for those serious human rights abuses that are of serious concern to the international community—genocide, crimes against humanity, and war crimes. For a description of these criminal acts, see Articles 5–8 of the statute that created the ICC. Rome Statute of the International

matter, domestic courts will have easier access to evidence and witnesses, and the judiciary will have a better understanding of the cultural context that may have contributed to the atrocities.¹⁸ As for normative considerations, domestic courts enjoy the features that hybrid tribunals attempt to appropriate—that is, local ownership of and participation in the judicial process, which enhances legitimacy and can result in “culturally adapted justice.”¹⁹

Although domestic courts may be preferred in principle, they face many problems that arise from the circumstances that surround mass-atrocity crimes. For example, mass atrocities or large-scale human rights violations are often carried out by state agents or individuals acting with the state’s acquiescence.²⁰ “National courts tend to be reluctant to render justice against people who may be part of the state apparatus,” especially if those state organs remain in power post conflict.²¹

Additionally, domestic judicial systems are often incapable of providing credible accountability due to practical difficulties in post-conflict situations.²² These difficulties may be physical, such as extensive damage to infrastructure, or personnel related, where the judicial body might be staffed with severely compromised or unqualified actors.²³ Post-conflict states often suffer from logistical and financial limitations, which may hinder accountability mechanisms.²⁴ More pernicious, judges and prosecutors may be leftovers from a previous regime and have little incentive to hold their political allies accountable; alternatively, there may be wholesale change in personnel from a new, victorious faction who would not only be lacking in experience and skill, but also may be tempted to engage in retaliatory prosecutions.²⁵

Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. DOC. A/CONF. 183/13 (Vol. I) arts. 5–8 (July 17, 1998), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf [<https://perma.cc/5VJW-6T48>] [hereinafter Rome Statute].

18. Cassese, *supra* note 1, at 4.

19. Raub, *supra* note 4, at 1042.

20. Cassese, *supra* note 1, at 4.

21. *Id.*

22. Dickinson, *supra* note 8, at 301.

23. *Id.*

24. Higonnet, *supra* note 7, at 349.

25. *Id.*

When these difficulties prove to be insurmountable for a domestic judicial system, resort to an international tribunal is often necessary to bring to justice the people responsible for mass-atrocity crimes.²⁶ Professor Antonio Cassese, first president of the ICTY, argued that there were three reasons why the tribunal was created; these points, I believe, reflect why an international tribunal, whether ad hoc or hybrid, may be necessary in certain situations.²⁷ First, there must be a situation in which the domestic judicial system is either incapable of administering, or unwilling to administer, justice.²⁸ Second, there must be political will to create a tribunal from either the international community or the affected state itself, or, in the case of hybrid tribunals, both.²⁹ And third, there must be political will to finance a costly international tribunal (although hybrid tribunals are much more economical than ad hoc tribunals, they are still significantly expensive).³⁰

International tribunals, both the second-generation ad hoc tribunals and the third-generation hybrid tribunals, vary greatly in their design and composition. They may be created by a variety of mechanisms, such as Security Council resolutions under Chapter VII of the UN Charter,³¹ UN-administered transitional authorities,³² bilateral treaties with the UN,³³ or through regional efforts.³⁴ Essentially, no two international tribunals are identical. However, tribunals share enough common features that they may be roughly organized into three main categories: international military tribunals, ad hoc international tribunals, and hybrid international tribunals. A fourth

26. Cassese, *supra* note 1, at 5.

27. *Id.*; see also Cesare P. R. Romano, *Mixed Criminal Tribunals (Sierra Leone, East Timor, Kosovo, Cambodia)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Aug. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e173> [<https://perma.cc/WRR2-2V8J>] (discussing the rationale for hybrid international tribunals more generally).

28. Cassese, *supra* note 1, at 5.

29. *Id.*

30. *Id.*; see also Thordis Ingadottir, *The Financing of Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS, *supra* note 1, at 271, 285 (comparing the ICTY's budget of US\$128 million for 2003, and Serious Crimes Panel in East Timor, the Special Court in Sierra Leone, the Extraordinary Chambers in Cambodia, and the "Regulation 64" Panels in the Courts of Kosovo's combined annual budget of US\$48 million).

31. Van Schaack, *supra* note 2, at 178–85.

32. *Id.* at 185–91.

33. *Id.* at 191–95.

34. *Id.* at 195–204.

type of international justice mechanism, the International Criminal Court, is distinguishable as it is designed to serve as a permanent juridical body to handle international criminal cases, while the other three types are constituted to address specific situations; however, as will be shown, the ICC does not render the other types of international justice mechanisms superfluous. The general structures, examples, and particular shortcomings of each category will be discussed in turn, and an in-depth discussion of hybrid tribunals will be addressed in Part II.

A. *International Military Tribunals: Nuremberg and Tokyo*

The Allied Powers created the first modern international tribunals at Nuremberg and Tokyo to hold individuals accountable for war crimes, crimes against peace, and crimes against humanity, which had previously only been charges attributable to states under international law.³⁵ The International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (Tokyo Tribunal) were established in 1945,³⁶ and marked as “the first time the leaders of a major state were to be arraigned by the international community for conspiring to perpetrate, or causing to be perpetrated, a whole series of crimes against peace and against humanity.”³⁷

Although military tribunals have probably existed for as long as there have been regularized armies, the term “international military tribunal” typically refers to one of these two specialized mechanisms that were created in the wake of World War II.³⁸ Unlike traditional military tribunals, which are a

35. *Id.* at 177.

36. *Id.* The IMT and the Tokyo Tribunal were established by the London Agreement of 1945 and the August 1945 Potsdam Declaration, respectively. *Id.* The prosecution of crimes committed in the Pacific theater was first contemplated at the Potsdam Declaration, although the actual creation of the tribunal was the result of a unilateral proclamation of General Douglas MacArthur, who was declared the Supreme Commander of the Allied powers in occupied Japan. *Id.* at 177–78.

37. Richard Overy, *The Nuremberg Trials: International Law in the Making*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 1, 2 (Philippe Sands ed., 2003).

38. Johannes Fuchs & Flavia Lattanzi, *International Military Tribunals*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Apr. 2011), <http://opil.ouplaw.com>

means for militaries to exercise discipline over their own personnel, the international military tribunals were a novelty when they were created in 1945 and have not been widely replicated.

Both the IMT and the Tokyo Tribunal were created unilaterally by the Allied Powers without meaningful consent from the defeated states, and as a result they suffered from accusations of doling out little more than “victor’s justice”—biased and politically influenced procedures in which only the defeated were held accountable for breaches of the international laws of armed conflict.³⁹ Despite their deficiencies, these tribunals are generally regarded as foundational to the field of international human rights law, specifically for the recognition that states and state leaders could be held accountable for crimes against their own citizens—even when those crimes were done in accordance with their domestic laws.⁴⁰ The principles of international law regarding state and individual responsibility that emerged from the IMT and the Tokyo Tribunal, known as the Nuremberg Principles,⁴¹ were later affirmed by the UN General Assembly and provided the genesis for international criminal justice as we know it today.⁴²

B. International ad hoc Tribunals

A second generation of international tribunals cropped up in the 1990s, a decade in which mass-atrocity crimes in the former Yugoslavia and Rwanda—the enormity of which had not been seen since the Holocaust—captured the world’s attention.⁴³ Acts of genocidal massacre and war crimes were en-

/view/10.1093/law:epil/9780199231690/law-9780199231690-e312?rskey=lbcZnp&result=2&prd=OPIL [https://perma.cc/XRQ8-G9VQ].

39. Van Schaack, *supra* note 2, at 177–78.

40. Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT’L L. 689, 703 (1998).

41. G.A. Res. 1/95 (I) (Dec. 11, 1946), <http://hrlibrary.umn.edu/instreet/1946a.htm> [https://perma.cc/VJ6Q-DL6C] (affirming the principles of international law recognized by the IMT Charter and judgment).

42. Van Schaack, *supra* note 2, at 178.

43. Reports depicted heinous crimes—including thousands of civilians being killed and wounded, tortured and sexually abused in detention camps, and hundreds of thousands being expelled from their homes. *See About the ICTY*, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Nov. 13, 2017) [https://perma.cc/7ESJ-J6LJ] (providing an overview and pictorial depictions of the war crimes in Yugoslavia); *see also International*

democratic to the conflicts that resulted from the disintegration of the former Yugoslavia, where estimates indicate that around two hundred and fifty thousand people died and more than one million were displaced.⁴⁴ Similar internecine conflict engulfed Rwanda, where the 1994 civil war culminated in ethnically motivated genocide, in which members of the Hutu majority slaughtered approximately eight hundred thousand Tutsi and Pygmy Batwa in roughly one hundred days.⁴⁵ A UN-commissioned report characterized the Rwandan genocide as “one of the most abhorrent events of the twentieth century.”⁴⁶

The international community responded, through UN Security Council resolutions, by creating the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, and less than a year later, the International Criminal Tribunal for Rwanda (ICTR).⁴⁷ These tribunals have been given the appellation “ad hoc” because they were constituted to deal with specific instances of international criminality that occurred during finite periods of conflict—typically non-international conflicts or civil wars.⁴⁸ The limited scope of their competence may be juxtaposed with the broader mandates possessed by permanent adjudicatory bodies, such as the ICC, the International Court of Justice, or the International Tribunal for the Law of the Sea.⁴⁹

The creation of these purely international ad hoc tribunals reflected the view that it was both politically desirable and legally justified to seek international accountability, due to the transborder interests that were affected by the conflicts and

Criminal Tribunal for Rwanda (ICTR), PROJECT ON INT’L CTS. AND TRIBUNALS, <http://www.pict-pcti.org/courts/ICTR.html> (last visited Nov. 13, 2017) [<https://perma.cc/BS6B-NQXE>] (providing an overview of the ICTR and why it was established).

