

A RENEWED CALL FOR HYBRID TRIBUNALS

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International criminal law, in its current state, is broken. A general lack of resources among the International Criminal Court and domestic judiciaries, compounded by legitimacy crises afflicting both judicial mechanisms, is contributing to widespread impunity for atrocity crimes. In

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order to mitigate this expanding impunity, this article calls for a return to the hybrid model for prosecuting mass atrocities by establishing tribunals that blend aspects of international law with the law of the state or region where the atrocities were committed. This article examines the unique ability of the hybrid model to combat impunity by both obtaining accountability and achieving broader transitional and restorative justice goals for post-conflict communities. In support of this renewed call for hybrid tribunals, this article employs a geographic case study analyzing the failures and achievements of the two Asian hybrid tribunals—the Special Panels for Serious Crimes in East Timor and the Extraordinary Chambers in the Courts of Cambodia—in terms of accountability, legitimacy, and capacity building. Drawing on the experiences of the two Asian hybrid tribunals, this article calls for a global return to the hybrid model of prosecution for mass atrocities, albeit with modifications that consider the limitations of this adjudicatory model.

I. INTRODUCTION

International criminal law is broken. Impunity has become the norm for mass violations of international law,¹ and the international criminal system has not evolved quickly or effectively enough to address the growing impunity gap. To mitigate impunity for both recently committed and ongoing mass atrocities, the international legal community must return to the use of “hybrid” or “mixed” courts and tribunals—those that combine elements of international law with the law of the state or region in which the atrocities occur.²

In many cases, the measures necessary to combat impunity for mass atrocities extend beyond pure accountability, and instead require attention to methods of restorative justice to ensure that victims—both individuals subjected to heinous acts and states ravaged by mass crimes—be made whole. Accordingly, in considering what constitutes “impunity” for mass atrocities, this article adopts the definition developed by the

1. This article relies on the terms *atrocities* and *atrocious crimes* to refer to crimes against humanity, war crimes, and genocide.

2. Eileen Skinnider, *Experiences and Lessons from “Hybrid” Tribunals: Sierra Leone, East Timor and Cambodia*, 3 ASIA-PAC. Y.B. INT’L HUMANITARIAN L. 243, 243 (2007). This blending of international and local legal elements is evident in the juridical origination, structure, and functions of hybrid courts. *See id.* (“‘Hybrid’ or mixed tribunals or ‘internationalized’ courts are terms used to describe those courts that involve both national and international elements in the organization, structure and functioning of the court systems and in the application of laws and criminal procedure.”).

U.N. Commission on Human Rights, which defines the term as the:

[F]ailure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried, and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.³

Thus, an avoidance of impunity is more than mere retributive justice; it must comprehensively encompass aspects of transitional justice, including rehabilitation, peacekeeping, and community recovery.⁴

The current impunity crisis for atrocity crimes results from the respective flaws of the two primary mechanisms designated for prosecuting violations of international criminal law: the International Criminal Court (ICC) and domestic courts. Regarding the former, the ICC is a court of limited jurisdiction, with many ongoing atrocities falling outside of its territorial reach.⁵ The ICC is also limited in terms of re-

3. INT'L PEOPLE'S TRIBUNAL 1965 FOUND., FINAL REPORT OF THE IPT 1965, at 125 (2016) (quoting Diane Orentlicher (Independent Expert to Update the Set of Principles to Combat Impunity), *Promotion and Protection of Human Rights: Impunity*, at 7, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005)).

4. See Matthew F. Putori, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 FORDHAM INT'L L.J. 1131, 1147–48 (2011) (noting that transitional justice encompasses both backward-looking and forward-looking goals; the former includes accountability and punishment, while the latter refers to promoting respect for the rule of law, fostering democracy, and establishing sustainable peace); see also Melissa S. Williams & Rosemary Nagy, *Introduction*, in TRANSITIONAL JUSTICE 1, 5 (Melissa S. Williams et al. eds., 2012) (“Transitional institutions are expected to deliver justice to the perpetrators of past wrongs, recognition and reparation to their victims, a truthful and common public narrative of past wrongdoing, and the conditions for lawful order and societal peace.”).

5. Per the Rome Statute, the ICC is limited to exercising jurisdiction over crimes committed on or after July 1, 2002, the date on which the Rome Statute came into effect, and even then, only over: (1) crimes committed by a state party national, in the territory of a state party, or in a state that accepts the jurisdiction of the court; or (2) crimes referred to the ICC Prosecu-

sources, with significant constraints on funding and staff hampering its ability to investigate and prosecute atrocity crimes perpetrated worldwide.⁶ Moreover, the ICC has recently become the target of attacks from various states and organizations for alleged discrimination and infringement of state sovereignty.⁷ These attacks, which have prompted the withdrawal of several African and Asian nations from the Rome Statute,⁸ have also created an “unprecedented crisis of confidence” in the court.⁹

tor by the U.N. Security Council. Rome Statute of the International Criminal Court arts. 11–13, July 17, 1998, 2187 U.N.T.S 38544.

6. See Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA. J. INT'L L. 887, 895 (2006) (“[T]he ICC cannot handle more than a tiny percentage of genocide, war crimes, and crimes against humanity cases, as it faces many problems, including lack of necessary budget and staff”); see also Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VAND. J. TRANSNAT'L L. 1133, 1144 (2017) (recognizing the ICC as a court of “finite resources,” with limits on the number of investigations and prosecutions it can pursue); Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 101, 103–04 (2016) (considering that the ICC can only “handle a fraction of the situations demanding justice around the globe”).

7. See Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. INT'L L. 131, 170 (2019) (summarizing the U.S. government’s recent attack on the ICC premised on claims that the court “unacceptably threatens American sovereignty and U.S. national security interests”); John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 53 (2018) (noting African complaints that “the ICC is pursuing a policy of ‘selective justice’ in which the only people it is interested in prosecuting are Africans”).

8. In October 2017, Burundi became the first nation to withdraw from the ICC, followed by the Philippines in March 2018. *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Mar. 15, 2019), <https://www.hrw.org/news/2019/03/15/qa-international-criminal-court-and-united-states>. South Africa also initiated its withdrawal from the ICC in 2016, but the South African High Court struck down the withdrawal decision as “unconstitutional and invalid,” thereby halting the withdrawal process. Katherine Lessing, *Evading Jurisdiction: How to Hold Burundi Accountable for Human Rights Violations After Withdrawal from the International Criminal Court*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 511, 516 (2019). While other nations, including Kenya, have called for a collective withdraw of African nations from the ICC, this has failed to materialize. *Q&A: The International Criminal Court and the United States*, *supra*.

9. Terrence Chapman & Stephen Chaudoin, *People Like the International Criminal Court—As Long As It Targets Other Problems in Other Countries*, WASH. POST (Jan. 20, 2017), <https://www.washingtonpost.com/news/monkey->

On the other hand, while domestic prosecution is the preferred method of rendering accountability for mass atrocities, this likewise comes with its own particular deficiencies. In states recovering from periods of mass violence, often perpetrated or supported by the prior state regime in power, domestic prosecutions can suffer from a multitude of “defects,” including “inexperienced judges, prosecutors, and defense counsel, inadequate criminal laws and jurisdictional statutes, and insufficient resources.”¹⁰ Often, states simply do not possess adequate resources or sufficiently competent judicial structures to conduct the necessary prosecutions.¹¹

In this inarguably turbulent period for international criminal law, neither the ICC nor domestic courts seem capable of rendering necessary justice for ongoing mass atrocities. Indeed, between the backlash against the ICC and the lack of competent, funded domestic courts equipped for international prosecution, an increasing number of individuals most responsible for global mass atrocities have succeeded in avoiding punishment, while the pain caused to victims has gone largely unaddressed. This expanding lacunae in international criminal law presents serious questions regarding the proper means of prosecuting atrocity crimes, as these continue to be perpetrated globally.

In order to close this expanding impunity gap, there must be a return to the use of hybrid tribunals to accompany the ongoing work of the ICC and domestic courts. The hybrid model can secure accountability through investigations, trials, and convictions for crimes that would otherwise go unprosecuted. Hybrid courts can involve victims in the adjudicatory process, providing an element of local involvement or ownership that is notably absent in most purely international criminal proceedings.¹² Accountability goals can be achieved while

cage/wp/2017/01/20/people-like-the-international-criminal-court-as-long-as-it-targets-other-problems-in-other-countries/?utm_term=.e2bc692f07ad.

10. Milena Sterio, *Sequencing Peace and Justice in Syria*, 24 ILSA J. INT'L & COMP. L. 345, 352 (2018).

11. *See id.* (acknowledging the “defects” that often plague domestic prosecutions of internationally recognized crimes).

12. David Cohen, *“Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 5–6 (2007) (recognizing the “idea that the citizens of the country in which the crimes occurred should feel some participatory connection to the trials, through,

also flexibly promoting transitional justice components—including peacekeeping and truth-telling measures—and restorative initiatives, by helping to rebuild governments and judicial systems and strengthen the rule of law in post-conflict states. While substantial scholarship initially advocated for the use of the hybrid model to prosecute and adjudicate atrocity crimes, given the failure of the hybrid model to immediately attain the lofty goals initially set for it, it has largely fallen out of favor with the international legal community, and relatively few scholars continue to promote it as a preferred international judicial mechanism. However, the emerging challenges facing the ICC and domestic judiciaries that are exacerbating the growing impunity crisis make clear that a return to the hybrid model to prosecute atrocity crimes is imperative.

In considering the benefits of reducing impunity for mass atrocities by returning to the hybrid model of prosecution, this article examines the use of the hybrid model within Asia. Employing Asia as a geographic case study is significant for two primary reasons. First, the continent has played host to a number of mass atrocities—both recent and currently ongoing—the vast majority of which have been met with impunity.¹³ Sec-

for example, the participation of their fellow citizens as judges, prosecutors, or defense counsel, or through coverage by their national media”).

13. Within recent decades, mass atrocities committed in Indonesia, Nepal, Sri Lanka, and South Korea have gone unpunished. *See* Priya Pillai, *International Justice: Tackling Impunity in Asia*, INTERPRETER (NOV. 29, 2018), <https://www.lowyinstitute.org/the-interpreter/international-justice-tackling-impunity-asia> (recognizing a legacy of “rampant impunity” throughout Asia). Moreover, evidence acquired by the United Nations and nongovernmental organizations (NGOs) support widespread allegations of ongoing war crimes, crimes against humanity, ethnic cleansing, and genocide that state actors are committing in Myanmar, Syria, and North Korea. *See generally* Rep. of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011, U.N. Doc. A/73/741 (Feb. 13, 2019) (examining the evidence acquired by the U.N. mechanism created to investigate ongoing war crimes and crimes against humanity in Syria since March 2011); TRANSITIONAL JUSTICE WORKING GRP., MAPPING CRIMES AGAINST HUMANITY IN NORTH KOREA (2017), [https://en.tjwg.org/TJWG_Report-Mapping_Crimes_Against_Humanity_in_North_Korea\(July2017\)-Eng_Final.pdf](https://en.tjwg.org/TJWG_Report-Mapping_Crimes_Against_Humanity_in_North_Korea(July2017)-Eng_Final.pdf) (presenting evidence reflecting the ongoing commission of crimes against humanity by the North Korean government); U.N. High Comm’r for Human Rights, *Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries: Human Rights Council 36th Ses-*

ond, Asia is one of the geographic regions most quickly retreating from international criminal law: Only nineteen Asian-Pacific countries are states parties¹⁴ to the Rome Statute, and the Philippines recently withdrew from the ICC.¹⁵

Through this geographic case study, this article will examine the history and legacies of the two hybrid courts established to date in Asia: the Special Panels for Serious Crimes in East Timor (SPSC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Specifically, this article will analyze these two hybrid courts in terms of accountability, legitimacy, and capacity building of the domestic legal and judicial communities, in order to comprehensively consider the courts' levels of success in obtaining restorative justice within the respective post-conflict states they were designed to serve. This article ultimately concludes that, despite the respective obstacles encountered by both the SPSC and the ECCC, hybrid tribunals provide an effective and necessary method for prosecuting mass atrocities and implementing transitional justice, not only within Asia, but globally. In reaching this conclusion, however, this article recognizes the inherent limitations

sion Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights (Sept. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=e> (defining the ongoing persecution of Rohingya Muslims in Myanmar as "a textbook example of ethnic cleansing").

14. While the Rome Statute does not explicitly define the term state party, other international treaties and conventions, such as the Convention on the Rights of the Child, generally define the term as "a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument." U.N. Int'l Children's Emergency Fund, Introduction to the Convention on the Rights of the Child: Definition of Key Terms, <https://www.unicef.org/french/crc/files/Definitions.pdf> (last visited Dec. 30, 2019).

15. Lasse Schuldt, *Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court*, 16 GERMAN L.J. 75, 80, (2015). See generally Michael Plachta, *The Philippines' Withdrawal from the ICC Rome Statute: Background and Context*, 34 INT'L ENFORCEMENT L. REP., no. 3, 2018, at 118 (detailing the Philippines' March 2018 announcement of its decision to withdraw from the Rome Statute); see also generally Kiran Mohandas Menon, *Asia and the ICC: 20 Years Later*, DIPLOMAT (Oct. 13, 2018), <https://thediplomat.com/2018/10/asia-and-the-icc-20-years-later> (noting that China and India, two of the largest and most influential Asian-Pacific states, are not state parties to the Rome Statute); Schuldt, *supra* at 99–103 (broadly discussing the reluctance of countries in the Association of Southeast Asian States to participate in the ICC).

of the hybrid model, and accordingly envisions adaptations necessary to ensure future success for this judicial mechanism.

II. AN HISTORICAL BACKGROUND OF HYBRID TRIBUNALS

While there is some debate regarding the common definition for hybrid tribunals,¹⁶ scholars and practitioners agree that these judicial bodies blend elements of international and state or regional law through the composition of their judiciary, the scope of substantive law, and their financing.¹⁷ The hybrid model developed in the late 1990s—prior to the creation of the ICC—in response to widespread criticisms of the two ad hoc criminal courts for the former Yugoslavia and Rwanda, specifically that the courts exceeded their anticipated budgets and temporal mandates and failed to provide affected victims with involvement in the justice process.¹⁸ Compared to other international mechanisms, the hybrid tribunal was envisioned as a flexible alternative that would achieve justice efficiently, while simultaneously molding its structure and approach to justice to more widely appeal to victims.¹⁹

The international community set its expectations high for the hybrid model, viewing hybrid tribunals as a means to pro-

16. See, e.g., Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 356 (2006) (recognizing that the precise definition of hybrid tribunal is still evolving).

17. But see Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT'L L. 482, 491–92 (2016) (noting there exists a small but ardent debate pertaining to whether the features shared by hybrid tribunals necessarily define the judicial mechanism and recognizing that hybrid courts “defy simple definition”).

18. See Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 584–85 (2009) (noting the citizens of Rwanda and the nations of the former Yugoslavia largely consider the ad hoc tribunals to be “Western, imperialistic courts run by and for outsiders”).

19. See ANDREW NOVAK, *THE INTERNATIONAL CRIMINAL COURT* 15 (2015) (explaining that the “hybrid model was intended to shorten the duration of judicial proceedings while respecting due process, ensure the greater involvement of and impact on local societies, and provide greater financial efficiency”); Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1017 (2009) (recognizing that hybrid tribunals offer an “alternative approach” to international criminal justice that expands the options available and provides greater flexibility in punishing war crimes and crimes against humanity).

vide cheaper and more effective justice; to provide victims with a more active role within judicial proceedings; to facilitate the transfer of information to assist in rebuilding and strengthening domestic judiciaries; and to provide a form of legitimacy missing from purely international and domestic courts.²⁰ Essentially, the hybrid model strove to combine “the expertise of the international community with the legitimacy of local actors.”²¹

Moreover, the hybrid model sought to cure one of the most egregious failings of the ad hoc courts: the lack of national ownership over the judicial process.²² Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were located in countries outside of the territory where the prosecuted atrocities occurred, and neither tribunal included judges, prosecutors, or defense counsel from the respectively harmed states.²³ With insufficient media coverage of the criminal proceedings within the home nations, the vast majority of victims felt removed and intentionally blocked from participation in the tribunals’ operations.²⁴ Compounding this issue, both tribunals largely failed to implement or promote sufficient community outreach for the victims of the prosecuted

20. Van Schaack, *supra* note 6, at 104–05; see also AARON FICHTELBERG, HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION, at ix (2015) (recognizing that hybrid tribunals were meant to prosecute those “high-profile offenders” whom post-conflict states lacked the political or economic resources to successfully prosecute); Pdraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan*, 7 J. INT’L L. & INT’L REL. 1, 7 (2011) (discussing how hybrid tribunals were originally predicted to leave behind a legacy consisting of developing national judicial capacity, incorporating fair trial norms, and fostering cultural commitments to national courts).

