



# DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS

LEAD AUTHORS:  
KIRSTEN AINLEY AND MARK KERSTEN



Institute of  
Global Affairs



WAYAMO  
FOUNDATION





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## LEAD AUTHORS:

Kirsten Ainley  
Mark Kersten

## DRAFTING TEAM:

Philipp Ambach  
Elena Baylis  
Fidelma Donlon  
Tijanjana Maluwa  
Angela Mudukuti

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For more information contact the authors via the website: <http://HybridJustice.com>



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Additional research for the Dakar Guidelines, and for the [Hybrid Justice Project](#) more broadly, was conducted by Claire Wilmot. Wilmot also edited the Guidelines. Johanna Rodehau-Noack designed and laid out the document. Sareta Ashraph, Kelly-Jo Bluen and Dov Jacobs provided extended and very valuable comments on drafts.

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# FOREWORD

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## THE USEFULNESS AND ADAPTABILITY OF THE HYBRID APPROACH TO INTERNATIONAL CRIMINAL JUSTICE

*By*  
*Stephen Rapp\**

In the initial, heady days after the establishment of the International Criminal Court (ICC), it was common to hear that hybrid courts would no longer be needed because prosecutions for atrocity crimes could go forward either at the ICC or at the national level. Now, after 16 years of operation of the Rome Statute system and with only three convictions at the ICC for core international crimes as well as limited progress in trying serious alleged perpetrators at the national level, there is a recognition that an effective system of global accountability requires more options. The choices cannot be only a single court in The Hague that is necessarily expensive, distant and easy for local leaders to demonise, and national systems that are often challenged to overcome legacies of dysfunction that led to impunity before the mass violence and then were further disabled by it.

This general recognition of the need for additional justice options, alongside the recent creation of new hybrid courts for the Central African Republic (CAR) and Kosovo as well as the agreement to establish one for South Sudan, make the publication of the Dakar Guidelines on the Establishment of Hybrid Courts particularly timely. Of course, the Guidelines are also very necessary because achieving justice against the interests of powerful actors, at any level, is never easy, and as the authors note requires “trade-offs among aims and features that are in some tension with each other”.

My own experience as the Prosecutor of the hybrid Special Court for Sierra Leone (SCSL) followed my tenure in the Office of the Prosecutor at the International Criminal Tribunal for Rwanda. It convinced me of the profound advantages of the hybrid approach<sup>1</sup>. However, even at the SCSL, I thought that the court was perhaps too internationalised. I wished that more could have been done to connect it to Sierra Leone’s own justice system so as to strengthen the future protection of the rule of law at the national level.

As the Rome Statute recognises the primary responsibility of the national legal systems and admits cases at the international level only where there is clear necessity, the design and creation of hybrid courts should be internationalised only to the extent required to fill specific needs that cannot be met at the national level. If those needs can eventually be met domestically, then the hybrid court should be organised in a way that facilitates the transition.

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\* Stephen J. Rapp is a Fellow at the United States Holocaust Memorial Museum’s Center for Prevention of Genocide. From 2009 to 2015, he was Ambassador-at-Large heading the Office of Global Criminal Justice in the US State Department. Rapp was the Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution of former Liberian President Charles Taylor. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide. Before becoming an international prosecutor, he was the United States Attorney for the N. District of Iowa from 1993 to 2001.

The deficiencies that require creation of hybrid courts include 1) inadequacy of legal tools available at the national level, 2) insufficiency of domestic judicial capacity, and 3) absence of the political will to deliver independent justice for core international crimes.

Legal tools are often lacking at the national level in that top leaders may benefit from traditional immunities and domestic law may not recognise command responsibility or modes of liability that reflect the ways in which mass crimes are typically perpetrated. In many countries, national statutes do not prohibit or define genocide, crimes against humanity, and war crimes, particularly those committed during civil conflicts. While Article 15(2) of the International Covenant on Civil and Political Rights permits countries to apply international criminal law retroactively, such retroactive application of national law is sometimes prohibited by domestic constitutions or regional treaties.

In the case of former Chadian dictator Hissène Habré, the political will to try him in Senegal, his country of exile, eventually emerged, and there were international donors ready to assist Senegal in developing the necessary capacity. But the legal tools could not be provided by domestic legislation. In November 2010, the Economic Community of West African States' Court of Justice ruled that it was a violation of the African Charter on Human and Peoples' Rights for Senegal to try Habré under a retroactive domestic statute, and that this could only be accomplished by following the international practice of establishing an *ad hoc* or special court. This was subsequently achieved by an international agreement between the African Union and Senegal to create the Extraordinary African Chambers, staffed entirely by Senegalese personnel except for two international judges, one to preside at trial and the other on appeal.

Another common deficit at the domestic level, particularly after devastating internal conflicts, is the lack of national capacity to investigate, prosecute, and try atrocity crimes in the national courts. If this were the only deficit, it might be remedied by the training of domestic personnel and the provision of resources to rebuild and equip the national system. However, international assistance may be hit-and-miss, depending on the priorities of the donors, and may not result in a functioning judicial system. It may be particularly challenging to develop the capacity to try atrocity crimes given the complexity of the cases and the security threats posed by powerful perpetrators against witnesses and court personnel.

After the commission of mass atrocities in CAR in 2013-2014, transitional President Samba-Panza demonstrated the political will to seek justice for the crimes by referring her country to the ICC in order to pursue the major perpetrators and by creating a "special cell" to investigate and charge those at the mid and lower levels. Five months later, the head of the special cell told a UN fact-finder that his only success was in finally finding a "chair" from which to work. Several major donors put their resources into efforts to re-establish the ordinary courts that had been so starved that they had not conducted trials in the five years before the conflict. When I visited in September 2016, the ordinary courts had conducted a few long-delayed trials, but the prosecutors told me that there was no way that they could be sufficiently secure to try even those accused of low-level atrocity crimes.

The answer was the creation, under national legislation, of the hybrid Special Criminal Court (SCC). It has an international prosecutor, and a mix of national and international judges. Though the available funding is limited, it is sufficient for the facilities, security and personnel necessary to commence op-



erations. The SCC has recruited legal and judicial officers from other countries that follow the French civil law system, so that the internationals can work comfortably with their CAR counterparts, gaining capacity by learning from each other's knowledge and experience in ways not easily achieved through training courses alone. Because this was not a situation where political will was the obstacle deficit, the statute provided that the international judges were in the minority, and was structured so that they would be phased out over time.

In many other situations, it is the absence of political will that is the greatest hurdle to accountability. Particularly during and immediately after the commission of mass atrocities, state authorities are quite unlikely to be willing to pursue defendants who have control over state institutions or to pursue the leaders of opposing armed groups who have joined in power-sharing arrangements. To date, all hybrids have been created with the consent of the governments of the territorial states. While there are creative proposals for third-party states to pool protective and universal jurisdiction to reach crimes committed in unwilling states, the hybrid approach has not been a realistic option in situations where the territorial state is overtly hostile to accountability.

However, after the perpetrators of atrocities have been defeated in conflict, or after their removal from political power, the new national authorities may have an abundance of will to pursue these former enemies as well as former allies who may become political competitors. Exclusively national trials, conducted by the victors of an internal conflict, are thus likely to be seen as unfair to parts of the population and can even sow the seeds of future conflict. It is a much better approach if civil society groups and international partners encourage the new leaders, perhaps as a condition of acceptance and assistance, to negotiate the creation of hybrid courts that will be seen to deliver independent justice. The resulting trials may end up being one-sided, but nonetheless fair. This is not an insignificant achievement, given that this was the outcome of international tribunals at Nuremberg and Arusha. Ideally, such hybrids could increase the possibility that serious perpetrators on more than one side of an armed conflict are prosecuted, as was achieved at the International Criminal Tribunal for the former Yugoslavia and at the hybrid SCSL.

The SCSL met this test in its successful prosecution of the leaders of the pro-government militia, the Civil Defense Force (CDF). It is unlikely that significant convictions would have resulted if the SCSL statute had not provided for majorities of international judges in both trial and appeal chambers. In the three-judge trial chamber, the national judge voted to acquit the CDF defendants and in the five-judge appeals chamber one national judge voted to acquit and the other voted against the prosecution's successful appeal to increase the sentences for very serious crimes from six years to fifteen years for one defendant, and from eight years to twenty years for another. While the CDF prosecution was controversial, the SCSL's successful outreach program helped increase public knowledge of the evidence and fairness of the proceedings, and may have contributed to the general national perception, verified by independent surveys, that the court contributed to the country's peace and security. In the process, the court also delivered a message to those combating insurgencies by "fighting fire with fire": that these tactics escalate brutality and human suffering and should appropriately result in accountability even for those who fight on the "right side."

The inclusion of international judges may be important in situations even where national participation is already balanced, but where a conflict has exacerbated divisions in domestic society. In Bosnia, the War Crimes Chamber of the State Court, established in 2002, included judges that were representative of the Bosnian Muslim, Bosnia Croat and Bosnian Serb communities. However, many victims and other witnesses were profoundly distrustful and even fearful of personnel who came from the same communities as the charged perpetrator(s). Having international judges and other personnel reduced this tension and showed that justice could be delivered fairly by courts that included staff from a mix of ethnic, religious or national backgrounds. This did not require a majority of international judges, and by 2009 the international participation was substantially diminished and by 2012 was ended completely. Nevertheless, the Bosnian War Crimes Chamber has been able to continue to deliver justice in trials of alleged perpetrators from each of the three communities.

The Dakar Guidelines draw on the experiences of people who were directly involved in all of the situations and accountability efforts that I have described. The authors have studied what has worked and not worked, depending on the context, and offer practical advice and guidance in designing solutions that will best fit the needs and political realities of differing situations. Most importantly, the Guidelines show the usefulness, potential creativity, and adaptability of the hybrid approach. They provide us and all those interested in achieving accountability with a roadmap for delivering justice in ways that are more fair, efficient, accessible, and beneficial for the victims and their future protection in the nations in which they live.

*Stephen Rapp*  
*July 2019*

# DRAFTING TEAM BIOGRAPHIES

**Dr. Kirsten Ainley** is an Associate Professor in the Department of International Relations at the London School of Economics and Political Science. She is principal investigator on the Hybrid Justice project, and on the [ESRC Conflict, Justice and Development project](#), researching the links between transitional justice and development in Colombia, Sri Lanka, Syria and Uganda. She is Deputy Principal Investigator and Co-Director of the [UKRI GCRF Gender, Justice and Security Hub](#), which aims to accelerate progress towards gender justice and inclusive security in conflict-affected societies. Her research focuses on international policy and practice in military, legal and development-focused interventions, and on the impacts of these interventions. She has published on international criminal law, transitional justice, the International Criminal Court and the Responsibility to Protect in journals such as *International Journal of Transitional Justice*, *Ethics and International Affairs*, *London Review of International Law*, *International Affairs* and the *Cambridge Review of International Affairs*. Dr. Ainley is the co-author, with Chris Brown, of *Understanding International Relations* (2009) and co-editor (with Rebekka Friedman and Chris Mahony) of *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (2015). Ainley has a PhD and an MSc in International Relations from the London School of Economics and a BA in Philosophy, Politics and Economics from the University of Oxford.

**Dr. Philipp Ambach** is Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court (ICC). Previously, he worked in the Presidency of the ICC as the President's Special Assistant for more than five years until November 2016. From February to September 2015, Dr. Ambach temporarily worked as a team leader and legal officer in the Registry of the ICC. Before that, he held for more than three years the position of associate legal officer in the Appeals Chamber of the ICTY, ICTR, as well as in the Registry of the ICTY. Nationally, Dr. Ambach had been accepted at the Cologne Public Prosecutor's Office prior to his employment with the ICTY. Dr. Ambach holds a Ph.D. in international criminal law of Free University of Berlin; his thesis develops a proposed framework convention for the establishment of international(ised) hybrid tribunals. He has authored a number of publications on various topics in the area of international criminal as well as humanitarian law and regularly gives guest lectures on ICL/ IHL topics at various universities, academic institutions and summer schools.

**Professor Elena Baylis** is a Professor at the University of Pittsburgh School of Law and holds a joint appointment with the Graduate School of Public and International Affairs at the University of Pittsburgh. She is an expert in post-conflict justice. Her scholarship focuses on hybrid courts and other mechanisms of engagement between international and national legal systems, the relationships between international criminal law and rule of law initiatives, and the roles of transnational networks and communities in developing legal norms. She has conducted field research and worked on legal education/ rule of law initiatives in several post-conflict states, including Kosovo, Ethiopia, and the Democratic Republic of Congo. She has recently written about hybrid courts (*Cosmopolitan Pluralist Hybrid Tribunals*), the development of soft law norms (*The International Law Commission's Soft Law Influence*), development donors' support for transitional justice initiatives (*Transitional Justice and Development Aid*), hybrid courts' influence on national courts (*The Persuasive Authority of Internationalized Criminal Tribunals*), transnational networks (*Function and Dysfunction in Post-Conflict Justice Networks and Communities*), and international engagement in post-conflict settings (*What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives*). Professor Baylis is a graduate of the University of Oregon Honors College, *summa*

*cum laude*, and of the Yale Law School, where she was awarded the Raphael Lemkin Prize for the best paper on international human rights.

**Dr. Fidelma Donlon** is Registrar of the Kosovo Specialist Chambers. Prior to this Dr. Donlon was Head of the Specialist Chambers and Registry Court Planning Team where she managed the strategic and organisational establishment of the Kosovo Specialist Chambers during 2015-16. As part of her longstanding career in international criminal justice, Dr. Donlon has extensive experience as a senior manager at various criminal tribunals as well as significant experience in justice sector reform and judicial capacity building projects. From 2010 to 2013, she served as Deputy Registrar of the Special Court for Sierra Leone. Dr. Donlon was also an advisor to the Special Court of Sierra Leone in 2008. She authored the expert Report on, and designed, the Residual Special Court for Sierra Leone. In 2004, she was appointed Deputy Registrar of the War Crimes, Organized Crime, Economic Crime and Corruption Chambers of the Court of Bosnia and Herzegovina (BiH), where she managed the set-up of the Chambers and the successful transfer of cases from the ICTY and the start of trials at the new court. From 2002 to 2004, Dr. Donlon was the Head of the Criminal Institutions and Prosecutorial Reform Unit within the Office of the High Representative in Bosnia and Herzegovina, where she managed the establishment of the War Crimes and Organized Crimes Chambers of the BiH State Court and developed the national strategy for the reform of the BiH Prosecutorial System. Dr. Donlon is a graduate of University College of Dublin and the Law Society of Ireland. She obtained her Doctorate in Law at the Irish Centre for Human Rights at the National University of Ireland with the thesis The Completion Strategies of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone – Lessons for Complementarity and the Prosecution of Crimes by National Courts (2012). She has lectured in International Criminal Law and published widely on the topics of tribunals and international justice and human rights.

**Dr. Mark Kersten** is the Deputy Director of the Wayamo Foundation and a Fellow at the Munk School of Global Affairs at the University of Toronto. In 2011, Dr. Kersten founded the blog Justice in Conflict, which regularly publishes articles on the challenges of pursuing transitional justice in the context of ongoing violent political conflicts. He has taught courses on genocide studies, the politics of international law, transitional justice, diplomacy, and conflict and peace studies at the London School of Economics, SOAS, and University of Toronto. In 2016, Oxford University Press published Mark's book, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*. He holds a PhD and MSc in International Relations from the London School of Economics and a BA (Hons) in History from the University of Guelph. His research focuses on the politics and effects of interventions by the International Criminal Court (ICC) and has appeared in numerous academic fora as well as in media publications such as *The Globe and Mail*, *Al Jazeera*, *Foreign Policy*, and *The Washington Post*. Dr. Kersten has previously been a Research Associate at the Refugee Law Project in Uganda and as a researcher at Justice Africa in London.

**Professor Tiyanjana Maluwa** holds the H. Laddie Montague Chair in Law at Penn State University School of Law, and is concurrently Professor of International Affairs at Penn State School of International Affairs. He previously worked as the Legal Counsel of the Organization of African Unity (OAU), the predecessor to the African Union (AU), and subsequently as the Legal Adviser to the Office of the UN

High Commissioner for Human Rights. Prior to joining the AU, he was Professor of Law at the University of Cape Town, and Extraordinary Professor of Law at the University of Pretoria. He has also been a Visiting Research Fellow at the Max-Planck Institute for Comparative Public Law and International Law in Heidelberg. Professor Maluwahas authored, co-authored, edited and co-edited a number of books, contributed chapters to books, and published numerous articles in law journals and other academic publications in the fields of public international law, human rights, and international organisations. Since 2005, he has been a member of the International Jury of the Stockholm Prize in Criminology. In 1997, he was appointed by the then UN Human Rights Commission to serve as the Special Rapporteur for Human Rights in Nigeria following the execution of the famed poet-activist Ken Saro-Wiwa. He has also served as an expert consultant to the AU, the UN, and other international organisations. Professor Maluwa was the inaugural director of the Penn State School of International Affairs from 2007 to 2015. Most recently, in 2017, he was a Senior Fellow at the Kolleg-Forschergruppe, based at Humboldt University, Berlin. He holds a Ph.D. degree in International Law from the University of Cambridge.

**Ms. Angela Mudukuti** is a Zimbabwean international criminal justice lawyer committed to enhancing international criminal justice in Africa. Currently with the [Wayamo Foundation](#), Angela focuses on capacity building for African prosecutors and investigators to further enhance domestic capacity to investigate and prosecute core international crimes. Formerly with the Southern Africa Litigation Centre (SALC) in South Africa, Angela worked on precedent setting cases on crimes against humanity before the highest court in the country, the Constitutional Court and was deeply engaged in advocacy and strategic litigation, including seeking the arrest of former Sudanese President Omar Al Bashir and holding the South African government accountable for failure to arrest him. Prior to joining SALC, Angela worked for the Immediate Office of the Prosecutor at the International Criminal Court in The Hague, and under the supervision of Professor Cheriff Bassiouni at the Siracusa International Institute for Criminal Justice and Human Rights in Italy. Prior to that Angela was in private practice in Zimbabwe working on civil and criminal matters. Angela has a master's degree in International Criminal Law and Transitional Justice and an undergraduate law degree. Angela is a permanent member of the *Opinio Juris* blog and has written on international criminal law issues in law journals, books and newspapers. She has also been featured by the Financial Times, The Guardian, the BBC, Reuters and Al Jazeera.



# LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
BIH WCC	The War Crimes Chamber in Bosnia and Herzegovina
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CJA	Centre for Justice and Accountability
CSO	Civil Society Organisation
Dakar Guidelines	Dakar Guidelines on the Establishment of Hybrid Courts
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOWAS	Economic Community of West African States
ECHR	The European Convention on Human Rights
EU	European Union
EU CSFP	European Union Common Foreign and Security Policy
HR	Human Resources
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	Iraqi High Tribunal
IRMCT	International Residual Mechanism for Criminal Tribunals
IT	Information Technology
KPIs	Key Performance Indicators
KSC	Kosovo Specialist Chambers
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

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MOU	Memoranda of Understanding
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RSCSL	Residual Mechanism for the Special Court for Sierra Leone
SCC	Special Criminal Court in the Central African Republic
SCSL	Special Court for Sierra Leone
SGBC	Sexual and Gender-Based Crimes
SPDDC	Special Panels of the Dili District Court in East Timor
SPO	Kosovo Specialist Prosecutor's Office
STL	Special Tribunal for Lebanon
TJ	Transitional justice
TRC	Truth and Reconciliation Commission
UN	United Nations
UNSC	United Nations Security Council
VWU	Victim and Witness Unit

# I) INTRODUCTION, GUIDING PRINCIPLES, AND KEY TERMS

On 30 May 2016, Hissène Habré was convicted for his role in crimes against humanity, war crimes, and torture committed during his reign as President of Chad. Habré's trial took place not in N'Djamena, but in Dakar, Senegal, where the Extraordinary African Chambers (EAC) were established as a joint venture between the African Union and Senegal for his prosecution. The EAC's creation represented the latest generation of hybrid courts, a tribunal type that usually employs both national and international staff and applies both national and international laws. It prosecuted Habré for international crimes for his involvement in the arbitrary arrest and detention, rape, sexual slavery, and deaths of some 40,000 people between 1982 and 1990. As the Habré trial progressed in the Palace of Justice in Dakar, officials at the African Union were negotiating the creation of a hybrid court in South Sudan while, in the Central African Republic, the hybrid Special Criminal Court was being staffed and set up.

This interest in hybrid courts has not been limited to the African continent. In recent years, courts that would blend various combinations of international and national law and staff were established for Kosovo (the Kosovo Specialist Chambers (KSC) and Specialist Prosecutors Office (SPO)) and proposed for Syria, Sri Lanka, Myanmar, and for the bombing of Malaysian Air MH17 over eastern Ukraine, among other situations. Together, these institutions demonstrate the return of the hybrid in the realm of international criminal justice.

Hybrid tribunals are one of a series of possible responses to widespread attacks on civilians and other acts deemed to be unethical and/ or illegal during conflict. One of the most dramatic shifts in international politics in the last thirty years has been the increase in the use of international or internationalised criminal justice mechanisms in post-conflict states.<sup>1</sup> Instead of conflict being resolved through political deal-making between elites and amnesties for fighters, perpetrators of what are now widely called 'atrocities' (a term which usually refers to genocide, crimes against humanity and war crimes, plus, depending on context, ethnic cleansing and aggression) are often tried in *ad hoc* or permanent international or internationalised criminal courts. These courts are intended not just to provide accountability, but also to underwrite stable and resilient peace.<sup>2</sup> There is widespread support in international organisations such as the United Nations for the view that criminal justice is positively correlated with measures of peace, though little concrete evidence of this so far.<sup>3</sup> The 'prosecution preference' is currently based more on principle and the preferences of interested parties (victims and survivors, but also state actors who might benefit from delegitimising opponents) than evidence, in part because such evidence is tremendously difficult, perhaps impossible, to gather. These Guidelines should be read with the tensions inherent in the practice of international criminal justice in mind: prosecutions for atrocity crimes are justified by commitments to retributive and (to a more limited extent) restorative justice, and

1 Sriram, Chandra, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability*, Routledge (2005); Teitel, Ruti, *Globalizing Transitional Justice*, Oxford University Press (2014).

2 Skaar, Elin, Camila Gianella Malca & Trine Eide, *After Violence: Transitional Justice, Peace, and Democracy*, Routledge (2015).

3 United Nations Secretary General, "Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice" United Nations (2010), available at: [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf); United Nations, "Transforming our World: The 2030 Agenda for Sustainable Development" (2015), available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>; United Nations & World Bank, *Pathways for Peace*, World Bank Publications (2018), available at: <https://www.pathwaysforpeace.org/>; Thoms, Oskar N.T., James Ron & Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?", *International Journal of Transitional Justice*, Vol. 4 (2010): 329–354.

are likely to be in the interests of diverse groups within affected states. However, any sense of the imposition of justice from the outside, in particular from states not willing to subject their nationals to international(ised) justice mechanisms, can be counterproductive.<sup>4</sup> Tribunals can also be used to further factional or political interests rather than the interests of justice.<sup>5</sup> And criminal justice tends to be expensive, at times diverting resources from other forms of transitional justice (TJ) or development that may be preferred by victim communities.<sup>6</sup>

The move to criminal justice responses to conflict is controversial, but well-established.<sup>7</sup> Its contemporary manifestation began with the establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTR and ICTY) in 1993 and 1994 respectively. The ICTY and ICTR were established by the UN Security Council under Chapter VII mandates, to prosecute individuals accused of serious violations of international humanitarian law. They had concurrent jurisdiction with national systems but could claim primacy over national proceedings.

Neither tribunal was located in the state(s) in which crimes were alleged to have taken place, nor were there concerted efforts to populate the tribunals with local staff. The initial spate of hy-

brid courts can be seen as a response to the need to make justice for atrocity crimes more responsive and accessible to local populations.

The first generation of hybrid tribunals was initiated by the creation of the Regulation 64 Panels in the Courts of Kosovo and the Special Panels of the Dili District Court (SPDDC) in East Timor in 2000. These were followed by the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the War Crimes Chamber of the Court of Bosnia and Herzegovina (BiH WCC), the Iraqi High Tribunal (IHT) and the Special Tribunal for Lebanon (STL). These hybrid tribunals were quite different in their establishment and design as compared to the two *ad hoc* International Criminal Tribunals. The hybrids blended different elements and varying degrees of national and international law and staff. Some held proceedings in the relevant situation country, others in third-party states, and yet others in both. Most made some claims to building capacity in domestic legal systems that had been damaged by conflict. All contributed significantly to the broader 'system' of international criminal justice. However, with the creation of the International Criminal Court (ICC) in 2002 and an international community increasingly prioritising funding for international security and combating terrorism, interest in creating additional hybrid

4 For more on the relationship between bodies like the UN Security Council and the ICC, see Kersten, Mark, "A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court", in Jeff Handmaker and Karin Arts (eds.) *Mobilising International Law for 'Global Justice'*, Cambridge University Press (2018); Jalloh, Charles Chernor, "The African Union, the Security Council, and the International Criminal Court", in Charles Chernor Jalloh and Ilias Bantekas (eds.) *The International Criminal Court and Africa*, Oxford University Press (2017); Kaye, David, with Bryan Hance, Manal Hanna, Sunny Hwang, Elisabeth Levin, Grace Lo, Esther Yoo, and Xiangyu Zhang, *The Council and the Court: Improving Security Council Support of the International Criminal Court*, University of California Irvine, (2013).

5 Ainley, Kirsten, "Transitional Justice in Cambodia: The Coincidence of Power and Principle", in Renee Jeffery (ed.) *Transitional Justice in the Asia-Pacific*, Cambridge University Press (2014).

6 Clark, Theresa M. Clark, "Assessing the Special Court's Contribution to Achieving Transitional Justice", in Charles Chernor Jalloh (ed.) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press (2014): 765.

7 Ainley, Kirsten, "Excesses of Responsibility: the Limits of Law and the Possibilities of Politics", *Ethics and International Affairs*, Vol. 25 (2011): 407-431.

courts waned. From 2007-2014, the hybrid model had seemingly fallen out of favour with no new hybrid courts created during this time.

Since 2014, however, the hybrid tribunal has once again emerged as a popular response to mass atrocities. The reasons for this resurgence of hybrid courts have been addressed at greater length elsewhere, but it is notable that the resurgence accompanied a recognition of the limitations of the International Criminal Court.<sup>8</sup> The establishment of the ICC was expected to make hybrids redundant, but the shortcomings of the Court, in particular perceived politicisation and bias, meant that states turned once again to the hybrid model.<sup>9</sup> However, because hybrids were thought to be a relic of pre-ICC justice, there is a relatively limited academic literature on their establishment and impact.<sup>10</sup> Little has been written about how hybrids should be designed in order to ensure that they are both effective in achieving accountability as well as ‘resilient’, that is, able to withstand political pressures and contribute to the resilience of the communities in which they operate.

This is where the *Dakar Guidelines for the Establishment of Hybrid Courts* (hereinafter “the Dakar Guidelines”) come in. The goal of the Dakar Guidelines is to provide a reference guide on the establishment of hybrid courts. As such, the Dakar Guidelines do not represent a roadmap, nor are they a best practices manual. Rather, the Guidelines offer national, regional, and international actors involved in the establishment of hybrid tribunals a set of key decision points and design options that should be considered when establishing and running a hybrid court. The Guidelines are particularly tailored to two purposes: (1) to highlight issues that have proven complicated or had long-term implications for past hybrid courts and so should be given special consideration in the design phase, and (2) to suggest design components that may increase the resilience of the court (i.e., the court’s own capacity to act independently and to resist political, financial, and other pressures), and the resilience of affected communities through engagement with the court. They further offer interested observers, academics, researchers, and students a comprehensive and coherent study of the hybrid court model. They are, in short, a practical set of guidelines on

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- 8 Kersten, Mark, “As the Pendulum Swings – The Revival of the Hybrid Tribunal.” In Christensen, Mikkel Jarle & Ron Levi (eds.) *International Practices of Criminal Justice*, Routledge (2017): 251-273; Van Schaack, Beth, “The Building Blocks of Hybrid Justice”, *Denver Journal of International Law and Policy*, Vol. 44 (2016): 169.
  - 9 Guilfoyle, Douglas, “Part I- This is not fine: The International Criminal Court in Trouble”, Blog of the *European Journal of International Law* (2019), available at <http://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/>; Kersten, Mark and Angela Mudukuti, “Building bridges and reaching compromise: Constructive engagement in the Africa-ICC relationship”, Wayamo Policy Paper (2018), <http://www.wayamo.com/archives/policy-paper-africa-and-the-icc-building-bridges-and-reaching-compromise/>; Ainley, Kirsten, “The International Criminal Court on Trial”, *Cambridge Review of International Affairs*, Vol. 24 (2011): 309-333; Ainley, Kirsten, “State Power, Head of State Immunity and the Crisis at the International Criminal Court”, in Alison Brysk and Michael Stohl (eds.) *Contracting Human Rights: Crisis, Accountability, and Opportunity*, Edward Elgar (2018) 179-93.
  - 10 Notable exceptions include Ciorciari, John D. & Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, University of Michigan Press (2014); Cohen, David, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Center (2006); Fichtelberg, Aaron, *Hybrid Tribunals: A Comparative Examination*, Springer (2015); Jalloh, Charles Chernor (ed.) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press (2014); Meisenberg, Simon M. & Ignaz Stegmüller (eds.) *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*, T.M.C. Asser Press (2016); Williams, Sarah, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Hart Publishing (2012).



the establishment of hybrid tribunals meant to be of utility to a broad array of constituencies.<sup>11</sup>

The Dakar Guidelines are an output of the Hybrid Justice Project. The project, which is a product of its members' interest in the intersection between international criminal law and international relations, focuses on hybrid courts and resilience. Resilience in this context refers to the ability of hybrid courts to withstand political and other pressures in order to deliver justice and accountability, while also bolstering the resilience of affected communities. The interest of the project in hybrid courts is thus not on the traditional focus of efficiency, rates of convictions, prosecutorial strategies, or the value for money that hybrids offer. Rather, its interest is in the design options available to the creators of hybrid tribunals as well as how their design affects the resiliency of these institutions.

The Dakar Guidelines were drafted by a team that included academics whose research focuses on hybrid and internationalised tribunals as well as practitioners with extensive experience of establishing and working in such institutions. The goal of the project was to capture this expertise in a format that would be useful to those contemplating the establishment of hybrids in the future. The Dakar Guidelines were drafted over two years and were informed by broad-based consultations with a range of experts. Initial discussions for the Guidelines took place in March 2017 in London. This was followed by a drafting session in July 2017 in Dakar. Primary drafters were: Kirsten Ainley, Philipp Ambach, Elena Baylis, Fidelma Donlon, Mark Kersten, Tiyanjana Maluwa, and Angela Mudukuti. Ainley and Kersten under-

took subsequent drafting through 2018 and the Dakar Guidelines were finalised in 2019.

The drafters and contributors differ in their views of the record of hybrid tribunals to date, as well as in their perspectives on some of the topics discussed and recommendations offered in this document. But all share a commitment to the prosecution of acts that constitute international crimes. They similarly share a conviction that accountability for international crimes is best enacted through the leadership of national actors, and with all due respect to domestic laws and legal traditions. This should not be read to suggest that they believe that the prosecution of international crimes can act as a panacea for the ills that generate and prolong violence or, in and of itself, resolve societal cleavages. The Dakar Guidelines offer suggestions on how to decide when the prosecution of atrocity crimes could have positive impacts and how to minimise possible negative consequences.

The issues arising when designing a court are complex, and the Guidelines below endeavour to outline the choices available and to explain their advantages and disadvantages in different contexts. The Guidelines do not propose a single model to fit all situations. This is not a checklist or a box-ticking exercise. The Dakar Guidelines offer a series of lessons learned, questions to ask, and recommendations based on prior experience.

In each section of the Guidelines, we discuss the design choices to be made, their implications and, in many sections, recommendations. These recommendations are based on extensive research, the experience of the practitioners who have

11 The Dakar Guidelines are not designed to be a handbook on the operation of hybrid courts. Lessons learned are shared on some aspects of hybrid practice, but the practice of running trials is not covered in any detail. Readers are referred here to the resources listed in [Section 5\(C\)](#) on Running Trials.

been involved in drafting the Dakar Guidelines, reports by courts, legal practitioners and civil society organisations, and academic literature (see Useful Resources in [Appendix B](#) for the key literature used). It is important to note, however, that many of the costs and benefits of different design choices, and the advantages and disadvantages of establishing a hybrid tribunal, are still theoretical rather than proven. Those involved in establishing tribunals should keep in mind:

- Many of the long-term benefits that hybrid tribunals may offer are as yet unproven, so in pursuing these, hybrid designers will have to operate with a significant degree of uncertainty. More is known about short-term, small-scale effects, and here, careful attention should be paid to prior models and their results.
- Once a desired aim or benefit is identified—for instance accountability, capacity building, or outreach—structural features to promote that aim will need to be built into the tribunal’s design in multiple organs and aspects of the tribunal. Resources will also need to be committed to ongoing mechanisms and processes in order to support that aim.
- Some choices will come in the form of trade-offs among aims and features that are in some tension with each other. In particular, hybrid
- tribunals inevitably face tensions between internationalising and localising the key characteristics of the court.
- Other choices will come in the form of determining how to best expend limited resources and limited jurisdiction in the face of complex conflicts and numerous offences.
- Context is a determining factor of success – there is not a single model of tribunal that

will work across contexts. While there are substantial lessons to be learnt from previous experience at hybrid tribunals, local realities need to be taken into account in designing hybrids in order to ensure that they achieve optimum forms of accountability in the contexts in which they operate.

In addition to offering guidelines and a reference guide on the creation of hybrid courts, the Dakar Guidelines also highlight the need to consider evaluation criteria for hybrids from the outset. The final section of the Guidelines outlines a number of criteria against which such courts can be measured. As discussed above and in [Section 9](#) below on Evaluation, it is tremendously difficult to investigate whether hybrids are successful in achieving or contributing to deterrence or reconciliation. But there are a number of other criteria against which these courts can be fairly judged. Establishing evaluation criteria in the form of clear goals and benchmarks ensures that stakeholders can hold the court and its staff accountable.

The Guidelines are just one of the resources developed within the Hybrid Justice project. The project’s [website](#) contains [key facts](#) about each past and present hybrid court, including links to their founding legal documents, lists of the status of cases as of January 2019, literature reviews specific to each court, and diagrams illustrating the organisational structure of each court. The website also features a [dataset tool](#) enabling users to compare features of past and present hybrids. Finally, the website contains a literature review of hybrid courts, available [here](#),<sup>12</sup> and reviews for each past and present hybrid, available via the [Hybrids page](#). The literature review for each court focuses on analyses of the ‘impacts’ of

<sup>12</sup> <https://hybridjustice.files.wordpress.com/2019/02/hybridsoveralllit.pdf>

these mechanisms. The reviews include articles that focus on internal evaluation, which analyse the court's legal framework, jurisprudence, and functional effectiveness, and on external evaluation, which analyse the impact of the hybrid on communities and individuals, the country's domestic justice system, and themes such as reconciliation and healing.

The Dakar Guidelines also can be read alongside two complementary recent reports on international criminal justice mechanisms. The Open Society Foundation's [Options for Justice](#) report outlines lessons learned from previous mechanisms of criminal accountability for grave crimes, including hybrid courts, as well as summarising the key features of thirty three previous mechanisms. The ICTJ's [Lessons from Hybrid Tribunals](#) documents the experiences and lessons learned in the establishment and operation of five hybrid or mixed courts (the BiH WCC, the ECCC, the STL, SPDDC and the SCSL). There are many more Useful Resources listed in [Appendix B](#) below. Ultimately, it is the hope of the drafters of the Dakar Guidelines that they are of use to all actors interested in the efficacy of hybrid courts and, in particular, to those actors involved in the negotiation, establishment, and operation of these tribunals.

## A) GUIDING PRINCIPLES

1. The overriding objective of hybrid court founders should be to build a genuinely independent institution, properly established in law, to maximise the integrity, effectiveness and legitimacy of its organs.
2. The design of the hybrid court should respond as much as possible to the particular needs

and circumstances of the concerned state(s) and to the conflict or situation that gave rise to the crimes at issue.

3. Hybrid designers will need to make choices about prioritising certain aims or benefits over others, rather than attempting to achieve all the potential goals or benefits.
4. Continuous evaluation must be planned in from the outset, including by designing appropriate, and where possible measurable, aims, goals, and benchmarks.

The Guiding Principles above are drawn from the lessons learned and design considerations detailed in the Dakar Guidelines. Notably missing from these principles are suggestions for what the outcome objectives of a hybrid should be – for instance, ending impunity, promoting reconciliation or stabilising a post-conflict state. This is because hybrids must be responsive to individual contexts, and outcome objectives will differ across cases. As discussed in [Section 9](#) below on Evaluation and Benchmarking Hybrid Mechanisms, goals should be defined at an early stage of the design process and may be a mix of ambitious targets (for instance, ending impunity for perpetrators of the gravest crimes; contributing to reconciliation between groups) and targets that hybrid staff have direct control over the achievement of (for instance, providing for fair trials to the highest standards).

## B) KEY TERMS

There is no consensus on what makes a hybrid tribunal 'hybrid'.<sup>13</sup> In the field of international criminal law, one hears the terms 'internationalised', 'mixed', and 'hybrid', as well as the terms 'hybrids', 'hybrid tribunals', 'hybrid courts' and

13 Ainley, Kirsten and Mark Kersten, "Hybridization—A Spectrum of Possibilities", in Carlson, Kerstin, Sharon Weill and Kim Thuy Seelinger (eds.) *The Habré Trial and Beyond: New Models of Prosecuting International Crime?* Oxford University Press (2019).

