

“More than a Domestic Mechanism”: Options for Hybrid Justice in Sri Lanka^{*}
Beth Van Schaack

Introduction

After years of resistance, the new government of Sri Lanka has now committed to launching a genuine transitional justice program to address, and redress, the grave international crimes committed by all sides in the almost 30-year conflict with the Liberation Tigers of Tamil Eelam (LTTE).¹ In addition to comprehensive political reforms focused on good governance, the devolution of power, security sector reform, and the rule of law, the future transitional justice process will reportedly involve four main pillars: a truth and reconciliation commission; a reparations process; an office to investigate and resolve disappearances; and an accountability mechanism. These building blocks find expression in a landmark consensus resolution by the Human Rights Council issued in September 2015 with Sri Lanka as a co-sponsor.² Although this will be a Sri Lankan process, the resolution calls upon government actors to take advantage of “expert advice from those with relevant international and domestic experience” and to draw upon “international expertise, assistance and best practices.”³ In joining the resolution, Sri Lanka has affirmed the importance of including foreign personnel—including judges, defense counsel, prosecutors, and investigators, potentially drawn from among the Commonwealth states—in any judicial mechanism.⁴ The resolution thus embodies one of the key recommendations emerging from the Human Rights Council’s engagement in Sri Lanka: the imperative of establishing a

^{*} The quoted phrase comes from the remarks of the High Commissioner for Human Rights, who “remains convinced that, for accountability to be achieved in Sri Lanka, it will require more than a domestic mechanism.” Human Rights Council, *Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*, U.N. Doc. A/HRC/30/61, para. 88 (Sept. 28, 2015).

¹ In the absence of a genuine domestic accountability process, the Human Rights Council authorized a comprehensive investigation into international crimes committed in Sri Lanka from February 2002, when the two sides signed a Ceasefire Agreement, to November 2011, when the results of the country’s own Lessons Learnt and Reconciliation Commission were presented to the then-President. See Human Rights Council, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, U.N. Doc. A/HRC/25/1 (March 27, 2014). The report exhaustively documented the commission of a wide range of international crimes and advanced a number of cogent transitional justice recommendations. See Report of the OHCHR Investigation on Sri Lanka, U.N. Doc. A/HRC/30/CRP.2 (September 16, 2015) (“OISL Report”).

² Human Rights Council, *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka*, U.N. Doc. A/HRC/30/L.29 (Sept. 29, 2015).

³ Ibid at preamb. para. 16 and OP 3.

⁴ The Resolution indicates that the Council:

Welcomes the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system, notes with appreciation the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators...

Ibid at OP 6.

hybrid tribunal of some sort to ensure an independent, impartial, and credible criminal process free of intimidation and political interference.⁵

Notwithstanding this pledge, government representatives, journalists, and others have since expressed reticence about inviting international interference in, or ceding too much control over, the administration of justice for the crimes of the civil war.⁶ In response, members of civil society have urged the government to stay the course, resist nationalist rhetoric rejecting any international involvement, adhere to its prior commitments, and work with the international community to ensure a genuine accountability process.⁷ The term “hybrid tribunal” has emerged as a particular flashpoint in this discourse, with commentators rejecting the concept out of hand as somehow inherently violative of Sri Lanka’s sovereignty. This chapter hopes to demonstrate that there are multiple ways that domestic judicial processes can be “internationalized” in order to bolster the perceived domestic and international legitimacy of a judicial process, take advantage of investigative, forensic, and legal expertise developed in other societies facing similar transitional justice dilemmas or in the various international courts, and benefit from material assistance from the international community whose members are committed to investing in the new Sri Lanka—all without sacrificing judicial sovereignty over the penal process.

⁵ See OISL Report, *Ibid* note 1, at para. 1246:

In these circumstances, OISL believes that for an accountability mechanism to succeed in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators, that will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicisation and highly polarised environment in Sri Lanka.

See also *Ibid* at Recommendation 20 (calling on Sri Lanka to “[a]dopt specific legislation establishing an *ad hoc* hybrid special court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity, including sexual crimes and crimes committed against children, with its own independent investigative and prosecuting organ, defence office, and witness and victims protection programme.”).

⁶ Jason Burke & Amantha Perera, “UN Calls For Sri Lanka War Crimes Court To Investigate Atrocities”, THE GUARDIAN (quoting Namal Rajapaksa, the former president’s son and a member of Parliament, as describing the proposal to create a hybrid court as “a complete insult to the entire legal system in this country”); K.T. Rajasingham, “A Hybrid Court in Sri Lanka : A Non-Starter ...?”, ASIAN TRIBUNAL (Sept. 21, 2015) (“the establishment of a hybrid special court with a compliment of international judges, prosecutors, lawyers and investigators, is something unthinkable in a country, where everyone—this writer including—is mad about the sovereignty and independence of the nation, and dead set against any interference in any form.”); Shenali D Waduge, “Sri Lanka Does Not Need Hybrid Courts When The Culprits Sit In Judgement”, LANKAWEB (Oct. 10, 2015); Azzam Ameen, “Sri Lanka President Wants “Internal” War Crimes Court”, BBC News (Jan. 21, 2016), <http://www.bbc.com/news/world-asia-35376719>.

⁷ See the statement from activists and organizations within Sri Lanka:

In the context of wide-scale impunity and the alleged collusion of state functionaries in systemic criminal conduct, robust participation of foreign personnel in trials is a necessary starting point to redeeming the trust of victims in the state, and ensuring the confidence and participation of all stakeholders in Sri Lankan transitional justice processes. ... We also recognize the expertise and skills required to investigate and prosecute serious abuses of international human rights and humanitarian law, and note the vacuum in this regard within Sri Lanka.

See also, Bhavani Fonseka and Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka* (January 2016), <http://www.cpalanka.org/wp-content/uploads/2016/01/Hybrid-vs.-Domestic-Myths-Realities-and-Options-for-Transitional-Justice-in-Sri-Lanka.pdf>.

Background

A number of states emerging from periods of armed conflict or mass violence have created national institutions dedicated to prosecuting international crimes and invited the involvement of international experts in various capacities. Included within these internationalized institutions are special chambers and investigative units that are deeply ensconced within the relevant domestic system but that benefit from international support and expertise through seconded personnel and the provision of technical assistance. These institutions have been called “hybrid” or “mixed” tribunals simply because they possess qualities of both domestic and international courts.⁸ For example, past models have been staffed by international and domestic personnel (judges, prosecutors, investigators, defense counsel, administrators, and support staff) working in tandem with their local counterparts and have applied a mixture of international and domestic criminal law and procedures.⁹ The involvement of local personnel has been crucial to the success of these efforts, from the perspective of perceived domestic legitimacy, technology and knowledge transfer, and cultural and legal literacy.