44. *The Conflicts*, UN INT’L CRIM. TRIBUNALS FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/what-former-yugoslavia/conflicts> (last visited Jan. 4, 2019) [<https://perma.cc/4KYB-S5RP>].

45. U.N. Secretary-General, *Rep. of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN DOC. S/1999/1257, at 3 (Dec. 15, 1999).

46. *Id.*

47. *UN Documentation: International Law*, UN DAG HAMMARSKJÖLD LIBRARY: RESEARCH, <http://research.un.org/en/docs/law/courts> (last visited Nov. 13, 2017) [<https://perma.cc/G9FZ-2WA9>].

48. *Ad Hoc Tribunals*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/ad-hoc-tribunals> [<https://perma.cc/7QSE-S73E>].

49. *Id.*

the nature and gravity of the atrocities committed.⁵⁰ The UN Security Council reasoned that, because of these international dimensions and the lack of national accountability, the situations in both regions constituted threats to international peace and security as contemplated in Chapter VII of the UN Charter.⁵¹

Just as the postwar military tribunals were susceptible to allegations of victor's justice for their one-sided nature, the ad hoc international tribunals had their own practical and theoretical disadvantages—namely extraordinary costs, glacial pace, and limited temporal and spatial mandates.⁵² Moreover, removing the justice mechanism to a purely international forum gave rise to a host of normative concerns. Criticism of international tribunals often focuses on the lengthy duration of trials⁵³: delays not only infringe on the right of the accused to have a speedy trial—considered by many to be a general principle of international law⁵⁴—but also do little to foster legitimacy and reconciliation.⁵⁵ One high-profile example of this issue occurred at the ICTY, where Slobodan Milosevic, the so-called Butcher of Belgrade,⁵⁶ died in his cell in The Hague seven years after being indicted on charges of genocide, crimes against humanity, and war crimes, but before a verdict could

50. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 375 (1999).

51. *Id.* at 376 n.54. Chapter VII provides the UN Security Council the power to issue legally binding resolutions if it “determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

52. Elizabeth Nielsen, *Hybrid International Criminal Tribunals: Political Interference and Judicial Independence*, 15 UCLA J. INT'L L. & FOREIGN AFF. 289, 290–91 (2010).

53. David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT'L L. 1, 1–4 (2007).

54. Brian Farrell, *The Right to a Speedy Trial Before International Criminal Tribunals*, 19 S. AFR. J. ON HUM. RTS. 98, 100 (2003).

55. Raub, *supra* note 4, at 1020.

56. Marcus Tanner, *The Bloody Life and Times of the Butcher of Belgrade*, INDEPENDENT (Mar. 12, 2006, 1:00 AM), <http://www.independent.co.uk/news/world/europe/the-bloody-life-and-times-of-the-butcher-of-belgrade-6106856.html> [<https://perma.cc/EX93-TMTA>].

be rendered.⁵⁷ Undoubtedly, some victims viewed the ICTY's inability to hold Milosevic accountable as justice denied.⁵⁸

The exorbitant costs associated with purely international *ad hoc* tribunals are another inherent drawback; the ICTY and ICTR have been particularly harangued for their expenditures.⁵⁹ The money these tribunals spent has not necessarily resulted in the ability to hold a significant number of trials.⁶⁰ The logistical costs associated with holding tribunals in a foreign state alone are staggering—as of mid-2015, more than 4,650 witnesses had appeared before the ICTY alone, with the vast majority of them traveling internationally to do so.⁶¹ Because of these costs, the ICTY and ICTR, despite being massive judicial institutions with large budgets and staff, have only been able to try a relatively small number of high-level perpetrators for their crimes.⁶²

International *ad hoc* tribunals must contend with normative, as well as practical, concerns. Issues of legitimacy often arise when accountability mechanisms are removed to a purely international forum, whereas local trials engender trust in the proceedings.⁶³ For both the general population and victims alike, “it matters a great deal whether an alleged perpetrator . . . is paraded before the local press, judged in a local court-

57. Raub, *supra* note 4, at 1020.

58. *Id.*

59. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 42, U.N. Doc. S/2004/616 (Aug. 23, 2004) (“The two *ad hoc* tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars—equivalent to more than 15 per cent of the Organization’s total regular budget. Although trying complex legal cases of this nature would be expensive for any legal system and the tribunals’ impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.”).

60. Raub, *supra* note 4, at 1023.

61. *Witness Statistics*, UNITED NATIONS INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/registry/witnesses/statistics> (last visited Jan. 19, 2018) [<https://perma.cc/Z2WQ-DGK8>].

62. *Id.* The ICTY indicted 161 people and sentenced 89, while the ICTR indicted 93 people and sentenced 62. *Key Figures of Cases*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://unictr.unmict.org/en/cases/key-figures-cases> (last updated Sept. 19, 2018) [<https://perma.cc/DLQ6-ULVA>]; *Key Figures of the Cases*, UNITED NATIONS INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last updated June 2018) [<https://perma.cc/T4RP-YBK5>].

63. Raub, *supra* note 4, at 1022.

room in a language that [the local population] can understand, subjected to local procedure, and given a sentence that accords with local sentiments.”⁶⁴ In Bosnia and Herzegovina, for example, a study published in 2000 on the perceptions of the ICTY showed that local judges and lawyers were not only ill-informed on the tribunal’s work but also that they were suspicious of its motives and results.⁶⁵ The study attributed the tribunal’s legitimacy issues to the physical distance between the tribunal and the local population, the failure of the ICTY to publicize its work in Bosnia, the lack of participation by local actors, and the application of unfamiliar legal processes.⁶⁶

Either because of their inherent drawbacks, or because of the complicated politics necessary to get the international community—the UN Security Council in particular—to support them, there has yet to be a subsequent ad hoc international tribunal in the mold of the ICTY and the ICTR. Instead, the international community has turned to alternative criminal justice mechanisms: the International Criminal Court and hybrid international tribunals.

C. *The International Criminal Court*

The ICC came about as the result of a multilateral treaty in 1998, the Rome Statute of the International Criminal Court (Rome Statute), and began operation in 2002 as a permanent forum to try international crimes, which are limited under international law to genocide, crimes against humanity, war crimes, and the crime of aggression.⁶⁷ Indeed, the ICC was largely a reaction to the untenable nature of ad hoc tribunals, both in practical and theoretical terms.⁶⁸ As a practical matter, the creation of a permanent forum for trying international crimes, staffed with personnel experienced and trained in litigating complex trials with international dimensions, holds the

64. Alvarez, *supra* note 50, at 403–04.

65. See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT’L L. 102, 136–40 (2000).

66. *Id.* at 144–47; Dickinson, *supra* note 8, at 302–03.

67. See Rome Statute, *supra* note 17, at art. 5; Raub, *supra* note 4, at 1015.

68. Raub, *supra* note 4, at 1015.

promise of greater efficiency.⁶⁹ On the more theoretical level, the ICC was created with an eye toward retaining some local control over prosecutions. The vehicle for promoting this value is called the “principle of complementarity,” in which the ICC, by its statute, gives preference to legitimate domestic accountability.⁷⁰ The complementarity regime provides that the ICC can only assume jurisdiction if domestic courts are either unable or, for various reasons, unwilling to investigate and prosecute perpetrators.⁷¹

Many crimes are beyond the competence of the ICC, either because the state in which they occurred is not a signatory to the Rome Statute or because the crime took place before the Rome Statute went into effect, precluding ICC jurisdiction.⁷² Moreover, because of practical considerations and limited resources, the ICC is not capable of trying more than a handful of the senior figures involved in a conflict, even when its jurisdiction is properly seized.⁷³ Notwithstanding the ICC’s complementarity regime, the court is still plagued with concerns over its legitimacy, especially in African nations, where the court is considered by some leaders as “a new form of imperialism.”⁷⁴

69. Dickinson, *supra* note 8, at 297–98.

70. Rome Statute, *supra* note 17, at art. 11.

71. Dickinson, *supra* note 8, at 308.

72. Rome Statute, *supra* note 17, at art. 11 (limiting the jurisdiction *ratione temporis* to preclude retroactive application of the Statute); Higonnet, *supra* note 7, at 349.

