WIDE ANGLE

PROMOTING A CULTURE OF RULE OF LAW AND HUMAN RIGHTS: THE HYBRID COURTS SYSTEM IN SITUATIONS OF POST-CONFLICT

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Author: **Francesca Mauri** (UN online volunteer)
Editing: **Peter Ford** (UN online volunteer)
Graphic design: **Vilmar Luiz** (UN online volunteer)
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L'Osservatorio – Research centre on civilian victims of conflicts
Via Marche, 54
00187 Rome – Italy

For further information and feedback, please contact:

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In countries emerging from war, where the civil population suffered mass violations of their human rights and war crimes were committed, the four main objectives of a transitional justice process are truth-seeking, reparations, institutional reform, and the investigation and criminal prosecution of the perpetrators.

Often, however, domestic jurisdiction institutions in post-conflict contexts have collapsed and the countries suffer from severe structural problems, making them unequipped to conduct trials for crimes of such large scale. Therefore, in order to effectively address such crimes, domestic jurisdiction may require international assistance that draws on internationally recognized best practices, such as "hybrid" courts or tribunals.

Hybrid courts are defined as courts of mixed jurisdiction, encompassing both national and international aspects. They usually operate within the jurisdiction where the crimes occurred and are often designed to try a selected number of perpetrators in a limited period of time. To date, hybrid courts have been created in Sierra Leone, Kosovo, Timor-Leste, Bosnia Herzegovina, Cambodia, Colombia and Central African Republic, and other states emerging from conflict situations are planning to create one (for instance Sri Lanka).

This article reviews the background, the genesis and the experiences of the hybrid courts and tribunals mentioned above. In order to do so, it examines the experiences and the founding mandates and statutes of some of the courts.

The conclusions discuss the legacy and the outcomes of hybrid justice as well as its role and implications in promoting a culture of Rule of Law and Human Rights in post-conflict societies.

Keywords: Hybrid Courts, International Criminal Justice, Transitional Justice, Criminal Prosecution, Rule of Law, Legacy

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Introduction

In post-conflict situations, in which a civil population suffered mass violations of human rights and war crimes were perpetrated, transitional justice processes are often established to help the society transition from conflict and state repression to the restoration of justice and rule of law.

The core elements of the transitional justice process, which are related and interconnected, are:

- Truth seeking, to be intended as any means of investigation and reporting on massive human rights violations and systematic abuses combined with recommendations and possible solutions;
- Reparations, which are the means through which the governments recognize and try to address the harm suffered by victims;
- Institutional reforms, which affects state institutions, such as the armed forces, judiciary and police, to clean up corruption and abuses and prevent the recurrence of human rights violations and impunity;
- Criminal prosecution, which is directed against perpetrators considered to be the most responsible for human rights violations and war crimes.

U.N. High Commissioner for Human Rights Zeid Ra'ad Al Hussein, left, shakes hands with Sri Lankan Prime Minister Ranil Wickremesinghe during their meeting in Colombo, Feb. 9, 2016.
Credit: lakruwan Wanniarachchi
Source: http://si.wsj.net/public/resources/images/BN-MN679_srilan_G_20160210010852.jpg

Given that the application of the above arguments to specific cases is quite complex and would require a long discussion, in the following pages we will focus on the issue of criminal prosecution and especially on the interesting role that "hybrid courts" play in the field of international criminal law.

These bodies are defined as courts of mixed composition and jurisdiction, encompassing both national and international aspects. They are characterized by a mix of

national and international components and usually operate within the jurisdiction where the crimes occurred. For these reasons, hybrid courts are thought to "hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other[1]."

In post-conflict situations, domestic trials often suffer from systemic problems arising from inadequate laws, endemic corruption, incompetence, poor conditions of service and pay, lack of access to justice and very little case-law reporting. These structural weaknesses, connected with the seriousness of the violations to be treated, make national courts unequipped to conduct trials for such crimes. Therefore, in order to grant an adequate and effective prosecution, in some situations it is necessary to support domestic jurisdictions with international assistance.