'hybrid mechanisms' used, sometimes interchangeably. For the purposes of the Dakar Guidelines, 'hybrids' is shorthand for 'hybrid, internationalised, and mixed investigatory and criminal justice mechanisms'. Structural diagrams of the institutions that fall under this categorisation can be found in the [Appendix A](#). We use 'hybrids', 'hybrid tribunals', 'hybrid courts', 'hybrid mechanisms', 'tribunals' and 'courts' interchangeably in the Guidelines to avoid excessive repetition. 'National', 'domestic', and 'local' are to all intents and purposes interchangeable in the Dakar Guidelines. We acknowledge that in other contexts a distinction may be drawn between 'national' and 'local', but we are not drawing any such distinction in this document. Our focus is on the partnership between domestic actors and international actors in general. National input and ownership are critical to the legitimacy of hybrids and should be prioritised at all stages of the establishment of hybrid courts.

'Statute' is used as shorthand for 'statute or legal framework', as a statute is often used to establish a hybrid, but other mechanisms of legal establishment are possible.

'Section', 'office', and 'unit' are used interchangeably to refer to administrative units or sub-units of a court. Hybrids differ on whether they set up separate units or sections within existing units to undertake functions such as victim participation.<sup>14</sup>

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14 Useful glossaries which explain many of the terms used in the Dakar Guidelines have been written by the Coalition for the International Criminal Court (CICC), and the Centre for Justice and Accountability (CJA).

## **Section 1) Summary and Key Recommendations**

### **Introduction, Guiding Principles, and Key Terms**

Since 2014, there has been a resurgence of hybrid courts as a popular response to mass atrocities. While the reasons for this shift have been explored in academic literature, little has been written about how hybrids should be designed to maximise their effectiveness and resilience.

The Dakar Guidelines are a reference guide developed by the Hybrid Justice Project to support the establishment of future hybrid courts. They offer those working to establish hybrids a set of key decision points and design options.

It is important to note that the costs and benefits of various design choices are still largely theoretical, rather than proven. At present, there are no reliable methods for evaluating the contribution of hybrids to some of the goals they are intended to achieve, namely social reconciliation, political transformation, and other transitional justice goals.

Guiding principles for hybrid courts include:

- Institutional independence from political pressure
- Responsiveness to the needs and circumstances of the victims and the concerned state
- Selection and prioritisation among a range of possible aims
- Continuous evaluation



## 2) NEEDS ASSESSMENT

A comprehensive needs assessment should be undertaken as the first step when considering whether to establish a hybrid tribunal. Understanding the political, social, legal and economic contexts is essential. Such an appraisal of context in the first stage of the Needs Assessment is what will ultimately determine whether or not a hybrid court is an appropriate mechanism to institute in response to mass crimes. The second stage of the Needs Assessment, which is carried out if a hybrid court is deemed to be appropriate, will provide the basis for decisions about the scope of the court's jurisdiction and its relationship to the national legal system.

Needs assessments should be conducted by an advance team that is able to evaluate the specific context of the crimes to which a hybrid would be responding and the environment in which a hybrid would potentially be embedded. The advance team should constitute qualified national actors, such as legal professionals, civil servants, and civil society leaders—particularly those from organisations that represent victim populations. Additionally, it should include international experts, such as legal professionals who have worked in other international or hybrid criminal tribunals as well as international civil society representatives who have a longstanding presence and expertise in the region. In general, it is useful to include expertise in the following areas in the advance team conducting the Needs Assessment:

- The investigation, prosecution and defence of relevant crimes at the domestic level
  - The investigation, prosecution and defence of relevant crimes in international criminal law
  - Victim needs, views and interests
  - Attitudes towards justice in general, and specific justice mechanisms in particular, among key stakeholders in affected states and among likely donors
- The contemporary political, economic and social contexts in the state(s) in

which crimes took place and the state(s) in which a hybrid could be based

- The role of any third-party states and international organisations with significant political and economic relations with the state(s) in question
- The history and dynamics of the crimes likely to be prosecuted, and, where relevant, the conflict within which they took place
- The establishment and functioning of hybrid courts.

Decisions on whether to establish a hybrid should be responsive to national preferences. The team conducting the Needs Assessment should work extensively with groups and organisations in the situation country to ensure that a broad and representative appraisal of the preferences of the population is generated, and later incorporated into the design of any justice mechanism consequently established.

If the decision is made that a hybrid tribunal would be useful and appropriate as a means to address crimes perpetrated in a given situation, a more detailed second stage of the Needs Assessment should inform actors of how the tribunal should be designed.

It is important to stress that this process should not be rushed. There may be pressure from advocates as well as victims and survivors to get a hybrid court set up as soon as possible. However, it is important to gather sufficient information to decide if a hybrid is the right option, and, if so, to set it up in such a way that ensures that the court is independent and is an appropriate and effective response to the political crisis or conflict it is seeking to address. Ensuring that this is the case requires a thorough understanding of the political violence and criminality that the tribunal is responding to as well as the context in which it would operate. The legal context and

the available options for justice must be clearly understood. The impetus for a hybrid court might be the lack of ability to prosecute certain crimes within the domestic system, for instance if the domestic system allows for head of state immunity or if there are concerns about retroactivity. The EAC was created (as opposed to using Senegalese domestic courts) because the Economic Community of West African States (ECOWAS) Court ruled that a Senegalese statute enacted in 2007 could not be applied retroactively and that a court of ‘international character’ was required to prosecute Habré.<sup>15</sup> The May 2019 decision of the Appeals Chamber of the ICC on the Bashir case establishes (controversially) that the ‘international’ character of a court can override head of state immunity.<sup>16</sup> Hybrid courts may therefore be useful to overcome constraints within domestic law.

In the initial stage, assessing whether or not the state in which crimes were committed is willing and able to engage in the process of setting up a tribunal—and how—is crucial. It is also critical to listen carefully and actively to the sentiments of relevant local civil society organisations, particularly those in a position to reflect and represent victims and survivors. If domestic civil society is in favour of prosecutions and the state is willing to support prosecutions but requests or requires external support, then additional actors in the international community will need to be engaged to partner with the relevant state. These might include international organisations like the United Nations or regional organisations such as the African Union (AU) or European Union (EU).

Here, it is important to note that political context can and does change. Political sentiment towards

international justice is anything but static, and a states’ interest in a hybrid court may be fluid through time. However, getting strong, vocal, and concerted commitment from the concerned state and civil society from the outset can help capacitate tribunals to better weather any future political storms and potentially increase the costs to national governments seeking to renege on their previous commitment(s) to accountability.

If the relevant state is open to the creation of a hybrid, the advance team will have to ascertain the specific individuals and institutions that they and the hybrid court’s staff can engage with. Different contexts will require different approaches in this respect. There may not be any issue in engaging with representatives of states undergoing a genuine political transition. However, in other cases, there may be a need to engage with alleged perpetrators of international crimes who retain positions in government because the country has not experienced any genuine transition.

In situations where interlocutors may subsequently be persons of interest to the tribunal, the advance team and political figures involved in the design and creation of the court must take special care to insulate the tribunal’s development from politicisation and, at all times, to avoid commitments to particular prosecutorial decisions. They should also seek to guarantee the tribunal’s independence and ability to execute its mandate securely. Here, it might be useful for the advance team to get specific and public pledges of good faith and support for the hybrid from the relevant state actors as a means to deepen national investment in the tribunal and, potentially, as a reference point if such support waivers in the fu-

15 ECOWAS Court of Justice, *ECOWAS Ruling: Hissein Habre v. Republic of Senegal* (2010). Available at: <http://www.legal-tools.org/doc/cb76bb/>

16 Appeals Chamber of the ICC, *Judgment in the Jordan Referral re Al-Bashir Appeal* (2019). Available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397-Corr>

ture. Generally, it is good practice to seek only essential contact with anyone who may be implicated, directly or indirectly, in the violence that led to the consideration of a hybrid court in the first place. Hybrid designers should also pay attention to the possibility that government actors with relatively clean hands might support the hybrid to undermine political opponents, which can affect the legitimacy of the hybrid among domestic audiences. Public contact with any political group, which might be perceived to indicate an alignment of views or objectives, should therefore be minimised.

In the second stage, the Needs Assessment should ascertain the appropriate temporal jurisdiction of any hybrid court by gathering the views of different affected communities on when the conflict effectively began and ended (if it is indeed perceived to have ended) and highlighting which alleged crimes would be under the jurisdiction of the hybrid given different choices on temporal limits.

The second stage of the Needs Assessment should also evaluate the security situation within the concerned country. If the concerned state is still unstable or the security of the court and its personnel cannot be ensured, then the court may need to be located outside of the relevant country. On the other hand, if the country is stable and the risk to court personnel and the court itself is low, then the court may be located within the concerned state. This latter option is ideal because of the benefits for proximity to and engagement with the concerned communities, including domestic legal actors, victims, and the public.

The Needs Assessment will also need to consider the types of criminality that seem to have taken place, so as to develop a basis for determining the subject matter jurisdiction of the court. A no-

table trend in international criminal justice is the linkage of core international crimes (genocide, crimes against humanity, war crimes and aggression) with transnational organised crimes (such as corruption, piracy, terrorism, money laundering, trafficking of drugs and people, and the exploitation of natural resources). Accordingly, the Needs Assessment should evaluate the prevalence and centrality of transnational organised crimes, as well as international crimes, to the period of political violence under scrutiny and the extent to which their perpetration was/ is linked. The same goes for national crimes, insofar as they reflect the specific national context of criminality that the hybrid court is supposed to respond to. Particular attention should be paid to whether sexual and gender-based crimes (SGBC) took place.

Finally, a thorough understanding of the domestic legal situation, existing national laws and relevant constitutional norms and decrees, as well as the country's policing, investigatory, prosecutorial, and judicial capacities will help to determine the additional resources that are needed to effect a hybrid court. This information should also inform designers' thinking on the roles that national officials can have in the tribunal, the applicable procedural law, the extent to which capacity building initiatives will be beneficial or required, and whether any national legislation can be used or requires amendment.

Overall, it is hard to over-state how important it is that a sophisticated understanding of the nature of the political crisis, political violence, and current state of security be established. That understanding will inform when, where, and how a hybrid court can be created, as well as the parameters regarding the violence and criminality that it is seeking to address. It will also instil an understanding of the causes and drivers of political violence and atrocity—something that tribu-

nals are often accused of not being sufficiently attuned to.<sup>17</sup>

Furthermore, decisions taken from the very outset of tribunal design will continue to resonate throughout the lifespan of the court, so that a careful, comprehensive needs assessment will be essential to its resilience. What follows in the sections below are guidelines on how hybrids can respond to identified needs, as well as details of current good practice in specific contexts.

## A) CHECKLIST OF QUESTIONS FOR NEEDS ASSESSMENT

### Stage 1

The first stage of the Needs Assessment determines whether a hybrid court is necessary and appropriate. Questions to ask at this stage include:

1. What are the justice preferences of victims and affected communities? In particular, what is the relative importance of prosecutions versus other mechanisms of transitional justice (such as a truth commission) to these groups?
2. What are the alternatives to establishing a hybrid? Are any of them preferable to a hybrid?
3. Why is a hybrid being considered to address atrocities rather than national systems or the ICC (perhaps in conjunction with national systems)?
4. Do the local institutions and law enforcement authorities have sufficient capacity to investigate and prosecute complex cases?
5. Are the domestic judiciary sufficiently independent, or is there a risk of political interference with the local courts?
6. Is there a legal justification for establishing a hybrid, for instance to overcome constraints in domestic law on head of state immunity and/ or non-retroactivity?
7. Under which system would fair trial rights be most likely to be upheld?
8. Would a hybrid tribunal fit within a larger framework of transitional justice where other mechanisms are also implemented?
9. Might a hybrid court divert resources/ funding/ staff from other potential transitional justice mechanisms, particularly those which have a high level of support from victim communities?
10. What are the key features of the political, social, security and economic landscape(s) that the hybrid would operate within and how might they impact the court?
11. What are the political, social, and economic drivers of the violence and crimes that the tribunal is seeking to address?
12. Which domestic actors support the establishment of a hybrid and why? Are their objectives realistic?
13. Which domestic actors oppose the establishment of a hybrid and why? How likely are they to be able to critically undermine the functioning of a legal mechanism?
14. Who are the key interlocutors in other concerned states? Who are the relevant international or regional organisations that are likely to support the establishment of a tribunal and which actors are most likely to oppose it?
15. Which other actors would it be useful to gain support from? How could their support be achieved?

17 Kersten, Mark, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016): 37-63.

16. What is the community of practice (especially within the domestic legal community) that the hybrid court could draw upon for expertise and staffing?
17. Is there sufficient *national* interest in contributing funding, human resources, etc. to a hybrid?
18. Is there sufficient *international* and/ or *regional* interest in contributing funding, human resources, etc.? Which regional or international organisations might take the lead?
19. Would funding from identified likely sources come with any (political) expectations that need to be identified and confronted?
20. Does a hybrid have a realistic chance of success? Is it a justifiable use of resources given the alternatives?

## Stage 2

The second stage of the Needs Assessment takes place once it has been decided that a hybrid court should be established. Questions to ask at this stage include:

1. How can the hybrid be designed to maximise local authority and ownership?
2. Where should the hybrid be based? Is the relevant state able and willing to host the tribunal? If not, what is the most appropriate location for the court to be based?
3. How long should the hybrid ideally be in operation for?
4. What time-frame should the tribunal have jurisdiction over?
5. Which crimes should the hybrid have jurisdiction over?
6. What are the key features of the legal context within which the hybrid will operate? Can existing national laws be used, or would they need to be amended?
7. What are the capacities, capabilities, and levels of independence from political pressure

- of the domestic judiciary, legal personal, law enforcement agencies, etc? How can these be increased or supplemented if necessary?
8. How would victims ideally participate in the court?
9. Is there the potential for a trust fund for victims or a reparations fund to be established?
10. How can domestic and external opposition be confronted or managed from the outset?

The [Options for Justice report](#) has further lists of Key Questions to consider in the Needs Assessment and establishment phases of justice mechanisms, many of which are relevant to hybrids.

## Section 2) Summary and Key Recommendations

### Political Environment and Needs Assessment

The Needs Assessment is an imperative first step when considering whether a hybrid court is appropriate and necessary after atrocity crimes. An advance team made up of legal professionals, government officials and civil society organisations from the affected country, alongside relevant international experts, should conduct the assessment.

Those establishing hybrid courts should also have a sophisticated understanding of the context of alleged crimes and current state of political affairs, which will inform key design choices.

There are two main stages involved in the Needs Assessment:

#### *Stage 1*

- This stage seeks to determine whether a hybrid court is necessary and appropriate for the context.
- The determination should be based on information about the following (see page 12 for a checklist of questions):
  - Victim preferences
  - The capacity of existing justice systems to deliver justice
  - Other transitional justice frameworks and ongoing justice efforts that would affect the jurisdiction of the hybrid court
  - Political, legal, and security context in the affected country or proposed host country
  - National and international commitment to criminal justice
  - Dominant actors and potential spoilers
  - Access to resources and funding
  - The likelihood of a hybrid court achieving desired aims

*Stage 2*

- This stage occurs if a hybrid court is deemed appropriate and necessary.
- The second stage should assess the following (see page 13 for a checklist of questions):
  - Capacity of national justice system and justice officials to contribute to the work of the hybrid court
  - Jurisdiction
  - Access and participation for victims and affected communities

### 3) CONSTITUENT LEGAL DOCUMENTS, JURISDICTION, AND STRUCTURE

#### A) PROCESS OF CONSULTATIONS, STATUTE ADOPTION, AND IMPLEMENTATION IN LAW

As per the discussion above, the legal constitution and promulgation of a hybrid tribunal must be context-driven. It is important to engage relevant national, regional, and international actors in the agreement to constitute a hybrid tribunal and in relevant consultations, drafting of the Statute or legal framework, and implementation of the hybrid.

Past hybrid courts have been constituted by bilateral agreements between the relevant state executive (and sometimes also state legislature) and a variety of international and regional institutions. Examples of these institutions include:

- The UN Secretariat (SCSL; ECCC)<sup>18</sup>
- A UN Mission, regional mission, or other transitional authority (Special Criminal Court in the Central African Republic (SCC); SPDDC; IHT; KSC; SPO)
- Another regional entity such as the African Union (EAC; the proposed hybrid court for South Sudan).<sup>19</sup>

Sharing responsibility for the establishment and functioning of a hybrid court among domestic, regional, and international actors ensures national input and access to justice, and may be a useful means of insulating the court from political manipulation as multiple actors have scrutiny over it. However, in cases where there is significant competition of interests among national actors, having an independent external authority take

responsibility for implementation may be more in line with the interests of justice and of victim populations. This was the case, for instance, at the EAC, which was entirely independent from Chad. It should be noted that a significant cost of the lack of engagement with Chad was the failure of the EAC to secure the extradition of five of Habré's co-accused.<sup>20</sup> Shared commitment and responsibility from all affected actors is likely to lead to better outcomes when it is possible to achieve.

In most cases, it will be critical for national specialists to be involved in the technical elements of tribunal design and for national authorities to signal their acceptance and support for the tribunal at the political level, both so that the tribunal is designed to function effectively as well as to facilitate national collaboration and legitimation. This may require, where appropriate, that national authorities—including those from the ministries of justice, law enforcement, and security agencies—play a direct role in the drafting of the Statute or legal framework as well as any relevant legislation relating to the creation of the tribunal, such as a witness protection law or an extradition treaty. Domestic experts and officials who support the hybrid are well situated to identify the relevant existing legislation that can be utilised by the court, as well as any legislation that needs amendment for the court to function effectively.

Without leadership and support from domestic officials, institutions, and experts, the establishment of even a well-considered hybrid court could become an external imposition, which is

18 The ECCC was technically established by the domestic legislation that situated the Court, as envisaged by the Agreement between the UN and Cambodia, into the Cambodian legal framework.

19 The [Hybrid Justice Project website](#) provides more details of the legal constitution of each hybrid. Note that the STL was intended to be established by an agreement between the UN Secretary General and Lebanon, but it was eventually established by a UN Security Council resolution as the Lebanese parliament failed to ratify the agreement.

20 Hicks, Celeste, *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice*, Zed Books (2018).



likely to undermine its effectiveness and legitimacy. National legal and political buy-in will likely affect levels of domestic ownership as well as the presence and persistence of broad and popular acceptance of the tribunal's existence and mandate. However, it is also important to note that in situations where, for example, trust in domestic institutions is low or domestic actors are primarily responsible for relevant crimes, *external* buy-in will be essential to the success of a tribunal and its legitimacy. This is likely to be the case in any situation in which victims are alleged to have suffered at the hands of people who remain in power.

Domestic legal consent will affect the level of support that the establishment of a tribunal enjoys. This can be achieved by, for example, assenting and effectuating legislation in parliament which, depending on the existing domestic law, may require specific legislation approving the hybrid court's statute. This was the case, for instance at the ECCC and the KSC. Alternatively, if the domestic law does not require amendment to the legal code for the hybrid to be created, consent can be achieved by legislation committing the government and state to supporting the tribunal. At all times, professionally drafted legislation regarding the tribunal and its legal framework should be insulated from changes driven by overtly political interests.

Situations where domestic law needs to be created or amended for the tribunal to be established are a potential opportunity for early capacity building, which is often a core goal of hybrids (see [Section 7\(b\)](#) below for an extended discussion of capacity building). The process of drafting or amending domestic law can be used by hybrid designers, ideally working with civil society organisations, in order to try to ensure that legal reforms reflect the highest appropriate standards of international human rights law. The

process can also increase domestic understanding of relevant legal texts and tools where there has been limited previous engagement with international law.

Regardless of whether a statute must be legislated or whether the existing law is sufficient, it is important for all legal frameworks to provide absolute clarity in stipulating the material law that is applicable and the interaction between domestic and international law. Cognisance of and respect for relevant national procedural law is likely to be crucial to the effectiveness of the court in its context, as well as enhancing national understanding of and commitment to the court's work and proceedings. Where key features of the national procedural law (such as a common law approach or an inquisitorial process) are replicated in the hybrid structure, national legal practice will be able to connect better to the hybrid institution.

Consultation with the public is critical in order to adequately represent the needs of the stakeholders as well as to establish legitimacy amongst officials, civil society, victims, and the wider citizenry, including opposition voices. This should be done at the Needs Assessment stage, and again after a professional and detailed statute/ framework has been drafted which can be used to inform and structure consultations. This should be done not only to consider and understand the views and expectations of stakeholders, but as an early opportunity to:

- Create broad-based support and good-will
- Generate understanding from key actors involved in the creation of the hybrid as to what the community's grievances are
- Build a broad understanding of the tribunal, its functions and its limitations
- Manage expectations about what the tribunal can achieve (and what it cannot) and how

quickly—this is particularly important for issues of victim participation and, where relevant, a reparations scheme, which should be planned in at the outset

- Help to establish the key concerns and likely criticism that a tribunal might face and give proponents an early opportunity to engage with and address this criticism
- Engage with non-affected populations in order to build sympathy and understanding for the need for a tribunal<sup>21</sup>
- Broaden understanding of how the hybrid court may interact and relate with other transitional justice or post-conflict, post-atrocity development goals
- Establish effective networks that can subsequently be engaged for outreach and feedback purposes.

An open appreciation and acknowledgement that victims and affected communities have divergent and diverse views, some of which may not be in line with those of the tribunal, is an important way to establish good will and open lines of communications between the tribunal and those constituencies. Further, understanding and making clear that no tribunal will be a panacea for the social and political harms done by conflict and atrocities is crucial to fostering trust among affected and non-affected populations. Tribunals should ideally be seen as useful and necessary but limited tools to address past crimes and offer accountability, rather than as potential solutions to a wider range of societal ills or as a drain on national resources and energy.

In some conflict-affected contexts, the ability to initiate a fully comprehensive programme of consultations prior to the establishment of a court

may be severely limited as a result of political, security, and infrastructural issues identified in the Needs Assessment phase. Hybrid court staff, the government, and their partners should not use the lack of an ability to have pre-establishment consultations as a reason to stop the process of creating a hybrid or thinking about how to share information. They can also consider consulting parties creatively, such as through radio programmes or broad-based leafletting. In such scenarios, more resources can also be focused on ensuring effective consultations during the process of implementation of legislation creating the hybrid tribunal as well as on outreach efforts once the hybrid is created. Indeed, as the hybrid tribunal's work increases, so too will knowledge of it, requiring ongoing and consistent consultation with relevant segments of society. It is important to stress here, however, that unanimous support for the creation of a hybrid court is never likely to be achieved. International criminal justice is, by its very nature, a project that pushes uncomfortably against those who seek to retain positions of influence and power over others. It may also sit uncomfortably against expectations of reconciliation, truth telling, or other priorities related to transitional justice and post-conflict development. There will never be full buy-in from all actors and the entire population. Staff and supporters of hybrid tribunals should not presume otherwise.

## B) JURISDICTION

To a significant extent, the jurisdiction of hybrid courts determines the impacts that they can have on achieving accountability for atrocity crimes and on attempts to address the past more broadly. Care should be taken to ensure that the hybrid

21 Quinn, Joanna R., "Cultivating Sympathy and Reconciliation: The Importance of Sympathetic Response in the Uptake of Transitional Justice", in Clark, Tom, Ravi de Costa, Sarah Maddison (eds.) *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage*, Springer, (2016): 119-135.

has jurisdiction over the crimes that were identified during the Needs Assessment phase, recognising that there will almost certainly be pressure from actors who might come under the jurisdiction of the court to design jurisdiction in ways that exclude them but include their (political) opponents. Hybrids are always at risk of allegations of being politicised, biased against those who fall under their jurisdiction and working in the interests of those who do not. There are limits to how far these allegations can be avoided, but drafters should at least consider the implications of decisions about jurisdiction in terms of which crimes or actors are included and excluded under different options. Reference back to the Needs Assessment should aid in making decisions over jurisdiction.

### i) Concurrent and Primary

As a consequence of their ‘hybrid’ nature, it is important to clearly and formally spell out the relationship between hybrid courts and their domestic counterparts. This will ensure clarity over whether or not a hybrid tribunal has concurrent jurisdiction with national courts (i.e. whether the hybrid and national courts both have authority to hear the same or similar cases) and whether or not the tribunal can exercise primary jurisdiction over the authority of domestic courts—in other words, whether the hybrid has the authority to select its cases, including from those that national courts have concurrent jurisdiction over. In order to be effective in investigating and prosecuting international crimes, hybrid courts must

be able to cooperate effectively with and, if and when necessary, exercise authority over national courts, prosecutorial services, and investigation services. Such situations arise when domestic courts are used, for example, in an attempt to shield perpetrators rather than prosecute them.

Drafters of hybrid tribunals must also be aware of the concurrent jurisdiction that the tribunal may share with regional courts and/ or the ICC. The former may become particularly relevant if the Malabo Protocol is enacted, expanding the jurisdiction of the African Court for Human and Peoples’ Rights (ACHPR) to include core international crimes alongside an extensive catalogue of transnational and other crimes.<sup>22</sup> The latter is already of relevance to some hybrid courts, such as the Special Criminal Court in the Central African Republic. The SCC is investigating international crimes concurrently with the ICC and has a Memorandum of Understanding with it.<sup>23</sup> The SCC’s statute cedes primary jurisdiction to the ICC.<sup>24</sup> States Parties to the Rome Statute which are involved in establishing hybrid courts should open lines of communication to the ICC early in the process, as the status of hybrids under the complementarity regime of the Rome Statute is not settled. Equally, it is not yet clear how the expanded jurisdiction of the Malabo Protocol might affect hybrids, and the African Union should ideally be involved in discussions on jurisdiction for African hybrids in order to enhance regional commitment.

22 African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014). Available at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>

23 Human Rights Watch, “Looking for Justice: The Special Criminal Court, a New Opportunity for Victims in the Central African Republic” (2018). Available at: <https://www.hrw.org/report/2018/05/17/looking-justice/special-criminal-court-new-opportunity-victims-central-african>

24 Labuda, Patryk I., “‘Open for Business’: The Special Criminal Court Launches Investigations in the Central African Republic”, Blog of the *European Journal of International Law* (2019), available at: <https://www.ejiltalk.org/open-for-business-the-special-criminal-court-launches-investigations-in-the-central-african-republic/>.

## ii) Subject Matter

Hybrid tribunals are tasked with investigating and prosecuting complex crimes and, in most cases, core international crimes. This generally includes war crimes, crimes against humanity, and genocide. It could also, where appropriate, include transnational organised crime (i.e. wildlife trafficking, human trafficking, money laundering, illegal trade in arms, terrorism, etc.), as well as relevant crimes under national laws. The specific subject matter jurisdiction (i.e. which crimes the hybrid has jurisdiction over) of a tribunal should reflect the set of circumstances—and crimes—to which the tribunal is responding. These crimes must be clearly defined in the hybrid court's statute. Relevant definitions, particularly relating to international crimes, can be sourced from existing legal documents such as the Geneva Conventions, the Rome Statute of the International Criminal Court, other relevant treaties, and from the Statutes and jurisprudence of other tribunals. However, it is important to note that there may be multiple international legal definitions for one crime, as is the case for crimes against humanity. (Note, however, that the anticipated Draft Convention for Preventing and Punishing Crimes Against Humanity may promote international consensus on the definition of this crime and/ or provide a model definition for hybrids.) In addition, the drafters should know whether the national legal system has adopted the relevant international crimes as part of its national criminal code. If so, drafters should consider whether the Statute should refer to the national versions of these crimes (which increases legitimacy and could help to avoid criticism that the hybrid is violating the principle of legality) or to an international version – and if so, which specific international version. The drafters should also consider

whether to refer to other crimes under national law that may be particularly appropriate if there are distinctive offences as noted above. In addition, the Malabo Protocol can be drawn upon for definitions of transnational crimes such as piracy, terrorism, corruption, money laundering, drug trafficking, human trafficking and the exploitation of natural resources (noting that these definitions are not yet well-established in law, so definitions used in relevant national codes, if they exist, are likely to be less problematic at least in terms of legality).

Definitions of crimes can be tailored to the situation for which the hybrid tribunal is being designed. Such tailoring is, however, controversial. Many would argue that the definitions of core crimes should be consistent and that amending them to fit particular situations risks creating confusion and narrowing the definitions to exclude some acts. Any tailoring of offences should therefore be kept to a minimum and be clearly justified by the context.

In selecting among potential definitions of crimes, another important consideration is legality during the time period in question, particularly if considerable time has elapsed. The KSC Statute, for example, specifies that the court should apply the relevant international customary law and national law “as applicable at the time the crimes were committed”, so as to ensure non-retroactivity.<sup>25</sup> This is also a concern in determining modes of liability, as discussed below.

Hybrid courts cannot do it all; nor should they. It is therefore important that prosecutors prioritise cases (see also the discussion below in [Section 5\(a\)](#) on case selection). In most circumstances, this will mean that only crimes of a certain grav-

25 Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053, art. 12 (2015).

ity and relevance to the given context should be eligible for prosecution at hybrid courts. A clear definition or set of guidelines regarding gravity will help the tribunal prosecute those accused of sufficiently grave crimes. Such guidelines could include both quantitative measures, such as the amount and nature of victimisation, incidence of violence, numbers of displaced persons (though absolute numerical minimums may be ill advised), and qualitative measures, which could focus on the broader social, economic or political impact and consequences of the crime(s) on affected communities. Note that gravity is not the only reason to select cases. There may be contexts in which prosecuting mid-level perpetrators is appropriate, for example where the ICC is prosecuting the gravest crimes or where the hybrid has the objective of capacity building within the domestic system and so might want to prosecute a range of crimes including those deemed less grave, as, for instance at the BiH WCC.

In assessing the relevant domestic legal landscape to determine if the crimes defined can be prosecuted, the creators of a hybrid court will often have two choices if national laws have shortcomings: (a) rely on international legal standards (though note that there may be multiple legal standards in some cases) or (b) work with relevant national partners to revise and amend domestic law. The former has the advantage of likely being more efficient. The latter, however, presents an opportunity to enhance the domestic legal landscape and build the capacity of domestic actors and institutions. Hybrid court designers and staff will need to balance these two prerogatives of efficiency and domestic impact.

It is essential that the subject matter jurisdiction of the hybrid court as it relates to national courts be made clear. In situations where there may be a national statute of limitations regarding crimes, a hybrid statute should deal with this head-on and

clarify that no such statute of limitation applies to the (international) crimes under its jurisdiction. The Statute should also address the questions of immunity and amnesties. This is particularly important if domestic law provides for immunity for the head of state or senior officials, or if peace agreements or other documents offer amnesties from prosecution under domestic law. In addition, the Statute of the hybrid court could be used by national actors to advance national law here, for instance by supporting or enabling national-level trials of historically under-investigated crimes relating to sexual and gender-based violence, rape, or the destruction of cultural artefacts and historical sites.

Finally, it is important that the court has jurisdiction over crimes against the administration of justice. The types of alleged crimes that a hybrid tribunal investigates and prosecutes will invariably be politically sensitive. There will consequently be those parties and powers that will seek to avoid scrutiny or prosecution. Some may seek to subvert investigations and prosecutions by interfering with witnesses or intimidating them or others involved in relevant investigations or prosecutions. It is therefore essential that the tribunal be given jurisdiction over offences such as giving false testimony, presenting evidence known to be false, offences against witnesses, offences against court officials, and accepting or soliciting bribes as a court official.

### iii) Temporal

The Statute of a hybrid court should set limitations on the specific period that the hybrid is able to investigate. The temporal jurisdiction (i.e. which time period the hybrid has jurisdiction over) of a hybrid tribunal should accurately reflect the period of political violence and hostilities under examination. The choice of temporal jurisdiction must also be communicated effec-

tively to affected populations, as it will ultimately shape the narrative of political conflict under consideration. In other words, the time period of the court's jurisdiction will signal to communities and outsiders a view of when the political conflict effectively began and ended.

While often appearing innocuous, there is a distinct danger in tailoring the temporal jurisdiction in order to limit a tribunal's examination of particular actors' conduct and alleged crimes. The SCSL's temporal jurisdiction, for instance, began on 30th November 1996, which was the date of the Abidjan Peace Accord. This created a *de facto* amnesty for the first five years of the Sierra Leonean civil war. Similarly, the ICTR's temporal jurisdiction was limited to 1 January – 31 December 1994, a period that covered the Rwandan Genocide, but which ensured that any crimes planned or committed in the lead-up to the genocide as well as in its wake were left outside of the scope of investigation and prosecution.<sup>26</sup> It is important, therefore, for hybrid tribunal designers to be cognisant of the implications of their decisions at 'both ends' of a tribunal's temporal jurisdiction—i.e. how far back the jurisdiction of the hybrid court can reach as well as the cut-off point for when its jurisdiction ends.

It may be that alleged crimes outside of the temporal jurisdiction of a tribunal are only brought to light in the course of the hybrid's lifespan. This may result in the scenario of certain perpetrators escaping investigation and prosecution. In addition to undermining accountability, this can lead to disenchantment and disappointment among the population, particularly if the crimes outside of the temporal jurisdiction were, or are believed to have been, disproportionately committed by a

particular side to a conflict. Public consultation at the Needs Assessment and early establishment phases of the hybrid should help to ensure that alleged crimes are identified early enough to be taken into account when temporal jurisdictional limits are set.

At the same time, the temporal jurisdiction of a hybrid should not be so overly expansive so as to burden the tribunal with an impossible mandate. Some crimes and some causes of conflict will inevitably be excluded in setting the temporal jurisdiction of tribunals. However, by gaining an appreciation for the causes and dynamics of the political violence or conflict, the Needs Assessment advance team as well as drafters and designers of hybrid courts can work to find an adequate, if not perfect, middle-ground. In particularly complex cases, they may also consider temporal jurisdiction 'buffers'—a period of 1-2 years before and after episodes of political violence and atrocity that can be invoked and thus 'added' to the tribunal's temporal jurisdiction if reasonable grounds to do so become apparent in the course of the tribunal's work.

#### iv) Territorial

Decisions on territorial jurisdiction (i.e. which territory the hybrid has jurisdiction over) must also reflect an understanding of the situation as established during the Needs Assessment phase. If the geographical scope of the conflict was international, the legal framework of the tribunal should reflect this if possible, so as not to create blind spots or zones of impunity. Territorial jurisdiction, however, may be limited by political factors, particularly if only one state is involved in a hybrid court's establishment. The rules of terri-

26 Lanegran, Kimberly, "Truth Commissions, Human Rights Trials, and the Politics of Memory", *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 25 (2005): 111-121.

torial integrity of states might serve as a limiting factor where no UN Security Council mandate under Chapter VII exists, as other states cannot be compelled to cooperate with the hybrid.

In those cases where the geographical scope of the conflict, including the geographical location of key protagonists, is limited to a particular state or region of a state, then the Statute's provisions on territorial jurisdiction should likewise reflect that.

#### v) Personal

The Statute of a hybrid court must clearly establish personal jurisdiction (i.e. which actors the hybrid has jurisdiction over, which is often framed in terms of nationals of specific states). This will invariably be linked to the territorial jurisdiction of the court. The hybrid tribunal should ideally have jurisdiction over any persons alleged to have committed crimes, including citizens of the state(s) under its jurisdiction and citizens of any other states who are alleged to have committed crimes in the territory within the temporal jurisdiction of the tribunal. Clearly elaborating personal jurisdiction is of particular importance where: i) crimes are *committed* outside of the territory over which the hybrid has jurisdiction but were *initiated* on the territory; ii) where the perpetrators are not citizens of the state in which crimes took place; or iii) where crimes were committed on the territory which the hybrid has jurisdiction over by perpetrators who were geographically distant. For example, former Liberian President Charles Taylor was prosecuted by the SCSL and convicted for aiding and abetting war crimes and crimes against humanity in neighbouring Sierra Leone. Drafters should in general err on the side of a broader personal jurisdiction, as criticisms

of former hybrids have often focused on the inability or unwillingness of the courts to prosecute external actors who bore responsibility for grave crimes. In such instances, the relevant governments should work with international partners such as the UN and regional institutions if necessary, to establish extradition treaties as well as other means of legal and technical cooperation and assistance.

It is important to be aware that some exceptions to personal jurisdiction may be advocated by states supporting the tribunal, for example, for United Nations peacekeepers or other personnel who are typically under the jurisdiction of their native states. These kinds of exceptions to jurisdiction are heavily criticised and risk undermining the independence and legitimacy of the court. It is important for hybrids to maintain independence from donor states as well as the concerned state. Exceptions to personal jurisdiction should certainly be resisted if international peacekeepers or other personnel were directly involved in the perpetration of atrocities during the relevant period under investigation by the hybrid court.

The Statute of a hybrid tribunal should also clearly state the minimum age that is required for an alleged perpetrator to be prosecuted. The general standard amongst tribunals is 18 years. However, some tribunals, such as the Special Court for Sierra Leone, set the minimum age limit at 15. There is no consensus age for adulthood, reflecting ongoing disputes about when individuals can express effective agency. Here again, drafters must be context sensitive, and the alleged involvement of child soldiers in crimes, for example, may affect the provision on age requirements.<sup>27</sup>

27 Drumbl, Mark, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press (2012).

To date, the jurisdiction of hybrid courts has not extended to corporate actors. However, corporate liability may be contemplated as a novel feature of new hybrids, especially given the propensity of corporate actors to be responsible for, or complicit in the commission of, atrocities. The investigation and prosecution of corporate actors could arguably be handled by prosecuting the few key decision makers of relevant corporations individually.

The [Options for Justice report](#) has useful lists of Key Questions to consider when designing jurisdiction.