73. Higonnet, *supra* note 7, at 349.

74. Elise Keppler, *Managing Setbacks for the International Criminal Court in Africa*, 56 J. AFR. L. 1, 6 (2012). In 2014, Uganda’s President Yoweri Museveni called the ICC “a vessel for oppressing Africa,” while other African leaders have called the court a “toy of declining imperial powers” and accused the ICC of treating Africans “like toddlers.” *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <http://www.bbc.co.uk/news/world-africa-24506006> [<https://perma.cc/577F-46L7>]; Michael Birnbaum, *African Leaders Complain of Bias at ICC as Kenya Trials Get Underway*, WASH. POST (Dec. 5, 2013), https://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html [<https://perma.cc/NV4-HQ9R>]; *Ugandan Leader Calls on Africa to Quit the ICC*, ALJAZEERA (Dec. 12, 2014), <http://www.aljazeera.com/news/africa/2014/12/ugandan-leader-calls-africa-quit-icc-201412121712353977.html> [<https://perma.cc/L9JN-T4XJ>].

D. The Emergence of Hybrid International Tribunals

Following the military and ad hoc tribunals, a third generation of international tribunals, the hybrid tribunals, emerged in the late 1990s and early 2000s as an alternative to purely international and purely domestic justice mechanisms.⁷⁵ These tribunals are referred to as “hybrid” for two reasons. First, because of their mixed nature—they either coexist alongside the local judiciary or are subsumed in the domestic judicial system—and second, because they blend international norms and laws, procedures, and personnel with their domestic corollaries.⁷⁶ Although no two tribunals are identical, they are typically constituted in a post-conflict state where there is no pre-existing international tribunal, the state in question is not subject to ICC jurisdiction, or where there is an existing tribunal or ICC jurisdiction but those bodies are incapable of handling the entirety of the inevitably large number of cases that arise in post-conflict situations.⁷⁷

The fact that hybrid tribunals take various forms makes the discussion and study of their efficacy immensely complicated. At their essence, hybrid tribunals are “products of judicial accountability-sharing between the states in which they function and international entities, particularly the U.N.”⁷⁸ They can exist as a completely independent body alongside, parallel to, or completely housed within the regular local judicial system.⁷⁹ The personnel is usually a mix of international and local judges, lawyers, and staff.⁸⁰ Domestic law, sometimes reformed to reflect international standards, may be applied along with international law, both in procedural and substantive matters.⁸¹ Some scholars argue that the only defining characteristic of hybrid tribunals is a mixed composition of judges,⁸² while others have identified a range of commonali-

75. See Romano, *supra* note 27, at ¶ 62.

76. Higonnet, *supra* note 7, at 356.

77. Dickinson, *supra* note 8, at 295.

78. Higonnet, *supra* note 7, at 356.

79. *Id.*

80. *Id.*

81. *Id.*

82. Sarah M.H. Nouwen, “Hybrid Courts”: *The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 213 (2006) (arguing that the mixed composition of the Bench is the “only defining commonality” of hybrid tribunals).

ties.⁸³ For the purposes of this Comment, it is enough to recognize that hybrid tribunals are characterized by the blending of features of international and domestic law to address situations that neither a purely domestic nor a purely international judicial body is capable of handling effectively, efficiently, or both.⁸⁴

Six hybrid tribunals were established between 2000 and 2007, and they provide the bulk of models available for study; these are: (1) the “Regulation 64” Panels in the Courts of Kosovo;⁸⁵ (2) the Special Panels for Serious Crimes in East Timor;⁸⁶ (3) the Special Court for Sierra Leone;⁸⁷ (4) the Extraordinary Chambers in the Courts of Cambodia (ECCC);⁸⁸ (5) the War Crimes Chamber for Bosnia and Herzegovina;⁸⁹ and (6) the Special Tribunal for Lebanon.⁹⁰ The ECCC, in particular, has been plagued with legitimacy issues and, as

83. SARAH WILLIAMS, *HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES* 201–52 (2012). Williams concludes that hybrid tribunals: (1) primarily serve a criminal (as opposed to a civil, administrative, or investigatory) judicial function; (2) operate for a limited duration as an ad hoc or temporary response to a specific situation; (3) provide for the possibility of participation by international judges, who do not necessarily compose a majority on the bench; (4) may be partially financed by international actors; (5) enjoy material jurisdiction over a mix of international and national crimes; and (6) involve a party other than the affected state, whether the UN, a regional organization, or (an)other state(s). *Id.*

84. *See, e.g.*, Dickinson, *supra* note 8, at 295; Higonnet, *supra* note 7, at 352; WILLIAMS, *supra* note 83, at 8.

85. U.N. Interim Admin. Mission in Kosovo, Reg. No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64 (Dec. 15, 2000).

86. U.N. Transitional Admin. in East Timor, Reg. No. 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (Mar. 6, 2000).

87. Statute of the Special Court for Sierra Leone, U.N. Doc. S/2002/246, art. 13(1) (Jan. 16, 2002) (annexed to Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone).

88. 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, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 41723.

89. Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia and Herzegovina, OFFICIAL GAZETTE BOSN. & HERZ., No. 12/04 (Dec. 1, 2004).

90. S.C. Res. 1757, ¶ 4 (May 30, 2007).

such, provides important examples for this examination.⁹¹ In recent years, there have been preliminary negotiations and proposals to establish hybrid tribunals to deal with situations in the Central African Republic,⁹² South Sudan,⁹³ Sri Lanka,⁹⁴ and others, but due to their nascent or still hypothetical nature, they will not be considered here.

II. THE PROMISED BENEFITS OF HYBRID TRIBUNALS

A. *Issues with Purely Domestic Tribunals That Hybrids May Address*

Hybrid tribunals provide many of the advantages that purely international tribunals offer over domestic mechanisms. In the main, questions of legitimacy are what hinder domestic judicial bodies from providing credible accountability in post-conflict situations.⁹⁵ Hybrid tribunals, through the incorporation of international judges and litigators, are better equipped to provide legitimate accountability. Introducing international actors may enhance the perception of judicial independence, which helps to address some of the legitimacy concerns that arise in post-conflict states.⁹⁶

Moreover, international actors' expertise in trying complex cases involving international law offenses may result in more satisfactory justice.⁹⁷ Purely domestic courts and lawyers are often unfamiliar with the subtleties of international humanitarian and human rights law and may be incapable of capturing the complexity or magnitude of mass-atrocity crimes, potentially minimizing the harms suffered.⁹⁸ For example, the Iraqi High Tribunal, constituted to prosecute Saddam Hussein

91. See *infra* Sections III.B and IV.A.

92. Memorandum of Intent between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic and the Government of the Central African Republic 4 (Aug. 7, 2014) (unofficial translation).

93. Rep. of the U.N. Mission in the Republic of South Sudan, *Conflict in South Sudan: A Human Rights Report*, 61 (May 8, 2014).

94. U.N. High Comm'r for Human Rights, *Rep. of the OHCHR Investigation on Sri Lanka*, recommendation 20 at 250, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015).

95. See *infra* Part III.

96. Dickinson, *supra* note 8, at 306.

97. Raub, *supra* note 4, at 1017–18.

98. *Id.*

and other high-level officials for mass-atrocity crimes following the 2003 Iraq War,⁹⁹ was by all measures a domestic court and was plagued by allegations of procedural deficiencies.¹⁰⁰ Judges, prosecutors, and defense attorneys with international experience, on the other hand, are often better equipped to provide competent legal services to all parties involved. The goal is to “marry the best of two worlds—the expertise of the international community with the legitimacy of local actors.”¹⁰¹

Employing international judges, prosecutors, and defense attorneys who provide expertise and experience in trying complex international issues alongside local staff, who may possess important cultural knowledge and may also have intimate knowledge of the atrocities themselves, combines the best of both worlds to bolster both international and domestic legitimacy.

B. Issues with Purely International Tribunals That Hybrids May Address

Hybrid tribunals offer solutions to many of the issues that were inherent to the international ad hoc tribunals—their extraordinary cost, slow pace, domestic perceptions of illegitimacy, and limited mandates and jurisdiction.¹⁰² Being situated in the locality of events provides many practical advantages, which in turn promotes improved efficiency and lower costs. Additionally, hybrid tribunals may address some of the normative concerns that plagued both the international military tribunals and the international ad hoc tribunals.¹⁰³

Framers of some hybrid courts, such as the Special Court for Sierra Leone, wrote time limits into their constitutive documents to further spur efficiency and prevent the delays that

99. Law of the Supreme Iraqi Criminal Tribunal (no. 4006 of Oct. 18, 2005) (Iraq), <http://gjpi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> [<https://perma.cc/4C43-WC4N>]; Guenael Mettraux, 2005 *Revision of the Statute of the Iraqi Special Tribunal*, 5 J. INT'L CRIM. JUST. 287, 288 (2007) (noting the “Iraqization” of the new Statute, which diminished the role of international personnel and weakened certain procedural guarantees).

