



PEACE NEGOTIATIONS  
POST-CONFLICT CONSTITUTIONS  
WAR CRIMES PROSECUTION

# **HYBRID TRIBUNALS: CORE ELEMENTS**

**Legal Memorandum**

**Prepared by the**

**Public International Law & Policy Group**

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## Executive Summary

The purpose of this memorandum is to identify core elements of the use of hybrid tribunals to prosecute those responsible for serious violations of international law. The structure of a hybrid tribunal will be influenced by the particular factual circumstances of the conflict it is designed to address. Relevant factors include the number of accused likely to be tried; their relative degrees of culpability; the perceived need for independence from ordinary judicial institutions; and the reputation, expertise and capacity of the domestic judiciary.

Hybrid tribunals present several distinct characteristics that differentiate them from purely domestic or purely international tribunals. Hybrid tribunals can utilize both domestic and international sources of law, and thus the flexibility to incorporate elements of existing criminal law, while addressing serious violations of international criminal, human rights and humanitarian law. Hybrid tribunals may also employ both domestic and international personnel to gain legitimacy while maintaining a substantial connection to the affected state. In addition, a mixed staff can promote capacity building within the domestic judiciary through the incorporation of knowledge and experience from international personnel. Finally, hybrid tribunals can be located in or close to the affected state. Allowing the affected population access to the proceedings and can contribute to the larger transitional justice process as well as help prevent a return to conflict.

There is no uniform model for establishing a hybrid tribunal. State practice reflects that a post-conflict government can create a hybrid a tribunal in one of four ways: (1) under UN administrations; (2) by bilateral agreement; (3) as a domestic court with international elements; and (3) by Security Council resolution.

States may consider a number of other factors in establishing a hybrid tribunal. Protections ensuring the right to a fair trial for the accused, including a clear appeals process, may add to the perceived and actual legitimacy of proceedings. Additionally, states may be confronted with questions of whether and how to shield or mitigate the culpability of child soldiers. Finally, states may provide for coordination between the tribunal and other transitional justice mechanisms. While such coordination may improve evidence available at trial, it may also discourage perpetrators from participating in truth and reconciliation processes for fear that their statements will later be used against them.

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## HYBRID TRIBUNALS: CORE ELEMENTS

### Statement of Purpose

The purpose of this memorandum is to identify core elements of the use of hybrid tribunals to prosecute those responsible for serious violations of international law.

### Introduction

Prosecutions of perpetrators of violations of human rights and humanitarian law are an essential element of a comprehensive transitional justice process in states emerging from conflict. Faced with a judicial system that has been stripped of capacity after protracted conflict, states may need international assistance to investigate crimes and initiate judicial proceedings against alleged perpetrators of grave violations of international criminal law and international humanitarian law.<sup>1</sup> Hybrid tribunals emerged, beginning in the late 1990s and early 2000s, as a transitional justice solution in post-conflict situations when there is insufficient domestic capacity to deal with mass atrocity crimes. To date, all hybrid tribunals have been created to address armed conflict or incidences of mass violence.

While a variety of methods exist to establish hybrid tribunals, some common elements can be identified. While their procedures and functions may be comparable in some aspects, hybrid tribunals have no mandatory requirements or basic defined model. However, several factors are common to all hybrid tribunals, including (1) the application of both domestic and international law, (2) the combination of international and domestic personnel and judges, (3) the employment of both domestic and international lawyers, and (4) formal international participation.<sup>2</sup> Hybrid tribunals are normally, but not always, located in or near the conflict-affected state.

Previously established hybrid tribunals include the Special Panels for Serious Crimes in the District Court of Dili in East Timor; the “Regulation 64” Panels in the Courts of Kosovo; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia; and the Special Tribunal for

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<sup>1</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 352-56 (2006), available at [www.ajicl.org/AJICL2006/vol232/Higonnet%20article.pdf](http://www.ajicl.org/AJICL2006/vol232/Higonnet%20article.pdf).

<sup>2</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 356 (2006).

Lebanon.<sup>3</sup> The War Crimes Chamber of the State Court of Bosnia and Herzegovina and the Iraq Special Tribunal are sometimes referred to as hybrid tribunals, although they are more similar to purely domestic tribunals in most aspects.<sup>4</sup>

This memorandum focuses on the mechanisms and logistical considerations for establishing hybrid tribunals. This memorandum discusses the characteristics that differentiate hybrid tribunals from purely domestic or international tribunals and outlines the four main ways in which hybrid tribunals are created. This memorandum then discusses the structure and composition of hybrid tribunals, jurisdictional concerns, applicable law and other important considerations in establishing a hybrid tribunal. Finally, this memorandum outlines the potential advantages and drawbacks of providing for coordination between a hybrid tribunal and other transitional justice mechanisms, such as truth and reconciliation commissions.

## Characteristics of Hybrid Tribunals

Hybrid tribunals can be an effective solution where the local community is willing, but needs international assistance to effectively prosecute mass-atrocity crimes. Hybrid tribunals may allow states to distribute costs of prosecutions between the post-conflict state and international sources. In addition, hybrid tribunals can provide a degree of flexibility to adapt to the unique situation in each post-conflict state. The combination of international and domestic involvement in hybrid tribunals can with capacity building of the bar and the judiciary and lend perceived legitimacy to the proceedings in the eyes of the international community and the local population. Hybrid tribunals located in or near the state in which the conflict occurred can provide increased access for victims and the affected population and help avoid a return to conflict.

### *Financing*

States may not have the resources to finance domestic accountability proceedings, especially for those states emerging from conflict or without a

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<sup>3</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1023-40 (2009), available at [http://www.issafrica.org/anicj/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrica.org/anicj/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>4</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 353-54 (2006).

working judiciary.<sup>5</sup> Most post-conflict states lack the financial capacity to cope with lengthy, costly trials for international crimes.<sup>6</sup> In the context of hybrid tribunals, states and the international community can share the responsibility and financial burden of accountability proceedings.<sup>7</sup> For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL) were both funded jointly by the state government and contributions from the international community.<sup>8</sup>

### *Flexibility*

Unlike international tribunals, which operate entirely outside of the domestic judicial system and have very little engagement with the domestic penal system, hybrid tribunals offer a flexible model that can be tailored to each post-conflict situation.<sup>9</sup> Hybrid tribunals are created through a collaborative process between the post-conflict state and the international community, and can be tailored to best suit each individual conflict.<sup>10</sup> International tribunals can only apply international criminal law, whereas hybrid tribunals can apply international legal norms alongside domestic laws.<sup>11</sup> In addition, where international prosecutions are generally limited to high-level perpetrators or those most culpable, hybrid tribunals may have greater flexibility and capacity to focus on a wider range of perpetrators.<sup>12</sup>

### *Post-Conflict Legitimacy*

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<sup>5</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 348 (2006).

<sup>6</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 357 (2006).

<sup>7</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 347, 352-56 (2006), available at [www.ajicl.org/AJICL2006/vol232/Higonnet%20article.pdf](http://www.ajicl.org/AJICL2006/vol232/Higonnet%20article.pdf).

<sup>8</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41(4) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1013, available at [http://www.issafrika.org/anicy/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anicy/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>9</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41(4) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1013, 1024 available at [http://www.issafrika.org/anicy/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anicy/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>10</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41(4) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1013, 1043 available at [http://www.issafrika.org/anicy/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anicy/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>11</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS 1013, 1017 (2009) available at [http://www.issafrika.org/anicy/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anicy/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>12</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS 1013, 1017 (2009) available at [http://www.issafrika.org/anicy/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anicy/uploads/Raub_Positioning_hybrid_tribunals.pdf).

