THIRD GENERATION OF INTERNATIONAL CRIMINAL JUSTICE:

HYBRID COURTS IN CAMBODIA, EAST TIMOR, AND KOSOVO

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Summary

Hybrid courts represent the most recent type of international criminal courts. According to the United Nations – which typically participate in their creation – hybrid courts are defined as judicial bodies of mixed composition and jurisdiction, comprising both domestic and international components, usually functioning in the country where the crimes happened. Combining three broad methodological approaches customary to examining mechanisms and their practices in transitional justice – legal-doctrinal, normative, and empirical – my thesis examines three cases of hybrid courts, namely those in Cambodia (Extraordinary Chamber in the Courts), East Timor (Serious Crimes Special Panels), and Kosovo (Regulation 64 Panels). Also, it tries to answer whether this type of transitional justice mechanism can contribute to overcoming the constraints of domestic and international criminal justice. Each case is analyzed in four steps: a) background and challenges after atrocity, b) legal basis and organization, c) empirical overview of practices, and finally d) acceptance and legacy. My thesis concludes that despite all the serious problems, difficulties, individual failures, and controversies, establishment of hybrid courts does contribute to overcoming certain constraints regarding selectivity, impunity, and perceived legitimacy. It also warns that the process of bringing the perpetrators to justice in post-conflict areas is long and painful, and often requires more patience and understanding from both domestic and international actors. Therefore, hybrid courts should have more support in terms of political means, funds, witness protection, dissemination of results, as well as complementary mechanisms of transitional justice.

Key words: Hybrid courts, Transitional justice, International criminal justice, Cambodia, East Timor, Kosovo

Table of Contents

List of Abbreviations

AI – Amnesty International

CAVR – Commission for Reception, Truth and Reconciliation in East Timor

CPP – Cambodian People's Party

ECCC – Extraordinary Chambers in the Courts of Cambodia

EU – European Union

EULEX – European Union's Rule of Law Mission in Kosovo

FRETILIN – The Revolutionary Front for an Independent East Timor

ICC – International Criminal Court

ICTJ – International Center for Transitional Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for Yugoslavia

IJP – International Judges and Prosecutors Program in Kosovo

ISF – International Stabilization Force in East Timor

JSMP – Judicial System Monitor Program in East Timor

KLA – Kosovo Liberation Army

KPP-HAM – Commission of Inquiry on Human Rights Violations in East Timor

NATO – North Atlantic Treaty Organization

OSCE – Organization for Security and Co-operation in Europe

R-64 – “Regulation 64” Panels in Kosovo

RUF – Revolutionary United Front in Sierra Leone

SCIT – Serious crimes Investigation team in East Timor

SCSL – Special Court for Sierra Leone

SCSP – Serious Crimes Special Panels in East Timor

SCU – Special Crimes Unit (Prosecutors office in East Timor)

SRSG – Special Representative of the Security-General in Kosovo

STL – Special Tribunal for Lebanon

TNI – Indonesian Army (*Tentara Nasional Indonesia*)

UN – United Nations

UNAKRT – United Nations Assistance to the Khmer Rouge Trials

UNDP – United Nations Development Program

UNMIK – United Nations Interim Administration Mission in Kosovo

UNMISET – United Nations Mission of Support in East Timor

UNTAC – United Nations Transitional Authority in Cambodia

UNTAET - United Nations Transitional Administration in East Timor

WCC – War Crimes Chamber in Bosnia and Herzegovina

INTRODUCTION

Hybrid courts are the most recent type of international criminal courts. Some refer to them as "mixed" or "internationalized" tribunals. Typically they represent a mixture of the national and international components. The main idea is to suggest a novel approach which is to consider, and possibly overcome, concerns about solely international justice on one side, and purely domestic on the other. Here the "era" of hybrid courts is considered as *The Third Generation* of international criminal justice; the first being trials for atrocities committed during the World War II (Nuremberg and Tokyo), and the second one comprising the UN's *ad hoc* tribunals for mass killings in the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the International Criminal Court (ICC) based on the Rome Statute.

Given a relative novelty of the institution of hybrid courts, the concept and practice are still controversial. Furthermore, it is not always entirely clear which empirical cases exactly fit the *model* of hybrid courts. Since 2000, these judicial institutions have been created in Kosovo, East Timor, Bosnia, Sierra Leone, Lebanon, and Cambodia, however some other institutions might be included in this group too, and such are the tribunals in Iraq and Ethiopia. My thesis examines three cases of hybrid courts, namely those in Cambodia (Extraordinary Chamber in the Courts), East Timor (Serious Crimes Panels), and Kosovo (Regulation 64 Panels). Also, it tries to answer whether this type of transitional justice mechanism can contribute to overcoming the constraints of domestic and international criminal justice.

Evidently coping with the past is never easy: as Alexandra Barahona de Brito pointed out "one of the most important political and ethical questions that societies face during a transition from authoritarian or totalitarian to democratic rule is how to deal with legacies of repression"[1]. At this moment, there are several dozens of countries throughout the world practicing some form of transitional justice, seeking for truth and/or justice for victims of mass atrocities; hoping to achieve peace, democratic stability and reconciliation, and applying different mechanisms to achieve these goals. It has been argued that, although relatively new, and despite the challenges that they have faced, "the hybrid tribunals are now an established part of transitional justice"[2]. While many societies seek for the right model of dealing with the past, my thesis contributes to an ongoing debate on what is the role of hybrid courts in the transitional process.

The beginnings of modern understanding of transitional justice (arguably) could be traced back to World War I, yet the concept becomes understood as both international and extraordinary only after 1945,[3] when International Military Tribunals in Nuremberg and Tokyo were conceived in order to deal with crimes committed by Nazi and Japanese leadership. The concept of transitional justice and term itself was not known back then. However, when looking from the contemporary perspective, we can identify mechanisms and processes that we today consider as features of transitional justice. These tribunals in Nuremberg and Tokyo fundamentally changed the system of criminal accountability by ending the (national) state's exclusive responsibility to bring out justice and focusing on individual responsibility for certain grave crimes. Nuremberg legacy helped defining war

[1] De Brito, Alexandra Barahona, Carmen Gonzalez-Enriquez, and Paloma Aguilar, introduction by editors to *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press 2001), pp. 1

[2] Hermannn, Johanna, "Hybrid Tribunals" in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013), pp. 41

[3] Teitel, Ruti "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16 (2004)

crimes and crimes against humanity, as well as the principle of command responsibility, and the rejection of the validity of a defense of superior orders[4]. Moreover, both Geneva Conventions and Genocide Convention from 1948 insist on punishment and prevention as twin objectives: they require punishment of grave breaches as a means to discourage them, and pledge to criminalize not only genocide and various genocidal acts, but also conspiracy, instigation and incitement. These instruments, however, do "lack any serious mechanism of implementation of such norms, leaving it largely to State parties to organize them within their own legal systems"[5].

Indeed, the later mechanisms of transitional justice worldwide were typically launched in national settings. These mechanisms came in several waves comprising trials and purges in post-dictatorship Greece and Portugal, followed by the end of a military rule in Latin America, and finally post-1989 transitions in Eastern Europe, Africa, and Central America. It was not until the last decade of 20th century when the international approach to criminal justice, initiated in Nuremberg, recurred with foundations of the *ad hoc* tribunals for mass crimes in former Yugoslavia (ICTY) and Rwanda (ICTR) in 1994. Some years later, following decades of failed attempts, the permanent International Criminal Court was created (based on 1998 Rome statute), and it operates in The Hague from 2002. Although its jurisdiction is usually limited in the territory or by the nationals of the states (parties of the treaty), the UN Security Council can request to investigate crimes in committed at another locations, such was the case of the Darfur region in Sudan[6]. Also, the ICC was conceived as a court of last resort, in accordance with the principle of complementarity, which means that it

[4] Aptel, Cecile, "International tribunals", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

[5] Mendez, Juan, "*In Defense of Transitional Justice"*, in James McAdams (ed.) *Transitional Justice and the Rule of Law in New Democracies,* (Notre Dame: University of Notre Dame Press, 1997), ch. 4

[6] Aptel, "International tribunals", 2013

can only exercise its jurisdiction where the state party of which the accused is a national, is unable or unwilling to prosecute.

These tribunals – institutions of the second generation of international criminal justice – however, had been frequently criticized for number of reasons, among others for high financial costs and operating too remote from the communities in question, therefore missing a real social impact. However, despite all the problems and controversies, there is a broad agreement that the establishment of international courts has been a major breakthrough in both international law and transitional justice.[7]

Likewise the newest generation of international criminal justice, represented by hybrid ("mixed", or "internationalized") courts has been welcomed with great expectations: they are presumed to combine the strengths of the international courts with the benefits of local prosecutions[8]. While strengths and weaknesses of domestic and international trials differ from each other, supporters of the hybrid courts argue that they share the following limitations: a) legitimacy deficit, b) weak capacity building, and c) weak norm penetration.[9] The big promise of hybrid courts is to overcome these concerns. Today when some societies examine the option of establishing their own hybrid court as a mechanism of transitional justice (for

[7] See:
Teitel, Ruti *Transitional Justice,* (Oxford: Oxford University Press 2000)
Paige, Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice", *Human Rights Quarterly*, Vol. 31, No. 2, (2009)
Mendez, Juan, *Fifteen Years of International Justice: Assessing Accomplishments, Failures and Missed Opportunities - Lessons Learned* (2008)
Kerr, Rachel and Eirin Mobekk, *Peace and Justice. Seeking Accountability after War*, Ch. 3 (Cambridge: Polity Press, 2007)
O'Callaghan Declan, "Is the International Criminal Court the Way Ahead?", *International Criminal Law Review*, 8 (2008)

[8] Nouwen, Sarah M.H. "Hybrid courts: The hybrid category of a new type of international crimes courts", *Utrecht Law Review*, Volume 2, Issue 2 (2006)

[9] Dickinson, Laura A. "The Promise of Hybrid Courts", *The American Journal of International Law*, Vol. 97, (2003) pp. 295-310

instance, Uganda, Burundi, Sudan, and Kenya), the lessons learned from the experiences of Cambodia, East Timor, and Kosovo might be beneficial for the future.

My thesis is structured as it follows: Chapter I provide an overview of methodological approaches and the research methods used in the research. This includes operationalization and explanation of the main strategies, building blocks, and justification of the case selection. This is followed by Chapter II that explores the concept of hybrid courts and their role in contemporary international criminal justice. This chapter deals with issues of criminal justice and its centrality, and tries to identify reasons for establishing these hybrid tribunals in the context of (existing) dichotomy between domestic and international norms and actors in transitional justice; finally, it analyzes the defining characteristics of the hybrid courts. Courts in Cambodia, East Timor, and Kosovo are further examined in Chapter III. Each case is analyzed in four steps: a) background and challenges after atrocity, b) legal basis and organization, c) empirical overview of practices, and finally d) acceptance and legacy of these hybrid courts. Lastly, chapter IV compares the lessons from case studies and concludes my thesis.

I METHODOLOGY

Scientific research in the area of transitional justice very often supposes a certain methodological eclecticism. According to Oxford's *Transitional Justice Methods Manual,* human rights practices, in many cases, have driven the development of scholarship: these convergences caused (often unstated) tensions between pursuing researches as a device of human-rights advocacy and pursuing them for academic goals.[10] My thesis tries to combine three broad methodological approaches customary to examining institutional mechanisms and their practices within the scopes of transitional justice: legal-doctrinal, normative, and empirical. The first requires a review of the existing law in order to determine its relevance to a particular issue. The second one is value-driven and requires a certain analysis of the principles underpinning the law, examining whether these principles can be morally justified.[11] Following the third approach my thesis studies workings of hybrid courts in their social and political settings, explicitly in Cambodia, East Timor, and Kosovo. This is due to a fact that judicial institutions as mechanism of transitional justice are greatly contextualized and their success or failure does depend of a certain communal acceptance.

[10]Swisspeace and Oxford Transitional Justice Research, *Transitional Justice Methods Manual,* 2013
[11] Ibid

1.1 Research Question

In spite of its limitations, criminal justice remains the principal mechanism of transitional justice. Main arguments for criminal justice usually can be summarized in three major concepts: retribution, deterrence and social solidarity. Evidently, having in mind the strict responsibilities of the institution of court, in this research I limit myself to examining solely the criminal element of the transitional, post-conflict process. According to Mendez, criminal prosecution is an "essential ingredient of any preventive effort"; however it should never be understood as the solitary response by the international community[12]. Thus, at this point I acknowledge that, in order to achieve the goals of transitional justice, a comprehensive, holistic approach to the problem is crucial. This includes a variety of truth seeking and victim-oriented mechanisms, such as truth and reconciliation commissions, reparations, restitutions, lustration, or commemoration initiatives. However, the scope of my research is restricted to the hybrid courts as institutions of criminal justice.

Most of the literature provides a set of promises, or normative defenses of the hybridity.[13] Nevertheless, considerably less attention is devoted to the institutional performance of hybrid courts and their impacts in respective communities. The attempts to locate the empirical difficulties in the everyday work of the hybrid tribunals (as well as the controversies that surround them) into the existing theoretical framework are fairly rare. Also, there is a tension between domestic and international actors and norms (especially where accountability is

[12] Mendez, "In Defense ", 2008, ch. 4

[13] See:
Megret, Frederic *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice* (2005)
Dickenson, "Promices", 2009
Johana Hermannn, "Hybrid Tribunals", 2013

sought for a current or former political and military elites), as well as a certain indistinctness about the degree to which transnational processes succeeded to erode this dichotomy.[14]

Hence, the main question of the research is as follows: how do hybrid courts contribute to overcoming constraints that criminal justice mechanisms in transitional (i.e. post-conflict) societies may face? In other words, the question is what are the lessons learned in Cambodia, East Timor, and Kosovo. Are the hybrid courts a) "the real deal", a blueprint that shows in which direction the international criminal justice ought to go, b) rather a failure, an expensive experiment which fail to fulfill the great expectations, or c) an additional instrument of transitional justice, complementary to the existing domestic and international mechanisms? Or, maybe, these courts are so heterogeneous (in terms of their historical and political backgrounds, legal basis, orders and personalities) that it is impossible to draw a common conclusion, and therefore an analysis of each particular case is needed.

1.2 Operationalization

My main focus is on the hybrid courts as an institution of transitional justice and on an assessment of their contribution to achieving the goals of transitional justice. Therefore, firstly, I build upon the present scientific work on the mechanisms of dealing with the past and offer a theoretical contribution regarding the role of hybrid courts in the contemporary transitional justice. Secondly, I study the cases of tribunals in Cambodia, East Timor, and Kosovo by analyzing information within the scopes of the existing theoretical framework, in order to answer the question how do hybrid courts contribute overcoming constraints that criminal justice mechanisms in post-conflict society may face. Special attention of the

[14] Sriram, Chandra Lekha, "Zone of Impunity", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

research is on the context in which the courts exist, their institutional configurations, empirical results and perceived legitimacy.

According to Csilla Kiss, programs seeking to handle the repressive past can be judged by the following elements: a) their declared goals, b) the expectations of the general public, and/or c) some ideal standards of justice, truth and reconciliation[15]. These transitional justice programs can fail at the stage of formulation, stage of adoption, or stage of implementation.[16] Having this in mind, the issues addressed during my research covered the following eight building blocks:

1. Criminal justice as a mechanism of transitional justice; its centrality, potentials, and constraints
2. International *versus* domestic justice: the positive and the negative sides of the international involvement and the local ownership respectively
3. Reasons for establishing the hybrid courts
4. Defining characteristic of hybrid courts: legal regimes, procedures, personnel
5. Main characteristics of hybrid courts in Cambodia, East Timor, and Kosovo; their institutional designs and mandates
6. The way these hybrid courts address some common issues of transitional criminal justice, such are impunity, selectivity, or perceived legitimacy
7. The common difficulties and controversies in their work (criticisms, delays, stops in work, tensions, negotiations, judge resignations etc.)
8. Identifying the individual criminal cases that may be used as illustrations

[15] Kiss, Csilla, "Causes of Failure in Transitional justice", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)
[16] Ibid

As a final point, my thesis acknowledges the existence of three possible approaches to the legitimacy of hybrid courts: normative, legal, and empirical[17]. I will use the empirical (sociological) approach, which understands legitimacy in terms of support and acceptance. This is in accordance with Webber's sociological conception of legitimacy which states that those who are governed, including the organs of the state, acquiesce to its terms.[18] The logic behind such a choice of the perspective is that the reasons to create a hybrid court are exactly to increase the acceptance of international justice and help gradual reconciliation in the local community; the reasons for establishing the hybrid courts are discussed in detail in Chapter III of my thesis.