### C) MODES OF LIABILITY

Modes of liability should also be clearly spelled out within the Statute of any hybrid tribunal. Because modes of liability are an evolving and controversial area of international criminal law, careful attention to the current state of jurisprudence and experience in this area is advisable. As a general rule, national doctrine should apply if it adequately addresses the types of crimes and modes of involvement identified in the Needs Assessment. However, national law may not have been drafted to address situations of atrocity crimes and so may not sufficiently address the specifics of the conflict. In particular, international modes of liability, including joint criminal enterprise, indirect (co-)perpetration, conspiracy (to commit genocide), and command responsibility, may better address prosecutions of high-level leaders who directed but did not personally engage in atrocities, and so might be appropriate to include in the Statute of the hybrid. As noted above in the discussion of definitions of crimes under subject matter jurisdiction, it is important to consider questions of legality during the timeframe in question in determining modes of liability, to ensure non-retroactivity. For modes of liability not already specified within domestic

legislation, amendments to national law may be required.

### D) COMPOSITION

The sections below discuss the principal organs that must be established within hybrid mechanisms, along with options for variation depending on context. This variation can also be seen in the diagrams of the structures of previous hybrids provided in [Appendix A](#) of these guidelines.

There are several key design choices that recur in staffing various organs of the tribunal. These include:

- Whether to include both international and national staff
- How to balance numbers of international versus national staff if including both, including whether the balance should shift towards more national staff over time
- Minimum qualifications for each category of staff
- Staff characteristics that promote the smooth operation of the tribunal, such as staff language ability, experience in a shared legal tradition, experience in other international/hybrid tribunals, representation of national ethnic groups/ religions and/ or regional representation

There are also several key aims that must be balanced in making design choices:

- Independence of the tribunal
- Security of personnel and witnesses
- Efficient functioning of the court
- Facilitation of capacity building and cooperation between national and international staff within the tribunal



- Facilitation of external connections with national courts, civil society, and government for purposes of cooperation, publicity of the court's activities, capacity building, and norm penetration within the wider system, legacy, and perceived legitimacy<sup>28</sup>

There is no single model of national/ international composition that suits all cases, though a useful principle to work from is 'as national as possible and as international as necessary'.<sup>29</sup> When establishing a hybrid that is intended to be a transitional institution and lend itself to greater domestic ownership and participation over time, consideration should be given to designing a temporally limited model (for example, 5-years reviewable for extension) in which authority, staff composition and responsibility for funding moves from the international to the national in controlled phases. This is the case, for example, with the War Crimes and Organized Crime Chambers in the State Court of Bosnia and Herzegovina. See [Section 3\(e\)](#) on Funding for further discussion.

### i) Chambers

The powers of the Pre-Trial (where relevant), Trial and Appeals Chambers, as well as the Presiding Judge (where one is appointed) should be established in the founding Statute. The general choice of model, particularly in the Pre-Trial Phase (Pre-Trial Chamber or a *juge d'instruction*/ investigative judge), should be influenced by the

prevalent legal system in the host state. Mirroring the structure of the legal system in the host state has the potential to enhance local identification with and support for proceedings. Of critical importance is to have a clear definition of the roles of the Pre-Trial versus the Trial Chamber (which maybe be elaborated in law or in relevant rules of procedure and evidence (RPE)).

### **Composition of Chambers:**

A key decision for the drafters of a hybrid tribunal is the extent to which they choose to mix the composition of chambers between nationals and internationals. There is no universally appropriate approach to this issue, as reflected in the practice of hybrid courts to date.<sup>30</sup> Some tribunals employ a majority of national judges, while others have minorities, and the KSC has solely international judges. Thus far, there have not been any hybrid courts that have begun their tenure with solely national judges, although and as noted above, the BiH WCC transitioned from a mix of international and national judges to solely national judges over time. The ECCC has a different structure that has been widely criticised and should generally be avoided; it has a majority of national judges but requires that judicial decisions be either unanimous or have a 'super-majority' (four of five in the Pre-Trial and Trial Chambers or five of seven in the Supreme Court Chamber), meaning that national judges cannot outvote internationals even though they have a simple majority. This was a reasonable compromise to try to prevent

<sup>28</sup> See [Section 7\(b\)](#) below for an extended discussion of capacity building.

<sup>29</sup> The ICTJ's Handbook on Complementarity sets out the arguments for the prosecution of atrocity crimes being as national as possible, see Seils, Paul, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, ICTJ, (2016), available at: [https://www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf)

<sup>30</sup> See [Appendix A](#) below.

political pressure on national judges affecting decisions of the ECCC, but it has led to deadlock.<sup>31</sup>

Deciding on the domestic-international split is no easy task and every choice here carries its own risks. But the prevailing principle must be to ensure that the court is insulated from undue political influence. Considerations include:

- The number and availability of national judges to serve
- The risk of political influence on, or threats to, national judges
- The experience of national judges with international criminal law or complex cases
- The resources of the national court system to investigate and try cases
- The availability of international judges with experience in international criminal law or complex cases
- Factors affecting the independence, impartiality, and expertise of international judges
- The possibility of capacity building amongst international and national judges.

In situations where the tribunal is addressing a transitional state, with little political stability and potentially few remaining legal staff, there may be reason to favour a majority of international judges – at least at the initial stages. However, the court should not be an external imposition on the state and affected communities, and the inclusion of national judges and staff mitigates against this to some extent as well as offering potential local capacity building in the investigation, prosecution and adjudication of complex international crimes. The model of the War Crimes Chamber in the Court of Bosnia and Herzegovina was a creative way to ensure that authority

passed from international to domestic level over time: international judges were given a limited tenure, to be replaced by national colleagues.

In balancing these interests, the findings of the Needs Assessment will be of critical importance. In a situation in which political influence from the national government or other powerful national actors is a serious risk, the need to safeguard the impartiality of the court is paramount and it will be important to ensure a majority of international judges in each panel, or even an entirely international bench in extreme cases. However, where the risk of national political influence is lower, greater proportions of national judges may provide the benefits of closer connections to the national justice system, as well as serving the general principle that international involvement should be the minimum necessary to achieve the hybrid's goals. Attention should also be paid to whether there are risks of interference from outside the host state, and how these could be mitigated through the composition of Chambers.

If capacity building is a priority consideration (see also [Section 7\(b\)](#)), then there must be a mix of international and national judges within each panel or grouping. However, designers should be aware that simply placing national and international judges together in the same court or panel will not produce effective capacity building at either national or international level. Rather, specific measures must be taken to promote these ends, such as investing in formal training sessions, selecting judges with experience in mentoring programs, or providing incentives for mentoring to take place. In addition, shared characteristics should be taken into account when selecting international and national judges.

31 Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, Open Society Institute (2010).

es, such as shared language and legal systems, or anything else that will facilitate collaboration. Finally, but critically, capacity building must be understood as a process of knowledge exchange that works both ways. Domestic legal systems in post-conflict contexts may lack capacity versus a well-resourced international system, but hybrid tribunals are an opportunity for mutual learning. National and international judges will each be the source of valuable but differentiated expertise.

In severely conflict-affected states, the selection of national judges and officers of the court should take into consideration the size and strength of the national legal community. Hybrids should undoubtedly capitalise on the expertise and skill of domestic legal practitioners. However, there is a real risk of a legal ‘brain drain’ in situations where the legal community is small. This can have adverse effects on transitional states, which ‘lose’ key legal figures to tribunals who would otherwise be potentially instrumental in the transition. This is a particularly salient risk where hybrid courts pay significantly higher salaries than that of public institutions. Entering the higher-paid work of tribunals may also have the longer-term effect of keeping those legal professionals out of public service for extensive periods of time if they gain skills and capacities that lead to careers in international criminal law outside of the country.

### **Selecting Judges:**

Key issues that should be considered in developing standards and processes for selecting judges include:

- Design of employment contracts (see [section on HR/ administration](#))
- Consideration of having a roster of judges rather than judges on permanent salary
- Guarantees to protect impartiality and independence

- Minimum qualifications of candidates
- Knowledge of ICL and/ or domestic criminal law and procedure
- Knowledge of the relevant conflict situation and other political and social contexts
- Whether to include international as well as national judges
- How to balance the use international and national judges, if including both
- National judges’ characteristics beyond minimum qualifications, i.e. language ability, any experience with ICL or complex domestic cases
- International judges’ characteristics beyond minimum qualifications, i.e. language ability, experience in a similar legal tradition to national judges, regional affiliation, any experience with ICL or complex domestic cases
- Representation issues, e.g., gender, ethnic, and religious representation

The quality and professionalism of judges is critical for the real and perceived legitimacy of international tribunals. In order to ensure that judges who will uphold the highest legal standards assume positions in the tribunal’s chambers, hybrid courts should include minimum provisions for the qualification of judges.

It is particularly important that judges are selected for their impartiality and independence. In conflict-affected states, the risk of judges siding with domestic political actors or being influenced by political actors can be significant and can severely damage the credibility of a tribunal. As well as being able to demonstrate impartiality and independence, all judges who are selected should also:

- have experience as judges in criminal cases
- have a strong understanding of relevant law(s)

- show sensitivity to relevant cultural norms (for instance around the disclosure of sexual and gender-based crimes and awareness of the potential for cultural bias in legal proceedings)
- demonstrate an understanding of the relevant conflict situation

There is also a need to ensure, among judges as well as staff in general, gender balance in the chambers. Beyond minimum qualifications, the efficient functioning of the court and ability of the judges to collaborate will be facilitated by selecting judges who share a common working language to the extent possible, as well as by selecting judges who share a common legal tradition with each other and the concerned state. The legitimacy of the court may benefit from selecting judges representing the full range of ethnic groups, religions, and other important social groups when possible.

In addition to stipulating the minimum qualifications of judges, hybrid courts should also spell out the duration of terms of judges and establish a fully transparent and fair procedure of selecting judges and the President of the tribunal as well as allocating judges to the various chambers (pre-trial, trial, and appeals). The independence of the selection panel is of the utmost importance. Without exception, procedures that effectively permit governments to appoint their own judges should be avoided. The judicial selection procedure of the Kosovo Specialist Chambers is an example of particularly good practice — see Article 28 of the Law on Specialist Chambers and Specialist Prosecutor's Office.

In order to attract highly qualified international judges, several factors are important beyond setting minimum and desired qualifications. The location of the court, including its accessibility to international travel and its security will affect the interest of foreign personnel in serving as judges on the court. This is not to suggest that the appeal of a location to international judges should be part of the considerations when deciding where to base a hybrid, but a court seen as insecure will have more difficulty attracting high calibre judges. The duration of the appointment and of the anticipated lifespan of the court is another factor. The type of employment contract offered, including salary, benefits, and other features will also matter.

Several of the recent tribunals, including the EAC and the SCC, have hired exclusively or primarily from the concerned region (broadly defined). This may be useful in enabling the court to attract highly qualified personnel who may have useful connections with national personnel, such as a shared language or legal background. In some circumstances, regional staffing may also enhance the perceived legitimacy of the court.<sup>32</sup>

### ***Judicial Standards:***

In order to maintain high professional standards, hybrid tribunals should adopt a Code of Judicial Ethics. The Bangalore Principles of Judicial Conduct, which have been endorsed by the UN Commission on Human Rights, the UN Commission on Crime Prevention and Criminal Justice and the UN Economic and Social Council, sets out six principles:

32 Hobbs, Harry, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy," *Chicago Journal of International Law*, Vol. 16 (2016): 482-522. Available at: <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/5>

- Independence
- Impartiality
- Integrity
- Propriety
- Equality
- Competence and diligence.<sup>33</sup>

The International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors contains practical guidance on the implementation of judicial standards, along with the text of relevant international and regional standards and norms.<sup>34</sup> In addition, The Oslo Recommendations For Enhancing The Legitimacy Of International Courts lay out good practice standards and principles for the appointment and practice of judges.

## ii) Office of the Prosecutor

The role of the Prosecutor should be clearly defined in the Statute: is the Prosecutor to be a party, and thereby fully committed to finding incriminating evidence? Or are they called on to seek incriminating and exonerating evidence in order to find the truth? Early ad hoc and hybrid tribunals such as the ICTY, ICTR and SCSL tended to be highly adversarial, while other tribunals have used a less adversarial and more inquisitorial or truth-seeking approach. Such a strategy may help to mitigate concerns about the limited resources of the Defence, though past practice suggests that prosecutors will not always secure and dis-

close exonerating (or generally useful) evidence to the Defence.<sup>35</sup>

The independence of the Office of the Prosecutor (OTP) is paramount to any tribunal's success. It is fundamental to the integrity, credibility, and legitimacy of the court. In exercising their discretion in case selection, the Prosecutor should not seek or act upon any instructions from external sources that would undermine the independence of the OTP. The International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors includes a useful section on the role of prosecutors as well as the text of the UN guidelines on this issue.<sup>36</sup>

Separating politics from the selection of the Prosecutor can, at times, be difficult insofar as states seek to have high-level representation at international tribunals and courts, and often attempt to influence post occupancy through budgetary contributions and political support. It is notable, for example, that every Chief Prosecutor of the SCSL was an American national, with the exception of one who was British. But all must be done to ensure that prosecutors are not selected in order to influence the decision-making of the OTP.

As with judges, the procedure to select the Prosecutor must be transparent, fair, and devoid of any political interference or manipulation. The tenure of the Prosecutor must also be clearly spelled out. The Prosecutor must be a highly qualified individual with experience in international criminal

33 Judicial Integrity Group, *Bangalore Principles of Judicial Conduct* (2006). Available at: <https://www.judicialintegritygroup.org/jig-principles>. See also the UN Office on Drugs and Crime, *Commentary on the Bangalore Principles* (2007). Available at: [https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentary\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentary_on_the_Bangalore_principles_of_Judicial_Conduct.pdf)

34 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007). Available at: <https://www.refworld.org/pdfid/4a7837af2.pdf>

35 Pitcher, Kelly, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings*, T.M.C. Asser Press (2018).

36 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007). Available at: <https://www.refworld.org/pdfid/4a7837af2.pdf>

law or complex domestic cases, an ability to work in the main language of the court (see [Section 3\(h\)](#)), and someone who will not be affected or susceptible to political interference.

As with all staffing decisions at hybrid courts, there remains the question of the division between national and international staff within the OTP. The considerations described above in the section on judges are important to consider here as well. One key option to bear in mind is a division of labour whereby the chief prosecutor is a national and the deputy prosecutor is an international, or vice versa. Again, this should be decided on a case-by-case basis depending on variables and information identified in the Needs Assessment process. If there are deep national, ethnic, political, regional, or social divisions in the relevant country, for example, it may be wise to avoid a national chief prosecutor from any sector of society whose selection may stoke, rather than alleviate, communitarian divisions—irrespective of the other merits of their appointment. In the prospective Hybrid Court for South Sudan, for example, where political violence wrought upon civilians is the result of long-standing ethnic divisions, the decision has been made that the Chief Prosecutor cannot be a citizen of South Sudan. In such cases, it may be feasible and wise to ensure that multiple communities are represented in the court by, for example, having multiple deputy prosecutors drawn from different groups. This could also help elevate productive working relationships across societal cleavages that could inspire similar collaboration outside of the court. There is also a general need to ensure gender balance among staff in the OTP.

Ultimately, there is no ‘Goldilocks Zone’ for mixing international and national staff in the OTP or any other organ of a hybrid court; there is no ‘just right’. Designing hybrids is very much an imperfect science where any decision will have trade-

offs. But any decision-making on this subject should be led by an effort to select a constellation of actors, which can elevate national buy-in, promote judicial and prosecutorial independence, and enhance the effectiveness, fairness, and efficiency of prosecutions.

As with the Chambers, in order to maintain high professional standards and demonstrate internal accountability, hybrid tribunals should adopt a code of ethics for counsel and investigators, to elucidate the ethical standards of the OTP. The [Code of Professional Conduct for Counsel at the SCSL](#) is available publicly, but does not include specific provisions on investigators. The [Code of Professional Conduct for Counsel and Prosecutors at the KSC](#) has more detail on investigations. A procedure to disqualify the Prosecutor should be developed to handle situations where the Code of Ethics is breached. [Article 42 of the Rome Statute of the International Criminal Court](#) on the OTP may serve as a suitable baseline template.

### iii) Defence Provisions

The overall priority of a court is not to achieve convictions but to ensure fair trials. It is thus important to focus on this primary aim in the planning and implementation phases and elaborate provisions for the Defence as well as for investigations and prosecutions. [Article 14 of the International Covenant on Civil and Political Rights \(ICCPR\)](#), the [African Charter on Human and People’s Rights \(ACHR\)](#) and the [European Conventions on Human Rights \(ECHR\)](#) set the thresholds that must be met by courts with regards to provisions for the rights of the Defence. In particular, an accused has the right to select counsel or, in the event that an accused is indigent or partially indigent, they have the right to have funds provided by way of a legal aid scheme provided by the court in order to enable their defence.

From the start of the negotiations to establish a hybrid tribunal, it is important to ensure that the rights of the Defence are guaranteed in substantive and procedural law. Included in the legal framework should be the international standards of due process enshrined in relevant conventions and treaties, such as the ICCPR and regional human rights conventions, as well as applicable national constitutions. After the adoption of constituent documents and once implementation and deployment of personnel is initiated, the defence component should be functional. In other words, throughout the planning and building phase, a defence component should be in place.

There are a number of models for defence structure, resourcing and support — see the Hybrid Justice website for a comparison between tribunals.<sup>37</sup> The STL established its Defence Office as a separate organ of the court, and the Bosnia State Court established an independent defence office that had licensing authority over lawyers who wanted to practice before the court. But most hybrids have relied instead on an independent office attached to the Registry that supports both defence and victim counsel. The ICC follows a similar model with external defence counsel, although the Office for Public Counsel for the Defence is incorporated into the court structure and established to assist external defence teams.

It is imperative that the role of a defence office *vis-à-vis* that of defence counsel is clarified from the outset, including the limits of the Defence Office's (non-privileged) relationship with the various accused. This is particularly so where, at the time of initial arrests, defence office staff may be required to step into the role of duty coun-

sel until defence counsel have been appointed. Within the SCSL, the failure to properly delineate the role of the Defence Office led to recurring tensions between the Defence Office and the defence counsel. This led to a written ruling on the institutional role of the Defence Office within the SCSL.<sup>38</sup>

To guarantee the rights of the Defence, counsel should be well-resourced and as independent of the court as possible. A separate defence office is costly and can threaten the autonomy of the Defence. However, when defence support is institutionalised in this way it demonstrates that the rights of the defendants are being taken seriously by ensuring that funds are available for accused who are indigent; it also creates pathways through which the Defence can raise institutional issues. Note, however, that the way that the Defence is treated structurally does not resolve the issues around equality of arms. Defence lawyers at previous hybrid tribunals have observed a continuing problem of unequal funding and resources regardless of the structural position of the Defence. A strong and properly resourced defence is one of the fundamental signs of legitimacy of any court.

As the hybrid court will be able to adopt its own rules of procedure and evidence, it is essential that it ensure that defence rights are represented during the drafting and review process, for instance through inclusion of a defence lawyer in the process. It is also important that the court's governing framework include the possibility for the formation of a defence association and for the association to be able to propose amendments to the rules of procedure throughout the

37 See the Hybrid Justice Project's website at [www.hybridjustice.com](http://www.hybridjustice.com).

38 *Prosecutor v. Sesay et al.*, 19 June 2006, SCSL-04-15-T-584, §§ 41-43. See also Ashraph, Sareta, "The Naked Defence Office", in Charles Chernor Jalloh (ed.) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press (2014).

duration of the court's work. Such an association of defence counsel is key to ensuring that the voice of the Defence is properly represented in institutional decision-making, especially where the Defence remains outside the immediate court structure. Examples include the Association of Defence Counsel before the ICTY and ICTR, and now the International Residual Mechanism for Criminal Tribunals (MICT), as well as the ICC Bar Association before the ICC.

Defendants should have as much freedom as possible to choose their legal representatives. Again, there are a number of models, but often the Registry will generate a list of approved counsel. Examples of counsel selection and appointment procedures can be found in Rule 44 and 45 of the ICTY RPE and regulations 67-78 of the ICC's Regulations of the Court. Quality control is necessary to ensure that lawyers have the experience and expertise required to effectively defend their clients. They may be required to complete a training course in relevant areas of international criminal law as well as in the relevant amended domestic legislation and to subsequently remain on a list of counsel available to accused persons at the tribunal. In the case of Bosnia, the office also provided mentoring and training programmes for lawyers. This is a model for hybrids that intend to use lawyers in a national bar association rather than incorporating the Defence Office as an integral part of the court.

Finally, defence counsel and investigators should be bound by a code of ethics for counsel and investigators (see Section 3(d)(ii) above).

#### iv) Registry

The Registry plays a critical role in the structure and operation of hybrid courts. Its powers should be clearly established within the legal framework of the tribunal. Generally, the Registry has two

main functions: the provision of judicial support services and overall administration of the tribunal. By centralising the many administrative functions into one organ, i.e. the Registry, it is possible to rationalise expenditure and build an effective and robust administrative framework for management of hybrid courts and donor funds.

In terms of the judicial support function, the Registry provides services required by judges and other parties to the proceedings. This entails the management of day-to-day work in the courtrooms, along with additional responsibilities that, in a domestic system, would be spread across various ministries and other authorities such as the ministries of justice and/ or security. Judicial support includes management of a legal aid scheme, administration of a victim participation scheme, management of detention services, court management, language services, as well as witness protection and support.

The Registry also provides security for the tribunal's premises, general services for all users of the court, procurement, as well as finance and human resources management. As a rule, the Registrar is responsible for preparation and management of the budget, including liaising and securing cooperation with donor States or other responsible bodies. In addition, the Registrar exercises a number of external relations functions with states and other partners. For example, it cooperates closely with states to finalise enforcement of sentences agreements as well as witness relocation agreements. Lastly, outreach programmes are generally managed by the Registry.

An efficient registry can help to ensure that other organs stay focused on implementing their respective mandates rather than focusing on administrative matters. With the effective management of the witness and victim support function together with the court management and



language services function, the Registry can also ensure that proceedings run as smoothly as possible without encountering delays.

### ***Staffing the Registry:***

To fulfil its functions, it is essential that registry staff can work impartially in a model which incorporates both national and international staff. In general, it is beneficial to avoid having a majority of staff that are from one or faction or group involved in the conflict, as this can lead to further and avoidable tensions or misperceptions of the tribunal. It is also important to avoid a situation whereby civil society or victims' groups may perceive a bias or security risks due to the composition of the court's management team. In situations where there is an existing national structure in place into which the hybrid tribunal is being added, it is critical to assess and determine if there is any history of leaking or any risk to the management and custody of the most confidential court records.

### **v) Victim and Witness Unit**

A robust system of victim and witness protection is essential to the operation of a court, in addition to being the ethical duty of hybrid court staff. As many hybrids operate in contexts in which there is minimal documentary evidence of alleged crimes, the quality of justice depends to a large extent on eyewitness testimony. To put it starkly: if witnesses and victims do not trust that they will be protected, they will not participate in proceedings, and cases will likely fail. Even worse, if witnesses and victims are not in fact protected, then their association with a court set up at least in part to advance their interests may lead to their experiencing intimidation, violence, and other harms.

The law establishing the tribunal must clearly spell out obligations in order to ensure the security, safety and well-being of people who testify or cooperate with the court, as well as their families, where relevant. This should include a commitment from the host state to provide an appropriate level of security. An example of such an obligation might read: 'The government of [relevant state] shall ensure, within its territory, the protection of all parties and witnesses in the trial for the entire duration of the proceedings.'

The legal framework should also include the creation of a victim and witness unit (VWU) in order to provide protection and support for prosecution and defence witnesses and victims.

In previous hybrids, VWUs have been independent. For example, the Victim Support Unit at the ECCC sat in the Registry. In the IHT, BiH WCC and the EAC, the VWU was situated in administration. In others, specifically the SCSL and the STL, the VWU resided between the Office of the Prosecutor and the Registry, and in the SPDDC, it sat in the equivalent of the OTP—the Serious Crimes Unit. Views on good practice vary—for some, the gold standard is for the VWU to sit within the Registry as a neutral body. Others encourage the creation and use of a unit within the national system using national police and government officers, with only a small number of security staff working directly for the Registry (particularly to secure confidential witness relocation, and occasionally also to facilitate victim participation). The latter option has the benefit of building national capacity and costing far less, but it will not be under the direct control of the hybrid. If the national system is to be relied upon, a detailed Needs Assessment should be conducted to ascertain the capacity and trustworthiness of the national programme and programme officers, and measures put in place to avoid draining the capacity of the national system. Ensuring the secure and independent operations of the VWU should be a top

priority of the tribunal, and the Unit should be established early to provide protection for victims from the time that they apply to be recognised as such.

The tribunal's founding law and, importantly, the procedural rules, should also include judicial protective measures. Judges should be empowered to order voice distortion, face distortion, pseudonyms, video testimony, and the relocation of proceedings to another site to hear witnesses, if doing so is necessary for their safety. Specific provisions for the protection of vulnerable witnesses (for instance, those who are traumatised, victims of sexual and gender-based crimes, children, and elderly people) should also be implemented.

Where victim participation is provided in the court's legal framework, relevant provisions should make clear participating victims' rights to protection not only in the event that they *also* appear in court as witnesses, but also on account of their identity as a participating victim. Protection and security issues should be dealt with together in one office, section or unit, while tasking a separate office, section or unit with victim participation and related support (including legal representation in the proceedings and, if provided for in the legal framework, reparations). See [Section 3\(i\)](#) below on Victim Participation.

## E) FUNDING

There are two principal models of funding for hybrids: funding through voluntary contributions and through assessed contributions. As far as possible, hybrid tribunals should aim for unconditional, assessed funding as this would avoid the need to regularly 'sell' the tribunal to donors and would prevent unnecessarily large amounts of time and energy being devoted to fundraising rather than core tribunal work. However, most

hybrids to date have been funded through voluntary contributions, leaving them financially insecure. If an assessed contributions model is possible, it should be chosen. If not, there are various options to structure voluntary contributions and minimise the disadvantages of this model. Funding should be secured as early in the establishment process as possible, and objectives for both the donors and the hybrid staff should be managed so that over-reaching and/ or under-funding are avoided.

Options for voluntary funding include:

- Voluntary funding by a group of member states with administrative oversight by a management committee of interested states with duties related to oversight of non-judicial matters of the court.
- Voluntary funding by a group of member states with a percentage of the budget being paid by the state where crimes were committed into a general fund to be administered by the court. Once again, administrative oversight would be by a management committee of interested states with duties related to oversight of non-judicial matters of the court.

The issue of funding relates to the issue of selecting which regional and international partners the hybrid should engage with, as discussed above in the section on negotiating and implementing the legal framework. Affiliation choices with regional and international organisations may affect funding options. For example, the African Union would be more likely to fund an initiative that it is sponsoring than one sponsored by the UN or another non-African entity.

As a best practice, it is advisable to secure a political agreement on record for support and funding for a number of years from donor states. For instance, in Bosnia and Herzegovina, there was

a commitment for the five-year transitional period at the BiH WCC. In Kosovo, there is political endorsement to fund based on a five-year budget forecast for the KSC. This must not be understood to mean, however, that the proceedings have to finish within five years or that the *de jure* mandate of the court is five years.

Funding may be raised from entities other than states, such as foundations or international organisations, for certain features and/or special projects run by the hybrid court. For example, the SCSL's outreach programme was not funded from the tribunal's core budget and struggled to raise money.<sup>39</sup> It is desirable to have all of the necessary resources in the core budget, but it is always an option to expand and explore alternative sources of funding for some functions of the court. However, certain core functions such as witness protection, IT, and courtroom management should be shielded from targeted 'extra funding', as this may come with an agenda to influence proceedings.

If the tribunal is UN-backed and funded by voluntary means, it is essential to include the provision that if the voluntary funds are not sufficient to fund the operations of the court, then the court can apply to the UN for a subvention grant. Subvention grants have been used frequently by tribunals, including at the Special Court for Sierra Leone.

A five-year programme model for funding should be considered when the hybrid is established, in order to assist in raising funds and, if appropriate, in transferring authority to national systems. For instance, during the initial phase of a hybrid, international funds can be deployed, with the

budget of the hybrid gradually shifting to become the responsibility of the host state. Voluntary funds for international staff and infrastructure and running costs can be added to the national budget of the host state with assurance that, after the transitional mixed national-international staffing phase, the national staff remain on the national budget. This is the model followed by the BiH WCC.

Various aspects of hybrid tribunals can be extremely costly, and these costs should be built into the funding strategy from the start. For instance, victim participation, protection, and reparation are high-cost, yet central, aspects of hybrid justice. Equally, separate defence offices and field offices add substantially to the funds needed.

Sufficient and reliable funding is essential for the independent and effective functioning of a hybrid court, and efforts should be made as early as the Needs Assessment phase to identify whether an assessed contributions model would be possible and, if not, who the likely funders would be.

## F) LOCATION AND PREMISES

### *Location:*

The possible and preferable location(s) of the hybrid court and tribunal proceedings should be determined during the Needs Assessment. One of the attractions of establishing a hybrid court is that it can operate in or close to the state in which the offences took place. As a general principle, the court should be located as close to the location of the alleged crimes as possible. This is

39 Kerr, Rachel & Jessica Lincoln, *The Special Court for Sierra Leone: Outreach, Legacy and Impact*, King's College London (2008). Available at: <http://www.rscsl.org/Documents/slfinalreport.pdf>

likely to also be in proximity to the location of the victims of these crimes.

There are a number of reasons for locating the hybrid in-country. Hybrids are intended to support states in rendering justice for their own citizens rather than usurping state power, which can happen if the hybrid is located outside of the affected state. They are also intended to act as deterrents for future offenders and to support rule-of-law and access-to-justice work more broadly. A distant court will likely have fewer effects that can outlast the trials themselves in terms of potential deterrence, knowledge transfer, or bolstering domestic justice systems. It may also have less legitimacy or local relevance. Hybrids are also often intended to contribute to capacity building within states (see also [Section 7\(b\)](#) below). This is possible from a distant location, but the more remote the institution is, the fewer national staff are likely to work in it. Additionally, in-country hybrids are easier for the public to access, more convenient for witnesses to appear at, easier for victims to access and participate in, and, if the institutional design provides for it, to claim any reparations. In-country hybrids should be both cheaper and more financially beneficial for the country hosting the hybrid, as the courts can have local economic effects through the level of international funds they attract to a location. However, while some of these immediate impacts on cost, national participation and other short-term factors can be observed, the long-term impact of a domestic location on reconciliation, rule of law, and other aims is as yet unproven.

In terms of specific location(s) in-country, while access is important, it is not always necessary to house hybrids, or hold all trials, in capital cities. If atrocities are alleged to have taken place largely outside the capital city, or if location in the capi-

tal city would have deleterious political effects, it might be most appropriate to locate the hybrid, or at least to hold some parts of the proceedings, close to atrocity sites. If the security and financial situation permits it, partial proceedings can take place across different parts of the relevant state. Options for conducting parts of trials or proceedings by video-link (in order to avoid inconvenient or dangerous movements for witnesses or the accused, and to avoid the high security costs of moving an entire trial chamber) should also be considered. In general, the opportunities provided by technology should be used as extensively as possible insofar as it brings relevant communities closer to the trial proceedings. If it is not possible to locate the hybrid in-country at the outset, the legal framework should stipulate that parts of the proceedings can be held in-country if it becomes feasible and economically viable to do so. Rule 100 of the [ICC Rules of Procedure and Evidence](#), which stipulates that the Chamber can take sit outside the regular premises of the Court where it is in the interests of justice for it to do so, could be used as a guide here.

There may also be reasons to locate the mechanism outside of the country, including: if the risk assessment shows that an in-country location risks destabilising the state; if the administration of justice would be seriously compromised by the hybrid being located in-country (for instance because the risk of political influence is very high); or if the cost of doing so would be too high in terms of security. Ideally, the location in this instance should have some link to the country in which the offences took place. For instance, the hybrid could be located in the wider region. The EAC was located in Senegal, which had custody of Habré. Location in Chad would have been better if politically possible, but the EAC still satisfied many victims as it was located in the African state

where Habré had fled to exile.<sup>40</sup> The KSC and the STL are both located in The Hague, which has the advantage of being the seat of a number of international courts and therefore has significant general capacity and experience in running trials under international criminal law and a friendly host government. However, their location makes engagement with relevant domestic actors from the affected states challenging, despite their extensive outreach programmes. If a hybrid cannot be held in-country, it is particularly important to maximise the use of national law and domestic actors with the operation of the court to offset the physical distance to some extent. Funding should also be allocated to bring victims and domestic journalists to the hybrid for important events within trials and to hold outreach events in-country where significant parts of the proceedings are broadcast.

Wherever the hybrid is located, agreements will need to be negotiated with the host state and any other states whose cooperation will be integral to the justice process (see [Section 8\(a\)](#) on Host State Relations and Host State Agreements).

If the Registrar is appointed early in the process of establishing a hybrid, they should be consulted during the decision-making process on location and premises, as they will be ultimately responsible for the functioning of the hybrid.

#### **Premises:**

It is rare that premises are built specifically for a hybrid court. Most hybrids are located in repurposed existing structures, although the Special Court for Sierra Leone is a notable exception. Key concerns with regards to premises include:

- **Security:** When designing or choosing a building in which to house the court, the primary concern must be physical and virtual security. This includes, for instance, the provision of: at least two holding cells; a secure vault for evidence; a secure entrance to and exit from the compound for secured vehicles; a secure route from vehicles to holding cells and from holding cells to the courtroom for the accused; secure routes around the building for judges and witnesses that are separate to those for the accused. Also, the security of the premises should be regularly reviewed when the court is functioning and regularly checked for listening devices.
- **Privileges and immunities:** Full privileges and immunities need to be guaranteed for the premises and staff working on the premises. This is typically agreed in the Host State Agreement (see [Section 8\(a\)](#)) and includes provisions from the Vienna convention. Premises must be inviolable; staff and premises must have immunity.
- **Separation of court personnel:** There should be separate and secure offices for the use of the OTP and defence teams within the court building. Ideally the chambers, the OTP, defence offices, and victim services sections should all have separate areas of the building and common access to shared services such as a cafeteria and resource library.
- **Public access and outreach:** The court should allow for high levels of public access if it aims to achieve broad understanding of its work and local legitimacy. Cameras should be installed in the courtroom(s) and a substantial area provided for public seating. It is particularly important to broadcast proceedings of trials in the main language(s) of the affected population if the hybrid is not located

40 Hicks, Celeste, *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice*, Zed Books (2018).

in-country (see also [Section 7\(a\)](#) on Outreach, below).

- **Effective working conditions:** The hybrid will require a large enough courtroom for all of the parties and staff who will need to use it, which will include victim representatives (where victim participation is permitted) as well as relevant registry staff such as court ushers, translators/ interpreters/ transcribers, and security. The court will also require reliable IT equipment and connectivity, including video-link capacity between field offices, central offices, the detention centre and the courtroom (for general communications, witness testimony, and provision of feed to detention centre if an accused person will not attend in the courtroom). The courtroom also needs the capacity to cater for all in-court witness protection measures.
- **Cost:** The court should be run as cost-effectively as possible, given that the criticisms of international(ised) trials often focus on their high cost. The SCSL, for instance, was regarded by some as inappropriate in its surroundings—it sat above Freetown on a hill, was ostentatiously different to local architecture, was surrounded by high walls (suggesting a lack of access and transparency), and was strongly lit night and day before there was an electricity grid in place in Freetown (indicating an excessive use of oil to run the generators, in sharp contrast to what was available to citizens). The less ‘alien’ institutions of internationalised criminal justice appear, the more likely they will resonate with location populations and generate interest and support.
- **Aesthetics:** The aesthetics of the court affect public perceptions. The hybrid should be as accessible to the public as possible and should be designed in such a way to facilitate local ownership. This might include, for instance, signage on the building being multi-language,

with the local language listed first. It might also include designing the layout of the courtroom in such a way as to make it recognisable within the domestic system and usable in that system once the hybrid’s mandate has concluded.

- **Legacy:** It is important to consider at the design or refurbishment stage what the building is likely to be used for once the hybrid has completed its work. Will it become a court for the national legal system? A museum? A library? What will the remand facilities be used for? Hybrids are, by their very nature, temporary and the building should be designed or refurbished to enable cost-effective repurposing once the hybrid ceases to function. This includes ensuring that the building can be run in a cost-effective way, as building maintenance will be funded through national rather than international budgets once the hybrid has completed its work.
- **Detention facilities and holding cells:** Remand facilities will be needed before and during the trial. Remand facilities should meet international standards, which might mean that a budget should be allocated to build bespoke facilities or upgrade existing domestic facilities. Remand facilities should have high security protection. Unless remand facilities are on-site, holding cells will be needed within the court building for use by accused persons during proceedings.
- **Field offices:** If the hybrid is not located in the country in which the alleged offences took place, or if there are significant links to other states, such as location of witnesses or evidence, then field offices may be necessary. These offices are expensive and security may pose a particular challenge. The offices must be equipped with secure IT to be able to move sensitive evidence quickly. The STL has significant experience here as it is located in The Hague but has a large field office

in Beirut. The ICC, while not being a hybrid, has multiple field offices and may be a source of guidance in terms of up and downscaling of relevant structures in the life cycle of proceedings from investigation to the issuance of the verdict and beyond.

## G) ACCESS TO THE TRIAL

The legal framework of the tribunal should ideally include a specific commitment to access to trials. Article 33 of the [EAC Statute](#) is useful to draw upon in this regard. It reads: “All reasonable measures shall be taken to guarantee access to the trial for all concerned parties as well as to representatives of the press, to international and African Union observers, and to representatives of civil society.”