Hybrid tribunals may bolster the legitimacy of post-conflict justice mechanisms by utilizing international legal expertise while allowing the conflict-affected state to play a major role in the process. Legitimacy is a major concern for post-conflict tribunals that adjudicate violations of international criminal, humanitarian, and human rights law.<sup>13</sup> Legitimacy encompasses not only formal legitimacy, including respect for due process protections, but also perceived legitimacy by the conflict-affected society.<sup>14</sup>

Domestic trials of those accused of committing war crimes, crimes against humanity, and genocide in post-conflict societies may appear to be “victor’s justice” to those on the losing side of the conflict. Domestic tribunals may be biased in favor of the ruling party, resulting in unfair or sham trials leading to over-politicization or fast executions.<sup>15</sup> In addition, purely international trials, often far-removed from the population that experiences the conflict, can be perceived as lacking in legitimacy and local ownership over the process, which may in turn disrupt the process of reconciliation and societal healing.<sup>16</sup>

Hybrid tribunals’ fusion of domestic and international law and expertise can mitigate this perception. Inclusion of international and domestic personnel applying both international and domestic law can demonstrate that the hybrid tribunal is upholding international standards and the rule of law.<sup>17</sup> At the same time, the conflict-affected state can remain involved in the justice process through employment at the tribunal and the location of the tribunal in or near the affected state.<sup>18</sup> Of course, whether actual legitimacy is achieved depends upon several factors, including funding, the quality of court personnel, and the effectiveness of

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<sup>13</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>14</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>15</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>16</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS 1013, 1022 (2009) available at [http://www.issafrica.org/anicej/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrica.org/anicej/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>17</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts*, 3-4 (2008), available at [www.ohchr.org/Documents/Publications/HybridCourts.pdf](http://www.ohchr.org/Documents/Publications/HybridCourts.pdf).

<sup>18</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).



the cooperation between the local and international community, the quality of court personnel.<sup>19</sup>

### *Capacity Building*

Another major characteristic of hybrid tribunals is their potential to build much-needed capacity amongst judges and lawyers in the post-conflict state.<sup>20</sup> Hybrid tribunals can improve overall domestic judicial capacity by providing a platform whereby domestic personnel can engage, learn, and train.<sup>21</sup> Ideally, these personnel may then continue to contribute to positive judicial culture throughout their careers. By building the judicial infrastructure and training domestic personnel, hybrid tribunals can leave a legacy that will enhance the effectiveness of the domestic judiciary in upholding international standards of justice.<sup>22</sup> For example, one of the intentions of the United Nations in establishing the Special Court of Sierra Leone was to help strengthen public institutions, especially the judiciary.<sup>23</sup>

### *Accessibility for Victims and the Local Population*

The presence of a hybrid tribunal in or near the affected state may increase accessibility to the trial for the affected population. One criticism of international tribunals is their tendency to respond to the international community rather than the victims of the conflict.<sup>24</sup> Citizens of the affected state may not feel a participatory connection to the proceedings, hampering the transitional process as a whole.<sup>25</sup> For example, one major criticism of the ICTY and ICTR, and to some extent the ICC, is that the beneficial effects of the prosecutions do not reach the affected communities and nationals of the states affected by the atrocities had no

<sup>19</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>20</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts*, 3-4 (2008).

<sup>21</sup> Olga Martin-Ortega and Johanna Herman, *Hybrid Tribunals and the Rule of Law*, JUST AND DURABLE PEACE BY PIECE, 7 (May 2010).

<sup>22</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41(4) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1013, 1043 available at [http://www.issafrika.org/anij/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anij/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>23</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 357 (2006).

<sup>24</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS 1013, 1021-22 (2009) available at [http://www.issafrika.org/anij/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anij/uploads/Raub_Positioning_hybrid_tribunals.pdf).

<sup>25</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS 1013, 1022 (2009) available at [http://www.issafrika.org/anij/uploads/Raub\\_Positioning\\_hybrid\\_tribunals.pdf](http://www.issafrika.org/anij/uploads/Raub_Positioning_hybrid_tribunals.pdf).

connection to, or understanding of, the trials.<sup>26</sup> Witnessing the trials in person and in the setting in which the atrocities occurred can allow the affected population to better understand the conflict and can contribute to the social reconstruction process.

### *Avoiding a Return to Conflict*

Capacity-building of the judiciary and the bar provided by hybrid tribunals may contribute to long-term sustainable peace, as a strong domestic judiciary is critical in preventing the reoccurrence of crimes. A judicial system in which all citizens are held to the same standard, eliminates injustice and impunity for the elite, both of which contribute to conflict.<sup>27</sup> Thus, hybrid tribunals can contribute to lasting peace by strengthening the domestic legal system, which in turn may deter crime, combat impunity and contribute to the stability of state security and rule of law.

The increased accessibility of hybrid tribunals, as opposed to purely international tribunals, may contribute to prevention of a return to conflict. Normative values of accountability may not reach local levels when tribunals are culturally, linguistically, and physically separated from the conflict-affected state.<sup>28</sup> The location of hybrid tribunals in or near conflict-affected states may provide local communities and conflict-affected populations greater access to information about prosecutions. Witnessing trials in person, in local languages, and in the settings where the alleged crimes occurred may allow the victims, witnesses, and other interested persons a feeling of greater participation in the judicial process.<sup>29</sup> Accessibility can contribute to deterrence, especially when lack of local knowledge about prosecutions may result in a higher risk that similar atrocities could recur.<sup>30</sup>

## **Establishing Hybrid Tribunals**

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<sup>26</sup> Chris Maina Peter, *The International Criminal Tribunal for Rwanda: Bringing Killers to Book*, 321 INTERNATIONAL REVIEW OF THE RED CROSS (Dec. 31, 1997), available at <http://www.icrc.org/eng/resources/documents/misc/57jnz8.htm>.

<sup>27</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>28</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>29</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts*, 17-21 (2008).

<sup>30</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

Methods for establishing hybrid tribunals vary depending on the circumstances of the conflict. In general, states either integrate hybrid tribunals into their existing judicial system or allow them to operate independently from the existing judicial system. States establish hybrid tribunals in four ways: (1) under the authority of a UN Security Council Resolution in territories under UN administration, (2) by bilateral agreement; (3) as domestic courts incorporating international elements; and (4) by UN Security Council Resolution.<sup>31</sup>

No uniform pattern characterizes the establishment of past hybrid tribunals. Though some common factors exist, all the hybrid tribunals arose from a different set of circumstances.<sup>32</sup> One similarity among the hybrid tribunals is that, unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), most hybrid tribunals were not created through a U.N. Security Council Resolution under Chapter VII of the U.N. Charter.<sup>33</sup> The only exception to this rule is the Special Tribunal for Lebanon (STL).<sup>34</sup> Another similarity is the limited financial support from United Nations for hybrid tribunals. In most cases, although the United Nations and other states contribute financially to hybrid tribunals, a large amount of the financial responsibility for maintenance and day-to-day functions rests with the affected state.<sup>35</sup>

### *Hybrid Tribunals Created Under UN Administrations*

A United Nations (UN) transitional or interim administration can establish a hybrid tribunal. Where there is a post-conflict situation characterized by a complete breakdown of all government structures or the disappearance of statehood, the United Nations may facilitate the transitional phase and place a territory under its international administration.<sup>36</sup> In this context, the United Nations can help establish and administer a tribunal when the conflict-affected state is unable or unwilling to do so.

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<sup>31</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>32</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>33</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>34</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>35</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>36</sup> See Rüdiger Wolfrum, *International Administration in Post-Conflict Situations by the United Nations and other International Actors*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 649 (2005), available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/wolfrum\\_9\\_649\\_696.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/wolfrum_9_649_696.pdf).

One example of a hybrid tribunal set up under UN administration is the Special Panels for Serious Crimes in East Timor (SPSC). East Timor had been raging since the end of the Indonesian occupation in 1999. After pro-Indonesian militias destroyed much of the capital city Dili and engaged in mass killings, the United Nations Temporary Authority in East Timor (UNTAET) established the SPSC in the Dili District Court as part of its mandate to establish and maintain law and order after the end of the conflict.<sup>37</sup> Recurring problems included lack of funding, lack of interest from both the United Nations and the people of East Timor, and lack of cooperation from Indonesia, resulting in the prosecution of mostly low-level offenders.<sup>38</sup>

The UN also established a hybrid tribunal in Kosovo after the brutal conflict between the Serbs and the Albanians under the leadership of Slobodan Milosevic. The UN Security Council passed a resolution creating United Nations Interim Administration Mission in Kosovo (UNMIK), which was authorized to establish a new judicial order and administer the judiciary in Kosovo.<sup>39</sup> It created the hybrid tribunal system for Kosovo, which functioned in a similar manner to the domestic system, with the addition of international law and personnel. In furtherance of its authority, UNMIK also helped establish “Regulation 64” panels, which included a majority of international judges and an international prosecutor.<sup>40</sup> The project in Kosovo receives international support from the US, Europe, and NATO.<sup>41</sup>

### *Hybrid Tribunals Created by Bilateral Agreements*

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<sup>37</sup> United Nations Transitional Administration in East Timor [UNTAET], *On the Organization of Courts in East Timor*, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), available at <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2000-11.pdf>; as amended by UNTAET, *On the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure*, U.N. Doc. UNTAET/REG/2001/25 (Sept. 14, 2001), available at <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2001-25.pdf>; UNTAET, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2000-15.pdf>.