100. Mettraux, *supra* note 99; Van Schaack, *supra* note 2, at 211–12.

101. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 619 (2005).

102. Nielsen, *supra* note 52, 290–91.

103. See *supra* Sections I.A, I.B.

plagued the ICTY and the ICTR.¹⁰⁴ Hybrid tribunals are physically located closer to where atrocities occurred; the resulting proximity equates to easier access to evidence and witnesses, and results in speedier, more efficient trials.¹⁰⁵ For example, less than two years after its creation in 2002, the Special Court for Sierra Leone had indicted all of the top leaders of the country's former warring factions.¹⁰⁶ By 2013, it became the first hybrid court to complete its mandate and transition to a residual mechanism.¹⁰⁷ The ICTY, by comparison, required twenty-four years to complete its mandate—more than twice as long as the Special Court for Sierra Leone.¹⁰⁸

Additionally, the cost savings that hybrid tribunals offer over purely international tribunals can be substantial. The budget of the ICTY for just the years 2010 to 2011 amounted to more than US\$286 million,¹⁰⁹ with estimates placing the overall cost of the tribunal upwards of US\$2.7 billion.¹¹⁰ This is a staggering amount of money to indict only 161 individuals.¹¹¹ Compare that with the planned US\$56.3 million expenditure for the first three-year budget of the Extraordinary Chambers in the Courts of Cambodia (ECCC)¹¹² or the approximately US\$16 million annual budget of the War Crime Chambers in Bosnia and Herzegovina,¹¹³ and the cost savings are apparent.

104. Cohen, *supra* note 53, at 4, 12–13.

105. Raub, *supra* note 4, at 1022.

106. Higonnet, *supra* note 7, at 385 n.127.

107. *Special Court for Sierra Leone*, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org> (last visited Mar. 12, 2018) [<https://perma.cc/WS6P-72WD>].

108. *International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://www.icty.org> (last visited Mar. 12, 2018) [<https://perma.cc/B6DT-YJCD>].

109. *The Cost of Justice*, UNITED NATIONS INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/tribunal/the-cost-of-justice> (last visited Mar. 12, 2018) [<https://perma.cc/324W-6RF5>].

110. Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 3 n.3 (2014).

111. *ICTY: Facts and Figures*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://www.icty.org/en/content/infographic-icty-facts-figures> (last visited Mar. 12, 2018) [<https://perma.cc/G3ZP-NHT6>].

112. Press Release, Pledging Conference for UN Assistance to Khmer Rouge Trials, Governments Pledge \$38.48 Million for Khmer Rouge Trials in Cambodia, U.N. Press Release L/3082 (Mar. 28, 2005), <http://www.un.org/News/Press/docs/2005/13082.doc.htm> [<https://perma.cc/M3G2-BQ6X>].

113. Van Schaack, *supra* note 2, at 277. Although, some of the crimes adjudicated by the Special War Crimes Chamber in Bosnia-Herzegovina benefited from previous ICTY investigations and adjudicated facts. *Id.*

However, it is important to keep in mind that the costs associated with hybrid international tribunals are still significant: despite the ECCC's initial proposed budget, the final overall cost of securing three convictions took eleven years and nearly US\$300 million.¹¹⁴

Hybrid tribunals may provide normative advantages over international tribunals as well. Although mixing local and international officials is not a panacea for legitimacy problems,¹¹⁵ it can ameliorate perceptions of imperialistic justice being imposed on a local populace.¹¹⁶ Due to their physical and symbolic proximity to the crimes, their anchoring in local and regional norms, and their being more in touch with "the complex domestic and social causes that led to the crimes,"¹¹⁷ hybrid tribunals enjoy many of the features that give domestic judicial systems legitimacy.¹¹⁸

C. *Why the International Criminal Court Does Not Make Hybrid Tribunals Superfluous*

The intent behind the creation of the International Criminal Court, which began operating in 2002, was to provide a permanent forum to adjudicate international crimes, thus obviating the need for incident-specific international tribunals.¹¹⁹ But the ICC does not render hybrid-justice mechanisms superfluous. The ICC's limited jurisdiction¹²⁰ and its inability to prosecute more than a handful of senior figures involved in any mass-atrocity event have left many criminal actors beyond the scope of the ICC's competence.¹²¹

114. Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> [https://perma.cc/2M9A-4SCK]. The ECCC may be something of an outlier; however, due to the rampant corruption in the Cambodian judicial system. See *infra* Section III.B.

115. See *infra* Section III.A and accompanying text.

116. Dickinson, *supra* note 8, at 306.

117. Frederic Megret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT'L L.J. 725, 729–30 (2005).

118. Van Schaack, *supra* note 2, at 172–73.

119. Rome Statute, *supra* note 17, preamble.

120. See *supra* Section I.D and accompanying text.

121. Higonnet, *supra* note 7, at 349.

Because the ICC's jurisdiction is limited to the 123 states that have ratified the Rome Statute¹²² and it is limited to adjudicating only the crimes of the most serious international concern, many culpable criminals lay beyond its grasp.¹²³ Take the example of Omar Al Bashir, the President of Sudan, who has been indicted by the ICC on five counts of crimes against humanity, three counts of genocide, and a multitude of war crimes, yet remains the sitting head of state in Sudan.¹²⁴ Arrest warrants were issued for Al Bashir in 2009 and 2010, but because Sudan is not a signatory to the Rome Statute, he has yet to be held accountable for the mass atrocities he is accused of committing during the War in Darfur.¹²⁵

Hybrid tribunals do more than provide a venue for those beyond the ICC's jurisdiction; they can provide complementary justice to the ICC (or other international tribunals) by hearing numerous lower-profile cases that occur during conflicts, as well as any additional crimes that may arise post-conflict.¹²⁶ Because the ICC and ad hoc international tribunals are mainly focused on trying high-level figures, that is, those most culpable for mass-atrocity crimes, a large number of cases may consequently go unprosecuted if there is no other international justice mechanism available.¹²⁷ Hybrid tribunals, in tandem with other international justice mechanisms, may provide more complete and just accountability by providing a forum for trying lower-profile, yet still responsible, criminals. The UN established "Regulation 64" Panels in the Courts of Kosovo and

122. *Rome Statute of the International Court*, TREATIES.UN.ORG (Mar. 12, 2018), https://treaties.un.org/Pages/ShowMTDSDetails.aspx?src=UNTS&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en [<https://perma.cc/ENA2-TW3G>].

123. Raub, *supra* note 4, at 1047.

124. Prosecutor v. Al Bashir, ICC-02/05/01/09, Case Information Sheet (Apr. 2018), <https://www.icc-cpi.int/darfur/albashir> [<https://perma.cc/3KWR-NVWN>].

125. Press Release, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity, and War Crimes in Darfur (July 14, 2008), <https://www.icc-cpi.int/Pages/item.aspx?name=a> [<https://perma.cc/DG2J-JSXQ>].

126. Dickinson, *supra* note 8, at 308.

127. For example, as a part of its Completion Strategies, the Security Council instructed the ICTY to focus on "the most senior leaders suspected of being most responsible for crimes." Van Schaack, *supra* note 2, at 258 (quoting S.C. Res. 1534, ¶ 5 (Mar. 26, 2004)).

the War Crimes Chamber for Bosnia and Herzegovina for this very reason.¹²⁸

D. "Aspirational Capacity Building" as a Component of Hybrid Justice

Scholars have identified many benefits that derive from hybrid-justice mechanisms beyond lower cost, greater efficiency, and complementing the ICC.¹²⁹ By dint of their localized position, hybrid tribunals can integrate local norms and provide "culturally adapted justice" to local populations.¹³⁰ Familiarity with the local judicial culture, languages, and customs enable local personnel to provide needed context to their international colleagues.¹³¹ Moreover, local trials provide the opportunity for local populations to confront those responsible for atrocities, potentially leading to reconciliation and recovery for victims.¹³² One of the desirable outcomes that can result from hybrid tribunals, and of most interest here, is a benefit that I have termed "aspirational capacity building." Capacity building, roughly defined as the strengthening of a local judicial system through various programmatic initiatives—such as monetary contributions, educational programs, and infrastructural works—is an important aspect of recovery for any post-conflict state.¹³³ Aspirational capacity building, as I define it, is a desire to see capacity building result as epiphenomenon of other legal processes, rather than as a specific objective.

In most post-conflict situations, hybrid accountability mechanisms may be necessary because the local judiciary lacks the capacity to handle accountability procedures on its own. Most scholarship identifies capacity building as one of the primary benefits of the hybridization of domestic and international legal procedures, yet this benefit is usually understood as a tangentially related bonus accruing from the process, ra-

128. Higonnet, *supra* note 7, at 355; *see, e.g.*, U.N. Interim Admin. Mission in Kosovo, Reg. No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64 (Dec. 15, 2000).