To date, hybrid courts have been created in Sierra Leone, Kosovo, Timor-Leste, Bosnia Herzegovina, Cambodia, Colombia and Central African Republic and other States emerging from post conflict situations such as Sri Lanka and Colombia are planning to create versions for themselves.

Why create a Hybrid Court?

These courts have been established in a wide variety of circumstances to respond to different needs. In general, the rationales for the creation of hybrid courts depend on the national cultural and historical context. Some of the most frequently cited are:

- Lack of capacity or resources at national level: it is frequent that hybrid courts are established where domestic legal systems lack the technical and legal capacity to try past and current serious crimes. For instance, in Timor-Leste, Kosovo and Bosnia Herzegovina the international assistance has been a part of a broader effort to rebuild national capacity and operationalize criminal courts;
- Fears of bias and lack of independence in the legal system: often, the international component has been introduced to overcome a perception of bias or lack of independence within national legal system. For example, in the Extraordinary Chambers of the Courts of Cambodia, which are the only hybrid court with a majority of national judges, this concern has resulted in the introduction of a complex mechanism of "super majority" in the judicial decision-making;
- Lack of justice and effective remedies: the international involvement in hybrid courts plays a crucial role in ensuring that those suspected of criminal responsibility are investigated and prosecuted;
- Culture of impunity: the prosecution of particularly serious crimes is fundamental, especially where impunity represents a root cause of conflict. The restoration of rule of law and the punishment of perpetrators represent a turning point towards a democratic transition.

A focus on the experiences of the existing Hybrid Courts

In order to understand the different level of international involvement in the examples of hybrid courts, it is important to investigate into their geneses, looking especially at how they were requested and established.

In cases such as Sierra Leone[2] and Cambodia[3], the creation of the hybrid courts was a consequence of a direct request of the national government, who invited the United Nations to create a hybrid tribunal within their territories. In other cases, such as Timor-Leste[4] and Bosnia Herzegovina[5], the United Nations decided to incorporate international professionals into the domestic systems. This was done in order to cope with the challenge of trying mass crime and politically sensitive cases against a background of an extremely weak national system or an overwhelmed supranational jurisdiction[6]. As a consequence of their diverging establishment histories, the founding instruments, and thereby the legal basis of hybrid courts, vary substantially, with important consequences on the legal frameworks and their legal personality.

Some courts were established as a result of cooperation between the UN and National Governments. For instance, the Extraordinary Chambers in Cambodia[7], as well as the Special Court for Sierra Leone[8] were established through an international agreement concluded between the Security Council and the Government and ratified into domestic law.

Some others, as East Timor[9] and Kosovo[10], were not created as a result of negotiations and agreements with the country concerned due to the fact that there was no legitimate government to negotiate with. In these cases, the UN acted as the national authority and promulgated regulations on the establishment of the Tribunals. Under the power granted by Chapter VII of the UN Charter, the Security Council produced domestic law establishing the Hybrid Tribunals. Technically, despite the involvement of international law as the legal basis for these court system, the Special Panels for Serious Crimes in East Timor and the Special Chamber in Kosovo should be considered as domestic instruments.

A third case is that of the Bosnian War Crime Chambers[11], which is also based on domestic law, albeit allowing for the international community's High Representative to adopt the law in case the national parliament would not do so.

Considering their founding instruments, hybrid courts can be placed in two categories. On one side there are the Cambodian Extraordinary Chambers, the panels in East Timor and Kosovo and the Bosnian War Crimes Chamber, which are all part of the domestic system and their legal personality is that of domestic courts. On the other side there's the Special Court for Sierra Leone, which is legally separate from the judicial system of Sierra Leone.[12]

Taking into account the differences discussed above, we will now focus on the predominant commonality between these courts lying in their hybridity, often defined as an "amalgam of local and international elements".[13] Notwithstanding the simultaneous presence of national and international personnel in all the hybrid courts considered, they differ widely in the way in which they appoint and employ staff.