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21. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT’L L.J. 616, 619 (2005).

22. Higonnet, *supra* note 16, at 361–62; see also Cohen, *supra* note 12, at 5–6 (noting that the ad hoc tribunals failed to allow the citizens of affected country to feel some “participatory connection” to the proceedings, and thus failed to provide them ownership).

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23. Cohen, *supra* note 12, at 5–6 (discussing challenges arising out of the fact that both the ICTY and ICTR are located outside of the countries where the prosecuted violence took place).

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24. Higonnet, *supra* note 16, at 418–19, 423.

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atrocities.²⁵ Without the victims’ active participation in and understanding of the proceedings conducted by the tribunals, the goal of establishing victims’ respect for judicial institutions and the rule of law was simply unattainable.²⁶ The hybrid model sought to return a sense of ownership over the justice process to the affected states and victims.²⁷

The new millennium brought with it a flurry of the first hybrid courts, with six created between 2000 and 2007.²⁸ During this period, hybrid tribunals were established to prosecute crimes committed in East Timor, Kosovo, Sierra Leone, Cambodia, Bosnia and Herzegovina, and Lebanon.²⁹ Despite the commonalities between them, each tribunal presented marked differences in structure, operations, and levels of internationalization.³⁰ Unfortunately, it became quickly evident

25. See Morrison, *supra* note 18, at 585 (explaining that the ICTY did not establish an outreach program until 1999, six years after its creation, and the ICTR did not open an “information center” in Rwanda until 2000, five years after its establishment).

26. See Cohen, *supra* note 12, at 6 (noting that “[t]he possibility of trials having an effect on reconciliation, accountability, and the promotion of respect for the rule of law depends on effective outreach and other educational or capacity-building programs,” and that “[s]uch success becomes all the more difficult when the justice process is perceived as taking place in a foreign court.”).

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27. See Elizabeth Nielsen, *Hybrid International Criminal Tribunals: Political Interference and Judicial Independence*, 15 UCLA J. INT’L L. & FOREIGN AFF. 289, 292 (2010) (recognizing that local participation in a hybrid tribunal could “contribute to a deeper sense of participation, consensus, and democratization in international affairs”).

28. Hobbs, *supra* note 17, at 485 n.8.

29. McAuliffe, *supra* note 20, at 2.

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30. Each hybrid tribunal presents a differing degree of international involvement. See ELENA NAUGHTON, INT’L CTR. FOR TRANSITIONAL JUSTICE, COMMITTING TO JUSTICE FOR SERIOUS HUMAN RIGHTS VIOLATIONS: LESSONS FROM HYBRID TRIBUNALS 5 (2018) (“There is no model hybrid tribunal. Rather, each hybrid court is established in response to the particular needs of the context and may be ‘internationalized’ in varying ways and to different degrees.”). On one side of the internationalization spectrum, scholars have labeled the Sierra Leonean model of hybrid tribunal, in which state participation was strictly limited per the terms of the Statute of the Special Court for Sierra Leone, as a “mainly international tribunal with a few national elements.” Nielsen, *supra* note 27, at 325. On the other hand, the Cambodian model of hybrid tribunal, which has suffered substantially from the pervasive role of the Cambodian government in its operations and proceedings, is recognized as a “domestic system with limited international features.” Nielsen, *supra* at 325.

that the hybrid model would not be without shortcomings. Each tribunal presented its own set of complications, from issues of political interference, to trial delays,³¹ to personnel and infrastructure issues.³² In addition, a lack of consistent and reliable funding has underscored the operations of nearly every hybrid tribunal.³³

Following the failure of hybrid tribunals to immediately attain the “lofty goals” set by the international community, 2007 through 2014 marked a “period of dormancy,” during which no additional hybrid tribunals were established.³⁴ Yet, recent years indicate a potential, albeit hesitant, return to the hybrid model, with the establishment of the Kosovo Specialist Chambers and the Special Criminal Court in the Central African Republic in 2015.³⁵ Furthermore, there are ongoing discussions regarding the creation of hybrid courts to prosecute recent atrocities committed in Sri Lanka, the Democratic Republic of Congo, and South Sudan.³⁶

III. THE SPECIAL PANELS FOR SERIOUS CRIMES IN EAST TIMOR

The first hybrid tribunal in Asia was established with the purpose of prosecuting those responsible for the mass violence perpetrated in the island nation of East Timor at the

31. See McAuliffe, *supra* note 20, at 50 (noting that delayed trials were challenges in East Timor, Kosovo, and especially Sierra Leone, where it was widely considered the tribunal’s “greatest failing”).

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32. John Dermody, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT’L & COMP. L. REV. 77, 83 (2006) (recognizing that the hybrid tribunals in East Timor and Kosovo experienced “significant personnel and infrastructure issues”).

33. See *id.* (recognizing that hybrid courts in East Timor and Kosovo suffered from personnel and infrastructure issues, while Sierra Leone had continuous issues with funding and delays); McAuliffe, *supra* note 20, at 32 (noting that funding was especially problematic for the ECCC and the Sierra Leonean court, which relied on voluntary funding and contributions).

34. Hobbs, *supra* note 17, at 485 & n.8.

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35. See Patryk Labuda, *The Special Criminal Court in the Central African Republic*, 22 AM. SOC’Y INT’L L. INSIGHTS 2 (2018), (discussing the creation of the Special Criminal Court, which was created by law in the Central African Republic in June 2015, and which will be a “tribunal integrated into the Central African justice system”); *Background, KOS. SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR’S OFF.*, <https://www.scp-ks.org/en/background> (last visited Dec. 30, 2019) (providing background for the 2015 creation of the Kosovo Specialist Chambers and Specialist Prosecutor’s Office).

36. NAUGHTON, *supra* note 30, at 8 n.13.

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turn of the millennium. The brutal violence endured by the people of East Timor in the wake of its post-colonial independence is considered one of the greatest “unknown atrocities” post-World War II.³⁷ Following three centuries of Portuguese colonization, East Timor—also known by its Portuguese name of Timor-Leste—gained brief independence, declaring itself an independent democratic republic in November 1975.³⁸ However, hardly more than a week later, neighboring Indonesia, led by its president, General Suharto, invaded and attempted to annex the island, naming it a new Indonesian province.³⁹ The resulting “occupational government,” run primarily by the Indonesian military, ruled with brute force.⁴⁰ During the twenty-four-year occupation, a total of 102,800 people died as a result of the occupation; 18,600 of these deaths were the result of armed conflict, while 84,200 were attributable to widespread starvation and rampant disease.⁴¹

In 1999, following the fall of the Suharto regime, Indonesia’s new leader, B.J. Habibie, responded to growing international pressure and agreed to hold a referendum in East Timor on whether the province should transition to self-rule.⁴² Under U.N. supervision, nearly the entirety of the East Timorese population voted in the referendum in August 1999, with 78.5% voting in favor of self-rule.⁴³ In the referendum’s immediate wake, Indonesian military forces and militias opposed to East Timorese independence instituted a widespread campaign of violence and destruction as they withdrew from the new self-governing nation.⁴⁴ In little more than a month, these forces destroyed an estimated seventy percent of all East Timorese infrastructure; forcibly displaced 600,000 individu-

37. FICHTELBERG, *supra* note 20, at 12.

38. *Id.* at 12–14.

39. Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 248 (2003).

40. FICHTELBERG, *supra* note 20, at 15.

41. Romesh Silva & Patrick Ball, *Part 6: The Profile of Human Rights Violations in Timor-Leste, 1974 to 1999*, in CHEGA! 1, 3 (Comm’n for Reception, Truth, & Reconciliation in Timor-Leste ed., 2006), <https://www.etan.org/etanpdf/2006/CAVR/06-Profile-of-Violations.pdf>.

42. Katzenstein, *supra* note 39, at 248.

43. *Id.* at 249.

44. *Id.*

als, nearly three quarters of the population; and killed more than 1,000 civilians.⁴⁵

Following this wave of violence and systematic destruction, the United Nations, by Security Council resolution, established the U.N. Transitional Administration for East Timor (UNTAET) to assume responsibility for the administration and implementation of the new democracy.⁴⁶ Functioning as the nation’s main governing body, UNTAET almost immediately concerned itself with providing accountability for the crimes committed leading up to and after the independence referendum.⁴⁷ Following the violence in East Timor, UNTAET found a “judicial vacuum” with nearly all physical judicial infrastructure, including court buildings and libraries, destroyed.⁴⁸ The vast majority of lawyers and judges in East Timor, many of whom were Indonesian, had fled during or before the violence erupted.⁴⁹ Those few East Timorese citizens who possessed a legal education and remained throughout the violence generally had no practical legal experience.⁵⁰

Also during this time, the United Nations assembled a group of experts to investigate the pre- and post-referendum violence, which ultimately concluded that gross violations of human rights and crimes against humanity had been committed and that they warranted prosecution.⁵¹ Following further separate investigations that UNTAET and the Indonesian gov-

45. *Id.*

46. Mark Rothert, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANS. NAT’L L. 257, 261 (2000).

47. Alberto Costi, *Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations*, 22 N.Z. U. L.R. 213, 227 (2006) (noting that “[a]ccountability for serious humanitarian law violations was a top priority for UNTAET).

48. Katzenstein, *supra* note 39, at 250.

49. CAITLIN REIGER & MARIEKE WIERDA, INT’L CTR. FOR TRANSITIONAL JUSTICE, THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE 11 (2006), <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>.

50. REIGER & WIERDA, *supra* note 49, at 11.

51. FICHTELBERG, *supra* note 20, at 57–58. The experts’ report specifically concluded that the Indonesian military and militias engaged in “patterns of gross violations of human rights and breaches of humanitarian law,” and recommended the establishment of an international human rights tribunal, staffed with international judges but including participation from East Timor and Indonesia, to prosecute these crimes. U.N. Office of the High Comm’n for Human Rights, Rep. of the Int’l Comm’n of Inquiry on East

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ernment conducted⁵²—both of which identified the Indonesian forces as the party primarily responsible for the violence—the debate turned to the proper method for prosecuting these crimes.⁵³ The creation of a new ad hoc tribunal was hotly contested and eventually discarded.⁵⁴ Instead, the United Nations decided to create a hybrid tribunal, which it structured within the East Timorese domestic judicial system.⁵⁵ Throughout negotiations, the Indonesian government indicated its sheer refusal to cooperate with an international tribunal—including the hybrid tribunal in East Timor—ultimately prompting the United Nations to agree to allow Indonesia to conduct domestic prosecutions of the perpetrators, simultaneous with the East Timorese hybrid tribunal proceedings.⁵⁶

This rift ultimately resulted in the creation of two separate courts to try essentially the same crimes: the Indonesian Human Rights Ad-Hoc Tribunal for East Timor (Indonesian Tribunal), a purely domestic court created by the Indonesian government, and the SPSC, a hybrid tribunal in East Timor.⁵⁷ The Indonesian Tribunal retained jurisdiction over cases involving Indonesian defendants charged with committing gross human rights violations in specific districts within East Timor

Timor to the Secretary-General, ?? 123, 153, U.N. Doc. A/54/726 (Jan. 31, 2000).

52. See Skinnider, *supra* note 2, at 250 (explaining that both the U.N. Commission of Inquiry on East Timor and the Indonesian Inquiry Commission concluded that Indonesia perpetrated, or at least tolerated, the crimes committed during the post-referendum violence, and that the militias were “armed, trained and financed” by the Indonesian military).

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53. See REIGER & WIERDA, *supra* note 49, at 8–9 (explaining that while the Indonesian report sought domestic prosecution of perpetrators, the U.N. report proposed an international prosecutorial mechanism).

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54. See *id.* at 8 (noting that the U.N. Security Council ultimately discarded an ad hoc international criminal tribunal as a method of prosecution largely because of “donor fatigue and sustained criticism of the ICTY and ICTR over the lengthy duration of trials and the tribunals’ perceived lack of results”).

55. Skinnider, *supra* note 2, at 250–51.

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56. REIGER & WIERDA, *supra* note 49, at 10 (noting that, despite the U.N.’s agreement to Indonesian domestic prosecution, the Security Council retained the right to pursue further prosecutions of Indonesian defendants if the Indonesian courts failed to satisfy international fair trial standards).

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57. FICHTELBERG, *supra* note 20, at 145.

between April and September 1999.⁵⁸ In contrast, the SPSC’s jurisdiction extended to all persons, regardless of nationality, who were allegedly responsible for “serious criminal offenses” committed between January and October 1999.⁵⁹ UNTAET Regulation 2000/11, which served as the SPSC’s jurisdictional mandate, defined “serious criminal offenses” to include genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.⁶⁰

Along with the judicial arm of the SPSC, UNTAET also established the Serious Crimes Unit—a prosecutorial unit within the East Timor prosecutor’s office—to prosecute the crimes falling within SPSC jurisdiction, and later a Defense Lawyer’s Unit to provide the defendants identified by the Serious Crimes Unit with defense counsel.⁶¹ All units within the SPSC, including the Serious Crimes and the Defense Lawyer’s Units, operated within the Timorese domestic judicial system.⁶² Each panel of the SPSC, two at the trial level and one at the appellate level, were composed of two international judges and one East Timorese judge.⁶³

A. *Accountability*

The legacies of the two tribunals designed to prosecute the 1999 post-referendum violence in East Timor are marred

58. Skinnider, *supra* note 2, at 254 (recognizing that the Indonesian Tribunal’s geographic jurisdiction was limited to Indonesian crimes committed in the Liquica, Dili, and Saoe Districts of East Timor).

59. *Id.* at 251–253.

60. JUDICIAL SYS. MONITORING PROGRAMME, DIGEST OF THE JURISPRUDENCE OF THE SPECIAL PANELS FOR SERIOUS CRIMES 8 (2007), https://www.locjkt.or.id/Timor_E/new/pdf/Digest%20of%20the%20Jurisprudence.pdf. Additionally, UNTAET Regulation 2000/11 granted the SPSC “universal” jurisdiction over genocide, war crimes, crimes against humanity, and torture, meaning “the SPSC [had] jurisdiction over such crimes regardless of where in the world such a crime was committed.” JUDICIAL SYS. MONITORING PROGRAMME, *supra* at 9.

61. FICHTELBERG, *supra* note 20, at 59. Notably, the SPSC differed from other hybrid tribunals in that it was created by the sole authority of a U.N. body, while many of the other hybrid tribunals were the product of agreements between a U.N. body and a state government. FICHTELBERG, *supra* at 59.

62. Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?*, 21 AM. U. INT’L L. REV. 525, 527 (2006).

63. *Id.*

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largely with regard to their approaches to retribution.⁶⁴ Collectively, the two tribunals failed to prosecute those most responsible for the East Timorese violence, while convicting almost exclusively low-level Timorese officials.⁶⁵

At the time the United Nations closed the SPSC's doors in 2005, the hybrid tribunal had accumulated 391 indictments and eighty-four convictions, and had conducted fifty-five trials.⁶⁶ Despite these impressive figures, the majority of individuals most responsible for the post-referendum violence eluded justice entirely. While the Special Crimes Unit took an aggressive stance towards prosecuting those with the greatest responsibility for the serious crimes within its jurisdiction, its efforts were significantly thwarted by the Indonesian government's lack of cooperation.⁶⁷ Out of the nearly 400 individuals that the Special Crimes Unit indicted, more than 300 had fled to territories outside of the country, primarily Indonesia.⁶⁸ Further, Indonesia refused to extradite Indonesian nationals for prosecution before the SPSC, meaning that many of those indicted remained outside of the SPSC's reach.⁶⁹ Accordingly, nearly every one of the individuals actually prosecuted before the SPSC was an East Timorese national who played a rela-

64. See Leonie von Braun & Monika Schlicher, *Rethinking Justice for East Timor*, WATCH INDONESIA! (Feb. 2005), <http://www.watchindonesia.org/5681/rethinking-justice-for-east-timor?lang=en> (designating the SPSC "unable" and the Indonesian Tribunal "unwilling"); see also DAVID COHEN, INT'L CTR. FOR TRANSITIONAL JUSTICE, *INTENDED TO FAIL: THE TRIALS BEFORE THE AD HOC HUMAN RIGHTS COURT IN JAKARTA*, at vi-vii (2003), <https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Rights-Court-2003-English.pdf> (identifying the underlying issue causing the failure of the SPSC as "[t]he failure of political will in the attorney general's office and the highest levels of the Indonesian government to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed in East Timor").

65. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 287 (2007).

66. FICHTELBERG, *supra* note 20, at 148; *East Timor*, WAR CRIMES STUDIES CTR., https://www.ocf.berkeley.edu/~wscs/?page_id=193 (last visited Jan. 23, 2020).