The rationales for internationalizing elements of the domestic judicial system in the wake of mass violence are multi-fold. Most importantly, the inclusion of international personnel serves to restore legitimacy and popular faith in domestic institutions that may have suffered a loss of confidence in the eyes of victim groups and perpetrators.¹⁰ Indeed, many victims and human rights advocates see the judicial sector as having been blind to, or even complicit in, the crimes of the state during the war, including through a biased application of the Prevention of Terrorism Act.¹¹ Mixed institutions may be better equipped to advance the rule of law in keeping with international principles and to protect against over-zealous, one-sided, or unfair prosecutions. Transitional societies often must deal with a wealth of legal claims, including property and

⁸ Although this chapter focuses on personnel, there are many ways to hybridize transitional justice mechanisms, including with respect to substantive and procedural law. See generally Project on International Courts and Tribunals, *Hybrid Courts*, available at <http://www.pict-pecti.org/courts/hybrid.html>; Beth Van Schaack, ‘The Building Blocks of Hybrid Justice’, 44 DENV. J. INT’L L. & POL’Y 169 (2016).

⁹ Laura Dickinson, ‘The Promise of Hybrid Courts’, 97 AM. J. INT’L L. 295 (2003); Etelle R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, 23 ARIZONA J. INT’L & COMP. L. 347 (2006). For an extensive bibliography, see Sarah Williams, *Hybrid International Criminal Tribunals*, OXFORD BIBLIOGRAPHIES, available at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>.

¹⁰ Office of the High Commissioner for Human Rights, *High Commissioner Urges Creation of Hybrid Court for Sri Lanka* (17 September 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/SriLanka.aspx#sthash.OZ8dfyMU.dpuf> (“‘The levels of mistrust in State authorities and institutions by broad segments of Sri Lankan society should not be underestimated,’ the High Commissioner said. ‘It is for this reason that the establishment of a hybrid special court, integrating international judges, prosecutors, lawyers and investigators, is so essential. A purely domestic court procedure will have no chance of overcoming widespread and justifiable suspicions fueled by decades of violations, malpractice and broken promises.’”).

¹¹ See Basil Fernando, *Sense and Nonsense on Judicial Matters*, Asian Human Rights Commission (2 October 2015), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-168-2015>; Statement by United Nations High Commissioner for Human Rights Zeid Ra’ad Al Hussein at the End of his Mission to Sri Lanka, U.N. Doc. HC/16/13 (9 February 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17025&LangID=E> (“Sri Lanka has many excellent judges, lawyers, and law enforcement officials. But over the years the system they depended on, and which depends on them, became highly politicised, unbalanced, unreliable.”)

probate issues; as such, there are practical advantages to relying on a cadre of foreign experts with experience investigating and prosecuting cases involving international crimes (and defending against such charges). Integrating international experts may also allow these institutions to operate more economically, because such personnel are often seconded from their home systems and compensated from foreign or international coffers. These experts—who should be identified by way of a rigorous selection process—bring experience investigating and prosecuting complex crimes, enabling the domestic system to begin operations more quickly and to magnify its impact. Attention should be paid to gender and ethnic parity and to appointing personnel with experience in international criminal law, human rights, and gender.¹² In addition to being chosen for their expertise, individuals should be known internationally for their professionalism, humility, adaptability, impartiality, and integrity.¹³ For judicial processes to contribute to reconciliation and to respond to felt needs for justice, it is vitally important that all stakeholders have faith in the integrity and fairness of both the process and the actors involved.¹⁴

The concept of the hybrid or mixed tribunal emerged as a response to perceived shortcomings of prior efforts at international justice that necessitated the extensive involvement of the international community working through the United Nations Security Council, General Assembly, and/or Secretary General. As it turned out, these standalone international, or quasi-international institutions, were slow to reach their stride and proved to be quite expensive in terms of start-up and maintenance expenses. Many were located far from the events in question, which hindered their accessibility, undermined local ownership within the constituencies they were designed to serve, and limited the degree of technology and knowledge transfer available to help rebuild or strengthen national judicial systems. As compared to these predecessors, some of the more recent hybrid institutions have proven to be more agile in operation, better anchored in local and even regional norms, and more attuned to “the complex domestic and social causes that led to the crimes” in the first place.¹⁵ They are usually designed and stood up following “a collaborative process between the post-conflict state and the international community, and can be tailored to best suit each individual conflict.”¹⁶ As such, hybrid entities have the potential to enjoy greater cultural and procedural legitimacy than either purely domestic or fully international institutions.

There are many ways to internationalize an otherwise domestic accountability mechanism. All told, a number of key decisions must be made. In terms of staffing, tribunal architects must determine how to appoint domestic and international staff positions and in what ratio. If panels of judges are contemplated, ensuring a majority of internationals generally lends legitimacy to the process and potentially enhances the fairness of proceedings, assuming that the international personnel are of high quality. Such personnel can be phased out over time as domestic capacity for addressing these complex crimes develops. If the relevant system employs

¹² Nienke Grossman, ‘Sex Representation on the Bench: Legitimacy and International Criminal Tribunals’, 11 INT’L CRIM. L. REV. 453 (2011).

¹³ For a discussion of the recruitment and remuneration of international staff, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts* 23-27 (2008), available at www.ohchr.org/Documents/Publications/HybridCourts.pdf. IHCHR (“OHCHR, Legacy”).

¹⁴ For a useful discussion of how to maximize the legacy of hybrid courts, see *Ibid.*

¹⁵ Frédéric Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’, 38 CORNELL INT’L L. J. 725, 730 (2005).

¹⁶ Public International Law & Policy Group, *Hybrid Tribunals: Core Elements* (June 2013), available at http://syriaaccountability.org/wp-content/uploads/PILPG-Syria-Hybrid-Tribunals-Memo-2013_EN.pdf.

single judges, it is possible to appoint foreign judicial advisers, professional clerks, or *greffiers* to inject international expertise into the adjudicative process. A more comprehensive plan to integrate foreign experts into prosecution and defense offices as well as the courts' administrative body will ensure that all elements of the process enjoy an infusion of international expertise. Although states often want their nationals to occupy top posts in hybrid institutions, international personnel may be better positioned to withstand domestic political pressures, particularly during the early phase of a justice process.¹⁷ They may also be less vulnerable to security threats. At the same time, many states may resist the inclusion of foreign personnel in certain posts; resort to experts drawn from the country's diaspora or from partner states in regional or political organizations may mitigate these concerns.¹⁸ In any case, domestic legislation and changes to local bar rules may be required to enable foreign personnel to occupy certain positions although some Commonwealth states (such as the Seychelles) grant reciprocal rights to lawyers hailing from other Commonwealth jurisdictions. The interoperability of Commonwealth judges could prove to be useful as the actors consider accountability options for Sri Lanka, as anticipated by the Human Rights Council.¹⁹