129. *See* Higonnet, *supra* note 7, at 349.

130. *Id.*; *see also* Raub, *supra* note 4, at 1042.

131. Raub, *supra* note 4, at 1042–43.

132. *Id.* at 1042.

133. *See* Varda Hussain, Note, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals*, 45 VA. J. INT'L L. 547 (2005).

ther than as one of the defined, achievable goals of a hybrid tribunal.¹³⁴ Terms such as “demonstration effect”¹³⁵ and “norm-penetration”¹³⁶ accurately describe the passive nature in which capacity-building benefits are meant to be realized in the local judicial body.¹³⁷ Dickinson explains the aspiration and passive nature of the process:

It is hoped that the infusion of international experience and expertise into domestic penal processes by way of mixed panels and prosecutorial units will offer capacity-building opportunities for national personnel, exert a “demonstration effect” for how justice should be administered, create binding precedent and opportunities for norm penetration that will guide future accountability efforts, magnify the expressive and constitutive function of the law, and counter corrupt tendencies in societies in which the rule of law is frail or has broken down.¹³⁸

The Security Council intended to promote capacity building in war-torn Sierra Leone when it established the Special Court by recognizing “the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone.”¹³⁹ However, the Security Council failed to clarify in what manner the court was expected to achieve meaningful capacity building or how it was to be prioritized in relation to the court’s other stated objectives.¹⁴⁰ Instead, the Security Council hoped that the benefits would “flow” from the process—benefits such as improved infrastructure, respect for the rule of law and trust in public institutions, and improved professional standards.¹⁴¹

134. See Van Schaack, *supra* note 2, at 172 (“It is hoped that the infusion of international experience and expertise . . . will offer capacity-building opportunities.”).

135. *Id.*

136. *Id.*

137. That is, such terms denote that the host state accrues the benefits from the international judicial process without active participation on its part.

138. Dickinson, *supra* note 8, at 172.

139. Cockayne, *supra* note 101, at 659 (citing S.C. Res. 1315, UN Doc. S/RES/1315, P 10 (Aug. 14, 2000)).

140. *Id.*

141. *Id.*

As such, one of the primary benefits of employing the hybrid tribunal model, often touted by the international community, is purely incidental. While those who negotiate and draft a tribunal's constitutive documents undertake the positive obligation of determining which jurisdictional, procedural, and substantive rules will be employed,¹⁴² they do not likewise consider capacity-building initiatives to warrant the same consideration.

Although hybrid international tribunals offer many benefits and improvements over alternative models of international justice, they are not without endogenous drawbacks and pitfalls. The subsequent Part will address the primary challenges—particularly issues of legitimacy—that hybrid tribunals face before turning to a discussion of prescriptive capacity-building as a means of overcoming these hurdles.

III. LEGITIMACY ISSUES INHERENT IN HYBRID TRIBUNALS

Each hybrid tribunal has its own particular flaws, but by examining them *in toto*, one can extract what may be generalized as inherent flaws in the hybrid system.¹⁴³ Discussion of many of these inherent flaws—such as still-considerable costs, security risks, possible fragmentation of international criminal law, and lack of Chapter VII authority for the UN Security Council to compel state cooperation¹⁴⁴—are beyond the scope of this discussion. Of interest to this Comment are issues of perceived legitimacy, to which hybrid tribunals—due to the dangers of potential political manipulation or lack of substantive national contribution—are susceptible.

A. *Legitimacy Issues*

Legitimacy is the “quality that leads people (or states) to accept authority—independent of coercion, self-interest, or rational persuasion—because of a general sense that the author-

142. Raub, *supra* note 4, at 1023.

143. Higonnet, *supra* note 7, at 410–11.

144. For a detailed discussion regarding these inherent flaws, see Higonnet, *supra* note 7, at 411–17.

ity is justified.”¹⁴⁵ The concept of legitimacy is more than just a normative concept; it also has a sociological dimension. For a hybrid court to enjoy sociological legitimacy, the people of the affected state must perceive the tribunal as justified and accept its authority.¹⁴⁶ This concept may be partly achieved through the application of the emerging norm of “fair reflection,” which posits that a judiciary is more likely to be perceived as legitimate if it is reflective of the society in which it operates.¹⁴⁷ One of the most visible and important expressions of the norm is the composition of judges who sit on a tribunal’s bench.¹⁴⁸ But, it is important to recognize that the principle of fair reflection does not, in and of itself, cure all of the perception issues that may arise in a hybrid tribunal, especially when the affected host state suffers from rule-of-law deficiencies.¹⁴⁹

Hybrid tribunals are vulnerable to legitimacy issues when their constitutive agreements vest too much or too little control of the accountability process in international actors. When the international elements of a hybrid system wield much more power than the local judiciary, the local population may not feel they have any ownership of the process, exposing the court to charges of imperialism.¹⁵⁰ These are the same perception problems to which the purely international ad hoc tribunals and the ICC are vulnerable, and the very issue that the principle of fair reflection is meant to address.¹⁵¹ On the other hand, the further a tribunal veers toward the purely domestic model, the greater the risk of political interference, which can result in sham trials or the perception that a trial is little more than victor’s justice.¹⁵²

The potential for political interference, particularly in post-conflict states that are suffering from rule-of-law deficiencies,

145. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 600 (1999).

146. Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT’L L. 482, 494–95 (2016).

147. *Id.* at 496–97.

148. *See generally id.*

149. *Id.* at 497–98. Hobbs correctly notes that a diverse bench does not per se create public confidence if there is a deficiency in the traditional integral judicial qualities on the bench, such as impartiality and professional skill, but it is merely one factor in the overall perception of a judicial system. *Id.*

150. Dickinson, *supra* note 8, at 306.

151. *Id.* at 302–03; *see generally* Hobbs, *supra* note 146.

152. Higonet, *supra* note 7, at 411.

is exceptionally acute.¹⁵³ When a ruling faction of a political body retains power following a period of conflict, that party's participation in a hybrid tribunal can open the door to "sham trials by insincere regimes implicated in the very atrocities adjudicated."¹⁵⁴ If, on the other hand, a new ruling faction opens accountability proceedings, it raises the possibility of "political show trials by successor regimes bent on vengeance instead of justice [so that the trials] are not likely to advance the rule of law at either the national or international levels."¹⁵⁵ If a hybrid tribunal is perceived, rightly or wrongly, as being interfered with by political forces—resulting in continued impunity or biased accountability—it frustrates the very reasons that local participation is desirable, such as the promotion of reconciliation and the establishment of credibility in post-atrocity governments.¹⁵⁶ Moreover, international oversight, procedures, or staff may be seen as nothing more than a veneer, lending credibility to what may otherwise be a defective legal process.¹⁵⁷

In short, hybrid tribunals must find the golden mean in balancing the needs and desires of the local population to see accountability happen, and the international community's interests in seeing justice done legitimately.

B. How Rule of Law Deficiencies May Exacerbate Legitimacy Issues in Hybrid Tribunals

Black's Law Dictionary sums up the concept of the rule of law in one concise phrase: "The doctrine that every person is subject to the ordinary law within the jurisdiction,"¹⁵⁸ or, to put it more bluntly, "nobody is above the law."¹⁵⁹ The rule of law has been a cornerstone of UN peacebuilding and reconciliation

153. *Id.* at 412–13.

154. Alvarez, *supra* note 50, at 370.

155. Nielsen, *supra* note 52, at 293 (citing Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948)) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

156. Higonnet, *supra* note 7, at 361–62.

157. Van Schaack, *supra* note 2, at 173.

158. *Rule of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

159. *The Four Pillars of the Rule of Law*, LAW DICTIONARY, <http://thelawdictionary.org/article/four-pillars-rule-of-law/> (last visited Nov. 10, 2017) [<https://perma.cc/694K-98VT>].

efforts since the early 1990s, as reflected in the 2004 Secretary-General report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.¹⁶⁰ The UN has described the rule of law as a principle of governance in which all persons and the state are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated.¹⁶¹ These general principles are ensured through adherence to the specific concepts of supremacy of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency, accountability and fairness in the application of the law, and equality before the law.¹⁶²

The concept of rule of law is not a monolithic construction. Rather, it encompasses “a multiplicity of definitions and understandings . . . even among the [UN’s] closest partners in the field,”¹⁶³ and it “is not a recipe for detailed institutional design . . . [it is] an interconnected cluster of values.”¹⁶⁴ However, even the most minimal adherence to rule-of-law norms requires an independent judiciary,¹⁶⁵ which is anathema to the type of political interference to which societies emerging from post-conflict situations are vulnerable. The norm of judicial independence is a necessary but not sufficient element of the rule of law; without adequately functioning courts and a judicial system, there can be no rule of law.¹⁶⁶ There are many further elements

160. UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. A/2004/616 (2004), <http://archive.ipu.org/splz-e/unga07/law.pdf> [<https://perma.cc/Z257-GBWY>].