While location in-country is intended to facilitate access to the court, there has been considerable variation in attendance at trials by the general public. The ECCC has seen large audiences, while the SCSL generally did not, although both were located in the concerned state’s capital city. Other measures may be necessary to encourage public attendance beyond simply locating the tribunal in the concerned country—see [Section 7\(a\)](#) on Outreach below. For instance, at the ECCC, civil society organisations organised and funded a high number of Court visits for groups from affected communities.

## H) OFFICIAL AND WORKING LANGUAGES

The *working* language (or languages) of the hybrid is the language in which the majority of communication between parties, including in the courtroom, will take place and in which all court documents will be produced. Having more than one working language has significant budgetary and efficiency implications due to the cost in time and resources of interpretation and translation.

The *official* languages of the hybrid are all of the languages that the proceedings will be translated into and that key court documents will be translated into. The number of official languages also has budgetary and efficiency implications. The Statute might also make provisions for official languages to be changed during the course of proceedings if doing so is deemed relevant and necessary.

When determining the official and working languages of the court, the defendants’ rights and the objectives of the hybrid in terms of outreach and capacity building should be given high priority. All defendants have the right to have charges read to them in a language that they understand. Human rights legal instruments dictate that they should be able to follow the entirety of relevant proceedings in a language that they comprehend. To promote the court’s accessibility, legitimacy, and impact, the victim population and affected national populations should be able to understand proceedings and the workings of the hybrid, as well as foster some national ownership of it. Ideally, therefore, the working language of the court will be a language that the defendants and the victims speak.

However, if the local language is not widely spoken by court personnel (be they national or international) it may be necessary to pick a more widely shared language as the working language. This works to make proceedings more efficient and also supports capacity building, as national staff do not need to work in a language foreign to them. In this case, all official national language(s) should be included as official language(s) of the hybrid in order to ensure that relevant populations comprehend its work. Any other languages that would allow the work of the hybrid to be communicated to interested parties should also be adopted in such cases. At least one of the working languages of the ICC (English and French)



should be included as an official language in order to ensure access to the hybrid proceedings to broader legal communities.

As noted above in the sections on judges and the prosecution, in selecting court personnel, consideration should be given to their fluency in the official and working languages of the tribunal. Having a shared language among personnel working in the same office or work grouping greatly facilitates communication and collaboration among staff.

When participants do not speak one of the official or working languages of the hybrid, the Statute should include a commitment to translate relevant proceedings and documents into a language that participants understand, ideally via simultaneous interpretation or transcription in the courtroom, in order to make the full proceedings as accessible as possible.

In terms of broader communication goals, broadcast material should be made available in local languages in order to ensure wide public outreach. Another crucial objective when determining which languages to use for which parts of the hybrid's work is to be able to communicate this work to the victim population and national population.

## I) VICTIM PARTICIPATION

Victim participation is a key factor in terms of reparative impact, societal support and local ownership. As such, it should be a priority in the establishment and functioning of the hybrid. The details of victim participation should be worked out from the outset of the court's establishment. The treatment of victims from the earliest stages of the hybrid's design can impact the real and perceived legitimacy of the tribunal, especially if court supporters claim that the tribunal is acting

in the interests of the victims. Victim participation is complex and should be acknowledged as a cost driver, particularly if indigent victims are provided with counsel paid by for the court. It goes without saying that victims will likely have diverse views on who should be prosecuted and for what, and hybrids will therefore not be able to satisfy or repair all victims in a given situation.

Separate offices or sections in the Registry can facilitate victims' access to the court as participants in the proceedings by collecting their information, registering them as participants, and supporting them administratively as they participate in proceedings. Such offices may be called the 'Victims Participation Unit/ Office' (STL, KSC), 'Victims Support Section' (ECCC) or 'Victims Participation and Reparations Section' (ICC). These sections assist victims in making their applications to the chamber, maintain contact and share information with victims throughout the proceedings, and assist victims in the choice/ facilitation of their legal representation in court.

Regarding victims' legal representation in tribunal proceedings, different models have been developed to date, including the creation of designated registry offices created to support such representation, external counsel established to represent clients in court (as was the case at the ECCC), or in-house counsel provided through an independent office housed within the court's Registry (as at the KSC).

### i) Fundamental Statutory Provisions

Empirical information regarding victim participation in practice is fairly limited amongst hybrid courts, and the experience of the ICC remains the most instructive in terms of jurisprudence and scholarly analysis of the record of a victim participation system.



If a hybrid is vested with a victim participation function, the minimum statutory provision should ideally be akin to Article 17 of the STL Statute (which draws on Article 68(3) of the Rome Statute):

*Where the personal interests of the victims are affected, the court/chamber shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court/chamber and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the court/chamber considers it appropriate, in accordance with the Rules of Procedure and Evidence.*

The Statute should also provide a definition of the term ‘victim’. The definition applied in Rule 85 of the ICC Rules of Procedure and Evidence has been accepted and replicated by hybrid courts (see, for instance: Article 22 of the Law on the Kosovo Specialist Chambers and Specialist Prosecutors Office; Article 25(1) STL Statute; Glossary of the Internal Rules, ECCC): victims are defined as natural persons who have suffered harm as a result of the commission of crimes within the jurisdiction of the court. Ideally, situational victims who fall within the jurisdiction of the mechanism should be provided for as well as victims of specific charges brought in a given case. A hybrid might also admit organisations or institutions as victims, following the example of Rule 85(b) of the ICC Rules of Procedure and Evidence.

Finally, while this has not transpired at tribunals, it is possible for the views of victims to be considered beyond victim participation in proceedings.

For example, the OTP may want to consult victims as to which cases are of greatest relevance to affected communities and how to conduct investigations in a manner that is sensitive to victim needs and expectations. The OTP should not, of course, be swayed by political considerations, but a well-designed, victim-sensitive prosecutorial strategy could cement the buy-in of victims, survivors, and affected communities.

## ii) Victim Application Process

Victims should be provided with a clear procedural framework detailing how they can apply to participate in court proceedings. In general, it should be for the Registry (by way of a specially designated section) to organise this process and report to the Chamber as appropriate. Rule 89 of the ICC Rules of Procedure and Evidence on the Application for Participation of Victims in the Proceedings sets a recognised and viable example (see also Rule 23bis of the ECCC Internal Rules; Rule 86 of the STL RPE; and Rule 113 of the KSC RPE). An individualised application process, ideally through a pre-established application, is advisable in order to safeguard the transmission of the minimum required amount of victim data to assess the criteria of victimhood. An example of the STL application form can be found here.<sup>41</sup> In order to reach the broadest range of victims, the assistance of civil society organisations should be sought, forms should be available in all local languages, and they should be worded to enable victims to describe in their own words the crimes they believe themselves to be victims of.

A commonly used standard threshold of proof administered by different chambers to decide over victims’ rights to participate is one of *prima facie*, i.e. victims are allowed to participate

41 [https://www.stl-tsl.org/sites/default/files/victims/20110705\\_victims\\_application\\_form\\_EN.doc](https://www.stl-tsl.org/sites/default/files/victims/20110705_victims_application_form_EN.doc)

in court proceedings if, on the face of the matter, the description of the harm suffered results from either the commission of a crime charged (in a case-based admission) or the commission of a crime within the jurisdiction of the court (for a situation-based admission).

Ideally, the assessment of victim applications against this standard is delegated to a designated registry section so that chambers do not have to assess potentially high numbers of applications. A specialised section within the Registry would also be appropriate as it is likely to be neutral towards the parties. The Registry's assessment of victim applications should be subject to legal review and challenge by the parties—Rule 89 of the ICC RPE provides for template language. Equally, the application procedure for victim recognition before the court should include provisions for a victim applicant's appeal against a registry decision that an individual does not qualify as a victim, or the right to apply again with further information.

Where a designated section is established within the Registry to facilitate victims' access to the court through information, advice, and an application process, it is crucial that relevant staff be adequately skilled and trained to sensitively engage and work with victims and survivors. Training for all staff working in victim participation should be allowed for in the budget of the hybrid court, as staff will need a solid understanding of the relevant law(s) alongside advanced interpersonal skills to ensure that interactions between victims and staff at the court do not retraumatise victims. This is particularly important for cases involving SGBC. In addition, staff working on victim participation need to have clear guidelines and training on how to approach potential victims and explain the court proceedings in a language that the affected person or group can understand. National staff might be more appropriate

than international in this area, though there are contexts in which outsiders are comparatively easier to disclose to. This may be the case when there are high levels of stigma attached to being the victim of particular type of crimes, which is often the case with SGBC, and disclosure to compatriots may feel shameful.

Finally, robust provisions in the court's regulatory framework need to cater for the protection of victims' identity where there are prevalent security risks (see [Section 3\(d\)\(v\)](#) on VWU, above).

### iii) Victim Participation in the Proceedings and Legal Representation

The various procedural rights of victims at the different stages of the proceedings should be laid down explicitly in the Rules of Procedure and Evidence in order to avoid any ambiguity and ad hoc discretionary or contradictory decisions by different Chambers. Two key issues relating to victim participation need to be spelled out by a hybrid court's legal framework: (a) the scope of participatory rights of victims; and (b) the ways that victims can interact with the proceedings.

#### a) Participatory rights:

Victims are generally permitted to participate in more recent hybrids by providing their "views and concerns" where "their personal interests are affected" (Article 17, STL Statute). This necessitates a set of procedural rules, including on participation in hearings, access to the (confidential) case file; opening and closing statements; the right to submit oral and written observations during trial; the questioning of witnesses; and the presentation of evidence (see, for example, Rule 91 ICC RPE; Rule 87 STL Rules; Rule 114 KSC RPE). At the ECCC, victims are even to "support the prosecution" (Rule 23(1) ECCC Internal Rules). The STL RPE contain the most detailed provisions on victims' procedural rights.

The scope of participatory rights may differ according to the different procedural stages at which victims may be admitted to participate. At the ECCC, victims' rights already exist at the investigation stage, while the STL and KSC allow for relevant rights at the pre-trial phase or confirmation of the indictment. The scope of victim participation should be focused and meaningful. This may entail that victims should be allowed to provide the Prosecutor or the Investigative Judge with information pointing to certain crime complexes and potential sources of evidence in the elaboration of the charges, as at the ECCC.

It is worth highlighting that if victims are allowed to participate at the pre-trial stage, this may lead to frustration among affected communities where only a limited number of charges is actually brought forward and/ or further reduced if certain charges are not accepted by the judges. An effective communication, information, and outreach strategy of the relevant victim participation section of the court should help to manage victims' expectations to some extent.

#### **b) Legal representation:**

Victims generally participate in the proceedings through their legal counsel (also called 'legal representative' (Rule 86(C) STL RPE); 'Victims' Counsel' (Rule 114 KSC RPE); or 'Civil Party Lead Co-Lawyers' (Rule 23(3) of the ECCC Internal Rules). In most instances, they are organised into victim groups rather than represented individually. The representation of victim groups is efficient in terms of the court's proceedings and appropriate if victims' interests are aligned within relevant groupings. However, there may be conflicting interests of different victim groups (i.e. child soldiers as one group of victims and victims of crimes committed by child soldiers as another) where a common legal representative could lead to a conflict of interest. In such cases, pro-

vision should be made for multiple *common legal representatives* of victim groups to be admitted in the proceedings. Groups of victims who might be relevant to the hybrid's work should be identified early in its establishment and at the outset of investigative work, along with likely intermediaries to access victims' groups. Socio-economic and cultural inequalities present in the context in which the hybrid will operate should be considered to help ensure that some groups of victims are not privileged over others. Avoiding competition among victims and/ or establishing a hierarchy of victimhood should be a priority.

Ideally, the choice of a legal representative should be afforded to the victim. However, in practice, counsel have generally been chosen by hybrid courts. Where victim groups are unable to choose a (common) legal representative, the Registrar should be mandated choose one, or at least to make a relevant recommendation to the Chamber for a decision. In the choice of counsel for victims, the court should be respectful of the wishes and distinct interests of victims.

Where victims/victim groups lack the necessary means to pay for a legal representative due to indigence (which is often the case), the legal framework of the court should ideally provide for necessary assistance. This can be achieved, for instance, by providing a legal counsel employed by the court or financial assistance for an external counsel to be hired to assist victims in the proceedings (see Rule 23(5) KSC RPE; Rule 51(C) STL RPE). The absence of a legal aid policy for victim representatives could result in a *de facto* denial of effective victim participation in proceedings.

The decision as to how and to which groups legal aid is afforded can be either taken by the Registry or the relevant chamber, based on the advice, recommendations and information received from the designated victim participation unit. If a hy-

brid court opts for group representation of victims through internal victim counsel, it would be for the Chamber merely to decide/ validate how many different victim groups may be admitted under the applicable legal aid scheme.

The qualification and remuneration of victim counsel should be comparable to defence counsel, although note that the number of support staff required may be more extensive for defence teams.

## J) REPARATIONS

The idea of providing reparations at the conclusion of a criminal process and issued by the *same* court is alien to many national jurisdictions and relatively novel to hybrid courts.

Two general regimes of reparations can be distinguished: first, there are the more inclusive reparations regimes of the ECCC, KSC, and the EAC (as well as the ICC), which have their own statutory means to issue a reparations order and award reparations. For the EAC, which follows the ICC model, this is carried out through a trust fund for victims. Second, there are internationalised court systems that merely refer to national courts and (potential) national compensation programmes, such as the STL and the KSC.<sup>42</sup> While a final judgment can be used as an executable title ('final and binding', i.e. Rule 167(2) of the KSC RPE) for compensation claims in national proceedings before civil law courts, these internationalised courts play no further role in the allocation of reparations.

Whatever regime of reparations is chosen, those establishing and running the hybrid should manage victims' expectations according to the funding available for the regime. Previous tribunals

have experienced criticism after victims had been led to believe (by court actors or civil society organisations) that they were likely to receive more in reparations than was eventually forthcoming.

Key questions for a hybrid to consider are:

- Whether victims will be entitled to reparations through that same court, and how these will be determined and funded
- Whether situational victims will be entitled to reparations or only victims of specific successful charges
- Whether indirect victims, including the families of victims can receive reparations, or whether they will only be granted to direct victims
- Whether individual and/ or collective reparations can be awarded
- Whether assets from convicted persons can be seized and used for victim services and reparations
- Whether a Trust Fund for victims will be established that can, in addition to administering reparations post trial, provide services to victims of crimes that fall into the hybrid court's jurisdiction prior to final judgments.

### Statutory Provisions:

The ICC has the most elaborate set of provisions with regards to reparation provisions at an international tribunal. Article 75 of the Rome Statute enables the competent chamber to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

42 Article 25(3) of the STL Statute and Rule 86(G) of the STL Rules; Article 22(8) KSC Statute.

If a hybrid chooses to provide for a full ('inclusive') set of reparation provisions, the scope of the reparations order and award also needs to distinguish between individual and collective reparation awards. This means determining whether the tribunal intends to provide for one or the other, or a combination of the two. Article 27 of the Statute of the Extraordinary African Chambers and Article 22(8) of the KSC Statute follow this approach. The ECCC limits reparations measures to 'collective and moral' reparations (Rule 23 of the Internal Rules), which arguably limits the budgetary strain on the implementation of reparations, though this has also led to disappointment from victims, in particular in Case 001.

As per the above, the term 'victim' needs to be carefully defined. Ideally, the same definition would be used for the purposes of victim participation. Regarding family members of victims, the term 'indirect victim' may be used. At the ICC, for an indirect victim to be linked closely enough to the direct victim(s) in order to benefit from the reparations scheme, the Chambers have held that there needs to be a 'close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents'. Note here that *The Prosecutor v. Thomas Lubanga Dyilo* decision at the ICC established the principles and procedures to be applied to reparations in such cases.<sup>43</sup>

### Reparations Experts:

A hybrid court with an inclusive reparations mandate should cater for the option that the Trial Chamber may appoint experts to assist in determining the scope of any damage and suggest

options of appropriate—individual or collective—reparations (i.e. Rule 168 KSC RPE; Rule 97(2) ICC RPE).

### Standard of Proof:

While for victim participation, a *prima facie* standard has been considered sufficient, this may differ for reparations, particularly where reparations are afforded by the convicted person to individual victim beneficiaries directly. The ICC has applied a 'balance of probability' standard, which, while much less than 'beyond reasonable doubt', is still more demanding than *prima facie*. Reparations-related information from victim applicants should be collected and synthesised to allow the Registry to make an assessment similar to the one for victim participation to the Chamber. This will allow the chamber to decide based on the Registry legal assessment and recommendations. The second half of [this form](#) gives an example of reparations-related information.<sup>44</sup> Parties should be afforded the right to challenge the Registry assessment and/ or the Chamber's decision.

### Application Process:

An unproblematic way to deal with the issue of victim applicants for reparations is to stipulate from the outset that participating victims will be automatically potential reparation beneficiaries in case of a conviction (i.e. ECCC; KSC). If a hybrid were to choose two separate processes (for instance following the ICC framework), then a process akin to the victim application process should be handled by the designated section for victim participation and reparations. This should be

43 International Criminal Court, Official Court Translation, ICC-01/04-01/06-2904, 7 August 2012, paragraph 195. See: [https://www.icc-cpi.int/CourtRecords/CR2016\\_01895.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_01895.PDF)

44 [https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassanAppFormInd\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassanAppFormInd_ENG.pdf)

done in order to ensure continuity, synergies in data collection, and a speedy admission process.

### Trust Fund for Victims:

Hybrid courts will have insufficient funds to afford reparations to victims if the convicted person has no assets. A possible solution is the establishment of a ‘trust fund’ for the benefit of victims. The trust fund should be financed by voluntary contributions from governments, international institutions, non-governmental organisations, and other entities wishing to support the victims (see, for example, Article 28(1) EAC Statute; Article 79 ICC Statute).

If a trust fund is to be established, it should be done so as early as possible so that fundraising efforts can take into account additional expenses.

It may be contemplated to vest the trust fund with a ‘double mandate’, i.e. (i) to provide assistance (rehabilitation services, counselling, psychological care) to victims of violence within the hybrid’s jurisdiction already during ongoing judicial proceedings (‘assistance mandate’); and (ii) to provide reparations as ordered by the Chamber in case of a conviction of an accused (‘reparations mandate’). This is the mandate of the ICC Trust Fund for Victims, and is good practice, albeit a resource-intensive one.

### Where a Hybrid does not have its own Reparations Scheme:

A provision that would allow the judgments of the hybrid to translate into reparations cases in domestic courts could be built into the host state agreement (the CAR agreement for the SCC is an example of this: Articles 56 to 62 of CAR’s Code of Criminal Procedure stipulate that repara-

tion measures can be sought through civil action claims before national courts).

These provisions should be drawn up with potential national proceedings (either concurrent or transferred by the hybrid) in mind, so that reparations can be coordinated between the hybrid and domestic courts, and/or any state-sponsored compensation programmes for victims of relevant crimes.

### Freezing of Assets:

The Host State Agreement (see [Section 8\(a\)](#)) and agreements with other interested states should also, if possible, include provisions that the state(s) will: (i) freeze an accused’s assets at the request of the hybrid court; and (ii) waive rights to claim the assets of convicted persons in order that these assets might be used to afford reparations to victims.

## K) TRIALS IN ABSENTIA

The Statute should make clear whether the Trial Chamber permits trials *in absentia*. Generally, these have been prohibited at hybrids because of concerns over fairness of proceedings and the cost to the perceived legitimacy of the tribunal. A notable exception is the Special Tribunal for Lebanon, which permits them. When deciding whether they should be permitted, it is useful to refer to precedent in the relevant national system, as the STL did, and to consider the possibility that, if defendants present themselves while an *in absentia* trial is ongoing, it may have to be restarted. As a general rule and due to the inherent tensions between *in absentia* trials and fair trial rights, it is advisable to avoid trials *in absentia* unless there is some overwhelming reason for doing so in the

particular circumstances, such as the suspect(s) being extremely unlikely to appear before the court for the duration of its existence.<sup>45</sup>

## L) THIRD PARTIES AND AMICI CURIAE

Third parties and *amici curiae* ('friends of the court') should be generally allowed to participate in proceedings, subject to relevant procedural safeguards, unless there are context-specific reasons not to. It can be beneficial for hybrids to be able to call on a wide range of expertise, especially on complex legal issues that have little jurisprudence. The procedures for participation of third parties and *amici curiae* should be set out in the Rules of Procedure and Evidence. The STL has issued a Practice Direction on *amici curiae* submissions that may be of use, which is available [here](#).<sup>46</sup>

## M) PENALTIES

Sentencing practices in hybrids have in the past been inconsistent internally as well as across hybrids and relevant domestic courts. This has an impact on the legitimacy of the institution, as the public sees defendants receive dramatically different sentences for similar behaviours within the same contexts.

The legal framework of a hybrid should contain details of the applicable penalties and the factors that the Trial Chamber should consider when imposing sentences. This includes, in general, the gravity of an offence and individual circumstances of the convicted person. Ideally, a sentencing guideline would be included for transparency,

making clear what will be done if domestic and hybrid practices clash, or if the practices of the hybrid in question clash with those of previous international or internationalised criminal mechanisms. For instance, will the hybrid's powers override national law? Will the law more favourable to the convicted person be applied? And will the hybrid be permitted to innovate on sentencing?

It would also be useful to add to the mandate a clause on forfeiture, for instance the SCSL Statute 19(3) or Rome Statute 77(2b)/ Rule 147 of the ICC RPE. The Rome Statute version might be preferable to the SCSL clause as it permits the tribunal to decide what to do with the assets rather than requiring their return to their rightful owners. They could, for instance, be used towards a reparations scheme where the hybrid caters for one.

The overwhelming consensus in international criminal law mitigates strongly against the use of the death penalty. Support from the UN or other relevant international organisations with a human rights commitment will almost certainly be denied if the death penalty is permitted in sentencing. None of the existing hybrids permit the death penalty.

## N) ENFORCEMENT OF SENTENCES, PARDON, AND COMMUTATION

Early in the process of establishing a hybrid, consideration should be given as to where sentences will be enforced. Will convicted persons serve custodial sentences in the state in which the hybrid is located or in a third-party state? In

<sup>45</sup> For a summary of recent debate on *in absentia* trials see the International Bar Association International Criminal Court and International Criminal Law Programme *Report on the 'Experts' Roundtable on trials in absentia in international criminal justice* (2016) available at: [https://www.ibanet.org/ICC\\_ICL\\_Programme/ICL\\_Trials\\_in\\_Absentia\\_2016.aspx](https://www.ibanet.org/ICC_ICL_Programme/ICL_Trials_in_Absentia_2016.aspx)

<sup>46</sup> <https://www.stl-tsl.org/en/documents/internal-regulatory-documents/court-management-2/1402-practice-direction-on-amici-us-curiae-submissions-before-the-special-tribunal-for-lebanon>

the past, sentences have mostly been served on the territory of a third state, making this another area in which state cooperation is critical to the success of the hybrid. When sentences are served in-country, victims and witnesses will likely be reticent to participate unless they can be reassured as to the security of remand and custodial sentencing facilities (see also the Detention Subsection under the Registry in [Section 3\(d\)\(iv\)](#), above).

The RPE should establish procedures for deciding on matters to do with sentence enforcement. This will be particularly important once the hybrid has ceased its work. One of the main functions of the residual mechanism, the body that will remain in existence to undertake any work that arises following the official closure of the hybrid (see [Section 3\(p\)](#) below), will be to determine issues concerning convicted persons. If no residual mechanism is envisaged, procedures should be established for dealing with questions of enforcement, pardon, and commutation through national authorities. Generally, existing agreements on the enforcement of sentences for the UN ad hoc tribunals and/ or the ICC can be used as drafting guidance.

Any mechanisms for pardoning or granting early release to convicted persons, by the hybrid or third parties, should be established in the Statute in order to provide reassurance to victims and witnesses that pardons will not be issued for political reasons. To avoid political pardons, a review mechanism for the possible reduction of sentencing could be used instead of a pardoning provision.

Similarly, the hybrid's regulatory framework should include a provision on the transfer of a person upon completion of sentence if the enforcement is carried out in third party states.

## O) LIFESPAN

The intended lifespan of the tribunal should be identified from the outset. Hybrids are meant to be temporary institutions, usually designed to aid in some form of political transition away from conflict, authoritarianism and/ or a regime which has participated in or failed to prevent atrocities. A well-defined and realistic timespan can help to attract funding, as there is less risk of costs escalating far beyond initial estimates. However, a shorter timespan could compromise the operation of the hybrid if it is likely that gathering evidence will take considerable time and if perpetrators work to 'outlast' the hybrid in order to escape justice. Estimates of how long the hybrid would need to function properly and to achieve its objectives should be generated in the initial Needs Assessment phase.

It is notable that all of the hybrid tribunals established to date have significantly outlasted the initial estimates of their lifespans. This has been a source of controversy with both national and international constituencies. It is important to be realistic that the process of establishing a new institution and then investigating and trying cases is extremely long. It is further important to recognise that whatever anticipated lifespan is identified will be controversial with some stakeholders. Some will want the hybrid to do a limited amount of work as fast as possible and then cease, but others will be more ambitious for the court, particularly if they believe it is more likely to bring justice over time than the national system could.

The development of relevant performance indicators setting out action and time benchmarks can be a powerful mechanism to make realistic estimates as to a hybrid's lifespan from relatively early in its functioning. See [Section 9\(b\)](#) below on Benchmarking and Key Performance Indicators.



## P) RESIDUAL MECHANISM

A commitment to establishing a residual mechanism should be in the Statute, unless the intention is to pass residual functions onto the national system. There has been some discussion of a possible general residual mechanism for hybrids run through the UN, similar to the International Residual Mechanism for Criminal Tribunals (IRMCT), although this presents many challenges and therefore has not come to fruition to date.

Residual mechanisms are necessary in order to carry out a range of ongoing and ad hoc functions. Ongoing functions, which draw upon the experiences of IRMCT and the Residual Mechanism for the Special Court for Sierra Leone (RSCSL), include:

- Maintenance, preservation and management of the archives of the court
- Witness protection and support
- Assistance to national prosecution authorities (for instance managing requests for evidence and information)
- Supervision of prison sentences/ pardons/ commutations/ early release
- Monitoring cases that have been referred to national jurisdictions.

Ad hoc functions include:

- Tracking remaining fugitives and conducting any outstanding trials or referring outstanding cases to national jurisdictions
- Review of convictions and acquittals
- Contempt of court proceedings
- Defence counsel and legal aid issues (for instance, the RSCSL provides defence counsel for residual proceedings)
- Claims for compensation
- Prevention of 'double jeopardy'.

Plans for residual functions should be made while the hybrid is being established in order to ensure a smooth transition.

### Section 3) Summary and Key Recommendations Constituent Legal Documents, Jurisdiction, and Structure

#### *Jurisdiction*

Concurrent:

- Relationship between the hybrid and domestic courts should be formalised, in order to clarify which justice system has jurisdiction in which circumstances.

Subject matter:

- In most cases, hybrid courts will handle core international crimes (war crimes, crimes against humanity, and genocide), but could also include others, such as transnational organised crimes or domestic crimes.
- There may be cases where national laws conflict with core international crimes. Drafters have two options: Rely on international standards (faster and easier) or work to amend domestic law (slower, but possibly advantageous to longer-term justice reform goals).
- Prosecutors must develop guidelines that establish a means of prioritising cases and clearly define the “gravest” crimes. These guidelines should be made public to avoid criticism of biased case selection.

Temporal:

- There are risks associated with excluding crimes that led up to (and perhaps exacerbated) the conflict or atrocity. However, if the temporal jurisdiction is overly expansive, the tribunal will be burdened with an impossible mandate.

Territorial:

- Jurisdiction should reflect the geographic location of the conflict as well as the location of key actors.

#### *Modes of Liability*

National doctrine should apply as far as possible, unless the specifics of the context require a more systemic approach.

### *Composition*

Hybrid court designers must make key sets of decisions about the composition of the Chambers, the Office of the Prosecutor, the Defence Office, the Registry, the Victim and Witnesses Unit. These include:

- Balance of national and international staff: ‘as national as possible and as international as necessary’. Special consideration should be given to key roles such as judges and head prosecutors.
- Recruitment, hiring, retaining, and dismissal processes for staff, particularly judges, prosecutors, and registry staff.
- The role of the Office of the Prosecutor: an inquisitorial prosecutor may be more in line with the objectives of hybrid courts and can mitigate concerns about the limited resources of the Defence, but past practice suggests that prosecutors do not always secure and disclose exonerating evidence.
- Whether defence will be an independent organ or embedded in the Registry.
- How to ensure victims and witnesses are best protected.

Ultimately, these choices should be informed by the Needs Assessment and consultations with a range of national actors, and clearly articulated in the hybrid’s foundational legal documents.

### *Funding*

Hybrid tribunals should aim for unconditional assessed funding as opposed to voluntary funding by donor states. Unfortunately, most hybrid tribunals are funded through voluntary contributions and are therefore financially insecure.

If a court must rely on voluntary funding, it is advisable to secure a written agreement for financial support from a donor country or group of countries for a set number of years.

### *Location and access*

The location of the tribunal should be determined by the Needs Assessment as well as a risk assessment. Because hybrids are intended to bring justice closer to affected populations, it is preferable to situate the court in country wherever possible. Other considerations for the location include security, accessibility, working conditions, and available detention facilities.

There has been significant variation in participation and attendance between hybrids—for example, the ECCC had large audiences whereas the SCSL did not, despite both being located in-country. Outreach and communication may be important to improve access.

#### *Official and working languages*

The rights of the defendant and the objectives of the hybrid should be the main considerations when choosing the official and working languages of the court. Defendants must understand the charges against them, and ideally, affected populations would be able to understand the proceedings. Outreach and communications materials should be made available in local language(s).

#### *Victim participation*

Victim participation can impact the legitimacy of the hybrid. Efforts should be made to include victims in proceedings.

- Offices or sections in the Registry should be set up to help victims navigate the tribunal and access assistance when needed.
- Ideally, victims should be assisted with legal representation if they are indigent. As much as possible, victims should be allowed to choose their own lawyers; however, in practice tribunals often select counsel.
- Robust provisions in the court's regulatory framework should protect victims' identities, in situations where they are at risk.
- Relevant hybrid staff should be trained so as not to re-traumatise victims

#### *Reparations*

Reparations may be built into the framework of the hybrid court or hybrid courts may refer victims to national courts for potential compensation through civil or other legal processes.

- The hybrid should manage victims' expectations around reparations carefully.
- The hybrid should distinguish between collective and individual reparations.
- 'Victims' must be clearly defined.
- While *prima facie* is sufficient for victim participation, reparations may require a slightly higher burden of proof. The ICC uses a 'balance of probability' standard.
- While asset seizure and forfeiture may be one option for securing reparations payments, if the convicted person has no more assets, a trust fund for victims may need to be established. A trust fund can be supported by voluntary contributions.

### *Trials in absentia*

Generally, trials in absentia have not been permitted at hybrid courts, with the exception of the Special Tribunal for Lebanon. Unless there is an obvious reason for doing so, trials in absentia are generally not recommended.

### *Third parties and amici curiae*

Third parties and *amici curiae* should generally be allowed, unless there are obvious reasons not to permit them in particular cases.

### *Penalties and enforcement of sentences*

Sentencing jurisprudence or practice often differs between the hybrid court and the national justice system. In these cases, sentencing guidelines would ideally clarify key questions about which practice the hybrid ought to adopt based on particular circumstances.

To avoid politicised pardons or commutations after the life of the hybrid is over, the hybrid's Statute should clearly articulate any mechanisms for pardon or commutation to reassure victims and witnesses.

### *Lifespan*

The drafters should decide on the ideal lifespan of the hybrid court at the outset and seek to define realistic timelines and secure necessary funding. However, most hybrids have exceeded their lifespans. Benchmarking may be one way of setting realistic timelines for particular activities and objectives of the court.

### *Residual mechanism*

If a residual mechanism is established, it should be included in the hybrid's Statute, and planned for during the establishment phase. Residual mechanisms have been used in hybrids like the SCSL to in order to: continue offering witness and victim protection; safeguard the court's archives; offer assistance to national prosecuting authorities; monitor cases referred to national courts; and supervise prison sentences.

## 4) RULES OF PROCEDURE AND EVIDENCE

The Rules of Procedure and Evidence (RPE) should be developed as soon as possible after the hybrid's statute is promulgated. A well-defined and inclusive procedure is extremely important in order to ensure efficient proceedings, the proper management of trials, fairness, and to generate beneficial legacies, given that procedural rules and expertise often live on in domestic systems. Previous hybrids have been criticised for poor procedural regimes (at least at the outset), or even judged to have been failures because of serious procedural shortcomings. Rational processes to define applicable procedural law should therefore be agreed upon during the establishment of the hybrid, with reference to local standards and to existing international good practice.<sup>47</sup> Ideally, the RPE should be drafted by representatives of all Parties, including Prosecution and Defence, rather than by judges alone.

Where possible, local RPE should be used to ensure that national judges play a full part in proceedings, that affected populations understand the legal proceedings, and so that the potential for cross-fertilisation with the national system as a legacy of the hybrid is maximised. Using local RPE also means that the same standards are likely to apply to perpetrators who are tried in the national system as at the hybrid, which could bolster the legitimacy of the tribunal. It is notable that international standards have tended to overwhelm domestic procedure in past hybrids. For instance, the ECCC agreement provided that procedure was to be in accordance with Cambodian law and only if there were gaps could the ECCC refer to international procedure. However, Cambodian law was rarely used at the ECCC. Safeguards against the dominance of international procedure can be put in place through careful

wording in the tribunal's legal framework. This does not, however, require that national standards should always be prioritised: at all times, the most progressive standards should be given preference, be they national or international. In general, as much detail as possible on the procedural law to be used should be included in the legal framework itself to guide the hybrid's functioning.

Particularly important contributions of RPE are to:

- Ensure that the rights of defendants are upheld through the court process
- Establish procedures for effective and expeditious trials
- Ensure that the rights of victims are upheld through the court process
- Avoid putting victims, in particular those who appear as witnesses, at risk of re-traumatisation
- Provide for the effective protection of witnesses
- Establish a clear and straight-forward victim application and participation regime
- Prescribe robust evidence gathering and handling procedures (including clear rules on disclosure and relevant procedural timelines) in order to strengthen the presentation of cases
- Allow for organised and efficient disclosure of evidence between the parties and to the judges.

The RPE may also be used to regulate the use of intermediaries, which has proved challenging for past hybrids and the ICC, although this could also be regulated by internal protocols rather than through procedural law. Intermediaries facilitate

<sup>47</sup> See, for instance: Sluiter, Goran, Hakan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappala (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press (2013).

access to victims and witnesses, and are therefore necessary for effective prosecutions, but the use of intermediaries needs to be guided by the RPE, which should:

- define the status of intermediaries
- define the scope of their use
- set out the ethical expectations for intermediaries' engagement with victims and witnesses
- manage the potential tensions between confidentiality and disclosure that their use generates.

Serious questions about the engagement of intermediaries in witness tampering as well as non-disclosure of evidence provided by intermediaries on a confidential basis have arisen in cases at the ICC, so hybrids should give careful attention to their policies and practices concerning intermediaries (see also [Section 5\(b\)](#) below on Running Investigations).<sup>48</sup>

The RPE should additionally determine admissibility standards for forms of evidence. This might include evidence derived from unconventional sources. A growing phenomenon is the development of smartphone apps that people who observe violence can use to record what they are seeing and upload it for review and storage by an international NGO. The Eyewitness Project is a good example here. If well designed, such apps can protect the integrity of evidence captured by them, while helping to ensure a clean chain of custody and the admissibility of the evidence. If such apps were in use during the concerned con-

flict, investigators (and eventually other organs of the court) will need to determine how to treat such recordings. Additionally, in situations where conflict and atrocities were captured and disseminated on social media platforms, it will be crucial to employ investigators who are specifically able to discern the probative value of open-source evidence.

The RPE can also be important for the transfer of evidence and cases between the national and hybrid systems, and the use of hybrid evidence in national cases. However, such transfers can also be dealt with through separate law, as it is at the BiH WCC. If evidence is gathered, catalogued and stored in different ways between the two systems, it may not be admissible in both. Laws on process may also be stricter at the national level, meaning that a transfer of cases from hybrid to national courts can be compromised if the hybrid RPE do not mirror national RPE.<sup>49</sup>

The act of transferring cases creates links between the hybrid and national systems and is an important aspect of the hybrid's legacy. The ability to transfer cases also helps to limit the lifespan of the tribunal. The potential transfer of evidence and cases should form part of the negotiations with the host country, with an awareness of the challenges this will pose in terms of how much of the hybrid's evidence is shared and with whom. Proper protections for affected parties should be built into the RPE. Ideally, investigatory material would only be shared when the hybrid has developed a strong working relationship with the party

48 A valuable discussion of the roles of intermediaries and the challenges that their use poses in international criminal prosecution can be found here: Open Society Justice Initiative, *Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties*, Open Society Foundations (2011), available at: <https://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties>, and the International Criminal Court, *Code of Conduct for Intermediaries* (2014), available at: <https://www.icc-cpi.int/iccdocs/lt/CCI-Eng.pdf>

49 Donlon, Fidelma, "Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal's Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber", in Carsten Stahn and Mohamed M. El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press (2014).

that the material will be shared with and can trust that the material will be used and stored responsibly. Conversely, as hybrid trials are likely to be more expeditious if testimony from other cases (in national or international proceedings) can be used without recalling witnesses, standards regulating the use of testimony and evidence from other proceedings should be included in the RPE.