Models for Integrating International Personnel

International, internationalized, and hybrid justice mechanisms have been created through a number of different legal routes.²⁰ That said, it is anticipated that any accountability mechanism in Sri Lanka will be the product of domestic legislation, although this may be accompanied by a bilateral treaty with some element of the United Nations to address staffing, funding, or legal issues, such as the definition of actionable crimes.²¹ Recent research confirms that notwithstanding recent protests to the contrary,²² there is no constitutional or statutory impediment to creating or specialized chambers in Sri Lanka or staffing them with international experts. In particular, it has been observed that

a fully functional hybrid court could be structured within Sri Lanka's legal system in a way that is entirely compatible with the existing constitution. A legislative

¹⁷ International Center for Transitional Justice, Caitlin Reiger & Marieke Wierda, *The Serious Crime Process in Timor-Leste: In Retrospect* 15 (March 2006), available at <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> ("ICTJ, *Timor-Leste*") noting that in East Timor, "the appointment of international judges was rejected on the basis that it would undermine local ownership of the judges system," minimize the need for translation, and "encourage the participation of local jurists, which would have political and symbolic significance."

¹⁸ For example, it was contemplated that members of the Somali diaspora could be included if a specialized piracy court were established for the Horn of Africa. See Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2011/30 (25 January 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement>.

¹⁹ "UN Calls for Sri Lanka War Crimes Court to Investigate Atrocities", THE GUARDIAN (16 September 2015). See also Fonseka and Ganeshathasan, *Ibid* note 7, at 14-16 (noting prior precedent of integrating Commonwealth personnel into Sri Lankan commissions).

²⁰ See Van Schaack, *Ibid* note 8 (comparing the origins of international and mixed tribunals).

²¹ The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Special Criminal Chambers in the Central African Republic were all established through a mix of international instruments and domestic legislation.

²² "Foreign Judges Politically Unacceptable, Unconstitutional", DAILY NEWS (6 November 2015), <http://www.dailynews.lk/?q=2015/10/21/local/foreign-judges-politically-unacceptable-unconstitutional-mr>.

package passed by a simple majority of Parliament along with incidental regulatory changes could establish a uniquely Sri Lankan hybrid mode.²³

A number of different systems in other post-conflict states provide exemplars for the process underway in Sri Lanka. Some of these involved the creation of a standalone domestic tribunal with dedicated staff, an autonomous appellate body, and bespoke rules;²⁴ by contrast, other states embedded special chambers within, or sprinkled international personnel throughout, the extant domestic penal system. The latter models inevitably inherit or reflect elements of the underlying system, subject to occasional adjustments.²⁵ By contrast, autonomous *ad hoc* tribunals that enjoy a separate legal personality have been the subject of greater structural and procedural innovation. The creation of a stand-alone institution also cabins international involvement to certain cases, although there may be benefits to having international personnel participate in the adjudication of a broader range of matters as part of the ordinary court system, including other complex or politically sensitive cases dealing with terrorism, corruption, or organized crime.²⁶ A less centralized approach avoids the creation of a two-tiered justice system, enables more interactions between local and international personnel, and may increase the impact of hybridity on the system as a whole. That said, a more integrated model may be less appealing in situations, such as Sri Lanka, where there is resistance to admitting foreign personnel.

An early and under-explored example of embedding international expertise into a domestic process for the purpose of enhancing judicial capacity and procedural legitimacy is found in the 1981 trials of would-be coup leaders in the Gambia.²⁷ This effort traces its provenance to a coup staged by local actors that was rumored to be part of a Pan-African Marxist conspiracy spearheaded by Muammar Gaddafi—a theory that was later debunked.²⁸ In response, the Gambia invoked a mutual defense pact with Senegal, whose troops helped to quickly oust the rebels. Thousands of people were detained in connection with the uprising. Fearing that key members of the government and judiciary had been somehow involved in the coup attempt, the Gambia established special tribunals staffed by lawyers and judges from the Commonwealth

²³ See South Asia Centre for Legal Studies, Rhadeena de Alwis & Niran Ankatell, *A Hybrid Court: Ideas for Sri Lanka* 2 (2015); Fonseka and Ganeshathasan, *Ibid* note 7, at 5-9 (concluding that there are no constitutional bars to the participation of foreign nationals in the judicial process).

²⁴ The War Crime Chambers in Bosnia-Herzegovina, for example, were independent of the domestic judicial system and contained their own dedicated appellate panels. See Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* 5 (2008), available at <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

²⁵ So, for example, the Iraqi High Tribunal (IHT) reflected many standard features of the ordinary Iraqi courts, including a role for investigating judges. See Article 8, Law of the Supreme Iraqi Criminal Tribunal, Al-Waqa'i Al-Iraqiya—No. 4006 (18 October 2005), available at <http://gji.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> ("IHT Statute"). See generally Guénaél Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', 5 J. INT'L CRIM. JUSTICE 287 (2007).

²⁶ In Kosovo, for example, mixed panels of local and foreign judges heard a range of cases featuring allegations of war crimes, ethnically-motivated violence, and organized crime involving government officials and former Kosovo Liberation Army members. See generally OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review* (Sept. 2002), available at <http://www.osce.org/kosovo/documents/reports/justice/>.

²⁷ The best treatment of this history, and a first-hand account, is found in HASSAN B. JALLOW, *JOURNEY FOR JUSTICE* (2012).

²⁸ Arnold Hughes, *The Attempted Gambian Coup d'état of 30 July 1981*, available at <http://www.mybasse.org/news/analysis-the-july-30-1981-gambian-coup/>.

association of states—including British subject Sir Desmond Da Silva²⁹ who was an expert on the 1351 English Treason Act and went on to serve as Chief Prosecutor of the Special Court for Sierra Leone—to assess the legality of the detentions and prosecute those who were deemed most responsible. All told, 45 people were tried in 4 years. Also involved were Hassan Jallow (the former Chief Prosecutor of the International Criminal Tribunal for Rwanda and the Mechanism on International Tribunals) and Fatou Bensouda (now the Chief Prosecutor of the International Criminal Court (ICC)), who were young professionals working in the judicial system at the time.³⁰

A similar arrangement was implemented in the former Yugoslavia to complement the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) sitting in The Hague. Once it became clear that the ICTY would not be able to manage all, or even a solid percentage, of war crimes cases generated by the dissolution of Yugoslavia, policymakers in the newly independent states began to consider local options. Eventually, special war crimes chambers were established in Bosnia-Herzegovina (BiH), Serbia and Montenegro, and Croatia.³¹ The system in BiH was composed of a War Crimes Chamber (WCC) and a Special Department for War Crimes in the Prosecutor's Office.³² The WCC heard cases referred from the ICTY as well as cases resulting from the prosecutors' own investigations. The WCC legislation allowed for the injection of international staff—administrators (including the Registrar), judges at the trial and appellate levels, and prosecutors working alongside national staff—who were gradually phased out over the years.³³ The President and Chief Prosecutor, however, were always Bosnian nationals. Controversially, there were no prospects for the provision of international defense counsel.³⁴ Internationals were paid out of a pool of donor funds. The ICTY, the U.S. Department of Homeland Security's Human Rights Violators Unit, and other outside organizations provided professional advice and technical assistance to various elements of the WCC, particularly when it