1.3 Cases and Data

My Thesis examines and compares the three cases of hybrid courts, namely those in Cambodia (ECCC), East Timor (SCSP), and Kosovo (R-64). These cases are chosen following the logic of The Most Different Systems Design which consists in comparing very different cases, all of which however have in common the same dependent variable, so that any other circumstance which is present in all the cases can be regarded as the independent variable[19]. East Timor, Kosovo, and Cambodia are chosen accordingly: these are countries with different historical and cultural backgrounds, different legal and political systems, and also societies that suffered different types of conflicts.

[17] Stensrud, Ellen Emillie, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leona and Cambodia", *Journal of Peace Research*, Vol. 46, No. 1 (2009) pp. 5-15

[18] Webber Max, *Economy and Society,* (University of California Press 1978)

[19] Anckar, Carsten, "On the Applicability of the Most Similar Systems Design and the Most Different Systems Design in Comparative Research", *International Journal of Social Research Methodology* 11.5 (2008), pp. 389-401

Cambodia presents the case of atrocities committed by the regime (Khmer Rouge, 1975-1979) against its own population. The regime is sometimes being labeled as “Marxist” or “Maoist”, yet the truth is that this sort of monstrous collective experiment have never been conducted anywhere else in the world. East Timor, on the other hand, is a former Portuguese colony invaded and occupied by Indonesia in 1975. Timorese struggle for independence culminated with referendum in 1999 after which in the “Dili Massacre” thousands of lives have lost due to the brutal reaction of Indonesian militias, supported by the army. Lastly, Kosovo is a clear-cut case with an ethnic dimension. It was never occupied in classical sense such is the case of East Timor (until 1999 Kosovo had been Serbian/Yugoslavian province), nonetheless the Albanian community had been systematically excluded from the society; and this exclusion in 1990’s turned into an obvious state repression, open war, and finally international military intervention, by NATO in 1999. More detailed historical and political backgrounds to the establishment of the courts in East Timor, Kosovo, and Cambodia are provided in chapter IV of my thesis.

Eventually, in each of these three countries hybrid courts were established, yet many questions regarding their institutional configurations and day-to-day work are still unanswered. In order to collect empirical materials which are to contribute explaining these concerns, multiple sources of data are used:

- Scientific publications (this also includes population surveys, ethnographical research, personal testimonies of individuals involved in the creation or work of hybrid courts etc.)
- Official documents, statements and notifications issued by the hybrid courts, including documentation on specific cases (trials and sentences)

- Documents and report issued by the United Nations (since their mixed composition, the UN is typically involved in the creation and work of the hybrid courts)
- Data on other institutions of transitional justice in the analyzed countries, such as the ICTY in the case of Kosovo, or the truth commissions in the case of East Timor (truth commissions are potentially valuable source of data since the comprehensiveness of their work and their general role to establish the causes and patterns of mass killings and not to deal with individual cases; therefore they can provide information on the context in which hybrid courts exist)
- Reports on trials issued by International human rights institutions and media

II CONCEPTUALIZING HYBRID COURTS

According to the United Nations, hybrid courts are defined as courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.[20] In general – though not in each and every case – they have a specific mandate to prosecute crimes from a particular conflict or over a particular period of time.[21] This chapter explores the concept of hybrid courts. It firstly locates the criminal justice within a transitional process; secondly**,** it scrutinize**s** the potentials of international and domestic approaches to criminal justice; thirdly, it identifies the reasons why these "mixed" bodies, as an institutional solution, appear in a certain society; and finally provides an overview of the defining characteristics of hybrid courts as a transitional justice mechanism.

2.1 The Centrality of Criminal Justice

"How can I go back there and have any peace as long as the people who killed all of my family are still free", said one Khmer man at a conference on his home country, at Berkeley University in 2012. The first impulse among individuals in many of the post-conflict societies

[20]United Nations, *Rule-Of-Law Tools For Post-Conflict States: Maximizing The Legacy Of Hybrid Courts* (2008)

[21] Hermann, "hybrid Tribunals", 2013

is exactly to punish the perpetrators: as Diane Orentlicher pointed out, "This is not to say that all victims want the same thing, but it is to say that many who have endured unspeakable crimes have a powerful need for justice".[22] Some might call it revenge, but punishment indeed "dominates our understanding of transitional justice"[23]. In some cases this is inevitably followed by the characteristic *binary dilemmas* in transitional societies, such as "peace or justice" and "peace or truth".[24] Nevertheless, once a society (most commonly the international community as well) makes this hard decision and agrees to start implementing criminal justice, it inevitably opens the *Pandora's Box* of the new concerns; legal, political, and normative ones.

Criminal justice as the harshest form of law is seen to be exemplary when it comes to accountability and rule of law. Ruti Teitel says that "its impact far transcendent its incidence".[25] Traditionally, criminal justice refers to the system in charge of coping with acts clearly legally defined as crimes and their perpetrators: "After an investigation by competent authorities and a hearing in a criminal court, the suspect's individual criminal responsibility is determined and guilt or innocence established".[26] Ideally, transitional justice would rest on the "institutionalization of trials and criminal sanctions, especially for those considered to be most responsible for massive human rights justice violations".[27] So criminal justice,

[22] Orentlicher, Diane "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *The International Journal of Transitional Justice*, Vol. 1, No. 1 (2007), pp. 22

[23] Teitel, *Transitional Justice*, 2000, pp. 27

[24] See:

Zalaquett, Jose "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints", In Neil Kritz (ed.), *Transitional Justice. Volume I: General Considerations*, (Washington: US Institute of Peace 1995)

Juan Mendez, "In Defense", 1997

[25] Teitel, *Transitional Justice*, 2000, pp. 27

[26] Ambos, Kai, "Criminal Justice", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013) pp. 283

[27] Alana Tiemessen, "Judicial and Nonjudical Methods in Transitional Justice", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013) 2013, pp. 211

especially at the international or "internationalized" level, aims for those considered to be *most responsible* for atrocities, which usually involves individuals in position of political or military authority; those who were, at one point in time, in a capacity to organize and to conduct mass violence. Indicative of such a prosecutorial strategy, among others, are the iconic trials of Theoneste Bagosora in ICTR, Slobodan Milosevic and Ratko Mladić in ICTY, indictment of Omar al-Bashir at ICC, and finally the case of Charles Taylor in the hybrid tribunal in Sierra Leone[28].

On the other hand, non-judicial methods of transitional justice most often imply national truth and reconciliation commissions (as a "middle way between vengeance and forgiveness"[29]), but also reparations, restitutions, lustration, commemoration initiatives, and variety of different tools at the community level. Out-of-court mechanisms of transitional justice are indeed sometimes seen as alternatives to criminal justice. A short summary of the most noticeable benefits of judicial and nonjudical methods in transitional justice are provided in the Table 1 below.

Table 1: Summary of the Most Noticeable Benefits of Judicial and Nonjudical Methods in Transitional Justice (Source: Tiemessen, 2013)

Judicial methods	Nonjudical methods
➢ Appropriateness *vis-a-vis* gravity of the crime ➢ Perpetrator-centered ➢ Deterrent value ➢ Contribution to the reestablishment to the rule of law ➢ Support of making historical records of mass atrocities	➢ Credibility (victims often demand an approach that provides a truth-telling forum) ➢ Victim-centered ➢ Cultural appropriateness ➢ Capacity to address broader range of acts and agents ➢ Potential to contribute to reintegration and reconciliation

[28] Ibid

[29] Minow, Martha, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998)

As stated earlier, my thesis recognizes the need for a more holistic attitude towards transitional justice, but it also points out to a palpable centrality of criminal justice in transition, and particularly focuses on the role of the hybrid tribunals in the process. Orentlicher, for instance, defends the broad trend of supporting criminal accountability for those principally responsible for mass crimes, in the form of three major empirical findings found in a variety of post-conflict societies: a) victims' thirst for justice in the form of prosecutions, across diverse cultures, b) the work of courts at universal level and states' increased resort to universal jurisdiction have had impact on the countries where violence actually occurred, simultaneously breaking some earlier barriers to accountability, and c) even societies that are at some point of time unable to build cases in the initial phases of their democratic transition, might gain such capacity with the passage of time (e.g. Argentina, Chile, Cambodia).[30]

Moreover, one could argue that the role of criminal justice in transitional period goes beyond its importance in "ordinary" times. According to Teitel, sanctions play a significant and complex role in political transformation; they are not solely an instrument of stability, but also a tool that is potentially to bring out a certain social *change*. Thus transitional criminal justice raises deep questions connected to the rule of law in a period of political flux: most noticeably how to bring together desired normative change and stay loyal to conventional legality".[31] In this view, punishment in transitional justice should not be considered as a largely *retributive* concept, but rather a *transformative* one; it is about transforming social relations, and the role of law from the corrupt instrument into the basis of democracy and rights. The rule of law in a transitional society is carried out through extraordinary conditions (circumstances of radical political change). Therefore, a punishment addresses a broader (political) community; it

[30] Orentlicher, "Settling Accounts", 2007
[31] Teitel, *Transitional Justice*, 2000, pp. 66

prosecutes the politics, constituting a "critical response to illiberal rule through the criminal law".[32]As a final point regarding the criminal justice in transition, the dilemma which sets up here is *who* is to prosecute and judge in cases of mass atrocities. This dilemma is empirical because of the question of capacity, and it is legal to the extent that a certain type of crime is covered by both international and domestic law. No doubt, the question *who* is to prosecute and judge a matter of tension between local (national) and universal (international) justice, their formal institutions, norms, and practices.

2.2. Between the Local and the Universal

The evolution of the transitional justice discourse in the Post-Cold war period highlighted a complex interaction between the dimensions of the universal and the local.[33] Those who are in favor of hybrid courts claim that these institutions "bring together the best of domestic and international justice".[34] But where lays the tension? Crimes against humanity are definitely being brought to justice, as it has been stated above, in a manner of a "critical response to illiberal rule through the criminal law"[35]. Intuitively, humanity is something that is indeed universal (even cosmopolitan), and surely not nationally determined or constrained. Nevertheless, it still seems that the tribunals of the **s**econd generation of international criminal justice (ICTY, ICTR, and ICC) missed to throw a final punch and truly bring out a certain social change, where the room for atrocities would be substantially reduced. In addition, some think that a noteworthy part of this discussion is embedded within wider contemplations on

[32] Ibid, pp. 67
[33] Teitel, "Genealogy", 2004
[34] Hermannn, "Hybrid tribunals", 2013
[35] Teitel, *Transitional Justice*, 2000, pp. 67

international relations and human rights, regarding the influence of universal values and regulations on domestic behavior.[36]

The question is whether these two – seemingly conflicting – approaches could be possibly reconciled. Orentlicher admits that there is an inherent tension between the strong case in favor of international legal norms (especially when it comes to fighting impunity) on one side, and a pivotal importance of promoting broad participation of victims and other citizens in the process of creating and bringing out the mechanisms of transitional justice. Being a strong supporter of "a strong international duty to prosecute past abuses"[37], Orentlicher still insists "on the importance of local agency in fashioning and implementing policies of justice".[38] Apparently, there is a wide-spread support for a combination of domestic and international criminal justice:

1. Even those highly sympathetic to a domestic ownership of legal confrontation with the abuses of the previous regime, acknowledge that national governments certainly have to comply with their international legal obligations
2. Addressing the concern whether international community should pressure fragile democracies to engage in some kind of a transitional justice, consensus is that successor administrations – ideally – should undertake at least some prosecutions (following Zalaquett's account of seeking for *the whole truth, and as much justice as possible*)[39]

In this view, governments should be called upon to press charges against those considered to be responsible for grave violations of human rights, yet not to a point at which they could

[36] Sriram, "Zone of Impunity", 2013
[37] Orentlicher, "Settling Accounts", 2007, pp. 11
[38] Ibid, pp. 21
[39] Ibid, pp. 12

jeopardize their own existence and the process of democratic transition as a whole[40]. These concerns brings the story back to Dickenson's identification of the three dimensions to which hybrid courts offer (partial) solutions: a) legitimacy, b) capacity building, and c) norm penetration.[41]

Firstly, the legitimacy of domestic courts is often highly questionable: the legal systems typically suffered during the years of conflict and the judicial system is damaged, if not non-existent. Moreover, the judges and prosecutors are sometimes "inherited" from the previous (criminal) regimes, and they might be the very people who once already failed to prosecute those responsible for wrongdoings. On the other hand, the examples of ICTY and ICTR show that it is not easy to establish a broad acceptance for the international courts. Local communities see these courts as something *far away from them*, as an image of the *victors' justice* and tend to claim that they exist only to prosecute one group. Simply put, those who share group identity with perpetrators often see international prosecutions as being aimed against the whole group. On the other hand, members of the victimized community will tend to see the efforts of the international courts as insufficient. Secondly, when it comes to capacity building issues, it is hard to deny that the states involved in some form of transitional (criminal) justice at the first place do seek for international support and, do not have a fully equipped and potent justice system to start with, at least not in the initial phase of transition.[42] Besides, bypassing the local population and practicing only "foreign" courts neglect the need for establishing the (new) rule of law in affected countries. Therefore having purely international or purely domestic justice may fail to promote local capacity building. Finally, this kind of a "one-sided" approach usually has modest impacts on development of substantive laws and regulations criminalizing mass atrocities.

[40] Orentlicher, "Settling Accounts", 2007
[41] Dickenson, "Promice", 2003
[42] Ibid

So with an establishment of "mixed" tribunals and a concept of transnational accountability, concludes Sriram, practices and debates slightly shifted from a firm local-universal dichotomy closer to questions of norm transmission and socialization.[43] Following this view, it might be that in the context of the third generation of international criminal justice, this conspicuous distinction between international and domestic components is not as robust as it once was; that it is "false or declining in significance, with the increased salience of transnational normative processes, actors, and networks, including judicial globalization".[44]However, another possibility would be that these "external" tensions between universal and local norms and actors are now, in a sense, "interiorized" and continue to exist *within* the "internationalized" institutions. Therefore, I further examine the hybrid courts, the causes of their grounds and manners of their formation, as well as the features of their institutional configurations.

2.3 Why to Establish a Hybrid Court?

A hybrid tribunal in one society is typically established to ensure criminal accountability in those political and legal systems in which domestic means of prosecution are too weak, corrupt, or politicized to deal with high profile cases[45]: they may be open to political manipulation, corruption, or bias. In other words, hybrid tribunals are formal judicial institutions that are – unlike the *ad hoc* tribunals – established under a *dual authority*; authority of the UN (but this time not with a so-called Chapter VII resolution) and the authority of the respective state. These changes signified a dawn of the third generation of

[43] Sriram, 2013
[44] Ibid, pp. 204
[45] Stensrud, "New Dilemmas "2009,

international criminal justice, and have been seen as a "result of both tribunal fatigue and tribunal euphoria in the international community".[46]

Having in mind the nature of the very crimes that these tribunals are to deal with – mass atrocities in which the state/elites had important roles – it follows that some kind of a *political will* for coping with the past is critical. Emillie Stensrud reminds that if trials are to be held in the national courts a certain level of stability should be achieved first, giving the example of Latin American countries where retribution was often sacrificed, while aiming towards peace and democracy (the *binary dilemmas*, again). In this view, most arguments for internationalized justice are based on assumptions about the liberating and civilizing force of law"[47]. Antonio Cassese likewise sees the matter of impunity as one of the fundamental causes for establishing mixed courts since the statute officials engaged in criminal behavior "tend to protect one another, taking shelter behind the protection of traditional rules safeguarding sovereign prerogatives of states".[48]

In general, the zone of impunity is defined in transitional justice as a space in which criminal accountability is impossible to pursue, usually due to one of the following reasons: a) local authorities are unable or unwilling to act, b) there is no relevant court with jurisdiction over territories or individuals in question, or c) prosecutorial strategy is simply selective.[49] For example, establishment of the hybrid court in Sierra Leone, as it has been mentioned before, did contribute bringing Charles Taylor to justice, yet there he could be held criminally responsible only for the crimes on the territory of the country, but not for those committed in

[46] Tiemessen, "Judicial and Nonjudical", 2013, pp. 206
[47] Stensrud, "New Dilemmas", 2009, pp. 9
[48] Cassese, Antonio, "The Role of Courts and Tribunals in the Fight Against International Criminality", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia,* (Oxford University Press: New York 2004)
[49] Sriram, "Zone of Impunity", pp. 292

Liberia. The logic behind impunity is fairly simple: there are cases when the defeat of the previous repressive regime is just partial or temporal; hence the old elite is either still likely to turn around the game once more, or the new one is still not powerful enough to prevent a backlash against criminal charges (e.g. great influence of military forces in the Philippines, even in post-Marcos era).[50] Hybrid courts came into the picture in order to address some of these concerns.