<sup>38</sup> International Bar Association, *Special Panels for Serious Crimes*, available at [http://www.ibanet.org/Committees/WCC\\_EastTimor.aspx](http://www.ibanet.org/Committees/WCC_EastTimor.aspx).

<sup>39</sup> S.C. Resolution 1244, U.N. Doc. S/RES/1244 (June 10, 1999), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/1244.pdf>.

<sup>40</sup> Laura Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENGLAND LAW REVIEW, 1059, 1061 (2003); UNMIK, *On Assignment of International Judges/ Prosecutors and/or Change of Venue*, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at <http://www.unmikonline.org/regulations/2000/reg64-00.htm>.

<sup>41</sup> European Rule of Law Mission, available at <http://www.eulex-kosovo.eu/en/front/>; National Center for State Courts, *Kosovo-KLP Program*, available at <http://www.ncscinternational.org/Projects/Europe-and-Eurasia/Kosovo-KLP.aspx>.

Conflict-affected states may also establish hybrid tribunals via bilateral agreements with the United Nations (UN). It is not uncommon for states to request an agreement with the UN, although the negotiations may be unique to each situation.<sup>42</sup> Bilateral agreements may be undertaken when the state in question's government cannot agree on the establishment of a domestic tribunal or when political concerns prevent it. The UN can begin the process in a politically neutral manner and allow the state in question to take over more of the process as time passes.<sup>43</sup>

For instance, after an eleven-year civil war in Sierra Leone left the state's judiciary in disarray and without the capacity to try the perpetrators of the conflict, President Kabbah requested that the United Nations provide assistance to establish an independent "Special Court."<sup>44</sup> Within months, the UN Security Council passed a resolution allowing the Secretary General to enter into negotiations to establish the proposed court.<sup>45</sup> A formal agreement, signed on January 16, 2002, created the Special Court for Sierra Leone (SCSL), funded entirely by voluntary contributions from United Nations member states.<sup>46</sup> The SCSL is mandated to prosecute both domestic and international crimes and employs both foreign and national personnel.<sup>47</sup>

In a manner similar to Sierra Leone but with a much longer negotiation period, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established by bilateral agreement between the United Nations and the Government of Cambodia. Cambodia's first and second prime ministers approached the United Nations in 1997 to seek assistance in creating a tribunal to prosecute the leaders of the Khmer Rouge Government, which was responsible for

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<sup>42</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 355 (2006).

<sup>43</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform* 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 347, 356 (2006).

<sup>44</sup> Human Rights Watch, *Brining Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings and Needed Support*, 10 (2004) available at [www.hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf](http://www.hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf)

<sup>45</sup> Human Rights Watch, *Brining Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings and Needed Support*, 10 (2004) available at [www.hrw.org/reports/.../sierraleone0904/sierraleone0904.pdf](http://www.hrw.org/reports/.../sierraleone0904/sierraleone0904.pdf); S.C. Resolution 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

<sup>46</sup> Human Rights Watch, *Brining Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings and Needed Support*, 10 (2004), available at [www.hrw.org/reports/.../sierraleone0904/sierraleone0904.pdf](http://www.hrw.org/reports/.../sierraleone0904/sierraleone0904.pdf); *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (U.N.-Sierra Leone, Jan. 16, 2002) [SCSL Agreement], available at <http://www.scs-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>.

<sup>47</sup> HUMAN RIGHTS WATCH, *Brining Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings and Needed Support*, 1-2 (2004).

the death of 1.7 million people from 1975 to 1979.<sup>48</sup> A UN Group of Experts, established by General Assembly Resolution to explore potential avenues for bringing perpetrators to justice, recommended that the tribunal be placed under international control.<sup>49</sup> However, Cambodia refused to accept a purely international tribunal.<sup>50</sup> After a series of difficult negotiations lasting seven years, the Government of Cambodia and the UN finally reached an agreement creating the ECCC, funded by Cambodia and the United Nations with voluntary donations of money and staff from outside states and private donors.<sup>51</sup>

### *Hybrid Tribunals Created as Domestic Courts with International Elements*

States may also choose to establish tribunals as domestic courts with formal international involvement. These tribunals are primarily domestic, but also incorporate international law and have some international personnel to oversee trials.<sup>52</sup> These domestic hybrid tribunals may be a more pragmatic choice for those states whose citizenry is wary of international involvement. However, if states have not incorporated international law into their domestic laws, these hybrid tribunals may not have the jurisdiction to prosecute important international crimes, such as genocide or war crimes.

For example, after the conflict in the former Yugoslavia, the Dayton Peace agreement created the Office of the High Representative for Bosnia and Herzegovina (OHR) tasked with reforming the Bosnian legal and judicial system.<sup>53</sup> The High Representative established the War Crimes Chamber (WCC) within the Criminal Division of the State Court of Bosnia, where it officially began its operations on March 9, 2005.<sup>54</sup> Although the WCC is a domestic institution operating under national law, the Chamber employs various international experts and personnel as part of their efforts to gain legitimacy and to build domestic

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<sup>48</sup> Brian D. Tittmore, *Khmer Rouge Crimes: The Elusive Search for Justice*, available at <http://www.wcl.american.edu/hrbrief/v7i1/khmer.htm>.

<sup>49</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 188 (2001).

<sup>50</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 189 (2001).

<sup>51</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 187-191 (2001), available at [www.essex.ac.uk/armedcon/story\\_id/000385.pdf](http://www.essex.ac.uk/armedcon/story_id/000385.pdf).

<sup>52</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>53</sup> Param-Preet Singh, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, HUMAN RIGHTS WATCH, 2 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-lookingforjustice.pdf>.

<sup>54</sup> Param-Preet Singh, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, HUMAN RIGHTS WATCH, 2 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-lookingforjustice.pdf>.

judicial capacity.<sup>55</sup> Under the agreement between the OHR and the ICTY, there is an understanding that the WCC will phase out international personnel over the course of five years so that the WCC and its Registry will ultimately be absorbed into the domestic court system.<sup>56</sup> The placement of the WCC within the domestic system has made it more accessible to Bosnians than the ICTY, which sits in The Hague.<sup>57</sup>

In contrast, the appointed Iraqi Governing Council established the Iraqi High Tribunal (IHT) in 2003.<sup>58</sup> Designed as a domestic court, the IHT is located in Baghdad and employs Iraqi judges and the prosecutors.<sup>59</sup> However, the IHT is established as a tribunal independent from the domestic judicial system, and can try individuals for violations of international as well as some provisions of domestic Iraqi law. The legality and impartiality of the IHT has often been challenged, and it has been criticized on many occasions as being reflective of ‘victor’s justice’—some see the tribunal as unfairly pursuing Ba’athists for prosecution to the detriment of due process.<sup>60</sup> In addition, disruptions to trial proceedings, including boycotts, assassinations of defense council and resignation of judges, further undermined the credibility of proceedings.<sup>61</sup>

### *Hybrid Tribunal Created through Security Council Resolution*

The Special Tribunal for Lebanon (STL) is the only hybrid tribunal created through a Security Council Resolution pursuant to a request from the state.<sup>62</sup> Although the United Nations (UN) and the Government of Lebanon attempted to conclude a bilateral agreement similar to those with Sierra Leone or East Timor,

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<sup>55</sup> Param-Preet Singh, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, HUMAN RIGHTS WATCH, 2 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrw-lookingforjustice.pdf>.

<sup>56</sup> Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 5 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

<sup>57</sup> Param-Preet Singh, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, HUMAN RIGHTS WATCH, 2 (2006).

<sup>58</sup> Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 4 (2007), available at [http://74.220.219.58/~drafting/sites/default/files/paper\\_article/Scharf%2520Article.pdf](http://74.220.219.58/~drafting/sites/default/files/paper_article/Scharf%2520Article.pdf).

<sup>59</sup> Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 2 (2007).

<sup>60</sup> Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 399, 399-403 (June 2006), available at [http://www.icrc.org/eng/assets/files/other/irrc\\_862\\_newton.pdf](http://www.icrc.org/eng/assets/files/other/irrc_862_newton.pdf).