²⁹ Da Silva later served as a highly-paid "expert" to the Rajapaksa government. Various reports attributed to him and leaked to the press proved to be highly controversial, because they seemed to justify the harsh tactics employed by the government or otherwise lay blame on the LTTE for civilian casualties previously attributed by other credible investigations to the government. See Dharisha Bastians, 'Changing Course', COLOMBO TELEGRAPH (24 July 2014), <https://www.colombotelegraph.com/index.php/changing-course/comment-page-1/#comment-1406154>; 'The Maxwell Paranagama Report: Transiting from Rajapaksa Palanaya to Yahapalanaya', THE ISLAND ONLINE (24 October 2015), http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=134098.

³⁰ Beth Van Schaack, 'IHL Dialogs: Prosecutors' International Criminal Law Round-Up', IntLawGrrls (4 September 2014), available at <http://ilg2.org/2014/09/04/ihl-dialogs-prosecutors-international-criminal-law-round-up/>.

³¹ Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro* (Oct. 2004); MLADEN OSTOJIĆ, BETWEEN JUSTICE & STABILITY: THE POLITICS OF WAR CRIME PROSECUTIONS IN POST-MILOŠEVIĆ SERBIA 165-215 (2014) (discussing domestic War Crimes Chamber in Serbia).

³² Law on Court of Bosnia And Herzegovina, Official Gazette of Bosnia and Herzegovina, 49/09, available at http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf ("WCC Law"). A similar Special Chamber (Chamber II) exists for Organized Crime, Economic Crimes, and Corruption. See Ibid at Article 14. Chamber III is dedicated to general crimes. For background, see David Schwendiman, 'Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina', 8 NORTHWESTERN J. INT'L HUM. RTS. 269 (2010).

³³ WCC Law, Ibid note 32, at Article 24. See also Schwendiman, Ibid, at 280-1 (noting that delays in reappointing and extending the mandate of international staff slowed down cases and led to the loss of expertise).

³⁴ David Tolbert & Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, 23-4 (15 December 2008), available at <http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-bih-finalreportwebsitecorrected.pdf> (raising equality of arms concerns).

came to the reform of national legislation and the training of staff, defense counsel, and judges.³⁵ The WCC, which have become a permanent addition to the court system, continue to receive international support but are largely self-sufficient.

Following post-referendum violence in East Timor, the United Nations launched the Transitional Administration in East Timor (UNTAET), a peacekeeping operation organized to exercise Timorese legislative and executive authority, including the administration of justice, during the fledgling country's transition to self-government.³⁶ Early UNTAET regulations created both an ordinary court system and a system of Special Panels to address the commission of international crimes.³⁷ The UNTAET administrator appointed the Special Panel judges upon the recommendation of a mixed Timorese-foreign commission, which enabled local input into staffing.³⁸ It was envisioned that the Dili District Court would house several Special Panels, but hiring delays meant that it took years to establish a second panel.³⁹ The Court of Appeals, which included two international judges, was to assert jurisdiction over appeals from ordinary panels in the District Court in addition to Special Panel cases.⁴⁰ Other international positions within Timor-Leste's Special Panels were identified through standard U.N. recruitment processes for peacekeeping missions,⁴¹ which contributed to delays because such missions do not often contain a judicial component. Staffing the Special Panels remained a challenge given the lack of qualified international candidates for what amounted to a hardship post and the weak domestic capacity. In these institutions, delays in the appointment of personnel, and especially international judges who were subject to U.N. hiring procedures, slowed the judicial proceedings and left many appeals pending.⁴² Such delays could easily be avoided for institutions not governed by the at-times cumbersome U.N. hiring process.

The structure of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is unique and, in certain notable respects, not worthy of emulation. In particular, every key position at the ECCC is shared by a Cambodian and an international appointee. So, there are Co-Investigating Judges (CIJs), Co-Prosecutors (CPs), Co-Civil Party Representatives, etc.; even the Office of Administration is bifurcated into two distinct components that service the national and international "sides" of the ECCC. Coordination and communication problems abound. Unlike the other *ad hoc* tribunals, the ECCC also includes a Pre-Trial Chamber that is supposed to resolve conflicts between the CIJs and CPs during the investigation stage and hear "appeals" against CIJ orders.⁴³ The PTC's rulings, however, are not binding or subject to an appeal; as a

³⁵ Ivanišević, *Ibid* note 24, at 40-41; Lilian A. Barria & Steven D. Roper, 'Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY', 9 HUM. RTS. REV. 317 (2008).

³⁶ For details on the many U.N. operations in Timor Leste, see

<http://www.un.org/en/peacekeeping/missions/past/unmit/background.shtml>.

³⁷ Sections 9-10, Regulation No. 2000/11 on the Organization of Courts in East Timor, U.N. Doc. UNTAET/REG/2000/11 (6 March 2000).

³⁸ *Ibid* at Sections 9-10, 15; Regulation 2000/3 on the Establishment of a Public Service Commission, U.N. Doc. UNTAET/REG/2000/3 (Jan. 20, 2000).

³⁹ ICTJ, *Timor-Leste* *Ibid* note 17, at 15.

⁴⁰ *Ibid* at 14, 25.

⁴¹ *Ibid* at 14.

⁴² *Ibid* at 14-15.

⁴³ See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on Oct. 27, 2004, NS/RKM/1004/006 ("ECCC Statute"), available at

result, the Trial and Appeal Chambers have considered many of the same issues *de novo*.⁴⁴ In principle, this arrangement respects the prevailing legal architecture more than a common-law style process would have given Cambodia's civil law tradition, but in practice, it has resulted in repetitive proceedings at every step along the way.⁴⁵

Cambodian negotiators also succeeded in ensuring that each Chamber has a majority of Cambodian judges; however, a super-majority is necessary to render any important ruling.⁴⁶ As such, the tribunal is considered only as strong as its weakest international judge. A longstanding dispute between the CPs and CIJs over whether to move forward with charges in Cases 003 and 004 has led to pointed criticism that the government is interfering in the judicial process and the Cambodian personnel are failing to fulfill their mandate.⁴⁷ Multiple international CIJs have resigned amidst complaints that they had either been "captured" by the Cambodian side or prevented from functioning independently.⁴⁸ At the moment, these cases are proceeding without the blessing of the Cambodian CIJ or CP because the PTC did not achieve the super-majority required to halt the investigation.⁴⁹ Wisely, no other hybrid court has adopted this strict hybrid formula for staffing.