Moreover, reasons for establishing hybrid tribunals are being defended from a normative point of view as well. For Frederic Magret, it is indeed possible to justify hybridity purely on functional grounds (international concern for due processes, cost-efficiency, domestic legitimacy etc.). Nevertheless he argues that it might be something about the choice of this mechanism that is profoundly normatively desirable as such. For him hybrid tribunals can be seen as sophisticated attempts at striking „the best possible balance between the competing pulls of sovereignty and universalism in a way that maximizes the 'representational' function of international criminal justice"[51]. Basically, here the *hybridity* is not a second-best solution, but it has its own intrinsic value: it addresses universal values and involves local agents as "representatives" of the community involved in past atrocities. This "representational" function of trials means that the key concern of international criminal justice in fact lies in giving each *owner* its due, as an adequate symbolic representation of those individuals that have been affected by the crimes. At this point Megret follows Teitel's account according to which the transitional normative message is expressed most plainly "through the international legal order, as its strengths are normative machinery with the capacity to comprehend extraordinary political violence deployed outside the ordinary legal order".[52]

[50] De Brito et al, *The Politics of Memory*, 2001
[51] Megret, "*In Defense"*, 2005, pp. 32, 33
[52] Ibid, pp. 5

2.4 Defining Characteristics of Hybrid Courts

There is no uniform model of a hybrid court. However, each of these tribunals combines domestic and international elements of justice and provide a mixed court system. Their main mission is to pursuit accountability for violations of human rights and international humanitarian law[53]. The pioneer examples of the new "mixed" mechanisms are the SCSP in East Timor and R-64 in Kosovo, both formed in 2000 by specific UN's regulations. They have been followed by WCC in Bosnia and Herzegovina and ECCC in Cambodia; finally, internationally dominated courts with domestic elements were introduced in Sierra Leone (SCSL) and Lebanon (STL).[54]

The definition and characteristics of hybrid courts are generally derived from the elements which the current hybrid courts have in common. Sarah Nouwen argues that as a result of the fact that these elements are deduced from the current examples of hybrid courts, there are two fundamental issues that therefore remain unaddressed: first, whether the common elements are important enough as to prevail over some of the noticeable differences between the courts themselves; second, which of these common characteristics of the current hybrid courts are defining elements of the model.[55] So the challenge for the future here is to avoid creating conceptual, legal, and functional limitations for all conceivable forms of hybrids, having in mind that new "mixed" courts are quite likely to emerge in the new post-conflict societies. In this view, the major differences between current examples of hybrid courts are observable in three main aspects:

- Different historical backgrounds
- Different legal bases (laws by which they are founded)

[53] Hermannn, "Hybrid Tribunals", 2013
[54] Ibid
[55] Nouwen, "The Hybrid Category", 2006

- Different legal orders (law used in proceedings), and legal personalities (chamber composition and staff)

For example, when Special Tribunal in Iraq was created in 2003 there was a possibility (but not a requirement) for international judges. Nevertheless, the Law of the Supreme Iraqi Tribunal from 2005 narrowed this possibility solely to the cases where one of the parties is a state. Likewise, in Ethiopia international involvement was limited to providing advice and support only for the Special Prosecutor's office.[56]From these reasons, as stated earlier, tribunals in Ethiopia and Iraq are usually not treated as examples of hybrid courts.

On the other hand, the predominant commonality among these courts, for sure, is the concept of *hybridity* itself. More precisely, their central features are the combination of norms from different legal systems, and composition of staff (domestic plus international). This discrete mixture means that hybrid courts employ nationals as well as foreigners in the official positions of judges, prosecutors, registrars and support staff. Simultaneously, the hybrid courts all use a mixture of domestic and international law (in some cases even the documents establishing institutions mandate the panels to apply directly both national and international law). Elements that are empirically shown to be common for mixed courts are:

- The seat of the court – Unlike the international tribunals for Yugoslavia and Rwanda, hybrid courts are typically located in the affected countries
- United Nations involvement
- An *ad hoc* nature – They have been created in order to respond to special situations: it is clearly not an exclusively hybrid courts feature

[56] Ibid

- No duty of cooperation of the third States – these courts are, formally, part of the domestic legal system and Security Council cannot oblige other countries to co-operate with the tribunals
- No obligatory contributions – Costs of the courts are not borne by the UN members (or the party states in case of the ICC)[57]

In general, number of scholars, such is Cassese, believe that the "mixed" tribunals may prove to be one of the most effective tools available in the nowadays' international legal order[58]. This, however, does not mean that these courts do not face some legal and practical difficulties as well. The short list of provided merits and limitations connected to the work of the hybrid courts' is given in the Table 2 below.

Table 2: Merits and Difficulties in the Work of the Hybrid Courts

Merits	Difficulties
➢ Local judges and prosecutors are familiar with the territory, language, and the habits of the accused ➢ Holding trials in the territories were crimes are committed could help gradual reconciliation in the local community ➢ May produce a significant spill-over effect in that they may contribute building the capacities of local personnel ➢ Promoting the democratic legal training for local members ➢ May expedite prosecutions and trials	➢ The need to emulate different legal philosophies ➢ Ensuring that the international and the national components cooperate smoothly ➢ Finding the financial resources to make the tribunals work ➢ Problem of the establishment of a body of law; the body of both substantive and procedural law ➢ The question of legal aid

[57] Ibid
[58] Cassese, "The Role of Courts", 2004

without compromising international standards

The establishment of hybrid courts in the affected country as well as the parallel operation of a domestic and international jurisdiction, as Shraga pointed out, inevitably produces a certain conflict of laws.[59] For instance, in the cases of Sierra Leone and Cambodia the most important dispute concerns the amnesties granted under domestic laws, and to what extent these amnesties are in fact applicable to the crimes against humanity, war crimes, and genocide. Sierra Leone in 1999 offered and "absolute and free pardon" to Foday Sonkah personally as well as to the membership in Revolutionary United Front (RUF), while Cambodian king Sihanouk, in 1996, pardoned one of the Khmer Rouge leaders Ieng Sary, in respect of his conviction for genocides reached back in 1979. This issue came up again during marathon negotiations between UN and the Cambodian government.

At the same time, ensuring a positive legacy for the new type of courts is an important goal for all the international factors involved in the process: "Once a hybrid tribunal has completed its mandate, it is hoped that the national staff will return to the domestic system and raise its standards".[60] Their characteristics will be further observed in the next chapter, through the cases of hybrid courts in Cambodia, East Timor, and Kosovo; their institutional designs, mandates, performances and outreach.

[59] Shraga, Daphna, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

[60] Johanna Hermannn, "Hybrid Tribunals" 2013, pp. 41

III CASE STUDIES

In this chapter of my thesis I present three case studies: Cambodia, East Timor, and Kosovo. Section one analyzes the Extraordinary Chambers in the Courts of Cambodia (ECCC). Although the hybrid model of the "Khmer Rouge court" was an inspiration for creating other "mixed" tribunals, marathon negotiations between the UN and the national government led to a situation that actual trials in Cambodia started much later than in other examples of hybrid courts. Second section explores the case of the Serious Crimes Special Panels (SCSP) in East Timor; the first specially constructed hybrid court which has tried cases of serious crimes, and also the first hybrid court that has finished its work. In Section three I study the so-called "Regulation 64" panels established in Kosovo. The youngest European country has no hybrid court understood in terms of a single "internationalized" judicial institution, but rather an institutional arrangement where international judges and prosecutors work within the courts of Kosovo. I analyze each of these cases in four steps: a) background and challenges after atrocity, b) legal basis and organization, c) empirical overview of practices, and finally d) acceptance and legacy of these hybrid courts.

3.1 Cambodia

Cambodia was a French protectorate from 1863 until 1953 when the country gained independence. However, independence in Cambodia did not bring peace, prosperity and stability: the country was in an on-and-of regime of disturbances until the last decade of the

20th century. According to BBC World, Cambodia is still trying to end its dependence on foreign aid, while drawing foreign investment (especially from China and Vietnam) due to its economic potential and natural resources.[61] Nevertheless, corruption is wide-spread in this Southeast Asian society, and Cambodia is still one of poorest countries worldwide, with every third person living on less than one US dollar per day.

3.1.1 Background and Challenges after Atrocity

Kingdom of Cambodia was ruled by King Norodom Sihanouk until 1970 when General Lon Nol organized a military action to take over the power, supported by the United States which saw in the new regime a geopolitical ally for both combating communism and neighboring Vietnam.[62] The following years were marked as a period of civil war in which number of rebel groups fought against each other and Nol's government. The most organized of these groups was the Khmer Rouge backed by China and led by Saloth Sar, known as Pol Pot. Finally, Khmer Rouge seized power, marched into the capital Phnom Penh in April 1975, and proclaimed "Democratic Kampuchea".[63] General Pot created a unique plan that targeted political regime, the structure of society, and the status of individuals in order to create a kind of a perverted agrarian utopia. His agenda had eight straightforward tasks:

1. Evacuate the people from the cities
2. Abolish all markets
3. Abolish currency
4. Defrock all monks

[61] "Cambodia Profile"
http://www.bbc.com/news/world-asia-pacific-13006539

[62] Luftglass, Scott, "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge", *Virginia Law Review*, Vol. 90, No. 3 (2004), pp. 893-964

[63] Ibid

5. Execute leaders of Nol's army and government
6. Establish communal eating cooperatives across the country
7. Dislocate the entire Vietnamese population
8. Establish firm and guarded borders[64]

The most notorious aspect of this transformation was the systematic and deliberate torture and murder of Cambodian citizens. Regime committed widespread human right abuses, including torture and execution of hundreds of thousands of people.[65] The violence was particularly directed against ethnic and religious minorities, intellectuals and members of other political parties.[66] Through starvation and hard labor it is believed that the regime killed about 1.7 million people, which is more than one fifth of the country's 1975 population of roughly seven and a half million. In November 1978, Vietnamese troops invaded "Democratic Kampuchea" still ruled by the Kampuchean People's Revolutionary Party. Subsequent refusal of Vietnam to withdraw from Cambodia led to the Cambodian–Vietnamese War. It ended only in October 1991 when The Paris Peace Accords were signed with the mediation of eighteen foreign governments.[67] This agreement meant a deployment of the first post-Cold War peace keeping mission (UNTAC) and the first ever occasion in which the UN took over as the government of a state.[68]

Pol Pot or "the brother number one" never faced any charges. In 1979 he fled the capital: in a remote northern area of the country he continued to fight against Vietnamese and remained

[64] Ibid, pp. 900
[65] Hermann, Johanna, "Extraordinary Chambers in the Courts in Cambodia" in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)
[66] Ibid
[67] Governments of Australia, Brunei Darussalam, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, Philippines, Singapore, Thailand, USSR, United Kingdom, USA, Vietnam, and Yugoslavia
[68] "Cambodia - 20 years on from the Paris Peace Agreements" http://www.ohchr.org/EN/NewsEvents/Pages/Cambodia-20yearsonfromtheParisPeace.aspx

free until his house-arrest in 1997 (allegedly, a faction of the Khmer Rouge rebel group turned against him).[69] He died in April 1998 and was never brought to justice in the Cambodian hybrid court which was at the time at the initial phase of its establishment. It has to be mentioned that Cambodia did hold a domestic trial against Pol Pot as well as Ieng Sari *in absentia*, in 1979. The two leaders were found guilty for genocide and sentenced to death by a domestic tribunal. Nevertheless, these trials are widely regarded as farcical, and international community refused to recognize them as legitimate, for several reasons.[70] Firstly, they were sentenced without any defense presented in the court. Secondly, the language used during the process was functionally assuming their guilt. Finally, the definition of genocide was not suitable with internationally accepted definition, and it is seen to be crafted specifically for these two defendants.[71] Furthermore, seventeen years later Cambodian government granted amnesties to Pot and Sary, and one of the tasks of the new hybrid chambers was exactly to judge the validity of this decision.

So the time has passed, but the burden of legacy is still present in nowadays Cambodia – wounds are still to be healed. Having in mind all the horror that Pol Pot regime brought into the poor Southeast Asian country, the trial against Khmer Rouge leaders which are still alive is sometimes referred to as "the most important trial since Nuremberg".[72] The "National Day of Hatred" (also known as the "Day of Remembrance" and the "Day of Maintaining Rage") is marked throughout the country each May 20, the date when mass killings started in 1976. Practically every citizen of modern Cambodia had members of his or her extended family

[69] Shivakumar, M. S. "Pol Pot: Death Deprives Justice", *Economic and Political Weekly*, Vol. 33, No. 17 (1998), pp. 952-954

[70] Luftglass, "Crossroads in Cambodia", 2004

[71] Ibid, pp. 902

[72] For example:
Foreign Policy: "War Crimes 2011 Year In Review – Asia"
http://foreignpolicyblogs.com/2011/12/28/war-crimes-2011-year-in-review-asia/
The Guardian: "Khmer Rouge trial is failing Cambodian victims of Pol Pot's regime"
http://www.theguardian.com/law/2011/nov/23/khmer-rouge-trial-cambodia-victims

murdered during the bloody regime, and great number of political establishment members had either collaborated with or fought the Khmer Rouge. Etcheson refers to the post-atrocity challenges in the country as a "tremendously intimate question for entire political elite"[73]. There was a certain *pro et con* debate in the public sphere, and he reported that a number of surveys showed that there is in fact a majority support for the trials against former-regime leaders even though in Cambodia there is no real history of a formal justice in a Western sense and no rights-based legal culture.[74] For instance in Khmer language the word "suspect" literary means "the guilty one". In this view, t3he phenomena of the former regime leaders facing the justice are not just the matter of retribution as much as the way to find the answer to the elusive question of what really happened. This basic question is still troubling the contemporary Cambodian society, as the trials at ECCC are proceeding.

3.1.2 Legal Bases and Organization

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a special Cambodian court which receives international assistance through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). The Court is more commonly referred to by the more informal name of the "Khmer Rouge Tribunal" or the "Cambodia Tribunal".[75] Formally speaking, the Extraordinary Chambers have jurisdiction to prosecute individuals for serious violations of domestic penal as well as international law during the period of Democratic Kampuchea. The jurisdiction of the court is as follows:

- Temporal jurisdiction – It is not unusual for an internationalized court to have a limited jurisdiction within a specific period of time. Although the Cambodian conflict

[73] Etcheson, Craig, "The Politics of Genocide Justice in Cambodia, in Cesare Romano, Andre Nollkaemper", and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004), pp. 181
[74] Ibid
[75] Hermann, "Extraordinary Chambers in the Courts in Cambodia, 2013

infected the region with violence from the end of 1960s to the early 1990s, the ECCC is to cover only the crimes dated from April 1975 to January 1979

- Subject matter jurisdiction – The court is to deal with genocide (as defined in 1948 Convention) and crimes against humanity. As for the later, the special law establishing the ECCC is somewhat more limited than the Statute of the ICC and refers only to imprisonment, rape, and persecutions on political and religious grounds
- Personal jurisdiction – Individuals that should be brought to justice are the senior leaders of the regime and those most directly responsible for crimes. It has been argued that such a formulation is opened to different interpretations and shows the political dimension of the court
- Amnesty – The court is to decide about amnesties granted in 1996 to Pol Pot and Ieng Sary sentenced for genocide in absentia back in 1979[76]

The dispute between the UN and the Cambodian government regarding a desirable structure of the court has not led to a satisfactory result. Throughout the negotiations the Cambodian officials wanted a national tribunal with the UN's assistance, while the UN aimed for a predominantly international tribunal. In March 1999, the group of UN experts reported that the best approach for accountability in Cambodia would be a tribunal in the mold of ICTY and ICTR, this being the only model that would guarantee international standards of justice. However, in August 1999 the Cambodian prime-minister rejected the UN plan. Finally the US pressured the Cambodian side to walk back from their proposals and to move towards endorsing a special chamber. At the end, in May 2003, UN's General assembly approved the agreement. According to David Scheffer who personally participated in the process, this final

[76] Meijer, Ernestine E. "The Extraordinary Chambers in the Court of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized Tribunal", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia,* (Oxford University Press: New York 2004)

agreement "reflects a compromise between the need to address impunity and the need to preserve Cambodian sovereignty".[77] He also noticed that the creation of the court in Cambodia took longer than any other international or hybrid court in the post-Cold War era. A short history of negotiations and internationalization of the judicial system in Cambodia is provided in the Table 3.