For instance the Statue of the Special Court of Sierra Leone provides that the majority of judges in the Trial and Appeals Chambers are appointed by the UN Secretary General and the remainder by the Sierra Leonean Government.[14] As the judges appointed by the Government do not need to be Sierra Leonean, the court can be – as it happened – predominantly composed by international judges. Also the Registrar and the Prosecutor are appointed by the Secretary general[15], and the Deputy Prosecutor is required by the Statute to be Sierra Leonean.[16]

The Court of Cambodia on the other hand ensured that national judges are the majority and international judges are nominated by the Secretary General but appointed by Cambodia's Supreme Council of Magistracy.[17] A national and an international figure serve as equal co-prosecutors and as co–investigating judges.[18] There's a Pre-Trial Chamber to settle differences between national and international judges and prosecutors. The head of the Office of Administration is Cambodian.

Along this differentiation from predominantly international to predominantly national courts, the experience in Kosovo is more similar to Cambodia. Initially, international judges and prosecutors were introduced into national courts but they constituted a minority.[19] Subsequently, after the introduction of Regulation 64, the UN Special Representative was entitled to designate an international prosecutor, an international investigating judge and/or a panel of three judges with at least two international representatives on the request of the prosecutor, defense counsel or accused.[20]

The Kosovo Specialist Court building in The Hague
Credit: Europol.
Source: http://www.balkaninsight.com/en/file/show//europol,%20640.jpg

Unlike Kosovo, in which hybrid panels are "optional", in East Timor they're institutionalized for specific serious crimes under the jurisdiction of Special Panels of one national and two international judges.[21] The additional requirement for an international General Prosecutor made Special Panels for Serious Crimes in Timor a predominantly international court.

The Bosnian War Crimes Chamber features an innovative structure that provides for a "phasing-out" plan for the international staff. What started with an international majority became a purely national court after five years.[22]

In conclusion, despite the hybridity of all the Tribunals mentioned above, the level of international involvement changes from case to case, and goes from mainly international courts, as in Sierra Leone, to mainly national courts, as in Cambodia.

Another important characteristic of hybrid courts relates to applicable law; the set of rules serving as the basis of the functioning of the courts. Most of the literature on the topic believes that applicable law consists of a "blend of the international and domestic".[23] Indeed, the hybrid courts of Kosovo, Cambodia, Sierra Leone, East Timor and Bosnia Herzegovina have in common a mixed jurisdiction composed of national and international law. However, the level of hybridity changes from court to court and the blend between national and international provisions appears to be very different.

There are the hybrid courts of Sierra Leone[24], Cambodia[25] and East Timor[26], whose mandates expressly provide the application of both national and international criminal law.

But there are also the tribunals of Bosnia Herzegovina and Kosovo, which have jurisdiction over crimes under domestic law only. In Kosovo, international criminal law is applied indirectly and in Bosnia Herzegovina the national legislation has been amended to introduce international crimes. It is clear that the applicable domestic law has to be compatible with international human rights protection standards.

That said, how much is the UN directly involved in hybrid court's system? The UN played a key role in the creation and establishment of all the examples of hybrid courts mentioned above. However, the level of its involvement varies from court to court. It goes from a role of transitional administration for the creation of the court, as the one played in East Timor and Kosovo, to a part of mere assistance to the national government for the establishment of the tribunal, as in Cambodia and Sierra Leone. The War Crimes Chamber of Bosnia Herzegovina differs totally from the other courts in the fact that it doesn't stem from an act or agreement with the involvement of the UN.

While it is clear that hybridity implies a mixture of national and international elements, it is dubious whether the international involvement must necessarily derive from the UN or could consist of the involvement of a different international organization or state. Notwithstanding the fact that the UN is the only interlocutor who can grant the authority to establish panels through regulations (as happened in Kosovo and East Timor), there were cases which contemplated the establishment of hybrid tribunals without UN involvement. The literature is still divided on the necessity of the involvement of the UN in the process. According to some authors, the involvement is fundamental because the process pursues the UN goals of rebuilding States and fight impunity.[27] However, this doesn't necessarily

mean that States or other international organizations cannot assist in reconstructing justice and peace in the affected states.[28] Indeed, as demonstrated by the fact that the ICC, through the complementarity principle, has to give right of way to States exercising universal jurisdiction, the aim of the fight against impunity pertains also to States other than the one affected, which can make contributions to the process. Thus, we can say that UN involvement does not represent a compelling character of hybrid courts.