67. *Id.* Granted, the Special Crimes Unit was able to indict several very high-ranking members of the Indonesian military. *Id.*

68. See McAuliffe, *supra* note 20, at 53 (noting that of the 391 suspects that the SPSC indicted, 339 were located outside the jurisdiction of the tribunal).

69. Skinnider, *supra* note 2, at 255.

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tively minor role in the violence.⁷⁰ Compounding these problems, the Special Crimes Unit also failed to develop a clear prosecutorial strategy, leaving it prosecuting a handful of individual perpetrators who lacked any connection to the political violence.⁷¹ As a result, the SPSC succeeded in convicting many East Timorese “small fish” defendants, while allowing Indonesian “big fish” military or militia leaders with command responsibility for the 1999 violence to go free.⁷²

The Indonesian Tribunal, on the other hand, indicted only eighteen individuals.⁷³ Notably, it refused to indict any of the individuals whom an Indonesian investigatory commission identified as those most responsible for the crimes and human rights violations committed in the post-referendum violence.⁷⁴ Of the eighteen individuals indicted, twelve were acquitted.⁷⁵ The six convictions, all of which carried minimal sentences, were ultimately reversed on appeal.⁷⁶ Further, the six defend-

70. See REIGER & WIERDA, *supra* note 49, at 2 (noting complaints that the SPSC convicted only East Timorese defendants, while Indonesian offenders were largely unpunished).

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71. See, e.g., FICHTELBERG, *supra* note 20, at 141, 151 (noting that the connection between one defendant, Charles Taylor, to the commission of the crimes was unclear, and indicating later that the prosecutor’s strategy was not explicitly clear).

72. Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT’L L. REV. 371, 389 (2004); Catherine M. Yang, *Accounting for Accountability: A Post-Conflict Role for Transnational Advocacy Networks in East Timor*, 45 GEO J. INT’L L. 589, 600 (2014).

73. WAR CRIMES RESEARCH OFFICE, *INDONESIAN AD HOC TRIBUNAL INDICTEE DETAILS 2* (2006), <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/resource-court-information-and-external-links/resources/special-panels-for-serious-crimes-in-east-timor/master-list-indictees>.

74. Von Braun & Schlicher, *supra* note 64 (noting that the Indonesian Tribunal failed to indict “prominent suspects,” including General Wiranto and João Tavares, the former commander in chief of the Indonesian militias).

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75. See generally WAR CRIMES RESEARCH OFFICE, *supra* note 73 (reflecting that only six of the eighteen defendants were sentenced in their initial trial).

76. *Indonesia and East Timor: Against Impunity, for Justice*, NAUTILUS INST. FOR SECURITY & SUSTAINABILITY: APSNET POL’Y F. (April 24, 2008), <https://nautilus.org/apsnet/indonesia-and-east-timor-against-impunity-for-justice>; see David Cohen & Leigh-Ashley Lipscomb, *When More May Be Less: Transitional Justice in East Timor*, in TRANSITIONAL JUSTICE, *supra* note 4, at 257, 263–66 (noting that while “[t]he Indonesian court prosecuted some high-level Indonesian commanders and Timorese perpetrators, . . . all convictions were subsequently overturned on appeal or judicial review”).

ants initially convicted remained free pending appeal, and, ultimately, no Indonesian official served more than a few months for his role in the post-referendum violence.⁷⁷

An unfortunately clear example of the SPSC's deficient prosecutorial strategy is its approach to prosecuting General Wiranto, the commander in chief of the Indonesian Army at the time of the 1999 post-referendum violence and undeniably a big fish, so to speak.⁷⁸ The Indonesian Tribunal declined to indict General Wiranto, ignoring the express recommendation of the Indonesian investigatory commission.⁷⁹ The Special Crimes Unit, however, chose to pursue prosecution of Wiranto, indicting him on charges of crimes against humanity, including murder, deportation, and persecution.⁸⁰ Many months after issuing the indictment, the SPSC issued an arrest warrant for Wiranto, but the East Timorese government failed to provide the indictment to Interpol to execute the international arrest.⁸¹ Instead, then East Timorese President Xanana Gusmao declined to pursue Wiranto's arrest, choosing instead to prioritize East Timor's burgeoning relationship with Indonesia.⁸² The Serious Crimes Unit's indictment of Wiranto has seemingly had no detrimental effect on his reputation or career possibilities: In 2004, Wiranto ran for Indonesian President,⁸³ and in 2016, Indonesia's current president, Joko Widodo, appointed Wiranto to serve in his cabinet as his security minister.⁸⁴

77. Bowman, *supra* note 72, at 394.

78. *General Wiranto*, TRIAL INT'L (Feb. 5, 2016), <https://trialinternational.org/latest-post/general-wiranto>.

79. Stefanie Frease, *Playing Hide and Seek with International Justice: What Went Wrong in Indonesia and East Timor*, 10 ILSA J. INT'L & COMP. L. 283, 287 (2004).

80. Stromseth, *supra* note 65, at 287.

81. *Id.*

82. *Id.* at 287–88.

83. Jane Perlez, *Ex-General to Make Run for President of Indonesia*, N.Y. TIMES (Jan. 16, 2004), <https://www.nytimes.com/2004/01/16/world/ex-general-to-make-run-for-president-of-indonesia.html?auth=login-smartlock>.

84. *Indonesia: Indicted General Unfit for Cabinet Post*, HUM. RTS. WATCH (July 28, 2016), <https://www.hrw.org/news/2016/07/28/indonesia-indicted-general-unfit-cabinet-post> (recognizing that Wiranto's appointment to security minister was a "slap in the face to Indonesians seeking accountability for past atrocities in Indonesia").

Both courts' approaches to Wiranto are indicative of two broader themes: the Indonesian government's refusal to prosecute its own citizens for orchestrating the mass violence in East Timor, and the East Timorese government's reticence to prosecute those most responsible for the violence in favor of pursuing a peaceful relationship with Indonesia, its neighbor and former brutal oppressor.⁸⁵ As a result of these national dynamics, as well as the SPSC's failure to hold accountable those Indonesian militia leaders most responsible for the post-referendum violence, the SPSC failed to attain the goals envisioned by the hybrid model.

Compounding these shortcomings, many critics have decried the limited jurisdiction of the hybrid tribunal, as well as its Indonesian counterpart. In a view shared by many East Timorese, the mass crimes committed during the twenty-four-year Indonesian occupation "far outweighed" those committed in the 1999 post-referendum violence.⁸⁶ Yet despite the efforts devoted to prosecuting the latter crimes, those responsible for the former have been met only with impunity.

B. *Legitimacy & National Ownership*

One of the most widely perceived shortcomings contributing to the SPSC's lack of accountability derives from a clear division of ownership within the tribunal and its prosecutorial and defense units.⁸⁷ The SPSC lacked a clear delineation of authority between UNTAET personnel and the East Timorese government, which ultimately provided both entities with a means of avoiding responsibility, creating logistical issues and ineffective prosecutions throughout the SPSC's mandate.⁸⁸ Because of overlapping responsibilities and the parties' corre-

85. See REIGER & WEIRDA, *supra* note 49, at 32 (noting that senior Timorese politicians did not support the Serious Crime Unit's prosecution of senior Indonesian officials, because they "felt that better relations with Indonesia was a higher priority than dealing with the 1999 crimes").

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86. Stromseth, *supra* note 65, at 289.

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87. See Cohen, *supra* note 12, at 9 (identifying ownership as one of most basic structural problems underlying the Special Panels).

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88. *Id.* at 9–10 (noting that a clear lack of ownership led to severe consequences involving "recruitment, management, and accountability"); see Raub, *supra* note 19, at 1030–31 (noting that "[c]onfusion regarding ownership . . . led to conflicts regarding the appointment, recruitment, and management of personnel").

sponding failure to act, the SPSC structure lacked adequate security, especially during trials, and did not possess reliable electricity until four years after the SPSC commenced proceedings.⁸⁹ The lack of clarity regarding respective responsibilities also created a dispute between UNTAET and the East Timorese government over judicial appointments that was so severe as to result in an essential shutdown of the appeals panel for twenty-one months.⁹⁰

Moreover, despite modeling the SPSC as a hybrid tribunal, the involvement of East Timorese nationals as judges, prosecutors, and defense counsel was relatively minimal. This lack of involvement stemmed largely from the absence of educated and trained East Timorese lawyers following the Indonesian occupation.⁹¹ Additionally, while defendants were initially represented only by East Timorese trained lawyers, once UNTAET established the Defense Lawyer’s Unit, it employed exclusively international counsel, interpreters, and administrative staff, who refused to collaborate with East Timorese defense counsel.⁹² UNTAET also did not invite East Timorese professionals into the Special Crimes Unit—which until then was composed exclusively of international prosecutors—until 2002, several years into proceedings, when the Unit was entering its “winding down phase.”⁹³

Coupling its failure to fully involve local attorneys, the SPSC did not engage in any type of effective community outreach: It never created a public affairs section or an outreach office.⁹⁴ This further ostracized East Timorese locals from

89. Cohen, *supra* note 12, at 9–10; *see also* Katzenstein, *supra* note 39, at 260 (noting that due to the lack of court stenographer, the first thirteen trials conducted before the SPSC lacked a transcript or audio recording, in violation of UNTAET regulations).

90. Cohen, *supra* note 12, at 10–11 (noting that with one exception, the appeals panel did not hear any appeals during this twenty-one-month period).

91. Nehal Bhuta, *Part 3: International Justice Mechanisms for East Timor*, in INTERNATIONAL JUSTICE FOR EAST TIMOR 1, 22 (2003), http://vuir.vu.edu.au/26165/1/BHUTA_compressed.pdf.

92. REIGER & WIERDA, *supra* note 49, at 27.

93. Katzenstein, *supra* note 39, at 266.

94. JOHN D. GIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 234–35 (2014). However, the Special Crimes Unit, independent of the SPSC, eventually engaged in outreach work by appointing a Public Affairs Officer and publishing “regular

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SPSC proceedings, leaving many feeling “alienated” from the tribunal’s operations.⁹⁵ Public knowledge of SPSC proceedings was thus limited to East Timorese nationals located in the Dili area, where the SPSC was based, and in the communities that investigators from the Serious Crimes Unit visited.⁹⁶

The location of hybrid tribunals within the post-conflict state that they are designed to serve is generally lauded as a way to ensure local ownership over the justice process. However, when these tribunals fail to achieve the accountability, local involvement, and justice promised, their location makes their failures much more evident.⁹⁷ Because of the SPSC’s in-state presence, East Timorese locals were well aware of the tribunal’s lack of retribution. An Australian study conducted in 2012 reflects the generally shared view among East Timorese citizens that the SPSC failed to achieve the level of justice that was anticipated.⁹⁸ UNTAET’s decision not to involve East Timorese nationals in the adjudicatory process to the extent possible was a severe detriment to its effectiveness in terms of legitimacy.

Despite the SPSC’s failure to provide national ownership, transitional justice mechanisms established to complement the SPSC provided a greater opportunity for local involvement. Most notably, the United Nations created the Commission for Truth, Reception, and Reconciliation (CAVR) in 2001 to serve

fact sheets and update reports,” which helped to improve public understanding of the Special Crimes Unit’s work. REIGER & WIERDA, *supra* note 49, at 31.

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95. FICHTELBERG, *supra* note 20, at 102 (quoting Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT’L REV. RED CROSS 93, 112 (2002)).

96. REIGER & WIERDA, *supra* note 49, at 31.

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97. *Id.* at 3.

98. See LIA KENT, THE DYNAMICS OF TRANSITIONAL JUSTICE: INTERNATIONAL MODELS AND LOCAL REALITIES IN EAST TIMOR 161 (2012) [hereinafter DYNAMICS OF TRANSITIONAL JUSTICE] (quoting “Justino,” a respondent in the 2004 study, who stated that East Timorese “[p]eople are not *puas* [satisfied] because only those who carried guns, not those who made the orders, are in jail. Justice is still not *los* [right].”); see also LIA KENT, RETHINKING TRANSITIONAL JUSTICE: LESSONS FROM EAST TIMOR I (Australian Nat’l Univ., In Brief No. 2013/6, 2013), http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/SSGM_IB_2013_6_0_0.pdf (noting that in addition to accountability, the East Timorese public also sought other goals, including the recovery of missing bodies, public shaming of perpetrators, and economic assistance, which neither UNTAET nor the SPSC addressed).

as a complement to the SPSC's mandate, and to broadly investigate truths regarding human rights violations committed between 1974 and 1999 in East Timor.⁹⁹ Both international and East Timorese staff supported the CAVR, which East Timorese politicians governed.¹⁰⁰ The CAVR's operations focused on a community reconciliation process and truth-telling operations, whereby both victims and perpetrators shared their stories in national and local hearings.¹⁰¹ The CAVR also provided victim healing programs for individuals suffering from severe physical or mental trauma, as well as an informal reparations program.¹⁰² The CAVR issued its final report, spanning more than 2,000 pages, in November 2005.¹⁰³ Despite its flaws,¹⁰⁴ the domestic impact of the CAVR's missions and its report was argua-

99. REIGER & WIERDA, *supra* note 49, at 34. The CAVR acronym reflects its name in Portuguese: *Comissa~o de Acolhimento, Verdade, e Reconciliacao*. REIGER & WIERDA, *supra* note 49, at 34. In addition to CAVR, in 2005, Indonesia and East Timor jointly created a bilateral truth commission aptly titled the Truth and Friendship Commission (CTF). *Ad-Hoc Court for East Timor*, GLOBAL POL'Y F., <https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/adhoc-court-for-east-timor.html> (last visited Dec. 30, 2019).

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100. Cohen & Lipscomb, *supra* note 76, at 266. The East Timorese and Indonesian governments created a second bilateral truth commission in 2005, the CTF, which conducted "truth-seeking" with the ostensible purpose of "promot[ing] sustainable peace" and strengthening ties between the two nations. Cohen & Lipscomb, *supra* at 297. Unlike the CAVR, the United Nations and local human rights organizations and activists denounced the CTF, on the grounds that it was unnecessary—in that it simply repeated the work that the CAVR already done—and failed to adequately foster victim participation. Cohen & Lipscomb, *supra* at 297–98, 300.

101. *Id.* at 294–96.

102. *Id.* at 295–96; *see also After 10 Years, CAVR Report Still Resonates in Timor-Leste and Around the World*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Feb. 23, 2016), <https://www.ictj.org/news/10-years-cavt-report-timor-leste-truth> (explaining that the CAVR conducted eight national and fifty-two local hearings, collected 7,699 statements from victims, witnesses, and perpetrators, and provided reparations to 712 victims).

103. *See generally* COMM'N FOR RECEPTION, TRUTH, & RECONCILIATION IN TIMOR-LESTE, CHEGA! (2005), <https://www.etan.org/news/2006/cavr.htm> (reporting CAVR's findings regarding human rights violations committed in East Timor from 1974 to 1999).

104. *See* Stromseth, *supra* note 65, at 295 (noting various shortcoming in the CAVR as recognized by victims and the CAVR itself, including the need for "clearer guidelines" for victims' roles in the proceedings and a "greater focus" on victims' needs).

bly greater than that of the SPSC, both in terms of local ownership and involvement.¹⁰⁵

C. Capacity Building

Scholars have mixed reviews regarding the SPSC's impact on capacity building within East Timor.¹⁰⁶ Capacity building took a back seat—both in terms of funding and attention—to the United Nations' need to address dire logistical concerns, such as the need for adequate security and reliable electricity in court buildings.¹⁰⁷ The training provided to East Timorese judges and legal counsel, to the extent it existed, proved largely ineffective.¹⁰⁸ For example, of the six East Timorese prosecutors within the Serious Crimes Unit, only one spoke English, making training of East Timorese prosecutors by “shadowing” their international counterparts—who litigated in English—impossible.¹⁰⁹ Moreover, the training created a deeper rift between the East Timorese lawyers and their international counterparts; the former began to view the international judges and attorneys as supervisors seeking to discipline, rather than as mentors attempting to train and educate.¹¹⁰

Further, to the extent that the SPSC's international actors sought to lead the East Timorese judges and lawyers by example, they did so poorly. Practitioners and academics have criticized the SPSC for failing to comply with international standards in conducting proceedings. Specifically, scholars argue that SPSC judges lacked consistency in their application of international law by imposing comparably harsh sentences on lower-level defendants, specifically those prosecuted early on in the SPSC proceedings.¹¹¹ Further, significant evidence exists to suggest that the SPSC often failed to preserve defend-

105. See Cohen & Lipscomb, *supra* note 76, at 292 (recognizing that no other entity, including the Special Panels, “dealt with such a large volume of victims and cases or at such an intimate level”).

106. Stromseth, *supra* note 65, at 290.

107. Katzenstein, *supra* note 39, at 266.

108. *Id.* at 267.

109. *Id.* at 268.

110. *Id.* at 267.