Table3: A short history of negotiations and internationalization of the judicial system in Cambodia[78]

Year	Event
1997	In June, Cambodia's prime-minister signed a letter to UN asking for the assistance in bringing to justice those responsible for the genocide and crimes during the rule of the Khmer Rouge
1998	In April, the US mission and the UN circulated Chapter VII resolution aimed at establishing a internationalized court with its seat in the Netherlands
1999	In March, the group of UN experts reported that the best approach for accountability in Cambodia is tribunal in the mold of ICTY and ICTR, being the only model that would guarantee international standards of justice In August, Cambodian prime-minister rejected the UN plan In September, the US pressured the Cambodian side to walk back from their proposals and to move towards endorsing a special chamber
2000	In April, the UN mission negotiated a draft Memorandum of understanding between the two sides about the establishment and operation of the ECCC and draw a copy of the ECCC law
2001	In January, the Cambodian Senate unanimously passed the ECCC law
2002	In February, the UN ended its participation in the process since concluded that ECCC cannot guarantee the independence, impartiality and objectivity that a court established with the support of the UN must have In July, the group of foreign governments began to question the judgment of shutting down the negotiations
2003	In June, the new text was finalized and the agreement was signed by the UN and Cambodia

[77] Scheffer, David, "The Extraordinary Chambers in the Courts of Cambodia", in Cherif Bassiouni (ed.) *International criminal law*, (Martinus Nijhof Publisher, 2008, 3rd edition)
[78] Ibid

2004	In October, the agreement was finally ratified by Cambodian institutions
2005	In March, the most of the international community's voluntary share of the ECCC three-years budget was pledged
2006	In July, the judges, prosecutors and investigators were sworn into the office
2007	In June, one year after they started, the judges approved the ECCC Internal Rules

During the negotiations, a wide array of complex internal and external factors was involved. The United States government was an important player in the game, leading most of the international efforts to create the court. China, on the other hand, took the opposite side being a long-time Khmer Rouge ally.[79] They were firmly on the stand that prosecuting a leader of an Asian communist regime could be potentially very dangerous precedent. Furthermore, Russia, India, and France, out of their own particular interests, tried to reduce the UN's influence. Finally, the agreement is reached and a two-tier hybrid court is formed; this was also a matter of dispute since the Cambodian government preferred a three-tier solution.

Extraordinary Chambers comprise a Trial Chamber, which consists of three Cambodian and two international judges, and a Supreme Court Chamber of four domestic and three foreign judges. This actually means that the ECCC is the only example of hybrid that does not have a majority of international judges.[80] The prosecution strategy is devised also by two co-prosecutors, one Cambodian and one international. They are sought to cooperate and develop a common procedural strategy: theoretically they should work together to initiate investigations, formulate charges, request the opening of judicial inquiries and so on. The final organ of the ECCC is the Office of Administration run by a Cambodian director and an international deputy. The deputy is responsible for the international components and the

[79] Ibid

[80] Williams, Sarah, "Public International Law", *International and Comparative Law Quarterly* (2004) pp. 227-245

international staff recruitment, while the director bears the responsibility of the overall management of the office.[81]

3.1.3 Empirical Overview of Practices

The Extraordinary Chambers in Courts of Cambodia started operating in February 2006. The first person in trial was Kaing Guek Eav, also known as Comrade Dutch. He was the head of the notorious "S-21" prison, a high school in Phnom Penh turned into a prison. This trial is known in Cambodia as the "Case 001". In July 2012, Dutch was sentenced for crimes against humanity and grave breaches of the Geneva Convention for 35 years in prison.[82] At the beginning, in "Case 002" four formal leaders accused for crimes against humanity, and genocide against Vietnamese and Cham (Muslim) population were on trial. However, Iang Sary died in March 2013, while his wife was found unfit to stand trial due to her dementia. Since then the two accused are Nuon Chea, the former Chairman of the National Assembly (and Deputy Secretary of the Communist Party), and Khieu Samphan, former Head of State of Democratic Kampuchea. The process in divided in two separate hearings, each addressing a different section of the indictment.

One has to stop here, to remind that the formal process and decisions provide for only one part of the story, and one might say the beginning of the perils with bringing Khmer Rouge leaders to justice. The outcomes of the transitional justice mechanisms often depend on political, social and cultural circumstances. At the same time Cambodia is often addressed as the only functionally authoritarian regime in Southeast Asia, while UNDP tagged it as a

[81] Sluiter, Goran, "Legal Assistance to Internationalized Criminal Courts and Tribunals", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)
[82] Hermann, "Extraordinary Chambers in the Courts in Cambodia", 2013

"nation in need of reconstruction".[83] Furthermore, according to Edo Andreessen, current local political geographies in the region of Southeast Asia are also dependent on a "bewildering array of more informal institutions and social characteristics such as collective action, elite capture, and the organization of civil society, ethnic cleavages, oligarchic families and individual behavior of local politicians".[84] In this context it is not surprising that the work of the ECCC attracted a lot of negative criticism, especially from the Western monitors.

The majority of criticism is closely related to the controversies surrounding the so-called "Case 003" and "Case 004". On 7 September 2009, the international Co-Prosecutor filed two Introductory Submissions, requesting the Co- Investigating Judges to initiate investigation of five additional suspected persons. What is symptomatic about these processes are that the identity of the two suspects in Case 003 officially remains confidential. What is officially announced is that the investigation in the "Case 003" is focused on crimes allegedly committed between 17 April 1975 and 6 January 1979 on several locations.[85] Unofficially, among suspects in the "Case 003" are Im Chaem, and her two accomplices Ta An and Ta Tith. Allegedly Im was running a giant irrigations construction site for Pol Pot built by the forced labor of thousands of despised and starving workers and also a special security center. Today, she is a public official, a commune leader in Anlong Veng district. Ta Tith who is suspected for ordering the tortures and mutilations of prisoners' in Phnom Penh, is today

[83] UNDP: Local Governance in Cambodia http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects_and_initiatives/local_governanceincambodia/

[84] Andraisse Edo, *Comparative dynamics of Southeast Asia's political geographies* (2010)

[85] These locations are: a) S-21 Security Centre, Phnom Pen, b) Stung Tauch execution site, Ponhea Krek District, c) Kampong Chhnang Airport Construction Site, Krang Leav commune, d) Division 801 Security Centre, Rattanakiri Province, e) Stung Hav Rock Quarry worksite, Kampong Som Province, e) Wat Enta Nhien Security Centre and execution site (also known as Wat Kroam), Kampong Som Province, f) S-22 Security Centre, Phnom Penh, g) Durian Plantation, Ream Village, Preah Sihanouk Province, and h) Bet Trang worksite, Preah Sihanouk Province.

according to the media a "wealthy businessman".[86] As for the "Case 004" (which concerns atrocities committed or assisted by some mid-ranked officials as well), there is a strong disbelief within the Cambodian society that the suspects would ever face charges. In the meantime, judge resignations drew new suspicions about these cases.

German Judge Siegfried Blunk (appointed by the UN) and his Cambodian colleague You Bunleng first drew attention for closing down the investigation against senior leaders within the "Case 003". The German judge as well as much of the other international staff resigned in 2012 after the details leaked in public. The Swiss judge Laurent Kasper-Ansermet nominated to replace the tribunal investigating judge also suddenly resigned, casting more doubt on the courts' ability to pursue more cases against the former regime leaders. Reuters reported that judge found himself in "a highly hostile environment" with Cambodian judge You Bunleng, whom he accused of blocking investigations. Furthermore, Anne Heindel, an American lawyer and legal adviser to the Documentation Center of Cambodia stated that if the case ever gets to trial, "it will be a new mess".[87]

Simultaneously, the Cambodian prime-minister Hun Sen – at one point a mid-ranking Khmer Rouge commander himself – in several occasions repeated that that he does not wish for new trials after the one in the "Case 002" will be concluded. Similar signals were sent by two of his ministers. Media reported that the trial is "at legal limbo"[88], while experts were stating that it is a "clearly outcome-driven process"[89] and that it "does not meet basic requirements or adhere to international standards or even comply with the courts own prior jurisprudence".[90]

[86] "Khmer Rouge genocide: justice delayed may be justice denied"
http://www.reuters.com/article/2013/03/10/us-cambodia-court-idUSBRE9290HM20130310
[87] Ibid
[88] "Khmer Rouge crimes in legal limbo"
http://www.thenational.ae/featured-content/latest/khmer-rouge-crimes-in-legal-limbo
[89] "Cambodia's Khmer Rouge Tribunal Draws New Criticisms"

Besides, the question of how the court is being financed later came into the picture. In September 2013 the Cambodians working for the ECCC (interpreters, translators, and various technical staff) went to strike. Human Rights Watch reported that the Cambodian governments' refusal to pay local staff is just a latest attempt to undermine the efforts to bring former Khmer Rouge leaders to justice. They said that the prime-minister Hun Sen "spent years obstructing the trials (...) but the donors to the court have played along and continued to subsidize the seriously compromised court".[91] Basically, under the agreement with the UN, the international community is to pay the foreign stuff and national government the Cambodians and the state officials have regularly demanded contributions from the donors. When the court was founded in 2003, the total cost of three years of operation of the court was estimated at 19 million US Dollars[92]. It was believed that a three years' period would be enough for trials and appeals to be completed, however the trials didn't even start by that time. In the first five years of trials estimated 150 million US dollars was spent.

3.1.4 Acceptance and Legacy

The future of the trials within hybrid court in Cambodia is uncertain. In that light, Stensrud argues that the narrow focus of the court "fits nicely into the ruling party, CPP's, presentation of history"[93]. How? The current (long-lasting) regime in Cambodia consists of many former members of the Khmer Rouge who changed the side in time (i.e. defected to Vietnam), and it is in their interest, argues Stensurd, to present the Khmer Rouge atrocities solely as the crimes

http://www.voanews.com/content/cambodias-khmer-rouge-tribunal-draws-new-criticisms-130558383/145767.html

[90] Ibid

[91] "Cambodia: Government Obstructs Khmer Rouge Court"
http://www.hrw.org/news/2013/09/05/cambodia-government-obstructs-khmer-rouge-court

[92] Williams, "Public International Law", 2004, pp. 237

[93] Stensrud, "New Dilemmas , 2009, pp.11

of a small clique, rather than an organized network, and a "Killing machine".[94] Cambodian People's Party traces its roots to the same conference in 1951 which the Khmer Rouge cites as their founding congress. According to Etcheson, most of the CPP's senior cadres began their political carrier as lower or middle member of the vicious regime and, at some point, fled to Vietnam escaping from Pots purges. [95] Supposedly, when the Vietnamese occupation tropes withdrew from the country, the party publically abandoned the command-and-control economy and adopted the new name – CPP. The same author defines five different currents within the party in terms of their approach to question of facing the past and bringing former leaders to justice:

- "Nativists" emphasize the Cambodian sovereignty and oppose any UN indolent in the tribunal
- "Rejectionists" are against of any idea of criminal justice on the grounds that it could be harmful to the process of national reconciliation
- "Protectionists" oppose any international interference because they think there are too many skeletons in the closets of the CCP members
- "Modernizers" on the other hand see the ECCC just as a perfect opportunity for Cambodia to become fully accepted member of the international community
- "Triumphalists", finally, think that fully internationalized court is "final act of revenge against those who destroyed Cambodia's revolution"[96]

On the other hand, the victims' attitude to trials is more complex. Some of them perceive the verdicts as too lenient.[97] Others were disappointed with the limited reparations awarded by

[94] "S-21: The Khmer Rouge Killing Machine" is a 2003 documentary film about atrocities committed in the former Security Prison 21 in Phnom Penh; today this is Tuol Sleng Genocide Museum

[95] Craig Etcheson, The Politics of Genocide in Cambodia, in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia, Oxford University Press, New York 2004

[96] Stensrud, "New Dilemmas, 2009, pp. 184

the court. Civil parties made reparation submissions asking for memorials and free medical care. The court rejected most of these submissions as being out of the scope of the chambers. ECCC though agreed to include the name of the relatives next to the victims and include them in published apology statement made by Dutch.[98]

Nonetheless, despite all the criticisms, negative evaluations, practical difficulties and controversies, virtually all the surveys show the great popular support towards the work of the tribunal.[99] According to the Human Rights Center of the University Of California in Berkeley, responses to specific questions about the expected impact of the ECCC suggest an overall improvement in the ECCC's public image.[100] They compared the date before and after the trial for Case 001 and concluded that Cambodians increasingly believed the court will help rebuild trust in their country (11% increase), and would help promote national reconciliation (14% increase). In this view, "although opinions about whether the ECCC would bring justice to the KR regime had not significantly changed, the overall sentiment remains very optimistic".[101]

[97] Hermann, "Extraordinary Chambers in the Courts in Cambodia", 2013

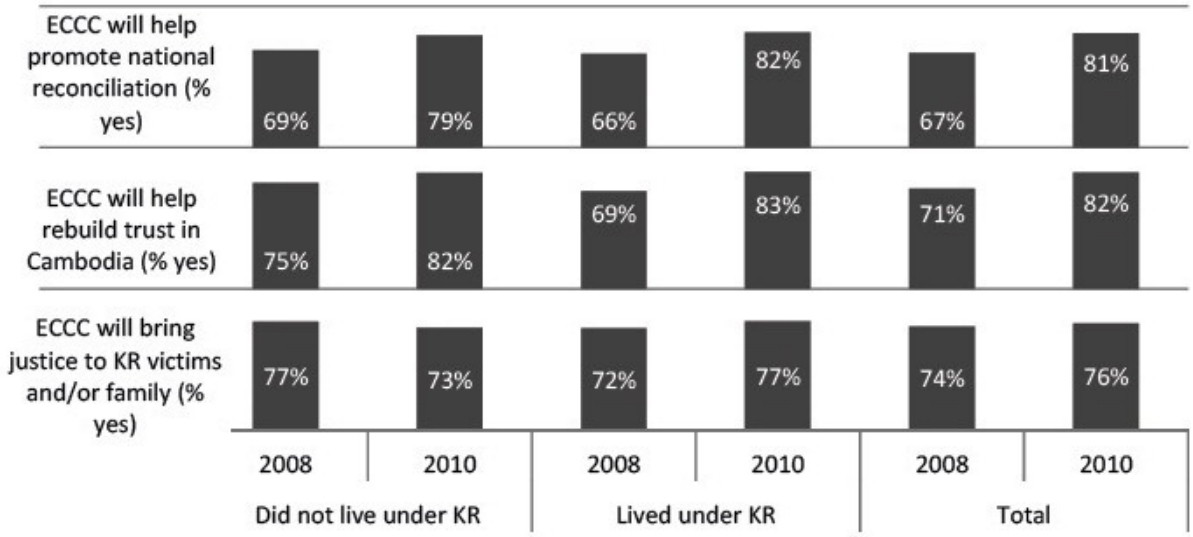
[98] Ibid

[99] This kind of an attitude can come from the specific cultural norms that are dominant in Southeast Asian societies. "Saving face" is a pivotal virtue and open criticism is often considered to be rude. The communal and interpersonal relations are to a high extent shaped by the dominant traditional culture. For instance Chan and Chheang (Cultural Challenges to the Decentralization Process in Cambodia, 2008) seeking to answer the question of how to externally impose the notion of decentralization is negotiated with local cultural and traditional terrains, they find five core obstacles: a) Patron–Client Relations, b) Power Distance, c) Social Capital vs. Mistrust, d) Collectivism vs. Individualism, and e) Feminism vs. Masculinity.

[100] Human Rights Center of the University Of California in Berkeley, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (2011)

[101] Ibid

Figure 1: Expected impact of the ECCC, according to the Human Rights Center of the University Of California in Berkeley



The same survey showed that since 2008, both awareness of and knowledge about the ECCC has increased. The years later the percentage of the population without any knowledge of the ECCC decreased among respondents who lived under the Khmer Rouge regime (22 to 34 per cent) and those who did not live under the regime (33 to 50 per cent). Moreover, the majority of the Cambodian population after the first trial thought that the court was right to find Comrade Dutch guilty for what he did (77 per cent), which has more trust in the law than before the trial (72 per cent), that know more about what happened during the Khmer Rouge reign (57 per cent). In addition 41 per cent of the respondents answered that, after the trial, they are more ready to reconcile with Dutch. At the same time, while justice is indeed important for the population, its priorities were jobs and services to meet basic needs, including health and food as well as improvements in the country's infrastructure, such as electricity, roads, and building of schools.[102]

[102] Ibid

3.2 East Timor

East Timor was a Portuguese colony for several hundred years. In 1960 East Timor declared itself as a "non-self-governing" territory administered by Portugal. Later on it became the first newly established nation-state of the 21st century. The rebuilding of the East Timor after the years of mass violence, atrocities and destruction has been regarded as one of the UN's biggest success stories.[103] Since January 2013 there is no direct peacekeeping presence in East Timor.