The Extraordinary African Chambers (EAC), established by the African Union in Senegal to prosecute Hissène Habré of Chad and several of his confederates, are minimally international: they are staffed by a sprinkling of international judges (who do not comprise a majority) applying international criminal law and domestic procedural law.⁵⁰ Although technically comprising an international court, the EAC exists within the ordinary Senegalese district and appeals court structure in Dakar. In keeping with local law, there are four chambers: an investigative chamber, an indicting chamber, a trial chamber, and an appeals chamber.⁵¹ The presiding judges of the latter two chambers hail from another AU member state.⁵² Individuals are nominated by the Senegalese Justice Minister and appointed by the African Union Commission Chair, although there is no requirement that they be experts in international criminal law as has been required for other international and internationalized tribunals.⁵³ The African

<http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf> ("ECCC Law").

⁴⁴ John Ciorciari & Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal', 35 MICH. J. INT'L L. 369, 378 (2014).

⁴⁵ *Ibid* at 374-7.

⁴⁶ ECCC Law, *Ibid* note 43, at Article 14 new.

⁴⁷ Open Society Justice Initiative, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia* (Oct. 2012), available at https://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf.

⁴⁸ Human Rights Watch, *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign* (3 October 2001), available at <https://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>.

⁴⁹ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015* 3-4, available at <https://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf>.

⁵⁰ Article 11, Statut des Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises pour la Poursuite des Crimes Internationaux Commis au Tchad durant la Période du 7 Juin 1982 au 1er Décembre 1990, available at <http://www.hrw.org/node/248651> ("EAC Statute").

⁵¹ EAC Statute, *Ibid* at Article 2.

⁵² *Ibid* Article 11.

⁵³ *Ibid*. Compare Article 13, Statute of the Special Court for Sierra Leone, 2178 U.N.T.S. 145, available at <http://rscsl.org/Documents/scsl-statute.pdf> ("SCSL Statute") ("The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the

Union wisely established an independent Defense Office to protect the rights of the defense and otherwise support defense counsel.⁵⁴ The EAC offer a minimally hybrid model, but one that will still benefit from international expertise in prosecuting complex international crimes.

The latest effort in this tradition is found in the nascent Special Criminal Court (SCC) for the Central African Republic (CAR).⁵⁵ The SCC is the product of newly-passed legislation,⁵⁶ which follows on the heels of a U.N. commission of inquiry recommendation,⁵⁷ an August 2014 agreement between CAR and the United Nations that contemplates the establishment of the SCC,⁵⁸ and a Special Investigation Cell formed by presidential decree to begin investigations.⁵⁹ The legislation envisions a mixed bench composed of international and domestic judges in roughly equal numbers.⁶⁰ The Prosecutor will be a foreign national, but the Chief Justice will hail from CAR.⁶¹ It is anticipated that the SCC will be in existence for 5 years, subject to renewal at the initiative of the government in consultation with the United Nations.⁶² The SCC's jurisdiction will overlap with that of the ICC, which is undertaking investigations into two sets of international crimes, including crimes committed since 2012 by the Séléka Alliance and their anti-Balaka foes that will be heard by the SCC.⁶³

The DRC offers a microcosm of internationalized justice mechanisms. According to one long-standing proposal,⁶⁴ draft legislation would create specialized mixed chambers with

highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source. ... In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.”).

⁵⁴ See Human Rights Watch, *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (27 April 2015), available at

https://www.hrw.org/sites/default/files/related_material/2015_Senegal_Chad_Habr%C3%A9_case_Q%26A_2.pdf

⁵⁵ Géraldine Mattioli-Zeltner, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic* (July 13, 2015), available at <https://www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic>.

⁵⁶ Loi Organique No. 15.003 Portant Création, Organisation et Fonctionnement de la Cour Pénale Spéciale (2015), available at <https://rongdhrca.wordpress.com/2015/07/22/loi-organique-n15-003-portant-creation-organisation-et-fonctionnement-de-la-cour-penale-speciale/> (“CAR Loi Organique”).

⁵⁷ The International Commission of Inquiry on the Central African Republic, *Final Report*, U.N. Doc. S/2041/928, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/N1471229.pdf>. The COI was established by UNSCR 2127 (2013).

⁵⁸ See U.N. Secretary-General, *Report of the Secretary-General on the Situation in the Central African Republic*, U.N. Doc. S/2014/857 (28 November 2014).

⁵⁹ Parliamentarians for Global Action, *Parliament of the Central African Republic Adopts the Law Establishing a Special Criminal Court* (29 April 2015), available at <http://www.pgaction.org/car-centralafricanrepublic-criminalcourt.html>; Human Rights Watch, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic* (13 July 2015).

⁶⁰ CAR *Loi Organique*, Ibid note 56, at Articles 11-14.

⁶¹ Ibid at Article 18.

⁶² Ibid at Article 70.

⁶³ FIDH, *Central African Republic: The ICC Opens an Investigation on International Crimes Committed Since 2012* (Sept. 24, 2014), available at <https://www.fidh.org/en/region/Africa/16116-central-african-republic-the-icc-opens-an-investigation-on-international>.

⁶⁴ Human Rights Watch, *DR Congo: Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes* (15 April 2011). Another statute enacted in January 2016 incorporated ICC crimes into domestic penal law and provides a legal framework for cooperation. See La Proposition de Loi de Mise en Oeuvre du Statut de Rome dans la Législation Congolaise, available at http://www.pgaction.org/pdf/pre/Comoros_Adubango.pdf. See Patryk Labuda, *The Democratic Republic of Congo's Failure to Address Impunity for International Crimes: A View from Inside the Legislative Process 2010-2011*,

jurisdiction over the range of international crimes.⁶⁵ Although this proposal remains in flux, the basic structure involves three five-member Trial Chambers (including two foreign advisor judges) and one five-person Appeals Chamber. These special chambers would be housed within provincial appeals courts and staffed with a mix of national and international personnel, including judges, prosecutors, administrators, investigators, and defense counsel. A special mixed chamber in the national *Cour de Cassation* would be empowered to review judgments from the Appeals Chamber, which will be co-located in Kinshasa.⁶⁶ Investigative and Prosecutorial Units for each Chamber will be made up of a blend of foreign and Congolese staff appointed by the President and other officials.⁶⁷ Nationals of states that border the DRC would be excluded from consideration given the involvement of neighboring states in perpetrating and perpetuating the violence. Military and police defendants would be entitled to have career military magistrates serve on their panels, a preference of the Ministry of Defense and a function of Congolese military law, which incorporates the international crimes and vests jurisdiction in military courts during a state of war. Military courts in the DRC have amassed ten years' worth of experience prosecuting international crimes arising out of the various armed conflicts within the country. In this way, the DRC tribunals would be mixed/mixed, incorporating domestic and international elements as well as civilian and military personnel. Under current proposals, international judges would be in the minority of each panel and would gradually be phased out.⁶⁸

Another important innovation in the DRC is found in the mobile courts that were developed to bring justice to remote areas in eastern DRC that have been ravaged by war but are far from any formal justice institutions.⁶⁹ These courts are creatures of domestic law and come in both civilian and military varieties. They rely heavily on international assistance. In particular, the United Nations Development Program,⁷⁰ the American Bar Association's Rule of Law Initiative (ABA ROLI),⁷¹ and other donors provide training for court staff, help to secure lodging

INTERNATIONAL JUSTICE MONITOR (8 November 2011), available at <http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011/>.