161. United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* ¶ 6, 23 Aug. 2004, S/2004/616, <https://www.un.org/ruleoflaw/files/2004%20report.pdf>. [<https://perma.cc/KXY7-MKCZ>].

162. *Id.*

163. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 31 (2006) (quoting The Secretary-General, *Rep. of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 ¶ 5 (Aug. 23, 2004)).

164. Gerhard Casper, *Rule of Law? Whose Law?*, Keynote Address at the CEELI Award Ceremony and Luncheon (Aug. 9, 2003) (quoting MARTIN KRYGIER, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 13404 (Smelser & Baltes eds., 2001)).

165. *Id.* at 3; see generally AGNES HURWITZ & KAYSIE STUDDARD, INT’L PEACE ACADEMY, RULE OF LAW PROGRAMS IN PEACE OPERATIONS 3 (2005), https://www.ipinst.org/wp-content/uploads/publications/ipa_e_report_rule_of_law.pdf [<https://perma.cc/X5RM-43TJ>].

166. Tolbert & Solomon, *supra* note 163, at 45.

that constitute the rule-of-law corpus, notably policing, law enforcement, and anticorruption programs,¹⁶⁷ but it is the lack of an independent judiciary—the *sine qua non* of post-conflict accountability validity—that engenders perceptions of illegitimacy and the potential associated risks of sham trials and political show trials.

Crucially, the lack of an independent judiciary can lead to further political instability and unrest in post-conflict states. Although exposing the local population to accountability processes may have a cathartic and reparative effect, tribunals viewed as illegitimate may have the opposite result.¹⁶⁸ Tribunals that are perceived as politically motivated “could . . . be destabiliz[ing] politically if specific communities or groups feel targeted by the prosecutions or if victims do not feel their grievances are being redressed.”¹⁶⁹ Thus, the effectiveness of a hybrid tribunal hinges on its perception as a legitimate means of accountability, which, in turn, is impossible to achieve without the “interconnected cluster of values” known as the rule of law.

Rule-of-law deficiencies in Cambodia plagued the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in adjudicating some of the most egregious crimes of the Pol Pot era, in which an estimated 2 to 2.2 million people—up to one-third of the entire population—perished during the Khmer Rouge’s extremely short three-year, eight-month, and twenty-day rule.¹⁷⁰ During the 2003 negotiations between the UN and Cambodia to establish the tribunal,¹⁷¹ many accommo-

167. *Id.* at 44.

168. Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia* (JAD-PbP Working Paper No. 7, 2010), [http://issat.dcaf.ch/content/download/2284/19858/file/Hybrid%20Tribunals%20and%20the%20Rule%20of%20Law%20Martin-Ortega%20and%20Herman%20\(2010\).pdf](http://issat.dcaf.ch/content/download/2284/19858/file/Hybrid%20Tribunals%20and%20the%20Rule%20of%20Law%20Martin-Ortega%20and%20Herman%20(2010).pdf) [<https://perma.cc/NCG9-LW4H>].

169. *Id.* at 6; see also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2615 (1991); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 L. & CONTEMP. PROBLEMS 81–92 (1996).

170. Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, in INTERNATIONALIZED CRIMINAL COURTS 181 (Romano et al. eds., 2004); ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA UNDER THE KHMER ROUGE REVOLUTION* (1986).

171. Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes

dations were made to the Cambodian government for its insistence on political control and its preferences in the structure of the court, despite the UN Secretary-General expressing doubts about the accommodations, and, at one point walking away from negotiations altogether.¹⁷² The eventual framework agreement left the UN with a substantial amount of responsibility over the ECCC's work, but without effective means of controlling it.¹⁷³

And the UN was justified in being wary of Cambodia's motivations for wanting to retain control. The Cambodian justice system was, and is,¹⁷⁴ widely regarded by the international community as corrupt, lacking impartiality, and prone to political interference.¹⁷⁵ Disagreements over the court's design came to a head regarding the composition of the chambers, which is one of the most visible components in the norm of fair reflection.¹⁷⁶ The UN strongly preferred a bench with a majority of international judges (i.e., non-Cambodian), but the government insisted on a majority of local judges, to which the Secretary-General eventually agreed, but not without remarking:

Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter U.N.-Cambodia Agreement].

172. Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in INTERNATIONALIZED CRIMINAL COURTS 208 (Romano et al. eds., 2004). Negotiations were so fraught that the UN inserted a termination clause in the final agreement: "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." U.N.-Cambodia Agreement, *supra* note 171, at art. 28.

173. John D. Ciorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT'L L. 369, 373 (2014).

174. See, e.g., *Cambodia: Courts of Injustice*, AMNESTY INT'L (May 30, 2017, 1:04 PM), <https://www.amnesty.org/en/latest/news/2017/05/cambodia-courts-of-injustice/> [https://perma.cc/XR8D-T8CJ].

175. Meijer, *supra* note 172, at 218. The UN General Assembly went so far as to "note with concern the continued problems related to the rule of law and the functioning of the judiciary [in Cambodia] resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary." UNGA Res. 57/225 s II, para 2 (Feb. 26, 2003).

176. See Hobbs, *supra* note 146, at 495–98.

[I]n view of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would very much have preferred . . . for . . . the Extraordinary Chambers to be composed of a majority of international judges. I was, and continue to be, of the view that international judges, who would not be dependent in any way upon the executive authorities of Cambodia, would be much less likely to be influenced by, or yield to, any interference from that quarter.¹⁷⁷

The resulting composition of the ECCC was predominantly based on a domestic law model, with its Pre-Trial Chamber and Trial Chamber each composed of three Cambodian and two international judges, and its appellate and Supreme Court chamber employing four Cambodian judges and three international judges.¹⁷⁸ Additionally, the ECCC separated the national and international personnel, with each side employing its own staff of co-prosecutors and co-investigating judges, and using separate administrative bodies—each of which had independent funding sources, hiring practices, and reporting requirements.¹⁷⁹ The court's bifurcated structure and lack of international oversight resulted in a host of preventable problems, including cost overruns,¹⁸⁰ inefficiencies, political polarization on sensitive issues, and, importantly, political interference in the judicial process.¹⁸¹

Cambodia's rule-of-law deficiencies fed the perception of the ECCC's illegitimacy in the local population, which in turn reinforced the view that the entire Cambodian judicial culture was illegitimate.¹⁸² The ECCC, instead of contributing to meaningful capacity building by providing a positive example and precedent for the local judiciary,¹⁸³ exacerbated the very

177. U.N. Secretary-General, *Report of the Secretary-General on Khmer Rouge Trials*, UN Doc A/57/769, at 11 (Mar. 31, 2003).

178. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, arts. 10–13 (NS/RKM/1004/006) (2004) (Cambodia).

179. Ciorciari & Heindel, *supra* note 173, at 372.

180. *See* Mydans, *supra* note 114.

181. Ciorciari & Heindel, *supra* note 173, at 373, 393–400.

182. Dame, *supra* note 3, at 256–57.

183. *See supra* Section II.D and accompanying text.

deficiencies in the Cambodian judicial system that international justice mechanisms are meant to address.¹⁸⁴ By emulating the flaws in the local judiciary,¹⁸⁵ the ECCC further fueled the culture of corruption, creating a self-reinforcing cycle.¹⁸⁶ Moreover, the international community was in some ways complicit in continuing the cycle; as Heather Ryan, the Cambodia representative of the Open Society Justice Initiative, has argued: “Funding a court that is unwilling to address credible allegations of corruption is a significant problem It makes it appear that you are in some respect condoning the situation.”¹⁸⁷

It is important to note that Cambodia’s rule-of-law deficiencies did more than just create the perception of illegitimacy in the local population—they substantially contributed to corruption and political interference in the court.¹⁸⁸ As such, the Cambodian situation serves as a powerful example of how a weak rule-of-law culture can stymie legitimate international justice.

IV. REQUIRING RULE OF LAW INITIATIVES IN THE CONSTITUTION OF HYBRID TRIBUNALS

There is always a point when negotiations lead to a binding, written agreement between the affected host state and the international stakeholders involved. Each resultant agreement establishes the tribunal’s procedural rules, its competency and jurisdiction, its financing, and other necessary details and con-

184. Dame, *supra* note 3, at 255.

185. For example, the ECCC’s Chief Judge publicly admitted “he was taking money from the people who appeared before his court after their trials were over, maintaining that there was no other way to survive on his salary of \$30 per month.” Nielsen, *supra* note 52, at 306.

186. Dame, *supra* note 3, at 255 n.300.

187. Seth Mydans, *Corruption Allegations Affect Khmer Rouge Trials*, N.Y. TIMES (Apr. 9, 2009), <http://www.nytimes.com/2009/04/10/world/asia/10cambo.html> [<https://perma.cc/HB5L-AQAX>]. The Open Society Justice Initiative is the operational human rights program of the Open Society Foundations, which engages in, *inter alia*, monitoring of international tribunals. *Open Society Justice Initiative*, OPEN SOC’Y FOUNDS., <https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative> (last visited Mar. 16, 2018) [<https://perma.cc/D4T4-ADBF>].