3.2.1 Background and Challenges after Atrocity

After the 1974 revolution in Portugal, political parties were authorized in East Timor too. This process divided the political actors in three groups: Democratic Union advocating for greater integration of East Timor in a larger Portuguese-speaking community, Popular Democratic Association calling for closer ties with Indonesia (a former Dutch colony), and social-democrats which later transformed into the Revolutionary Front of Independent East Timor, known as the FRETILIN.[104] This organization unilaterally declared independence in November 1975, yet only one month later East Timor was invaded by the Indonesian army. According to an ICTJ report from 2006, invasion was the beginning of 24-years of constant atrocities and human rights abuses, during which about 200.000 lost their lives, which was almost one third of East Timor's population. Although invasion was marked by violence and brutality, the case of East Timor did not receive any significant international attention until 1991, when Santa Cruz cemetery massacre in the capital Dili occurred. At this occasion,

[103] BBC: "East Timor profile"
http://www.bbc.com/news/world-asia-pacific-14919009

[104] De Souza Soarez, Denis and Sabrina Evangelista Medeiros "Commission of Inquiry for Human Rights Violations in East Timor" "Serious crimes Unit, Office of the General Prosecutor of the Republic of Timor-Leste", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Indonesian forces opened fire on a crowd gathered at the funeral of a youth killed by the same troops, murdering 271 persons and injuring 362 others.[105] As a result of the UN-sponsored negotiations with Portugal, Indonesia agreed to let East Timorese decided on their future in the referendum for independence.

Referendum was held on 30 August 1999, under the auspices of the United Nations. That day people of East Timor – 78.5 per cent of them – voted for independence from Indonesia. There have been visible escalation of violence prior to the referendum, but five days later, after the results were announced, violence dramatically increased. The cases of murders, kidnappings, rape, and property destruction with the Indonesian government's goal of forced deportation had been reported throughout East Timor.[106] Before the international forces, mandated by the Security Council and consisting mainly of Australian Defense Force personnel, landed in the island on 20 September 1999, more than half of the population – an estimated 400.000 to 500.000 people overall – had been displaced during the conflict. Out of that number around 200.000 East Timorese fled or had been deported to Indonesia.[107] Subsequently, the UN established a mission called UNTAET with the mandate to prepare the East Timor for independence, administer the country and exercise all legislative and executive authority, including judicial affairs. Next year in May, the new country officially became independent and six months later the "Democratic Republic of Timor Leste" entered the United Nations as the 191st member-state. Subsequently, the political life in East Timor started normalizing. Legislative elections were held in August 2001 resulting in an easy triumph for the former

[105] Ibid

[106] Linton, Suzannah, "Cambodia, East Timor And Sierra Leone: Experiments In International Justice", *Criminal Law Forum 12* (2001) pp. 185–246

[107] De Bertodano, Sylvia, "East Timor: Trials and Tribunals", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

liberation movement, the FRETILIN. In April 2002 their historic leader, Xanana Gusmão was elected as the first president.

According to Caitlin Reiger and Marieke Wierda, who investigated the judicial system in East Timor for International Center for Transitional Justice (ICTJ), the UNTAET mission simultaneously began to turn its attention to re-establishing the justice system in the new country, especially having in mind the pressing number of people held in detention on suspicion of committing atrocities: "this process required building a new judiciary and legal system almost entirely from scratch".[108] Besides the fact that the end of Indonesian occupation left a certain vacuum when it comes to the legal framework, the physical infrastructure was destroyed as well. Courts, prisons, books, and records were completely destroyed (mostly set on fire) during the "scorched-earth" campaign in the course of the withdrawal of the Indonesian military (TNI) and militias. The only UN reports that examined the question of how to deal with past atrocities and which mechanism of transitional justice should be applied were those of Special Rapporteurs and International Commission of Inquiry. Suzannah Linton writes that the mistake in these special reports' reasoning was that they did not take into considerations all the possible models and which one of them suits best the challenges in East Timor.[109] Commissions did however conclude that Indonesia hadn't taken any actions in order to clarify the fact or to bring perpetrators to justice. Both of these reports concluded that "the best efforts would be unlikely to result in complete investigations into the full range of crimes".[110] Also they called for an international tribunal to be established, foreseeing that the East Timorese judicial system, which had yet to be created and tested, could not cope with investigations into atrocities of this scale. Nevertheless, instead of

[108] Reiger, Caitlin and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, (International Center for Transitional Justice, 2006)
[109] Linton, "Experiments In International Justice", 2001
[110] Ibdi, pp. 213

an international tribunal, a hybrid court pretty soon came into the picture, since at the time there was a large number of suspects already being held in detention (virtually all of them low level perpetrators with no leadership role or involvement in ordering or organizing the atrocities); therefore UNTAET did not have the luxury of time and had to act as a matter of urgency in establishing a system for prosecuting the crimes.[111] So the obvious necessity rather than robust decision were the factors that influenced the creation of the hybrid structure within East Timor judiciary. Other practical reasons for establishing the court – practically without negotiations – were experiences with international tribunals for crimes committed in Yugoslavia and Ruanda in terms of their costliness and limited outreach.

Post-conflict East Timor faced some additional issues too, including both new wave of violence and issues regarding impunity. Firstly, in May 2005, the United Nations peacekeeping forces left East Timor, yet less than a year later violence broke out in the country succeeding a rebellion by soldiers who came from the eastern parts of the country. Combats between rebels and government forces resulted in at least 37 killings and once again provoked mass displacement; this time more than 100.000 people lost their homes.[112] As a response, the International Stabilization Force (ISF) was established in 2006 in order to help contain violence and restore the authority of the internal security forces.[113] Secondly, a number of militia leader from the period of armed conflict in 1999 fled East Timor together with other refuges after the results of the independence referendum had been announced. According to Sylvia de Bertodano, in the period after the atrocities, these militia leaders residing in West Timor (Indonesia) had been a particular problem since they still undoubtedly

[111] Ibid

[112] Trial: "Special Panels for Serious Crimes - Timor Leste" http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/special-panels-for-serious-crimes-timor-leste.html

[113] Feijó, Rui Graça, "Timor-Leste in 2013: Marching on Its Own Feet", *Asian Survey*, Vol. 54, No. 1 (2013) pp. 83-88

had an influence within their communities. UN counted on using them in process of resettling the refugees back to East Timor. On the other hand, these people were afraid of trials.[114] So there was an evident tension between two major goals of international community in the region, resettling (political) refugees and prosecuting those suspected for serious crimes. It has been reported even that some of those leaders suspected for war crimes – those that have been involved in the reconciliations process – were able to cross the borders without any fear of arrest, although officially never granted an amnesty.[115]

This complicated situation perhaps helps explaining why hybrid court is only one among institutions of transitional justice employed in East Timor. It was believed that society familiar with informal social institution would be keener to some non-judicial types of transitional justice mechanisms.[116] It is quite likely that no country in the world has more commissions established in order to locate the causes and patterns of violence. Firstly, Indonesian government created the Commission of Inquiry for Human Rights Violation in East Timor (KPP-HAM). Although it attributed responsibility for the abuse of authority to the Indonesian military, the work of KPP-HAM did not have significant effect.[117] After that UN set an initial investigatory process for crimes committed in the aftermath of 1999 referendum, called International Commission of Inquiry. Later on, in July 2001 The Commission for Reception, Truth, and Reconciliation (CAVR) was created with a purpose to deal with the human rights violation in longer period of time: some quarter-century period from departure of colonial powers in 1974 until the peacekeeping intervention that followed post-independence violence. It was accepted better than previous projects for its emphasis on public participation and culturally appropriate approach; however the big expectations and the

[114] De Bertodano, "East Timor: Trials and Tribunals", 2004
[115] Ibid
[116] Linton, "Experiments In International Justice", 2001
[117] De Souza Soarez and Medeiros, "Commission of Inquiry for Human Rights Violations in East Timor", 2013

built-in assumption of its complementarity with the work of prosecutors left the feeling of "unfinished business" among local population.[118] Finally, Indonesia and East Timor jointly founded the Commission for Truth and Friendship; Megan Hirst who is a program associates with the ICTJ in Timor-Leste described the commissions' efforts with a comment: "Too much friendship, too little truth".[119]

3.2.2 Legal Basis and Organization

The Special Panels of the Dili District Court (sometimes referred to as the "East Timor Tribunal") was the hybrid international-East Timorese tribunal that was created in 2000 by the United Nations mission UNTAET. The Special Panels sat from 2000 to 2006 and tried cases of serious criminal offences which took place during the outbreak of violence in 1999. Unlike some other examples of hybrid courts – such was the case of Sierra Leone, for instance – the possibility of creating a hybrid court by a treaty did not exist due to a simple fact that there was no independent national government with whom to contract. Therefore, the creation of the SCSP was accomplished by means of a Regulation issued by UNTAET. The creation of the hybrid Special Panels was entirely the initiative of the international staff within the UN administration, and, according to Reiger and Wierda, Timorese judges who were expecting to handle such cases themselves reacted with a certain hostility. [120] They reported that the domestic organizations and judicial personnel raised an issue that that there was no real consultation prior to the establishment of the Special Panels. However, the constitution of East Timor from 2002 incorporated transitional provisions that allowed for the continued

[118] Lambourne, Wendy, "The Commission for Reception, Truth, and Reconciliation", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)
[119] Megan Hirst, *Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste: Too Much Friendship, Too Little Truth* (ICTJ 2008)
[120] Reiger and Wierda, *The Serious Crimes Process*, 2006

application of UNTAET regulations, including the transitional rules which regulate the criminal procedure, until replaced by a new legislation.

In the initial phase of the SCSP's work, there was only one panel of the court, until the end of 2003 when additional two were organized; however, in practice most often only in front of one of them trials were actually held. Each of the panels was composed of two international judges and one East Timorese judge. International judges came from Brazil, Burundi, Cape Verde, Germany, Italy, Portugal, Uganda, and the United States.[121] In order to increase the acceptance among domestic judiciary staff, UNTAET approved the domestic justice minister to choose the international candidates. Consequently, he insisted on considering as candidates only civil law jurists who spoke Portuguese. Eventually, 11 international judges were chosen (ten out of them being male). All of them were rated in the UN internal salary scale substantially lower than, for example, personnel at under-secretary level in the ICTY and ICTR.[122] The rest of the national judges were left to deal with ongoing "ordinary" crimes on their own. Simultaneously with the hybrid court, the prosecution Special Crimes Unit – also composed of international personnel – worked in four regional offices (located in Dili, Manufahi, Maliana, and Oecuesse) and covered 13 country's districts. The first trials before the Special Panels began in 2001. Timeline of key events in the process of internationalization of judicial system in East Timor is provided in Table 3 bellow.

Table 3: Timeline of key events in the process of internationalization of judicial system in East Timor

Year	Event
1999	In October, the UN Security Cancel established a mission called UNTAET with a mandate to administer the country and exercise all legislative and executive authority
2000	In March, UNTAET formed an organization of courts in East Timor, including the

[121] Trial: Special Panels for Serious Crimes - Timor Leste http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/special-panels-for-serious-crimes-timor-leste.html

[122] Reiger and Wierda, *The Serious Crimes Process*, 2006

	system of district courts and the Appeal court
2000	In June, Special Panels for Serious Crimes within the district court in Dili had been founded
2002	In May, East Timor declared Independence; constitution of East Timor from 2002 incorporated transitional provisions that allowed for the continued application of UNTAET regulations
2006	In May, the Serious Crimes Investigation Team (SCIT) was formed as a new institution for a reason to help domestic prosecutors
2013	In January, 2013 the UN stopped having a direct presence in East Timor; with the work of several multilateral agencies, mostly those concerned with development, children and labor issues, as well as educational, scientific, and cultural work

SCSP was founded within the District Court in Dili with a jurisdiction to deal with serious criminal offences (jurisdiction over genocide, war crimes, crimes against humanities and torture) on the territory of East Timor and committed by or against its citizens.[123] The Special Panels by design indeed enjoyed primacy over the ordinary national courts for offenses within their exclusive jurisdiction. Yet in practice, genocide and war crimes were not charged before the Special Panels. Reiger and Wierda could not identify the exact reasons why, but speculate that it may have to do with the prosecutors' interpretation of the 1999 crimes as a widespread campaign against a civilian population, rather than as crimes in the context of an armed conflict.[124] But Linton asks another question: she thinks that it is unclear what was the aim of East Timor tribunal experiment: is it an end in itself, with no greater purpose beyond retributive justice in the individual case, or it has a more important role within the scopes of transitional justice in terms of reconciliation in a nation struggling to come to terms with a violent history, "with the courts used as a means of checking impunity, establishing the rule of

[123] Carla Marcelino Gomes, 2013
[124] Ibid

law and determining the wider truth of what occurred".[125] She offers an example of Joao Fernandes convicted for participating in massacre at the Maliana Police Station in September 1999. He was charge only for his own specific role in the event, without any placing of the incident within the context of the entire massacre, let alone within the emerging mass violence across East Timor. The point of the criticisms is that there seemed to be lack of a will to conceptualize the past atrocities as a coherent action (in opposite to series unrelated incidents) and understand how and why they happened. In theory, some of these concerns might be overcome by additional mechanisms of transitional justice.

3.2.3 Empirical Overview of Practices

Special Panels in East Timor represent the first hybrid court which has tried cases of serious crimes as a part of the domestic justice system. It is also the first hybrid court that has finished its work. It was hard to obtain information about the budget: it is known that in 2002 some 600,000 US dollars was spent on the Special Panels, whereas almost million went on the SCU, out of a total budget for UNMISET of more than 200 million dollars.[126] During almost six years of trials, 55 cases were completed, involving overall 86 accused individuals. Four persons were acquitted and 82 were convicted, with 24 of them pleading guilty. At the initial point of dealing with the past atrocities, much more suspect have been considered for prosecution: when the UN ceased funding the Special Panels and the Serious Crimes Unit, there were close to 400 suspects, 514 outstanding cases for which investigations had been conducted but no indictments issued and 50 cases for which no investigations had yet been conducted. These cases which were not tried included 828 accounts of alleged murder, 60 rapes, and over 100 cases of alleged torture or other serious violence. Those sentenced

[125] Linton, "Experiments In International Justice", 2001, pp. 214
[126] Reiger and Wierda, *The Serious Crimes Process*, 2006

received a wide variation of punishments, with most of them in the range of seven to fifteen years. ICTJ reported that there was virtually no collaboration from the Indonesian side, as well as that the domestic institution lack of political will and judicial capacity to finish what they had started.[127] Situation slightly changed with the Los Palos case, the first trial for crimes against humanity. This process attracted significant attention, and eventually all ten accused were convicted and received sentences from four to 33 years (which was later reduced **to** 25 years on the basis of a presidential pardon).

At the same time, it seems that dichotomy between international and domestic components in transitional justice in case of East Timor continued to exist, only this time within one institutional structure. Some independent observers noted early occasions where international judges "demonstrated patronizing attitudes to their national colleagues, citing instances where a national judge's questions of an accused were cut short by the Presiding Judge, despite the fact that they related to specific details of the context that may not have been apparent to internationals, such as Indonesian military structures".[128] Apparently, on one occasion, the opposing opinion of the domestic judge was not even published.[129] Furthermore, special panels had substantial difficulties to meet standards regarding due processes. Reiger and Wierda noticed problems such are delays in recruitment of international judges (in first three years there were only enough judges to constitute one panel at a time), poor management of recreational leave, and average contract length of personal of only 6 to 12 months.[130] Also, during 2003 a number of partly heard trials had to be restarted for the reason that judges were simply leaving their positions. Judge resignation problem, however, was not as perceptible as it was in the case of the Cambodian hybrid court.