⁶⁵ A 2013 Peace, Security and Cooperation Framework signed by all major parties involved in stabilization efforts in the Great Lakes region called for an end to the long-standing impunity for grave international crimes in the DRC. See generally David Zounmenou & Naomi Kok, *Peace, Security and Cooperation Framework for the DRC: Hopes and Challenges* (8 March 2013).

⁶⁶ Human Rights Watch, *Accountability for Atrocities Committed in the Democratic Republic of Congo* (Apr. 1, 2014), available at http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#_ftnref3.

⁶⁷ Specifically, the Congolese President would appoint the Congolese judges and senior prosecutorial staff, including a Congolese chief prosecutor. All foreign members would be appointed by the Prime Minister, with recommendations from the Justice and Foreign Ministers.

⁶⁸ For a discussion of this proposal and other transitional justice developments in the DRC, see International Center for Transitional Justice, *The Accountability Landscape in Eastern DRC* 13-15 (July 2015), available at https://www.ictj.org/sites/default/files/ICTJ-Report-DR-C-Accountability-Landscape-2015_0.pdf ("ICTJ, DRC").

⁶⁹ The mobile courts are convened on an *ad hoc* basis as needed, particularly where serious international crimes have been committed in remote areas. An international coordination forum verifies the need and authorizes funding. Lawyers and judges (including military judges if the defendant is a member of the military) are then deployed to the location where the hearing will be held, usually in a temporary structure. International monitors ensure that trials are held in accordance with international standards.

⁷⁰ Monica Rispo, *Evaluation of UNDP's Support to Mobile Courts* 9 (May 2014), http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_ROL_Mobile%20CourtsEvaluation_No%20v2014.pdf.

⁷¹ ABA ROLI has received funds from the Dutch, Norwegian and United States Governments, the MacArthur Foundation, the Open Society Justice Initiative for Southern Africa, and other donors. United States Government

and transportation for witnesses (which diminishes adjournment rates), and offer *pro bono* legal assistance to victims and defendants. The mobile courts, which also work with the U.N. Stabilization Mission (MONUSCO) and other partners, offer a high degree of local access and ownership while helping to build legal capacity. MONUSCO also provides transportation and, in partnership with the Congolese authorities, security. The mobile courts coordinate with legal clinics to ensure cases are trial-ready; provide appropriate referrals to non-legal organizations that can provide medical, social, and economic assistance to victims; and engage in community education and outreach.⁷² So far, evaluations of the mobile courts have been cautiously optimistic, although their dependency on international funding hampers sustainability, and concerns about victim and witness protection persist.⁷³

As an alternative to the creation of a stand-alone tribunal, specialized court, or mixed judicial chambers, states have also sought assistance from the United Nations and donor countries to strengthen domestic investigative and prosecutorial authorities through a range of rule-of-law initiatives that include the secondment of international experts to dedicated international crimes units. The Commission Against Impunity in Guatemala (CICIG),⁷⁴ for example, embeds international experts in the Guatemalan Attorney General's office and the National Police to help investigate and disband criminal organizations with ties to the security forces and other corrupt state structures that are threatening the enjoyment of human rights in Guatemala.⁷⁵ CICIG has its origins in civil society demands and a 2002 request from the Government of Guatemala to the United Nations for assistance in dealing with the high levels of postwar violence and entrenched impunity.⁷⁶ The U.N. Department of Political Affairs originally proposed a hybrid commission that would enjoy both investigative and prosecutorial powers (to be called the Commission for the Investigation of Illegal Groups and Clandestine Security Organizations (CICIACS)).⁷⁷ The Guatemalan Constitutional Court in a consultative opinion raised concerns that such a delegation of prosecutorial authority might be unconstitutional,

funding has come from the Bureau of Democracy, Human Rights, and Labor (DRL), the Bureau of International Narcotics and Law Enforcement (INL), and the Agency for International Development (USAID). ABA ROLI has also helped create a network of legal aid clinics. See American Bar Association, *Rule of Law Programs in the Democratic Republic of Congo*, available at http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/programs.html.

⁷² Tessa Khan & Jim Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice', Oxford Transitional Justice Research Working Paper Series 19, 27, available at <http://otjr.crim.ox.ac.uk/materials/papers/178/mobile%20courts%20DRC.pdf>.

⁷³ Rispo, *Ibid* note 70, at 11. See generally Milli Lake, 'Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood', 58 INT'L STUDIES Q. 515 (2014); Michael Maya, *Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?*, available at http://worldjusticeproject.org/sites/default/files/mobile_courts_in_the_democratic_republic_of_congo_maya.pdf.

⁷⁴ <http://www.cicig.org/index.php?page=home>.

⁷⁵ See generally Open Society Justice Initiative, *Unfinished Business: Guatemala's International Commission Against Impunity (CISIG)* (March 2015); Andrew Hudson & Alexander Taylor, 'The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms', 8 J. INT'L CRIM. JUSTICE 53 (2010).

⁷⁶ Activities of the International Commission Against Impunity in Guatemala: Report of the Secretary-General, U.N. Doc. A/64/370 (Sept. 23, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/523/86/PDF/N0952386.pdf?OpenElement> ("CICIG Report").

⁷⁷ Washington Office on Latin America, *A Brief Background on the UN Commission Against Impunity In Guatemala* (26 April 2007), available at <http://www.wola.org/es/node/337>.

attesting to the importance of sorting such legal issues out in advance.⁷⁸ Accordingly, the final bilateral agreement between Guatemala and the United Nations established special investigative cells of embedded international experts who provide technical assistance to local actors and undertake direct investigations.⁷⁹ Although dependent on Guatemalan officials to pursue charges, CICIG is entitled to present potential criminal charges to the Public Prosecutor (*Ministerio Público*) and join proceedings as a private prosecutor (*querellante adhesivo*).⁸⁰ It can also seek sanctions against Guatemalan officials who hinder ongoing investigations or prosecutions.⁸¹ On a structural level, CICIG has been instrumental in proposing legal reforms (including the establishment of a witness protection program), capacitating domestic actors, and establishing a merit-based judicial appointment system. In this way, CICIG's contributions go beyond the provision of technical assistance to investigations and prosecutions.⁸²

There may also be a role for the United Nations to provide assistance and advice on foreign appointments, even for a purely domestic institution. For example, a majority of the judges and the Chief Prosecutor of the Special Court for Sierra Leone were appointed by the U.N. Secretary-General; the Government of Sierra Leone appointed the others as well as a Sierra Leonean Deputy Prosecutor.⁸³ In actuality, there were very few Sierra Leoneans in professional positions at first given the lack of local capacity. This asymmetry was accentuated by the fact that the government appointed some internationals to fill posts that were designated for local personnel.⁸⁴ In the early days, and notwithstanding this multilateral appointment process, many top posts went to lawyers from the United States, which was a major supporter—financial and otherwise—of the SCSL.⁸⁵ This did raise some concerns that the United States might exert undue influence over the tribunal.