<sup>61</sup> See Michael P. Scharf & Michael A. Newton, *The Iraqi High Tribunal’s Dujali Trial Opinion*, 10(34) ASIL INSIGHTS, December 18, 2006, available at <http://www.asil.org/insights061218.cfm>.

<sup>62</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

the Lebanese government could not agree on whether to ratify the agreement.<sup>63</sup> While establishing a tribunal through a UN Security Council Resolution can be useful to overcome political stalemate, it may also cause resentment among members of the government who are eventually overruled. The tribunal was established after an attack culminating in the assassination of former Prime Minister Rafiq Hariri.<sup>64</sup> The STL was established in 2007 and its temporal jurisdiction is limited to crimes committed after 2004.

The STL differs from the other hybrid tribunals in two significant ways. First, the STL has the most narrowly defined jurisdiction among all the hybrid tribunals. The Tribunal may only adjudicate cases of crimes targeted against a specific person.<sup>65</sup> Moreover, the STL is the only tribunal with jurisdiction only over crimes existing under domestic law, including the crime of terrorism.<sup>66</sup> Second, unlike other hybrid tribunals, the STL sits in The Hague, and although not an official United Nations body, a UN appointed Registrar oversees the day-to-day functioning of the Tribunal.<sup>67</sup>

## Structure and Composition

Most hybrid tribunals employ a combination of national and international personnel. The composition of the tribunal staff depends on the mandate of the tribunal and the needs of the state emerging from conflict.

### *Administrative Structure*

Hybrid tribunals consist of many different entities. Most include trial and appellate chambers, prosecution and defense sections, and the registry, which offers administrative support. In addition, many include a pre-trial section as well as specialty sections for victims and witnesses' services. Some hybrid tribunals also incorporate investigative units that, where necessary, travel to the sites of the crimes to gather evidence and interview witnesses.

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<sup>63</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>64</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1039 (2009).

<sup>65</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1038 (2009).

<sup>66</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1038-39 (2009).

<sup>67</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1040 (2009)



The Extraordinary Chambers in the Courts of Cambodia, for instance, is comprised of three formal chambers: (1) the Pre-Trial Chamber, (2) the Trial Chamber, and (3) the Supreme Court Chamber.<sup>68</sup> The Pre-Trial Chamber hears motions and appeals against orders issued by investigating judges while a case is still under investigation.<sup>69</sup> Trial hearings are conducted before the Trial Chamber. The Supreme Court Chamber hears appeals against decisions and judgments issued by the Trial Chamber.<sup>70</sup>

### *Judges*

In hybrid tribunals, judges' panels are often composed of a combination of international and national judges. One advantage of employing international judges is that they are often less vulnerable to security threats and political pressures that weigh on domestic staff.<sup>71</sup> In Kosovo, for instance, international judges have been employed in cases involving security risks to domestic judges.<sup>72</sup>

One possible model for judges' panels in hybrid tribunals is a majority of international judges and a minority of national judges. For instance, the panels in the Dili District Court of the East Timor Tribunal are made up of two international judges and one East Timorese judge.<sup>73</sup> The Dili Court of Appeal has a similar composition, except in cases of special importance in which case a larger panel of three international judges and two East Timorese judges preside over matters.<sup>74</sup> Similarly, the trial chamber of the Special Court for Sierra Leone (SCSL) is composed of three judges, two appointed by the UN Secretary General and one appointed by the government of Sierra Leone.<sup>75</sup> The SCSL appeals chamber is

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<sup>68</sup> *Judicial Chambers*, Extraordinary Chambers in the Courts of Cambodia, available at <http://www.eccc.gov.kh/en/judicial-chamber>.

<sup>69</sup> *Judicial Chambers*, Extraordinary Chambers in the Courts of Cambodia, available at <http://www.eccc.gov.kh/en/judicial-chamber>.

<sup>70</sup> *Judicial Chambers*, Extraordinary Chambers in the Courts of Cambodia, available at <http://www.eccc.gov.kh/en/judicial-chamber>.

<sup>71</sup> *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 4 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>72</sup> *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 16 n.33 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>73</sup> UNTAET, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, U.N. Doc UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2000-15.pdf>.

<sup>74</sup> UNTAET, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, U.N. Doc UNTAET/REG/2000/15 (June 6, 2000).

<sup>75</sup> *Statute for the Special Court of Sierra Leone*, art. 12 (2002), available at <http://www.scs-l.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>.

comprised of five judges, three of which are appointed by the UN Secretary General. The Government of Sierra Leone appoints the remaining two judges.<sup>76</sup> Although the government is authorized to make three appointments to the chambers, its appointees are not required to be Sierra Leonean by nationality.<sup>77</sup>

An alternative model is for national judges to represent the majority on judges' panels. For instance, as a result of the compromise agreement between the UN and the Government of Cambodia, the Extraordinary Chambers for the Courts of Cambodia (ECCC) is dominated by a majority of domestic judges, with three Cambodian judges and two foreign judges in the trial chamber and four Cambodian judges and three foreign judges in the Supreme Court Chamber.<sup>78</sup> Furthermore, a Cambodian national also occupies the Presidency of both the chambers.<sup>79</sup>

Finally, hybrid tribunals may be composed exclusively of national judges. Although the Iraqi High Tribunal (IHT) Statute allows for appointment of non-Iraqis to the bench, the IHT trial and appellate chambers are composed exclusively of Iraqi nationals.<sup>80</sup> Due to this judges' panel composition, the IHT more closely resembles a purely domestic tribunal than a hybrid tribunal.

Some states choose to include investigating judges in the structure of their domestic tribunals. Investigating judges are usually partly responsible for investigating crimes under the tribunal's jurisdiction and often make determinations on whether a case can advance to the trial stage. For instance, in the ECCC, investigations are launched when the co-prosecutors present an introductory submission.<sup>81</sup> This report presents the facts of the case, the types of alleged offences, applicable law, the name of the persons to be investigated, and the possible evidence and witnesses.<sup>82</sup> The remainder of the investigation is

<sup>76</sup> *Statute for the Special Court of Sierra Leone*, art. 12 (2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&>.

<sup>77</sup> *Statute for the Special Court of Sierra Leone*, art. 12 (2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&>.

<sup>78</sup> *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, art. 9 (2003), available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf).

<sup>79</sup> *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, art. 9 (2003).

<sup>80</sup> *Iraqi High Tribunal Statute*, art. 3 (2005) available at [http://www.law.case.edu/saddamtrial/documents/IST\\_statute\\_unofficialenglish.pdf](http://www.law.case.edu/saddamtrial/documents/IST_statute_unofficialenglish.pdf).

<sup>81</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Co-Investigating Judges*, (2012), available at <http://www.eccc.gov.kh/en/ocij>.

<sup>82</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Co-Investigating Judges*, (2012), available at <http://www.eccc.gov.kh/en/ocij>.

entrusted to the co-investigating judges, who investigate the charges and decide whether to bring an indictment with which the prosecutors can bring the case to trial.<sup>83</sup> The ECCC's co-investigating judges cannot investigate facts other than those presented by the co-prosecutors. They can, however, indict any person within the court's personal jurisdiction, even if the person was not mentioned in the introductory submission.<sup>84</sup>

### *Victim and Witness Representatives*

Some tribunals provide special support to witnesses and victims. The duties of these sections range from psychological assistance to training on legal rights and dissemination of information about pending claims. The Extraordinary Chambers for the Courts of Cambodia (ECCC) was the first international or hybrid tribunal to allow victim participation as civil parties in trial proceedings.<sup>85</sup> Victims may participate in ECCC proceedings by (1) filing complaints along with the co-prosecutors and (2) making applications to join as civil parties.<sup>86</sup> Victims have a right to present a complaint alleging the commission of crimes within the jurisdiction of the Extraordinary Chambers and to request the initiation of an investigation.<sup>87</sup> If they do present such a complaint, the victims may be asked to participate in the proceedings as witnesses or to provide evidence. Once the criminal proceedings begin, victims have a right to directly participate as civil parties with similar rights to those of the prosecution and the defense.<sup>88</sup> As civil parties, victims have a right to present their position to the Court, to be heard by the accused and the judges, to appeal decisions, and to request reparations.<sup>89</sup> The ECCC's Outreach Office includes a Victims Support Section that works with

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<sup>83</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Co-Prosecutors* (2012), available at <http://www.eccc.gov.kh/en/ocp/office-co-Prosecutors>.