[127] ICTJ: "Background: Justice Denied"
https://www.ictj.org/our-work/regions-and-countries/timor-leste
[128] Reiger and Wierda, *The Serious Crimes Process,* 2006
[129] Ibid
[130] Ibid

In general, lack of cooperation with Indonesia and absence of a coherent prosecution strategy are the two issues that came as the largest obstacles to fighting impunity and bringing full number of suspects to justice. Indonesian authorities did sign a Memorandum of understanding with UNTAET; however their national parliament never ratified it.[131] Requests for transfer of suspects coming from SCU were met with silence, and there was no formal reply about attendance of witnesses. At the time, the situation had been compared with Serbia and it had been thought that only dramatic transformation of political climate could guarantee extradition of high-profile defendants, such was the case with Slobodan Milosevic in 2001. Simultaneously, Indonesian government created its own *ad hoc* tribunal, yet the most people involved in the processes agree that these hearings (known as "the Jakarta trials") did not bring any real measure of justice for atrocities in East Timor. Bertodano quotes one unnamed Indonesian human rights lawyer who said that the only purpose of "the Jakarta trials" from the very beginning was to meet the pressure coming from both inside and from international community: „It is not to get justice for the victims, it's just lip service".[132] The Judicial System Monitoring Program (JSMP), an NGO that provides independent information on the judicial system of East Timor and Indonesia, stated that that Indonesian government "did nothing to strengthen the process in order to deliver credible outcomes and justice".[133]

Moreover, when Serious Crimes Unit was formed as an international prosecutorial body within East Timor's judicial system, at first it was dealing predominantly with Timorese militia and individual murder charges. This narrow scope was quite disappointing for those who expected to see Indonesians on trial, especially those accused for war crimes and crimes

[131] De Bertodano, "East Timor: Trials and Tribunals", 2004
[132] Ibid, pp. 96
[133] Judicial System Monitoring Program
http://jsmp.tl/en/

against humanity.[134] In the first years, suspects were a mixture of some (but certainly not all) political and military leaders, and low ranking militia members who simply happened to be within the territorial jurisdiction of the court. According to Bertodano, with the change of the head of the SCU in 2003, more coherent strategy was developed, concentrating on framing indictment against political and military leaders, including those out of reach of the Court.[135] Afterwards, SCU made a list of 10 priority cases:

1. Liquiça Church massacre (6 April 1999),
2. Murders at the house of Manuel Carrascalão (17 April 1999),
3. Maliana Police Station (2 – 8 September 1999),
4. Los Palos case (21 April 21 – 25 September 1999),
5. Lolotoe case (2 May – 16 September 1999),
6. Suai Church massacre (6 September 1999),
7. Attack on Bishop Belo's compound (6 September 1999),
8. Passabe and Makaleb massacres (September – October 1999),
9. The second case in Los Palos (April – September 1999),
10. Sexual violence cases carried out in various districts (March – September 1999)[136]

Finally, in response to criticisms, the SCU managed to initiate the proceedings against Indonesian General Wiranto, the former Indonesian defense minister and commander of armed forces. The case of General Wiranto is an example in which two major criticisms meet, since Indonesia reacted against this indictment and offered a protection to Wiranto and other army leaders. In February 2003, General Wiranto was indicted together with seven other high

[134] Gomes, Carla Marcelino, "Serious Crimes Unit, Office of the General Prosecutor of the Republic of Timor-Leste", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

[135] De Bertodano, "East Timor: Trials and Tribunals", 2004

[136] Hirst, Megan and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in Timor-Leste*, (ICTJ 2005)

placed military and civilian individuals. The accused were charged with murder, deportation and persecution as crimes against humanity. They were implicated through their command responsibility as certain documents had shown that Indonesian authorities had effective control over the armed forces involved in these crimes.[137] Year later an arrest warrant was issued, however Indonesia again refused to cooperate with the hybrid court in East Timor. After his military carrier General Wiranto even become an active politician in Indonesia. More details about General Wiranto's post-transitional political engagement are provided in the next section which analyzes acceptance and legacy of the East Timor tribunal.

3.2.4 Acceptance and Legacy

The hybrid court finished its work in 2006. It has been suggested that serious crimes will be handled in ordinary domestic courts, or possibly in any international court that may be created with appropriate jurisdiction. In 2006, a new international prosecution unit, the Serious Crimes Investigation Team (SCIT) was formed. Unlike the SCU, a hybrid institution which was a division of the Office of the Prosecutor General, SCIT does not have real prosecutorial powers: its job is to assist to complete investigations in cases of serious human rights violations, in a similar fashion as in Ethiopia (as explained in Chapter III). So SCIT completes the investigations, prepare documents, and it hands a case file over to the OPG with a recommendation either to close or to prosecute the case. However in the ICTJ's study on impunity from 2010, a lack of sustained political will to support the SCIT was highlighted.[138] This study has shown many of the leading political figures in East Timor have long been publicly opposed to prosecuting serious crimes. For instance, President Jose Ramos-Horta in

[137] Trial: "General Wiranto"
http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/234/action/show/controller/Profile.html

[138] International Center for Transitional Justice, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make* (2010)

his speech for the 10th anniversary of independence called for the closure of SCIT and rejected the possibility of an international tribunal to try international crimes committed in the country.

Reiger and Wierda described for the ICTJ that the Special Panels themselves never paid great attention to any form of public outreach or distribution of information on its work: there was "no clear system for the public to access copies of court documents or judgments, many of which were not translated out of their original versions in either English or Portuguese",[139] Arguably the only public information about the hybrid court was coming through the JSMP. Officials of the Special Panel for the first time exercised their power to travel to a remote region of the country in March 2004, in order to conduct an on-site hearing in enclave of Oecussi. Monitors found that hundreds of community members were present and responded extremely positively, however, "the lack of accessibility generally for ordinary members of the public in districts far removed from the capital remained a huge problem for the public perception and understanding of the Special Panels".[140] Nevertheless, a 2005 report to the Secretary General of the Commission of Experts in fact appreciates the legacy. It points out that Timorese judges, sitting with other international judges at the Special Panels have undoubtedly "built skills and refined capacities through this experience, and that (...) will benefit from their experiences in the future."[141] Reiger and Wierda interviewed different unnamed prosecutors, who had drastically opposite views on hybrid courts' overall legacy.[142] One of them thinks that a chance was missed to clarify certain legal terms including the ICC's definition of rape and command responsibility for non-state actors. The other one insisted on the achievements such are the establishment of an historical record of what happened in East

[139] Reiger and Wierda, *The Serious Crimes Process,* 2006, pp. 31
[140] Ibid, pp. 31
[141] Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999 from 26 May 2005
[142] Reiger and Wierda, *The Serious Crimes Process,* 2006

Timor in 1999, and the demonstration of an orchestrated campaign between the militia and Indonesia's civilian administration.

The core issue in perception of the Special Panels and the work done, especially among victim communities and domestic NGOs have to do with the problem of selectivity. Many people observed the process for atrocities in East Timor as focused on low-level perpetrators, missing the leaders and master-minds behind the deadly operations. This pattern of opinion somewhat changed though after General Wiranto was accused. However, as stated earlier he was never actually brought to justice: Bertodano thinks that here international community fail to support the prosecutors who were "let down by the United Nations".[143] Moreover, later developments in the most prominent Timorese case did not contribute local trust to judiciary either. In Indonesia, the former armed forces chief General Wiranto became a presidential candidate in 2004, and Amnesty International reported that this event attracted international criticism because of his indictment by the UN-sponsored court in for crimes against humanity.[144] The last military commander under former dictator Suharto officially announced his presidential bid for 2014 presidential elections as well. Jakarta Globe reported that his candidacy provoked reactions ranging from skepticism about his chances, "to optimism for the return to power of a figure of authority". Wiranto made the announcement at the headquarters of the People's Conscience Party (*Hanura*), alongside his vice-presidential candidate, media baron and party's chief patron, Hary Tanoesoedibjo. Above all, Wiranto played on a "multicultural card", claiming that his candidacy with Hary best represent pluralism, since he is a Javanese Muslim, while Hary is ethnic Chinese and Christian. If it is for any conciliation for East Timorese victims, Wiranto does not have a lot of chances to win. For now, the favorite is Joko Widodo who is likely to be the first directly elected president of

[143] De Bertodano, "East Timor: Trials and Tribunals", 2004, pp. 92

[144] Amnesty International Report 2005: "The State of the World's Human Rights" http://www.amnesty.org/en/library/info/POL10/001/2005/en

Indonesia that is not of military background. The former major of Surakarta and governor of Jakarta district is supported by an iconic figure of Indonesian politics Megawati Sukarnoputri, daughter of the nation's father Sukarno, and herself Indonesian president during one phase of the East Timor conflict.

3.3 Kosovo

Kosovo is the youngest European country. In previous 15 years, Kosovo justice system has been truly "internationalized": the UN Interim Administration Mission in Kosovo (UNMIK) issued regulations permitting international judges to serve alongside domestic judges in existing courts in Kosovo. These panels – known as the *Regulation 64 Panels* after the regulation that created them – have a core mandate to try alleged perpetrators responsible for atrocities committed during the armed conflict.[145] However, in April 2014 Kosovo's parliament has approved creation of a new international court; in the eyes of the public it is largely seen as a body which is to handle war crimes committed by ethnic Albanians in the former Serbian province.[146]

3.3.1 Background and Challenges after Atrocity

Armed conflict in Kosovo came as the last phase of Yugoslav wars. These were in fact series of ethnic conflicts fought from 1991 to 1999 on the territory of former Yugoslavia, often

[145]UN Office for the Coordination of Humanitarian Affairs:
http://www.irinnews.org/indepthmain.aspx?InDepthId=7&ReportId=59472

[146] Amnesty International: "Document - Kosovo Court Important Step, but Questions about Impunity Gap Linger"
http://www.amnesty.org/en/library/asset/EUR70/011/2014/en/12abee4b-856f-4085-acbc-1c521d580e80/eur700112014en.html

described as the Europe's deadliest conflict since World War II. The wars followed the breakup of the country, where its constituent republics declared independence. The status of Kosovo "soon emerged as the new center of gravity of Yugoslavia's violent dissolution",[147] and, as journalist Tim Judah suggested in the spring of 1999, it was "a catastrophe waiting to happen".[148]

While the relationships were difficult throughout the communist Yugoslavia, the conflict reached a new peak in 1989 after the Serbian leader Slobodan Milosevic stripped the province of Kosovo of its autonomy. Having introduced the state of emergency, Milosevic "purged most ethnic Albanians from government offices and the court system, and closed the university and the law school".[149] Violence escalated again in 1998. Conflict was "multidimensional"[150] since it was both *internal* (Yugoslavian/Serbian police, military and paramilitary forces against the Kosovo Liberation Army and the local population more broadly) and *international* (NATO's Operation Allied Force undertaken to oppose the regime violence). According to the Kosovo Memory Book, 13,421 people were killed in Kosovo during the conflict, from January 1998 up until December 2000: 10,533 were Albanians, 2,238 were Serbs, 126 Roma, 100 Bosniaks and others. [151] Lastly, the NATO 78-day bombing campaign against Yugoslavia ended with an agreement calling for Serbian armed forces to withdraw from the territory of Kosovo within 11 days,[152] and allow entrance of 50,000 NATO

[147] Webber, Mark, "The Kosovo War: A Recapitulation," *International Affairs*, vol. 85, no. 3 (2009) pp. 447–450

[148] Ibid

[149] Carolant Robert F. *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court System: The Kosovo Experiment*, Transnat'l L. & Contemp. Probs. 9 (2008)

[150] Webber, "The Kosovo War", 2009

[151] "The Kosovo memory Book"
http://www.kosovomemorybook.org/?page_id=2884&lang=de

[152] Pernello, Tom and Marieke Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, ICTJ (2006)

troops.[153] In June 1999 the UN Security Council adopted the Resolution 1244 which established the United Nations Mission in Kosovo (UNMIK) and turned Kosovo into a UN protectorate. Nine years later, in February 2008, Kosovo's Parliament declared independence. New York Times reported that Kosovo's bid to be recognized as Europe's newest country was "the latest episode in the dismemberment of the former Yugoslavia, 17 years after its dissolution began".[154]

The court system in Kosovo after the summer of 1999 was devastated: virtually all of the existing court personnel were Serbian, and most of them refused to work in the new court system "out of fear for their safety or because Slobodan Milosevic's government paid them not to work by immediately paying them their pensions".[155] According to Michael Hartman served as the first international prosecutor of Kosovo for the UN, in the aftermath of the conflict thousands of ethnic Serbs fled Kosovo while most of the ethnic Albanians had little or no experience in judicial affairs due to the purges and exclusion during the previous regime. Moreover, new courts faced legitimacy problems since those few local Albanian jurists who had worked in courts in the 1990s were widely regarded within Albanian ethnic community as being collaborators with an oppressive Serbian rule.[156] As soon as January 2000 there was a consensus among the UN, OSCE, and international NGOs that the justice system in Kosovo has significant problems. As Hartmann pointed out, experienced observers could not agree that the Albanian jurists' discriminatory results were due only to lack of knowledge of war crimes law and human rights standards.[157] Something had to be changed.

[153] Carolant, *The Kosovo Experiment*, 2008
[154] New York Times: "Kosovo Declares Its Independence From Serbia"
http://www.nytimes.com/2008/02/18/world/europe/18kosovo.html?pagewanted=all&_r=0
[155] Carolant, *The Kosovo Experiment,* 2008, pp. 13
[156] Hartmann, Michael E. *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping*, 2003
[157] Ibid

Evolution of court system started after an incident occurred in February 2000 in town of Mitrovica, otherwise divided on "Serbian" North and "Albanian" South. Anti-tank rocket on a UN bus transporting Serbs into the town fueled rioting and mob violence between the two communities and shortly after the Special Representative of the Secretary-General (SRSG) brought Regulation 2000/6, which allowed international judges and prosecutors to serve in the Kosovo judiciary.[158] The evolution started slowly with this small step: Regulation 2000/6 allowed only one international judge and one international prosecutor to only one District Court (the one in Mitrovica), however the appointment of IJP did required different methods than those previously used to appoint Kosovo jurists[159], and it basically represented a dawn of hybridity in the domestic judicial system.

3.3.2 Legal Bases sand Organization

In contrast to the hybrid courts in Sierra Leone and Bosnia found on the basis of domestic legislation and/or a treaty, and somewhat similar to the one in East Timor, "internationalized" judicial institutions in Kosovo derivate from a regulation of UNMIK. This mission was mandated to provide an interim administration and it had all the legislative and executive powers, including the administration of the judiciary. The prior examples of hybrid courts are permanent panels or chambers applying laws specifically designed for them, with staff (including international judges and prosecutors) assigned to them, whereas Kosovo panels are formed *ad hoc* and apply the same laws as the other domestic courts.[160] This is due to the fact that, as John Cerone and Clive Baldwin pointed out in their evaluation of UNMIK's court system, after the withdrawal of the Serbian forces, the province was left in a law-and-order

[158] Carolant, *The Kosovo Experiment*, 2008
[159] Hartmann, "International Judges and Prosecutors", 2003
[160] Ibid

vacuum. In this view, the Kosovo's system is unique in a sense that "international judges permeate the court system, sitting on panels throughout Kosovo on a case-by-case basis".[161]

At the same time, the UNMIK lacked the resources and the mandate to act as the main venue to bring justice for the crimes.[162] So the "International Judges and Prosecutors" program (IJP) further evolved as a direct result of the earlier mentioned problems of international judges being outvoted and Kosovo prosecutors sometimes overcharging Serbs and undercharging Albanians.[163] Two significant regulations enacted by UNMIK came into the picture as a response. The first was Regulation 2000/64, known as "Regulation-64", which gave international community present at Kosovo a method to ensure majority international control of voting. New law approved that a particular case could be heard by a panel composed of three professional judges (with a minimum of two international judges) instead of a five judge panel with two professional and three lay judges. Second important decision while creating the hybrid structure was to allow international prosecutors the powers of resurrection; "R-64" gave them a power to undo acts of case or investigation abandonment by domestic judges.[164] This is how the international components were involved in Kosovo judicial system prior to the proclamation of independence and introduction of EULEX in 2008.