111. See, e.g., *id.* at 253 (“[I]n the cases that have been prosecuted and especially in the earlier ones, the judges neglected to apply international law or applied it incorrectly, and handed down harsh sentences for low-level perpetrators.”).

ants’ procedural rights.¹¹² In fact, defense counsel did not call witnesses in any of the first fourteen cases prosecuted before the SPSC.¹¹³ By failing to promote consistency in proceedings or adhere to international standards governing fair trial rights, the SPSC did little to promote respect for the rule of law among the East Timorese judges and lawyers, many of whom had little to no prior experience in the courtroom.

D. Conclusion

The trials that the SPSC completed have elicited large-scale international criticism.¹¹⁴ Many in the international legal community, as well as victims of the East Timorese massacre, were left disappointed with Asia’s first foray into hybrid prosecution.¹¹⁵ The United Nations closed the doors of the SPSC on May 20, 2005, leaving 514 investigation files open.¹¹⁶

Despite its failings, the massive challenges facing the United Nations in establishing the SPSC within a “judicial vacuum” should not be readily dismissed.¹¹⁷ As scholars have recognized, the United Nations succeeded at the very least in “creat[ing] a judicial system where before there had been none.”¹¹⁸ It should also be recognized that, at the time of its

112. *See id.* at 253 (noting that the accused, “until recently,” were often “detained beyond the seventy-two-hour limit and before their preliminary hearings”).

113. *Id.* at 264. The failure to call defense witnesses could be due, in part, to the fact that until 2002 (when UNTAET established the Defense Lawyers Unit), defendants before the SPSC were represented by East Timorese lawyers who had very “little or no criminal or international legal experience” and who were facing experienced international prosecutors. REIGER & WIERDA, *supra* note 49, at 27.

114. *See* McAuliffe, *supra* note 20, at 6 (noting that “the hybrid Special Panel process in East Timor [was] completed with widespread condemnation”).

115. *See, e.g.,* Bowman, *supra* note 72, at 373 (suggesting that the SPSC “perpetrat[ed] a type of injustice upon East Timor’s people by operating a legal system that punish[ed] former, low-level East Timorese militia members, but [was] incapable of reaching their more culpable Indonesian commanders”); DYNAMICS OF TRANSITIONAL JUSTICE, *supra* note 98, at 161 (detailing East Timorese victims’ views on the SPSC’s failure to prosecute Indonesian “big fish” defendants).

116. Raub, *supra* note 19, at 1030.

117. Katzenstein, *supra* note 39, at 250 (noting that the “[U.N.] administration confronted a judicial vacuum” following the violence in East Timor).

118. *Id.* at 252.

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creation, the SPSC was one of the first hybrid tribunals to prosecute mass crimes in a post-conflict setting.¹¹⁹ In retrospectively evaluating the SPSC's apparent mistakes, one should remember that the United Nations had no model and hardly any context for how to operate a successful hybrid tribunal.¹²⁰ Further, the SPSC succeeded in drawing international attention to and prosecuting the crimes within its mandate—marking a “milestone” in combating global impunity for mass atrocities.¹²¹

The United Nations faced significant uncertainty and disorganization in creating and operating the SPSC, from the lack of an existing competent domestic judiciary, to a lack of sufficient funding for the prosecutorial, defense, and adjudicatory units of the SPSC, to a lack of coordination with the local community, the international actors in the SPSC, and the neighboring Indonesian government. Given these impediments to success, the SPSC's ultimate failure to hold accountable the perpetrators most responsible for the post-referendum violence hardly came as a surprise to the international legal community. However, while the SPSC may have failed to achieve the goals set for the hybrid model, it paved the way for future hybrid tribunals, providing lessons on the need to engage the local community and promote accountability through clear prosecutorial strategies.

Despite the apparent failings of the SPSC, East Timor has developed into a peaceful and generally effective democracy. Since the closure of the SPSC, East Timor has completed several local and national elections, earning its title as “one of the most democratically governed countries in Asia.”¹²² Thus, while the legacy of the SPSC may be underwhelming, its proceedings, in conjunction with the other transitional justice mechanisms employed within the nation, have contributed to East Timor's presently peaceful and stable existence.

119. See Rapoza, *supra* note 62, at 530 (noting that “there was no specific model to use as a point of reference either to form the court or to conduct the process”).

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120. See *id.* (recognizing that “there was no U.N. guidebook to provide direction on how to set up a hybrid criminal process in a post-conflict society, especially one without a judiciary”).

121. McAuliffe, *supra* note 20, at 53.

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122. Cohen & Lipscomb, *supra* note 76, at 262.

IV. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The stated purpose of the ECCC is to prosecute those most responsible for the mass atrocities committed by the Khmer Rouge regime in Cambodia between 1975 and 1979.¹²³ The Khmer Rouge, a radical communist group, came to power in Cambodia following a five-year civil war and a devastating U.S. bombing campaign carried out as part of American efforts to quash communism in Vietnam.¹²⁴ Under its dictatorial leader, Pol Pot, the regime sought to cultivate a self-sufficient agrarian utopia by forcing all Cambodians from cities to forced labor communes scattered throughout the countryside.¹²⁵ Those with connections to the prior government, as well as those labeled “intellectuals,” were immediately executed, while other seemingly potential enemies—such as those belonging to ethnic minorities—were imprisoned, extensively tortured, and ultimately murdered and discarded in mass graves that came to be known as the “killing fields.”¹²⁶ Meanwhile, disease and starvation ran rampant throughout the country.¹²⁷ During the less than four years the regime remained in power, the Khmer Rouge was responsible for an es-

123. 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. 1, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Agreement].

124. See ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 16–17 (1986) (tracing the history of the Khmer Rouge movement in Cambodia).

125. See Adam Taylor, *Why the World Should Not Forget Khmer Rouge and the Killing Fields of Cambodia*, WASH. POST (Aug. 7, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/08/07/why-the-world-should-not-forget-khmer-rouge-and-the-killing-fields-of-cambodia/?utm_term=.9f2b4a6afbe7 (“Just days after the Khmer Rouge took power, they ordered 2 million people living in Phnom Penh and other urban areas to head to the countryside.”).

126. *Khmer Rouge History*, CAMBODIAN TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history> (last visited Dec. 30, 2019); *id.*

127. Randle C. DeFalco, *Justice and Starvation in Cambodia: The Khmer Rouge Famine*, 2 CAMBODIA L. & POL’Y J. 45, 46 (2014) (recognizing that between 500,000 and 1.5 million Cambodians died from a “combination of starvation and disease” related to famine during the Khmer Rouge reign).

timated two million civilian deaths,¹²⁸ having killed nearly twenty percent of the entire Cambodian population.

The brutal atrocities of the Khmer Rouge regime were met largely with impunity for nearly thirty years.¹²⁹ In 1997, Cambodia's long-serving Prime Minister, Hun Sen, wrote to the United Nations, and later the United States, requesting assistance in establishing a tribunal to prosecute the crimes committed by the Khmer Rouge.¹³⁰ However, early in the negotiations, Hun Sen became insistent that there be minimal international involvement in the tribunal, instead demanding a purely Cambodian court with international funding.¹³¹ This

128. Dan Fletcher, *A Brief History of the Khmer Rouge*, TIME (Feb. 17, 2009), <http://content.time.com/time/world/article/0,8599,1879785,00.htm>.

129. After the fall of Democratic Kampuchea in 1979, both Pol Pot and his brother-in-law, Ieng Sary, were tried for genocide by the judicial arm of the newly reinstated Cambodian government; since neither defendant had yet defected or been captured, the trials were conducted in absentia, with no defense counsel present. Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 902 (2004). After a procedurally and fundamentally defective "show trial[]," both defendants were sentenced to death. Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 ASIAN-PAC. L. & POL'Y J. 300, 311–12 (2011). Yet both men avoided serving their sentence; Pol Pot died from natural, albeit mysterious, causes, and Ieng Sary, whom the king of Cambodia pardoned upon his defection from the Khmer Rouge, was ultimately charged by the ECCC and died before trial. John D. Ciorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT'L L. 369, 384, 387 (2014); John Gittings & Mark Tran, POL POT 'KILLED HIMSELF WITH DRUGS,' (Jan. 21, 1999) <https://www.theguardian.com/world/1999/jan/21/cambodia>.

130. On June 21, 1997, Hun Sen and his then co-Prime Minister Norodom Ranariddh sent a joint letter to U.N. Secretary General Kofi Annan requesting "the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979." Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELB. J. INT'L L. 462, 467 (2004). Following an internal coup led by Hun Sen to oust Ranariddh from power, Hun Sen and new Prime Minister Ung Huot sent a letter to President Bill Clinton requesting similar assistance from the United States on November 27, 1997. DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 351 (2012).

131. Robert Petit, *Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the "Khmer Rouge Tribunal,"* 43 CASE W. RES. J. INT'L L. 189, 193–94 (2010).

resistance largely stemmed from the fact that, at the time of negotiations, Cambodia's government was composed of numerous high-ranking Khmer Rouge officials who had defected prior to the fall of the regime.¹³² Given the Cambodian government's evident resistance towards prosecuting these officials, the negotiations between the Cambodian government and the United Nations regarding the creation of the ECCC quickly grew contentious and repeatedly stalled.¹³³

Finally, in 2003, the two entities executed a legal agreement¹³⁴ establishing the ECCC—a domestic system with limited international features¹³⁵—in the outskirts of Phnom Penh,¹³⁶ Cambodia's capital and the site of many of the Khmer Rouge's crimes. One year later, in 2004, the Law on the Establishment of the ECCC (ECCC Law) was incorporated into Cambodian law, rendering the ECCC the only international tribunal created through domestic legislation.¹³⁷ This marks one of many features rendering the ECCC unique, even among the handful of international hybrid tribunals created to date.

The ECCC is modeled after Cambodia's civil law system and is divided into several judicial levels of investigation, with a majority of Cambodian and a minority of international judges

132. *See id.* at 190 (noting that in addition to Hun Sen, many “ex-Khmer Rouge commanders and . . . cadre who had defected” to Vietnam prior to the fall of the Khmer Rouge to escape Pol Pot's purges “now served as Cambodian figureheads for the new government”); *see also* Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html?mcubz=1> (recognizing that because the Cambodian government is composed of several former Khmer Rouge members, it “has been careful to protect its own”).

133. Petit, *supra* note 131, at 193–95.

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134. *See generally* ECCC Agreement, *supra* note 123 (executed by U.N. officials and the Cambodian government with the purpose of regulating the cooperation between the two entities in “bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” within the jurisdiction of the ECCC).

135. Nielsen, *supra* note 27, at 325.

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136. *Where Are the Trials Taking Place?*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA (July 20, 2017), <https://www.eccc.gov.kh/en/faq/where-are-trials-taking-place>.

137. Van Schaack, *supra* note 6, at 125.

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seated at each level.¹³⁸ Every decision made at each judicial level requires a supermajority vote, so as to ensure the participation of at least one international judge in every decision.¹³⁹ Each key role in the tribunal outside the judiciary, including the role of prosecutor, is shared between a Cambodian and an international appointee.¹⁴⁰ The complex structure of the court provides the Cambodian judges with great power over proceedings, but has also rendered the ECCC easily susceptible to the Cambodian government’s political interference.¹⁴¹

A. *Accountability*

The ECCC’s jurisdiction is significantly limited, potentially to its detriment. The ECCC Law renders the tribunal’s jurisdiction exclusive to “senior leaders” of the Khmer Rouge and those “most responsible” for its egregious crimes.¹⁴² While the ECCC initially interpreted this jurisdictional language as providing guideposts for prosecutorial discretion, in recent decisions, it has adopted a much more stringent approach to jurisdiction.¹⁴³ Largely because of this, to date, the ECCC has rendered only a total of five convictions against three individuals. The first, Kaing Guek Eav, alias Comrade Duch (Duch), was convicted and sentenced to life imprisonment for the crimes against humanity committed in his role as the commandant of the notorious Tuol Sleng interrogation facility and se-

138. *Id.* at 159–60 (noting that the ECCC structure is premised on a civil law model, with great emphasis placed on pre-trial investigations conducted primarily by investigating judges).

139. GIORCIARI & HEINDEL, *supra* note 94, at 36.

140. Van Schaack, *supra* note 6, at 160.

141. *See* Giorciari & Heindel, *supra* note 129, at 403, 405 (recognizing that the “supermajority” voting structure has resulted in “delay, deadlock, and obstruction” and has made allegations of political interference more difficult to address).

142. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Oct. 27, 2004, No. NS/RKM/1004/006, as amended, ch. II, art. 2, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (Cambodia).

143. *See* Sara L. Ochs, *In Need of Prosecution: The Role of Personal Jurisdiction in the Khmer Rouge Tribunal*, 55 STAN. J. INT’L. L. 117, 133 (2019) (explaining that in early decisions, the ECCC broadly interpreted its personal jurisdiction, but that recent decisions have “narrow[ed] the ECCC’s jurisdictional scope to nearly unworkable circumstances”).

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curity center, where 12,272 individuals were killed, many after extensive torture.¹⁴⁴ The other two defendants, Nuon Chea and Khieu Samphan, were both the subjects of two separate convictions, each rendered after lengthy joint trials.¹⁴⁵ The first post-trial judgment convicted the defendants of crimes against humanity largely related to the forced evacuation of Phnom Penh in 1975, as well as subsequent executions.¹⁴⁶ The second judgment convicted the defendants of additional crimes against humanity and genocide against minority populations.¹⁴⁷

The ECCC's international prosecutors' efforts to prosecute beyond the three convicted defendants have proven unsuccessful. In 2018, the Office of Co-Investigating Judges dismissed charges against two defendants, Meas Muth, a former Khmer Rouge military commander,¹⁴⁸ and Ao An, a Khmer Rouge sector secretary linked to genocidal acts against minorities and violent purges of Khmer Rouge colleagues.¹⁴⁹ Specifi-

144. Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶¶ 2, 7 (Feb. 3, 2012).

145. See generally Michael Plachta, *Khmer Rouge Tribunal Convicts Two of Genocide*, 34 INT'L ENFORCEMENT L. REP., no. 12, 2018, at 597 (2018) (discussing the separate trials and convictions rendered against Nuon Chea and Khieu Samphan).

146. Co-Prosecutors v. Nuon (Chea) and Khieu (Samphan), Case No. 002/19-09-2007-ECCC/SC, Appeal Judgement, 519 (Nov. 23, 2016).

147. Co-Prosecutors v. Nuon (Chea) and Khieu (Samphan), Case No. 002/19-09-2007-ECCC/TC, Summary of Judgement, ¶¶ 51, 53, 60 (Nov. 16, 2018) [hereinafter Chea & Samphan, Summary of Judgment]. The judgment specifically found both the defendants responsible for the genocide of Vietnamese but determined that only Nuon Chea possessed the requisite genocidal intent to warrant a conviction for genocide against the Cham Muslims. Chea & Samphan, Summary of Judgment, *supra* ¶¶ 51–53, 60–62.

148. See *Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Meas Muth*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA (Nov. 28, 2018), <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-meas-muth> (discussing in detail the Cambodian Co-Investigating Judge's order dismissing the charges against Meas Muth and the International Co-Investigating Judge's decision finding that Meas Muth falls within the ECCC's personal jurisdiction).

149. See *Co-Investigating Judges Issue Two Separate Closing Orders in Case Against Ao An Case No. 004/2/07-09-2009-ECCC/OCIJ*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA, <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207> (last updated Sept. 6, 2018) (recognizing evidence demonstrating that Ao An worked to orchestrate a "purge" of Khmer Rouge colleagues believed by the

cally, the Co-Investigating Judges determined that, despite overwhelming evidence tying both Meas Muth and Ao An to the commission of crimes against humanity, neither defendant rose to the level of most responsible for the Khmer Rouge regime's crimes, thereby falling outside of the ECCC's jurisdiction.¹⁵⁰ Even more devastatingly, the Pre-Trial Chamber, which acts in an appellate capacity over certain Co-Investigating Judges' decisions, affirmed the dismissal of charges against Im Chaem, a Khmer Rouge secretary tied to the deaths of at least 50,000 individuals.¹⁵¹ Most recently, in June 2019, the Co-Investigating Judges dismissed charges against the last defendant remaining before the tribunal: Yim Tith, a sector secretary with responsibility levels comparable to Ao An and Im Chaem.¹⁵² While the dismissals of charges against Meas Muth,

paranoid Pol Pot to be enemies of the regime, which resulted in a "conservative minimum estimate" of 12,944 individuals killed by murder, torture, or forced labor, as well as evidence that he was responsible for contributing to the deaths of an estimated 17,115 deaths of Cham Muslims within his sector).