<sup>84</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 55 (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>85</sup> Johanna Herman, *Reaching for Justice: The Participation of Victims at the Extraordinary Chambers in the Courts of Cambodia*, Center on Human Rights in Conflict Policy Paper No. 5 (September 2010), available at <http://www.uel.ac.uk/chrc/documents/CHRCReachingforJustice2010.pdf>.

<sup>86</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Victims Support Section* (2012), available at <http://www.eccc.gov.kh/en/victims-support/victims-support-section>.

<sup>87</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Victims Support Section*, (2012), available at <http://www.eccc.gov.kh/en/victims-support/victims-support-section>.

<sup>88</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>89</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

victims to explain their rights and provide them with information on the status of their filed claims.<sup>90</sup>

Similarly, the Special Tribunal for Lebanon (STL) allows all persons to whom the court has granted victim status to participate fully in the proceedings before the STL.<sup>91</sup> When a person is admitted as a victim, he or she will have rights similar to those of the prosecutor and the defendant.<sup>92</sup> In this capacity, victims may be able to cross-examine witnesses, submit evidence, and file motions.<sup>93</sup>

Victim participation in proceedings before a hybrid tribunal may also trigger rights with respect to counsel. Victims participating as civil parties in the ECCC, for instance, have the right to be represented either by a domestic lawyer or by a foreign lawyer accompanied by a domestic lawyer.<sup>94</sup> A group of civil parties may choose to be represented by a common lawyer or, if necessary, judges may require a group of civil parties to choose common representation or appoint such representation for the group.<sup>95</sup> Additionally, the Special Tribunal for Lebanon law mandates that victims participate in the proceedings only through a lawyer. Thus, the STL must cover all the victim's legal costs if the victim cannot pay them.<sup>96</sup>

Victims are generally classified as persons who have suffered a particular type of harm during the conflict. For instance, the ECCC classifies as a victim any person who has suffered from physical or material harm as a direct consequence of the crimes under the jurisdiction of the tribunal.<sup>97</sup> Victims are not required to be

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<sup>90</sup> *Outreach Strategy for War Crimes Division of High Court of Uganda*, PUBLIC INTERNATIONAL LAW AND POLICY GROUP AND VANDERBILT UNIVERSITY LAW SCHOOL INTERNATIONAL STUDIES PROGRAM, 26.

<sup>91</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings* (2012), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>.

<sup>92</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings* (2012), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>.

<sup>93</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings* (2011), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>.

<sup>94</sup> Extraordinary Chambers in the Courts of Cambodia, *Victim Participation*, art. 4 (Feb. 2007), available at [http://www.dccam.org/Projects/Tribunal\\_Response\\_Team/Victim\\_Participation/PDF/Victim\\_Participation\\_Form\\_Eng.pdf](http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/PDF/Victim_Participation_Form_Eng.pdf)

<sup>95</sup> Extraordinary Chambers in the Courts of Cambodia, *Victim Participation*, art. 1.1 (Feb. 2007), available at [http://www.dccam.org/Projects/Tribunal\\_Response\\_Team/Victim\\_Participation/PDF/Victim\\_Participation\\_Form\\_Eng.pdf](http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/PDF/Victim_Participation_Form_Eng.pdf)

<sup>96</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings* (2011), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>.

<sup>97</sup> Extraordinary Chambers in the Courts of Cambodia, *Court Organization: Victims Support Section* (2012), available at <http://www.eccc.gov.kh/en/victims-support/victims-support-section>.

Cambodian nationals or reside in Cambodia.<sup>98</sup> Similarly, the Special Tribunal for Lebanon defines victims as any person who has suffered physical, material, or mental harm as a direct result of an attack within the STL's jurisdiction.<sup>99</sup>

In general, victims' rights to participate in proceedings before hybrid tribunals have been received with great support from the international community.<sup>100</sup> Victim participation can be a meaningful way of involving the community which experienced the conflict and improving the impact that accountability processes can have on the victims of the crimes being prosecuted. Conversely, victim's participation also makes the proceedings longer, more repetitive, and raises concerns regarding the due process rights of the defendant.<sup>101</sup> Critics of the Extraordinary Chambers in the Courts of Cambodia, for instance, have called on the tribunal to limit victims' participation for future cases and to establish specific rules so that victim participation will be more disciplined and organized.<sup>102</sup> Thus, when establishing the level of victim participation, a state may want weigh these difficulties and advantages to involve victims while safeguarding the transparency and legitimacy of the process.<sup>103</sup>

### *Other International Personnel*

Weakened post-conflict legal systems can hinder the recruitment of competent domestic staff. For example, domestic staff may have security concerns that might prevent them from working for a tribunal.<sup>104</sup> Employment of competent international staff may help bridge existing gaps.<sup>105</sup> Hybrid tribunals often employ

<sup>98</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>99</sup> Special Tribunal for Lebanon, *Victim's Participation: Who is a Victim* (2012), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-victims-participation-in-stl-proceedings>.

<sup>100</sup> See e.g. Kate Yebserg, *Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal*, 40 VICTORIA UNIVERSITY WELLINGTON LAW REVIEW 555 (2009), available at <https://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-40-2009/issue-2/accessing-justice-yesburg.pdf>.

<sup>101</sup> INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *Progress of the Extraordinary Chambers in the Courts of Cambodia*, 2 (2009), available at <http://ictj.org/publication/progress-extraordinary-chambers-courts-cambodia>.

<sup>102</sup> INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *Progress of the Extraordinary Chambers in the Courts of Cambodia*, 2 (2009), available at <http://ictj.org/publication/progress-extraordinary-chambers-courts-cambodia>.

<sup>103</sup> INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *Progress of the Extraordinary Chambers in the Courts of Cambodia*, 2 (2009), available at <http://ictj.org/publication/progress-extraordinary-chambers-courts-cambodia>.

<sup>104</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, , 23 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>105</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, , 23 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

international personnel in administrative roles, including in the Registry and as staff for judges or prosecutors.<sup>106</sup> States may also choose to employ international prosecutors in their hybrid tribunals. For instance, the “Regulation 64” panels of the Kosovo tribunals employ an international prosecutor who is appointed by the Special Representative of the Secretary General to the UN Mission in Kosovo (UNMIK).<sup>107</sup> In contrast, the ECCC prosecutorial team consists of both national and international prosecutors, all of whom appointed by the Supreme Council of Magistracy of Cambodia. However, the international prosecutor must come from the group of names submitted by the United Nations.<sup>108</sup>

Although having a high number of international staff comes with advantages, international recruitment and employment also presents potential complications. International recruitment under the auspices of the UN Secretariat is often slow, and hiring a staff member under the UN Staff Regulations could take several months.<sup>109</sup> Additionally, tensions may arise over remuneration and conditions of employment, which may differ significantly between international and domestic staff.<sup>110</sup> Additionally, cooperation between national and international staff may be hindered by physical separation and language barriers.<sup>111</sup>

Hybrid tribunals may also draw public criticism if they replace national judges or prosecutors with internationals. When the United Nations substituted internationals for domestic staff members in East Timor’s Special Panels for Serious Crimes, the public perceived the substitution as a broader criticism of the Timorese legal system.<sup>112</sup>

## Jurisdiction

<sup>106</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, 23 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>107</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1027 (2009).

<sup>108</sup> The Extraordinary Chambers of the Courts of Cambodia, *The Office of the Prosecutor*, available at <http://www.eccc.gov.kh/en/ocp/office-co-prosecutors>.

<sup>109</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, 25 n.55 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>110</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, 36 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

<sup>111</sup> The Extraordinary Chambers in the Courts of Cambodia, *Press Release by National Co-Investigating Judge*, (Mar. 26, 2012), available at <http://www.eccc.gov.kh/en/articles/press-statement-national-co-investigating-judge-0>.

<sup>112</sup> *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 24 (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

A clearly defined jurisdictional mandate is essential for an effective hybrid tribunal. Hybrid tribunals may limit jurisdiction along temporal, personal, and subject matter lines.<sup>113</sup> Jurisdictional limits are generally intertwined and are informed by the facts and circumstances of the conflict underlying the establishment of the tribunal. Restrictive jurisdictional mandates, which limit the tribunal's jurisdiction to high-level offenders and offenses committed over a set period, may help to minimize costs and maximize efficiency.<sup>114</sup> However, limited mandates may generate public dissatisfaction, as post-conflict populations often favor higher numbers of prosecutions.<sup>115</sup> To mitigate the a perception of impunity, states opting to use a hybrid tribunal may wish to focus the efforts of traditional criminal justice mechanisms on the prosecution of lower-level offenders.