188. Nielsen, *supra* note 52, at 306–09.

siderations.¹⁸⁹ Importantly, the agreement outlines each party's allocation of responsibilities and duties¹⁹⁰—essentially, what each stakeholder must give up to see its interests fulfilled. As discussed below, the international community largely has an interest in seeing justice done legitimately, while the host state may have an assortment of varied, or even conflicting, reasons to seek accountability proceedings. It is at this moment, when the interests of all the parties are sufficiently aligned through compromise, that rule-of-law initiatives—with which the host state may be otherwise unwilling to engage—could be written into the constitutive agreement of a hybrid tribunal, to the benefit of both the host state and the tribunal itself. The next two Sections will discuss the benefits that a turn to prescriptive capacity building would produce and propose a means of achieving such a result.

A. Transitioning from Aspirational to Prescriptive Capacity Building

The vastly different structure of each international hybrid tribunal is reflective of the incident-specific nature of each product; that is, the tribunals are often an on-the-ground innovation rather than the result of a precisely organized and thoroughly deliberated plan.¹⁹¹ The aspirational character of capacity building is a consequence of this deficiency in planning. As a 2003 report by the United Nations Development Programme and the International Center for Transitional Justice report on the failure of reform initiatives in the Special Court for Sierra Leone (the Draft Legacy Report)¹⁹² stated, “a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced.”¹⁹³ Capacity building, through rule-of-law initia-

189. See, e.g., Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, U.N.-Lebanon, Jan. 22–Feb. 6, 2007, 2461 U.N.T.S. 257.

190. See *Cooperation Agreements and Memoranda of Understanding*, SPECIAL TRIBUNAL FOR LEBANON, <https://www.stl-tsl.org/en/documents/cooperation> (last visited Feb. 14, 2018) [<https://perma.cc/4N6N-8NNA>].

191. See Dickinson, *supra* note 8, at 296.

192. See INT'L CTR. FOR TRANSITIONAL JUSTICE, DRAFT FOR DISCUSSION: THE “LEGACY” OF THE SPECIAL COURT FOR SIERRA LEONE 5, 12 (Sept. 29, 2003) [hereinafter DRAFT LEGACY REPORT], <https://www.un.org/ruleoflaw/files/LegacyReport.pdf> [<https://perma.cc/WU7F-J6E6>].

193. Cockayne, *supra* note 101, at 660.

tives, should move from the aspirational character it now embodies into a prescriptive component of a hybrid tribunal's constitution.

The forms and programs of rule-of-law initiatives are myriad and beyond the scope of this Comment. However, the Draft Legacy Report provides an example of what these initiatives might look like. The report advocated three key projects that would develop rule of law in Sierra Leone: reforming substantive Sierra Leonean law; implementing a strategic professional development program; and raising awareness of the Special Court to provide an example of effective rule-of-law principles.¹⁹⁴ The expected results were improved national legislation; better training and skill development for judges, lawyers, investigators, and court administrators; and increased public awareness and dialogue about the role of the judicial system in a post-conflict society.¹⁹⁵ These types of initiatives would be desirable for both the international and domestic actors engaged in hybrid justice mechanisms. The Draft Legacy Report identified these projects as *ex post* initiatives upon which the reform-oriented people of Sierra Leone should seize, using the Special Court as inspiration.¹⁹⁶ Although these projects, or similar reform initiatives, would undoubtedly be difficult and costly to undertake, they could have been made preconditional for the establishment of the Special Court, thus potentially achieving the desired reform while political will to create a tribunal was strong.

The inherent risk of hybrid tribunals being perceived as illegitimate would also be mitigated by strengthening rule of law through reform initiatives. Providing for local participation and ownership of the accountability proceedings, while simultaneously maintaining international oversight over the process can lead to a difficult balancing of competing interests. Grant too much power to the international element of a tribunal and the court is opened to charges of imperialism; grant too little and the court is vulnerable to political interference and accusations of putting on sham trials or meting out victor's justice.¹⁹⁷

Implementing rule-of-law initiatives would lessen the likelihood of negative perceptions in the local population, thus en-

194. *Id.*

195. *Id.* at 660–61.

196. DRAFT LEGACY REPORT, *supra* note 192, at 1.

197. Higonet, *supra* note 7, at 411; *see also* Dickinson, *supra* note 8, at 306.

gendering greater legitimacy. International participation is less vulnerable to accusation of transposed imperialistic justice because the domestic actors, both in the judiciary and the public at large, may see tangible ownership of the process at the national level—through legislative reform, continuing legal education programs, and other indicia of domestic transformations.

At the same time, the risks of a tribunal being perceived as little more than victor's justice or a sham trial is lessened by the institutional reforms that may help realize an independent judiciary. These reforms, by raising the population's confidence in their judicial system in general, would enhance the principles of fair reflection and local ownership that give hybrid tribunals many of their advantages. Through concrete initiatives and prescriptive capacity-building programs, a culture of impunity may be transmuted into an interconnected cluster of values known as the rule of law.

So, might this type of process have helped prevent the legitimacy issues that plagued the ECCC? As discussed above, many of the rule-of-law deficiencies in the Cambodian judiciary contributed to perceptions of the ECCC's illegitimacy, which in turn further undermined faith in the judicial system as a whole.¹⁹⁸ Bolstering the judiciary in Cambodia might have led to a better reception of the Khmer Rouge trials, which might have begun a positive self-referential loop and actually contributed to capacity building, rather than contributing to a negative feedback spiral. Commentators have identified many important aspects of rule-of-law deficiencies that have added to the ECCC's negative reception, such as integrity concerns,¹⁹⁹ lack of victim support,²⁰⁰ and outright corruption.²⁰¹ But it was the lack of an independent judiciary, which I have said is the *sine qua non* of post-conflict accountability validity,²⁰² that has particularly affected the ECCC's work.²⁰³

In two specific instances, Cambodian personnel in the ECCC have been suspected of bowing to their government's political interests at the potential expense of legitimate justice.²⁰⁴

198. See *supra* Section III.B and accompanying text.

199. Ciorciari & Heindel, *supra* note 173, at 409–12.

200. *Id.* at 424–25.

201. *Id.* at 411–15.

202. See *supra* Section III.B and accompanying text.

203. Ciorciari & Heindel, *supra* note 173, at 393–400.

204. *Id.*

In the first instance, the Cambodian government publicly resisted the defense teams' efforts to compel sitting government officials to testify as witnesses, and the tribunal—despite its broad mandate and discretion to compel witness participation—refused to accede to the defense teams' requests, citing the “practical difficulties,” and the “undue delay[s]” that might result.²⁰⁵ A proposed internal investigation into potential political interference, partly spurred by government statements made in the press,²⁰⁶ led to naught, as domestic judges blocked the supermajority needed to institute an investigation.²⁰⁷

The second instance led to even greater internal discord. The ECCC prosecutors were mandated with investigating and trying the “senior leaders” of the Khmer Rouge, or persons “most responsible” for the crimes committed during its rule.²⁰⁸ Initially, the ECCC contemplated only two cases—one, the trial of the former head of the secret prison at Tuol Sleng (Case 001), and the second against a pair of surviving senior Khmer Rouge leaders (Case 002).²⁰⁹ Given their mandate, the ECCC prosecutors and judges were provided with wide discretion to determine who may fall within the tribunal's personal jurisdiction beyond just the “senior leaders.”²¹⁰ In 2008, one of the international Co-Prosecutors, Robert Petit, initiated two new judicial investigations, Cases 003 and 004, which were subsequently blocked by a national Co-Prosecutor Chea Leang.²¹¹ The government had consistently opposed trying new suspects, with Cambodia's Prime Minister Hun Sen—himself a former Khmer Rouge commander—expressly telling visiting UN Secretary-General Ban Ki-moon that there would be no trials be-

205. *Id.* (citing Case No. 002/19-09-2007-ECCC/OCIJ (PTC 51), Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, ¶ 3 (June 8, 2010)) (quoting Note of International Investigating Judge Marcel Lemonde at 3 (Jan. 11, 2010)).

206. One such government official is quoted as saying: “[T]hough the individuals could appear in court voluntarily, the government's position was that they should not give testimony. He said that foreign officials involved in the court could ‘pack their clothes and return home’ if they were not satisfied with the decision.” Sebastian Strangio & Cheang Sokha, *Govt Testimony Could Bias KRT: PM*, PHNOM PENH POST (Oct. 9, 2009, 8:04 PM), <http://www.phnompenhpost.com/national/govt-testimony-could-bias-krt-pm> [<https://perma.cc/2U4L-224U>].

207. Carciari & Heindel, *supra* note 173, at 393–95.

208. *Id.* at 395.

209. *Id.* at 373.

210. *Id.* at 395.