The practice of establishing the RPE at the STL was commendable according to many in the field of international criminal law. Justice Cassese, as President of the STL, issued an explanatory memorandum explaining “the President’s view as to the principal procedural problems likely to arise before the STL and the rationale underpinning their solutions in the RPE.”<sup>50</sup> This functioned to explain the relationship between national and international rules, and to outline how the tribunal could interpret its own rules, though critics regard it as demonstrating procedural bias on the part of the President. Perhaps more commendable was the process at the KSC. The RPE for the KSC went through various rounds of scrutiny, including a review by the Supreme Court of Kosovo, before being adopted.

#### Useful Resources:

Donlon, Fidelma, “Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal’s Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber”, in Carsten Stahn and Mohamed M. El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press (2014).

Special Tribunal for Lebanon, Rules of Procedures and Evidence, STL-BD-2009-01-Rev.10 (2009).

International Criminal Court, Code of Conduct for Intermediaries (2014).

Open Society Justice Initiative, Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties, Open Society Foundations (2011).

Sluiter, Goran, Hakan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappala (eds.), International Criminal Procedure: Principles and Rules, Oxford University Press (2013).

<sup>50</sup> Special Tribunal for Lebanon, Rules of Procedures and Evidence, STL-BD-2009-01-Rev.10 (2009), available at: <https://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/explanatory-memoranda>



#### **Section 4) Summary and Key Recommendations**

##### **Rules of Procedure and Evidence**

Procedural law should be defined at the outset, with reference to local standards and international good practice. Where possible, RPE should mirror local RPE to make it easier for national justice officials to partake in proceedings, and to ensure that the same processes and standards apply to perpetrators tried in the national system. However, there may be circumstances where national law and procedure is lacking, and international standards may be necessary, e.g. for sexual and gender-based crimes.

When selecting or drafting RPE, hybrids should seek to ensure that defendants' rights are upheld through the court process, that procedures are in place to ensure expeditious trials, that victims and witnesses are protected, that victims are not re-traumatised by the proceedings, and that clear protocols and procedures for handling evidence are in place.

## 5) LEGAL FUNCTIONING

### A) CASE SELECTION

While case selection is the primary prerogative of the independent prosecutor and OTP, the legal framework of the hybrid should outline the likely categories of crimes to be prosecuted and basic principles of selection. This should be relatively broad in order to avoid dictating prosecutorial strategy, but should both guide and constrain the OTP's work. Note, however, that all parties to a conflict (for a conflict-based hybrid) should be under the jurisdiction of the hybrid, in order to ensure the legitimacy of the tribunal (see the discussion of case selection in [Section 3\(b\)\(ii\)](#) on Subject Matter Jurisdiction above.)

Decisions should be made on the basis of the initial Needs Assessment for the hybrid, and should include the following contextual factors:

- Consideration of the nature of the context in which the alleged atrocities occurred. In particular, the drafters should consider whether the principles of selection should indicate a preference for representation of all parties to any conflict among defendants and whether the principles of selection should indicate a preference for representation of all types of crimes.
- The nature of the offences which were features of the conflict (for instance, mutilations; forced marriage; child conscription, etc). The drafters should ensure that all potentially relevant categories of international crimes are included, and in particular that the categories of crimes include any crimes that represent distinctive aspects of the conflict, where relevant. Drafters should consider whether to emphasise such crimes as part of its principles of selection, particularly if they concern under-protected persons or represent historically under-examined aspects of international criminal law.
- The level of seniority of the likely accused persons. The drafters should consider whether the principles of selection should indicate a preferred focus on high-level perpetrators or not.
- The likely spoilers in terms of powerful actors who might have (or seek to have) influence over the hybrid's proceedings.
- The approximate number of trials envisaged (which helps to establish duration and funding requirements) or, if available funding is better known, the number of trials that will be possible given the funding likely to be available.
- Whether the principles of selection should focus on those most responsible or provide an alternative guiding principle for prioritising cases and limiting the number of trials.
- The availability of jurisprudence from national or other international courts on relevant cases which the hybrid's cases can build upon (this might be particularly useful if there have been successful cases against lower-level perpetrators upon which cases against more senior people can be built).
- The availability of relevant crimes defined by the national legal system (see the discussion in [Section 3\(b\)\(ii\)](#) on Subject Matter Jurisdiction).

Another set of factors to consider is whether there might be national trials held simultaneously with those at the hybrid court and, if so, whether and how the hybrid court's case selection might best complement and contribute constructively to current or future national trials, by:

- Prosecuting high level or influential defendants whom the national courts might not prosecute for reasons such as political stability and national security.
- Identifying and addressing key legal issues for which the court can produce jurispru-

dence and legal analysis that might provide guidance for national courts. Here, it is important to note that, if this is a priority for the hybrid court, the tribunal will also need to devote resources to its connections with national courts and judges, as discussed further in [Sections 7\(a\)](#) and [8](#) on Outreach and External Relations below.

- Conducting investigations that might be difficult for national courts due to complexity or lack of resources. Here, drafters should consider that the hybrid might play one of two roles: it might replace a national investigation and trial through its own investigation and trial(s), or it might enable additional national trials by conducting an investigation, holding its own trial(s), and then sharing the court's findings of fact or evidence collected through its investigations with national authorities or courts. The role it plays will depend on the circumstances, and especially on the national system's ability to ensure victim and witness security.

Based on the experiences of past hybrids, issues to take into consideration when drafting the relevant sections of the Statute and planning hybrid practices include:

- **Representation versus gravity:** Does the hybrid aim to prosecute those crimes that are determined to be the most grave? Is justice more likely to be served by seeking to prosecute representative crimes on all sides of a conflict? Should the focus be on leaders or will mid-level perpetrators also be targeted? Statutes can refer to both the 'most responsible' and 'senior leadership' in order to give the OTP broad scope in its procedural strat-

egy. As another example, the SCC refers to those with a "key role" and is functioning concurrently with the ICC (see also [Section 3\(b\)\(ii\)](#) on Subject Matter Jurisdiction above).

- **Historically under-prosecuted crimes:** Sexual and gender-based crimes have historically not been an area of focus for hybrids, despite the pervasive harms that result from these crimes. The EAC's reclassification of the charges against Habré to include sexual violence was a notable development in this regard. One of the contributions that hybrids can make towards international law more broadly is to provide jurisprudence on under-prosecuted crimes. The SCSL jurisprudence on the use of 'bush wives' as a distinct crime against humanity is an instructive example. The *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* outlines the different forms of accountability that can be pursued.<sup>51</sup>
- **Prosecutorial independence:** This should be guaranteed within the Statute in order to safeguard the OTP from political interference.
- **Spoilers:** Most hybrids have had to withstand high levels of pressure and attempts to influence their case selection. This is particularly the case if persons likely to be accused by the tribunal hold senior positions or connections to the current government of the host state, or if the current government wants to see its adversaries targeted. There may be pressure to avoid targeting those currently in power, as their cooperation is likely to be needed for the hybrid to function. There may also be pressure not to target powerful external states, particularly funders, or their allies.
- **Funding implications of mandate:** A narrower mandate which constrains the likely

51 Ribeiro, Sara Ferro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, UK Foreign & Commonwealth Office (2017)

cases that the hybrid can take might make it easier to get funding, as funders will be better able to predict the timespan of the hybrid and its likely targets. Mandate limitation for budgetary reasons should, however, be considered as *ultima ratio* (the final argument) and avoided through solid cooperation with and deferral options to national courts. This is not necessarily limited to the courts of the country concerned; the exercise of universal jurisdiction by national courts should be encouraged.

- **Number of trials:** It will inevitably be only feasible for the hybrid to prosecute a small number of trials in comparison to the number of offences and potential defendants. Thus, it is important for the OTP to not only be able to articulate some defining principles for case selection, but also to openly acknowledge that its prosecutions will be limited in scope. It is also important for the OTP to articulate how it may be able to support the development of other justice and accountability mechanisms such as national trials or a truth commission to address the many unprosecuted offences.

The OTP should put into writing and make public its case selection strategy. This renders its work more transparent and should ward off some of the criticism that previous hybrids have faced. It also strengthens the hand of the OTP in the face of powerful actors attempting to influence its case selection.

The OTP should ideally continue to communicate with relevant groups (particularly victims and do-

mestic civil society) as its prosecutorial strategy evolves in order to maintain transparency and facilitate domestic buy-in.

### i) Sexual and Gender-Based Crimes

The challenges of prosecuting sexual and gender-based crimes as international crimes as well as the reasons that they are historically under-prosecuted, are extensive and well-established.<sup>52</sup> The challenges will not be overcome by piecemeal approaches. Hybrid courts should therefore adopt an explicit policy on the court's approach to SGBC that articulates the role of the institution as a whole, including all tribunal organs. If the institution as a whole is unable to adopt a policy on SGBC, the OTP should consider adopting one, as the OTP and its staff have significant influence on the success or failure of SGBC prosecutions. The policy paper issued by the ICC OTP is a useful reference point here.<sup>53</sup> A policy on sexual and gender-based crimes should cover all stages of proceedings from victim application through victim support, investigation, prosecution, adjudication and reparations, and should ideally commit the Principals and staff of the hybrid to integrating a gender perspective into all of their work. The policy might also commit the OTP to ensuring that charges for sexual and gender-based crimes are brought, as crimes *per se* (rather than only charging as other forms of criminal conduct), wherever there is sufficient evidence to support such charges. As part of its position on SGBC, the hybrid should also undertake to ensure effective and appropriate consultation with victims' groups and their representatives in

52 Sellers, Patricia Viseur, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, OHCHR (2008). Available at: <https://www.un.org/ruleoflaw/blog/document/the-prosecution-of-sexual-violence-in-conflict-the-importance-of-human-rights-as-means-of-interpretation/>; Grey, Rosemary, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*, Cambridge University Press (2019).

53 Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-Based Crimes* (2014). Available at: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>

order that the interests of victims of SGBC are taken into account at each stage of proceedings.

## B) RUNNING INVESTIGATIONS

Fair trials rely on solid investigations. There have been challenges in the previous hybrids and international courts in ensuring that investigations are conducted to the required standard to support counsel.

In order to improve the standards of investigations, hybrids need to employ highly qualified and well-trained investigators. Ideally, joint investigation teams should be established so that national and international investigators work alongside each other, with nationals either being employed solely at the hybrid and/ or being seconded from national investigation teams. This worked well at the BiH WCC. Building this kind of team will be resource-intensive, not least as it will likely require the provision of language classes as well as other training, but it is likely to lead to more robust and effective prosecutions.

To safeguard the rights of the defendant, the role of investigators (and more fundamentally the scope and mandate of the OTP) needs to be established clearly and early in the process of setting up a hybrid. Specifically, it is crucial to clarify whether OTP investigators are required to look for exculpatory as well as inculpatory evidence, or whether their job is to provide evidence to support prosecution. In addition, defence investigations should be properly resourced. They should have similarly highly-qualified and well-trained investigators, with the concomitant possibility of using both national and international investigators.

Special attention should be paid to the relevant skill set of investigators working in hybrid tribunals. Investigators are often the first point of contact from the hybrid court to victims and survivors. They are the professionals tasked with interviewing witnesses and engaging victims. Having well-trained and professional national staff is of the utmost importance as they will have to be sensitive to the situation facing victims and survivors, must be able to speak with victims in their native language, and must also have the ability to engage with interlocutors such as the national police and security services in order to access potential witnesses and evidence. Again, in situations with deep social and/ or identity-based divisions, care must be taken to ensure that investigators are, and are seen to be, independent. Everything necessary must be done to ensure that they respect the privacy of witness, victims, and survivors. Sensitivity training may be required to ensure that traumatised victims are not adversely affected by their contact with investigators. There are excellent resources available to support the documentation of SGBC that should investigators should be aware of.<sup>54</sup>

National and international actors may have different roles to play in investigations as victims and witnesses may prefer to engage with different actors in different contexts. National investigators, for instance, may be more attuned to the needs and views of victims and survivors, and may have better knowledge of the context of the alleged crimes. However, in some situations, affected communities may be more trusting of international investigators and prosecutors, viewing them as having greater independence and/ or not being from institutions that previously committed harms or ignored the suffering of af-

<sup>54</sup> Ribeiro, Sara Ferro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, UK Foreign & Commonwealth Office (2017).

affected communities. Such sentiments should be ascertained in the Needs Assessment phase and subsequently inform relevant staffing decisions.

Investigators need to operate according to transparent and well-established standards, and there must be adequate provisions for accountability to ensure that this is the case. The admissibility threshold at trial provides important checks and balances. Evidence obtained through illicit means will be tested by the judges as to its admissibility. In addition, a hybrid should also have an explicit provision sanctioning offences against the administration of justice. Such a provision applies to all parties to the proceedings and thus binds the OTP and the Defence. A useful template provision is provided in Article 70 of the ICC Statute. See also the discussion in [Section 3\(b\)\(ii\)](#) above.

Training should also be provided to investigators and counsel on the use of intermediaries, i.e. individuals or organisations who facilitate contact between one of the organs of a court, or its counsel, and victims, witnesses or affected communities. Investigators should be encouraged to work with other actors who have gathered relevant evidence — for instance civil society organisations (CSOs), victims' groups and international investigatory bodies. Third parties such as CSOs or private investigation organisations can be very useful for hybrids, as they may have already gathered important evidence prior to the establishment of the court. Where private investigative bodies operate in the field, potential admissibility challenges of evidence collected by the latter may arise. However, working with such bodies may also boost the capacity of the tribunal to investigate in areas where the court's staff

would otherwise be unable to access due to security or non-cooperation issues. The challenges of working with civil society organisations should be thought through early in the process. For instance, some of the evidence might not have been gathered using relevant standards for criminal proceedings (i.e. chain of custody rules for evidence), and CSOs might be reluctant to share information among organisations with which they compete for funding. See also [Section 4](#) on RPE above, and the [Guidelines](#) issued by the International Criminal Court for a discussion of the challenges of working with intermediaries.<sup>55</sup>

Finally, to run effective investigations for the prosecution, cooperation is required between the OTP and the Registry. In particular, experience at past hybrids suggests that investigators need to be trained not to promise anything to victims and witnesses in return for their cooperation. This is also essential in order to manage the expectations of victims and survivors.

The resources listed in [Section 5\(c\)](#) on Running Trials, below, are useful to consult during the investigation phase.

### C) RUNNING TRIALS

The Dakar Guidelines are focused on the many other aspects of establishing and running hybrid tribunals outside of trial practice. Excellent resources already exist discussing good practice in running trials, alongside other prosecutorial functions. These include:

- The *Manual of Developed Practices* developed at the ICTY, which has useful sections on trial

55 International Criminal Court, *Guidelines Governing the Relations between the Court and Intermediaries* (2014). Available at: <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>

management and on Pre-Trial, Trial Management and Drafting Trial Judgments<sup>56</sup>

- The *Manual on International Criminal Defence*, also from the ICTY, which has sections on all aspects of criminal defence<sup>57</sup>
- *Prosecuting Mass Atrocities*, from the Offices of the Prosecutor at the ICTY, ICTR, SCSL, ECCC and STL, which includes sections on information and evidence management, evidence analysis, indictment and trial preparation as well as running trials<sup>58</sup>
- *Prosecuting Conflict-Related Sexual Violence at the ICTY* and the *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, which document the challenges of prosecuting SGBC and lessons learned at the International Criminal Tribunals.<sup>59</sup>

56 International Criminal Tribunal for the former Yugoslavia and the United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices*, UNICRI (2017). Available at: [http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY\\_Manual\\_on\\_Developed\\_Practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf)

57 United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY), *Manual on International Criminal Defence*, UNICRI (2011). Available at: [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/ADC\\_ICTY\\_developed\\_practices\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/ADC_ICTY_developed_practices_en.pdf)

58 Petit, Robert et al (eds.) *Prosecuting Mass Atrocities: A Compendium of Lessons Learned and Suggested Practices from the Offices of the Prosecutors*, International Association of Prosecutors (2014). Available at <http://www.iap-association.org/> (membership required)

59 Brammertz, Baron Serge and Michelle Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press (2016); Office of the Prosecutor of the ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, ICTR (2014) Available at: [http://www.irmct.org/sites/unictr.org/files/legal-library/140130\\_prosecution\\_of\\_sexual\\_violence.pdf](http://www.irmct.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf)

## Section 5) Summary and Key Recommendations

### Legal Functioning

#### *Case Selection*

Case selection should be the prerogative of the prosecutor's office, and the court's legal framework should clearly outline the categories of crimes to be prosecuted, as well as a basic selection and prioritisation information. The initial Needs Assessment should inform case selection decisions. In particular, drafters should consider:

- Whether the selection process focuses on all parties to the conflict, as well as all levels of command.
- The nature or gravity of the offence, or whether certain offences present opportunities to develop international jurisprudence.
- National legal capacity to handle certain kinds of cases.
- If national proceedings are ongoing, how can the hybrid's cases contribute constructively to them?
- Representation vs. gravity – good practice suggests that all parties to a conflict should be under the jurisdiction of the hybrid; however, there may be instances where more grave offences were perpetrated by one side to the conflict.
- Wider vs. narrower mandates – limiting the number of cases a hybrid will take on may make it easier to secure funding but may subject the court to criticism.

The Office of the Prosecutor should make public its case selection strategy to ward off criticism of bias.

#### *Investigations*

Hybrids should employ highly qualified investigators trained in the particularities of atrocity crimes. Joint investigation teams are preferable to build local capacity and enhance international investigators' understanding of the context. Investigators should be trained to interact with victims and witnesses in a sensitive and constructive manner.

Third parties may be useful to investigators but working with intermediaries should be governed by the Statue and by relevant training. Standards of evidence collection and admissibility should be considered from the outset.



*Running trials*

A number of resources already exist on running effective and efficient trials in international contexts. Drafters and hybrid staff should refer to these for good practices around information and evidence management, trial preparation, and trial procedure.

## 6) ADMINISTRATIVE FUNCTIONING

The Registry fulfils a wide range of administrative and support functions within a hybrid court, which are dealt with in turn in this section.

### A) ADMINISTRATION

#### i) Human Resources

Human Resources (HR) are a key part of hybrids as they deal with a number of important issues, including: safeguarding transparent and properly regulated recruitments of staff and guaranteeing a comprehensive and accessible administrative framework regarding recruitment, rights and entitlements, and issues around pensions. Pension guidelines are particularly important where some staff are integrated into the UN Pension Fund, as in the STL and the SCSL. HR is also responsible for the efficient recruitment of staff with the right qualifications as the need arises for the tribunal, and for staff training. These considerations are more relevant for a hybrid tribunal that cannot afford the often excessive duration of recruitments characteristic of larger organisations.

There is a general need to attract people with strong qualifications and to avoid high levels of turnover among staff as a means to ensure effective and efficient functioning of hybrids. Therefore, conditions of employment must be made appealing to prospective staff. Of particular importance are:

- The length of employment contracts and the certainty of those contracts being renewed. Ideally, employment contracts should be for a period of at least one year and should be renewed regularly. When the length of employment contracts is less than one year, or when renewal is uncertain, staff are often reluctant to accept positions and tend to search for new positions throughout their tenure at the court, producing disruptive levels of staff

turnover. This can be particularly problematic when a tribunal is shutting down and positions are being eliminated.

- The availability of opportunities for promotion and/or professional development within the tribunal. A hybrid tribunal's lifespan can be quite long and individual trials may last for years. As such, if staff do not have an opportunity for promotion and the development of new skills within the tribunal, they will be likely to look for employment elsewhere while trials are still ongoing. This can be disruptive to the progress of cases and undermine institutional knowledge about those cases. Moreover, such turnover can become particularly problematic when new international or hybrid tribunals are founded, creating a large set of new openings all at once and risking brain drain from other tribunals.
- The quality of living conditions, including security, level of comfort, and accessibility for travel.

In addition to managing conditions of employment, the tribunal's HR staff should also establish other mechanisms for discouraging disruptive turnover among staff, particularly mid-trial. Additional useful measures may include:

- Drafting employment rules that enable overlap between outgoing and incoming staff in order to permit the training and transfer of institutional knowledge.
- Streamlining hiring processes so that vacancies can be filled efficiently in order to avoid gaps in staffing.
- Drafting employment rules that allow the tribunal to respond to offers from other employers with counteroffers in a timely manner to retain key personnel.
- Offering financial or other incentives for staff to remain with the tribunal through certain milestones or through the end of their cases.

This may include financial bonuses, preferences for promotion, or preferential selection for moving to other capacities of the hybrid. In the past, UN salary scales have been used as a guideline (for example, in the SCSL, ECCC, and STL). So too have EU salary scales, as in the case of KSC. African Union-supported hires have also followed broadly relevant UN salary scales. Secondment from national services is another possibility, but secondment is heavily reliant on the support of relevant states and thus connected to the risk of being slow and difficult to scale where secondments are for a shorter duration than the trial.

- Offering financial or other incentives for employees to continue employment until their positions are eliminated when the anticipated life span of the tribunal is winding down, in order to avoid a wave of pre-emptive departures. The SCSL, for example, used this strategy.
- Attempting to create a cultural norm by explicitly stating during the hiring process that the tribunal wishes to retain personnel through the end of cases and asking for a commitment in principle from staff to do so.

The recruitment process of judges and staff should be transparent and robust. This can include making criteria for judges and staff public, possibly publicising a ranking system of candidates as is used by the ICC in the election of judges), and making the names and qualification of candidates, especially for high-level positions, known prior to their election in order to encourage public debate.

If part of the administrative structure of the tribunal is made up of staff that have been seconded from state and government institutions, then it is essential that the administrative regulations, i.e. regulations on the recruitment and staff rules, explicitly state that there is no priority giv-

en to seconded staff. All staff must go through the recruitment process in the same manner as contracted staff. Job vacancies must be published and the posts open to both seconded and contracted individuals. Some tribunals have opted for only having certain staff contracted. At the Kosovo Specialist Chambers, for example, all of the judges are contracted in order to ensure the equality of treatment among staff.

In some situations, secondments may be preferable to directly employed staff. This is particularly true in contexts where there may be a significant disparity between the salaries of national and international staff. Managing this issue can be difficult and requires deft and sensitive consideration. The Special Criminal Court in the CAR is using a system whereby some staff are seconded from other states and continue to receive salary and benefits from the seconding state, while other posts are funded on UN pay scales through the budget of United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). However, when deployed, all international and national staff receive the same risk allowance.

If the tribunal seeks to incorporate seconded staff into its human resources plan, the tribunal should do everything possible to avoid the annual rotation of seconded staff by states. In order to avoid high staff turn-over and excessive re-training, the tribunal should negotiate with states to ensure that seconded staff can work at the tribunal for a set number of years. It is critical that these staff are bound by relevant provisions of the staff rules and the code of conduct of the court. In order to operate a regime with seconded staff, special rules will have to be incorporated for discipline and removal, which will entail a role for the member state from which the staff member was seconded.

Another often overlooked component of HR is the hiring and employment of interns. Many international and hybrid tribunals have numerous legal interns employed on a volunteer basis for six-month to one-year stints. Provisions should be made for the terms of such internships. The Registrar may wish to include the hiring of interns with experience at other tribunals, especially at the outset. Such interns can be a useful source of information about recent jurisprudence in the cases they have worked on and provide a point of connection to other tribunals. Interns should be remunerated for their work. At the very minimum, they should have their expenses covered in order to ensure that internships are accessible to individuals from diverse financial backgrounds and to those who may otherwise not be able to afford to work without pay.

### Capacity building and training:

If capacity building is an aim of the tribunal (see [Section 7](#) below), then this role should be built into job descriptions of court staff and the human resources structure. One way that this can be done is by incentivising mentoring, i.e. by including mentoring responsibilities in job descriptions, establishing formal mentoring relationships, and including mentoring activities in performance reviews as well as consideration for promotion. Similarly, team structure and office placement can be designed in ways that are conducive to mentorship. For example, international and national staff should be physically located in the same office space in order to enable collaboration to take place and should be assigned to the same teams, although one-to-one pairing of internationals and nationals in decision-making positions has been problematic at the ECCC and

should be avoided in relevantly similar circumstances.<sup>60</sup> Capacity building functions will also be served by prioritising certain staff characteristics in hiring that promote effective communication and shared legal concepts. This might include hiring international staff who share a common language with national staff (which should preferably be a working language of the tribunal) and hiring international staff who have been trained or worked in a legal system similar to that of the concerned country (for example, common law or civil law systems). These characteristics are important for the efficient functioning of the tribunal as well as capacity building.

The tribunal should also provide mandatory training for all incoming international and national personnel concerning key components of the tribunal's structure and mission, as needed, i.e. the relevant international and national law, the national legal system, the concerned conflict, the national culture and politics, the tribunal's aims and structure, and so on. Past hybrids have not always provided sufficient training, particularly for international personnel. The fact that international lawyers who have not been educated or practiced in the relevant national system may have to apply national law is an indicator that they must be trained. Likewise, if national law has been amended to cater for a hybrid, national lawyers should also be trained. Appropriate training of all personnel helps to promote the experience of nationals and internationals working together and to combat the presumption that international practitioners are considered superior. Many hybrid staff will need further training, and this is also likely to be a function of HR to coordinate, if mandated as such in the regulatory framework.

60 Ciorciari, John D, & Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, University of Michigan Press (2014).

## Useful Resources:

Baylis, Elena, "What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives", *Washington University Global Studies Law Review*, Vol. 14 (2015): 243, 259-65 & 301-303, available at: [https://openscholarship.wustl.edu/law\\_globals-tudies/vol14/iss2/6/](https://openscholarship.wustl.edu/law_globals-tudies/vol14/iss2/6/)

Baylis, Elena, "Function and Dysfunction in Post-Conflict Justice Networks and Communities", *Vanderbilt Journal of Transnational Law*, Vol. 47 (2014): 625, 636-38 & 667-70, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2345394](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345394)

Bibas, Stephanos and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", *Duke Law Journal*, Vol.59 (2010): 637, available at: <https://scholarship.law.duke.edu/dlj/vol59/iss4/1/>

## ii) Fundraising and Budget Management

If there is no option but to fund the hybrid court by means of voluntary contributions, the Principals of the court—typically the President, the Chief Prosecutor, and the Registrar (as well as sometimes the Head of the Defence Office)—should be involved in efforts to raise funds from relevant states. In general, it is preferable that the Prosecutor continue to focus exclusively on relevant cases, but situations where there is a shortfall of funding will require an 'all hands on deck' approach. At the same time, it is also essential that the tribunal recruit a person with extensive fundraising experience. This individual should be able to prepare and adapt funding proposals, arrange events, and tie fundraising into the overall strategic priorities of the institution. This requires a deft combination of traditional fundraising and

engaged diplomatic relations which, at all times, also preserves the independence of all organs of the tribunal.

Where funding is conditional, safeguards need to be built into the functions of the tribunal. This includes ensuring that relevant codes of ethics and conduct are signed by all staff and that, where there is improper behaviour on the part of staff in such situations, this can be investigated and appropriately reprimanded and/ or sanctioned.

The drawing up of the budget of a tribunal must be conducted with full transparency, with all expenditures clearly justified. There must also be robust internal governance by way of financial regulations and audits with, at a minimum, annual external audits conducted by independent auditors. At the STL and the SCSL, management committees were formed, comprising state donors to the courts and the Registrar. In the KSC, the Registrar signs a grant agreement with the European Commission and works closely with a number of EU committees responsible for funds provided from the Common Foreign and Security Policy instrument.

There should likewise be a designated office/ section dealing with budget management, including:

- Establishing relevant activity assumptions per budgetary year and matching this with expenditure assumptions.
- Expense tracking throughout the year.
- A reporting and evaluation function in order to provide transparent reports to the stakeholders.
- A contingency planning function in case unforeseen activities generate unforeseen expenses leading to over-implementation of the budget.
- A performance indicator/risk roster that can explain the reasons for any budgetary anomaly.

lies. The budget office needs to have a strong strategic planning forum to liaise with Chambers, the OTP, and other offices that represent major cost drivers (such as legal aid or witness protection). See Subsection (iii), below, on internal accountability.

### iii) Internal Accountability, Governance, and Audits

The functioning of hybrids will be heavily scrutinised by donors and interested parties, including the media, civil society actors, and academics. It is therefore imperative to plan for strong internal governance and accountability from the outset. This includes the early establishment of:

- Rigorous and clear internal accountability processes, including the identification of who is accountable for which aspects of the institution's functioning.
- A coordination council or group of senior managers (usually one level below the Principals) who will work on institutional management issues, to avoid these being left to staff with insufficient authority.
- A schedule of regular coordination meetings between principals in order to coordinate the administrative activities of the court.

Internal accountability mechanisms should include a robust code of judicial ethics as well as codes of conduct for counsel and staff. These should be enacted as soon as the institution begins its work. Having these systems in place is a useful means to show the host state and citizens that tribunal personnel can be held accountable if necessary. This is particularly important when a hybrid operates in a state where citizens perceive that the national judiciary is corrupt or that international agencies are corrupt and/ or poorly managed. Clear and reasonable guidelines for the

issuance of complaints regarding the conduct of staff by citizens or other staff should be in place.

The Kosovo Specialist Chambers are innovative in this respect as, for the first time, the model includes a constitutional court chamber as well as an ombudsperson, which provide additional remedies to persons who maintain their rights are being violated by the court itself. If the court does not apply the highest standards of human rights, then cases can be filed before the Constitutional Chamber as well as the Ombudsperson. This model strengthens institutional accountability. The ICC has an internal audit office as well as an independent oversight mechanism. Hybrids should have a single audit/oversight mechanism with a robust mandate that includes the ability to effectively address staff grievances.

Internal financial governance is imperative for attracting and managing funds. When building a hybrid court, it is important to be able to demonstrate to donors that the money they entrust to the institution will be spent responsibly. Financial rules and regulations must be in place for the independent administration of the court.

In addition to internal financial governance rules and procedures, stringent auditing is essential. In transitional environments, it is not unusual for courts to be criticised for wasting money, and actors who want to attack the credibility of the court may allege the misappropriation of funds. External audits are an effective defence against this. They also establish a credible management track record that is essential for successful fundraising. Audits should be carried out regularly (annually at a minimum) and should ideally be carried out by external auditors or under the oversight of the Office of Internal Oversight Services at the United Nations.

See [Section 9](#) on Evaluation and Benchmarking, below.

## B) JUDICIAL SUPPORT SERVICES

### i) Court Management

It is vital to ensure information and court record security as well as the preservation of hardcopy and digital court records in a safe and secure manner. To achieve this, an important step for hybrids is to develop and implement policies and practice directions which prescribe the classification of administrative and judicial records (i.e. confidential, sensitive, and public records) including regulations on management, access, and the declassification of records.

Equally important is the adoption of regulations on filing of court documents in proceedings before the court. Ideally, practice directions on filings and classification and security of court records will be adopted in coordination with judges and the Office of the Prosecutor prior to commencement of proceedings as a means to ensure a consistent approach to the management of records and the same system and standards are employed across tribunal functions.

Ideally, a hybrid court will have the resources and technology available to create and maintain an electronic system to manage court filings. A so-called “e-court system” can save costs in the long term and enhance the security of court records. However, this may not be suitable in all cases due to the lack of relevant infrastructure as well as the costs of maintaining such a database. Courts reliant on paper records must pay the utmost attention to the reproduction and distribution of court records as well as selecting appropriate vaults for court records.

It is essential to have court reporters/ transcribers who provide accurate transcription of the proceedings. Preferably, court proceedings should be transcribed so that drafts are available on the same day and transcripts can go to the Chambers and relevant parties for review and revision if required. Audio-visual recording of proceedings is highly desirable and very useful for judges in the course of deliberations as well as for outreach efforts. Where possible, streaming court proceedings online is advisable so that interested persons and communities can follow them. Accessible proceedings lend a sense of transparency to court functions. Streaming will require an effective IT staff that can manage audio-visual equipment for recording purposes. Given the sensitivity of atrocity crime prosecutions, it is further crucial that the tribunal have IT equipment that can enable voice and face distortion systems and time delays in streaming in order to guarantee witness protection measures.

If there are no national court management staff or systems present, it is important to use existing rule of law and development programmes in order to support establishment and training. If there are staff but they need training, tribunal employees can draw on the expertise and practices of existing international/ hybrid courts (the STL system is a model here) or a foreign national system that may be familiar to the country.

### ii) Victim and Witness Protection and Support

Critical components and duties of a Victims and Witnesses Unit (VWU) include providing protection, support, and psychological counsel for victims and survivors. This section deals with protection and support, while victim participation is dealt with separately in [Section 3\(i\)\(iii\)](#). The establishment of a VWU within the court’s legal framework is discussed in [Section 3\(d\)\(v\)](#).

As a great deal of the success of the hybrid will depend on the quality of evidence obtained as well as the safety of participants in trials, protection of victims and witnesses is one of the most important functions of the Registry. Qualified staff must be recruited for protection. This entails the ability to conduct and manage risk assessments. Qualified staff must also be recruited for support functions, which includes managing the wellbeing of persons who testify by providing them with any necessary psychological support. Recruiting staff who have extensive experience in providing psychological support to victims of sexual violence and trauma, children, and child soldiers is vital, as is providing specific and tailored services for victims of sexual and gender-based crimes, victims who are children or older persons, or other particularly vulnerable victims of conflict. A review of the crimes and determination of the likely support services to be provided as well as the skill and professional experience of staff should be carried out early in the establishment of the mechanism.

Further points to consider:

- Medical services for witnesses are very likely to be needed. It is important to ensure that there are funds in the budget to cover costs of witnesses' health when they are in the care of the tribunal. If possible, this should be negotiated as part of health insurance schemes and policies.
- Legal services for witnesses may also be necessary. While it will be a counsel support unit that caters for duty counsel as and when required, it is for VWU staff to ensure that victims are cognisant of their right to counsel under certain circumstances (i.e. risk of self-incrimination).
- Facilitation of any other in-court protective measures as stipulated in the legal framework and psychological stand-by support.

- Ensure low-key operations of the unit. Train staff in appropriate security measures such as witness escort work.
- Information management: ensure systems and procedures are put in place to guarantee confidentiality of all information and records.
- Ensure in-house expertise in monitoring social media for threats.
- Provisions for safe houses should be made, including for accommodation for witnesses who may not have protective measures but will need accommodation. At all times ensure that these locations are secure and appropriate.
- Cooperation with host states and neighbouring states is needed in order to have agreements on relocation. Long-term arrangements will be needed for some witnesses as well as short-term arrangements for others.

It is important to note that the duty to protect arises at the point at which a potential witness/victim is identified or approached. Therefore, it initially falls upon the OTP or the Defence to protect witnesses — or, in case of the Defence, to notify the VWU of relevant protection needs. The duty moves to the Registry once the individual in question has been registered as a victim or witness. The OTP and the Registry staff providing services for victims and witnesses therefore need to coordinate their work during the investigation phase when the OTP is approaching potential witnesses. Such cooperation also extends to the relevant victim participation section if it is identifying potentially vulnerable victims. There should be full disclosure of information from all sides in order to protect the security and welfare of potential victims and witnesses. Linked to this and in order to avoid bias, the VWU should determine clear and independent protection programmes, including criteria related to the circumstances under which they will relocate victims and witnesses.



See also [Section 3\(d\)\(v\)](#) on the establishment of a VWU and [Section 3\(i\)\(iii\)](#) on Victim Participation.

### iii) Defence Support

Following the Needs Assessment phase, hybrid tribunal designers can decide on the most appropriate structure that a defence office or defence counsel support section may take. In the event that a Defence Support Office is made a part of the Registry, this organ's responsibility relates in particular to the management of a legal aid scheme and liaising with counsel assigned to represent the accused facing trial. This is the case for the ECCC, STL, and the KSC, in varying degrees.

Whether or not defence counsel (and their support staff) remain external to the institution or have the status of staff of the court, the Registry support function is a necessary minimum and should: provide relevant administrative services to the defence team(s); provide a list of (duty) counsel as the need may arise; and monitor the legal aid scheme (for both defence and victim counsel).

Budget planning must always incorporate funds for defence counsel and the staff of the defence teams will need to properly investigate and prepare their case, including the necessary resources to manage the case and records. It is also important to incorporate reasonable costs for the Defence to conduct their own investigations. This will include travel and translation costs. Appropriate office space should be also provided for defence teams with all equipment and general services and support.

Finally, if there is a need to train defence lawyers, doing so should be organised through the Registry. Training can focus on, for instance, the areas

of advocacy skills, drafting, as well as procedural and substantive law.

The aforementioned equally applies to victim counsel and their support structure, particularly where they are organised externally to the court.

### iv) Translation Services

Depending on the languages used in the conflict and affected areas and as mentioned above, simultaneous interpreters would be required for the translation of proceedings. Interpreters and translators will need adequate training in the legal terminology that will be applied in proceedings, including in both substantive as well as procedural law. They will also require training to ensure familiarisation with the conflict area, including place names, individual names, and other relevant terms and facts, that will be commonly used in courtroom. There should be extremely close coordination between the Court Management Unit and the Interpretation and Translation Unit in order to develop and implement a system of prioritisation of translations, and also with the Records Management Unit in order to ensure non-duplication of document translation (see also [Section 3\(h\)](#) on Official and Working Languages).

### v) Security

A hybrid's security section needs to fulfil a diverse mandate, which includes: securing the premises and staff therein; vetting and assessing the situation in the region/ country in order to provide relevant advice to parties outside the court perimeters; and providing security to the court's IT structure (providing IT security can also be part of the IT unit). In addition, the section has to ensure that all staff follow relevant security protocols in their private life, since court employ-

ees may be targeted due to their affiliation when on leave/ away from the premises.

Relevant training needs to be provided to security staff, and transparent recruitment procedures need to be established in order to create a solid security network within the tribunal.