Often, states choose to limit a hybrid tribunal's personal jurisdiction to high-level perpetrators, or those "most responsible" for crimes. For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) are authorized to prosecute only senior leaders and those most responsible for atrocities.<sup>116</sup> The Special Court for Sierra Leone (SCSL) Statute authorizes the tribunal to prosecute persons most responsible for committing serious international crimes and those responsible for violations of Sierra Leonean law.<sup>117</sup> In contrast, East Timor's Special Panels for Serious Crimes (SPSC) is authorized to prosecute any individual who commits a crime within its prescribed subject matter jurisdiction.<sup>118</sup> Such restraints on personal jurisdiction may serve to minimize costs. Due to its limited mandate, for example, the SCSL operates relatively cheaply under a budget of approximately \$25 million per year.<sup>119</sup>

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<sup>113</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, r (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

<sup>114</sup> See e.g., OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 38 *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

<sup>115</sup> Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 6 (2006), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf>.

<sup>116</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 195-196 (2001).

<sup>117</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 234-236 (2001).

<sup>118</sup> Elieen Skinnider, *Experiences and Lessons from "Hybrid" Tribunals: Sierra Leone, East Timor and Cambodia*, available at <http://www.icclr.law.ubc.ca/site%20map/icc/ExperiencesfromInternationalSpecialCourts.pdf>.

<sup>119</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 38 *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

Temporal restrictions on jurisdiction are common to most tribunals. Tribunals are often authorized to adjudicate crimes that took place within a specific time period, restricting the jurisdiction to dates that are related to the commission of crimes, to the period of the conflict, or the duration of an abusive regime. For instance, the SCSL Statute restricted the tribunal's temporal jurisdiction to any crime committed after November 1, 1996, the date of a peace agreement between Sierra Leone and the rebels agreeing to free and fair elections. This restrictive time period keeps the tribunal from being overwhelmed with a large number of cases.<sup>120</sup> Similar restrictions on temporal jurisdiction exist in the tribunals of Kosovo, East Timor, Cambodia, and Lebanon. For example, the Special Tribunal for Lebanon (STL) has jurisdiction only over the events on the date of the assassination of the Prime Minister Rafik Hariri, February 14, 2005, as well as "connected" attacks of similar "nature and gravity."<sup>121</sup> The ECCC tries cases related to events that occurred between April 17, 1975 and January 6, 1979, when the Khmer Rouge was in control of Cambodia.

While less common, states may also choose to give tribunals a broad temporal mandate. For instance, the Iraqi High Tribunal (IHT) enjoyed a significantly broad temporal jurisdiction.<sup>122</sup> As per the IHT Statute, the Tribunal can prosecute Iraqi nationals and residents charged with crimes, including crimes under Iraqi domestic law, committed any time between July 17, 1968, which marks the date of the coup that brought the Ba'ath party into power and March 1, 2003, the date of the American invasion.<sup>123</sup>

## Applicable Law

Hybrid tribunals may apply domestic law, international law, or some combination of the two. Many states choose to incorporate international law into a hybrid tribunal's mandate in addition to domestic penal codes. The main reason states may choose to employ a combination of domestic and international law is to address the issue non-retroactivity, which prevents conviction for a crime unless the crime and its punishment were already codified by law when the act was committed.<sup>124</sup> If the crime was not a crime under domestic law when it was

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<sup>120</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 238 (2001).

<sup>121</sup> *Statute of the Special Tribunal for Lebanon*, art. 2, (2007) available at <http://www.stl-tsl.org/en/documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon>.

<sup>122</sup> *Iraqi High Tribunal Statute*, art. 1(2) (2005).

<sup>123</sup> *Iraqi High Tribunal Statute*, art. 1(2) (2005).

<sup>124</sup> See *Kenneth S. Gallant*, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW (2009).



committed, it may have been a crime under international law, and is therefore punishable.

Domestic crimes that may be placed within the jurisdiction of a hybrid tribunal include influencing the judiciary, waste of resources, corruption or abuse of position, gender crimes, destruction of property, homicide, torture, and religious persecution. For example, the Special Court for Sierra Leone (SCSL) may prosecute crimes under Sierra Leonean law, including offenses relating to the abuse of girls and offenses “relating to the wanton destruction of property.”<sup>125</sup> The Extraordinary Chambers in the Courts of Cambodia’s (ECCC) jurisdiction includes the domestic crimes of homicide, torture, and religious persecution as defined by the Cambodian Penal Code.<sup>126</sup> East Timor’s Special Panels for Serious Crimes (SPSC) have exclusive jurisdiction over murder, sexual offenses, and torture.<sup>127</sup> The relevant regulation defined murder and sexual offenses using East Timor’s Penal Code.<sup>128</sup> The Special Tribunal for Lebanon (STL) is the only hybrid tribunal that prosecutes only domestic crimes provided under Lebanese law, including the crime of terrorism, illicit association, and the failure to report crimes.<sup>129</sup>

In the case of conflict between domestic and international legal standards applicable in a hybrid tribunal, some states choose to give international law precedence over domestic codes. For instance, the Kosovo tribunal made use of domestic law in procedural matters, but when a conflict arose between domestic law and international human rights norms, precedence was given to international norms.<sup>130</sup>

## Important Considerations for Hybrid Tribunals

In addition to staffing and jurisdictional matters, states may consider other factors when establishing a tribunal including (1) the rights of the accused; (2)

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<sup>125</sup> *Statute of the Special Court for Sierra Leone* art. 5 (Sierra Leone, 2002), available at <http://www.scs-l.org/LinkClick.aspx?fileticket=uCln1MJeEw%3D&>.

<sup>126</sup> *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* art. 3 (Cambodia, 2001), available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

<sup>127</sup> UNTAET Regulation No. 2000/15, *On the Organization of the Public Prosecution Service in East Timor*, § 1.1., 1.3, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

<sup>128</sup> UNTAET Regulation No. 2000/15, *On the Organization of the Public Prosecution Service in East Timor*, § 8, 9 U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

<sup>129</sup> *Statute of the Special Tribunal for Lebanon*, art. 2 (2007).

<sup>130</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INTERNATIONAL LAW AND POLITICS, 1013, 1027 (2009).

whether to shield or mitigate the culpability of child combatants in criminal proceedings; (3) the structure of the appeals process; and (4) amnesties.

### *Rights of the Accused*

The strength of the framework for the rights of the accused can directly affect the perceived and actual legitimacy of a hybrid tribunal. Primary safeguards within this framework include the right to counsel, the right to examine and present evidence, and the rights of the accused. Defendants on trial at the Special Court for Sierra Leone (SCSL) receive a team of lawyers comprised of foreign and domestic personnel.<sup>131</sup> In contrast, the Cambodian criminal procedure code, which applies to the ECCC, has been severely criticized for what has been perceived as granting the accused insufficient protection, insufficient access to evidence and a lack of full respect for the right to counsel.<sup>132</sup> Furthermore, the Extraordinary Chambers in the Court of Cambodia (ECCC) Statute does not contain measures to protect an accused against “double jeopardy,” or being tried twice for the same crime.<sup>133</sup> Such provisions can significantly undermine a hybrid tribunal’s legitimacy.

### *Factors Mitigating Responsibility for Child Combatants*

In post-conflict contexts where child soldiers may have participated in hostilities, states may choose to either shield children completely from prosecution or to use the young age of the perpetrator as a mitigating factor for culpability. For example, the Criminal Code of Bosnia provides that the criminal legislation of Bosnia shall not apply to children who, at the time of perpetrating an offense, had not yet reached the age of fourteen.<sup>134</sup> Additionally, given that child soldiers were deeply involved in the Sierra Leonean conflict, the Special Court for Sierra Leone (SCSL) has attempted to strike a delicate balance on issues of child rights. In the rare case that an ex-child soldier is brought before the SCSL, Article 7 of the SCSL Statute requires that international human rights norms, especially those related to children, be honored. In case of conviction by the SCSL, juveniles cannot be

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<sup>131</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 237 (2001).

<sup>132</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 237-238 (2001).

<sup>133</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 237-238 (2001).