Likewise, in the Special Tribunal for Lebanon, the international prosecutor, head of the Defense Office, and all the judges have been appointed by the U.N. Secretary-General; the judges were chosen from among those recommended by the Lebanese government and member states.⁸⁶ Under the U.N. Agreement with Cambodia, the Supreme Council of the Magistracy selected the Cambodian judges from amongst the local judicial ranks, with mixed results in terms

⁷⁸ Corte de Constitucionalidad, Guatemala, Opinión Consultiva, Expediente No. 1250-2004 (5 August 2004).

⁷⁹ See Agreement Related to the Creation of an International Commission Against Impunity in Guatemala ("CICIG") (12 December 2006), available at http://www.wola.org/publications/cicig_text_of_the_agreement_between_the_united_nations_and_the_state_of_guatemala_on_th. The agreement was ratified by the Guatemalan legislature on Aug. 1, 2007. Beyond this agreement, the UN General Assembly also endorsed CICIG in Resolution 63/19 (16 December 2008) and called upon states to support CICIG through voluntary contributions, financial and in kind.

⁸⁰ CICIG, Ibid note 79, at Article 3; see generally Tove Nyberg, *Smoking the Rats Out: CICIG's Effort to Strengthen the Justice System in Guatemala*, available at <http://www.diva-portal.org/smash/get/diva2:730171/FULLTEXT01.pdf>.

⁸¹ Ibid at Article 3; Hudson & Taylor, Ibid note 75, at 61; Human Rights Watch, *World Report 2014: Guatemala*, available at <http://www.hrw.org/world-report/2014/country-chapters/guatemala?page=1>.

⁸² Hudson & Taylor, Ibid note 75, at 6.

⁸³ SCSL Statute, Ibid note 53, at Article 12; OHCHR, *Legacy*, Ibid note 13, at 10 n.19. Judicial nominations came from states, particularly the member states of the Economic Community of West African States (ECOWAS) as well as the Commonwealth.

⁸⁴ International Center for Transitional Justice, Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, at 21 (March 2006), <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf>.

⁸⁵ Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals*, in THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 131, 148 (Bruce Cronin et al, (eds.) 2008).

⁸⁶ S.C. Res. 1757, Annex (May 30, 2007), Article 9.

of skill and capacity.⁸⁷ The U.N. Secretary-General nominated potential international judges, but these too were subject to approval by the Supreme Council of the Magistracy, which drew criticism for trying to manipulate the process through unjustified delays.⁸⁸ Whatever the role of the international community in helping to staff mixed courts, the process should involve consultations with key national stakeholders, be based upon rigorous standards in terms of subject matter expertise and experience with other successful transitional justice efforts (international or domestic), and avoid the appearance of excessive influence by any one entity, local or foreign.⁸⁹

Potential Pitfalls

Despite their advantages over earlier models of international justice, these newer hybrid and internationalized institutions raise questions of their own when it comes to the imperatives of legitimacy, competency, and fairness, particularly when local personnel may be susceptible to political manipulation, where the rule of law is not fully established, or when domestic actors insist on certain concessions, such as the availability of *in absentia* proceedings or the death penalty. Moreover, as they become more idiosyncratic, these institutions risk undermining the universalist ethos that undergirds the entire human rights edifice. Likewise, legitimacy and efficiency deficits have plagued excessively hybridized institutions, such as the ECCC, as compared to the Bosnia-Herzegovina model, which pairs international and local personnel operating under international standards of due process. As Sri Lankan actors embark upon their own efforts at institution building, they should not lose sight of these potential pitfalls.

At the same time, leaving the prosecution of international crimes entirely to domestic systems can enable parochial forms of victor's justice and give expression to illiberal impulses that the international community should not endorse through the provision of financial, technical, diplomatic, or other forms of support. For example, although international advisors played a role in the work of the Iraqi High Tribunal (IHT), that justice process remained controversial.⁹⁰ The IHT was by all measures a domestic court—staffed by Iraqi personnel applying Iraqi law—that was internationalized by the presence of international advisors selected by the International Bar Association and others and by the training and administrative support provided by the U.S. Department of Justice's Regime Crimes Liaison Office (RCLO).⁹¹ Although the Coalition

⁸⁷ ECCC Law, *Ibid* note 43, at Article 11 new.

⁸⁸ Douglas Gillison, *Cambodia Rejects UN Genocide Judge*, THE INVESTIGATIVE FUND (15 January 2012), available at http://www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge/Most%20Emailed.

⁸⁹ See OHCHR, *Legacy*, *Ibid* note 13, at 10-11 (noting criticism around the failure of international transitional administrations to consult adequately in Timor-Leste and Kosovo with domestic actors in recruiting and integrating foreign personnel).

⁹⁰ Coalition Provisional Authority Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, available at http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf ("CPA Order No. 48"). The order delegated to the Interim Governing Council, which had been appointed by the CPA, authorization to establish the tribunal; a draft Statute purporting to be the result of extensive consultations between the CPA and the Governing Council appeared as an appendix to this order. See Law of the Supreme Iraqi Criminal Tribunal, Al-Waqa'i Al-Iraqiya—No. 4006 (Oct. 18, 2005), available at <http://gipi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> ("IHT Statute"); Guénaél Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', 5 J. INT'L CRIM. JUSTICE 287, 288 (2007) (noting the "Iraqization" of the new Statute, which diminished the role of international personnel and weakened certain procedural guarantees).