## vi) Detention

Shortcomings in the management of detention conditions, detention facilities, and prisons can lead to human rights violations and jeopardise the integrity of the proceedings and the tribunal itself. Typically, accused persons should be held in a high-security environment when in custody during trial. Everything must be done in order to ensure that international standards are met and that those in custody are unable to interfere illegally with the proceedings or to intimidate witnesses. Failure to achieve these goals may ultimately undermine the tribunal's credibility and potentially lead to witnesses, victims or affected communities losing confidence in the court.

In order to guarantee the highest standards of detention, tribunal designers should conduct a Needs Assessment with prison experts and lawyers to determine if there is a relevant detention facility that can ensure the custody of suspects in a maximum-security environment and which can guarantee custody in line with the [UN Nelson Mandela Rules](#) on detention, formerly known as the "Minimum Standards on Detention". The rules require, for instance, that all accused must be protected from torture, cruel and inhuman or degrading treatment. There must be respect for privacy and dignity. There must also be adequate space in cells, sanitation facilities, medical, ventilation and light, food, water and freedom to practice religion.

If a suitable facility does not exist, the hybrid may need to build or refurbish its own detention facility that meets international standards and has the requisite level of security. This has often been the case for prior hybrids. For instance, the SCSL built its own detention facility and additionally used international facilities in The Hague. The BiH WCC and Kosovo Specialist Chambers also have their own detention facilities.

If the court is managing its detention function (which would be part of the Registry's role), then rules of detention and complaints will need to be drafted and adopted. Draft rules should be prepared in order to ensure that the minimum standards are in line with the Nelson Mandela Rules. It is generally advisable to present the draft rules to the International Committee of the Red Cross (ICRC) for review and comments as they have specific and highly-regarded expertise in this area.

In hybrids and international tribunals, the ICRC is frequently mandated in law to supervise the conditions of detention. It is therefore advisable to coordinate with the ICRC from the early stages of the tribunal creation process in order to ascertain if they are to be the supervision authority. If they are, an agreement will be required with the ICRC on the scope of supervision and the submission of confidential reports to the court on the Committee's supervision visits.

With regard to hybrid tribunal staff operating in the detention facilities, they will generally be a mix of national and international actors. The appropriateness of that mix can be ascertained at the early stages of tribunal design and creation, as well as during the Needs Assessment phase. During the Needs Assessment, it is important to determine if there are well trained national prison officers who can deliver custodial services in line with minimum standards separate and apart from the standards at existing prisons.

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In general, it is essential that all international and national staff are trained on the Registry's rules of detention, humanitarian restraint, as well as conducting general and cell searches.

It is also important to consider the location of the detention facility vis-à-vis family visits. There has been considerable debate about funding family visits for the accused. Overall, in deciding on location it is important to consider a location that can facilitate family visits. However, there should be no general statutory obligation on the court to fund family visits. Establishing a trust fund for family visits funded by voluntary contributions is one option to fund such visits.

## Section 6) Summary and Key Recommendations

### Administrative Functioning

#### *Human Resources*

Registry staff must be able to work impartially in a model that either incorporates international staff into a domestic system or is comprised of both international and national staff in a separate office.

Hybrids will need to attract qualified, dedicated staff, and will need to design contracts and employment packages that entice staff to stay. The length of the contract should be at least one year, and subject to renewal. To avoid high turnover, contracts should include opportunities for professional growth and promotion, and the court might consider incorporating financial incentives into contracts in order to encourage staff to stay for the duration of a trial.

Recruitment processes should be transparent and robust, and the court may benefit from making hiring criteria public to avoid accusations of nepotism or politicised appointments. Secondments from national institutions should still go through a standardised hiring process for these same reasons, and these arrangements should be negotiated with the host governments for a set period of time.

#### *Fundraising and budget management*

If a court must rely on voluntary contributions, the Principals of the court should be involved in fundraising efforts. The tribunal should also hire someone with extensive fundraising experience who is able to engage diplomatically with donor countries. Codes of ethics should govern fundraising, and conditional donations should be avoided. Budgeting should be transparent, and spending should be monitored regularly. All finances should be subject to regular audits.

Hybrids will be heavily scrutinised by external parties and must plan for strong internal governance and transparency. Establishing a coordination council of senior managers may be helpful in this respect. An ombudsperson model may also be considered for reporting corrupt or otherwise problematic practices.

### *Judicial support services*

Filing and preserving court documents is important for the court's effectiveness and legacy. Ideally, e-court systems will digitise court records. If paper filing is used, the court should develop a system for managing hard copy documents. To help affected communities access court proceedings, a hybrid should consider streaming proceedings online.

Victim and witness units should provide protection and support, which may entail counselling services, health care, legal services, and physical protection. Costs associated with these supports should be built into the hybrid's budget from the outset.

Budgets should always include funds for defence counsel as well as their staff in order to properly carry out investigations. Beyond ensuring the safety of victims and witnesses, security considerations range from the physical protection of the court's premises, to protection of staff, and IT infrastructure.

Detention facilities should comply with the Mandela Rules on the Minimum Standards for the Treatment of Prisoners. If detention facilities in-country do not meet these conditions, then the hybrid may need to build and manage its own detention facility. Rules governing the use of detention should be drafted by the court, ideally in consultation with the ICRC. The Needs Assessment should help drafters determine needs and challenges around detention facilities.

## 7) OUTREACH, CAPACITY BUILDING, AND LEGACY

Outreach, capacity building, and legacy pertain to the tribunal's engagement with domestic constituencies, including communities affected by the crimes being prosecuted, the domestic legal community, and the general public(s). A common feature among these three activities is that they are all concerned with promoting the court's positive impacts in the concerned state, beyond its trials. Outreach is concerned predominantly with information sharing with all three constituencies listed above. Capacity building is concerned with enhancing the ability of national authorities to investigate and prosecute relevant crimes by engaging with the legal community. Legacy also relates to the tribunal's long-term effects following the conclusion of its cases.

Of course, there is significant overlap among these categories, especially where the legal community is concerned, as well as between this discussion and that of the External Relations section that follows it.

### A) OUTREACH

Outreach activities have emerged as a cornerstone activity of hybrid and international tribunals. They are generally aimed at affected communities as well as interested communities inside and outside of the state.

The outreach and public information offices of tribunals, typically located within the Registry, have many tasks, including:

- Increasing awareness of the court's activities
- Disseminating knowledge of the judgements and decisions of the court
- Bridging any disconnects between legal priorities and processes with local understandings of atrocity, conflict, and justice
- Engaging relevant constituencies in the work of the court

- Challenging popular but damaging or potentially dangerous narratives about the context of crimes or the hybrid
- Providing education regarding human rights standards and norms
- Facilitating communities in spending time with the tribunal's staff

Effective outreach can be achieved in a multitude of ways, including:

- Organising community dialogues between tribunal staff and relevant public(s)
- Engaging directly with victims' associations
- Radio, newspaper, and television programming
- Art exhibitions
- Developing grade-school programmes and activities
- Peer-to-peer meetings between local legal and judicial actors and staff from the tribunal
- Designing and implementing an interactive and user-friendly website where key events are publicised and proceedings are live-streamed
- Maintaining an engaged social media presence
- Engaging journalists regularly and in accessible language
- Surveying relevant communities and constituencies, etc.

The most appropriate and effective means of reaching various constituencies can be, in large part, ascertained during the Needs Assessment phase and therefore identified prior to the creation of the tribunal. In general, outreach must form a key component of the hybrid tribunal's work and its broader communications strategy.

The central importance of outreach activities reflects the adage that 'justice must not only be done but must also be seen to be done'. If the

work of the tribunal is to have a significant impact beyond the courtroom, sophisticated and effective outreach activities need to be planned and implemented. Importantly, the design of an outreach programme for a hybrid court should be initiated at the earliest stages of planning the establishment of the tribunal—and not only once the court is up and running. Outreach should be seen as a core function of the tribunal from its outset and, beyond its importance to affected and interested communities, as a means for the tribunal to build support for its work.

Outreach should be aimed at the communities affected by atrocity and conflict as well as the wider interested public. The Needs Assessment process will inform where the affected and interested communities reside, and therefore where outreach activities should be primarily focused. Given the complexity of violent political conflicts and other situations of mass atrocity, this may not be straightforward. For example, for the Extraordinary African Chambers, outreach activities relating to the trial of Hissène Habré were aimed at affected populations in Chad, but also to the Senegalese public and the wider international community interested in the court's work. Crucially, specific outreach activities must be designed to reach victims and survivors who will not or cannot be represented in court or who cannot participate directly in the tribunal's proceedings.

If the hybrid is to gain legitimacy amongst key constituencies, it is critical for outreach programmes to be designed so as to genuinely interact and engage with affected and interested populations. This requires first building a comprehensive understanding of the specific communities that will be engaged in outreach activities. Here, it is important to note that there is an ev-

er-present risk of using outreach as a means to promote particular values and to tell constituencies — which generally have a rich diversity of views on justice, conflict, and atrocity — what is 'good for them'. Outreach efforts must seek to be democratic, reach beyond local elites, and not only accept the diversity of views from affected populations but engage with, and respect, them — even if they are not in line with the underlying aims of the hybrid tribunal.

The advantage of hybrid tribunals with respect to outreach activities is that they are often located closer to affected communities than other international courts. In such cases, it is important to ensure that staff responsible for outreach efforts include local actors. This will ensure greater sensitivity to local and regional dynamics and improve the chances of successful outreach programming.

While outreach should be a core function of any hybrid court and all tribunals should have an outreach office with dedicated expert staff, it is not necessary for the tribunal to do all of the outreach work itself. Indeed, tribunal staff are often poorly equipped to conduct effective outreach activities as they require significant communications expertise and resources. Moreover, there is no need to develop or duplicate expertise that may already exist amongst friendly organisations and institutions outside of the tribunal, and which the hybrid court itself may tap into. Instead, hybrid courts may be able to outsource some outreach responsibilities to organisations that already house significant communications expertise. The EAC, for example, outsourced its outreach activities to a consortium of communications foundations and organisations who were

well suited to conduct outreach activities aimed at all of the relevant constituencies.<sup>61</sup>

An important risk for hybrid tribunals to mitigate is that outreach activities may be perceived as promising certain outcomes to affected populations and thereby falsely raising expectations of what the court is able to achieve. For example, tribunal staff involved in outreach efforts may speak to the issue of reparations that could be provided by the court following convictions. However, giving the impression that reparations will be provided risks building support for the tribunal based on monetary gain and incentives rather than on values of justice, accountability, or the deliverance of fair trials themselves. It also risks creating expectations that may not be met. Outreach efforts should avoid inflating expectations of what tribunals can deliver or creating perverse, monetised incentives to support the tribunal.

In addition to public outreach, hybrid tribunals should give particular attention to reciprocal engagement with national courts—especially if those courts are hearing or may hear related cases. Studies of the influence of international courts on national courts suggest that such engagement is among the key factors in promoting greater national impact of the international court.<sup>62</sup> This engagement may take several forms. Hybrid tribunals should ensure that national courts have access to their decisions and other key documents. Depending on the circumstances, this may mean translating the decisions into the appropriate language(s) and providing physical copies directly to the courts or to judges, not merely posting the decisions on the tribunal’s website. There may be networks of national and international

NGOs that can facilitate these exchanges, as has occurred with key ICC documents in the Democratic Republic of Congo (DRC). In addition, direct engagement between hybrid and national judges, attorneys, and other staff facilitates exchanges over relevant standards of law that are useful for both sides of the exchange. Staff in regional courts such as the European Court of Justice and the European Court of Human Rights have participated in this kind of direct engagement with national court judges. While the outreach office will take the lead on many aspects of outreach activities, outreach with counterparts in the national court system requires leadership and participation by other organs of the court.

See also [Section 8\(f\)](#) on relations with Civil Society.

## B) CAPACITY BUILDING

Hybrid tribunals may not be specifically mandated to conduct capacity building for the national system or domestic judiciary. However, in cases where they are so mandated, they are widely seen as having an advantage over other international courts due to the mixing of international and national staff. Working in a hybrid can represent an opportunity for national staff to develop skills and expertise in the practice of international criminal justice which can, in turn, strengthen national capacity. However, it is important to stress that lasting and enhanced national capacity cannot be achieved via mere osmosis. In order to ensure effective and durable capacities, relevant efforts must be well-designed and avoid common pitfalls.

61 Obara, Brian, “Outreach in the Hissène Habré trial was an exercise in winning hearts and minds”, Justice Hub (2017), available at: <https://justicehub.org/article/outreach-in-the-hissene-habre-trial-was-an-exercise-in-winning-hearts-and-minds/>

62 Baylis, Elena “The Persuasive Authority of Internationalized Criminal Tribunals”, *American University International Law Review*, Vol. 32 (2017): 611



First, a decision should be made at the outset of whether capacity building is a priority for the tribunal or not. Not all hybrid tribunals prioritise capacity building. The KSC plays no national capacity building role since it has no national staff. This choice is grounded in a context in which there have already been extensive capacity building efforts within the Kosovo legal system and in which there were countervailing concerns about influence on any national staff. Similarly, capacity building was not a priority of the EAC, which functions within the Senegalese legal system and not within the legal system of Chad, the concerned country (although EAC staff did conduct capacity-building exercises with staff from the SCC, organised by the Wayamo Foundation; see below). Whether capacity building is an appropriate aim will depend on circumstances that should be determined in the Needs Assessment. The existing strength of the concerned state's legal system should be assessed, and this should be considered when deciding whether to include both national and international staff. Similarly, the Needs Assessment should note other efforts aimed at rebuilding the concerned state's legal system, such as ongoing rule of law programs in that state. Whether it would be possible to hire international staff who have experience of similar legal systems and have relevant language skills, to enable them to collaborate in depth with national staff, should also influence decisions about including a capacity building mandate for the court.

Another key consideration in the initial determination about whether and to what extent to engage in capacity building should be whether the tribunal is able and willing to devote resources to incentivise capacity building activities. As not-

ed above in [Section 6\(a\)\(i\)](#) on Human Resources, simply hiring national staff will not suffice. Rather, the structure of offices and teams must be designed to permit capacity building and personnel must be trained and encouraged to engage in capacity building activities.

As previously noted, there is a risk in post-conflict and conflict-affected societies of a brain-drain from the national legal community into the hybrid court and, subsequently, into the international system. If this transpires, national staff won't be part of an enhanced national system (though they may be pursuing careers that they prefer). Hybrid courts must try to avoid hollowing out local capacity whilst claiming that they are building it.

In addition to internal capacity building, another means of helping to ensure that capacity is enhanced, even if some nationals pursue international careers, is to facilitate national staff to build capacity in, and provide training for, others in the domestic legal community as well as at other hybrid tribunals. The latter is another important but oft-forgotten element of capacity building—trans-tribunal capacity building and exchanges with other courts. A good example of this were the Wayamo-organised capacity building exercises and professional exchanges between the senior staff of the Extraordinary African Chambers and the judges and prosecutors of the CAR's Special Criminal Court in 2017.<sup>63</sup>

There are often rule of law initiatives ongoing in post-conflict states, including training for judges and attorneys, legislative initiatives, as well as support for transitional justice mechanisms beyond the hybrid tribunal. Rather than engaging

63 Capacity Building Workshop for the Members of the SCC in the CAR, Wayamo Foundation, Dakar, Senegal, July 2017, <http://www.wayamo.com/africa-group-for-justice-and-accountability/capacity-building-workshops-for-the-members-of-the-special-criminal-court-in-the-central-african-republic/>

in its own external capacity building initiatives, the hybrid may better expend its limited resources by supporting rule of law initiatives by these external international and national actors. At a minimum, hybrids should be conscious of these initiatives and the need to avoid drawing focus and resources away from them.

Moreover, staff from hybrids interested in capacity building must ensure that their efforts do not simply narrow the capacity of national institutions and officials. This can be avoided by focusing not only on building capacity regarding core international crimes, but on other transferrable knowledge and skills that are relevant to the investigation and prosecution of other crimes, including:

- The collection and preservation of evidence
- Building prosecution-led joint-investigation teams
- Investigation and prosecution best practices that may be relevant to other forms of criminality facing the relevant state, be it transnational organised crimes, terrorism, corruption, or high rates of 'ordinary' crimes
- Conducting politically sensitive investigations.

Above all, what capacity is needed should be defined by the domestic legal community and experts — and not by external staff with little knowledge of the state and the wider challenges facing it.

In some contexts, it may also be possible for hybrid courts to move their work into the relevant domestic court system over time. This may be particularly useful when a hybrid court is able to only investigate and prosecute a small subset of perpetrators, but a multitude of less senior perpetrators remain at large or in detention. This transfer from the hybrid to the national system

can act as a unique vector for effective cross-institutional and national-international collaboration, training, and capacity building, and has been successful in the BiH WCC.

Finally, it should go without saying that international staff will also develop their skills and expertise through their work at a hybrid. Capacity building is not a one-way process, despite capacity-building mandates usually focusing on enhancing national capacity. Opportunities for cooperation and knowledge exchange among a range of staff should result in capacity being built well beyond the host state.

### C) PLANNING FOR LEGACY

There is little evidence available as to whether previous hybrids have left successful legacies, but there is increasing support for the idea that legacy is in principle important for legitimacy — i.e. that hybrids should leave something useful behind when they cease to function. To maximise the capacity of a hybrid to achieve positive legacies, the desired legacies should be identified in the initial Needs Assessment. These might include:

- Capacity building
- Support for a rule-of-law culture (if it is not already present)
- Support for local civil society
- A physical legacy (the court building, prison and any physical assets)
- A historical archive

Ideally, the hybrid will leave more than fair trials and strong jurisprudence as its legacy. However, if accountability is the principal objective of the hybrid, then the integrity of proceedings and the quality of its jurisprudence would be a very significant legacy, and not one to be compromised for other forms of impact.

The Office of the United Nations High Commissioner for Human Rights has published an excellent guide to legacy. The report emphasises the importance of planning at the outset for different types of legacy, for instance in planning for capacity building. It notes that: “Ideally, justice sector assessment missions should undertake a comprehensive overview of the criminal justice sector and the state of the national legal framework, which may take longer than the few weeks often set aside for this purpose. Planning missions should seek to engage with a wide variety of actors, including civil society, and may devise a checklist to this end.”<sup>64</sup>

Experience so far suggests that, in terms of comparing potential legacy priorities, national staff often do not return to the national system to complete the process of capacity building, as discussed in Section 7(b) above. Notably, there has been relative success in establishing public archives via, for instance, peace museums where a copy of all the public records are available.

#### Useful Resources:

OHCHR, Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, United Nations, New York, USA, HR/PUB/08/2 (2008).

Jalloh, Charles Chernor, The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law, Cambridge University Press (2013).

ICTJ, Exploring the Legacy of the Special Court for Sierra Leone, New York, USA (2012).

Dittrich, Viviane, “Building a Legacy: Lessons Learnt from the Offices of the Prosecutors of International Criminal Tribunals and Hybrid Courts”, Wayamo Foundation, Conference Report, Nuremberg, Germany (2013).

<sup>64</sup> OHCHR, Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, United Nations, New York, USA, HR/PUB/08/2 (2008): 9, available at: <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>

## Section 7) Summary and Key Recommendations

### Outreach, Capacity Building, and Legacy

#### *Outreach*

Outreach activities should help affected populations and the general public understand and access the court's activities. They should also help to disseminate knowledge of judgments to the local legal community and help to shift damaging narratives about the conflict. Among other methods, effective outreach may be achieved by:

- Engaging with victims' associations and civil society groups
- Partnering with media outlets, particularly local media platforms using local languages
- Facilitating peer interactions between tribunal staff and the domestic legal community, and ensuring that hybrid staff reach out to domestic courts

'Justice must not only be done, but must also be seen to be done'. Outreach should be seen as a core function of the tribunal for the outset. However, the hybrid does not necessarily need to take on all outreach responsibilities on its own — other organisations may be better at disseminating information, and hybrids should try to partner with them, when possible.

Outreach efforts should seek to shape the hybrid's message and should focus on managing expectations about what the court could achieve — this is particularly important in managing expectations about reparations.

#### *Capacity building*

If a hybrid court has capacity building as part of its mandate, drafters should consider what kinds of capacity building the hybrid should focus on. These choices should be informed by the Needs Assessment, and decisions about what kind of support is needed should be determined by the domestic legal community and relevant experts. Hybrids should also be aware of rule of law efforts that are in progress in the country already — in some cases, the hybrid could offer support to these efforts rather than conducting its own.

Capacity building efforts should focus on investigation and prosecution skills that could be helpful for national staff handling domestic cases, rather than focusing solely on core international crimes.

*Planning for legacy*

There is no consensus about what legacy hybrids should leave behind, nor evidence to evaluate the legacies of previous hybrids. However, legacy is increasingly seen as important for the legitimacy of tribunals. Legacy should be defined at the outset and might include jurisprudential development and accountability, or it might extend to building the capacity of the domestic justice system, or building a historical record of the conflict or atrocity.

## 8) EXTERNAL RELATIONS

All external relations should be conducted in a manner that preserves the independence of the tribunal. The external relations duties of the relevant organs in the tribunal should be clearly stipulated from the outset so as to avoid any party overstepping its mandate and creating avoidable conflicts with colleagues in other organs.

There is broad consensus that relations with external actors and institutions should be divided among the various organs of the court. Most technical communications with external actors will be conducted by the Registry and will pertain to the court's regular operations, including: the transportation of staff, witnesses, and suspects; logistical issues; security of staff; host state administration matters, etc. Additional external relations activities can be housed with the Presidency of the court and the Office of the Prosecutor, which will deal with relations at a diplomatic level with the aim of increasing cooperation and building diplomatic support for operational activities that may be required to fulfil the hybrid court's mandate.

The designers of hybrid courts need to decide who will be the public face of the institution. In many instances, that will be the Prosecutor. If this is the case, a second public face should also be present during external relations exercises, such as the President of the tribunal, who will stress the importance of fair trials and the quality of defence. The risk is to otherwise be perceived as an institution solely interested in prosecution rather than fair justice and accountability.

Defence counsel will, in most cases, go through the Registry in order to engage with external actors as their engagement will tend to be of a technical nature. However, where the Defence is a distinct organ of the court, it may also be engaged in external relations, including outreach, seeking relevant cooperation from states, etc. In

some instances, this is carried out through an association of defence counsel that is established independently of the court. The limited mandate of a hybrid may, however, make the establishment of such an external body impractical, especially if only a handful of external counsel will ever be involved with the court.

As the above makes clear, the ability of hybrids to effectively conduct and coordinate with external actors interfaces directly with a tribunal's internal governance and relations. Certain activities, such as those in the 'field' pertaining to investigations and outreach, must be coordinated between the Presidency, the OTP, and the Registry. It is therefore advisable for the hybrid to set up a committee or group, composed of senior members of all of the court's organs, who meet regularly to coordinate efforts, ensure open communication between organs, and minimise any misunderstandings, competition and/ or duplication of efforts. In addition to this, the Principals of each organ should be required to meet regularly (e.g. once per month or more frequently if the need arises) in order to discuss and resolve any arising issues. In general, effective internal governance of the hybrid court should be a priority from the outset as a means to ensure that the tribunal has procedures in place to reduce internal frictions and that it does not need to play 'catch-up' when tensions or conflicts subsequently arise.

### A) HOST STATE RELATIONS AND HOST STATE AGREEMENTS

and its domestic institutions is crucial for the proper functioning of the court, especially for hybrids located in the country in which the alleged crimes took place. The relationship will determine the level of cooperation and access that investigators, prosecutors, outreach officers, and other tribunal staff will receive. National governments can also be essential in supporting securi-

ty and witness protection arrangements at hybrid tribunals. Good working relations between hybrid court staff and national governments is thus critical for evidence gathering, logistics, security, outreach, and capacity-building activities. At the same time, however, hybrid tribunals should avoid developing too much of an institutional dependency on national authorities, as doing so could subject the court to the risk of external interference, threatening their independence and legitimacy.

A comprehensive and strong host state agreement, regulating all areas of cooperation and support, including privileges and immunities, should guide cooperation. Specific to privileges and immunities, an agreement should be concluded with the Host State that encompasses not only the premises but also its property, funds and assets, as well as any archives and documents. It is important that this is spelled out in sufficient detail to shield a hybrid court from any potential influence, particularly if established in a host state with strong political interests in or around the court's potential activities. Immunities should also apply to all actors – from the Principals to all relevant staff of the court. This includes defence counsel and their assistants (as far as they are accredited with the court), as well as witnesses and victims participating in the proceedings (as far as a victim participation scheme is encompassed in the hybrid's regulatory framework). Immunity provisions may vary in terms of rights encompassed (mostly depending on the level of seniority and function of the rights holder), but certain minimum immunity rights should be guaranteed for all of the aforementioned groups. These include immunities from arrest and de-

tention; from seizure of personal baggage; from legal proceedings; and from immigration restrictions when entering on business for the court. The ICC Agreement on Privileges and Immunities provides helpful guidance here.<sup>65</sup> Similarly, all communication facilities of the hybrid court need to be encompassed by an immunity clause. The Memorandum of Understanding of the Special Tribunal for Lebanon with its host state on the Lebanon Office provides guidance here, as does the ICC Agreement on Privileges and Immunities (at Article 11). Finally, the conditions of waiver should be clearly laid out to avoid potential future complex litigation with the host state.

The cooperation with national governments (as well as with foreign governments – see below) on administrative status and other institutional matters is generally coordinated through the Registry. When it comes to technical cooperation on investigations regarding traditional police assistance such as searches and seizures, data provision, and location of persons, cooperation operates directly through the Office of the Prosecutor or the investigating authority of the hybrid. Once judicial proceedings have commenced, the Registry may take a more prominent role, either in executing measures ordered by the Chamber, or assisting the parties in their efforts. The entire cooperation regime, as well as the distribution of roles depending on the procedural stage, needs to be well established and articulated.<sup>66</sup> If the authority of the Registry is not sufficiently strong to guarantee cooperation and a lack of state cooperation becomes an issue affecting due process and fair trial standards, then the Chambers should take up the issue.

<sup>65</sup> Agreement on the Privileges and Immunities of the International Criminal Court, adopted by the Assembly of States Parties, First session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3.

<sup>66</sup> Part 9 of the Rome Statute provides guidance on the most relevant provisions and dispute resolution mechanisms.

Host state agreements are available online for the KSC and SPO (at <https://www.scp-ks.org/en/documents/host-state-agreement-between-netherlands-and-kosovo>) and the STL (at <https://www.stl-tsl.org/en/documents/legal-documents/cooperation>).

## B) FOREIGN GOVERNMENTS

The Office of the Prosecutor will have the capacity to engage in cooperation agreements with foreign governments, international organisations, and other relevant actors and institutions. Courts require state cooperation on a host of issues, not least the enforcement of witness protection agreements, providing visas for staff, and providing legal assistance to court staff, etc. Such agreements may pertain to specific technical cooperation measures in terms of investigations, information exchange, and the ability for investigators to conduct operations on another state's territory. Such cooperation agreements often also contain provisions on privileges and immunities. Early in the life of the court, the Office of the Prosecutor and the Registry should identify the countries in which the hybrid might operate, in order to have relevant agreements in place in a timely manner. This can provide protection and independence in the face of changing political tides and levels of state support.

Agreements with neighbouring states are particularly important in order to enable witness protection and potential provisional release/ enforcement of sentences. These agreements are frequently concluded by the Registry, often in parallel to relevant OTP cooperation agreements.

## C) REGIONAL AND INTERNATIONAL BODIES

Hybrid courts are regularly created in situations where regional and international bodies and institutions are already active. These may include

peacekeeping, stabilisation, humanitarian, or other missions whose express purpose lies within the domains of peace, security, and civilian protection. These efforts may overlap, to some degree, with the aims of the hybrid tribunal. Indeed, in some situations, like the Central African Republic, a United Nations peacekeeping force is providing the security in the capital of Bangui where the Special Criminal Court has been established. Without that provision of security, housing the tribunal in Bangui would not be a viable option. In other cases, such as the DRC, UN missions are involved in supporting the investigative activities of the ICC. In some cases, regional and international bodies may not only provide important security measures but also come into contact with and gather evidence of relevance to possible investigations and prosecutions at the tribunal.

In such contexts, coordination and cooperation between institutions, missions, and the hybrid tribunal will be essential. Where possible, the hybrid should try to secure relevant cooperation (and protection) agreements. Such agreements would usually be concluded by the Registrar of the court, along with the court President's authority, as appropriate.

## D) DONORS

While bearing in mind the ever-present need to be, and appear to be, independent, staff at hybrid tribunals must have close relationships with the representatives and ambassadors of donor countries within the host state as well as with the donor states themselves. It is important to regularly hold donor conferences and to provide donors with good budget forecasts which include milestones and plans of activities in order to maintain their support for the court. Putting together effective fundraising strategies in key states is also important.



The court's Principals should, in this context, reach out to the diplomatic community and hold bilateral meetings with key donors in order to ensure that the donors feel part of the process and can gain an appreciation of the court's work, of course without providing them with privileged or sensitive information about the tribunals' operations. As per the recommendations above, housing specific fundraising capacity at the hybrid is encouraged, to bolster and follow up on the Principals' diplomatic efforts to garner vows of financial support.

It is critically important to separate the source of money and method of receiving funding from the operations of the tribunal. Moreover, judges should not take any part in fundraising efforts at all and should be insulated from such efforts.

Court officials must do everything in their power to avoid transactional situations where donors ask tribunal staff for an outcome in exchange for funding—be it a judicial outcome or a secondment of a national of the donor state.

See also [Section 3\(e\)](#) on Funding, above.

## E) OTHER COURTS AND RELEVANT ORGANISATIONS

As noted above, hybrid courts may not be the only institution seeking to address the harms of political violence. Hybrids are often embedded in a landscape that includes other institutions that broadly share hybrid tribunals' aims of peace,

justice, and security. In this context, hybrids may not even be the only institution specifically seeking accountability for crimes in the relevant state. Relations between hybrids and other institutions, including the International Criminal Court or other tribunals active in the region, the International Committee of the Red Cross (see [Section 6\(b\)](#) (ix) above on Detention), and other mechanisms of justice and accountability, such as national courts, truth commissions or commissions of inquiry, need to be spelled out and managed. Many of the relevant entities present in the situation state can be identified in the Needs Assessment phase, although some new ones may arise during the lifespan of the tribunal. External relations with these bodies can be usefully outlined in memoranda of understanding (MOU), which can ensure clarity, bolster mutual respect, and help to avoid 'turf-wars' between them.

In general, relations should seek to enhance coordination and cooperation between these institutions but, critically, without undermining the mandate and, in particular, their independence.<sup>67</sup> MOUs between tribunals with overlapping jurisdiction can encourage positive cooperation between investigators and prosecutors, as is the case between the ICC and the Special Criminal Court in CAR.<sup>68</sup> In Sierra Leone, the SCSL and the Truth and Reconciliation (TRC) also had an agreement to ensure that evidence presented by participants in the TRC process was not subsequently used in trials, in an attempt to avoid a situation where the work of the SCSL would disincentivise participants from fully and genuinely participat-

<sup>67</sup> The ICTJ's handbook on complementarity is focused on relationships between national courts and the ICC, but many of the issues covered are equally relevant to hybrid/ICC relations. See: Seils, Paul, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, ICTJ, (2016), available at: [https://www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf)

<sup>68</sup> Labuda, Patryk I., "'Open for Business': The Special Criminal Court Launches Investigations in the Central African Republic", Blog of the *European Journal of International Law* (2019), available at: <https://www.ejiltalk.org/open-for-business-the-special-criminal-court-launches-investigations-in-the-central-african-republic/>.

ing in TRC proceedings for fear of being subsequently prosecuted.

Plans should be made from the outset for the possible transfer of cases between tribunals and national courts where relevant and appropriate, as discussed above in [Section 4](#) on Rules of Procedure and Evidence. To make such transfers effective, legislation is required to enable the transfer of cases and evidence to courts. Maintaining strong relations with the local judiciary also plays a constructive role. The relationship between the ICTY and the BiH WCC is a good example here.<sup>69</sup>

In situations where the OTP engages and cooperates with other courts and relevant organisations in support of their investigation and prosecution activities, it is important that these do not conflict with those external relations procedures and agreements established by other organs, such as the Registry. Whatever the OTP does with regards to (co)operation agreements with other actors, the office should share with the designated office in the Registry, as the Registry is a neutral organ and should be fully capable of keeping OTP operations and agreements confidential. This is particularly true with regard to the protection of victims and witnesses. Cooperation between the OTP and Registry services must be one of full disclosure of relevant information and full confidentiality between the two. As noted above, internal governance meetings between the Principals could be useful in avoiding such conflicts, and in preventing ambiguity of roles.

In addition to such formal cooperation with other courts about particular cases, hybrid tribunals will also benefit from informal relationships and collaborations with other tribunals and courts, so as to facilitate an exchange of jurisprudence, processes and practices, technical expertise, and so on. On the international level, new hybrids can benefit from the experience of their counterparts at existing hybrids. Staff may well bring with them interpersonal connections with colleagues at other tribunals and should be encouraged to leverage these for the purpose of collegial information sharing. There are also some multilateral formal mechanisms in place, such as the [International Association of Prosecutors](#) and the [Annual International Humanitarian Law Dialogs](#), which host international and hybrid court prosecutors. On the national level, such mutual exchange of information, expertise, and jurisprudence will also be beneficial both in extending the hybrid court's impact on the national system and in enabling it to gain from the national courts' expertise.<sup>70</sup>

## F) CIVIL SOCIETY

Strong relations with civil society can assist hybrids in accessing relevant populations and may boost domestic perceptions of their legitimacy. [Section 7\(a\)](#) on Outreach has discussed some aspects of this relationship, in particular regarding the dissemination of information. This section recommends establishing a formal mechanism for consultation with civil society so that information flows both ways between the hybrid and relevant CSOs.

69 Donlon, Fidelma, "Positive Complementarity in Practice: ICTY Rule 11*bis* and the Use of the Tribunal's Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber", in Carsten Stahn and Mohamed M. El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press (2014).

70 Baylis, Elena, "What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives", *Washington University Global Studies Law Review*, Vol. 14, (2015), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2700832](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700832); Baylis, Elena, "Function and Dysfunction in Post-Conflict Justice Networks and Communities", *Vanderbilt Journal of Transnational Law*, Vol. 47, (2014), available at: [https://www.vanderbilt.edu/wp-content/uploads/sites/78/Baylis\\_Function-and-Dysfunction-in-Post-Conflict-Justice-Networks-and-Communities1.pdf](https://www.vanderbilt.edu/wp-content/uploads/sites/78/Baylis_Function-and-Dysfunction-in-Post-Conflict-Justice-Networks-and-Communities1.pdf)

The first step in planning relations with civil society is to map the territory. This requires asking numerous questions, including:

- Which organisations represent which stakeholders or constituencies?
- Which organisations have legitimacy and credibility?
- Which organisations are natural allies with a hybrid, and which are not?
- Are NGOs the most suitable interlocutors for the court, or should it build relationships with other organisations such as labour unions?

Local knowledge and expertise should be relied upon to answer these questions. Once appropriate partners have been identified, a court support network (as in the case of Bosnia) or an interactive forum (as with the SCSL) or periodic NGO roundtable meetings (as with the ICC) should be established, with key organisations invited to regular (e.g. monthly) meetings with senior staff at the hybrid, including the Principals. Where organisations are dispersed around or across countries, information can be shared and consultation requested virtually. However, senior staff should make efforts to travel to meet the main organisations several times a year.

Attention should be paid to the distribution of power in civil society and organisational relationships should be periodically reviewed in light of these power distributions. Those organisations judged by the hybrid to be the most appropriate to consult will have their status raised by their relationship to the mechanism. Efforts should therefore be made to look beyond the most obvious or established civil society partners to identify, in addition, smaller or less powerful groups who have legitimacy among victims or publics, rather than working only with the most powerful organisations.

## Section 8) Summary and Key Recommendations

### External Relations

As with the hybrid court's other responsibilities, external relations duties should be clearly defined in the court's founding documents. Broad consensus is emerging that particular organs may be better suited to play particular roles in external relations. For example:

- Technical communications related to trial proceedings and logistics with external actors should be the Registry's responsibility.
- The Prosecutor is often well positioned to be the 'public face' of the institution.
  - A second public face, such as the President, should also engage in external relations activities in order to avoid giving the impression that the court is unduly focused on prosecutions versus fair trials.

#### *Host state relations and host state agreements*

Good working relationships between national governments and hybrid courts is essential for their functioning. Finding an appropriate level of cooperation with the host state will be crucial to avoid potential political interference. A host state agreement should regulate the areas of cooperation and support, particularly privileges and immunities.

#### *Foreign governments, regional, and international bodies*

The OTP should be able to engage with foreign governments and other relevant regional and international institutions. Where relevant, the OTP may need to secure agreements on witness protection, extradition, visa issues, etc. The Registry should also help to manage these agreements. In countries where there are peacekeeping efforts underway, the hybrid should seek to coordinate with relevant actors to secure protection agreements.

#### *Donors*

Principals of the hybrid should engage closely with the diplomatic community in order to ensure that donors understand the hybrid's work. The hybrid must avoid transactional support from donor countries in order to preserve its independence and credibility.

#### *Other courts and relevant institutions*

Hybrids are embedded in an environment with other institutions that share the aims of peace, justice, and security. The Needs Assessment should identify other relevant bodies and efforts (e.g. truth commissions, domestic justice efforts and ICC investigations) and should draft relevant MOUs in order to enhance cooperation and avoid unnecessary competition between them. Hybrids should also ensure that plans to transfer cases between courts are defined from the outset.