In conclusion, we can state that, while in fundamental issues such as historical background, genesis, establishment and legal order, the experiences of hybrid courts mentioned above are essentially different. The only defining character of hybrid courts, common to all the examples considered, is the contemporary presence of national and international staff.

Legacy and outcomes of Hybrid Courts experiences

It has to be clear that hybrid courts should not be expected to restore damaged or destroyed legal systems, but should seek to make a strategic contribution where possible. Indeed, as explained by the Office of the UN High Commissioner for Human Rights, "Legacy should not be seen as a distraction but as compatible with the core mandate of Hybrid Courts, and complementary with an overall approach to the restoration of the rule of law and respect for legal institutions".[29]

However, there are many ways in which hybrid courts can contribute to the implementation of the justice system and increased accountability at the local level. The experiences mentioned above confirm that high standards of independence, impartiality and the application of the principles of fair process can maximize the results of the process, making criminal prosecution successful and making those found responsible pay for their crimes. Likewise, outreach and public information are fundamental for the success of the demonstration effect and are the best way to formally involve victims and other stakeholders in the process.

An important legacy of hybrid courts lies in the development of local capacity and civil society. In order to do so, partnership with civil society and direct involvement of local NGOs can yield important benefits to the transitional justice process. The professional development of local personnel, through work in the field practice and training programs represents an important tool in rebuilding national capacity and implementing national awareness on international crimes prosecution and human rights protection.

Furthermore, legacy may also result in the heritage of physical infrastructure and materials left from the experience of hybrid tribunals. For instance, Cambodia's Extraordinary Chambers are located in renovated military buildings on the outskirts of the capital city Phnom Penh, with the detention facilities being the only new construction. Upon the Chamber's completion, these buildings will revert to military use.

Law reform represents one of the most important legacies of hybrid courts. The successful streamlining of legacy is deeply linked to a political environment that is open to legal reform and a strong legal system where legal professionals are less influenced by external pressures.

Conclusions

Some of the experiences of hybrid courts represent a perfect example of cooperation and convergence between national and international actors to implement new broad reforms of criminal law and procedures. For instance, Kosovo gained its autonomy in 1989 but did not have its own criminal legislation till 2004, when the UN and the Council of Europe assisted in producing the new Provisional Criminal Code and the new Provisional Criminal Procedure Code.[30] Similarly, in Bosnia Herzegovina a new Criminal Code was promulgated in 2003, after a significant contribution of the Office of the High Commissioner for Human Rights.

In other cases, such as Timor Leste, the difficulties arising from the socio-political context have made this convergence impossible, with the consequence of a legal reform conducted almost entirely by international actors. The result was a new Penal Code, adopted without any public consultation and drafted only in Portuguese, a language spoken only by a small percentage of population and almost unknown to the majority of lawyers. Cambodia, on the contrary, represents an example of a court established during the finalization of a new criminal procedure code prepared by national actors with the assistance of the French Government.

Among the most important impact and legacies of hybrid courts is surely the demonstration that fair trials and rule of law are possible in post conflict situations and, moreover, hybrid courts have provided essential contributions to the recent developments in international humanitarian law, international crimes investigation, and prosecution and international jurisprudence.

Hybrid courts do not have a "one-size-fit-all ideal model"[31], which means that the organization and the establishment of successful courts must depend on, and adapt to, the national historical and socio-political context of each country. For future courts to provide the important role in post-conflict rebuilding, they must place at their core the realities of national capacity, and ensure the willingness to take the path of justice, rule of law and reconciliation.

Ceremony for the distribution of the Final Judgement in Case 001, which sentences Jaing Guek Eav alias Duch to life imprisonment.
Credit: ECCC Court building
Source: https://www.eccc.gov.kh/sites/default/files/imagecache/photo_large/galleries/photos/ECH_4014.JPG

Endnotes

[1] Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", 2003, New England Law Review, p. 1060.