EULEX (the EU Rule of Law Mission) is a deployment of police and civilian resources to Kosovo. The Mission is introduced to support Kosovo on its path to a greater European integration in the rule of law area. The EU Joint Action of February 2008 (as well as Council Decision of 2010 and 2012) provided the legal basis for the mission which became fully

[161] Cerone, John and Clive Baldwin, "Explaining and Evaluating the UNMIK Court System", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

[162] UN Office for the Coordination of Humanitarian Affairs: http://www.irinnews.org/indepthmain.aspx?InDepthId=7&ReportId=59472

[163] Hartmann, "International Judges and Prosecutors", 2003

[164] Ibid

operational in April 2009. EULEX is supported by all 28 EU members and five contributing States (Canada, Norway, Switzerland, Turkey and the United States). It is divided into the Executive Division and the Strengthening Division. The former is in charge of investigations, prosecutions and adjudications of sensitive cases. It also monitors, mentors, and advises local counterparts in the police, justice and customs fields[165]. Executive Division deals not just with the cases relating to war crimes and terrorism, but also with organized crime, high level corruption, property, privatization, and other serious crimes, therefore reaching beyond the traditional areas of interest within transitional justice. Timeline of key events in the process of internationalization of judicial system in Kosovo is provided in Table 5 bellow.

Table 5: Timeline of key events in the process of internationalization of judicial system in Kosovo

Year	Event
1999	In June, the UN Security Council adopted the Resolution 1244 which established the mission in Kosovo (UNMIK) and turned the province into a UN protectorate
2000	In February, SRSG brought Regulation 2000/6, which allowed one international judge and one international prosecutor in the District Court in in Mitrovica
2000	In December, UNMIK Regulation 2000/64 was issued allowing for the assignment of international judges and prosecutors in particular cases; the new mechanism was called the "Regulation 64 Panels"
2003	In July, UNMIK Regulation 2003/25 and 2003/26 were issued, enacting the Provisional Criminal Code and Provisional Criminal Procedure Code, replacing the Yugoslav Federal Criminal Code that was still in effect
2008	In February, Kosovo declared independence. Country got its Constitution and the Mission of EULEX is introduced
2008	In March 13, the Assembly passed Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, as well as the Law on Special Prosecution Office of the Republic of Kosovo
2009	Kosovo adopted the (controversial) amnesty law, designed to help integrate the community

[165] EULEX
http://www.eulex-kosovo.eu/en/info/whatisEulex.php

	in Serb-run northern Kosovo by ensuring that people cannot be prosecuted for their past resistance to the Pristina authorities
2014	In April, Kosovo's parliament has approved creation of a new international court that may address the allegations that during the conflict the KLA ran an operation to harvest and sell organs from kidnapped Serbs

My focus is on R-64, which acts as hybrid tribunal in Kosovo. R-64 panel consists of two international judges, one local judge (by rule, one of the international judges serves as the president), as well as an international prosecutor. The international judges sit on the regular courts of Kosovo, while the international prosecutors work on a national level.[166] The judges receive their case assignments in two ways: directly from the Department of Justice, or alternatively they can petition to take on a specific case. For Jeremy Wilson, the vast internationalization of courts in Kosovo has to do with their both legitimacy and efficiency. He states that in initial phase (prior to the R-64) the judiciary primarily comprised ethnic Albanians "because Serbs refused to accept appointments as judges and prosecutors out of fear or general resentment".[167]

The applicable law in Kosovo is a unique blend of UNMIK regulations and domestic laws.[168] Besides the fact that Kosovo's hybrid system is unique in that there is no fixed internationalized court or panel, this case is distinguished in two additional dimensions: a) it is not mandated to directly apply international criminal law, and b) its competence overlaps with the ICTY, an *ad hoc* international tribunal created specifically for former Yugoslavia.[169] According to Cerone and Baldwin, the international human rights law has been introduced to

[166]Institute for War and Peace Reporting:
http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts

[167] Wilson, Jeremy M. "Law and Order in an Emerging Democracy: Lessons from the Reconstruction of Kosovo's Police and Justice Systems", *The ANNALS of the American Academy of Political and Social Science*, (2006)

[168] Pernello and Wierda, "Lessons from the Deployment", 2006

[169] Cerone and Baldwin, "Explaining and Evaluating the UNMIK", 2004

Kosovo *via* UNMIK regulation, while international criminal law applied indirectly through the vehicle of pre-existing domestic law. However, in 2003 UNMIK issued the provisional criminal and Criminal Procedure Code, replacing the former Yugoslav code that was still in effect. Finally, after the Kosovo's declaration of independence, the national Assembly passed two important laws that regulated jurisdiction, case selection and allocation of EULEX judges and prosecutors, and also the work of Special Prosecution Office. These laws are in accordance to the basic idea of hybridity since they recognize the authority of EULEX judges, prosecutors, and courts to work in tandem with their domestic counterparts.

3.3.3 Empirical Overview of Practices

According to Hartmann, the main lesson learned from the experience of Kosovo's criminal justice system is that "international participation in the judicial arena should have been immediate and bold, rather than incremental and crisis-driven"[170]. For him, earlier prosecution by international judges and prosecutors would have inhibited the growth of the criminal power structures, including alliances among extremist ethnic groups, war criminals, terrorists, and organized crime. In other words, Regulation 64 maybe came a little bit too late. Nevertheless, during the transition period when EULEX was taking over most of the responsibilities of UNMIK, all the pending cases were transferred, except some criminal trials in process and four cases of the Special Chamber, since it was estimated it might affect human rights or judicial effectiveness. Since then, EULEX judges have taken about 120 cases, while prosecutors almost 300 cases, 60 of them being connected to war crimes.

It was mentioned earlier that "R-64" differs from other hybrid systems in their broad discretion to take any pending case at the national level, not just those regarding war crimes and genocide. As the new system developed, the focus gradually shifted, notice Pernello and

[170] Hartmann, "International Judges and Prosecutors", 2003

Wierda, "from cases deemed inappropriate for local judges and prosecutors to cases that local judges and prosecutors did not want to try because of security concerns or other political pressures".[171] In later years the international prosecutors and judges indeed primary focused on organized crime and corruption cases, yet it does not mean that these issues are totally isolated from the atrocities committed during the armed conflict. Pernello and Wierda reported the words of an unnamed international prosecutor who stated that these categories of cases are often interrelated, because criminal power structures, including organized crime, are/were also involved in terrorism and inter-ethnic violence.[172]

On the other hand, the work of hybrid tribunals is potentially limited when they cannot reach the suspects residing in a country which refuses to collaborate. Courts in Kosovo (as well as the WCC in Bosnia) have difficulties extraditing individuals from Serbia. Hence Hartmann thinks that in this matter an international *ad hoc* tribunal such is the ICTY, despite the difficulties proven in practice, has greater capacity to access the suspects, since (at least in theory) all the countries are obliged to cooperate with it.[173] At the same time, Institute for War and Peace Reporting testified that due to the low number of international judges and prosecutors, they are often overwhelmed with their assignments.[174] In this view, there is no concrete policy or criteria on which whether the petitions should be accepted or rejected, which ultimately may influence consistency and impartiality. Another shortcoming in the system at the time was a growing backlog of cases: according to OSCE at the end of 2001 there were 33,538 civil and criminal cases, and this number increased to 81,900 within net two years.[175]

[171] Pernello and Wierda, "Lessons from the Deployment", 2006
[172] Ibid
[173] Hartmann, "International Judges and Prosecutors", 2003
[174] Institute for War and Peace Reporting:
http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts
[175] Ibid

Another major criticism regarding the hybrid judicial institutions in Kosovo has to do with the structure which basically gives the Special Representative of the Secretary-General (SRSG) an ultimate executive power to appoint international judges and prosecutors and choose cases in which they are to be involved. Judges and prosecutors are not subject to the domestic judicial and prosecutorial council, so there is no real local involvement in the oversight of their work. So the institutional design itself created an appearance of executive control over these officials.[176] This means that international judges and prosecutors are being treated as subjects to direct supervision of executive branch, therefore being led to a position in which they cannot be considered independent under the European Convention of Human Rights.[177]

Moreover, when it comes to the goal of imparting the knowledge and developing law, Cerone and Baldwin think that, in the first several years, UNMIK missed an opportunity to educate the local judiciary, since it established a system in which international personnel is administered as a parallel structure under the control of UN. In other words, the pre-hybrid dichotomy of international and domestic dimension remained, yet this time within one body. These authors think that although the use of international judges and prosecutors had both positive and negative effects, hybrid system in Kosovo certainly failed to: a) improve the quality of adjudication, b) develop human rights law, and c) to serve as a model of independent judicial decision making. [178]

On the other hand, internationalization of the existing court is a better solution than the creation of separate jurisdiction, despite the fact it is developed with the force of circumstances rather than by intentional design, Jean-Cristian Cady and Nicholas Booth.[179] They

[176] Pernello and Wierda, "Lessons from the Deployment", 2006
[177] Cerone and Baldwin, "Explaining and Evaluating the UNMIK", 2004
[178] Ibid
[179] Cady, Jean-Cristian and Nicholas Booth, "Internationalized Court In Kosovo: An UNMIK Perspective", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized*

think that deploying judges working side-by-side with domestic ones, firstly, avoids problems of conflict of jurisdiction, and, secondly, is more flexible for the reason that allows internationals to interfere in different stages and on different levels of a process: "without international judicial presence, UNMIK would fail to bring to justice accused for war and organized crime".[180] In this view, organized crime is targeted as a priority, not just because they are considered to be "high-profile" cases, but also because their perpetrators are often very closely linked with those involved in past ethnic violence and extremism. As a final point, it has been noted that the hybrid system is complementary not alternative to local capacity building and that it is only one of the tools, along with strong witness protection program, adequate security measures, or equipment to perform surveillance.

3.3.4 Acceptance and Legacy

Perceptions of the Regulation 64 Panels among citizens of Kosovo are to a significant degree divided along ethnic lines.[181] Pernello and Wierda reported the words of an unnamed Kosovo Serb defense lawyer who emphasized that the international judges and prosecutors are needed because of persistent division and hostility between the communities: "We do not believe to each other. Therefore any interethnic or war crimes cases cannot be handled by judges from either of these groups". So the perception-clash when it comes to the site of justice is not conceptualized merely along domestic-international line, but the "domestic" component is regarded through different scopes too, due to the obvious ethnic feature of the Kosovo conflict.

Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia, (Oxford University Press: New York 2004)

[180] Ibid, pp. 77

[181] Pernello and Wierda, "Lessons from the Deployment", 2006

Given that the hybrid system was introduced to minimize the bias against Serbs in post-1999 Kosovo courts, Serbian community is generally more supportive about the participation of international actors. This is both significant and unusual having in mind that Kosovo Serbs (and Serbian side as whole throughout the Yugoslav wars) often considered international community in general, and the ICTY in particular, as being mostly partial against them. This negative view of the ICTY had been sparked again in November 2012 when three high-ranking members of KLA – former prime minister and KLA commander Ramush Haradinaj, his uncle Lahi Brahimaj and deputy commander Idriz Balaj – have been acquitted after a retrial on war crimes committed during the armed conflict in 1998 and 1999. Afterwards, the Amnesty International (AI) called for justice for all of the victims and their relatives. John Dalhuisen, Director of AI's Europe and Central Asia program asked who did commit those crimes, if the these individuals are not guilty: "Is anybody ever going to be brought to justice? These are the questions that the victims and their families ask, and will continue to ask, until they see justice".[182] When affairs transferred to a domestic ground, Serbian side is much more approval on international presence within Kosovo's hybrid system.

In reverse, many Kosovo Albanians consider the treatment of war crimes suspects as imbalanced: they assert that many Serbs are acquitted, receive light sentences, or simply not prosecuted, while Albanians have received more severe punishments.[183] Local Albanians and Serbs have reacted very differently when the former KLA commander Rrustem Mustafa received a 17-year jail sentence for ordering the murder of five Albanians believed that had collaborated with the regime Serbs, and failing to prevent illegal detention in the Lap region in the North of the province during the conflict (Mustafa's accomplices Nazif Mehmeti, Latif Gashi, and Naim Kadriu were sentenced to thirteen, ten, and five years respectively). For

[182] Amnesty international: "Kosovo: If they are not guilty, who committed the war crimes?" https://www.amnesty.org/fr/node/35572

[183] Pernello and Wierda, "Lessons from the Deployment", 2006

many Albanians the Llap-group trial is politically motivated and unlikely to bring the local population any closer to the international community.[184] It is thought the perceived lightness of the sentence against Serbian perpetrators "sparked anger among witnesses and the families of the Albanian victims", as well as that the sentences handed down to four former ethnic Albanian rebels "will do nothing to promote reconciliation between Kosovo's communities".[185]

However, there is a certain agreement among foreign monitors that the system of international prosecutors and judges integrated directly into the national judiciary is an opportunity for a symbiosis between international and domestic components. The organization Transitions Online emphasize exposure of the Kosovo's legal community to international professionals and standards, and demonstrating unbiased legal proceedings, thus "helping to build trust in a legal system that many saw as a tool for oppression".[186] But the question here is whether the new court (the one that is yet to be established) is a *de facto* confession that the decade and half lasting hybrid system in Kosovo has failed? Prime Minister Hasim Thaci urged legislators to vote for the establishment of the court suggesting that it would help cleanse Kosovo from allegations of war crimes, despite his earlier claim that the new court is "the biggest injustice and insult which could be done to Kosovo and its people".[187] While Serbia welcomed the news, and Human Rights Watch called the vote "a step for justice and the rule of law", the Associated Press reported that the EU push for the court "reflects the reality that

[184]Institute for War and Peace Reporting: "Comment: KLA Trials Harm Reconciliation" http://iwpr.net/report-news/comment-kla-trials-harm-reconciliation

[185] Ibid

[186] Transitions Online: "Kosovo Approves New War Crimes Court, Erdogan in Condolences for 1915 Armenian Killings" http://www.tol.org/client/article/24275-kosovo-approves-new-war-crimes-court-erdogan-in-condolences-for-1915-armenian-killings.html

[187]Balkan Insight: "Serbia Welcomes New Kosovo War Crimes Court" http://www.balkaninsight.com/rs/article/serbia-welcomes-new-kosovo-war-crimes-court

many crimes from the rebel side of the Kosovo war have yet to be aired in court".[188] Although formally based in Pristina, the new court will most probably conduct the bulk of its work in the Netherlands under a staff of international jurists, once more shifting the site of the justice-delivery further away from the site of the actual atrocities.

According to AI the need to establish a chamber outside Kosovo "clearly points to the failure since 1999 of the international community".[189] For them, the fundamental barrier to the investigation and prosecution of crimes is a lack of an adequate witness protection. This international organization recommended that hearings should take place in the Netherlands only to the extent necessary for witness protection. In any other case efforts to provide justice would be unnecessarily further externalized, while "it is essential that justice be seen to be done within Kosovo".[190] However, creation of the new institution is still in its initial phase and there isn't a final decision how the court shall proceed. For now it is confident to say that the court may address the allegations that during the conflict the KLA ran an operation to harvest and sell organs from kidnapped Serbs within a wider organized crime network; an issue raised in Council of Europe report from 2010. The report implicates even Kosovo's prime-minister Hasim Thaci who was the leader of the KLA which might mean that once again the mechanism of transitional justice in this former Serbian province will face the challenges of impunity.

[188]Transitions Online: "Kosovo Approves"
http://www.tol.org/client/article/24275-kosovo-approves-new-war-crimes-court-erdogan-in-condolences-for-1915-armenian-killings.html

[189] Amnesty International: "Document - Kosovo Court Important Step, but Questions about Impunity Gap Linger"
http://www.amnesty.org/en/library/asset/EUR70/011/2014/en/12abee4b-856f-4085-acbc-1c521d580e80/eur700112014en.html

[190] Ibid

IV CONCLUSION

Applying any mechanism of transitional justice is never a smooth process. The problems in transitional processes in Cambodia, East Timor and Kosovo are also many and diverse. In my thesis, I have conceptualized hybrid courts and have explored their role as a mechanism of transitional justice. I analyzed the issues of criminal justice and its centrality, identified reasons for establishing these hybrid tribunals in the broader surroundings of the (existing) dichotomy between domestic and international norms and actors in transitional justice. I also explored the defining characteristics of these "internationalized" judicial institutions in general and hybrid courts in Cambodia, East Timor, and Kosovo in particular. Although some of the differences between empirical examples of these "mixed" tribunals may seem intense, and they, superficially, might leave no space to discourse about some kind of common core, this however does not necessarily mean that theoretically, analytically and even empirically these courts cannot be considered as a distinct type**,** namely a special sort of criminal justice mechanism in the transitional societies. The main structural characteristics of hybrid courts in Cambodia, East Timor, and Kosovo are provided in the Table 6 below.