#### *Civil society*

Relationships with local civil society organisations are helpful in terms of gathering and disseminating information and hybrids should ensure that they engage with a representative cross-section of civil society. Similarly, they should be cognisant of the political affiliations and power distributions between civil society groups and review their relationships periodically.

## 9) EVALUATING AND BENCHMARKING HYBRID MECHANISMS

Planning for evaluation and the identification of performance indicators, notably in the form of benchmarks, should take place relatively early in the establishment of a tribunal. Informal but often influential evaluations of the work of the hybrid work will be made regularly by the press, victims, donors, researchers, and so on. Hybrid staff should conduct internal evaluations, including in response to benchmarks. Staff can also enable more accurate external evaluations by gathering and sharing of relevant information.

### A) EVALUATION

As far as possible, the hybrid tribunal should be evaluated according to fair criteria which should include its stated aims and goals. At the design stage, efforts should be made to ensure that the goals of the hybrid are reasonable and achievable in order to avoid negative evaluations against unrealistic standards. Identifying individuals who are accountable for the achievement of the identified aims and goals is also advisable.

Hybrids can be evaluated according to a wide range of criteria:

- **Outcomes:** Positive outcomes are the ultimate goal of hybrid mechanisms, though outcomes cannot generally be evaluated until the majority of the mechanism's work has been completed. These outcomes may be immediate or long-term; they may relate directly to the hybrid's own work, such as the fairness of proceedings or the quantity of investigations
- **Mandates:** Evaluation against mandates is one of the fairest ways to evaluate a mechanism and underscores the need for a clear and realistic legal framework, which sets out the mandate of the court.
- **Goals:** Goals might be expressed in the legal framework or derived within the institution

or trials, or they may concern external impacts on the concerned state or communities. Outcome evaluation is made challenging by intervening variables—outcomes such as the socio-political impact of a hybrid are too far outside of its own control for it to be held accountable for them. This does not mean that evaluation of socio-political impact is unfair. It is extremely important to try to understand the wider impact of justice mechanisms, including the extent to which they contribute to or hinder peace,<sup>71</sup> conflict,<sup>72</sup> or reconciliation<sup>73</sup> so as to feed into decisions on whether and how to establish hybrid courts in future situations. Evaluations of wider impacts can also explore the rule of law effects of the hybrid (the 2011 UN Rule of Law Indicators Implementation Guide and Project Tools, available [here](#),<sup>74</sup> gives details on how to measure Rule of Law impacts). Such evaluations can also usefully assess the extent to which external actors made appropriate contributions to ensuring that the hybrid generated positive outcomes. These might include supplying funds, staff, resources, services and evidence, turning over accused persons, advocating for the tribunal, generating and maintaining the political will to ensure its success, etc.

71 Kersten, Mark, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016).

72 United Nations and the World Bank, *Pathways for Peace*, World Bank Publications (2018), available at: <https://www.pathwaysfor-peace.org/>

73 Clark, Janine Natalya, *International trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Routledge (2014).

74 [https://www.un.org/ruleoflaw/files/un\\_rule\\_of\\_law\\_indicators.pdf](https://www.un.org/ruleoflaw/files/un_rule_of_law_indicators.pdf)

and should be broken down by organ where relevant. Goals should be linked back to the initial Needs Assessment. Which needs were identified and to what extent is the hybrid meeting them? Care should be taken in all communications from the mechanism not to overclaim on goals or unfairly raise expectations.

- **Processes:** Evaluation against processes is fair and reasonable. Processes should aim at, and demonstrably achieve, the highest standards of justice. They might also be evaluated against standards of efficiency in terms of use of resources.
- **Values:** See below for discussion of how core values can drive standards. Values should be derived in such a way as to allow for ongoing evaluation on how well they are being achieved.
- **Deterrence:** Deterrence is a common goal of international criminal justice, though the conditions under which it is achieved are not well understood. Some studies suggest that prosecutions of atrocity crimes or serious human rights violations do lead to decreased incidents of atrocity crimes or increased observance of human rights law in future, but these studies remain controversial.<sup>75</sup> In general, it is thought that the likelihood of prosecution is a determining factor in some decisions to

commit criminal activity, so any work that a hybrid can do to develop and/ or support efficient, powerful and independent national systems, which have much greater reach than temporary institutions, may be more likely to lead to long-term deterrence than the judgments of the tribunal itself. The lack of clear evidence on the ways that courts do or do not deter future crimes make it very difficult to evaluate hybrids on their deterrence value.

- **History writing:** Hybrids might reasonably be expected to uncover and test evidence that extends our understanding of the nature and context of the crimes prosecuted. However, the history told within international trials and judgments is unevenly accepted by affected societies, so the production of an authoritative narrative should not be a primary goal of a hybrid.<sup>76</sup>
- **Conviction rates:** It is common but inappropriate to evaluate mechanisms according to conviction rates. The quality of justice is best measured through standards such as fairness, transparency, provision of reparation to victims, and equality of arms than by the number of convictions.

Article 7 of the African Charter on Human and People's Rights (ACHPR) and Article 6 of the European Convention on Human Rights give further

75 For example, see: Kim, Hunjoon, "Explaining the Deterrence Effect of Human Rights prosecutions for Transitional Countries", *International Studies Quarterly*, Vol. 54 (2010): 939-963, available at: [https://www.jstor.org/stable/40931149?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40931149?seq=1#page_scan_tab_contents); Vinjamuri, Leslie, "Deterrence, Democracy, and the Pursuit of International Justice", *Ethics and International Affairs*, Vol. 24 (2010): 191-211, available at: <https://www.cambridge.org/core/journals/ethics-and-international-affairs/article/deterrence-democracy-and-the-pursuit-of-international-justice/98DA0BB6062AA43121628E0AE929316A>; Jo, Hyeran and Beth A Simmons, "Can the International Criminal Court Deter Atrocity?", *International Organization*, Vol. 70 (2016): 443-475, available at: <https://www.cambridge.org/core/journals/international-organization/article/can-the-international-criminal-court-deter-atrocity/0A64E6F29E839427A0A5398EBD2273CB>; Schense, Jennifer and Linda Carter (eds.), *Two Steps Forward, One Step Back: The Deterrent Effects of International Criminal Tribunals*, International Nuremberg Principles Academy (2016).

76 Milanovic, Marko, "Establishing the Fact About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences", *Georgetown Journal of International Law*, Vol. 47 (2016), available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojintl47&div=42&id=&page=&t=1558652611>

criteria that evaluations can be designed around, for instance:<sup>77</sup>

- The fairness of the proceedings
- The (reasonable) duration of the proceedings
- The publicity of the judgment/ decision and transparency of the process
- The protection of minors (and other subjects for whom it is appropriate to provide a form of assistance)
- The comprehensibility of the prosecution, the course of the procedure, and of judgments/ decisions
- The right to legal assistance and access to justice in general
- Legal aid (when all the conditions are met)<sup>78</sup>

In all evaluations, a baseline for comparison should be established. No judicial mechanism will perform to an ideal standard, so comparisons to a realistic baseline (for instance, the relevant performance of other hybrids) as well as to an ideal should be undertaken. Some consideration should also be given of counterfactuals, that is: what justice outcomes do stakeholders believe might have been achieved if the hybrid had not been established? What were the alternative uses of the resources that have been invested in the mechanism? Is the existence of the hybrid an improvement on credible alternatives? A consideration of counterfactuals (recognising that they can never be known with certainty in complex contexts) can help to build logical links between the existence or work of the hybrid and tangible change.

## B) CORE VALUES

A valuable way to support goals and drive high standards and an ethical culture is to identify and communicate (internally and externally) a series of core values for the hybrid. The values should be enshrined within codes of conduct for all staff and the code of judicial ethics as well as a code of ethics for counsel. There is broad international agreement regarding the core values that courts should apply in carrying out their roles. The key values to the successful functioning of courts are those that guarantee due process and equal protection under the law to anyone who has business before the court.

Values suggested in The International Framework for Court Excellence include:

- Equality before the law
- Fairness
- Independence of decision-making
- Impartiality
- Integrity
- Transparency
- Competence
- Accessibility
- Timeliness
- Certainty

## C) BENCHMARKS AND KEY PERFORMANCE INDICATORS

Benchmarking can be a useful way to conduct on-going evaluations and is increasingly expected by funders. Benchmarks assist in building a transparent and auditable court from the outset and appropriate benchmarks should be chosen as the

77 For more information, see: European Commission for the Efficiency of Justice, *Measuring the Quality of Justice*, Council of Europe (2017), available at: <https://edoc.coe.int/en/index.php?controller=get-file&freid=7500>.

78 From European Commission for the Efficiency of Justice, *Measuring the Quality of Justice*, Council of Europe (2017), available at: <https://edoc.coe.int/en/index.php?controller=get-file&freid=7500>.



hybrid is being established. These benchmarks should be chosen in consultation with stakeholders, such as victim communities, as well as donors and the court's Principals.

Benchmarking is most efficiently done using key performance indicators (KPIs). KPIs are usually items that can be measured as a binary (i.e. "Has a particular policy been drafted? Yes/ no"), a number (i.e., the number of active trials), or percentages (i.e., "what percentage of budget has been spent on particular items?"). KPIs are a simplistic measure, and there are tensions between using KPIs to improve court legitimacy versus as a means of budgetary control, but regular data gathering through court management systems will ensure that the mechanism can establish baseline values and track changes over time.<sup>79</sup>

The ICC has developed extensive performance indicators, discussed in its reports on the development of performance indicators for the ICC. The 2017 report is available [here](#). Helpful benchmark indicators can also be found in the ICTY's and IRMCT's yearly reports to the UN on the tribunals' completion strategy. Further examples of benchmarks and KPIs can be found in the Useful Resources Section below.

Sufficient resources to conduct benchmarking and evaluations will need to be allocated to the Registry and, to a lesser extent, to the OTP. While these tasks might not appear to be a high priority, making efforts to evaluate the performance and impacts of courts should enable court principals and staff to improve performance if necessary, and should contribute to the court being seen by stakeholders as a legitimate and effective actor.

## Useful Resources:

There are a number of useful resources available for designing evaluation and benchmarking, including:

Ainley, Kirsten, Rebekka Friedman, and Chris Mahony (eds.), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, Palgrave (2015).

Ambach, Philipp, "Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?", *International Criminal Law Review*, Vol. 18 (2018): 426-460.

European Commission for the Efficiency of Justice, *Measuring the Quality of Justice*, Council of Europe (2017). Prepared by the CEPEJ-GT-QUAL on the basis of the preparatory work of Mr. Fabio Bartolomeo.

European Commission for the Efficiency of Justice, *Checklist for Promoting the Quality of Justice and the Courts*, CEPEJ 11th Plenary Meeting (2008).

Goldstone, Richard and Christine Van den Wyngaert, "Evaluating the Performance of International Tribunals and Courts", Brandeis Institute for International Judges (2016).

Jalloh, Charles Chernor, *The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law*, Cambridge University Press (2013).

<sup>79</sup> Ambach, Philipp, "Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?", *International Criminal Law Review*, Vol. 18 (2018): 426 – 460, available at: [https://www.researchgate.net/publication/325328835\\_Performance\\_Indicators\\_for\\_Internationalised\\_Criminal\\_Courts\\_-\\_Potential\\_for\\_Increase\\_of\\_an\\_Institution's\\_Legacy\\_or\\_'Just'\\_a\\_Means\\_of\\_Budgetary\\_Control](https://www.researchgate.net/publication/325328835_Performance_Indicators_for_Internationalised_Criminal_Courts_-_Potential_for_Increase_of_an_Institution's_Legacy_or_'Just'_a_Means_of_Budgetary_Control).

Kotecha, Birju, "The ICC's Office of the Prosecutor and the Limits of Performance Indicators", *Journal of International Criminal Justice*, Vol. 15 (2017): 543-565.

National Center for State Courts, The International Framework for Court Excellence, 2nd Edition, International Consortium on Court Excellence (2013).

Squatrito, Theresa, Oran R. Young, and Andreas Follesdal (eds.), *The Performance of International Courts and Tribunals*, Cambridge University Press (2018).

## Section 9) Summary and Key Recommendations

### Evaluation and Benchmarking Hybrid Mechanisms

External, influential evaluations of the hybrid's work will regularly be made by the media, donors, host governments, among others. Conducting regular, transparent evaluations may help the court describe its progress on its own terms.

Helpful evaluation criteria include:

- **Outcomes**—defined by goals in the court's founding documents, which fall within the court's sphere of influence. Evaluating hybrids' performance against socio-political outcomes (like sustained peace) may not help the court understand its success given the number of intervening variables that influence societal-level outcomes.
- **Mandate**—to what extent is the hybrid acting according to its mandate?
- **Goals**—Is the hybrid achieving the goals it has set for itself?
- **Processes**—how effectively are cases being handled (quality of investigations, efficiency of proceedings, witness and victim care, etc)?

Common criteria that should be avoided include:

- **Deterrence**—while this is a common goal for international justice, there is insufficient evidence on the link between prosecution and deterrence even in regular criminal justice.
- **Conviction rates**—these do not capture fairness, transparency, independence, competence, equality of arms, reparations, or other values of justice that a hybrid seeks to uphold.

#### *Benchmarks and KPIs*

Benchmarking through KPIs can help build a transparent and auditable court. However, KPIs tend to be simplistic, binary measures that may not provide court administrators with information to evaluate their performance. Gathering and analysing data through court management systems can at least ensure that the hybrid establishes baseline measures and tracks changes over time.

## 10) CONCLUSION

The Dakar Guidelines are part of wider, ongoing efforts to capture and share lessons learned in past and present hybrid tribunals to aid in the design of future hybrids. They should support attempts to achieve more meaningful accountability in contexts where a mix of national and international criminal justice has been chosen as a response to mass atrocities. The aim of the Guidelines was to set out key decision points and design options that should be considered when establishing and running a hybrid court. In particular, we sought to: (1) highlight particularly complex issues in the functioning and independence of hybrid courts, and issues that have had long-term implications for previous hybrids and so should be given special consideration in the design phase; and (2) suggest design components that may increase the resilience of the court (i.e. the court's capacity to act independently and to resist political, financial, and other pressures), and the resilience of affected communities through engagement with the court. We hope, therefore, that the Dakar Guidelines will be of use to anyone interested in designing as well as studying hybrid tribunals.

In drafting the Dakar Guidelines, four Guiding Principles for actors involved in the establishment of hybrid courts were identified:

1. The overriding design objective of hybrid court founders should be to build a genuinely independent institution, properly established in law, to maximise the integrity, effectiveness and legitimacy of its organs.
2. The design of the hybrid court should respond as much as possible to the particular needs and circumstances of the concerned state(s) and to the conflict or situation that gave rise to the crimes at issue.
3. Hybrid designers will need to make choices about prioritising certain aims or bene-

fits over others, rather than attempting to achieve all of the potential goals or benefits of internationalised criminal justice.

4. Continuous evaluation should be planned in from the outset, including by designing appropriate, and where possible measurable, aims, goals, and benchmarks by which to assess the tribunal.

Extensive further resources on hybrid tribunals, including a database that allows for easy comparisons between characteristics of past and present hybrids, are available at [www.hybridjustice.com](http://www.hybridjustice.com).

Hybrid tribunals, as we have tried to make clear throughout the Guidelines, operate in environments with a wide range of limitations and constraints. Moreover, like other options for justice, hybrids will not and cannot heal all ills, nor are they necessarily a path to peace. But, for those who support ending impunity for atrocity crimes, they offer the possibility of independent and effective prosecution as well as outreach and positive impact. When well-designed, they can make the best of unique opportunities. The crucial Risk Assessments, which should take place before accountability mechanisms of any kind are established or agreed upon, will make clear the constraints and opportunities in any given context. Constraints range from lack of political will to pursue accountability and political interference, through to active opposition to accountability mechanisms; from lack of resources to investigate and prosecute all of those most responsible for atrocity crimes, to challenges in obtaining key evidence or suspects. Victims and survivors will invariably have contrasting views on what form(s) of justice should be pursued, and experts of various stripes will put forward competing claims about the best way for justice to be achieved in any given context. Establishing and running hybrid tribunals is an exercise in creativity and

compromise in the face of multiple constraints and diverse criticism.

If limitations and constraints can be managed, then hybrid courts have the potential to offer accountability for crimes that cannot or will not be tried elsewhere. Creating a tribunal with international character can overcome constraints and immunities in domestic law. Meanwhile, constructing partnerships between national and international actors can lead to robust prosecutions that assist in strengthening or rebuilding domestic systems and advance the practice of international criminal law.

The International Criminal Court, even if it overcomes criticisms of its decisions and limited reach, will never have sufficient resources to try all those accused of the most serious international crimes. National courts in states in which such crimes have taken place will often have been compromised or weakened by the political environment that facilitated the crimes and, as a result, may simply not have the judicial or political capacity to investigate and prosecute atrocity crimes alone. In part for these reasons, the national-international partnerships at the heart of the hybrid tribunals are now seen to have utility in investigative settings too. The Dakar Guidelines focus on courts and tribunals, but there has been considerable innovation in the investigation of crimes by hybrid ventures in situations in which a full tribunal would not be possible to establish. The International Commission against Impunity in Guatemala (CICIG) is a U.N.-backed commission set up in response to a request for assistance from the Government of Guatemala, to support, strengthen, and assist Guatemalan institutions in investigating and prosecuting illegal groups and clandestine security organisations responsible for organized crime and human rights violations in Guatemala. In addition to CICIG, a similar commission was established in Hondu-

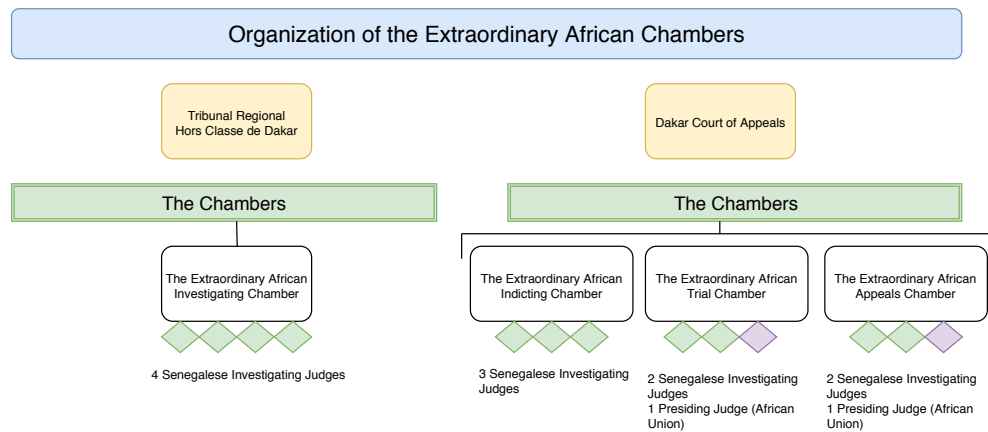
ras (MACCIH) and another is proposed in El Salvador (CICIES), where the Dakar Guidelines were launched in summer 2019. At the regional level, the Inter-American Commission on Human Rights has partnered with national governments in Mexico and Nicaragua to establish Interdisciplinary Groups of Independent Experts to assist national authorities with the investigation of the 2014 disappearance of 43 students in Mexico and of the violent events that took place between April 18th and May 30th 2018 in Nicaragua. At a more operational level, teams of international and national investigators are increasingly working together, with varying levels of national government support, in situations such as Iraq, Syria, Myanmar and Nigeria where the prospects of international criminal justice are severely limited. These commissions and groups have had mixed results but are an important part of a trend in which national and international resources are combined in the pursuit of justice.

The new forms of hybrid investigatory mechanisms mentioned above highlight that what is meant by 'hybrid' is continually changing. This reflects a dynamic legal landscape and an all-too-apparent need among justice communities to (re-)imagine and design new institutions and tools to meet growing demands for accountability. It was not long ago that hybrid tribunals were seen as being out of fashion. They have experienced something of a resurgence in recent years. Their renewed popularity may or may not last. Whatever the prognosis, we hope that the Dakar Guidelines will be of value to those pursuing or evaluating hybrid justice. Whether or not more hybrid courts are established in the coming years, it is clear that the future of accountability for atrocity crimes is, on many levels, hybrid.

# APPENDIX A: COMPOSITION OF HYBRID MECHANISMS

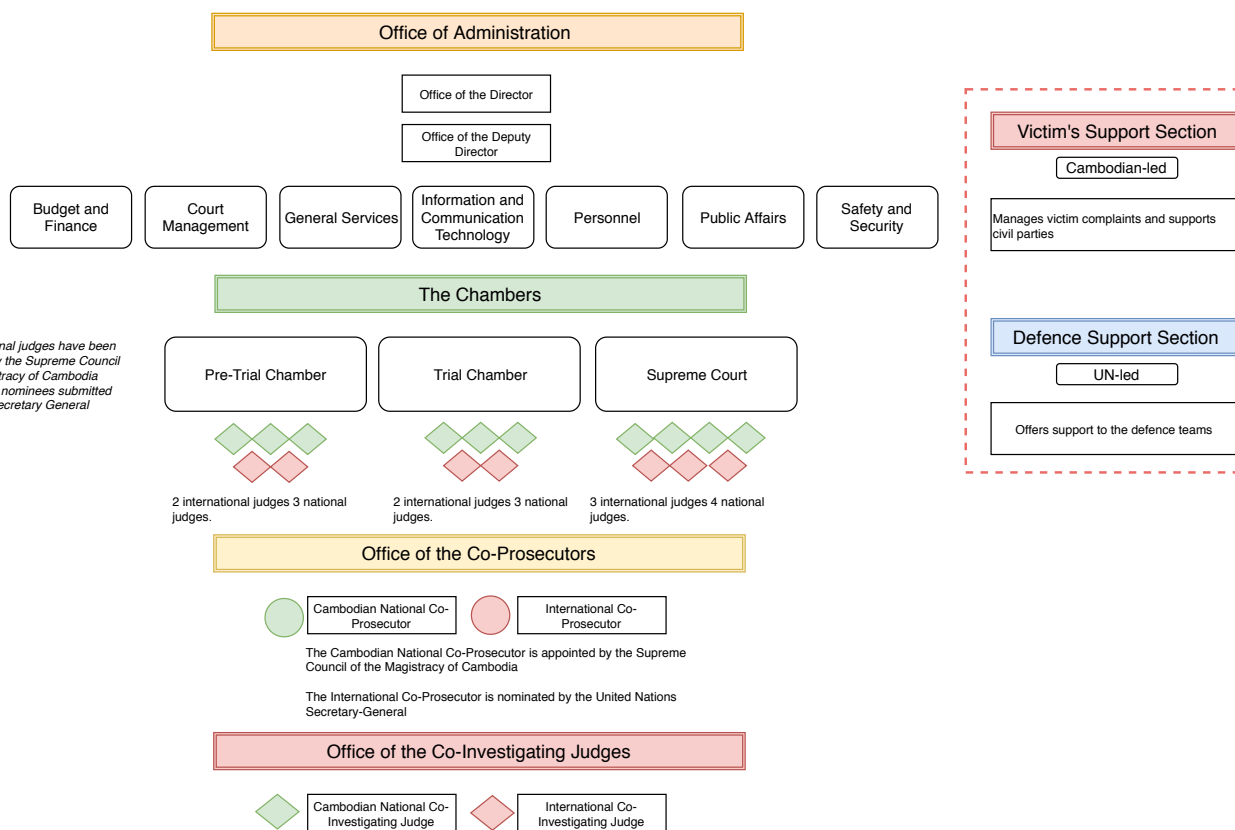
## Key to the diagrams:

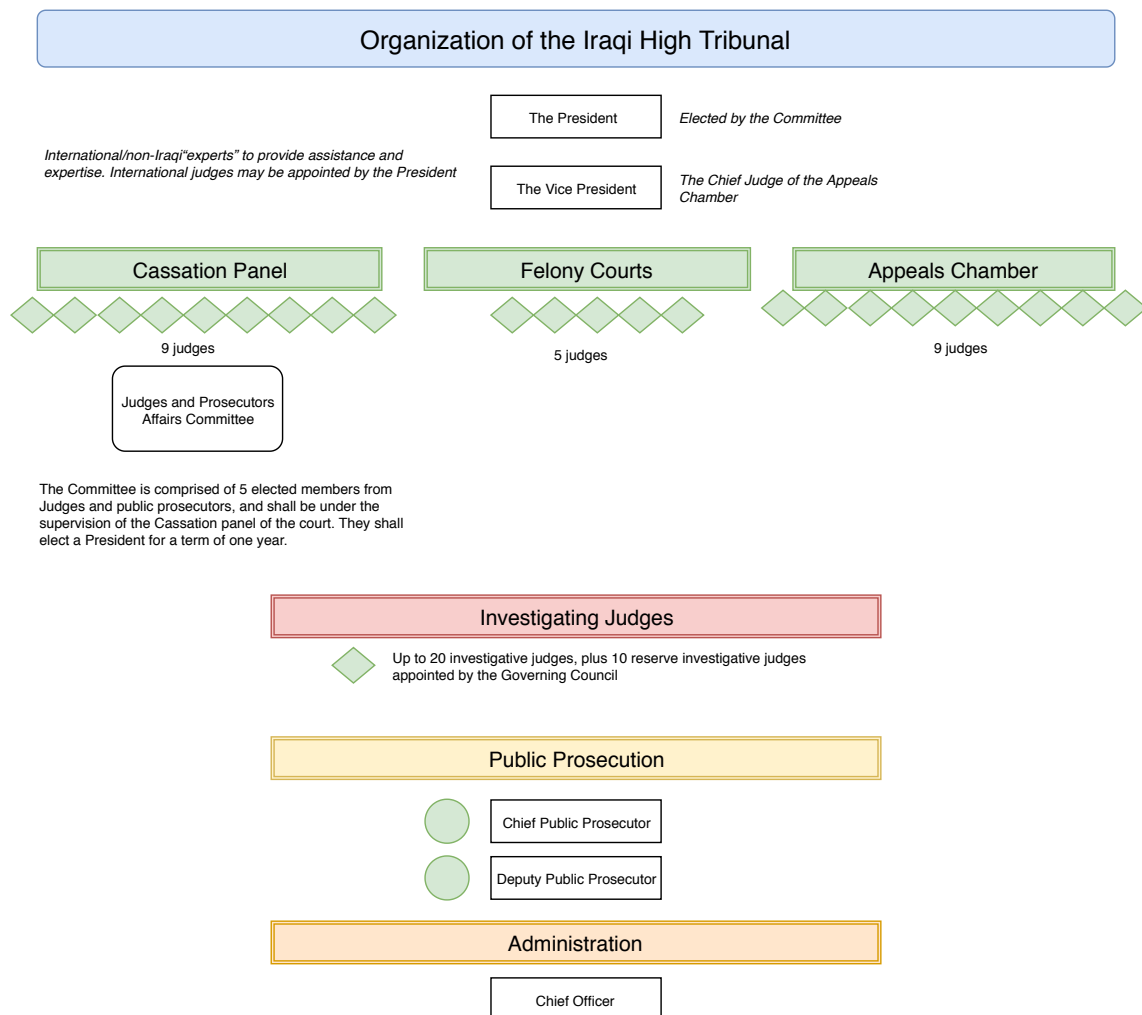
- Personnel shown as green shapes are national staff
- Personnel shown as red shapes are international staff
- Personnel shown as purple shapes are African Union staff
- Diamond shapes are Judges
- Circles are Prosecutors
- Triangles are Registrars



## Organization of the Extraordinary Chambers in the Court of Cambodia

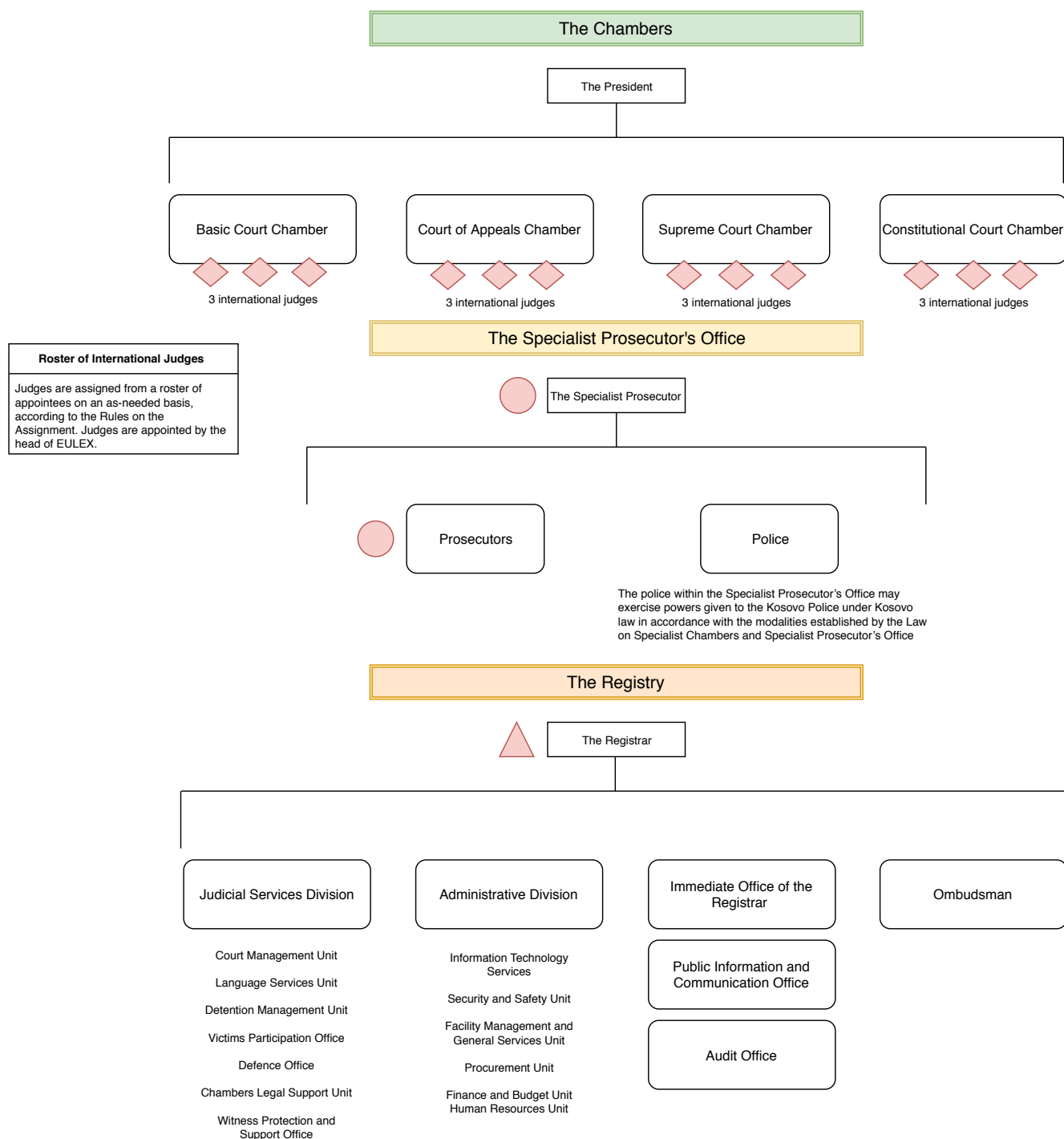
All international judges have been appointed by the Supreme Council of the Magistracy of Cambodia from a list of nominees submitted by the UN Secretary General



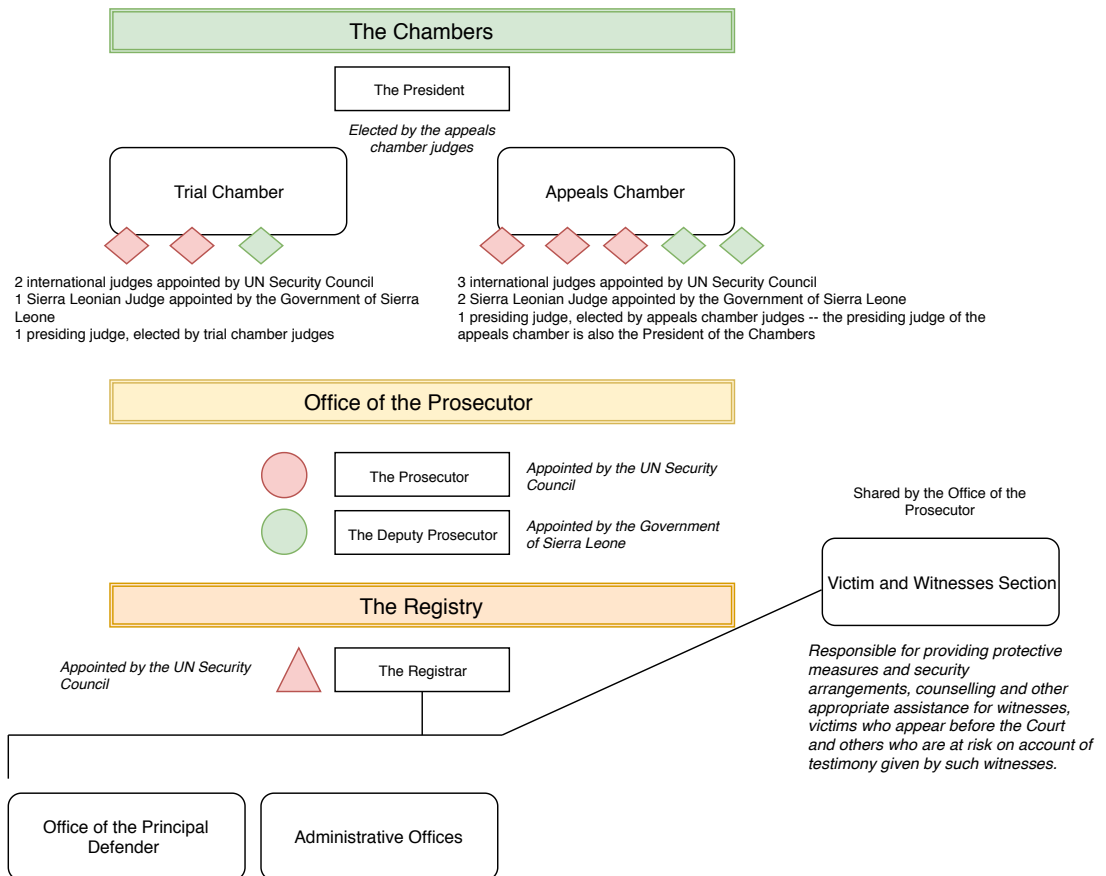




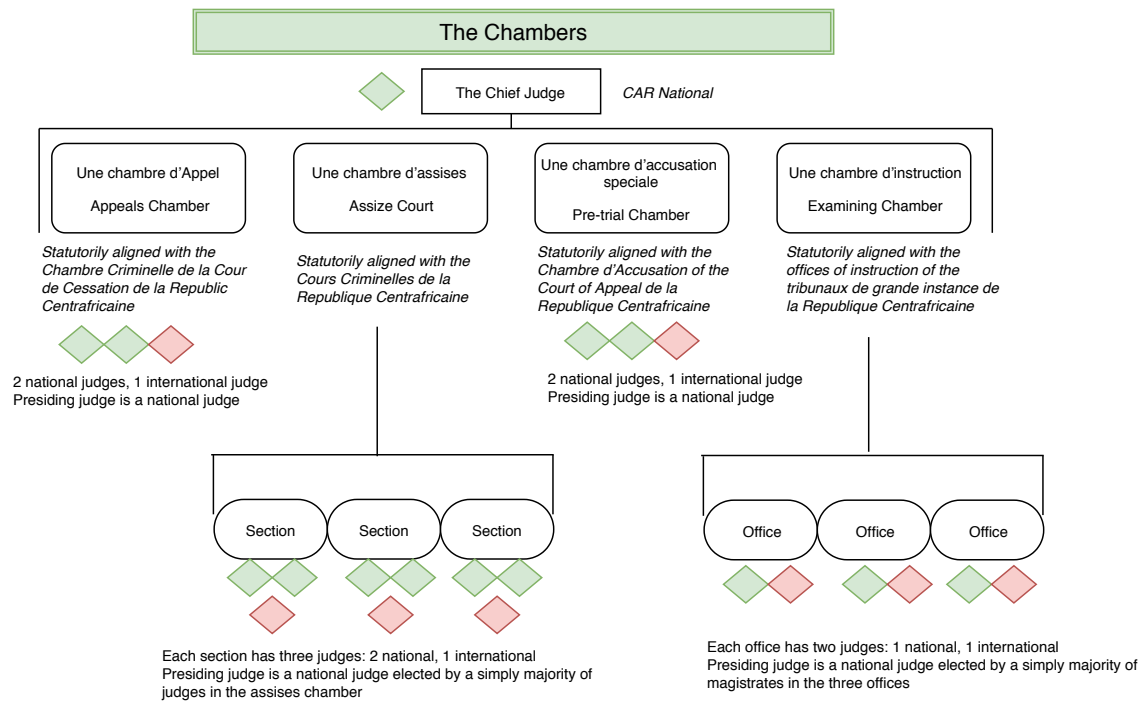
## Organization of the Kosovo Specialist Chambers and the Specialist Prosecutors Office



## Organization of the Special Court for Sierra Leone



## Organization of the Special Criminal Court in the Central African Republic

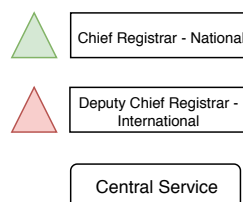


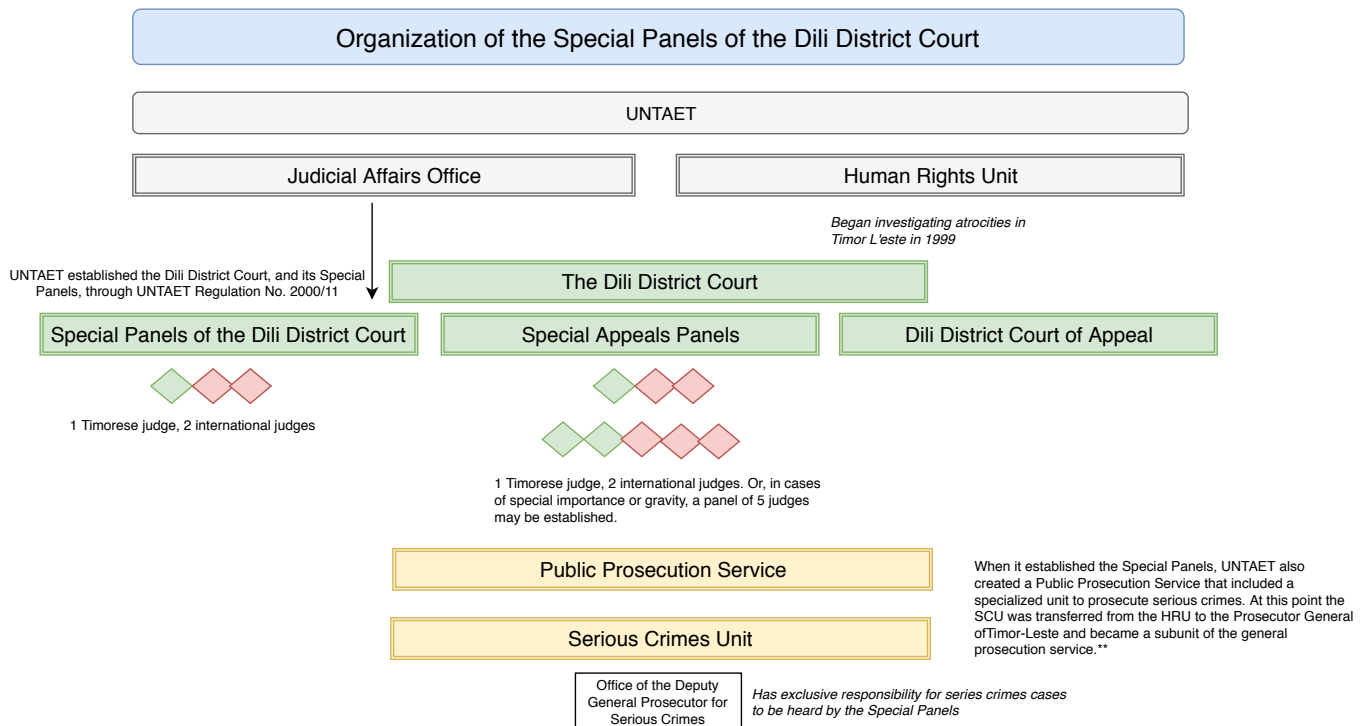
### Office of the Special Prosecutor



Special prosecutors are assisted by at least 2 substitutes.  
Measure are taken to ensure parity between national and  
international substitutes.