150. See *Co-Prosecutors v. Meas (Muth)*, Case No. 003/07-09-2009/ECCC/OCIJ, Order Dismissing the Case Against Meas Muth, ¶ 428 (Nov. 28, 2018) (concluding that while Meas Muth "had several roles, . . . he did not exercise much power," and that "[h]is participation was inactive, unimportant, and not proximate to the commission of the crimes"); *Co-Prosecutors v. Ao An*, Case No. 004/2/07-09-2009-ECCC/OCIJ, Order Dismissing the Case Against Ao An, ¶ 553 (Aug. 16, 2018), (holding that Ao An's "participation in the commission of crimes was non-autonomous, inactive, noncreative, and indirect, which is far different from Duch's active, direct and creative participation").

151. See *Co-Prosecutors v. Im (Chaem)*, Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), ¶ 92 (June 28, 2018) [hereinafter *Im Chaem, Appeal Order*] (dismissing all claims for lack of personal jurisdiction against Im Chaem, a former Khmer Rouge deputy secretary); *Co-Prosecutors v. Im (Chaem)*, Case No. 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), ¶¶ 127–130, 135 (July 10, 2017) (finding that, while reports reflecting specific numbers of deaths were unreliable, evidence linked Im Chaem to a conservative death toll numbering in the thousands).

152. See *generally* Press Release, Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Yim Tith, (June 28, 2019), <https://www.eccc.gov.kh/sites/default/files/media/ECCC%20PRESS%20RELEASE%20OCIJ%20YIM%20TITH%20English.pdf> (discussing in detail the Cambodian Co-Investigating Judge's order dismissing the charges against Yim Tith and the international Co-Investigating Judge's decision finding that Yim Tith falls within the ECCC's personal jurisdiction).

Ao An, and Yim Tith remain subject to appeal,¹⁵³ Im Chaem is now free to return to her idyllic life as a farmer in rural Cambodia without repercussion.¹⁵⁴

Two primary flaws contribute to the ECCC's minimal advancements in accountability. First, nearly thirty years passed between the fall of the Khmer Rouge regime to Vietnamese forces in 1979¹⁵⁵ and the commencement of ECCC operations. During this time, significant physical evidence was destroyed, key witnesses died, and surviving victims' memories lapsed.¹⁵⁶ Many of the individuals most culpable, including several whom the ECCC indicted, have also died of natural causes.¹⁵⁷ This nearly three-decade delay made ECCC investi-

153. Because the Pre-Trial Chamber, in its appellate capacity over the Office of Co-Investigating Judges, has never decided how to address directly contradictory closing orders between the national and investigating Co-Investigating Judges, there is speculation as to how exactly the Pre-Trial Chamber will handle the anticipated appeals of the three sets of orders. Ochs, *supra* note 143, at 143–45.

154. Julia Wallace, *The Bucolic Life of a Cambodian Grandmother Accused of Mass Killings*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/world/asia/cambodia-khmer-rouge-im-chaem.html> (explaining that Im Chaem, now retired, lives in a peaceful mountain village, where she grows vegetables and tends to her cows).

155. *Chronology of the Khmer Rouge Movement*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/history/cambodian-history/chronology-of-the-khmer-rouge-movement> (last visited Dec. 30, 2019) (noting that Vietnamese forces captured the Cambodian capital of Phnom Penh on January 7, 1979, sending Khmer Rouge leaders to flee to the Thai border).

156. OPEN SOC'Y FOUNDS., PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 12 (2016), <https://www.opensocietyfoundations.org/sites/default/files/performance-perception-eccc-20160211.pdf>.

157. *See, e.g.*, Thomas Fuller, *Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83*, N.Y. TIMES (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html> (stating that Ieng Thirith, the Khmer Rouge's minister of social affairs and the wife of Ieng Sary, died in 2015 at age eighty-three, after being declared unfit to stand trial on charges of crimes against humanity, genocide, and related crimes before the ECCC for reason of dementia); *Khmer Rouge Co-Founder Ieng Sary Dies at 87*, CAMBODIA TRIBUNAL MONITOR (Mar. 14, 2013), <http://www.cambodiatribunal.org/2013/03/14/khmer-rouge-co-founder-ieng-sary-dies-at-87> (noting that Ieng Sary, Pol Pot's brother-in-law and the public international face of the Khmer Rouge, died in 2013 at age eighty-seven from suspected heart problems, before the ECCC could render a verdict on the charges pending against him).

gation and prosecution especially difficult or, in some circumstances, impossible.

Second, and even more notably, since its establishment, the Cambodian government's interference in the ECCC has significantly and consistently compromised the tribunal's judicial independence. Even during negotiations, Hun Sen was adamant that the tribunal would not prosecute more than four to five defendants, apparently hoping to avoid a witch hunt among his own men.¹⁵⁸ To this day, Hun Sen remains outspoken in his opposition to the ECCC, going so far as to publicly threaten that prosecution beyond the three defendants that the tribunal already convicted would return Cambodia to civil war.¹⁵⁹ This political resistance is embodied in the conduct of the ECCC's Cambodian prosecutors, who, under Hun Sen's apparent influence, have repeatedly blocked efforts by their international counterparts to move forward with the investigation and prosecution of Meas Muth, Ao An, and Yim Tith.¹⁶⁰ Specifically, the Cambodian co-prosecutor repeatedly requested that the ECCC judiciary dismiss charges in all three pending cases, arguing that the three defendants did not possess the requisite responsibility within the Khmer Rouge regime to warrant ECCC prosecution.¹⁶¹ Moreover, recent deci-

158. *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign*, HUM. RTS. WATCH (Oct. 3, 2011), <https://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>.

159. Mydans, *supra* note 132.

160. See Randle C. DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law*, 8 GENOCIDE STUD. & PREVENTION J. 45, 46 (2014) (recognizing "widespread speculation that the Cambodian government is working to prevent [pending] cases from proceeding to trial").

161. For reflection of the National Co-Prosecutor's refusal to move forward with charges against Meas Muth, Yim Tith, and Ao An, respectively—on grounds that the ECCC's resources should give priority to ongoing cases (i.e., Nuon Chea's and Khieu Samphan's appeal)—see generally Press Release, Extraordinary Chambers in the Courts of Cambodia, Statement by the Office of the National Co-Prosecutor on Case 003 (Nov. 30, 2017), <https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20National%20Co-Prosecutor%20on%20Case%20003%20ENG.pdf>; Press Release, Extraordinary Chambers in the Courts of Cambodia, Statement by the Office of the National Co-Prosecutors on Case 004 (May 31, 2018), <https://www.eccc.gov.kh/en/articles/statement-office-national-co-prosecutors-case-004>; Press Release, Extraordinary Chambers in the Courts of Cambodia, Statement by the Office of the Co-Prosecutors on Case 004/02 (Aug. 31,

sions of the ECCC's Office of Co-Investigating Judges and the Pre-Trial Chamber—including the dismissal of charges against Meas Muth, Ao An, Yim Tith, and Im Chaem for lack of personal jurisdiction—reflect the systemic rift between the international and Cambodian actors of the ECCC, with the Cambodian judges writing in favor of dismissal, and the international judges arguing for a finding of jurisdiction and continued prosecutions.¹⁶² The dichotomy between the Cambodian and international arms with regard to these cases has grown so contentious as to prompt the resignation of multiple international judges.¹⁶³

Thus, exclusively considering statistics, the ECCC has made only marginal developments in regard to holding culpable defendants accountable. However, this level of accountability should be considered in tandem with the nearly three decades that passed between the time of the mass atrocities and the commencement of ECCC proceedings, as well as the ECCC's unavoidable vulnerability to the Cambodian government's control. Further, the ECCC has contributed significant and influential international criminal jurisprudence, especially regarding issues of genocidal intent and joint criminal enter-

2017), <https://www.eccc.gov.kh/sites/default/files/media/Statement%20by%20the%20Office%20of%20the%20Co-Prosecutors%20on%20Case%20004-02%20English.pdf>.

162. See generally Im Chaem, Appeal Order, *supra* note 151 (including the Cambodian judges' three-page majority opinion affirming dismissal of charges against Im Chaem, and the international judges' minority opinion spanning more than 100 pages and ultimately concluding Im Chaem qualifies as a person "most responsible" under ECCC jurisdictional language); *Co-Investigating Judges Issue Two Separate Closing Orders in Case Against Ao An Case No. 004/2/07-09-2009-ECCC/OCIJ*, *supra* note 149 (discussing separate closing orders against Ao An); *Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Meas Muth*, *supra* note 148 (discussing separate closing orders against Meas Muth).

163. Robert Theiring, *The Policy of Truth: A Comparative Study of Transitional Justice Between the Rwandan Gacaca Court and the Extraordinary Chambers in the Courts of Cambodia*, 48 CAL. W. INT'L L.J. 159,180 (2017) (recognizing that the deepening divide over the prosecution of Cases 003 and 004 against Meas Muth, Ao An, Im Chaem, and Yim Tith, respectively, prompted the resignation of German Co-Investigating Judge Siegfried Blunk and Swiss Judge Laurent Kasper-Ansermet, with the former citing a lack of judicial independence within the ECCC).

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prise liability.¹⁶⁴ The tribunal's November 2018 judgment against Khieu Samphan and Nuon Chea, convicting both defendants of genocide against the Vietnamese,¹⁶⁵ and Nuon Chea specifically of genocide against the Cham Muslims,¹⁶⁶ marked the first genocide convictions rendered by a hybrid tribunal, and was met with international acclaim.¹⁶⁷ These, along with the conviction of Duch for crimes against humanity, were monumental in Cambodia. Most importantly, these convictions established greater respect from the Cambodian people for the implementation of the rule of law. Thus, in looking beyond conviction statistics and considering the ECCC's convictions in a broader context, both with regard to their international jurisprudential value and significance for the Cambodian community, the ECCC's advancements in terms of accountability appear much more meaningful.

B. *Legitimacy & National Ownership*

Despite the inappropriate involvement of the Cambodian government in the ECCC's proceedings, as well as publicized allegations of corruption and bribery,¹⁶⁸ the Cambodian population, as a whole, has largely remained supportive of the tribunal's work. This support is especially strong from those af-

164. See Hannah Beech, *Khmer Rouge's Slaughter in Cambodia Is Ruled a Genocide*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/world/asia/khmer-rouge-cambodia-genocide.html> (recognizing the potential implications of the ECCC's genocide convictions of Nuon Chea and Khieu Samphan on future international prosecutions for crimes against humanity committed in the Sudan and Myanmar). See generally Jared L. Watkins & Randle C. DeFalco, *Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 63 RUTGERS L. REV. 193, 273 (2010) (discussing the importance of the ECCC's jurisprudence interpreting joint criminal enterprise liability law).

165. Chea & Samphan, Summary of Judgment, *supra* note 147, ¶¶ 51, 60.

166. *Id.* ¶ 53.

167. *Khmer Rouge Leaders Found Guilty of Cambodia Genocide*, BBC NEWS (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-46217896> (discussing the significance of the "landmark" genocide verdict).

168. See generally Christopher Dearing, *An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia* 2–3, 5 (2008) (unpublished legal associate project, Documentation Center of Cambodia), http://www.dccam.org/Abouts/Intern/Chris_Dearing_Judicial_Bias.pdf (detailing allegations of bribery, kick-back schemes, and an absence of judicial independence targeted at the ECCC).

forded the opportunity to participate firsthand in ECCC proceedings.

In a method unique among hybrid tribunals, the ECCC allows for substantial victim participation within criminal proceedings through its “civil party” system.¹⁶⁹ Potential civil parties must apply to and undergo a full review process by the Office of Co-Investigating Judges.¹⁷⁰ Once approved, civil parties are afforded full rights to participate in all phases of prosecutorial proceedings, including both the initial investigation and the trial.¹⁷¹ During the trial, civil parties are entitled to present testimony regarding their experiences under the Khmer Rouge regime to the court and the defendants, thereby incorporating functions similar to those of a truth and reconciliation commission.¹⁷² Civil parties may also be awarded monetary “collective and moral reparations” against the defendants.¹⁷³

A 2013 joint study conducted by the Cambodian Human Rights and Development Association and the Harvard Humanitarian Initiative reveals that civil party participants viewed

169. NADINE KIRCHENBAUER ET AL., *CAMBODIAN HUMAN RIGHTS & DEV. ASS'N & HARVARD HUMANITARIAN INITIATIVE, Victims Participation Before the Extraordinary Chambers in the Courts of Cambodia*, at iii, 3 (2013), <https://www.eccc.gov.kh/sites/default/files/Victims-participation-before-ECCC-Baseline-Study-Jan-2013.pdf> (recognizing that the ECCC's first trial against Duch “marked the first internationalized criminal trial in which victims joined the criminal proceedings as Civil Parties”).

170. See James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 521 (2009) (noting that the Co-Investigating Judges' approval of applications is based largely on how closely the applicant's experiences are connected to the charges against the defendant).

171. Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW J. INT'L HUM. RTS. 165, 169 (2010).

172. See John D. Ciorciari & Jaya Ramji-Nogales, *Lessons from the Cambodian Experience with Truth and Reconciliation*, 19 BUFF. HUM. RTS. L. REV. 193, 205 (2012) (summarizing years of negotiations between the United Nations and the Cambodian government, ultimately reflecting both parties' intent to establish a tribunal rather than a truth and reconciliation commission).

173. *Id.* at 211. NGOs envisioned these reparations would be used for structures such as health clinics and memorials for Khmer Rouge victims, but in reality, as of the conclusion of the Duch trial, the ECCC had only offered fairly minimal forms of reparation, such as providing access to an online compilation of apologetic statements that Duch made during his trial. *Id.* at 211.

both the civil party system and the ECCC favorably.¹⁷⁴ Indeed, a stunning ninety-nine percent of civil parties interviewed agreed that serving as a civil party provided them with a sense of justice, and ninety-eight percent stated that this participation provided them with greater trust in the law.¹⁷⁵ Further, 95.2% of the civil parties interviewed believed the ECCC would bring justice to Khmer Rouge victims and their families, while 88.8% saw both the ECCC and its judges as unbiased and fair.¹⁷⁶ These statistics are in sharp contrast with the civil parties' views on the Cambodian judicial system: 63.9% of the civil parties interviewed admitted to trusting Cambodian courts, and only 59.5% expressed trust in traditional Cambodian judges.¹⁷⁷

Looking beyond its civil party system, the ECCC has also engaged in substantial outreach at a level exceeding the ICC or the ad hoc international tribunals.¹⁷⁸ This outreach, sustained both by limited funding from ECCC donors and support from nongovernmental organizations (NGOs), comes in the form of lectures, village forums, and radio, film, and television programs about the tribunal.¹⁷⁹ The ECCC has also placed much greater emphasis on the public's ability to access proceedings than other international or hybrid courts, both by arranging public visits and facilitating free transport to and from the tribunal from throughout the country.¹⁸⁰ Because of these efforts, nearly 100,000 people collectively attended the 212 days of hearings in the first trial against Nuon Chea and Khieu Samphan between November 2011 and July 2013.¹⁸¹ Of those that attended, eighty-three percent were Cambodians who arrived at the hearings via the free transportation that the ECCC offered.¹⁸²

174. KIRCHENBAUER ET AL., *supra* note 169, at 1, 31.

175. *Id.* at 31.

176. *Id.* at 32.

177. *Id.* at 33.

178. GIORCIARI & HEINDEL, *supra* note 94, at 271 (recognizing that while the ECCC has not reached its full outreach potential, it has surpassed the fully international courts in terms of outreach).

179. *Id.* at 238–39.

180. *Id.* at 240.

181. *Id.* at 241.

182. *Id.*

Unfortunately, these outreach efforts are not without shortcomings. Both the ECCC's constant battle to obtain funding and the divisive split between the Cambodian and international arms of the tribunal have posed significant obstacles to outreach and legitimacy.¹⁸³ Despite the emphasis placed on public access to ECCC hearings, this opportunity remains elusive for many Cambodians, especially those living in remote, rural areas of the nation, who, despite free transportation, lack funds for necessary overnight stays near the tribunal.¹⁸⁴ Moreover, expanding beyond the views of civil parties in order to consider those victims who did not have the same opportunity to extensively participate in ECCC proceedings, trust in and knowledge of the ECCC appears to diminish.¹⁸⁵ In fact, a 2010 report by the University of Berkley Human Rights Center, following the conclusion of the Duch trial, revealed that twenty-five percent of adult Cambodians had no knowledge whatsoever of the ECCC's existence.¹⁸⁶ Likewise, only twenty-one percent of the adult population felt as though they were "quite a bit or extremely informed" of the ECCC's proceedings and operations.¹⁸⁷

While there certainly remains room for improvement, the ECCC's civil party system and victim outreach reflect efforts that have gone further than any other hybrid tribunal, bestowing upon victims a sense of ownership over judicial proceedings. The ECCC's work to involve victims and their families in trials and proceedings through community lectures, media programs, free transportation to court proceedings, and opportunities to participate as civil parties has promoted legitimacy and a sense of ownership among many Cambodians.