⁹¹ Michael P. Scharf, 'The Iraqi High Tribunal: A Viable Experiment in International Justice?', 5 J. INT'L CRIM. JUSTICE 258, 259 (2007) ("the [IHT] merits the characterization internationalized domestic tribunal. ... [It] is not

Provision Authority and the original Statute envisioned the appointment of non-Iraqi judges, this did not come to pass.⁹² Instead, foreign lawyers (mostly from the United States) were relegated to an advisory role.⁹³ The pool of qualified advisors was limited, however, by the fact that the U.N. Secretary-General prohibited senior personnel from the *ad hoc* tribunals to participate in any training programs given the controversy around the legality of the invasion of Iraq and the subsequent occupation.⁹⁴ The availability of the death penalty was also an impediment to direct U.N. involvement. As an exercise of lustration, Article 33 of the IHT Statute prohibited the appointment of anyone who had been a member of the Ba'ath party, which may have "dilute[d] the pool of qualified jurists significantly."⁹⁵ The IHT was plagued by allegations of political interference (on the part of the new Iraqi authorities and the United States) as well as threats to judges and defense counsel.⁹⁶ In part due to its controversial origins and in part due to perceived procedural flaws, the IHT never earned the support, or respect, of the international community.⁹⁷

In the absence of international assistance and involvement, domestic criminal prosecutions can become coopted by political forces in ways that undermine the laudable goals sought to be achieved. Nowhere is this more in evidence than in Bangladesh. The Bangladesh International Crimes Tribunal (BICT) is "international" in name and subject matter only. Tracing its roots to the War of Liberation that gave rise to modern-day Bangladesh, the BICT is dedicated to prosecuting alleged collaborators with the Pakistani Army (then West Pakistan) for atrocities committed when East Pakistan (now Bangladesh) sought to secede in March 1971.⁹⁸ A creature of domestic law with virtually no international involvement, the BICT is asserting jurisdiction over acts of genocide, crimes against humanity, war crimes, and "other crimes under international law" pursuant to a law that dates from the independence period.⁹⁹ The Bangladeshi government has barred, or erected impenetrable barriers to, the involvement of any international personnel, including defense counsel chosen by the accused to represent them and advisors who might have positively influenced the proceedings.

fully international or even international enough to be dubbed a hybrid court"). On the RCLO, see Eric Stover et al., 'Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq', 27 HUM. RTS. Q. 830, 841 (2005).

⁹² Coalition Provisional Authority Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, available at http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf ("CPA Order No. 48"). The order authorized the Interim Governing Council, which had been appointed by the CPA, to establish the IHT.

⁹³ Iraqi High Tribunal, Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, available at http://law.case.edu/Academics/AcademicCenters/Cox/WarCrimesResearchPortal/pdf/IST_Rules_of_Procedure_and_Evidence.pdf ("IHT RPE").

⁹⁴ Stover, *Ibid* note 91, at 843.

⁹⁵ Michael Newton, 'The Iraqi High Criminal Court: Controversy and Contributions', 862 INT'L REVIEW OF THE RED CROSS 399, 406 (June 2006).

⁹⁶ Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases* 6 (4 December 2008), available at http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf ("Chatham House, *Post-Saddam*").

⁹⁷ See M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38 CORNELL INT'L L. J. 327 (2005).

⁹⁸ See generally Beth Van Schaack, "The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad", INTLAWGRRLS (8 October 2014), <http://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/>; Stephen Kay, *Bangladesh War Crime Tribunal: A Wolf in Sheep's Clothing?*, available at <http://www.internationallawbureau.com/blog/wp-content/uploads/2010/11/Bangladesh-International-War-Crimes-Tribunal.pdf>.

⁹⁹ The International Crimes (Tribunals) Act 1973 (Bangladesh), art. 3, available at http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 ("1973 Act").

The BICT was inspired by principled objectives that have been betrayed by implementation. Any international support once enjoyed soon soured when it was clear that the process had been corrupted and would be more political than legal. Today, the international community is engaged largely as a critic, having failed in its efforts to bring the proceedings closer in line with international standards.¹⁰⁰ Indeed, the BICT has become an object lesson for how international criminal law can be manipulated for political ends, particularly given that the only individuals being prosecuted are associated with the opposition parties—Jamaat-e-Islami (JeI) and the Bangladesh Nationalist Party (BNP)—who are opposed to the governing Awami League.¹⁰¹ Not a single so-called freedom fighter (*mukti bahani*) or Pakistani national has been prosecuted, suggesting that the BICT is part of a byzantine political vendetta rather than a genuine, and long-overdue, effort at historical justice.¹⁰² The BICT might have garnered more respect had its principals been willing to allow for the involvement of international experts, as advisors or participants, to ensure the proceedings’ fairness and legitimacy.

Conclusion

The emergence of a new regime in Sri Lanka—and a new-found willingness to engage with the international community on transitional justice issues—offers all Sri Lankans the opportunity to put their country’s divisive history behind it and lay the foundation for a more inclusive, just, and prosperous society. How the country tackles entrenched impunity and the imperative of ensuring some accountability for the commission of grave international crimes will be central to this process. Fortunately, Sri Lanka is not in the situation faced by many post-conflict societies in which its judicial system has been destroyed, or must be built from scratch; rather, Sri Lanka has the benefit of a well-developed legal system and skillful local bar. What is lacking, however, is a shared confidence in the system and a uniform capacity to address complex international crimes. Involving international expertise offers a solution to these problems. Once these two priorities are achieved, international involvement can be gradually phased out and the domestic system will be left stronger for it.

Involving the international community in the process of post-conflict justice will be crucial to enhancing the credibility and impact of any trials and to contributing to long-term societal stability through the instantiation of a fair and effective justice system. Victims and defendants alike deserve a fair and legitimate process that adheres to internationally recognized due process principles. International involvement will cement Sri Lanka’s new-found good standing and respectability within the community of nations,¹⁰³ offer the opportunity for Sri Lanka to make its own contribution to the field of transitional justice, and provide opportunities to build a world-class judicial sector. All that said, any trials must be part of a diversified transitional justice program focused not only on the deployment of prosecutorial tools but also on

¹⁰⁰ See Stephen J. Rapp, *Press Roundtable, Dhaka, Bangladesh* (5 August 2014), available at http://Photos.State.Gov/Libraries/Bangladesh/621750/Speeches_Remarks_2014/Amb_Rapp_Press_Roundtable_Aug_5_2014.Pdf.

¹⁰¹ Geoffrey Robertson, *Report on the International Crimes Tribunal for Bangladesh* 10-12 (2015).

¹⁰² *Ibid* at 70.

¹⁰³ Jared Ferrie, *Sri Lanka War Crimes in the Spotlight as UN Rights Chief Visits*, (10 February 2016), <http://www.justiceinfo.net/en/component/k2/25927-sri-lanka-war-crimes-in-the-spotlight-as-un-rights-chief-visits.html> (noting that enacting transitional justice reforms and proposals could bring economic benefits to Sri Lanka, including restored access to the European Union’s Generalized Scheme of Preferences and the United States’ Millennium Challenge Corporation).

truth-telling exercises and the formation of an accurate collective memory; the rehabilitation and reparation of victims; the promotion of reconciliation among communities; an accounting for missing persons; and the development of new institutions and policies.¹⁰⁴ By launching a genuine transitional process, Sri Lanka will make a demonstrable international commitment to the rule of law and to universal principles of justice.

¹⁰⁴ Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 HARV. HUM. RTS. J. 39 (2002).