### The Registry





The Special Panels and the Serious Crimes Unit developed separately and never functioned as a single institution. The SCU was not simply an organ of the court, such as the Office of the Prosecutor at the Special Court for Sierra Leone, as it basically operated as a quasi-separate institution.\*

\*Reiger, Caitlin & Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect, ICTJ, 2006.

## Organization of the Special Tribunal for Lebanon

### Senior Management Board

Composed of the President, the Prosecutor, the Head of Defence Office and the Registrar. Intended ensure the coordination of the activities of the organs of the Tribunal.

The Senior Management Board shall meet once a month at the initiative of the President.

### The Chambers

The President

Judge elected by the appeals chamber judges

\* Current President is an international judge, but both Lebanese and international judges eligible for election.

Pre-Trial Judge

1 international judge

Trial Chamber

2 international judges 1 national judge. Judges elect the presiding judge

Appeals Chamber

3 international judges 2 national judges. Judges elect the presiding judge

### Office of the Prosecutor

Prosecutor

Appointed by the UN Security Council

Deputy Prosecutor

Appointed by the Lebanese Government

Shared by the Office of the Prosecutor

Victim and Witnesses Unit

Victim and witness protection services

### The Registry

The Registrar

Appointed by the UN Security Council

Outreach Unit

Victims Participation Unit

### The Defense Office

Head of the Defense Office

\* Current Head of Defense Office is an international judge, but both Lebanese and international judges are eligible

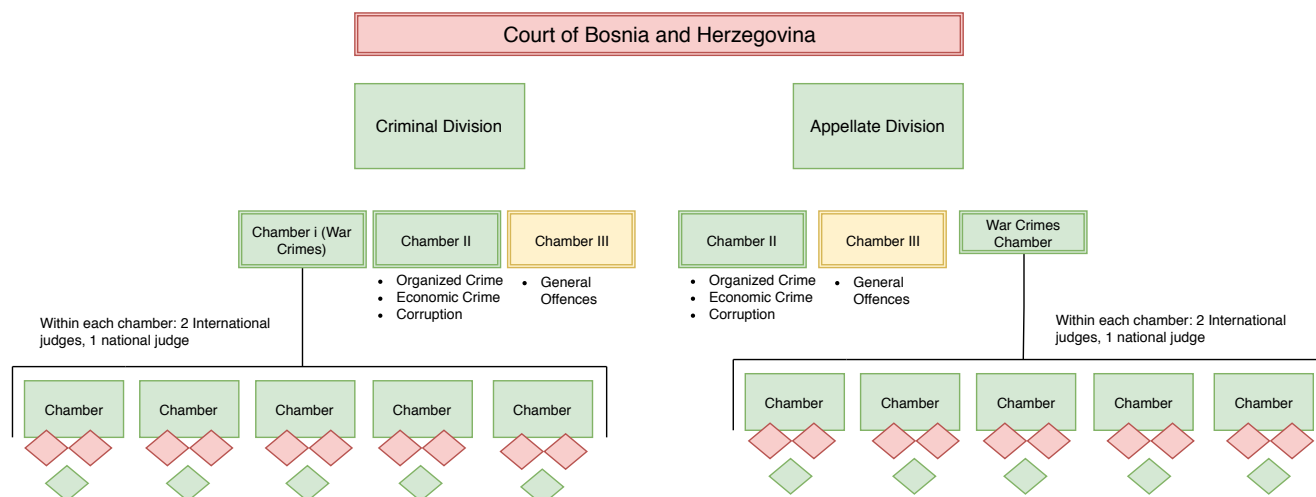
Defense Office Staff

List of Counsel

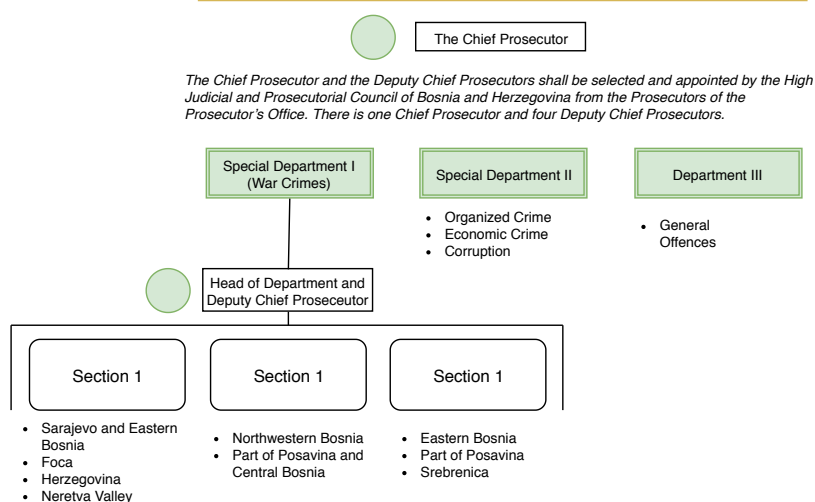
Only counsel admitted to the List are entitled to represent suspects and accused who receive legal aid.

In 2009, the STL used an Admission Panel to interview persons who wish to be added to the List, making them the first international and hybrid court to do so. The Panel determines whether an applicant meets the requirements of Rule 58 and 59 of the Rules of Procedure and Evidence, and thus whether a person is qualified and competent to appear before the Special Tribunal.

## Organization of the War Crimes Chamber in Bosnia and Herzegovina



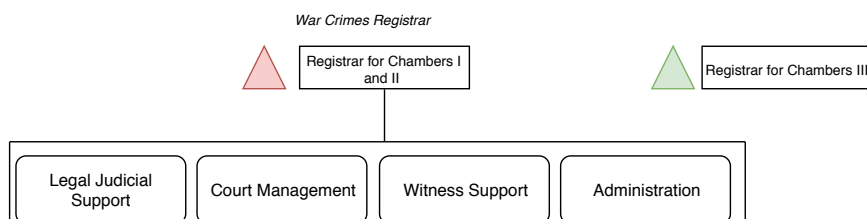
## The Prosecutor's Office of Bosnia and Herzegovina



## The Registry

*Serves the Criminal and Appellate Divisions, and is shared by the Organized Crime Chamber. It is also responsible for administering recruitment and appointment of international judges.*

*During the transitional period, an international Registrar shall be appointed as Head of the Registry for the Special Departments, responsible for the provision of support services to the Special Departments.*



## APPENDIX B: USEFUL RESOURCES

The following is a list of resources that readers might find useful, along with a short summary of each. The list includes those resources listed earlier in the Dakar Guidelines under specific sections, as well as more general items. The Hybrid Justice Project's website contains longer lists of useful resources, including a literature review of hybrid courts, available [here](#), and reviews for each past and present hybrid, available via the Hybrids page. The literature review for each court focuses on analyses of the 'impacts' of these mechanisms. The reviews include resources that focus on internal evaluation, for instance those that analyse the court's legal framework, jurisprudence, and functional effectiveness, and resources that focus on external evaluation, for instance those that analyse the impact of the hybrid on communities and individuals, the country's domestic justice system, and themes such as reconciliation and healing.

Ainley, Kirsten and Mark Kersten, "Hybridization—A Spectrum of Possibilities", in Carlson, Kerstin, Sharon Weill and Kim Thuy Seelinger (eds.), *The Habré Trial and Beyond: New Models of Prosecuting International Crime?* Oxford University Press (2019). This chapter uses the Habré trial as an example of how hybrid courts can become productive spaces for confronting persistent problems in international justice.

Ainley, Kirsten, "State Power, Head of State Immunity and the Crisis at the International Criminal Court", in Alison Brysk and Michael Stohl (eds.) *Contracting Human Rights: Crisis, Accountability, and Opportunity*, Edward Elgar (2018) 179-93. This chapter examines recent attempts to undermine the ICC to establish the extent to which the Court is in fact biased, dysfunctional or powerless. It argues that lack of support from States Parties and UNSC member states is at least in part to blame for the Court's perceived failings.

Ainley, Kirsten, Rebekka Friedman, and Chris Mahony (eds.), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, Palgrave (2015). This book examines the successes and failures of the transitional justice programme in Sierra Leone, and describes the implications of the Sierra Leonean experience for other post-conflict countries, and particularly for impact evaluations of transitional justice.

Ainley, Kirsten, "Transitional Justice in Cambodia: The Coincidence of Power and Principle", in Renee Jeffery (ed.) *Transitional Justice in the Asia-Pacific*, Cambridge University Press (2014). This chapter, in one of the few books about TJ in the Asia-Pacific region, argues that the establishment of the ECCC was less a victory for advocates of transitional justice than it was a reflection of the interests of the Cambodian government. By agreeing to a court to administer justice for past crimes, the government has diverted diplomatic and donor attention away from allegations of corruption and human rights abuses in the present.

Ainley, Kirsten, "Excesses of Responsibility: the Limits of Law and the Possibilities of Politics", *Ethics and International Affairs*, Vol. 25 (2011): 407-431. This article argues that atrocity crimes are often perpetrated by collective actors, and that war crimes trials should therefore be supplemented by non-judicial truth commissions that are mandated to hold to account individual and collective actors rather than simply to provide an account of past violence.

Ainley, Kirsten, "The International Criminal Court on Trial", *Cambridge Review of International Affairs*, Vol. 24 (2011): 309-333. This article assesses the structure and operation of the International Criminal Court. It argues that the ICC has gone some way to ending impunity but is inevitably a political body rather than a purely legal institution, its use as a deterrent is as yet unproven and the expectation that it can bring peace as well as justice is unrealistic.

Ambach, Philipp and Klaus U. Rackwitz, "A Model Of International Judicial Administration? The Evolution Of Managerial Practices at the International Criminal Court", *Law and Contemporary Problems*, Vol. 76 (2014): 119-161. This article is a critical evaluation of the institutional and administrative framework of the International Criminal Court, including its financial management, which contains useful insights for the designers of hybrid courts.

Ambach, Philipp, "Performance Indicators for International(ised) Criminal Courts – Potential for Increase of an Institution's Legacy or 'Just' a Means of Budgetary Control?", *International Criminal Law Review*, Vol. 18 (2018): 426-460. Performance indicators function as a means of budgetary control, and while they are becoming increasingly central to benchmarking performance, whether they are enhancing the court's legitimacy or supporting its broader impacts is unclear.

Baylis, Elena, "Function and Dysfunction in Post-Conflict Justice Networks and Communities", *Vanderbilt Journal of Transnational Law*, Vol. 47 (2014): 625. Drawing on a series of interviews with internationals who have worked in post-conflict justice, this article examines the role of international practitioners in shaping the evolving norms of international justice.

Baylis, Elena, "The Persuasive Authority of Internationalized Criminal Tribunals", *American University International Law Review*, Vol. 32 (2017): 611. This article recommends that future hybrid courts should focus on influencing national courts in post-conflict states through their judgements as a means of increasing impact in those states.

Baylis, Elena, "What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives", *Washington University Global Studies Law Review*, Vol. 14 (2015): 243. This article examines how internationals are developing the information and skills that comprise post-conflict justice knowledge, and assesses whether they are able to implement that knowledge.

Bibas, Stephanos and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", *Duke Law Journal*, Vol. 59 (2010): 637. This article argues that hybrid designers must focus on discovery, speedy trial rules, witness preparation, cross examination, and victims' rights in light of domestic experience.

Brammertz, Baron Serge and Michelle Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press (2016). This book documents the experiences, achievements and challenges of the OTP in prosecuting SGBC at the ICTY. The book argues there is a pressing need for sophisticated strategies to overcome the ongoing obstacles in prosecuting conflict-related sexual violence



crimes, and provides recommendations to improve the effectiveness of the future investigation and prosecution of SGBC.

Brandeis Institute for International Judges, *The Authority of International Courts and Tribunals: Challenges and Prospects*, International Center for Ethics, Justice and Public Life, Brandeis University (2016). This document includes discussions on the role of international judges in building a coherent international legal order, internal aspects of the functioning of international courts and tribunals, and an evaluation of the performance of international courts and tribunals.

Brandeis Institute for International Judges, *International Courts, Local Actors*, International Center for Ethics, Justice and Public Life, Brandeis University (2015). This document includes discussions of the international/local relationship in the pursuit of justice, international courts and local politics, the local impact of international justice, and the role of non-governmental organisations (NGOs) in international justice.

Brandeis Institute for International Judges, *Oslo Recommendations for Enhancing the Legitimacy of International Courts*, Brandeis University (2018). These recommendations were based on discussions with judges around strategies for enhancing their institutions' legitimacy in the eyes of diverse stakeholders.

Brandeis Institute for International Judges, *Toward an International Rule of Law*, International Center for Ethics, Justice and Public Life, Brandeis University (2010). Includes discussions on the fairness and accessibility of international judicial institutions, the impact of international justice, the implications of diversity for an international rule of law, and issues of judicial independence in the international sphere. It also features a keynote address by United Nations Under-Secretary-General for Legal Affairs Patricia O'Brien.

Ciorciari, John D, & Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, University of Michigan Press (2014). This major study of the ECCC examines the politics behind the tribunal's creation, its legal and institutional design, and the frequent political interference that has undermined its ability to deliver justice and to leave a positive legacy.

Clark, Janine Natalya, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Routledge (2014). This book uses the results of extensive fieldwork to analyse the ICTY's impact on reconciliation in Bosnia-Herzegovina, Croatia and Kosovo. Clark argues that reconciliation is not a suitable goal for a criminal court and that such courts must work alongside non-retributive transitional justice processes and mechanisms to realise the full goals of justice.

Cohen, David, "Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future", *Stanford Journal of International Law*, Vol. 1 (2007). This article draws out the lessons learned from the experience of seeking accountability in East Timor and Sierra Leone to assess the prospects and challenges facing the ECCC, which was starting its work as the article was published.

Cohen, David, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Center (2006). This major study of the Serious Crimes process in East Timor critically analyses the performance of the various components of the hybrid, documents its flaws, examines the legacy of the SPDDC and draws lessons for future hybrids.

Dancy, Geoff, and Christopher J Fariss, “Measuring the Impact of Human Rights: Conceptual and Methodological Debates”, *Annual Review of Law & Social Sciences*, Vol. 13 (2017): 273-94. This article examines the critiques of the use of indicators to evaluate human rights work (including human rights trials) and argues that international human rights law and its practice has contributed to social progress.

Dancy, Geoff, “Impact Assessment, not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice”, *The International Journal of Transitional Justice*, Vol. 4 (2010): 355-376. This article argues that a distinction should be made between impact assessment and evaluation in transitional justice. Impact assessment can be carried out using positivist approaches, but evaluation requires that normative ideals are identified that the TJ mechanism can be compared to.

Dittrich, Viviane, “Building a Legacy: Lessons Learnt from the Offices of the Prosecutors of International Criminal Tribunals and Hybrid Courts”, Wayamo Foundation, Conference Report, Nuremberg, Germany (2013). This report, based on a conference held in Nuremberg, explores three main questions: what is the impact of the prosecution of international crimes; what are the lessons learnt on partnerships between domestic and international jurisdictions; and how can functions currently undertaken by international courts be transferred to national systems?

Donlon, Fidelma, “Positive Complementarity in Practice: ICTY Rule 11bis and the Use of the Tribunal’s Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber”, in Carsten Stahn and Mohamed M. El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press (2014). This article describes lessons learned from the process of transferring cases from the ICTY to the BiH WCC—a useful case study for drafters examining case transfer and hybrid legacy questions.

Drumbl, Mark, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press (2012). This book offers a new way to think about child soldiers that rejects narratives that depict them as passive victims, vulnerable and not responsible for their crimes. The book argues in favour of restorative forms of justice to promote rehabilitation and social repair after conflicts in which child soldiers have fought.

European Commission for the Efficiency of Justice, Measuring the Quality of Justice, Council of Europe (2017). Prepared by the CEPEJ-GT-QUAL on the basis of the preparatory work of Mr. Fabio Bartolomeo. This recent report gives extensive advice on methods of evaluation, including court evaluation through client satisfaction.

European Commission for the Efficiency of Justice, Checklist for Promoting the Quality of Justice and the Courts, CEPEJ 11th Plenary Meeting (2008). This document contains around 250 essential questions

concerning all components of a judicial system to assess the quality of judicial services. However, the checklist does not include adequate questions about defence issues, the differential impacts of the court on different groups (for instance women or minority ethnic groups), or victim and witness participation, protection and support.

Fichtelberg, Aaron, *Hybrid Tribunals: A Comparative Examination*, Springer (2015). This book offers one of the only extended comparisons of the law and history of hybrid tribunals. It examines hybrids created in Sierra Leone, Kosovo, Cambodia, East Timor, and Lebanon, in terms of their origins, the legal regimes that they used, their institutional structures, and the challenges that they faced, and offers recommendations for future hybrids.

Grey, Rosemary, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*, Cambridge University Press (2019). This book analyses the ICC's practice in prosecuting SGBC up until mid-2018. It covers a broad range of topics, including wartime sexual violence against men and boys, persecution on the grounds of gender and sexual orientation, and sexual violence against 'child soldiers', as well as documenting the challenges of prosecuting SGBC.

Goldstone, Richard and Christine Van den Wyngaert, "Evaluating the Performance of International Tribunals and Courts", Brandeis Institute for International Judges (2016). This document describes various methods of evaluating the performance of hybrid courts, and weights the pros and cons of these methods.

Guilfoyle, Douglas, "Part I This is Not Fine: The International Criminal Court in Trouble", Blog of the *European Journal of International Law* (2019). This blog post (which includes 2 subsequent parts) provides an overview of a number of the ICC's shortcomings and argues that the institution is in need of reform.

Hicks, Celeste, *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice*, Zed Books (2018). This book tells the story of how Habré was brought to justice. Hicks argues that the conviction of a once untouchable tyrant has profound implications for African justice and for the future of human rights activism more broadly.

Hobbs, Harry, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", *Chicago Journal of International Law*, Vol. 16 (2016): 482-522. This article examines the link between sociological legitimacy and the composition of hybrid courts. It finds that the presence of local judges on international criminal courts can enhance their legitimacy among the local community, and that the appointment of international judges should prioritise individuals from regional states, those of the same legal tradition, and individuals who speak a language of the affected state.

Hobbs, Harry, "Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice", *Texas International Law Journal*, Vol. 49 (2014). This article examines some of the difficulties involved in institutionalising victim participation, and proposes practical solutions for hybrid and international tribunals.

International Bar Association International Criminal Court and International Criminal Law, *Programme Report on the 'Experts' Roundtable on trials in absentia in international criminal justice* (2016). This report summarises some of the underlying goals and justifications for trials in absentia. It discusses the compatibility of trials in absentia and fair trials, and the perspectives of counsel and stakeholders on trials in absentia in international criminal justice.

ICTJ, *Exploring the Legacy of the Special Court for Sierra Leone*, New York, USA (2012). This is a useful multimedia project on the SCSL's legacy, which describes and assesses the various legacies left by the SCSL.

International Criminal Court, *Guidelines Governing the Relations between the Court and Intermediaries* (2014). The ICC's Code of Conduct for Intermediaries offers guidance on working with third party investigative agencies, focusing on gathering and safeguarding evidence, and ensuring secure flows of information.

International Criminal Tribunal for the former Yugoslavia and the United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices*, UNICRI (2017). The manual is intended to contribute to the process of capacity building within international and hybrid justice mechanisms by sharing ICTY experiences and established practices in the prosecution and adjudication of complex cases.

International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007). The International Principles contain practical guidance on the implementation of judicial standards, along with the text of relevant international and regional standards and norms.

Judicial Integrity Group, *Bangalore Principles of Judicial Conduct* (2006). The Bangalore Principles are intended to establish standards for the ethical conduct of judges and to provide a framework for regulating judicial conduct. They have been endorsed by a number of UN agencies as well as by the International Commission of Jurists.

Jo, Hyeran and Beth A Simmons, "Can the International Criminal Court Deter Atrocity?", *International Organization*, Vol. 70 (2016): 443-475. The authors present the first systematic assessment of the deterrent effects of the ICC for both state and nonstate actors. They argue that the ICC can deter some governments and non-state groups that seek legitimacy in the eyes of particular populations.

Jalloh, Charles Chernor, "The African Union, the Security Council, and the International Criminal Court", in Charles Chernor Jalloh and Ilias Bantekas (eds.) *The International Criminal Court and Africa*, Oxford University Press (2017). This chapter critically assesses the political and legal relationship between the African Union, the International Criminal Court and the United Nations Security Council.

Jalloh, Charles Chernor (eds.), *The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law*, Cambridge University Press (2013). The most detailed study of the SCSL to

date, this is a particularly helpful resource for practitioners developing systems to evaluate the impacts of hybrid tribunals, and designing hybrid legacies.

Kaye, David, with Bryan Hance, Manal Hanna, Sunny Hwang, Elisabeth Levin, Grace Lo, Esther Yoo, and Xiangyu Zhang, *The Council and the Court: Improving Security Council Support of the International Criminal Court*, University of California Irvine, (2013). This comprehensive report explores the relationship between the International Criminal Court and the United Nations Security Council.

Kerr, Rachel & Jessica Lincoln, *The Special Court for Sierra Leone: Outreach, Legacy and Impact*, King's College London (2008). This report assesses the impact of the SCSL's outreach work on the dissemination of norms and values relating to the rule of law and rebuilding capacity in the Sierra Leonean judicial system.

Kim, Hunjoon, and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights prosecutions for Transitional Countries", *International Studies Quarterly*, Vol. 54 (2010): 939-963. This article uses new data on domestic and international human rights prosecutions in 100 transitional countries to understand the link between prosecutions for human rights abuses and decreased repression. The authors found a deterrence effect, and also examined mechanisms through which deterrence appears to be more likely.

Kersten, Mark, "As the Pendulum Swings – The Revival of the Hybrid Tribunal." In Christensen, Mikkel Jarle & Ron Levi (eds.) *International Practices of Criminal Justice*, Routledge (2017): 251-273. This book chapter examines the re-emergence of the hybrid tribunal model in international criminal justice and assesses the causes of this development, including the apparent limitations of the ICC.

Kersten, Mark, "A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court", in Jeff Handmaker and Karin Arts (eds.) *Mobilising International Law for 'Global Justice'*, Cambridge University Press (2018). With a focus on the case of Libya, this book chapter critically examines the relationship between the International Criminal Court, the Responsibility to Protect, and the United Nations Security Council.

Kersten, Mark and Angela Mudukuti, "Building Bridges and Reaching Compromise: Constructive engagement in the Africa-ICC relationship", Wayamo Policy Paper (2018), <http://www.wayamo.com/archives/policy-paper-africa-and-the-icc-building-bridges-and-reaching-compromise/>. This policy paper outlines the relationship between the ICC and African communities and states, elaborating numerous critiques of the Court, and offering possible avenues for reform.

Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016). Justice in Conflict examines the effects of ICC efforts in conflict-affected states in terms of building peace and supporting justice processes, and focuses on the experiences of Libya and Uganda.

Kotecha, Birju, ["The ICC's Office of the Prosecutor and the Limits of Performance Indicators"](#), *Journal of International Criminal Justice*, Vol. 15 (2017): 543-565. This article assesses and critiques the use of performance indicators in the OTP at the ICC, and argues that the indicators used do not measure the effectiveness in terms of outcomes within conflict-affected societies. The author provides cautionary tales about the use of indicators to prioritise economy and efficiency of prosecutions, possibly at the expense of broader justice goals.

Labuda, Patryk I., ["'Open for Business': The Special Criminal Court Launches Investigations in the Central African Republic"](#), Blog of the *European Journal of International Law* (2019). This post provides an introduction to the SCC and examines its and the prospects of accountability in CAR.

Lanegran, Kimberly, ["Truth Commissions, Human Rights Trials, and the Politics of Memory"](#), *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 25 (2005): 111-121. This article examines the efforts in East Timor, South Africa, Rwanda, Sierra Leone, and Cambodia to bring justice to individuals and societies that have experienced atrocity crimes.

Linton, Suzannah, ["Cambodia, East Timor And Sierra Leone: Experiments in International Justice"](#), *Criminal Law Forum*, Vol. 12 (2001): 185-246. This article examines the enormous challenges caused by problems in design and implementation at hybrid tribunals, based in large part on a close analysis of the Serious Crimes process in East Timor.

Meisenberg, M. & Stegmiller, I. (eds.) (2016) *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*. The Hague: T.M.C. Asser Press. This book is a comprehensive study of the work and functioning of the ECCC, including an analysis of the jurisprudence of the Chambers. Chapters from leading scholars and practitioners examine the establishment of the ECCC, subject matter crimes, joint criminal enterprise and procedural aspects such as trying frail accused.

Milanovic, Marko, ["Establishing the Fact About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences"](#), *Georgetown Journal of International Law*, Vol. 47 (2016). This article examines why the ICTY was so ineffectual in changing attitudes about the mass atrocities committed in the former Yugoslavia.

National Center for State Courts, [\*The International Framework for Court Excellence\*](#), 2nd Edition, International Consortium on Court Excellence (2013). The International Framework for Court Excellence develops a framework of values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver.

Naughton, Elena, [\*Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals\*](#), International Center for Transitional Justice (2018). This substantial report provides a summary of lessons learned from hybrid tribunals, and offers suggestions to designers of future transitional justice mechanisms.

Obara, Brian, “Outreach in the Hissène Habré trial was an exercise in winning hearts and minds”, Justice Hub (2017). This short article describes the outreach efforts of the EAC, and provides insight into what worked in the specific context of the Habre trial.

Office of the Prosecutor of the ICC, Policy Paper on Sexual and Gender-Based Crimes (2014). This policy paper details the commitments of the ICC OTP to: integrating a gender perspective and analysis into all of its work; being innovative in the investigation and prosecution of SGBC; providing adequate training for staff; adopting a victim-responsive approach in its work; and paying special attention to staff interaction with victims and witnesses.

Office of the Prosecutor of the ICTR, Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, ICTR (2014). This manual draws on the ICTR OTP’s extensive experience in prosecuting sexual violence crimes perpetrated during the 1994 Rwandan Genocide. The manual provides lessons learned and practical tips for other prosecutors tasked with investigating and prosecuting similar crimes. It includes summaries of key recommendations, checklists, sample investigative plans, and outlines of legal elements and modes of liability to help guide future prosecutions.

OHCHR, “Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts”, United Nations, New York, USA, HR/PUB/08/2 (2008). Drawing on the lessons learned from hybrid courts created since 1999, this report suggests policies, processes and techniques on the interrelationship between hybrid courts and domestic courts to enhance the credibility, effectiveness and impact of hybrid courts on the long-term stability and development of domestic justice systems.

Open Society Justice Initiative, Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes, Open Society Foundations (2018). Options for Justice is a comprehensive document outlining the institutional and legal design of internationalised courts. It provides the reader with detailed information on the courts and key questions for the designers of justice mechanisms, and outlines some of the strengths and weaknesses of various design choices.

Open Society Justice Initiative, Political Interference at the Extraordinary Chambers in the Courts of Cambodia, Open Society Institute (2010). This report outlines the commitment to international fair trial standards that are included in the Agreement establishing the ECCC, and the protections built into the Agreement to prevent political interference. The report includes recommendations to safeguard independence at the ECCC and to inform the structure and performance of future international(ised) courts.

Petit, R, D. Akerson, and M. Warren (eds.), Prosecuting Mass Atrocities: A Compendium of Lessons Learned and Suggested Practices from the Offices of the Prosecutors, International Association of Prosecutors (2014). This manual provides practical tips for prosecutors tasked with investigating and prosecuting atrocity crimes. It shares lessons learned at the three principal stages of prosecution: investigation, pre-trial and trial, and appeal and post-appeal. It also includes summaries of key recommendations, checklists, sample investigative plans, and outlines of legal elements and modes of liability to help guide future prosecutions.

Pitcher, Kelly, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings*, T.M.C. Asser Press (2018). This book examines judicial responses at the ICTY, the ICTR and the ICC to violations of procedural standards in the pre-trial phase of criminal proceedings, and offers recommendations for improvement at future international(ised) justice mechanisms.

Quinn, Joanna R., "Cultivating Sympathy and Reconciliation: The Importance of Sympathetic Response in the Uptake of Transitional Justice", in Clark, Tom, Ravi de Costa, Sarah Maddison (eds.) *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage*, Springer, (2016): 119-135. With a focus on the case of Canada and Indigenous peoples, this book chapter argues that, for acknowledgement and reconciliation to occur, "thin sympathy" must be developed between communities affected by atrocity and non-affected populations.

Ribeiro, Sara Ferro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, UK Foreign & Commonwealth Office (2017). The Protocol, produced in collaboration with over 200 gender and sexual violence experts, is designed to help strengthen the evidence base for bringing perpetrators to justice, thus overcoming one of the key barriers to tackling impunity for SGBC.

Schense, Jennifer and Linda Carter (eds.), *Two Steps Forward, One Step Back: The Deterrent Effects of International Criminal Tribunals*, International Nuremberg Principles Academy (2016). This publication seeks to fill a gap in the international justice field's understanding of the deterrent effects of hybrids and other international justice efforts by gathering new information about where deterrent effects have and have not been seen.

Seils, Paul, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, ICTJ, (2016). A handbook for practitioners that examines the relationship between the ICC and national court systems by describing how complementarity has been applied in various countries (Afghanistan, Colombia, Cote d'Ivoire, DRC, Kenya, and Libya). The handbook is focused on relationships between national courts and the ICC, but many of the issues covered are equally relevant to hybrid/ICC relations.

Sellers, Patricia Viseur, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, OHCHR (2008). This report examines the law on SGBC that international tribunals and courts have produced. It identifies progress made and gaps in the IHL and international criminal regimes. The report argues that all international judicial forums must, at a minimum, comply with human rights law and ensure that women and girls have equal and discrimination-free access to justice.

Skaar, Elin, Camila Gianella Malca & Trine Eide, *After Violence: Transitional Justice, Peace, and Democracy*, Routledge (2015). This book examines the effects of transitional justice on the development of peace and democracy, in particular on four cases: post-authoritarian Uruguay and Peru and post-conflict Rwanda and Angola. It identifies specific contextual obstacles and limitations to TJ processes.



Sluiter, Goran, Hakan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappala (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press (2013). This book provides a comprehensive overview of procedural law from international tribunals, and offers recommendations for the development of international criminal procedure in the future.

Squatrino, Theresa, Oran R. Young, and Andreas Follesdal (eds.), *The Performance of International Courts and Tribunals*, Cambridge University Press (2018). An edited collection which evaluates the performance of international justice projects through a comparative analysis of international courts covering the areas of trade, investment, the environment, human rights and criminal law. It offers a range of conclusions on how and why international court performance varies.

Sriram, Chandra Lekha, and Suren Pillay (eds.), *Peace vs. Justice? The Dilemmas of Transitional Justice in Africa*, University of KwaZulu-Natal Press and James Currey (2011). This edited book describes a range of approaches to accountability and peacebuilding in Africa, and explores not only hybrid courts, but also truth commissions and other non-state led initiatives.

Sriram, Chandra, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability*, Routledge (2005). This book examines the phenomenon of “globalising” justice, and its ramifications. It details practices of universal jurisdiction and hybrid justice, arguing that the actual and perceived legitimacy of globalised justice is threatened by its remoteness from the locus of the crimes. The book also details the opportunities for the use of civil penalties, particularly for collective actors such as armed groups or corporations, alongside criminal accountability.

Teitel, Ruti, *Globalizing Transitional Justice: Contemporary Essays*, Oxford (2014). This collection of essays reflect upon contemporary practices and discourses of transitional justice. Teitel focuses on the ways in which transitional justice concepts have found legal expression, especially through human rights law and jurisprudence, and international criminal law. She also examines the difficult choices and trade-offs encountered in the design of transitional justice mechanisms, and the contributions that that can make to political change.

Thoms, Oskar N.T., James Ron & Roland Paris, “State-Level Effects of Transitional Justice: What Do We Know?”, *International Journal of Transitional Justice*, Vol. 4 (2010): 329–354. This article reviews scholarship on TJ impacts, and concludes that that empirical evidence of positive or negative effects is still insufficient to support strong causal claims about the effects of TJ mechanisms. It concludes that more systematic and comparative analysis of TJ efforts is needed in order to move from ‘faith-based’ to ‘fact-based’ discussions of transitional justice impacts.

United Nations, “[Transforming our World: The 2030 Agenda for Sustainable Development](#)” (2015). This document sets out the UN’s Sustainable Development Goals, including Goal 16 on Peace, Justice and Strong Institutions.

United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-IC-

TY), *Manual on International Criminal Defence*, UNICRI (2011). This Manual is a resource for Defence counsel at international(ised) courts, which cover all aspects of the work of the Defence, from developing a Case Theory and Defence Strategy to defence work at the Appeals stage and (where relevant) post-conviction.

UN Office on Drugs and Crime, *Commentary on the Bangalore Principles* (2007). The Commentary provides an authoritative guide to the application of the Bangalore Principles, explaining the drafting and consultation process and the rationale for the values and principles espoused.

United Nations Secretary General, *"Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice"*, United Nations (2010). This Guidance Note sets out the guiding principles and framework for the United Nations' approach to transitional justice processes and mechanisms. It outlines key components of transitional justice, and ways to strengthen TJ activities.

United Nations & World Bank, *Pathways for Peace*, World Bank Publications (2018). This report sets out the United Nations' commitment to and guidelines on preventing conflict. Chapter 5 outlines the potential that transitional justice mechanisms are argued to have to contribute to conflict prevention.

Van Schaak, Beth, *"The Building Blocks of Hybrid Justice"*, *Denver Journal of International Law and Policy*, Vol. 44 (2015-2016):169. This article analyses international, hybrid, and internationalised judicial institutions, focusing on elements of institutional design. It develops a taxonomy of models and a "menu" of elements that can be mixed and matched as new accountability mechanisms are under consideration for historical, current, and emerging atrocity situations.

Vinjamuri, Leslie, *"Deterrence, Democracy, and the Pursuit of International Justice"*, *Ethics and International Affairs* Vol. 24 (2010): 191-211. This article examines some of the empirical claims made about what hybrid courts can achieve, and offers options for adapting justice strategies to enhance effectiveness.

Wayamo Foundation, *"Capacity Building Workshop for the Members of the SCC in the CAR"* (2017), <http://www.wayamo.com/africa-group-for-justice-and-accountability/capacity-building-workshops-for-the-members-of-the-special-criminal-court-in-the-central-african-republic/>. This document describes an example of a capacity building exercise between peer practitioners from two hybrids—the EAC and SCC.

Williams, Sarah, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Hart Publishing (2012). This major comparative study of hybrid tribunals analyses the factors driving the increasing demand for hybrids, determines the legal and jurisdictional bases of hybrid and internationalised tribunals and analyses how these bases affect the operation of the courts. The book examines the future role of hybrids, particularly in light of the operation of the ICC and assesses how hybrids fit into the frameworks of international criminal law and transitional justice.