183. *Id.* at 271.

184. *Id.* at 241–42.

185. *See id.* at 238–39 (noting that efforts of the ECCC tend to have had a small impact given illiteracy in the Cambodian countryside and insufficient funding for radio programs).

186. This figure had decreased from thirty-nine percent of the adult population in 2008. PHUONG PHAM ET AL., HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY SCH. OF LAW, AFTER THE FIRST TRIAL: A POPULATION-BASED SURVEY ON KNOWLEDGE AND PERCEPTION OF JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 21 (2011).

187. *Id.*

C. Capacity Building

Following the fall of the Khmer Rouge regime, the Cambodian judicial system was essentially decimated. At the time of the ECCC's establishment, after decades of civil conflict and the Khmer Rouge's targeted attack on intellectuals, the number of qualified attorneys or judicial personnel within Cambodia was minimal.¹⁸⁸ Like in East Timor, the United Nations was left to pick up the remaining pieces and rebuild the domestic legal system.

As it did from most courts adopting the hybrid model, the United Nations expected great accomplishments from the ECCC in terms of capacity building, given its in-state location and its incorporation into Cambodia's domestic judicial system.¹⁸⁹ Unfortunately, as with the SPSC, the realities of the ECCC's effect on capacity building have earned mixed reviews. Proponents of the ECCC point to the mentorship and training opportunities provided to Cambodian judges, lawyers, and other court personnel within the tribunal, which they can apply upon returning to work in the domestic legal system when the ECCC closes.¹⁹⁰ NGOs arriving in Cambodia on the heels of the ECCC's establishment also came prepared to provide legal training services to aspiring Cambodian attorneys and judges.¹⁹¹

On the other hand, critics of the ECCC's impact on capacity building note the lack of efforts made outside of the tribunal.¹⁹² Given international court personnel's heavy workloads, capacity-building efforts for the broader Cambodian community have been limited primarily to an internship program and

188. Horsington, *supra* note 130, at 480.

189. Giorciari & Heindel, *supra* note 129, at 431–32 (referring to Kofi Annan's 2003 prediction that the ECCC would have a "considerable legacy value" with regard to transferring skills and knowledge to Cambodian ECCC personnel).

190. *See id.* at 433 (noting that Cambodian lawyers have "improved their legal knowledge and skills" by participating in ECCC proceedings); *see also* Scully, *supra* note 129, at 342 ("[T]he ECCC has done much in terms of educating the national staff and judges who work at the Court, providing them with practical experience and hands on training.").

191. *See* Scully, *supra* note 129, at 342 (naming Yale University's Cambodian Genocide Project as one example of an NGO that has conducted legal training courses in Cambodia).

192. *Id.*

a handful of lectures and workshops.¹⁹³ Others argue that corruption runs far too deep in the Cambodian culture and judiciary for the ECCC to make a significant difference in building a free and reliable legal system,¹⁹⁴ especially considering the repeated allegations of corruption within the tribunal itself.¹⁹⁵ As a government routinely ranked among the most corrupt in the world, it is hardly surprising that Cambodian judges and other ECCC staff admitted to paying significant portions of their salaries to government officials in exchange for obtaining and securing their positions.¹⁹⁶ The Cambodian government's decision to award judicial positions to those Cambodian lawyers who can afford them—rather than to lawyers with the most potential to make significant changes in the ECCC and subsequently in the Cambodian domestic judicial system—unfortunately undermines the ECCC's advances in capacity building.

Ironically, despite these corruption allegations, one of the ECCC's greatest contributions to capacity building within the Cambodian legal community is its dedication to fair trial practices.¹⁹⁷ Unlike the SPSC, ECCC proceedings have largely provided defendants with both the substantive and procedural rights to which they are entitled under international law.¹⁹⁸ The ECCC thus provides the Cambodian legal system with a model for conducting trials that uphold and preserve defendants' rights.

193. Ciorciari & Heindel, *supra* note 129, at 434.

194. *See id.* at 436 (noting that “there is little evidence that the ECCC is profoundly affecting the local judicial system,” and implying that it is because “judicial corruption remains endemic”); *see also* Dearing, *supra* note 168, at 1–2 (detailing the pervasive nature of corruption in the Cambodian government and judiciary).

195. *See generally* Dearing, *supra* note 168, at 2–4 (detailing allegations of corruption against the ECCC).

196. *See id.* at 2 (referencing a 2007 Cambodian media publication that revealed that “Cambodian ECCC officials—including judges—were paying 30 percent of their salaries to government officials to secure their positions”).

197. CIORCIARI & HEINDEL, *supra* note 94, at 274.

198. *See id.* (noting that the ECCC has demonstrated “fair trial rights through a vigorous defense and procedural safeguards”).

D. Conclusion

Today's Cambodia has largely distanced itself from the Khmer Rouge horrors. In fact, by the fortieth anniversary of the fall of Pol Pot's brutal regime, only about ten percent of the Cambodian population retained first-hand memories of the atrocities.¹⁹⁹ Yet, Cambodia remains in many ways haunted by the Khmer Rouge. Approximately one-third to one-half of all Cambodians who lived through the Khmer Rouge era now suffer from post-traumatic stress disorder, which in many cases is so severe as to preclude these victims from maintaining steady employment, and so contributes to the nation's widespread poverty.²⁰⁰ The nation also remains under the strict rule of Hun Sen, who has brutally silenced any political opposition.²⁰¹ While the ECCC could not have solved all of these afflictions, additional outreach and victim-oriented programs may have assisted victims in obtaining the resources necessary for a more comprehensive recovery.

While the ECCC continues to conduct proceedings, its forthcoming closure is widely predicted. Following recent decisions dismissing all charges against every defendant to come before the court, it is anticipated that the ECCC will close its doors in the coming years. However, while the ECCC's conviction record may be minimal, the milestones the tribunal has made in obtaining justice and involving victims in the judicial process have been significant and well received throughout Cambodia. The ECCC has ended a thirty-year culture of impu-

199. See Casey Quackenbush, *40 Years After the Fall of the Khmer Rouge, Cambodia Still Grapples with Pol Pot's Brutal Legacy*, TIME (Jan. 7, 2019), <https://time.com/5486460/pol-pot-cambodia-1979> (explaining that Cambodian historian David Chandler's estimates that Cambodians in their 50s or older, who are capable of remembering the Khmer Rouge's atrocities, compose less than ten percent of the population, while nearly half of Cambodia's current population is under the age of twenty-four).

200. JOEL BRINKLEY, *CAMBODIA'S CURSE: THE MODERN HISTORY OF A TROUBLED LAND* 13, 137 (2d ed. 2012); see also Amelia Merchant, *Top 10 Facts About Poverty in Cambodia*, BORGEN PROJECT (Sept. 18, 2018), <https://borgenproject.org/top-10-facts-about-poverty-in-cambodia> (describing causes and results of Cambodia's widespread poverty, including limited access to clean drinking water, limited life expectancy, and food shortages).

201. See *Hun Sen: Cambodia's Strongman Prime Minister*, BBC NEWS (July 27, 2018), <https://www.bbc.com/news/world-asia-23257699> (describing Hun Sen as "an authoritarian figure with a poor human rights record and the resources and will to thwart any real political challenge").

nity for the Khmer Rouge's atrocities.²⁰² Despite the limited accountability rendered by the tribunal, the ECCC has made substantial impacts on the rehabilitation of Khmer Rouge victims.

V. A CALL FOR FUTURE HYBRID TRIBUNALS

To curb growing impunity for mass atrocities, changes must be implemented in the methods of prosecuting international crimes. In this undeniably turbulent period for international criminal justice, hybrid tribunals provide an opportunity for impunity redress, both with regard to accountability and the implementation of restorative justice in post-conflict states. Whenever possible, domestic courts should prosecute crimes committed within their state territory. When a lack of resources or a lack of capacity makes domestic prosecutions unattainable, the ICC—so long as it possesses jurisdiction over the crimes—may be a viable option for prosecution. However, given the expanding impunity gap arising between flawed international proceedings and under-resourced domestic courts, hybrid tribunals are becoming an increasingly necessary alternative to obtain justice in post-conflict states.

Recent years have rendered the ICC a target of backlash that has seriously compromised its legitimacy, especially in the Global South,²⁰³ while a lack of abundant resources and jurisdictional limitations prevent this permanent structure from prosecuting all mass atrocities. Likewise, national proceedings frequently hold a very slim possibility of legitimacy within a state recovering from mass atrocities: Not only do these post-conflict states often lack the capacity in terms of personnel and infrastructure to conduct fair or effective trials, but they may have also participated in or have ties to the regime responsible for the prosecuted crimes, thereby complicating the

202. See Scully, *supra* note 129, at 340–41 (discussing the importance of accountability to victims and to ending the culture of impunity).

203. While scholars have developed several definitions for this term, this article defines “Global South” in the same way as do many NGOs: to refer to “countries classified by the World Bank as low or middle income that are located in Africa, Asia, Oceania, Latin America and the Caribbean.” Marlea Clarke, *Global South: What Does it Mean and Why Use the Term?*, U. VICTORIA GLOBAL SOUTH POL. COMMENTS. (Aug. 8, 2018), <https://onlineacademic-community.uvic.ca/globalsouthpolitics/2018/08/08/global-south-what-does-it-mean-and-why-use-the-term>.

proceedings.²⁰⁴ Even impartial states that are capable and willing to prosecute may invite allegations of unfairness or impropriety in their handling of the proceedings, grounded in animosity towards the prior regime and notions of victor's justice.²⁰⁵

The deficiencies in each mechanism are contributing to a growing accountability gap in which an increasing number of international offenders responsible for orchestrating mass atrocities are escaping justice entirely.²⁰⁶ Without hybrid tribunals, perpetrators of the worst global atrocities will continue to slip through the cracks of justice, often going on to serve as heads of state or in high-ranking governmental roles. While hybrid courts cannot fix all the problems afflicting international criminal law, they can provide another method for prosecuting atrocity crimes that would otherwise go unprosecuted and unpunished. Thus, it is essential that hybrid tribunals continue to be used as a complement to purely domestic and purely international proceedings.

Again, nowhere is the need for a viable mechanism to address impunity for mass atrocities more essential than in Asia: a geographic region that is reluctant to engage in international criminal law, and one that is facing increasing challenges to domestic prosecutions. Recent years have marked a growing distrust of and unwillingness to participate in ICC proceedings among Asian nations. At the time of publication, only approximately one-third of Asian-Pacific states have become states parties to the Rome Statute.²⁰⁷ Significantly, Myanmar, Sri Lanka, and Indonesia, three states that have pepe-

204. McAuliffe, *supra* note 20, at 9; *see also* Costi, *supra* note 47, at 218 (citing a lack of "neutrality" as a primary reason for the lack of domestic prosecutions for mass atrocity crimes).

205. McAuliffe, *supra* note 20, at 11.

206. *See* Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 434 (2018) (recognizing an "accountability gap" between international and domestic efforts to address impunity for mass atrocities and the actual accountability rendered).

207. Schuldts, *supra* note 15, at 80; *see also* Hitomi Takemura, *The Asian Region and the International Criminal Court*, in CONTEMPORARY ISSUES IN HUMAN RIGHTS LAW 107, 107 (Yumiko Nakanishi ed., 2018) (recognizing that Asian states, and especially those in Southeast Asia, are underrepresented at the ICC). For a full list of Asia-Pacific state parties to the Rome Statute, *see Asia Pacific States*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/

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trated recent mass atrocities, are not parties.²⁰⁸ The Philippines' recent withdrawal from the Rome Statute further underscores Asia's resistance to ICC jurisdiction.²⁰⁹ Much of this distrust and resistance stems from Asian states' emphasis on national sovereignty and their suspicion of the ICC, which they see as a politicized international court intent on interfering in purely domestic Asian affairs.²¹⁰ At the same time, over and over again, domestic courts within Asia have declined to prosecute internationally recognized crimes committed within Asian state territories. Hybrid courts, through which Asian states can retain a level of ownership over the prosecution of atrocity crimes, provide a much more realistic and culturally compatible option than international courts, and a more feasible choice than domestic courts for Asian states. Evaluating the Asian hybrid tribunals as a collective case study sheds light on the potential shortcomings of the hybrid model. However, these evaluations also provide a comprehensive idea of the potential justice—both retributive and transitional—that such judicial mechanisms can achieve when operated effectively and with necessary limitations.

This section argues for the continued use of the hybrid model as a complement to established international and domestic judicial mechanisms, specifically by relying on the two Asian hybrid tribunals' accomplishments in terms of accountability, legitimacy, and capacity building. In doing so, this section draws comparisons between the experiences of the Asian hybrid tribunals and the purely international courts dedicated to prosecuting mass atrocity crimes. Based on the geographic case study, this section also reflects on the challenges that Asian hybrid tribunals face in order to identify limitations on

states%20parties/asian%20states/Pages/asian%20states.aspx (last visited Dec. 30, 2019).

208. *Asia Pacific States*, *supra* note 207.

209. See Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html> (explaining that the Philippines' withdrawal from the Rome Statute became effective on March 17, 2019, twelve months after it announced its withdrawal following the ICC's opening of a preliminary inquiry into allegations that leaders of the Philippine government, including President Rodrigo Duterte, had committed mass murders and other crimes against humanity in their war on drugs).

210. Schuldt, *supra* note 15, at 82–83.

the hybrid model. By structuring hybrid tribunals to conform to these limitations, the hybrid model holds a much greater likelihood of success in achieving its goals of accountability, legitimacy, and capacity building.

A. *Argument for Continued Use*

While hybrid tribunals were originally envisioned as a potential cure-all for international criminal law,²¹¹ recent scholarship has called for their discontinued use, pointing to the perceived failures of many of the hybrid courts created to date, including the SPSC and the ECCC.²¹² However, this scholarship ignores the significant potential the hybrid model possesses to implement justice in a restorative sense throughout post-conflict states, by combining accountability, in the form of punitive justice, with national ownership, victim outreach, and capacity building measures.

1. *Accountability*

Arguably, the most significant criticism of hybrid tribunals is their alleged universal failure to obtain the level of accountability envisioned by their creators. In order to achieve transitional and restorative justice for a post-conflict state, some measure of accountability must be rendered both to address victims’ need for retributive justice and to build respect and appreciation for the rule of law within the post-conflict society.²¹³

Because each hybrid tribunal is subject to its own legislation, which is most often the result of an agreement between the United Nations and a state government, the hybrid model provides a significant level of flexibility in its operation. Rather than the one size fits all approach adopted by the ICC and

211. See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 306–08 (2003) (discussing hybrid courts’ potential advantages over other international accountability mechanisms); McAuliffe, *supra* note 20, at 7 (tracing academic literature from the early 2000s “idealizing” the hybrid model).

212. See McAuliffe, *supra* note 20, at 5–7 (theorizing that the use of hybrid tribunals faced “marginalization” when they failed to achieve the expectations that the international community set for them).

213. See Stromseth, *supra* note 65, at 251–52 (noting that accountability signals to victims and other members of post-conflict societies that the prosecuted abuses “will not be permitted to recur”).

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utilized in any purely international mechanism, the flexibility inherent within the hybrid model allows for the creation of mandates, prosecutorial strategy, and investigation tactics in ways that are most advantageous to the circumstances surrounding the mass atrocities prosecuted.²¹⁴ This flexibility is extremely important, because it allows a hybrid tribunal to model its approach to accountability in a way that is culturally compatible with the victims of the state it is designed to serve. For instance, while the East Timorese culture views punitive justice as a necessary component of healing, it also prioritizes a “need for perpetrators to publicly ‘declare’ what they did and to ask for forgiveness.”²¹⁵ Likewise, many cultures expect justice to extend beyond pure convictions and encompass aspects of victim rehabilitation or perpetrator shaming.²¹⁶ Hybrid tribunals structured within these cultures can shape their approaches to accountability to encompass additional justice concepts beyond pure punitive convictions, both by working cohesively with outside transitional justice mechanisms like truth and reconciliation commissions, and by incorporating a level of restorative justice within their criminal proceedings. The ECCC’s civil party system is a perfect example of this flexible approach. Through this system, the ECCC has effectively combined purely criminal proceedings with the opportunity for victims to obtain healing by participating as actual parties in concurrent civil cases against their captors.²¹⁷

Moreover, the flexible nature of the hybrid model allows each hybrid tribunal to prosecute both crimes recognized by the international community as a whole, and crimes declared particularly egregious within the post-conflict state’s penal laws. This ability to create mandates allowing for prosecutions of both international and national crimes also provides for accountability goals more in line with state expectations.²¹⁸ Further, the in-state location of hybrid courts permits greater effi-

214. See Raub, *supra* note 19, at 1053 (recognizing the hybrid model as a “viable, flexible, and at times more desirable option” than other international criminal prosecutorial measures).