<sup>134</sup> Criminal Code, Chapter 3, art. 8 (Bosnia, 2003) available at [http://www.coe.int/t/dlapil/codexter/Source/country\\_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Code.pdf](http://www.coe.int/t/dlapil/codexter/Source/country_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Code.pdf).

sentenced to imprisonment but may be subject to alternative measures such as community service, supervision, counseling, and correctional training.<sup>135</sup>

In addition, states may explicitly include provisions in the statute of the hybrid tribunal mandating that international human rights norms in respect to children be honored in the event that a former child soldier is brought before the tribunal. All proceedings of the UN Transitional Administration in East Timor (UNTAET) trying minors were required to comply with the United Nations Convention on the Rights of the Child.<sup>136</sup> However, the Provisional Criminal Code of Kosovo applies to persons under the age of 18 to the extent that the applicable law on juvenile justice does not otherwise provide.<sup>137</sup>

### *Appeals Process*

The right of appeal to a higher tribunal is integral to the protection of fair trial guarantees.<sup>138</sup> States may choose to structure the appeals process differently depending on whether the hybrid tribunal was established within or outside of the domestic judicial system. Where a hybrid tribunal exists outside of the domestic judicial system, states may choose to provide for separate appellate panels within the tribunal. For example, appeals from the Bosnian War Crimes Chambers (WCC) proceed to appellate panels of the WCC.<sup>139</sup>

In hybrid tribunals set up within the domestic court system, appeals may be made within the existing system. The Extraordinary Chambers in the Courts of Cambodia (ECCC), established within Cambodia's existing court system, include both a Trial Chamber and a Supreme Court Chamber. The Extraordinary Chamber within the Supreme Court serves both as an appellate chamber and the chamber of

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<sup>135</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 237-238 (2001).

<sup>136</sup> UNTAET, *On the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure*, U.N. Doc. UNTAET/REG/2001/25 (Sept. 14, 2001), available at <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2001-25.pdf>.

<sup>137</sup> Provisional Criminal Procedure Code, Art. 105, (Kosovo, 2003), available at <http://www.unmikonline.org/regulations/2003/RE2003-26.pdf>.

<sup>138</sup> LAWYERS COMMITTEE FOR HUMAN RIGHTS, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, 21-22 (March 2000), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair\\_trial.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf).

<sup>139</sup> Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 5 (2008) available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

final instance, making final decisions on issues of law and fact in appeals made by the accused, victims, or prosecutors.<sup>140</sup>

### *Amnesties*

Since rules of customary international law prohibit amnesties for international crimes, amnesties in hybrid tribunals applying international law do not protect perpetrators charged with serious international crimes.<sup>141</sup> The International Criminal Tribunal for the Former Yugoslavia confirmed this principle in *Prosecutor v. Furundzija*, holding that amnesty granted for torture would not prevent the court from holding perpetrators criminally responsible.<sup>142</sup> Under Article 10 of the Statute of the Special Court for Sierra Leone, a grant of amnesty only applies to crimes committed under Sierra Leonean law. Thus, amnesty provisions do not protect perpetrators who are charged with commission of serious international crimes.<sup>143</sup>

However, hybrid tribunals may still be confronted with amnesties issued before the formation of the tribunal. For instance, the ECCC's statute provides that no amnesty or pardon shall be requested for any person under investigation or already convicted for crimes under the ECCC's jurisdiction.<sup>144</sup> However, the ECCC statute does not address pardons and amnesties granted before the commencement of the tribunal.<sup>145</sup> In the trial of Khmer Rouge leader Ieng Sary, the defense argued that a pardon issued shortly after the fall of the Khmer Rouge in 1996 absolved Sary from conviction by the ECCC for crimes against humanity, genocide, and grave breaches of the Geneva Conventions of 1949.<sup>146</sup> The argument was ultimately unsuccessful and the ECCC held that the pardon did not

<sup>140</sup> *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, art. 9, 36 (2003).

<sup>141</sup> International Committee of the Red Cross, Customary IHL Rule 159, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule159](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule159).

<sup>142</sup> *Prosecutor v. Furundzija*, Case IT-95-17/I-T, Judgment, para. 155 (December 10, 1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>143</sup> Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 107 (2008).

<sup>144</sup> *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, art. 40 (2003).

<sup>145</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIMINAL LAW FORUM, 185, 198 (2001).

<sup>146</sup> See *Prosecutor v. Ieng Sary*, Trial Chamber Decision on Ieng Sary's Rule 89 Preliminary Objections, para 37, November 2, 2011, Case No. 002/19-09-2007/ECCC/TC, available at [http://203.176.141.125/sites/default/files/documents/courtdoc/E51\\_15\\_EN.PDF](http://203.176.141.125/sites/default/files/documents/courtdoc/E51_15_EN.PDF).

apply.<sup>147</sup> In contrast, the Special Tribunal for Lebanon (STL) is mandated to disregard any amnesties granted before the STL's creation and the Government of Lebanon is prohibited from granting further amnesties.<sup>148</sup>

### **Coordination with Other Transitional Justice Mechanisms**

States may also choose to provide for coordination between the hybrid tribunal and other concurrent transitional justice systems, including truth and reconciliation commissions, documentation centers, and reparations programs. Such coordination may help facilitate communication among the various mechanisms and promote sharing of resources. Coordination among these transitional justice mechanisms may also foster community dialogue and collective healing, as well as provide closure and justice to victims.

#### *Truth and Reconciliation Commissions*

States might consider providing for cooperation between truth and reconciliation commissions (TRCs) and prosecutorial mechanisms. Careful coordination between truth and reconciliation commissions and tribunals may be necessary to avoid duplication of efforts and prohibitions on admission of testimony by certain actors. In Sierra Leone, for instance, the Special Court for Sierra Leone (SCSL) was developed separately from the Truth and Reconciliation Commission, which was established under the Truth and Reconciliation Act 2000<sup>149</sup> and received support from the United Nations Office of the High Commissioner for Human Rights.<sup>150</sup> From the tribunal's early stages, disputes arose concerning the exchange of information between the Commission and the SCSL. In 2003, for instance, when the Commission requested access to four suspects held in SCSL detention, the SCSL denied the Commission permission to interview the detainees unless the meetings were tape recorded and monitored by a

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<sup>147</sup> See *Prosecutor v. Ieng Sary*, Trial Chamber Decision on Ieng Sary's Rule 89 Preliminary Objections, para 53, November 2, 2011, Case No. 002/19-09-2007/ECCC/TC, available at [http://203.176.141.125/sites/default/files/documents/court/dec/E51\\_15\\_EN.PDF](http://203.176.141.125/sites/default/files/documents/court/dec/E51_15_EN.PDF).

<sup>148</sup> Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 107 (2008), available at [http://eprints.lincoln.ac.uk/3047/1/Wetzel%26Mitri\\_Special\\_Tribunal\\_Lebanon\\_LPICT\\_7\(2008\).pdf](http://eprints.lincoln.ac.uk/3047/1/Wetzel%26Mitri_Special_Tribunal_Lebanon_LPICT_7(2008).pdf).

<sup>149</sup> *Truth and Reconciliation Act 2000* (Sierra Leone, 2000), available at <http://www.sierra-leone.org/Laws/2000-4.pdf>.

<sup>150</sup> *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 33 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

Court representative, a demand which was unacceptable to the Commission.<sup>151</sup> The SCSL also did not allow the detained suspects to appear before the Truth and Reconciliation Commission in a public hearing.<sup>152</sup> The Commission, therefore, could not name the suspects in its final report because it had not afforded them the opportunity to respond to the allegations against them, as required by the established practice of truth and reconciliation commissions.<sup>153</sup> This controversy weakened the relationship between the Commission and the Court and effectively denied the Commission the opportunity to elicit the perspectives of suspects whose input could potentially shed valuable light on the conflict.

However, coordination between tribunals and TRCs may deter perpetrators from full disclosure during the commission process for fear of future prosecution. States that establish both criminal prosecution tribunals and TRCs commonly face the dilemma of prioritizing the dual pursuits of truth telling and prosecution. Truth commissions aim to reveal information about a period of conflict, but may in the process unearth information that implicates individuals in the commission of crimes. The information collected by truth commissions may enable tribunals to conduct successful prosecutions. However, if perpetrators know that the truth commission will share their testimony with a prosecutions tribunal, they have less incentive to cooperate with truth commissions and provide full disclosure. States might therefore wish to explicitly define the roles of each transitional justice institution to manage expectations and streamline the process.<sup>154</sup>

In Sierra Leone, for instance, the Sierra Leone Truth and Reconciliation Commission refused to share its information with the SCSL or to honor requests or subpoenas from the SCSL.<sup>155</sup> Although the Chief Prosecutor of the SCSL announced that he would not seek information from the Commission,<sup>156</sup> the

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<sup>151</sup> Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 6 (2004), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Justice-Review-2004-English.pdf>.