Table 6: The main structural characteristics of hybrid courts in Cambodia, East Timor, and Kosovo

	Cambodia	East Timor	Kosovo
Creation	The establishment of the ECCC comprises a variety of legal documents; the purpose of the Agreement is not to establish a legal basis for the trials, but to regulate the cooperation between the UN and the government	The UNTAET acted as *de facto* government and announced regulations on the establishment of the panels	The UNMIK acted as *de facto* government and announced the regulations deploying international judges and prosecutors
Legal status	It is the part of the domestic system and its legal status is that of a domestic court	It is the part of the domestic system and its legal status is that of a domestic court	International judges and prosecutors are part of the domestic legal system; No hybrid court understood in terms of a single body: program of international judges

			and prosecutors work within the courts of Kosovo
Composition	Trial Chamber consists of three Cambodian and two international judges, so domestic judges are in majority	Cases are judged by Special Panels of one domestic and two international judges	Cases are judged by Special Panels of one domestic and two international judges
Location	ECCC are seated in the capital Phnom Penh	The panels are seated in the capital Dili, prosecutors' unit also has four regional offices	Potentially, international judges and prosecutors can be deployed in every court in Kosovo
Jurisdiction	Genocide and crimes against humanity crimes committed from April 1975 to January 1979	Specific "serious crimes", which include war crimes, genocide, torture, and crimes against humanity	Dealing with virtually all types of crimes
Substantive laws	Panels have mandate to apply directly both domestic and international criminal law	Panels have mandate to apply directly both domestic and international criminal law	Panels have mandate to apply domestic law only; however the applicable domestic law also incorporates crimes as defined internationally

Hybrid courts are typically established in societies in which domestic judicial institutions are too week, politicized or corrupt to deal with such important matters. Evaluation of hybrid courts solely through the eyes of the Western developed democracies and their comprehensive reading of the rule of law, although needed, sometimes might mean simply raising the bar too high. This of course does not mean that universal rules shouldn't be followed, implemented, and applied, and that elementary due processes are to be compromised. This rather means that there should be a wider agreement for a more "fair" treatment and evaluation of local efforts to reestablish peace, and engage in building the peaceful coexistence among people.

Hence, despite all the serious problems, difficulties, individual failures, and controversies that were assessed in previous chapters, my thesis concludes that establishment of hybrid courts

does contribute to overcoming some of the pre-existing constraints that criminal justice mechanisms in transitional societies may face. It also points out that the process of bringing the perpetrators to justice in post-conflict areas is long and painful, and sometimes requires more patience and understanding from both international and domestic actors. However, it seems that, with the passage of time, the interest of these actors slowly shifts towards other substantive reforms in the post-conflict countries, mostly those regarding economy, corruption, or extensive institutional reforms. Despite the fact that criminal trials are being held as means to achieve truth and justice, document the past atrocities, and finally contribute to reconciliation, in many cases the political will to bring perpetrators to justice *via* the mechanism of hybrid courts is decreasing as the time passes. It is not likely that Cambodian court will go beyond only two completed cases, while political elites in East Timor explicitly declared that they are not interested in further prosecutions. At the same time the focus of international personnel in Kosovo's judicial system in last several years is chiefly on the cases of corruption and organized crime. In addition, The Special Chamber of the Supreme Court of Kosovo was established by UNMIK in 2003 on matters related to privatization process in Kosovo, carried out by the Kosovo Trust Agency.

Therefore my thesis finds that hybrid courts should have more international support in terms of political means, funds, witness protection, dissemination of results, as well as complementary mechanisms of transitional justice. Also the problem of funding was existent throughout the work of hybrid courts. Typically, there is no assessed contributions for these judicial institutions; costs of the courts are not borne by the UN members (or the party states in case of the ICC). Some monitors reported that personnel in the East Timor's Special Panels did not receive salaries that are suitable for the significance and risk of their work, while their colleagues in Cambodia were forced to strike for the reason that they haven't been played on

regular basis. The lack of more robust foreign support in Kosovo have negative outcome when it comes to the witness protection mechanisms.

On the other hand, to a certain extend hybrid courts do have an impact on constraints related to the goal of fighting impunity, though not without difficulties. To repeat, most commonly impunity comes when local authorities are unable or unwilling to act, when there is no relevant court with jurisdiction over territories or individuals in question, or when prosecutorial strategy is simply selective.[191] According to Herman, experience of hybrid tribunals in general has also shown that their work is drastically limited if they cannot reach the suspects residing in a country which refuses to collaborate.[192] In this light, East Timor and Kosovo (as well as Bosnia) are in a different position than other countries engaged in experiment of creating a hybrid court due to a simple reason that those are new states. They are practically generated after different type of conflicts, and a number of suspects reside out of their territories (in these cases in Indonesia and Serbia). These problems depart from the common characteristic of hybrid courts that there is no compulsory cooperation from the third states. "Mixed" courts are formally part of the domestic legal system and UN's Security Council cannot oblige other countries to cooperate with these tribunals.

However, international component in East Timor and Kosovo do have their role in combating impunity. Prosecutors in Kosovo have a special right to "resurrect" the criminal charge rejected by his domestic colleague. Also some people think that international domination in Serious Crime Unit in East Timor influenced the prosecutorial strategy and secured accusation of some high profile individuals such was general Wiranto. Finally, the model which guaranteed a majority of international judges contributed to impartiality and integrity in these two countries. On the other hand, situation in Cambodia is fairly more complicated.

[191] Sriram, "Zone of Impunity", 2013, pp. 292
[192] Hermann, "Hybrid Tribunals", 2013

Burden of legacy and complex network of today's political elites' interests forced even international judges to resign. As a reminder, international judges are anyhow, by design, in minority in Extraordinary Chambers in Courts of Cambodia. Cases internally called as "003" and "004" at the moment are not priority in the country dealing with extreme poverty. Local people do support criminal trials against Khmer Rouge leaders, yet this issue is less important for them than employment and building services to meet basic needs, including health, water and food.

These finding are in accordance to some of the Suzannah Linton's conclusions.[193] She thinks that the selection of the "internationalized" court has to follow a complete and informed consideration of other models of transitional justice and that the selected model must be realistic and take into consideration if the existing domestic system is capable to carry out such a project. The decision, according to Linton, should not be simply "copied from elsewhere on the assumption that it must be a 'good' model because it is used there, but be designed with the needs and circumstances of the particular country and the wishes of its people, in mind".[194] Another important dimension in this view is that the creators of institutional configuration in transitional period have to be precise whether criminal justice is applied merely as a mean of retribution, or it is part of a wider strategy for moving forward towards peace and reconciliation.

As a final point, lessons learned in first examples of hybrid courts – including those in Cambodia, Eat Timor and Kosovo – certainly can provide valuable lessons for future solutions of how to ensure criminal accountability and justice for victims within the domestic environment.[195] It is important to preserve their positive legacy in a sense that after their mandate is over, domestic judges, prosecutors and other staff are to take please of their

[193] Linton, "Experiments In International Justice", 2001
[194] Ibid, pp. 242
[195] Hermann, "Hybrid Tribunals", 2013

international counterparts. Such a “transfer” from internationally dominated towards a domestic court is already being made within the War Crimes Chamber in Bosnia. During the initial phase of operation (WCC’s staff was of mixed origin: the chambers were composed in a similar fashion such those in East Timor and Kosovo), however international component was set to gradually reduce its presence and disappear, making the court a fully national institution, run by domestic staff and financed by the state. In other words, although the principal task of hybrid courts as mechanism of transitional justice is to judge the past atrocities, the decision of their creation is brought with certain forward-looking goals in mind too. These judicial institutions have a role to contribute in both strengthening the rule of law and bringing certain normative change in a post-conflict society.

BIBLIOGRAPHY

Ambos, Kai, "Criminal Justice", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013) pp. 283

Anckar, Carsten, "On the Applicability of the Most Similar Systems Design and the Most Different Systems Design in Comparative Research", *International Journal of Social Research Methodology* 11.5 (2008), pp. 389-401

Andraisse, Edo, *Comparative dynamics of Southeast Asia's political geographies*, paper presented for SEAGA 2010, Hanoi 23 – 26 Nov 2010

Aptel, Cecile, "International tribunals", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Cady, Jean-Cristian and Nicholas Booth, "Internationalized Court In Kosovo: An UNMIK Perspective", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, New York 2004 pp. 59 - 78

Carolant, Robert F. *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court System: The Kosovo Experiment*, Transnat'l L. & Contemp. Probs. 9 (2008)

Cassese, Antonio, "The Role of Courts and Tribunals in the Fight against International Criminality", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

Cerone, John and Clive Baldwin, "Explaining and Evaluating the UNMIK Court System", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

Cohen, Stanley (2001) *States of Denial. Knowing About Atrocities and Suffering*, Cambridge: Polity Press

De Bertodano, Sylvia, "East Timor: Trials and Tribunals", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

De Brito, Alexandra Barahona, Carmen Gonzalez-Enriquez, and Paloma Aguilar, introduction by editors to *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press 2001)

De Souza Soarez, Denis and Sabrina Evangelista Medeiros, "Commission of Inquiry for Human Rights Violations in East Timor", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Dickinson, Laura A. "The Promise of Hybrid Courts", *The American Journal of International Law*, Vol. 97, (2003) pp. 295-310

Etcheson, Craig, "The Politics of Genocide Justice in Cambodia, in Cesare Romano, Andre Nollkaemper", and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004),

Feijó, Rui Graça, "Timor-Leste in 2013: Marching on Its Own Feet", *Asian Survey*, Vol. 54, No. 1 (2013) pp. 83-88

Gomes, Carla Marcelino, "Serious Crimes Unit, Office of the General Prosecutor of the Republic of Timor-Leste", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Hartmann, Michael E. *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping*, 2003

Hermann, Johanna, "Extraordinary Chambers in the Courts in Cambodia" in *Enciclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Hermann, Johanna, "Hybrid Tribunals" in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Hirst Megan, *Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste: Too Much Friendship, Too Little Truth* (ICTJ 2008)

Hirst, Megan and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in Timor-Leste*, (ICTJ 2005)

Human Rights Center of the University Of California in Berkeley, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (2011)

Human Rights Center of the University Of California in Berkeley, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (2011)

International Center for Transitional Justice, *Background: Justice Denied*

International Center for Transitional Justice, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference,* (2012)

International Center for Transitional Justice, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make* (2010)

Kerr, Rachel and Eirin Mobekk, *Peace and Justice. Seeking Accountability after War*, Ch. 3 (Cambridge: Polity Press, 2007)

Kiss, Csilla, "Causes of Failure in Transitional jusitce", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Linton, Suzannah, "*Cambodia, East Timor and Sierra Leone: Experiments in International Justice"*, *Criminal Law Forum 12* (2001) pp. 185–246

Luftglass, Scott, "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge", *Virginia Law Review*, Vol. 90, No. 3 (2004), pp. 893-964

Megret, Frederic *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice* (2005)

Meijer, Ernestine E. "The Extraordinary Chambers in the Court of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized Tribunal", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia,* (Oxford University Press: New York 2004)

Mendez, Juan, "In Defense of Transitional Justice", in James McAdams (ed.) *Transitional Justice and the Rule of Law in New Democracies,* (Notre Dame: University of Notre Dame Press, 1997)

Mendez, Juan, *Fifteen Years of International Justice: Assessing Accomplishments, Failures and Missed Opportunities - Lessons Learned* (2008)

Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998)

Nouwen, Sarah M.H. "'Hybrid courts': The hybrid category of a new type of international crimes courts", *Utrecht Law Review*, Volume 2, Issue 2 (2006)

Nouwen, Sarah M.H. "Hybrid courts: The hybrid category of a new type of international crimes courts", *Utrecht Law Review*, Volume 2, Issue 2 (2006)

O'Callaghan Declan, "Is the International Criminal Court the Way Ahead?" *International Criminal Law Review*, 8 (2008)

Orentlicher, Diane "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *The International Journal of Transitional Justice*, Vol. 1, No. 1 (2007)

Paige, Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice", *Human Rights Quarterly*, Vol. 31, No. 2, (2009)

Pernello, Tom and Marieke Wierda, Lessons *from the Deployment of International Judges and Prosecutors in Kosovo*, ICTJ (2006)

Ratner, Steven, Jason Abrams and James Bischoff (2009) Accountability for Human Rights Atrocities in International law: Beyond the Nuremberg Legacy

Reiger, Caitlin and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, (International Center for Transitional Justice, 2006)

Romano, Cesare, and Andre Nollkaemper, and Jann Kleffner (ed.) (2004) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press

Rule-Of-Law Tools For Post-Conflict States: Maximizing The Legacy Of Hybrid Courts (2008); Office Of The United Nations: High Commissioner For Human Rights; United Nations, New York And Geneva

Scheffer, David, "The Extraordinary Chambers in the Courts of Cambodia", in Cherif Bassiouni (ed.) *International criminal law*, (Martinus Nijhof Publisher, 2008, 3rd edition)

Shivakumar, M. S. "Pol Pot: Death Deprives Justice", *Economic and Political Weekly*, Vol. 33, No. 17 (1998), pp. 952-954

Shraga, Daphna, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

Sluiter, Goran, "Legal Assistance to Internationalized Criminal Courts and Tribunals", in Cesare Romano, Andre Nollkaemper, and Jann Kleffner (ed.) *Internationalized Criminal Courts: Lessons from Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press: New York 2004)

Sriram, Chandra Lekha, "Zone of Impunity", in *Encyclopedia of Transitional*, ed. Justice Stan, Lavinia and Nadya Nedelsky (Cambridge University Press 2013)

Stensrud, Ellen Emillie, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leona and Cambodia", *Journal of Peace Research*, Vol. 46, No. 1 (2009) pp. 5-15

Swisspeace and Oxford Transitional Justice Research, *Transitional Justice Methods Manual* (2013)

Teitel, Ruti "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16 (2004)

Teitel, Ruti *Transitional Justice*, (Oxford: Oxford University Press 2000)

United Nations Development Program, *Rule-Of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (2008)

Webber, Mark, "The Kosovo War: A Recapitulation," *International Affairs*, vol. 85, no. 3 (2009) pp. 447–450

Webber, Max *Economy and Society*, (University of California Press 1978)

Williams, Sarah, "Public International Law", *International and Comparative Law Quarterly* (2004) pp. 227-245

Wilson, Jeremy M. "Law and Order in an Emerging Democracy: Lessons from the Reconstruction of Kosovo's Police and Justice Systems", *The ANNALS of the American Academy of Political and Social Science*, (2006)

Zalaquett, Jose, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints", In Neil Kritz (ed.), *Transitional Justice. Volume I: General Considerations*, (Washington: US Institute of Peace 1995)

Internet Sources:

http://foreignpolicyblogs.com/2011/12/28/war-crimes-2011-year-in-review-asia/

http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts

http://iwpr.net/report-news/comment-kla-trials-harm-reconciliation

http://jsmp.tl/en/

http://www.amnesty.org/en/library/asset/EUR70/011/2014/en/12abee4b-856f-4085-acbc-1c521d580e80/eur700112014en.html

http://www.amnesty.org/en/library/info/POL10/001/2005/en

http://www.balkaninsight.com/rs/article/serbia-welcomes-new-kosovo-war-crimes-court

http://www.bbc.com/news/world-asia-pacific-13006539

http://www.bbc.com/news/world-asia-pacific-14919009

http://www.eulex-kosovo.eu/en/info/whatisEulex.php

http://www.irinnews.org/indepthmain.aspx?InDepthId=7&ReportId=59472

http://www.irinnews.org/indepthmain.aspx?InDepthId=7&ReportId=59472

http://www.irinnews.org/indepthmain.aspx?InDepthId=7&ReportId=59472

http://www.kosovomemorybook.org/?page_id=2884&lang=de

http://www.nytimes.com/2008/02/18/world/europe/18kosovo.html?pagewanted=all&_r=0

http://www.ohchr.org/EN/NewsEvents/Pages/Cambodia-20yearsonfromtheParisPeace.aspx

http://www.reuters.com/article/2013/03/10/us-cambodia-court-idUSBRE9290HM20130310

http://www.theguardian.com/law/2011/nov/23/khmer-rouge-trial-cambodia-victims

http://www.thenational.ae/featured-content/latest/khmer-rouge-crimes-in-legal-limbo

http://www.tol.org/client/article/24275-kosovo-approves-new-war-crimes-court-erdogan-in-condolences-for-1915-armenian-killings.html

http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/special-panels-for-serious-crimes-timor-leste.html

http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects_and_initiatives/local_governanceincambodia/

http://www.voanews.com/content/cambodias-khmer-rouge-tribunal-draws-new-criticisms-130558383/145767.html

https://www.amnesty.org/fr/node/35572

https://www.ictj.org/our-work/regions-and-countries/timor-leste