215. DYNAMICS OF TRANSITIONAL JUSTICE, *supra* note 98, at 160.

216. See, e.g., *id.* at 161 (recognizing that, based on interviews with East Timorese people, the culture reflects that there is “more to local expectations of justice than prosecutions alone”).

217. KIRCHENBAUER ET AL., *supra* note 169, at 3.

218. Sterio, *supra* note 10, at 354.

ciency and effectiveness in investigating and prosecuting mass crimes. Geographic proximity to evidence and the ability to obtain in-person witness statements present significant evidentiary advantages over both the ICC and ad hoc tribunals, thereby increasing hybrid tribunals' potential for obtaining punitive accountability.²¹⁹

Finally, hybrid tribunals' work in conducting trials of mass crimes— regardless of whether they end in successful convictions—should not be understated. While both the SPSC and the ECCC have not met the accountability expectations originally envisioned, the work of both courts has brought international recognition to crimes that would otherwise have gone unpunished and largely unnoticed by the international community. Specifically, the SPSC's trials represented one of the first major international addresses of human rights violations and contributed to restoring peace and preventing revenge crimes in the recovering nation.²²⁰ Even without convicting all individuals most responsible for prosecuted atrocities, the mere act of conducting trials helps bring closure to victims and provides peace and stability to post-conflict communities. Thus, evaluating a hybrid tribunal's success solely based on the amount of convictions it secures undercuts its value in restoring post-conflict communities.

2. *Legitimacy & National Ownership*

Looking beyond accountability to an arguably even more distinctive feature, the hybrid model provides recovering states with ownership over the adjudication of mass crimes that have essentially sought to destroy their entire being. Allowing victims to participate in these judicial proceedings as both lawyers and judges to almost the same extent they would in purely domestic prosecutions is extremely significant. Not only does this involvement promote a sense of healing among those that participate, but it also fosters respect throughout the state for

219. See, e.g., Raub, *supra* note 19, at 1022 (recognizing the obstacles posed by a tribunal's remote location with regard to witness production and ability to conduct investigations).

220. McAuliffe, *supra* note 20, at 53–54 (citing Summary of the Rep. to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (Then East Timor) in 1999, ¶ 8, U.N. Doc. S/2005/458, annex I (July 15, 2005)).

the hybrid court’s proceedings.²²¹ Given the involvement of the local community in prosecuting and adjudicating crimes under the oversight of international actors, the hybrid model provides a refreshing alternative to prosecuting mass crimes that carries trust and legitimacy within the state it is designed to serve.

The ECCC, despite its flaws, has in many ways exceeded expectations in involving the Cambodian community in proceedings. Its novel approach to victim participation has permitted Khmer Rouge victims to participate in ECCC trials as civil parties.²²² Further, its widespread outreach programs have provided thousands of Cambodians with opportunities to attend ECCC hearings and have kept many more apprised of the status of these proceedings.²²³ Despite widespread allegations of the politicization and corruption plaguing ECCC proceedings, the Cambodian public remains generally supportive of the tribunal.²²⁴

The accomplishments of the ECCC regarding victim participation and local involvement in proceedings stand in stark contrast to the experiences of the ad hoc tribunals. In both of the two ad hoc tribunals, proceedings were conducted in nations removed from the afflicted states, preventing victims from attending trials in person, and the lack of adequate outreach and in-state media coverage of proceedings precluded victims from obtaining even second-hand knowledge of the tribunals’ operations.²²⁵ As Padraig McAuliffe, a scholar and cautious proponent of the hybrid model, has noted, the remote location of the ad hoc tribunals, combined with their lack of outreach, diminished their capacity for instilling restorative justice in the former Yugoslavia and Rwanda.²²⁶

221. Cohen, *supra* note 12, at 6 (recognizing that national ownership within the justice process “is vital if a tribunal is to have an impact on the often stated goals of promoting reconciliation, developing a culture of accountability, and creating respect for judicial institutions in a post-conflict society”).

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222. CIORCIARI & HEINDEL, *supra* note 94, at 272.

223. *See id.* (discussing the achievements of the ECCC’s outreach efforts).

224. *See generally* KIRCHENBAUER ET AL., *supra* note 169, at 31 (“The overall experience of Civil Party participants at the time of this study was perceived to be positive.”).

225. McAuliffe, *supra* note 20, at 12.

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226. *See id.* (recognizing that “the physical and psychological distance between the sites of the atrocities in Yugoslavia and Rwanda” and their respec-

Moreover, the presence of international judges and lawyers in hybrid tribunals provides a level of legitimacy that is often absent in domestic courts.²²⁷ Especially in states recovering from extended periods of violence, corruption and bias can often plague domestic judiciaries. Having international actors to monitor post-conflict atrocity prosecutions can help ensure proceedings are conducted in compliance with both international and domestic criminal standards.

By involving local communities in criminal proceedings, hybrid tribunals provide victims with opportunities to face their oppressors, and in the case of the ECCC, to obtain moral reparations for their crimes. Even if the ICC or the ad hoc international tribunals adopted similar outreach programs,²²⁸ they could not replicate the advantages of the hybrid model, as victims would still be considered outsiders from the process.

3. Capacity Building

The importance of local capacity building as a complement to international prosecutions of atrocity crimes cannot be understated. Capacity building is essential for any recovering state to restore order and cultivate appreciation for the rule of law.²²⁹ Even more significantly, upon the withdrawal of international involvement in mass atrocity prosecutions, responsibility will eventually fall to the domestic judiciary to prosecute those crimes unaddressed by the international mechanism.²³⁰ It is thus imperative that international partici-

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tive courts in the Hague and Tanzania “meant there was little or no connection between the affected population and the trials”).

227. See Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia* 22 (JAD-PbP Working Paper No. 7, 2010), [https://issat.dcaf.ch/download/2284/19858/Hybrid%20Tribunals%20and%20the%20Rule%20of%20Law%20Martin-Ortega%20and%20Herman%20\(2010\).pdf](https://issat.dcaf.ch/download/2284/19858/Hybrid%20Tribunals%20and%20the%20Rule%20of%20Law%20Martin-Ortega%20and%20Herman%20(2010).pdf) (“The presence of the international staff in the Court has been essential to provide an aura of legitimacy.”).

228. See, e.g., CIORCIARI & HEINDEL, *supra* note 94, at 273–74 (arguing for the ICC to implement more effective outreach programs and to expand involvement of personnel from post-conflict states).

229. Costi, *supra* note 47, at 224.

230. See Sterio, *supra* note 6, at 900 (recognizing that because hybrid tribunals “cannot prosecute everybody,” the responsibility for prosecuting large-scale atrocity crimes will ultimately fall to national courts).

pation renders post-conflict domestic judiciaries capable of providing justice at an “internationally acceptable level.”²³¹

The hybrid model provides international actors with the capacity to rebuild the judicial structure within a recovering state. Post-conflict states generally suffer from a lack of basic judicial infrastructure, as evidenced by the status of the legal communities in both East Timor and Cambodia following their respective encounters with mass violence. For example, UNTAET encountered nearly complete destruction of all judicial buildings and libraries and a near nonexistent legal community following the 1999 post-referendum violence in East Timor.²³² Accordingly, in order to rebuild a local judiciary’s capabilities, one of the first needs to address is the physical rebuilding of domestic judicial and legal infrastructure.²³³ Through hybrid tribunals, international actors obtain greater awareness as to how to allocate international investments in order to best repair the local judicial system to meet the expectations of the post-conflict society. Further, given the placement of international actors within the local judiciary, the hybrid model provides on-the-ground oversight of the results of this investment, allowing international adaptation or modification where necessary.

The ICTY and ICTR’s lack of attention to local capacity building is one of the most notable flaws of the ad hoc tribunals’ legacies. However, this flaw is not specific to the two ad hoc tribunals, but is instead pervasive across all courts that are geographically distant from the communities that they are designed to serve. Purely international mechanisms, especially those in locations far removed from where the prosecuted crimes occurred, often make no efforts to help rebuild the domestic legal systems in the states subjected to those crimes. Compounding this lack of initiative, these purely international mechanisms also lack cultural awareness and intimacy with the

231. *Id.*

232. See Cohen & Lipscomb, *supra* note 76, at 259 (noting that East Timor was not unique in suffering from severe financial distress and a weak state, judiciary, and economy following the atrocities committed on its soil).

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233. See Meron, *supra* note 206, at 440 (recognizing that ensuring accountability for atrocity crimes remains infeasible without “significant investments in judicial, prosecutorial, and investigative infrastructures”).

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local judiciary's weaknesses, thereby precluding any opportunity for a legitimate attempt at local capacity building.²³⁴

Unlike purely international mechanisms, the hybrid model is well suited for success in rebuilding a post-conflict's state "judicial culture."²³⁵ The location of hybrid courts in the post-conflict state they are designed to serve—and in the cases of both the SPSC and the ECCC, even within that state's domestic judiciaries—provides international actors with an intimate view of the state's judicial institutions. As a result of this intimacy, international judges and lawyers within the hybrid model are more capable of providing skills training to their domestic counterparts in ways that are compatible with the local judicial system. Further, given the hybrid model's presence in the state, local actors often view international participation as holding a more cooperative role, rather than as a removed entity imposing foreign standards, and are thus more open to international training and education.²³⁶

B. *Conditions Necessary for the Success of the Hybrid Model*

Although the potential is great for hybrid tribunals to render accountability, provide justice to victims, and transform the judiciary of a post-conflict state following mass atrocities, the case study of the hybrid model in Asia makes clear that hybrid tribunals can only successfully function under several necessary conditions.

That the SPSC and the ECCC encountered significant obstacles should not be surprising given that these were two of the first hybrid tribunals created. These courts' experiences are not indicative of systemic flaws universally plaguing hybrid tribunals, but rather, they reflect problems dependent on the specific circumstances of the atrocities and the political administrations of post-conflict East Timor and Cambodia. For in-

234. Costi, *supra* note 47, at 224 ("An international tribunal located far away from the affected country and operated by foreigners cannot train local actors in the necessary judicial skills.")

235. This article adopts the definition of judicial culture advanced by Frank Dame, namely "the culture of the domestic judiciary," comprehensively referring to "a legal system's adherence to the rule of law, the energy of its courts, fairness of its trials, etc." Frank Dame, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, 24 MICH. ST. INT'L L. REV. 211, 213 n.2 (2015).

236. *Id.* at 271.

stance, not every hybrid tribunal has encountered the logistical problems that compromised SPSC proceedings or the issues of political interference that have plagued the ECCC.²³⁷

Thus, the respective failings of the SPSC and ECCC should not serve as warnings to halt the use of the hybrid model entirely, as the international legal community has largely viewed them; instead, they should be viewed as mere “growing pains” of a relatively new form of adjudication. Instead of discarding the hybrid model, the international community needs to acknowledge that hybrid tribunals are not a “one size fits all” type of judicial mechanism. Attention needs to be given to creating governing legislation and operating each hybrid tribunal in a way that is conducive to the post-conflict state’s cultural expectations, while also promoting the general goals of the hybrid model.

In order for a hybrid tribunal to achieve success in terms of accountability, legitimacy, or capacity building, it must obtain the support of the state it is designed to serve, operate in conjunction with other transitional justice mechanisms, involve local actors in every aspect of the judicial process, and promote transparency. Specifically, both the SPSC and the ECCC reflect that the viability of the hybrid model depends predominantly on the status of the recovering state’s government and connections to the prior violent regime. In the case of the SPSC, the East Timorese government, fresh off several centuries of foreign rule, felt that it had no option other than prioritizing relations with Indonesia at the expense of holding Indonesian citizens accountable for past crimes. Regarding the ECCC, the Cambodian government’s continued ties to the authoritarian Khmer Rouge regime has severely compromised its effectiveness in prosecuting Khmer Rouge defendants. Thus, it is clear that the hybrid model may only thrive following a significant regime change.²³⁸ Further, no single mechanism alone, including the hybrid tribunal, can achieve transitional

237. For instance, the Special Court of Sierra Leone took proactive efforts to limit political interference by the Sierra Leonean government, which, in part, contributed to its success as a hybrid tribunal that earned significant international support and recognition. Ochs, *supra* note 143, at 151.

238. Sterio, *supra* note 10, at 354 (noting that the “establishment of a hybrid tribunal presupposes the host country’s agreement,” which is not available without a transition from a violent or authoritarian regime to a new government).

justice for a state recovering from mass atrocities. Instead, to fully assist a state in transitioning from an authoritarian or otherwise violent regime, the retribution provided by hybrid tribunals must be paired with the restorative functions promoted by other transitional justice mechanisms, such as peacekeeping initiatives and truth commissions. Moreover, to achieve the national ownership and capacity building intended by the hybrid model, hybrid tribunals absolutely must permit and prioritize local involvement within all aspects of the judicial process. Finally, transparency regarding each hybrid tribunal's goals and the corresponding strategy for obtaining them within the communities that the tribunal is created to serve is imperative to establish legitimacy and to foster international trust in the tribunals. Each hybrid court must establish clear prosecutorial strategies and educate the local population on its goals and proceedings in order to cultivate support for the court's mandate. This section will consider each of these conditions necessary for the success of any hybrid tribunal.

1. *Cooperative Governments*

The respective failings of the SPSC and the ECCC clarify the need for post-conflict governments that are both cooperative with and supportive of hybrid prosecutions. As scholar Aaron Fichtelberg has recognized, it is impossible to operate a hybrid tribunal effectively without substantial support from the host nation: Absent political support, the tribunal is hampered at nearly every stage of prosecution, from investigation, to arrests, to the operation of proceedings.²³⁹

Perhaps the clearest illustration of this shortcoming can be seen in the adversarial proceedings before the ECCC. At the time of ECCC negotiations, the Cambodian government was still composed of many former Khmer Rouge officials and individuals who maintained connections to leaders of the

239. FICHELBERG, *supra* note 20, at 180; *see id.* at 354 (noting that while the hybrid model may be a viable method for prosecuting the atrocities committed during the Syrian war, this mechanism is largely infeasible while Syrian President Bashar al-Assad remains in power).

prior regime.²⁴⁰ Throughout the extensive negotiations between the United Nations and the Cambodian government regarding the creation of the ECCC, the Cambodian government made clear its resistance to prosecuting members of its current administration, several of whom possessed substantial responsibility for orchestrating the Khmer Rouge's brutal violence.²⁴¹ Yet, despite these clearly foreboding signs, the United Nations chose to proceed with the creation of the hybrid tribunal. Retrospectively, the lack of political support for the ECCC has served as one of its most troubling obstacles. This lack of support has divided the Cambodian and international arms of the tribunal, undermined indictments against defendants whose guilt is incontrovertible, and compromised ongoing cases against defendants before the tribunal.

The experiences of the Special Crimes Unit of the SPSC further reflect the need for government cooperation, with regard to both the government of the host nation and the governments of any other state involved in the conflict. From the outset of SPSC operations, the Indonesian government made clear its refusal to facilitate the Serious Crimes Unit's prosecution of Indonesian nationals.²⁴² This lack of cooperation, manifested in the Indonesian government's refusal to extradite SPSC defendants, proved an insurmountable hurdle to prosecution. The East Timorese government further undermined the Serious Crimes Unit, prioritizing the nation's relationship with Indonesia over the prosecution of senior Indonesian officials.²⁴³ As a result, the perpetrators most responsible for crimes falling within the SPSC's mandate received complete

240. Petit, *supra* note 131, at 190; see Mydans, *supra* note 132 (noting that the Cambodian government contains former Khmer Rouge members, including Hun Sen himself).

241. CIORCIARI & HEINDEL, *supra* note 94, at 24 (listing Hun Sen's 1998 statements that Nuon Chea and Khieu Samphan should be welcomed with "bouquets of flowers" upon their defection from the Khmer Rouge, and arguing that Cambodia "should dig a hole and bury the past" rather than pursue charges against these two former heads of the Khmer Rouge regime).

242. See Skinnider, *supra* note 2, at 255 ("The indictments of Indonesian military officers could not go forward because the Indonesian government did not recognize the Special Panels and refused to extradite nationals.").

243. See REIGER & WIERDA, *supra* note 49, at 32 ("Several senior Timorese politicians made it clear that they . . . felt that better relations with Indonesia was a higher priority than dealing with the 1999 crimes.").

impunity, as the majority of them were either Indonesian or had fled to Indonesia following the violence.

Thus, the hybrid model must be reserved as a mechanism for prosecuting mass atrocities within those post-conflict states with governments that have clearly denounced the prior regime under which the atrocities were committed. To allow otherwise undermines the potential effectiveness of a hybrid court before it even commences operations. In circumstances in which political support within the state's government is lacking, prosecutions may be more suitable for the ICC.