[2] The Special Court for Sierra Leone was set up in 2002 as the result of a request to the United Nations in 2000 by the government of Sierra Leone for a "special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade long (1991-2002) civil war. See UN Doc. S/2000/786, annex, "Letter dated 12 June 2000 from President of Sierra Leone to the Secretary General".

[3] When Cambodian civil war ended in 1998, the Cambodian government asked the UN for assistance in establishing a trial to prosecute the Khmer Rouge's senior leaders since Cambodia didn't have the resources or expertise to conduct this very important procedure. In June 2003 was reached an agreement 2003 establishing a new hybrid tribunal. See Letter of 21 June 1997.

[4] In Timor Leste the UN was even more heavily involved. It established a transitional administration for the Country after Indonesia's withdrawal after the violence following the consultation on East Timor's future status in August 1999. See UN Doc. S/RES/1272 (1999).

[5] The Bosnian War Crimes Chamber was established on March 2005 as an offspring of the ICTY's completion strategy. It was a result of the Security Council's decision to transfer ICTY's unfinished cases to competent national jurisdictions. See UN Docs. S/RES/1503 (2003) and S/RES/1534 (2004).

[6] This is, for instance, the case of the Special War Crimes Chamber of Bosnia Herzegovina, established to reduce the workload of the International Criminal Tribunal for the Former Yugoslavia.

[7] See UN Doc. GA/RES/57/228B (2003).

[8] See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

[9] See UN Transitional Administration in East Timor (UNTAET) and UNTAET/REG/2000/15 6 June 2000.

[10] See UNMIK Regulation No. 2002/13, dated 13 June 2002

[11] See "Agreement between the High Representative for Bosnia and Herzegovina and Bosnia Herzegovina on the establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes, Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia" 1 December 2004.

[12] The Ratification Act expressively provides that "the Special Court shall not form part of the judiciary of Sierra Leone".

[13] D. Orentlicher, “The Future of Universal Jurisdiction in the New Architecture of Transitional Justice”, in S. Macedo Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes, 2003, p. 224.

[14] See Special Court Statute, Art. 12.

[15] Ibid. artt. 15-16.

[16] However this position has been covered by internationals as Desmond de Silva and Christopher Staker.

[17] See Amended Extraordinary Chamber Law, Artt. 9-11.

[18] Ibid. art. 16.

[19] See UNMIK/REG/2000/6.

[20] See UNMIK/REG/2000/64.

[21] See UNTAET/REG/2000/15.

[22] See “Project Implementation Plan Registry Progress Report”, October 2004, in www.ohr.it.

[23] Dickinson, L. “The Relationship between Hybrid Courts and International Courts: The case of Kosovo”, 2003, in New England Law Review, p. 1059.

[24] The Statute of the Special court includes both international crimes, as crimes against humanity, violations of common Article 3 of the Geneva Conventions and Additional Protocol II, and crimes under Sierra Leonean criminal law, as the offences related to the abuse of girls and the destruction of property.

[25] The Extraordinary Chambers Law provides the power to prosecute homicide, torture and religious persecution under the Penal Code of Cambodia a well as genocide, crimes against humanity, grave breaches of the 1949 Geneva Convention, the destruction of cultural property and crimes against internationally protected persons.

[26] The Serious Crimes Panels have jurisdiction over murder and sexual abuse under the national penal code and over international crimes including all those covered by the ICC Statute and torture.

[27] Condorelli L. et al “ Internationalized Criminal Courts and Tribunals: are they necessary”, in Romano et al Internationalized Criminal Courts and Tribunals, 2004, p. 429.

[28] Nouwen S. “Hybrid Courts. The hybrid category of a new type of international crime courts”, in Utrecht Law Review, Vol. 2 Issue 2, December 2006, p. 211.

[29] Office of the United Nations High Commissioner for Human Rights, “Rule of Law Tools for Post Conflict States. Maximizing the Legacy of Hybrid Courts”, United Nation Publication, 2008, p. 40.

[30] See UNMIK Regulations n. 2003/25 and 2003/26, 6 July 2003.

[31] Nouwen s., supra, note 28, p. 214.

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