211. *Id.*

yond Cases 001 and 002.²¹² The dispute went before the Pre-Trial Chamber judges, who deadlocked on the issue along national/international lines—a result that has been perceived as politically motivated.²¹³ The division between the Cambodian and international personnel became so rancorous that, as the issue of instigating new prosecutions went between the Pre-Trial Chamber and the Office of the Co-Investigating Judges, it led two international judges and six UN staff to quit the tribunal.²¹⁴ Despite being initiated ten years ago, the decision on whether to hold trials over Case 003 and Case 004 is still pending.²¹⁵

Addressing the types of issues that have arisen in the ECCC would most likely require significant legislative reform in Cambodia. New laws intended to ensure the independence of the judiciary, for example, might prevent the perceptions (whether true or not) that the Cambodian personnel were making decisions based on governmental input. This in turn would build support for the process in the eyes of the domestic and international communities and faith in the Cambodian judicial system as a whole. Beyond the improved legitimacy for the ECCC and the Cambodian system, it would *actually* build capacity and rule of law in Cambodia by *actually* improving judicial independence for every stratum of the Cambodian legal system.

However, given that it took nearly twenty-five years and strenuous negotiations to convince the government of Cambodia to try only a few of those responsible for one of the most heinous mass atrocities in history, one can induce that Cambodia did not have much political desire to hold senior leaders of the Khmer Rouge accountable. As such, it is difficult to imagine that Cambodia would have been willing to reform their judicial system solely in exchange for international assistance in es-

212. Ek Madra, *Cambodia PM Rejects Wider Khmer Rouge Trials*, REUTERS (Mar. 31, 2009), <https://www.reuters.com/article/us-cambodia-rouge/cambodia-pm-rejects-wider-khmer-rouge-trials-idUSTRE52U1IZ20090331> [<https://perma.cc/MRB3-XF6Y>].

213. Ciorciari & Heindel, *supra* note 173, at 396.

214. *Id.* at 396–99.

215. See *Khmer Rouge Trials*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/khmer-rouge-trials/> (last visited Nov. 8, 2018) [<https://perma.cc/7U2P-W2GG>].

tablishing and funding the ECCC.²¹⁶ However, the Cambodian experience provides a powerful example of how rule-of-law deficiencies can frustrate legitimate accountability, and how requiring rule-of-law reforms would not only be desirable for the affected host state, but also may be necessary to achieve international justice.

B. The Bootstrapping of Political Will

Given that there are strong incentives for post-conflict governments to establish hybrid tribunals as accountability mechanisms, but that there is often little concomitant political will to engage in substantive rule-of-law reformatations, international actors could bootstrap one to the other, to the benefit of each. There are many reasons that post-conflict states pursue accountability for mass atrocities that go beyond the normative desire to see justice done.²¹⁷ Penologists recognize many theoretical frameworks for justifying accountability; they are generally classified into six major themes: (1) desert/retribution/vengeance, (2) deterrence, (3) rehabilitation, (4) restorative justice, (5) communication/condemnation/social solidarity, and (6) incapacitation,²¹⁸ of which all but incapacitation are typically cited as normative reasons for pursuing accountability in post-conflict states.²¹⁹ But, there are various other practical reasons why a government emerging from a period of political upheaval and violence may have incentives to participate in accountability proceedings, some laudable—such as building cre-

216. Etcheson argues that delays on behalf of the government of Cambodia may have been part of a campaign of "weak power diplomacy"—using the promise to hold, or postpone, accountability proceedings (depending on what the donor state wanted to hear) to secure monetary inducements in the form of foreign aid. Etcheson, *supra* note 170, at 202–03. China, who opposed a Khmer Rouge tribunal, and the United States, Europe, Japan, and other countries, who supported a trial, showered Cambodia with billions of dollars of assistance in an attempt to steer the government's actions. *Id.*

217. Stromseth, *supra* note 14, at 258.

218. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 44–45 (2002). See generally RUDOLPH J. GERBER, *PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY* (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998); *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* (Rudolph J. Gerber & Patrick D. McAnany eds., 1972); STANLEY E. GRUPP, *THEORIES OF PUNISHMENT* (Stanley E. Grupp ed., 1971); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993); NIGEL WALKER, *WHY PUNISH?* (1991).

219. Aukerman, *supra* note 218, at 45.

dence in a fledgling government—and some self-serving—such as consolidating power in a political or ethnic faction.

International actors have their own incentives to participate in the accountability proceedings, which include, *inter alia*, the promotion of capacity building as a means of deterring or preventing future transgressions of international law. As we have seen, a hybrid tribunal's ability to achieve many of its goals largely rests on it being perceived as a legitimate means of accountability, free of political interference²²⁰—a precept that, itself, must lie on a foundation of rule of law. But, for many reasons, the ability to engender rule of law in post-conflict states, where it is often deficient, is a difficult task in and of itself.²²¹ For example, although the incorporation of local cultural and legal norms may generate considerable legitimacy, these incorporations may also conflict with competing international human rights norms. This has occurred in post-invasion Afghanistan, where reconciling fundamental norms regarding women's rights with the local tribal justice system has been a challenge.²²²

Moreover, governments may have short-term interests in accountability, such as favoring peace over justice, but lack the desire or capacity to enact the type of extensive reforms needed to revamp an entire judicial culture.²²³ Post-conflict governments may have more nefarious rationales for resisting rule-of-law reforms as well, such as consolidating power or continuing their own abuses with impunity.²²⁴

To overcome domestic intransigence and achieve real-world, on-the-ground positive outcomes for the host state and the tribunal itself, the creation or funding of a hybrid tribunal could be conditioned on the enactment of rule-of-law initiatives. One could envisage a slate of reform options, potentially based on transitional justice models, as each specific context re-

220. See *supra* Section III.A.

221. Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT'L L. 415, 417–19 (2009).

222. *Id.* at 417–18. The study of the conflict between cultural norms and fundamental human rights is a broad subject, and too complicated to be addressed in-depth here. For an expansive discussion of cultural relativism and women's rights, see Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

223. See generally Owada, *supra* note 15 (discussing the application of ideals of justice in the international setting).

224. Van Schaack, *supra* note 2, at 173.

quires.²²⁵ Additionally, continued funding or international assistance could be predicated on the host state meeting certain time-sensitive benchmarks, to ensure good-faith implementation of initiatives. There is a panoply of context-specific options available, but an in-depth discussion is beyond the scope of this Comment.

The benefits derived from requiring rule-of-law initiatives in the constitutive agreements establishing hybrid tribunals—in effect, transforming the aspirational aspect of capacity building into a prescriptive goal—would be two-fold: first, it would bolster the tribunal's perceived legitimacy, improving the outcomes of the tribunal's work; second, it would improve the local judicial culture and foster global commitment to accountability. These requirements would do much to address the inherent legitimacy issues that are exacerbated by rule-of-law deficiencies.²²⁶ One need look no further than the Cambodian example to imagine a counterfactual in which prescriptive capacity-building, that is, rule-of-law reforms, might have improved the ECCC's perceived legitimacy and helped ameliorate the deficiencies in Cambodia's judiciary.

CONCLUSION

Hybrid international criminal tribunals promise a satisfying solution to many of the problems that plague accountability mechanisms in post-conflict states. By intermingling international procedures, law, and actors with an extant domestic judicial body, hybrid tribunals can provide local ownership and culturally nuanced justice to the victims of mass-atrocity crimes. Domestic tribunals often suffer from practical issues that arise from the violence or political upheaval that necessitates their existence, while purely international tribunals are largely regarded as too slow, too costly, and too disconnected from the location of events to act as solid examples of effective justice. Moreover, the jurisdictional, temporal, and practical limitations of the International Criminal Court mean that it will never be capable of trying more than just a handful of senior figures involved in mass atrocities, if it is able to try them at all. Hybrid tribunals provide sensible alternatives to

225. See *supra* Section IV.A.

226. See *supra* Section III.B.

other accountability mechanisms, while at the same time offering the promise of improved capacity building in the host state as a result of the process.

However, hybrid tribunals are not a panacea for every issue that may arise in the context of post-conflict accountability. The mixing of international and domestic elements of justice does not, in and of itself, cure many of the defects inherent in post-conflict judicial systems. Vesting too much control in international actors opens a tribunal to charges of imperialism, while vesting too little risks perceptions, deserved or not, of political interference and bias. Rule-of-law deficiencies that are common in post-conflict states, especially the lack of an independent judiciary, contribute to and exacerbate these inherent issues.

In requiring certain rule-of-law initiatives in the constitutional agreements of hybrid tribunals, international actors can realize tangible benefits both for the accountability process and the affected state. A state's unwillingness or inability to engage in rule-of-law initiatives can be overcome by bootstrapping the political will to host accountability mechanisms to tangible programs intended to foster a rule-of-law culture. The benefits would be two-fold: the perceived legitimacy of the accountability process would be improved, acting as a counterbalance to some of the inherent issues found in hybrid justice; and it would have the normatively desirable effect of improving the judicial culture in a post-conflict state, helping to promote reconciliation and deter future transgressions of international norms.

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