However, lack of political support does not necessarily preclude international involvement in providing transitional justice for post-conflict states. In such circumstances, international funding and resources should be allocated to mechanisms less heavily focused on retribution and more targeted to achieving transitional justice goals, such as truth and reconciliation commissions. As a guidepost, the East Timorese population viewed the achievements of the CAVR, one of two truth and reconciliation commissions implemented in East Timor, more favorably than the SPSC.²⁴⁴ Thus, in situations in which political support for a hybrid tribunal focused on retribution cannot be secured, attention may be better diverted to transitional justice mechanisms.

2. Paired with Transitional Justice Mechanisms

Even with political support, hybrid tribunals cannot wholly and effectively address impunity without incorporating elements of or working side by side with transitional justice mechanisms. The entire concept of transitional justice makes clear that retributive justice, while necessary,²⁴⁵ is incapable of repairing and rebuilding post-conflict societies.²⁴⁶ Likewise,

244. The CAVR operated simultaneously with the CTF, which East Timor and Indonesia operated bilaterally. MEGAN HIRST, INT'L CTR. FOR TRANSITIONAL JUSTICE, AN UNFINISHED TRUTH: AN ANALYSIS OF THE COMMISSION OF TRUTH AND FRIENDSHIP'S FINAL REPORT ON THE 1999 ATROCITIES IN EAST TIMOR 5–6 (2009), <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Unfinished-Truth-2009-English.pdf>.

245. Williams & Nagy, *supra* note 4, at 5 (recognizing that implementing “order without justice is neither morally nor politically sustainable”).

246. *See id.* at 8 (“Addressing the wrongs of the past . . . is not sufficient to create the conditions for a stable political society whose members have confidence that they will be treated fairly.”).

there is no one judicial body that can enact the transformative and restorative changes necessary for states and individual victims recovering from mass atrocities.²⁴⁷ Instead, hybrid courts should be used as only one element within a “holistic” approach to transitional justice, in which accountability measures achieved through courts or tribunals complement “community-based” truth-telling, peacekeeping, and reconciliation processes.²⁴⁸

In terms of transitional justice, the flexibility associated with the hybrid model provides an opportunity to pair the work of hybrid tribunals with that of peacekeeping, truth-telling, and, institutional reforms in post-conflict states. Whereas the ICC is relatively confined in its ability to contribute to transitional justice in post-conflict states given its remote location and the limited resources and funding it has to dedicate to mass crimes, hybrid tribunals can coordinate with other transitional justice mechanisms on the ground in the post-conflict state. This ability to coordinate international and local approaches to accountability with local truth telling and reconciliation initiatives provides a uniform, comprehensive approach to transitional justice that was previously unavailable within the scope of international criminal law.

The potential for a hybrid tribunal to fit within a broader transitional justice system is most clearly evidenced by East Timor’s comprehensive response to the 1999 mass violence. Between the SPSC, the Indonesian Tribunal, and two truth commissions, East Timor employed nearly every type of transitional justice mechanism.²⁴⁹ The CAVR, to some extent, was

247. *See id.* at 6 (recognizing that “[n]o single mechanism can do all the work of transitional justice”).

248. *E.g.*, INT’L CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRANSITIONAL JUSTICE? 1 (2009), <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (recognizing that no single transitional justice measure, including a court or tribunal, can effectively attain transitional justice); Elizabeth Andersen, *Transitional Justice and the Rule of Law: Lessons from the Field*, 47 CASE W. RES. J. INT’L L. 305, 316 (2015) (recognizing a prolonged call within the field of transitional justice for “holistic solutions that combine community-based processes of truth-telling and reconciliation with formal accountability and reparations regimes”).

249. *See* Cohen & Lipscomb, *supra* note 76, at 259 (noting that “East Timor is the only place where a hybrid tribunal, a national tribunal from another country, a national truth commission, and a bilateral truth commission have all been deployed”).

able to remedy several of the more prominent failings of the SPSC, specifically with regard to local ownership and victim participation. Despite the lack of local involvement in the SPSC, the CAVR provided victims with a means of addressing their oppressors, sharing their stories, and seeking truth, all of which contributed to the community's holistic recovery.

Likewise, the experiences faced in Cambodia reflect the need for a more comprehensive transitional justice approach in which additional mechanisms are used to complement hybrid courts' accountability functions. While the ECCC's civil party system was groundbreaking within the relatively small world of hybrid tribunals, opportunities existed for the ECCC to engage more prominently in delivering transitional justice to the Cambodian people, such as by providing victims with opportunities for mental and emotional health treatment. Cambodia's political instability coupled with the widespread emotional trauma still afflicting a majority of Cambodians are testaments to the need for additional mechanisms to address lasting emotional and societal damage.

Thus, hybrid tribunals alone should not be viewed as a solution to impunity. Instead, efforts must be made to complement the accountability rendered by these entities with transitional justice mechanisms that meet the expectations of the post-conflict community and extend beyond pure retribution. Only through a holistic approach to transitional justice can hybrid tribunals combat impunity for atrocity crimes in a manner that works to repair and rebuild post-conflict states.

3. *Local Involvement & Capacity Building*

While national ownership over the justice process and potential for rebuilding domestic legal systems are two of the strongest advantages of the hybrid model, these goals can only be realized when local involvement within the tribunal is actually prioritized.²⁵⁰ Limiting the participation of state nationals in court proceedings, as was done within the SPSC, undermines a primary goal of the hybrid model.

Instead, in order for a hybrid court to fully benefit the local community, both in terms of ownership and capacity

250. See FICHTELBERG, *supra* note 20, at 181 (recognizing the hybrid model's ability to positively influence domestic justice institutions as its "greatest contribution to international justice").

building, efforts need to be made to incorporate local actors into the court's investigatory, prosecutorial, defense, and adjudicatory operations.²⁵¹ Further attention should also be given to incorporating local involvement into the administration and management of the tribunal.²⁵² Local involvement needs to be extended beyond legally or practically trained individuals in order to facilitate community-wide participation in the tribunal. Whether this is done through a civil party victim participation program, as implemented in the ECCC, or through extensive and efficient outreach measures, locals need to feel connected to and informed about the hybrid court proceedings. It is only through this statewide involvement and understanding that the hybrid model can achieve its goals of establishing respect for the rule of law in recovering communities.

However, local involvement alone is insufficient to foster capacity building within the domestic judicial system. There has yet to be a hybrid tribunal, within or outside the boundaries of Asia, that has achieved the capacity-building goals set by the international community to the fullest extent possible.²⁵³ The origins of the hybrid model stem largely from the expectation that the international community would use local involvement in hybrid courts to educate, train, and provide practical legal experience to the local legal and judicial communities in post-conflict settings. Thus, following the closure of that hybrid court, these practitioners and judges could incorporate their new skills and education in the domestic judiciary.²⁵⁴ Yet, this goal has failed to be realized.

Both the SPSC and the ECCC present deficiencies in their approaches to capacity building. Despite what is viewed as an attempt to bridge stronger relationships between international and local communities, each hybrid tribunal has experienced

251. See Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1117–18 (2001) (noting that local participation in the operation of accountability mechanisms promotes democratization, encourages local engagement in the political process, and “lay[s] the groundwork for the strategic ‘self-government’ objectives of state-building”).

252. FICHTELBERG, *supra* note 20, at 181.

253. See generally McAuliffe, *supra* note 20, at 34–40 (discussing the respective failings of each hybrid tribunal with regard to capacity building).

254. See generally *id.* at 13–14 (identifying the theoretical capacity-building expectations for hybrid tribunals).

significant tension between the international and domestic arms of the court. In the SPSC, this bad blood was the result of the East Timorese participants’ resentment towards international actors for acting in a disciplinary capacity within the units of the SPSC. This ultimately contributed to delays in proceedings, and in one case, a nearly two-year-long complete shutdown of the SPSC’s appellate panel.²⁵⁵ Likewise, growing animosity within the ECCC between the Cambodian judges and co-prosecutor and their international counterparts regarding prosecutorial strategy has resulted in severe stagnation and anticipated dismissal of the three cases remaining before the tribunal.²⁵⁶

The enmity between local and international actors in both Asian hybrid tribunals is indicative of a systemic problem inherent in the international community’s approach to the hybrid model. Etelle Higonnet, a scholar of hybrid tribunals, recognized this as a flawed approach to the power dynamics within hybrid courts.²⁵⁷ She has suggested instead that hybrid tribunals disperse leadership and supervisory roles among both international and national actors.²⁵⁸ These positions must be premised on constant constructive feedback, mentorship, and training for both international and local supervisees.²⁵⁹ Not only will this foster feelings of a true partnership, rather than the flawed dynamic present in the SPSC, but it will also cultivate a two-way stream of information sharing. Thus, local judges, counsel, and staff will achieve a greater understanding of compliance with international legal standards, while their international counterparts will better comprehend how to mold international approaches to fit within

255. Cohen, *supra* note 12, at 10.

256. *See* Ochs, *supra* note 143, at 144–45 (explaining that the conflict between the Cambodian and international arms of the court has resulted in the affirmed dismissal of one defendant, and will likely result in the dismissal of charges against remaining defendants Meas Muth, Yim Tith, and Ao An).

257. *See* Higonnet, *supra* note 16, at 369 (proposing that hybrid tribunals should focus less on placing international actors in superior roles to local actors and instead prioritize a “cross-fertilization” of ideas and knowledge between the international and local arms of every hybrid tribunal).

258. *Id.*

259. *See id.* (proposing that tribunals mandate “regular joint strategy meetings and informational presentations, where local and international counterparts can be required to explain their work to each other and give each other feedback, advice, and support”).

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the confines of the domestic judicial system, and how to most effectively achieve the transitional goals that local communities envision. Only when hybrid tribunals are viewed as a true partnership, with exchanges of ideas, methods, and knowledge between international and local actors, can the model achieve its capacity building and local ownership goals.

4. *Transparency Within the Local Community*

Legitimacy, both locally and internationally, is unattainable without transparency. Each hybrid tribunal’s mandate should adequately and accurately reflect its prosecutorial strategy, so there is no question as to the tribunal’s selectivity with regard to prosecution. Given the inability to prosecute all individuals culpable of international crimes, a level of selectivity within international criminal prosecutions is unavoidable, whether in a permanent structure, such as the ICC, or in ad hoc or hybrid courts.²⁶⁰ An international court’s level of selectivity is also inextricably linked with its perceived level of legitimacy.²⁶¹

In order to combat this potentially detrimental impact on legitimacy, the prosecutorial strategy should be clearly developed and effectively communicated to the local population.²⁶² The public mandate of the tribunal should also reflect the determined prosecutorial strategy.²⁶³ These communications will both set reasonable victim expectations as to retributive justice and assist in recognizing the need for additional transitional

260. See FICHELBERG, *supra* note 20, at 178 (recognizing selectivity as “an unavoidable part of international criminal justice”) (citing Aaron Fichtelberg, *The International Criminal Court and the Ethics of Selective Justice, in THE NUREMBERG WAR CRIMES TRIAL AND ITS POLICY CONSEQUENCES TODAY* 114 (Beth A. Griech-Polelle ed., 2009)). See generally Hafetz, *supra* note 6 (discussing the role selectivity plays within the ICC and other international criminal courts).

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261. See Hafetz, *supra* note 6, at 1151 (recognizing the potentially detrimental role of selectivity on the legitimacy of international criminal courts).

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262. See Robert F. Carolan, *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 9, 23 (2008) (advocating for hybrid tribunals’ effective communication of clear prosecutorial strategies).

263. See *id.* (noting that such clarity is necessary so that the local population is aware of which perpetrators will be prosecuted).

justice mechanisms to investigate and address the crimes and suspects not subject to prosecution by the hybrid court.²⁶⁴

As evidenced by both the SPSC and the ECCC, hybrid courts are specifically limited in their prosecutorial scope by restricted funding and resources, political resistance, and other factors outside of prosecutors' control. However, in both tribunals, the reasons for prosecutors' selectivity in investigation and prosecution were not clearly conveyed to the local populations through effective outreach measures. This was especially injurious to the legitimacy of the SPSC given the dichotomy between its expansive mandate and its failure to prosecute those most responsible for the 1999 post-referendum violence.²⁶⁵ As a result, many of the primary complaints voiced by the East Timorese people against the SPSC stemmed from the Special Panels' failure to meet expectations in convicting those viewed as most responsible for the violence.²⁶⁶

In order to promote transparency of prosecutorial strategy and selectivity, more resources need to be allocated to outreach.²⁶⁷ While the ECCC's outreach strategy exhibits significant improvement from the near-nonexistent outreach that the ad hoc tribunals conducted, a lack of sufficient funds has hampered the success of its programs to some extent.²⁶⁸ Further, the ECCC's outreach fails to explain to local people the reasoning behind its judicial decisions, leaving the majority of

264. *See id.* (recognizing that clarity provides the local population with the opportunity to "devise alternate means, such as truth and reconciliation commissions, to address publicly those crimes that are not prosecuted").

265. While the ECCC's prosecutorial mandate was limited to senior leaders and those most "responsible" for the Khmer Rouge's atrocities, the UNTAET Resolution governing the SPSC did not limit prosecutions for post-referendum violence to any specific level of responsibility. *See* JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 60, at 8–9 (stating that the SPSC has jurisdiction over "serious criminal offenses").

266. *See* REIGER & WIERDA, *supra* note 49, at 2 (noting frequent complaints that the Special Panels convicted only East Timorese defendants, while the Indonesian perpetrators went unpunished); Skinnider, *supra* note 2, at 255 (recognizing that a major criticism raised about the Special Panels is that the trials conducted by the tribunal involved mostly low-level perpetrators).

267. *See* Carolan, *supra* note 262, at 23 (arguing for hybrid tribunals to give "[g]reater attention" to working with the local media to enhance outreach and keep the local population informed of the court's work and impact).

268. CIORCIARI & HEINDEL, *supra* note 94, at 236–37.

the local community unaware of its prosecutorial decisions.²⁶⁹ The legitimacy and ownership expected of the hybrid model can only be attained through transparent mandates and prosecutorial strategies coupled with extensive and adequately funded outreach programs.

VI. CONCLUSION

Nearly twenty years after the creation of the first hybrid tribunal, the use of the hybrid model in prosecuting global mass atrocities remains as imperative as ever. Given the legitimacy challenges facing purely international criminal mechanisms, combined with the lack of capacity and willingness to pursue prosecutions of atrocity crimes at a domestic level, eras of mass violence—especially in developing states—are going unprosecuted and relatively ignored at the international level.²⁷⁰ The hybrid model, when used as a complement to the other international and domestic adjudicatory mechanisms, including the ICC and domestic courts, can help bridge the growing accountability gap for atrocity crimes. It can achieve punitive justice against the perpetrators most responsible for the prosecuted atrocities, while also obtaining restorative justice for both individual victims and post-conflict states in their entirety, by providing local ownership over the proceedings and engaging in capacity building measures to rebuild the local judicial system.

Examining Asia’s use of hybrid tribunals as a case study of the effectiveness of the hybrid model in combating impunity for mass atrocities is especially instructive. Asia is experiencing growing distrust of the ICC and other purely international criminal mechanisms, while also suffering from a lack of capable domestic courts willing to prosecute mass crimes. As a result, within the last few decades, periods of mass violence throughout the region have largely gone unpunished. Indeed,

269. *See id.* at 243 (noting that the ECCC’s outreach program advised the local population as to its decision to sever the charges against Nuon Chea and Khieu Samphan into two trials, but failed to explain its reasons for doing so, leaving locals, including civil parties, unclear as to why the case had been divided).

270. *See* Sterio, *supra* note 6, at 899 n.68 (noting that perpetrators of internationally recognized crimes often “slip through the cracks and find a safe haven in the mere fact that nobody is capable of prosecuting them”).

Asia is arguably the region where hybrid tribunals are most needed.

While the SPSC and the ECCC experienced their own unique challenges—including a potential lack of cooperation between international and local actors in the case of the SPSC, and clear evidence of political interference within the ECCC—both courts' experiences reflect the potential for hybrid tribunals to achieve restorative justice for post-conflict states in terms of accountability, local ownership, and capacity building. Both courts brought international attention to crimes that would otherwise have gone unprosecuted and worked to incorporate victims into the process of prosecuting their attackers. Moreover, the problems that each tribunal encountered provide clear evidence of the limitations necessary for the hybrid model to achieve success, most notably that the United Nations reserve hybrid courts for use in those post-conflict states that are supportive of prosecutions.

The hybrid model is like any other type of judicial mechanism: imperfect and subject to a trial and error process. While the international community holds the hybrid tribunal to a higher standard than other adjudicatory entities, its failure to achieve widespread and immediate success should not undermine its potential effectiveness to bridge the widening gap in accountability and combat impunity for atrocity crimes. Instead, operated under the necessary circumstances, hybrid tribunals can be used to effectively combat widespread impunity and achieve transitional justice for post-conflict communities—both within and beyond the confines of Asia.