<sup>152</sup> *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 10 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

<sup>153</sup> Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 5 (2004), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Justice-Review-2004-English.pdf>.

<sup>154</sup> See e.g. William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission* in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, 21, 34-35 (Naomi Roht-Arriaza & Javier Mariezcurrena, 2006).

<sup>155</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, 10 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

<sup>156</sup> Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 5 (2004), available at [26](http://ictj.org/sites/default/files/ICTJ-</a></p>
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Commission's policy definitively precluded any potential information-sharing benefits. From the Commission's perspective, its power to grant confidentiality to its sources was vital to the fulfillment of its mandate, as perpetrators who were denied confidentiality would be more reluctant to speak to the Commission. In fact, ex-combatants were often hesitant to testify before the Commission during its initial hearings, only appearing in significant numbers when it seemed that the SCSL would take no special action against those that testified.<sup>157</sup> Neither the Truth and Reconciliation Act nor the implementing agreements establishing the SCSL explicitly addressed the relationship between the Truth and Reconciliation Commission and the SCSL.<sup>158</sup> Public confusion about the differences between the Commission and the SCSL may even have led to decreased participation in the Commission.<sup>159</sup>

### *Documentation Initiatives*

States may establish a documentation body or cooperate with civil society documentation initiatives in order to ensure accountability for international crimes. Documentation initiatives may complement the tribunal's own investigation and strengthen the evidence available to the parties and the tribunal. Documentation initiatives may also play an independent role in voicing narratives of victims and therefore promoting justice and reconciliation.

The Documentation Center for Cambodia (DC-Cam) has collected evidence of crimes committed by the Khmer Rouge and in an attempt to construct a historical record.<sup>160</sup> DC-Cam has interviewed victims and members of the Khmer Rouge, collected pictures of victims and prisoners, collected biographical information on members of the Khmer Rouge, and compiled information on its

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SierraLeone-Justice-Review-2004-English.pdf. See also, William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission* in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, 21, 34-35 (Naomi Roht-Arriaza & Javier Mariezcurrena, 2006).

<sup>157</sup> Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 4 (2004), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Justice-Review-2004-English.pdf>.

<sup>158</sup> Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 5 (2004), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Justice-Review-2004-English.pdf>.

<sup>159</sup> Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 41 (2006), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf>.

<sup>160</sup> Documentation Center of Cambodia, *Mission Plan*, (2012), available at [http://www.dccam.org/#/our\\_mission/plan](http://www.dccam.org/#/our_mission/plan).

structure and the modes of operation.<sup>161</sup> The work of the DC-Cam has provided much of the evidence presented before the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>162</sup>

### *Reparations Programs*

States may also establish a reparation program in order to recognize the harm suffered by the victims. Such reparations may be monetary or non-monetary. For instance, moral or collective reparations are awarded in the ECCC if an accused is found guilty, as a form of acknowledgement of the harm suffered by the parties as a result of the crimes committed.<sup>163</sup> The application for reparations must be submitted in a consolidated document by all civil parties to a case and include a specific description of the reparations requested along with an explanation of how the reparations address the harm suffered by the victims and how the reparations should be implemented.<sup>164</sup> The Chamber can decide whether the costs of implementing the reparations will be borne by the defendant or by external funding sources.<sup>165</sup>

Some states choose to grant compensation without classifying such an award as financial reparations. For example, although the Special Court for Sierra Leone (SCSL) has no powers to allocate reparations, victims or those acting on behalf of victims, may bring claims against the perpetrators seeking compensation through the SCSL in accordance with the Criminal Procedure Act of 1965.<sup>166</sup> The Registrar of the SCSL notifies victims, including those outside Sierra Leone, who may be affected by a particular conviction.<sup>167</sup> Victims from outside Sierra Leone

<sup>161</sup> Documentation Center of Cambodia, *Mission Plan*, (2012), available at [http://www.dccam.org/#/our\\_mission/plan](http://www.dccam.org/#/our_mission/plan).

<sup>162</sup> International Center for Transitional Justice, *Transitional Justice and DDR: The Case of Cambodia*, 26 (2009), available at <http://ictj.org/sites/default/files/ICTJ-DDR-Cambodia-CaseStudy-2009-English.pdf>.

<sup>163</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 *quinquies* (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>164</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 *quinquies* (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>165</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rule 23 *quinquies* (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf>.

<sup>166</sup> *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (Sierra Leone, 2002), available at [http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx;Special Court for Sierra Leone, Rules of Procedure and Evidence, rule 105 \(Nov. 16, 2011\), available at](http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx;Special Court for Sierra Leone, Rules of Procedure and Evidence, rule 105 (Nov. 16, 2011), available at)<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>.

<sup>167</sup> Special Court for Sierra Leone, *Rules of Procedure and Evidence*, rule 105 (a) (Nov. 16, 2011), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>.



must use their own national courts to bring actions to claim compensation, subject to the domestic laws of that state.<sup>168</sup> However, the judgment of the SCSL of the guilt of the convicted person is to be considered final and binding for the purposes of such claims, wherever they are brought.<sup>169</sup> The Special Tribunal for Lebanon (STL) follows similar rules and is not allowed to allocate compensation despite the fact that victims are able to participate in proceedings.<sup>170</sup> However, in the event of a conviction, the STL will provide the victim(s) with a certified copy of the decision, which can then be presented before a national court to request compensation.<sup>171</sup>

## Conclusion

There are many factors to consider in the establishment of a hybrid tribunal. The extent of internationalization, both in terms of composition of the tribunal and the application of international law, is key to creating a strong structural framework for the tribunal. In addition, a clear mandate establishing the tribunal's temporal and subject matter jurisdiction contributes to the efficiency of the ensuing proceedings. The rights of the accused may be safeguarded to meet at least the minimum prescribed in international human rights norms. Whatever mechanism is used to hold perpetrators accountable for violations committed, it is important that the mechanism strike a balance between safeguarding the rights of the accused, and justice and reconciliation for victims and society.

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<sup>168</sup> Special Court for Sierra Leone, *Rules of Procedure and Evidence*, rule 105 (b) (Nov. 16, 2011), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>.

<sup>169</sup> Special Court for Sierra Leone, *Rules of Procedure and Evidence*, rule 105 (c) (Nov. 16, 2011), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>.

<sup>170</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings*, (2012), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>.

<sup>171</sup> Special Tribunal for Lebanon, *Victim's Participation in STL Proceedings*, (2012), available at <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice/-/victims-participation-in-stl-proceedings>

## About the Public International Law & Policy Group

The Public International Law & Policy Group is a non-profit organization that operates as a global *pro bono* law firm to provide free legal assistance to states, governments, and groups negotiating and implementing peace agreements, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's primary practice areas are:

- **Peace Negotiations**
- **Post-Conflict Constitution Drafting**
- **War Crimes Prosecution**
- **Policy Planning**
- **Democracy and Governance**
- **Water Diplomacy**

To provide *pro bono* legal advice and policy formulation expertise, PILPG draws on the volunteer services of more than sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on *pro bono* assistance from major international law firms including Baker & McKenzie; Cleary, Gottlieb, Steen & Hamilton; Covington & Burling; Davis, Polk & Wardwell; Debevoise & Plimpton; DLA Piper/New Perimeter; Jones Day Milbank, Tweed, Hadley & McCloy; Orrick, Herrington & Sutcliffe; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom; Sullivan & Cromwell; White & Case; and WilmerHale. Annually, PILPG is able to provide over \$15 million worth of *pro bono* international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance; its members often serve on the delegations of its clients during peace negotiations. PILPG is based in Washington, DC, with additional offices in New York and Amsterdam. PILPG has also operated field offices in Georgia, Iraq, Kenya, Kosovo, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania and Uganda, and maintains contacts in nearly two dozen key cities around the globe.

PILPG was founded in London in 1995 and moved to Washington, DC in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. In July 1999, the United Nations granted official Non-Governmental Organization status to PILPG.

In January 2005, a half-dozen of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice.