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## Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?

Jane E. Stromseth

*Georgetown University Law Center*, [stromset@law.georgetown.edu](mailto:stromset@law.georgetown.edu)

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## **PURSuing ACCOUNTABILITY FOR ATROCITIES AFTER CONFLICT: WHAT IMPACT ON BUILDING THE RULE OF LAW?**

BY JANE E. STROMSETH\*

### INTRODUCTION

In countries ravaged by widespread violence, the trauma does not end when the guns fall silent. On the contrary, atrocities have cast a long shadow in places such as the Balkans, where brutal massacres, mass rapes, and ethnic cleansing were regular features of war; in Rwanda, where a devastating genocide killed hundreds of thousands of people; and in Sierra Leone, where the civil war was marked by forced recruitment of child soldiers, rapes and murders, and the gruesome mutilation of civilians. In Afghanistan, Iraq, East Timor, and many other societies, severe abuses have also left deep pain and trauma in their wake.

States that attempt to end periods of bloody conflict by intervention often focus on reestablishing security, reconstructing governance institutions, and reforming the justice system. While such efforts are crucial for promoting the rule of law, they are rarely sufficient to grapple with the complex legacy of past abuses. As a result, unless leaders in war-torn societies confront the difficult issue of accountability for past atrocities, they run the risk that new structures of law will be built upon shaky foundations.

Although nothing can undo the suffering of those who have endured violent abuse, ensuring that perpetrators of atrocities face some reckoning can be critical to moving forward on both an individual and community level in societies recovering from violent conflict. Ensuring

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\* Professor of Law and Director, Human Rights Institute, Georgetown University Law Center. © 2007, Jane E. Stromseth. This article is drawn from Chapter Seven of *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* by Jane Stromseth, David Wippman, and Rosa Brooks, published in 2006 by Cambridge University Press. The book examines the challenges of strengthening the rule of law in the aftermath of military interventions in societies as varied as Sierra Leone, East Timor, Bosnia, Kosovo, Haiti, Afghanistan, and Iraq. Emphasizing the cultural as well as the institutional aspects of the rule of law, the book explores issues ranging from the reestablishment of security to the role of civilian police, from transitional justice efforts to the linkages between formal law and informal dispute resolution mechanisms. Professor Stromseth thanks Gabe Rottman, Maya Goldstein-Bolocan, and Milan Markovic for excellent research assistance on this article, and David Wippman, Rosa Brooks, Stephen Scher, and Rachel Taylor for valuable suggestions.

some measure of accountability may help victims come to terms with the past and can also help signal to all members of post-conflict societies that, henceforth, such abuses will not be permitted to recur. Just as important, the process of pursuing accountability for atrocities can reinforce broader efforts to reform the justice system.

All this is far more easily said than done, however. In the wake of violent conflicts, national justice systems, if they function effectively at all, usually have only limited ability to render fair justice. Indeed, in many post-conflict societies, citizens view existing legal institutions skeptically because of corruption, systematic bias, association with abusive past regimes, failure to effectively address past grievances, or severe shortfalls in human and other resources. Moreover, those who have committed atrocities may still wield political power or exert influence behind the scenes. Even when criminal trials are initiated against perpetrators, those facing trial and their political allies may view the proceedings as illegitimate forms of “victor’s justice.” In some situations, accountability mechanisms may actually trigger further violence.

Meanwhile, it is not always clear how victims can best be served. Although some victims demand trial and punishment of perpetrators, others place greater emphasis on public acknowledgement of their suffering and on reparations or some tangible form of assistance. In such complex situations, both international interveners and domestic leaders—confronted by limited resources and other urgent reconstruction challenges—inevitably must struggle to balance justice, reconciliation, and other compelling goals.

Yet the fundamental issue of accountability—and its relationship to the rule of law—cannot be ignored. Establishing a credible and functioning justice system that serves the goals of the rule of law is central to moving forward after violent conflict. Even more fundamentally, strengthening the rule of law depends on building people’s confidence that they will be protected from predatory state and non-state actors, that they can resolve disagreements fairly and reliably without resorting to violence, and that legal and political institutions will protect rather than violate basic human rights. Only then is the rule of law likely to take root: a state of affairs in which most people, most of the time, choose to resolve disputes in a manner that is consistent with fair rules and fundamental human rights norms, in which modern legal institutions and laws exist, and there is a widely-shared cultural and political commitment to the values underlying those institutions and

laws.<sup>1</sup>

This Article explores a critically important question: can the pursuit of accountability for atrocities through criminal prosecutions and other supplementary methods help to build the rule of law and strengthen justice systems in post-conflict societies? At a broad level, this question has divided scholars and practitioners alike.

Advocates of a *rights-based approach* argue that major perpetrators of atrocities must be held legally accountable if a country is to make an effective transition to a society marked by the rule of law. Proponents of this approach see legal impunity as the biggest barrier to sustainable peace and argue that vigorous prosecution of at least major offenders is the only real way to remove the stain of impunity from traumatized societies. Fair trials affirm that atrocities are wrong and unacceptable—drawing a clear line for all to see—and incarceration both prevents the guilty from repeat offenses and potentially serves as a deterrent to others.<sup>2</sup> Trials can also give victims a sense of justice that helps them move forward without a need to seek personal vengeance. Truth commissions can supplement trials and acknowledge more fully the truth of what occurred and the pain and needs of victims, potentially contributing to reconciliation over time.<sup>3</sup> Even if accountability efforts are inevitably imperfect responses to the suffering caused by atrocities, they can symbolize a society's desire to confront its past, to reject patterns of impunity, and to move in a new direction.

An alternative, *realist view* disputes the beneficial impacts of trials and argues instead that criminal prosecution of major perpetrators can be destabilizing. Realists argue that conditional amnesties may be necessary to remove “spoilers” and thus help create a better prospect for peace and long-term development of the rule of law. Once political bargains are struck among contending groups, they argue, “institutions

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1. See JANE STROMSETH, DAVID WIPPMAN, & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (Cambridge University Press 2006) [hereinafter *CAN MIGHT MAKE RIGHTS?*], for a discussion of this definition of the rule of law and the many challenges in advancing it.

2. See, e.g., M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in *POST-CONFLICT JUSTICE* 3, 4, 54 (M. Cherif Bassiouni ed., 2002).

3. For an extremely thoughtful discussion of truth commissions, see PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001). Recently, in both East Timor and Sierra Leone, truth commissions sought to contribute to reconciliation through community-based reconciliation procedures, which are examined in this Article in Sections IV.C and IV.E below.

based on the rule of law become more feasible.”<sup>4</sup> Pursuing accountability without establishing “political and institutional preconditions,” they contend, “risks weakening norms of justice by revealing their ineffectiveness and hindering necessary political bargaining.”<sup>5</sup>

Neither camp is without its vulnerabilities. If some proponents of the rights-based approach are at times too starry-eyed about the practical benefits of trials and truth commissions or sometimes unpragmatic in acknowledging political and other constraints, the realists are prone to overstate the downsides of prosecution by focusing on the perspectives of self-interested ruling elites rather than on broader segments of post-conflict societies, including victims and civil society organizations.

The realists also tend to overstate the practical benefits of amnesties. Even if high-ranking individuals are given amnesty as the price for peace, there is no assurance that the amnesty will in fact be sufficient to sustain peace. In Sierra Leone, for instance, the amnesty given to Revolutionary United Front (RUF) forces and other groups in the 1999 Lome Agreement did not stop the conflict, rooted in greed and self-interest, from continuing.<sup>6</sup> A British-led international intervention was necessary. Realist critics also understate the degree of innovation and pragmatism reflected in more recent efforts to link accountability for past atrocities to forward-looking reforms.

Trends on the ground are, to some degree, overtaking this broad

4. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY, Winter 2003/04, at 5, 6. Snyder and Vinjamuri argue that “[j]ustice does not lead; it follows . . . [and] a norm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law.” *Id.* Although they “agree that the ultimate goal is to prevent atrocities by effectively institutionalizing appropriate standards of criminal justice,” they argue that “the initial steps toward that goal must usually travel down the path of political expediency.” *Id.* at 6–7.

5. *Id.* at 6.

6. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, U.N. Doc. S/1999/777, available at <http://www.sierra-leone.org/lomeaccord.html> [hereinafter Lome Accord]. Article IX of the agreement provided that “[i]n order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.” *Id.* That article also provided for the Government of Sierra Leone to “grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing” of the Lome Agreement. *Id.* In addition, “the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the time of the signing of the present Agreement.” *Id.*

theoretical debate. Advocates of the rights-based approach increasingly have recognized the need to supplement trials with noncriminal accountability mechanisms that offer alternatives to trials for lesser offenders. The community reconciliation process in East Timor (now Timor Leste) is one recent example.<sup>7</sup> Furthermore, the normative acceptability of amnesties for serious offenses is more contested today, both internationally and domestically.<sup>8</sup> In Afghanistan, for instance, amnesty provisions proposed by the Northern Alliance were not included in the Bonn Agreement, and a majority of Afghans surveyed oppose amnesties for serious offenses.<sup>9</sup> Furthermore, devising amnesty arrangements that effectively remove spoilers and genuinely help to create conditions for strengthening the rule of law—rather than just permitting impunity—is enormously difficult in practice.

Nevertheless, the realists have an important point. Moving forward after atrocities does require a clear-eyed assessment of the underlying forces that impede stability and reform. Holding key perpetrators criminally accountable—especially before international tribunals miles away—may advance international standards of justice. However, it may

7. Upon attaining independence in May 2002, East Timor became the Democratic Republic of Timor Leste. Because this article refers to multiple time periods, pre- and post-independence, the term East Timor is used for ease of reference, but Timor Leste is the country's preferred English name today. The community-based reconciliation procedures developed by the Commission for Reception, Truth and Reconciliation are discussed in detail in its report. *Chega!: Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (2005) [hereinafter *Chega!: Final Report of the CAVR*], available at <http://www.cavr-timorleste.org/> (“Chega!” means “Enough!” in Portuguese).

8. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 10, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004) (“United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights . . .”); Charles T. Call, *Conclusion to CONSTRUCTING JUSTICE AND SECURITY AFTER WAR* (Charles T. Call, ed., 2006).

9. See AFGHAN INDEPENDENT HUMAN RIGHTS COMM’N, A CALL FOR JUSTICE: A NATIONAL CONSULTATION ON PAST HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN 21, 41–43 (2005) [hereinafter A CALL FOR JUSTICE], available at [http://www.aihrc.org.af/rep\\_Eng\\_29\\_01\\_05.htm](http://www.aihrc.org.af/rep_Eng_29_01_05.htm) (noting that views varied regionally, but that 60.5% overall of those surveyed rejected the idea of “amnesties or pardons for anyone who confessed their crimes before an institution created for transitional justice.”). As the report explains, the Bonn Agreement “affirms accountability as a principle” but provides for no particular mechanisms. *Id.* at 42–43. Although an amnesty provision proposed by the Northern Alliance was not adopted, a clause prohibiting amnesty for war crimes and crimes against humanity supported by the United Nations “was deleted.” *Id.* In December 2005, the Afghan government affirmed that “no amnesty will be granted for gross violations of human rights.” Press Release, Afghan Independent Human Rights Commission, Truth-seeking and Reconciliation in Afghanistan (Dec. 15, 2005), at 2. Subsequently, in March 2007, the government adopted a controversial amnesty law, which is discussed in Part V.B. of this Article.

simultaneously have very little, if any, impact on strengthening the domestic rule of law in a post-conflict society. Just as we cannot assume that such trials will be destabilizing domestically, or that amnesties will effectively neutralize spoilers and clear the way for genuine reform, neither can we assume a positive spillover effect on the building of domestic rule of law from criminal trials.

Indeed, the question of whether and how accountability proceedings can contribute to strengthening domestic justice systems and to building the rule of law in post-conflict societies is surprisingly underanalyzed.<sup>10</sup> For too long, the practical division of the fields of “transitional justice” and “rule of law reform” into two largely separate communities of scholars and practitioners has impeded efforts to explore systematically how accountability processes might, concretely, contribute to forward-looking rule of law reforms.<sup>11</sup> If this gap can be overcome, opportunities for valuable synergies between accountability efforts and rule of law reform programs can be pursued more effectively. To be sure, we are relatively early in the process of understanding the longer-term impacts of accountability processes—such as criminal prosecutions, truth commissions, reconciliation proceedings, vetting—in different post-conflict societies; furthermore, the unique circumstances and obstacles in each society attempting to overcome horrific atrocities make generalizations risky. Still, more systematic thinking and empirical research on the impact of accountability proceedings in specific post-conflict societies is a critical need and an increasingly important area of inquiry.<sup>12</sup>

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10. Scholars advocating a variety of approaches to accountability acknowledge that we need more systematic analysis of the impact of accountability proceedings on strengthening the rule of law prospectively. For a helpful recent effort to explore the potential impact of accountability efforts on forward-looking justice reform, see CHARLES T. CALL, *Introduction and Conclusion to CONSTRUCTING JUSTICE AND SECURITY AFTER WAR*, *supra* note 8.

11. One scholar and practitioner who spans both fields and has worked hard to bring them together is Neil Kritz of the U.S. Institute of Peace. See, e.g., Neil J. Kritz, *The Rule of Law in the Postconflict Phase: Building a Stable Peace*, in *TURBULENT PEACE: THE CHALLENGE OF MANAGING INTERNATIONAL CONFLICT* 801 (Chester A. Crocker et al. eds., 2001); Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in *POST-CONFLICT JUSTICE*, *supra* note 2, at 55, 84–87.

12. For thoughtful recent assessments of East Timor’s community reconciliation proceedings, for example, see SPENCER ZIFCAK, THE ASIA FOUNDATION, *RESTORATIVE JUSTICE IN EAST TIMOR: AN EVALUATION OF THE COMMUNITY RECONCILIATION PROCESS OF THE CAVR* (2004); U.N. Dev. Programme [UNDP], *The Community Reconciliation Process of the Commission for Reception, Truth, and Reconciliation* (April, 2004) (prepared by Piers Pigou) [hereinafter *Community Reconciliation Process*], available at [http://www.jsmp.minihub.org/Reports/otherresources/UNDP\\_ReportOnCRP%5B1%5D.pdf](http://www.jsmp.minihub.org/Reports/otherresources/UNDP_ReportOnCRP%5B1%5D.pdf).

This Article aims to clarify what we know—and do not know—about the impact of accountability processes on domestic justice systems and the rule of law in post-intervention societies. By looking backward and forward at the same time, the Article aims to explore systematically the relationships, if any, between retrospective accountability proceedings and prospective domestic capacity-building and reform. Before examining the experiences in a number of post-conflict societies, Part I considers some of the broad trends that have influenced choices made in these situations regarding particular accountability mechanisms and goals. Part II offers a theory about how accountability processes may contribute to building the rule of law in post-conflict societies through their demonstration and capacity-building effects.

The remaining parts examine the empirical record. Part III looks at the domestic impacts of the international tribunals for former Yugoslavia and for Rwanda. Part IV examines the hybrid national/international tribunals in Kosovo, East Timor, and Sierra Leone, and their effects on the domestic rule of law, along with the role of the truth and reconciliation commissions in East Timor and Sierra Leone. Finally, Part V looks at some domestic approaches to accountability, including trials before Iraq's special tribunal for crimes against humanity and prospects for accountability in Afghanistan, along with the potential impact of the International Criminal Court.

The Article argues that the long-term impact of accountability proceedings on the rule of law depends critically on three factors: first, the effective disempowerment of key perpetrators who threaten stability and undermine public confidence in the rule of law; second, the character of the accountability proceedings pursued, particularly whether they demonstrate credibly that previous patterns of abuse and impunity are rejected and that justice can be fair; and third, the extent to which systematic and meaningful efforts at domestic capacity-building are included as part of the accountability process. In a number of countries studied here, criminal trials have not been as influential as advocates had hoped and seem to have had little impact at all on forward-looking efforts to strengthen justice systems and the rule of law. But in other cases, accountability processes—particularly those located within affected countries that enjoy considerable public support and engage in systematic outreach—are contributing to national capacity-building and may be reinforcing both domestic expectations of accountability and demands for fairer justice processes in the future. This Article identifies some of the features of the more effective processes, such as Sierra Leone's Special Court and East Timor's Commission for Reception, Truth and Reconciliation, but also acknowl-



edges their limitations and emphasizes the challenge of sustaining their impact and legacy.

First, however, some essential background is needed both on broad trends in efforts to seek accountability for atrocities since the 1990s and on key goals and specific mechanisms that have been pursued in different cases.

#### I. “TRANSITIONAL JUSTICE” IN EVOLUTION: THE ACCOUNTABILITY LEARNING CURVE

When international and local leaders pursue accountability for atrocities, they have many goals in mind beyond contributing to domestic legal reform.<sup>13</sup> Bringing major perpetrators to justice—demonstrating that their conduct is wrong and unacceptable—is an immediate and fundamental goal. Prosecuting and punishing major offenders affirms and reinforces the core international legal rules prohibiting genocide, crimes against humanity, and war crimes.<sup>14</sup> Holding individual perpetrators legally accountable can also provide some sense of justice and relief to victims and their families and potentially help to defuse grievances and curtail cycles of vengeance.

Prosecution of major offenders may help to deter future perpetrators by setting an example and making clear that wrong-doers will be held accountable. As such, prosecutions can be a central part of a larger effort to strengthen and to begin institutionalizing normative commitments to accountability—rather than impunity—in post-conflict societies. But accountability proceedings alone cannot claim too much with respect to preventing future atrocities. Because prosecutions inevitably are selective and because many factors contribute to individual decisions to commit atrocities, the issue of deterring future

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13. See Jane E. Stromseth, *Introduction: Goals and Challenges in the Pursuit of Accountability*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 1, 5-13 (Jane E. Stromseth ed., 2003). For analysis of accountability goals, methods, and concrete experiences, see, e.g., POST-CONFLICT JUSTICE, *supra* note 2; HAYNER, *supra* note 3; MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER MASS VIOLENCE (1998); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2nd ed. 2001); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002); David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43 (1999); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996).

14. See generally RATNER & ABRAMS, *supra* note 13; Bassiouni, *supra* note 2.

abuses is a complex and often uncertain matter.<sup>15</sup> The selective, focused nature of criminal trials after massive atrocities also limits them as mechanisms for achieving a number of broad goals, such as a comprehensive account of a conflict and its causes.

In contrast, truth commissions are more likely to be effective in compiling a comprehensive “truth” that addresses the larger context of a conflict and provides a fuller account of the factors contributing to atrocities. Truth commissions can provide a greater opportunity for direct participation by a larger number of victims and may also—as in East Timor and Sierra Leone—seek to promote reconciliation and reintegration of lesser perpetrators into the community through reconciliation agreements and rituals. Unlike trials, truth commissions can make far-reaching policy recommendations, and they may be better able to advance goals of “restorative” or “reparative” justice by focusing directly on the concrete needs of victims.<sup>16</sup> Sierra Leone’s Truth and Reconciliation Commission, for instance, has recommended free health care and education for amputees, victims of sexual violence, and others injured by the conflict.<sup>17</sup> East Timor’s Commission for Reception, Truth and Reconciliation likewise has proposed an ambitious reparations program (calling on Indonesia and other states to contribute), as well as a broad array of innovative reforms.<sup>18</sup>

No single mechanism or approach can satisfy the many—sometimes conflicting—goals of justice, truth, prevention and deterrence, reconciliation, and domestic capacity-building in the aftermath of severe atrocities. Recognition of this fact has contributed to several emergent trends intended to approach accountability efforts in new ways to increase their effectiveness in helping recovering states strengthen the rule of law.

One significant recent trend is toward “mixed” approaches to account-

15. On the difficulties of deterrence, see David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473 (1999); David Wippman, *Exaggerating the ICC*, in *BRINGING POWER TO JUSTICE: THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT* 99 (Joanna Harrington ed., 2005); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 290-95 (2000); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 *AM. J. INT’L L.* 7 (2001).

16. For a thoughtful discussion of reparative justice, see RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOW OF WAR* 173–78 (2002).

17. 1 *TRUTH & RECONCILIATION COMM’N, SIERRA LEONE, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION*, intro., para. 51 (2004) [hereinafter *WITNESS TO TRUTH*], available at <http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20ONE/VOLUME%20ONE.pdf>.

18. See *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 11.

ability that combine multiple mechanisms designed to advance a number of different goals. These mechanisms may include criminal prosecutions as well as truth commissions, reconciliation procedures for lesser offenders, and vetting (restrictions on access to government positions), for instance. Generally, the more deeply rooted the causes of atrocities, the more pressures accountability processes will face to not only be the arbiter of justice in specific cases but also an agent for achieving more systemic social change.

A second trend in transitional justice is to move away from remotely located international tribunals toward hybrid courts with national participation situated directly in affected countries. In both East Timor and Sierra Leone, for instance, defendants have been prosecuted for war crimes and crimes against humanity before mixed panels of national and international judges, with the prosecutorial staff likewise composed of international and national lawyers. Although purely international tribunals may sometimes be necessary, international courts—like the international criminal tribunals for former Yugoslavia and for Rwanda—are physically and often psychologically distant from the people most affected by the atrocities they are prosecuting; also, these tribunals are not designed to contribute resources or training directly to the domestic justice system. In contrast, hybrid tribunals located within post-conflict societies may be viewed as more legitimate by domestic audiences, have greater potential for domestic capacity-building by involving domestic jurists directly in the work of the court, and may be better able to demonstrate the importance of accountability and fair justice to local populations.<sup>19</sup> These potential benefits, in theory at least, have contributed to the trend toward hybrid arrangements, a trend that may well continue even with the arrival of the International Criminal Court.<sup>20</sup>

A third, and overdue, trend is a more systematic effort to understand the specific goals and priorities of domestic populations who, after all, are the people who endured the atrocities and must chart a new future. The question of how best to face the past—and what forms of accountability to pursue—is a difficult one, and different societies ultimately may have quite different goals and priorities. Within those societies, moreover, various actors and groups may disagree quite strongly over priorities. In East Timor, for example, President Xanana Gusmao has

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19. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

20. See Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005); Stromseth, *supra* note 13, at 1, 32.

long stressed the importance of reconciliation and forward-looking social justice, whereas others (including the Commission for Reception, Truth and Reconciliation in its report) also emphasize the continuing importance of criminal prosecution of major offenders.

Moreover, international actors have their own priorities. Even when international commitment to accountability is reasonably strong, which it sometimes is not, international actors may not give sufficient attention to the concrete problems and obstacles to achieving meaningful accountability in specific post-conflict countries. Domestic leaders often perceive international leaders and donors as more concerned about sending a general deterrent message regarding atrocities than about the specific, long-term needs of the particular post-conflict society directly involved.<sup>21</sup> Yet these needs, as well as the often deep-seated grievances, inequalities, and systemic problems that contribute to violence and instability, must be addressed if a stable rule of law is to take root.

The growing recognition of the importance of understanding local goals and priorities is evident in Afghanistan. With international support, the Afghan Independent Human Rights Commission (AIHRC) conducted a countrywide survey and series of 200 focus groups to determine the priorities of the Afghan people regarding accountability. In its report, *A Call for Justice*, the AIHRC documents overwhelming Afghan support for removing from power those who committed serious abuses during Afghanistan's long years of conflict, many of whom continue to wield power today.<sup>22</sup> Strong public support for criminal trials for the most serious offenders is accompanied by widespread support for vetting and removing other offenders from power. Afghans, though generally unfamiliar with "truth commissions" as such, also expressed a strong desire for some truth-seeking mechanism as well as deep support for "reparations" or compensation to those victims most in need. Afghans also expressed strong preferences for conducting criminal trials in Afghanistan, rather than outside the country, and for a hybrid tribunal that includes Afghan as well as international jurists. This impressive effort to understand what the people of Afghanistan want holds out the potential for tailoring accountability processes to fulfill deep domestic aspirations. But, whether these aspirations will in fact be realized remains an open question fraught with obstacles, as discussed below.

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21. See, e.g., Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 13, at 98–99, 130.

22. A CALL FOR JUSTICE, *supra* note 9, *passim*.

II. THE CHALLENGE OF DEMONSTRATING AND INSTITUTIONALIZING  
ACCOUNTABILITY NORMS

The trends discussed above not only underscore the need for multi-faceted accountability procedures but also signify a growing determination on the part of both international and domestic actors to leave behind a continuing legacy of facilities, skills, and new habits of thought and practice when accountability proceedings conclude. But the impact of different accountability initiatives on strengthening the domestic rule of law in post-conflict societies is not straightforward. Much depends on how accountability processes are conducted, the uncertainties of unintended consequences, and the extent to which local perceptions of justice are altered by the proceedings. The potentially salutary impacts of accountability proceedings fall into at least two categories: their demonstration effects and their capacity-building effects. This Article will consider each in turn.

A. *Demonstration Effects*

Accountability proceedings can contribute to strengthening the rule of law in post-conflict societies through their *demonstration effects*.<sup>23</sup> Most tangibly and directly, by removing perpetrators of atrocities from positions in which they can control and abuse others, criminal trials (and processes such as rigorous vetting) can have a cathartic impact by assuring the population that old patterns of impunity and exploitation are no longer tolerated. Barring known perpetrators from committing new atrocities and delegitimizing them in the eyes of the public helps to both break patterns of rule by fear and build public confidence that justice can be fair. Many Afghans, for instance, have made clear that their trust in justice and in government institutions depends on removing serious abusers from positions of power and that they view this as essential for, not contrary to, security and long-term stability.<sup>24</sup>

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23. The idea of “demonstration effects” has been discussed by others as well. See INT’L CTR. FOR TRANSITIONAL JUSTICE & U.N. DEVELOPMENT PROGRAMME, THE “LEGACY” OF THE SPECIAL COURT FOR SIERRA LEONE 12 (2003), <http://www.ictj.org/downloads/LegacyReport.pdf>. This Article aims to develop the concept and amplify the ways in which accountability proceedings can have positive demonstration effects on building the rule of law in post-conflict societies. For an interesting analysis of the “political effects” of criminal tribunals, including their impact in delegitimizing offenders and their possible stabilizing or destabilizing effects, see WILLIAM W. BURKE-WHITE, A SYSTEM OF MULTILEVEL GLOBAL GOVERNANCE IN THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW, ch. IV (forthcoming).

24. A CALL FOR JUSTICE, *supra* note 9, at 17, 41–44.

Such cathartic processes can, nevertheless, be wrenching and traumatic in the near term. As powerful figures and their allies see their authority slip away, they may choose to mount resistance, which can aggravate existing instabilities. Also, in circumstances where vetting processes have been extensive—if inconsistent, as in Iraq—there is a risk that so many individuals may be removed from their positions that it undermines the stability of existing institutions or prospects for building new ones in a timely manner.

In addition to disempowering perpetrators, the demonstration effects of accountability processes depend on their character and credibility. Accountability proceedings—particularly trials but also truth commissions—aim to demonstrate that atrocities are unacceptable, condemned, and not to be repeated. They aim to substantiate concretely, and to demonstrate, a norm of accountability. If the proceedings that lead to conviction for major offenses—or the reconciliation rituals for lesser offenses—are widely viewed as fair and legitimate, they are more likely to demonstrate credibly that previous patterns of impunity have been rejected, that law can be fair, and that political position or economic clout does not immunize a person from accountability. If a norm of accountability is demonstrated credibly, it may provide meaningful justice to victims, reducing the chances of personal vengeance-seeking and eliminating impunity as a source of grievance more broadly. Providing a model of fair justice—through fair criminal prosecutions or through balanced reconciliation agreements for lesser offenders, for instance—can give citizens legitimate reason to expect (and to demand) better accountability and fairer processes in the future in other areas of life as well.

Of course, if accountability proceedings are widely viewed as biased, or if big fish go free while much lesser offenders are held accountable, those proceedings may have negative, counterproductive demonstration effects. They may send a message that justice is not fair, that previous patterns of impunity are continuing, and that deep-seated grievances will not be addressed. The complete failure to pursue accountability at all can send a similar message. In Afghanistan, for example, impunity is still rampant in those parts of the country where regional commanders and warlords function as a law unto themselves. Accountability for current abuses is probably of greater immediate concern for many Afghans than accountability for the past, but the two are clearly related when, in many instances, warlords who grew accustomed to operating with impunity in the past brazenly continue to do

so in the present.<sup>25</sup>

Pursuing accountability fairly and credibly can have *empowering ripple effects* in a post-conflict society. By putting the issue of accountability on the national agenda, credible accountability proceedings can be a focal point for local and international nongovernmental organizations who advocate for related domestic reforms. Interveners involved in accountability proceedings can stress the importance of accountability norms to local elites generally,<sup>26</sup> and local and international NGOs can magnify these effects both by working to inform and empower ordinary citizens about the importance of accountability and fair justice and by keeping pressure on post-conflict governments.<sup>27</sup> To effectively strengthen the domestic rule of law in the long term, accountability proceedings must demonstrate the value and importance of accountability and fair justice to local leaders and ordinary citizens alike: positive domestic change is more likely if pressure can be applied both from above and below.<sup>28</sup>

Accountability proceedings, in short, can strengthen the fabric of a post-conflict society by helping to build and spread domestic support for a norm of accountability. As political scientists have argued, at some point in the development of a new norm, a “tipping point” is reached where the norm, enjoying broad acceptance, “cascades” through a

25. On the problem of impunity in Afghanistan, see RAMA MANI, AFGHANISTAN RESEARCH & EVALUATION UNIT, ENDING IMPUNITY AND BUILDING JUSTICE IN AFGHANISTAN (2003); A CALL FOR JUSTICE, *supra* note 9, at 17 (“Many persons who committed gross human rights violations remain in power today. This has provoked a profound disappointment in Afghans together with an almost total breakdown of trust in authority and public institutions.”).

26. For a helpful general discussion of the importance of socializing elites in achieving norm change, see G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 INT’L ORG. 283 (1990).

27. Political scientists have developed various models of norm diffusion and human rights advocacy. These include a “spiral model” through which local and international NGOs put pressure on domestic governments—from above and below—to abide by human rights principles, and a process of “norm cascades” as values gain credence broadly through a society after reaching a certain “tipping point.” See Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1-38 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds., 1999) (describing the spiral model); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 901 (1998) (norm cascades).

28. This analysis is consistent with Risse and Sikkink’s “spiral model.” Risse & Sikkink, *supra* note 27, at 1. On the critical importance of socializing elites, see Ikenberry & Kupchan, *supra* note 26. On the importance of empowering citizens, especially the poor, in building the rule of law, see Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for Int’l Peace, Democracy & Rule of Law Project, Rule of Law Series, No. 41, 2003), available at <http://www.carnegieendowment.org/files/wp41.pdf>.

society.<sup>29</sup> Before this point is reached, active efforts at persuasion by norm advocates, including local and international NGOs, are essential. Accountability proceedings can serve as a focal point for these efforts. Indeed, building toward an accountability cascade—in which expectations of accountability become the norm—is critical to overcome the legacy of a previous and pervasive impunity cascade in which order and accountability simply broke down (an example of an impunity cascade is Sierra Leone’s situation in 1991, when many factors together tipped the country toward violence with impunity).<sup>30</sup> The slow and enormously hard work of building new normative expectations of accountability—rooted in a real capacity to deliver it, at least at a basic level—is often the key to establishing a viable domestic rule of law after conflict. The demonstration effect of accountability proceedings can be an essential, though not sufficient, component of that long-term effort.

### B. *Capacity-Building Effects*

A second, related way that accountability proceedings can influence development of the rule of law domestically is through concrete *capacity-building*. Accountability proceedings cannot simply be an “aside”—standing totally apart from ordinary and ongoing processes of reform. Instead, over time, accountability norms—the condemnation of brutal atrocities, the importance of fair proceedings for determining responsibility, and the need for effective and impartial procedures for resolving future disputes more generally—must become *embedded in domestic practices*. Some accountability mechanisms, by virtue of their location and degree of local participation, can help build domestic capacity directly by increasing the skills and experience of local professionals and through outreach efforts designed to educate and em-

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29. See Finnemore & Sikkink, *supra* note 27, at 895-909.

30. Sierra Leone’s Truth and Reconciliation Commission has argued as follows:

While there were many factors, both internal and external, that explain the cause of the civil war, the Commission came to the conclusion that it was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made the conflict inevitable. Successive regimes became increasingly impervious to the wishes and needs of the majority . . . Government accountability was non-existent. Political expression and dissent had been crushed. Democracy and the rule of law were dead. By 1991, Sierra Leone was a deeply divided society and full of the potential for violence. It required only the slightest spark for this violence to be ignited.

WITNESS TO TRUTH, *supra* note 17, vol. 1, intro., para. 11.



power citizens and civil society organizations more broadly. International tribunals can serve important goals—such as providing justice for victims and conveying a strong international statement about fundamental international principles, including due process—even if their domestic impact in post-conflict societies is less clear. But unless norms of accountability are *institutionalized domestically* in a sustainable manner by strengthening national legal institutions and encouraging fairer processes and greater substantive accountability more broadly, the longer-term impact of accountability proceedings for past atrocities is likely to be uncertain.

Even though accountability proceedings can contribute to such domestic capacity-building, they also can compete with and divert resources from domestic legal systems. Prosecutions for serious violations of international humanitarian law are complex, costly, and time consuming. Competing priorities—for example, between international and domestic actors—can generate sharp tensions. In Rwanda, for instance, the government and ordinary citizens alike resent the millions of dollars spent on the international tribunal in Arusha, Tanzania, while Rwanda's own domestic legal system languishes, desperately in need of aid. Even when hybrid courts are established, as in Sierra Leone and East Timor, the contrast between the facilities and resources of war crimes tribunals and the regular justice system is stark and sobering. The long-term needs of “ordinary” justice institutions generally cry out for attention, while international funding typically flows more generously to the more dramatic accountability proceedings.

This potential tension highlights the need to think more systematically from the start about designing processes that can both advance fundamental goals of accountability and develop domestic capacity for fair justice. Criminal trials, of course, must focus on their core purpose of bringing individual perpetrators to justice in fair and impartial proceedings. But modest efforts to enhance their domestic rule of law impact (for example, through early and well-planned outreach to local populations explaining the proceedings and the principles underlying them) can potentially make a real difference.

Based on the framework outlined here, one would expect that international trials held far from the people most affected by atrocities—and lacking in any direct domestic capacity-building or outreach efforts—are unlikely to have a substantial impact on strengthening the domestic rule of law in post-conflict societies. Even if they prosecute and thereby remove major perpetrators from domestic power structures, these trials must also be seen domestically to be doing justice if they are to have positive demonstration effects. Hybrid tribunals or

truth commissions located in the affected country—with strong domestic participation and outreach—are more likely to leave a tangible legacy, at least if the bulk of the population views them as legitimate and fair. Either approach will have a limited long-term impact, however, if strategic efforts at domestic capacity-building are never undertaken or if underlying domestic conflicts (whether ethnic tensions or deep-seated perceived injustices) are simply left to fester or are even exacerbated by proceedings regarded as biased.

But what more specific conclusions can be drawn, from recent experience, regarding the impact of accountability proceedings on building the rule of law domestically? It is to this challenging question that we now turn.

### III. INTERNATIONAL TRIBUNALS AND THEIR IMPACT ON DOMESTIC RULE OF LAW: THE ICTY AND THE ICTR

The international community had good reason to establish special international tribunals for Yugoslavia and Rwanda. Both conflicts involved egregious and widespread violations of international humanitarian law, and many states were determined to convey an emphatic international message that such conduct was unacceptable. In neither case were domestic legal systems in a position to provide fair and impartial justice. The Balkans were in the throes of a bitter conflict, and violence and ethnic hostilities precluded chances of fair and unbiased domestic prosecutions. Rwanda's legal system was devastated and overwhelmed in the face of massive genocide. The risks of "victor's justice" in both situations were substantial. Under these circumstances, international tribunals held out a better prospect of independent and impartial proceedings and of gaining custody over perpetrators beyond national borders.<sup>31</sup>

Established by the UN Security Council and funded largely by member states, the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>32</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>33</sup> both have accomplished a great deal. They have each brought to justice, in fair trials, at least some of the individuals most responsible

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31. See, e.g., Kritz, *The Rule of Law in the Postconflict Phase*, *supra* note 11, at 816.

32. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); see International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, General Information, <http://www.un.org/icty/glance-e/index.htm> (follow "General Information" hyperlink) (last visited Jan. 3, 2007) [hereinafter ICTY at a Glance].

33. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

for egregious atrocities. Rwanda's former prime minister, Jean Kambanda, for instance, pled guilty and was convicted of genocide before the ICTR and is serving a life sentence.<sup>34</sup> At the ICTY, General Radislav Krstic—Commander of the Drina Corps—was found guilty of genocide in the 1995 Srebrenica massacres of as many as 8000 Muslim men and boys.<sup>35</sup> The trial of former Yugoslav president Slobodan Milosevic before the ICTY was plagued by delay and other difficulties before his death in March 2006 brought the proceedings to an end without a final verdict. But his indictment for crimes committed in Bosnia, Croatia, and Kosovo—the first indictment ever to be brought against a sitting head of state—sent a clear message that nobody is above the law and contributed to his ultimate fall from power.<sup>36</sup> Both tribunals have also set some groundbreaking legal precedents contributing to the development of international criminal law, and they have played an educational role in focusing world attention on fundamental rules of international law. In bringing major perpetrators to justice, both tribunals established an official record of the horrendous crimes committed and the criminal responsibilities of those involved.

Yet, despite these significant steps, both international tribunals may be remembered in the end as much for their shortcomings as their accomplishments. For one, they are geographically and psychologically distant from those most affected by the atrocities they are investigating and prosecuting. This distance, coupled with only belated and limited attempts at outreach, has undercut their legitimacy in the eyes of critical domestic audiences. Limited accurate information about the tribunals' proceedings, at least at first, undermined the tribunals' potential impact among local populations. For example, despite work-

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34. He was also convicted of conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 40 (Sept. 4, 1998). The ICTR also has brought a number of other high-level perpetrators to justice, including cabinet members and mayors. *See, e.g., Prosecutor v. Gacumbtsi*, Case No. ICTR 2001-64-T (June 17, 2004), available at <http://69.94.11.53/ENGLISH/cases/Gacumbtsi/index.htm>; *Prosecutor v. Ndindabahizi*, Case No. ICTR 2001-71-I (July 15, 2004), available at [http://69.94.11.53/ENGLISH/cases/Ndindabahizi/judgement/150704\\_Judgment.pdf](http://69.94.11.53/ENGLISH/cases/Ndindabahizi/judgement/150704_Judgment.pdf).

35. For information on the Krstic case, see *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment in the Appeals Chamber (Apr. 19, 2004), available at <http://www.un.org/icty/Supplement/supp49-e/krstic.htm>.

36. *See* Case Information Sheet: Milosevic (IT-02-54), available at <http://www.un.org/icty/cases-e/index-e.htm>. For a discussion of the indictment's impact, see BURKE-WHITE, *supra* note 23, ch. IV. As of January 2007, important ICTY indictees—such as Ratko Mladic and Radovan Karadzic—still remained at large.

ing hard to provide an impartial forum, the ICTY has suffered from a crisis of legitimacy, especially among Serbs, many of whom do not regard the tribunal as an embodiment of neutral justice.<sup>37</sup> These various factors have limited the ability of the international tribunals to demonstrate fair justice and accountability for atrocities in a way that resonates with the people most directly affected.

The ICTY and the ICTR also have contributed very little to building domestic judicial capacity in the Balkans and Rwanda, respectively. Although this was never their main purpose or preoccupation, both tribunals could have done much more to assist domestic capacity-building. The ICTY and ICTR are in a position to try only a limited number of high-level cases, so domestic legal systems have a critical role to play if significant accountability for atrocities is to be realized. But neither tribunal, until they began focusing systematically on their completion strategies (for wrapping up their own trials and investigations), had done very much to help strengthen the ability of local courts to deal with the substantial number of potential suspects remaining to be tried. More has been done since 2003, when the Security Council called for greater international assistance to improve the domestic capacity in relevant states and encouraged the ICTY and ICTR “to develop and improve” their outreach programs.<sup>38</sup>

A. *The ICTY’s Impact on Domestic Rule of Law: Kosovo and Bosnia*

The ICTY’s limited impact on domestic capacity-building is especially unfortunate in light of the more than a billion dollars spent on the tribunal.<sup>39</sup> Despite the start of an outreach program in 1999 and other periodic contacts between ICTY personnel and legal communities in the region, systematic and sustained efforts to share the tribu-

37. See Jelena Pejić, *The Yugoslav Truth and Reconciliation Commission: A Shaky Start*, 25 FORDHAM INT’L L.J. 1, 3 n.6 (2001). Others, including a group of Bosnian Serb and Bosnian Croat judges and prosecutors, have also expressed skepticism regarding the neutrality of the ICTY. See The Human Rights Ctr., Univ. of Cal., Berkeley, et al., Report, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT’L L. 102, 104 (2000) [hereinafter *Justice, Accountability, and Social Reconstruction*].

38. S.C. Res. 1503, ¶ 1, U.N. Doc. S/RES/1503 (August 28, 2003). For a discussion of ICTR outreach, see Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR’s Outreach Program*, 3 J. INT’L CRIM. JUS. 950, 957 (2005). For examples of ICTY outreach, see the Calendar of Events, <http://www.un.org/icty/bhs/outreach/events.htm> (detailing ICTY outreach activities from 1999 through 2004) [hereinafter *ICTY Calendar of Events*].

39. Total expenditures through 2005 equaled slightly more than \$1 billion. See ICTY at a Glance, *supra* note 32. An additional \$276.5 million has been authorized for 2006 and 2007. *Id.*

nal's technical expertise with justice systems in the region were not pursued, illustrating a general lack of priority placed on such efforts.<sup>40</sup> As David Tolbert, former senior legal adviser at the ICTY and later deputy prosecutor, put it: "principally due to a failure in design and, to a lesser extent, in implementation, the tribunal's long-term impact on the systems of justice in the area of conflict has been minimal."<sup>41</sup>

Take the situation in Kosovo, for instance. The ICTY has devoted enormous energy and resources to investigating war crimes committed in Kosovo in 1998–1999, but so far the ICTY and the UN Mission in Kosovo (UNMIK) have not developed formal arrangements for sharing information or enhancing cooperation.<sup>42</sup> And although ICTY staff have shared their expertise with Kosovo jurists in periodic outreach activities, the ICTY failed to develop systematic, formalized plans to help enhance the capacity of local institutions to try such complex cases.<sup>43</sup> Because of the substantial funds invested in the Tribunal's work, its "lack of impact on at least preparing and buttressing the local courts" to conduct war crimes prosecutions is "troubling,"<sup>44</sup> leaving more recent efforts associated with ICTY's completion strategy with considerable ground to cover.

The ICTY has played a somewhat greater role in Bosnia. To provide some ICTY oversight of domestic prosecutions, Rules of the Road were agreed on in 1996 between the ICTY and Bosnia, Serbia, and Croatia, respectively. Under this arrangement, ICTY prosecutors review domestic warrants and indictments to ensure their fairness.<sup>45</sup> On this basis,

40. David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 13–15 (2002).

41. *Id.* at 8.

42. Legislation evidently is being developed. Press Release, United Nations Mission in Kosovo, Legislation on Cooperation with ICTY Can Only Be Promulgated by UNMIK, UNMIK/PR/1123 (Feb. 20, 2004).

43. The outreach program in Kosovo has included ad hoc seminars and information sessions during which specialists from The Hague share their expertise with Kosovan jurists. See Int'l Crisis Group, *Finding the Balance: The Scales of Justice in Kosovo* 23, Balkans Report No. 134, Sept. 12, 2002; ICTY Calendar of Events, *supra* note 38.

44. Tolbert, *supra* note 40, at 12. Tolbert argues that with modest resources, the ICTY could have helped build domestic capacity by training local prosecutors, monitoring court proceedings in war crimes cases, training judges, and providing advice on victims' issues. *Id.* at 16. Instead, despite all the money spent on the ICTY, "there is virtually no effective enforcement of these important laws in the courts that ultimately matter the most, i.e., the region's domestic courts." *Id.* at 8.

45. Paragraph 5 of the Rome Agreement of February 18, 1996, provides that "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order,

trials of lesser war crimes suspects have been taking place in the two entities of Bosnia-Herzegovina.<sup>46</sup> The number of cases handled domestically is expected to increase sharply as the ICTY progresses with its completion strategy, putting an already weak domestic justice system under serious strain.

Yet concerns about fairness and about impunity have been endemic in Bosnia from the start. Bosnian cantonal or entity courts have dispensed justice that has proven highly inadequate, triggering frequent allegations that trials have been tainted by “ethnic justice” and are being used to exact revenge.<sup>47</sup> All too often, instead of promoting justice, war crimes prosecutions in Bosnian courts have been yet another means of continuing ethnic conflict, undermining the goals of justice both for victims and for the accused.<sup>48</sup> With a few notable exceptions, a disturbing pattern emerged with members of each of the three ethnic groups engaged in attempts to arrest, prosecute, and punish for war crimes members of their rival ethnic groups, who often

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warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.” Rome Agreement, Bosn. & Herz.-Croat.-Yugo., ¶ 5, Feb. 18, 1996, [http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content\\_id=6093](http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093).

46. As of November 2003, thirteen war crimes trials were taking place before entity courts. Amnesty Int’l, *Bosnia-Herzegovina: Shelving Justice* 6, AI Index EUR 63/018/2003, Nov. 12, 2003 [hereinafter *Shelving Justice*], available at [http://web.amnesty.org/library/pdf/EUR630182003ENGLISH/\\$File/EUR6301803.pdf](http://web.amnesty.org/library/pdf/EUR630182003ENGLISH/$File/EUR6301803.pdf). See also Int’l Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina* 31, Balkans Report No. 127, Mar. 25, 2002 [hereinafter *Courting Disaster*], available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400592\\_25032002.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400592_25032002.pdf) (reporting that, as of March 2002, approximately thirty-five verdicts had been entered against accused in courts of the Federation). As of May 2002, an estimated 3000 people in the Republika Srpska and 6000 in the Federation were suspected of war crimes. *Shelving Justice*, *supra*, at 1 n.1. By February 2006, the cantonal prosecutor for Sarajevo and the surrounding area reported about 2100 war crimes suspects in the region and about 1600 individuals were the subject of requests for investigation by local authorities. *Bosnian TV Reports Prosecutor Outlines Progress in War Crimes Processing*, BBC WORLDWIDE MONITORING, Feb. 3, 2006, <http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0602&L=justwatch-l&D=1&O=A&P=9979>.

47. See Michael Bohlander, *Last Exit Bosnia: Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 CRIM. L.F. 59, 67 (2003). According to the International Crisis Group, “[p]ublic debates and mutual accusations of pursuing ‘ethnic justice’ with the aim of eliminating political competitors or protecting one’s brethren continue[s], involving a wide range of politicians, judges and human rights’ activists,” and “[a] leitmotif of the controversy [is] a widely shared recognition that the local judiciary [is] incapable of handling war crimes cases either competently or fairly.” *Courting Disaster*, *supra* note 46, at 33.

48. Aram A. Schvey, *Striving for Accountability in the Former Yugoslavia*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 13, at 39, 67–68.

are still viewed as heroes by their respective communities.<sup>49</sup> Thus far, the majority of war crimes trials have taken place in the Federation, with Muslim areas targeting almost exclusively Bosnian Serbs and Croats, and Croatian areas targeting primarily Serbs and Muslims.<sup>50</sup> Rather than promoting healing and confidence-building among the parties, trials often end up exacerbating divisions and mutual suspicion.<sup>51</sup> The record thus far has been discouraging but some improvements have occurred.<sup>52</sup> For example, the creation of a special hybrid War Crimes Chamber within the national State Court of Bosnia and Herzegovina holds real promise.

This special War Crimes Chamber is now composed of national and international judges, prosecutors, and other staff, but the international participation will gradually phase out over a period of years.<sup>53</sup> This arrangement is designed to build local capacity to conduct fair trials in accordance with international standards, and ICTY staff have provided briefings and materials to judges and lawyers. The tribunal's location in Sarajevo means that its proceedings are more accessible to the local population and the prospects for direct outreach are greater. Compared to the problems that have plagued local trials, the special War Crimes Chamber has a greater capacity to render, and to be seen as rendering, impartial justice. The court began its first trial in September 2005 and received its first transfer of an indictee from the ICTY two weeks later.<sup>54</sup> The ICTY prosecutor's office has sought the transfer of an additional twelve defendants, and the local courts continue to send sensitive war crimes prosecutions to the special chamber.<sup>55</sup> Hybrid panels within the State Court also address difficult cases involving

49. *Id.* at 48–49.

50. *Id.* The first war crimes trial in the Republika Srpska started only in September 2003. See Human Rights Watch, *Bosnia: Massacre Trial Highlights Obstacles to Justice in the Balkans*, Jan. 16, 2004, <http://hrw.org/english/docs/2004/01/15/bosher6939.htm>.

51. See Kritz, *Coming to Terms with Atrocities*, *supra* note 13, at 136–37.

52. See OSCE, WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA: PROGRESS AND OBSTACLES 51 (2005); see also HUMAN RIGHTS WATCH, A CHANCE FOR JUSTICE?: WAR CRIMES PROSECUTIONS IN BOSNIA'S SERB REPUBLIC 20-21 (2006), available at <http://hrw.org/reports/2006/bosnia0306/bosnia0306webwcover.pdf>.

53. For a description of the special War Crimes Chamber, see *Report 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*, 109–10, 112–13, Annex II, U.N. Doc. S/2005/458 (July 15, 2005) [hereinafter *Commission of Experts Report*].

54. Council of Europe, *Bosnia and Herzegovina: Compliance With Obligations and Commitments and Implementation of the Post-Accession Co-Operation Program*, ¶ 54, SG/Inf(2005)21 (Nov. 3, 2005).

55. *Id.*

organized crime, economic crime, and corruption, with international participation and assistance that will gradually be phased out leaving purely domestic actors in place.

Compared to the distant ICTY and the often problematic local trials, the trials before the State Court's special chamber may be able to demonstrate impartial justice more directly and effectively to domestic audiences. The capacity-building effects of this arrangement are also substantial and vitally important. Even so, several concerns remain. For one, the schedule for the phase-out of international participation, driven substantially by funding realities, may be more rapid than is ideal for effective capacity-building. Furthermore, the entity-level Bosnian courts, rather than the State Court's special chamber, will continue to handle the bulk of war crimes cases, and if they do not receive greater assistance, there is a risk that some of the same problems that have confronted the ICTY may be "replicated at the national level."<sup>56</sup> Finally, although trials before the State Court's special chamber can help provide a model of fair and effective justice at the national level, systematic outreach and dialogue will still be needed as different segments of Bosnian society react to the prosecutions, particularly to those of figures who retain substantial loyalty and support within their respective communities.

### B. *The ICTY and Serbia*

The ICTY's contribution to improving the domestic justice system and building the rule of law has been even more complicated in the case of Serbia. For many Serbs, the international prosecution of Milosevic robbed Serbia of the opportunity to hold him accountable in domestic courts. Milosevic's decision to defend himself and to challenge the very terms of reference of the international tribunal resonated in many quarters within Serbia, and a substantial segment of the public questioned whether he was getting a fair trial.<sup>57</sup>

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56. *Shelving Justice*, *supra* note 46, at 8.

57. According to opinion polls, less than one-fourth of Serbs believed Milosevic was getting a fair trial, and his approval rating doubled at the outset of his trial; he went from being a reviled individual to the fourth most admired Serb. Michael P. Scharf, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, 37 NEW ENG. L. REV. 915, 930-31 (2003). Public opinion within Serbia has varied over the years, and there is some indication that public opposition to the ICTY diminished after release of the Scorpions video showing members of a Serbian police unit executing Bosnian Muslims in cold blood. See, e.g., Nicholas Wood, *Videotape of Serbian Police Killing 6 Muslims From Srebrenica Grips Balkans*, N.Y. TIMES, June 12, 2005, at A12.



Several factors have undercut the ICTY's ability to demonstrate to the Serbian population that the tribunal has been fair and impartial in its pursuit of accountability for atrocities. For one, many Serbs take a different view of the history of the breakup of the former Yugoslavia, rejecting the view of predominant Serb responsibility taken by NATO states supporting the ICTY. The tribunal's failure to indict leaders such as Croatian President Tudjman, who is now dead, has left the ICTY open to perceptions within Serbia of an anti-Serb bias. For many Serbs, this perception was reinforced by the tribunal's decision not to investigate NATO's actions during the Kosovo war. The circumstances surrounding the domestic handover of Milosevic to the ICTY also remain controversial, and many Serbs view the government's cooperation with the tribunal as strictly a function of monetary pressures rather than of justice. Finally, Milosevic sought to use his trial as a platform to influence public opinion in Serbia and was surprisingly effective at representing himself in court and portraying himself as an underdog.

All of these perceptions have been compounded by the ICTY's lack of effective outreach within Serbia. If the ICTY had provided Serbs with a clearer idea of its operations and purpose, early on, they might have been less prone to view the tribunal so skeptically. The ICTY did establish an outreach office in 1999 to inform people of the region about its work, but in crucial earlier phases the ICTY's work was subject to "gross distortions and disinformation" in many parts of the former Yugoslavia.<sup>58</sup> As ICTY official David Tolbert noted, "the tribunal became a political football for certain unscrupulous politicians in the region who cynically manipulated . . . misunderstandings."<sup>59</sup> The ICTY should have anticipated this potential opposition and taken steps to ensure that the Serbian population would hear the truth about its operations from the very start.

The ICTY's contribution to capacity-building within Serbia has also been sorely lacking. Although more than a billion dollars has supported the ICTY since its inception,<sup>60</sup> relatively little has been done to share the tribunal's technical expertise or to assist local courts, even though they are expected to bring to justice many perpetrators not tried in The Hague. Even though sharing its expertise and assisting local courts is not formally part of ICTY's mandate, more efforts to do this could have earned the ICTY considerable goodwill in Serbia and

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58. Tolbert, *supra* note 40, at 13.

59. *Id.*

60. See ICTY at a Glance, *supra* note 32.

helped to better prepare local courts to continue prosecutions after the ICTY concludes its operations.

Yet, despite these problems, attitudes in Serbia—at least among some groups—may gradually be changing, and the ICTY may yet have a positive impact over the longer term. Although Serbia had completed only four domestic war crimes trials by January 2003, despite a large number of suspected war criminals within its borders, Serbia created a new Special Court for Organized Crimes and War Crimes later that year.<sup>61</sup> An exclusively domestic court, Serbia's Special Court receives international support, and the law establishing the Court provides for cooperation with the ICTY. In the Special Court's first case, the "Ovcara trial," in which a number of Serbs were accused of executing 192 Croatian prisoners of war at the Ovcara pig farm in the Croatian city of Vukovar in 1991, ICTY prosecutor Carla del Ponte provided at least eight boxes of evidence to the Court, and Croatia provided exhumation records.<sup>62</sup> The ICTY's support to the Special Court in this case and in other potential cases is an important development as the ICTY begins to bring its own work to a close over the next few years. In December 2005, the Special Court completed the Ovcara trial, handing down lengthy prison sentences for fourteen of the sixteen defendants.<sup>63</sup>

Also in 2005, the emergence of a videotape showing members of the Serbian police unit known as the Scorpions callously executing Muslims at Srebrenica was aired extensively in Serbia and internationally after first being played at the Milosevic trial on June 1, 2005.<sup>64</sup> As of late 2006, one member of the unit depicted on the tape had been convicted in Croatia, and five others were on trial in Serbia.<sup>65</sup>

Serbia's Special Court has only recently begun its work and its long-term impact within Serbia remains to be seen. The Ovcara trial, at

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61. For the text of the law, which passed in July, 2003, see [http://www.osce.org/documents/fry/2003/07/446\\_en.pdf](http://www.osce.org/documents/fry/2003/07/446_en.pdf).

62. Milanka Saponja Hadzic, *Serbian Judiciary Facing Key Test*, INST. FOR WAR AND PEACE REPORTING, Mar. 15, 2004, [http://www.iwpr.net/?p=tri&s=f&o=166164&pc\\_state=henitri2004](http://www.iwpr.net/?p=tri&s=f&o=166164&pc_state=henitri2004); Press Release, Humanitarian Law Ctr., "Ovcara" Case: A Trial Is Professional but the Indictment Is Amiss (Apr. 6, 2005), available at [http://www.hlc.org.yu/english/War\\_Crimes\\_Trials\\_Before\\_National\\_Courts/index.php?file=1135.html](http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/index.php?file=1135.html).

63. *Serbian Court Jails 14 Over 1991 "Execution" of Prisoners in Croatia*, BBC NEWSFILE, Dec. 12, 2005.

64. Wood, *supra* note 57.

65. *Serb Jailed over Srebrenica Video*, BBC NEWS, Dec. 29, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4567704.stm>; "Scorpions" Case Nears End, B92, Dec. 17, 2006, [http://www.b92.net/eng/news/society-article.php?yyyy=2006&mm=12&dd=17&nav\\_category=113&nav\\_id=38678](http://www.b92.net/eng/news/society-article.php?yyyy=2006&mm=12&dd=17&nav_category=113&nav_id=38678).

least initially, received considerable domestic attention, and it may have helped to encourage greater public dialogue and awareness regarding war crimes, at least to some extent. The release and repeated broadcast in Serbia of the Scorpions video has added to that public discussion. Domestic debates over the ICTY still remain highly charged—and prone to opportunistic manipulation by political factions—but the ICTY's legal support to domestic prosecutions like the Ovcara case may help, over time, to demonstrate accountability and build domestic capacity in a manner more widely viewed as credible within Serbia.

C. *The ICTR: An Ambivalent Domestic Impact*

The ICTR's impact within Rwanda has likewise been mixed. The tribunal's relationship with the Rwandan government was uneasy from the start. After seeking international assistance in bringing perpetrators of Rwanda's devastating genocide to justice, Rwanda was the only state on the UN Security Council to vote against establishing the ICTR. Rwanda's objections—which still fester—included the failure to locate the tribunal within Rwanda, the lack of a provision for capital punishment, and the limits on the time frame of the court's jurisdiction.<sup>66</sup> Significant management problems early on at the ICTR, coupled with the over one billion dollars spent on the ICTR while Rwanda's domestic system struggles to try thousands of suspects, have also been a source of resentment and tension. The limited number of individuals that the ICTR is able to try, the slow pace of proceedings at the tribunal, and the limited role for, and attention to, needs of victims have all been criticisms raised by Rwandan political leaders.<sup>67</sup>

In the face of these criticisms, the ICTR has had a difficult time establishing broad credibility among the Rwandan public. "Constantly exposed to such bitter criticism highlighting the imperfections of the Tribunal, many Rwandans tend to hold an overwhelmingly negative opinion of international justice," notes Aloys Habimana.<sup>68</sup> For many Rwandans, moreover, the individuals who directly committed atrocities in front of their own eyes matter as much as the more distant architects of the genocide.

The ICTR should have done more from the start to explain its purpose and its proceedings broadly within Rwanda and to address

66. Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal for Rwanda Making a Difference Towards Reconciliation in Rwanda?*, in *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE?* 83, 84–85 (Steven R. Ratner & James L. Bischoff eds., 2003).

67. *Id.* at 85.

68. *Id.* at 86.

concerns raised by citizens. Instead, the tribunal's outreach has been belated and its physical presence within Rwanda has been limited.<sup>69</sup> Created in 1994, with its first trials commencing in 1997, the ICTR established an outreach project only in 1998 and an Information Center in Rwanda in 2000.<sup>70</sup> The ICTR's own web site has improved, and several web sites managed by international NGOs publish good information and analysis on the ICTR, but very few Rwandans have internet access, so this information is largely available only to foreigners.<sup>71</sup> Radio Rwanda reports from the tribunal in Arusha, Tanzania, and a number of organizations, including the European Commission and some NGOs, support outreach efforts that include distributing documents and showing documentary films about the ICTR in the Rwandan countryside.<sup>72</sup> In August 2006, staff from the ICTR's Information Center in Kigali held a full-day workshop in Nyagatare town "aimed at sensitizing the people in the area" about the ICTR's proceedings and the progress of the genocide trials—an initiative that will continue in other provinces.<sup>73</sup> Moreover, the ICTR's outreach department has stepped up its efforts in 2006 and 2007 to hold discussions in

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69. All of the courtrooms for the ICTR are in Arusha, Tanzania, and the ICTR's main formal presence in Rwanda is with the Office of the Prosecutor (formerly Carla del Ponte, now Hassan Jallow from the Gambia). The ICTR opened its Information Center in Kigali in 2000, three years after its first trials commenced. In 2007, the ICTR expects to open additional information centers throughout Rwanda. See Tim Gallimore, *The ICTR Outreach Program: Integrating Justice and Reconciliation* (Nov. 7-8, 2006) (conference paper), available at [http://69.94.11.53/ENGLISH/challenging\\_impunity/gallimore.pdf](http://69.94.11.53/ENGLISH/challenging_impunity/gallimore.pdf), for a discussion of a wide range of recent ICTR outreach initiatives.

70. Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 221 (2003). The Information Center, *Umusanzu mu Bwiyunge* ("Contribution to reconciliation"), in Rwanda's capital, Kigali, is open to "students, journalists, civil servants, judges and lawyers, as well as ordinary citizens." ICTR, *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, U.N. Doc. S/2003/707, A/58/140 (July 11, 2003) [hereinafter *ICTR Report*], available at <http://65.18.216.88/ENGLISH/annualreports/a58/140e.pdf>.

71. Uvin & Mironko, *supra* note 70, at 219.

72. *Id.* The U.S.-based Internews media organization, for example, has produced documentary films about ICTR and domestic war crimes trials, which are then shown in rural communities, sometimes accompanied by Rwandan ICTR outreach officers. See Peskin, *supra* note 38, at 960 (urging the ICTR to establish partnerships with Rwandan civil society leaders and academics, some of whom have tried to secure ICTR's commitment, thus far unsuccessfully, "to hold post-trial seminars in Rwanda with ICTR officials to discuss the significance of recent trials," which could be a foundation for further Rwandan-initiated outreach).

73. *Rwanda: ICTR Sensitizes Residents on Proceedings*, AFR. NEWS, Aug. 25, 2006.

schools throughout Rwanda, town hall meetings, and training sessions and seminars for Rwandan legal personnel and for journalists covering the court, and it expects to open new information and documentation centers throughout Rwanda in 2007.<sup>74</sup> This is an important beginning, but much more needs to be done if the ICTR expects to have a longer-term impact within Rwanda.

Still, despite a slow start, the ICTR has the potential to demonstrate the importance of accountability and fair justice to audiences within Rwanda in a number of ways. First, the tribunal has brought high-level perpetrators of genocide to justice. This sends “a clear message to victims, victimizers, and bystanders that leaders who commit gross violations of human rights are not always invincible,” which is a message that “is fundamental for ensuring the rule of law in a post-conflict society like that of Rwanda,” as Aloys Habimana argues.<sup>75</sup> Second, these trials reveal how self-interested leaders exploited ethnic differences for their own purposes—which may contribute to a greater domestic understanding of the causes of the genocide and possibly lay some foundation for reconciliation over time.<sup>76</sup> Finally, through fair trials that follow fundamental principles of due process, the tribunal can help demonstrate to Rwandans “what ‘fair justice’ should look like,”<sup>77</sup> potentially providing a point of reference for future domestic reforms.

But to have any sustainable long-term impacts along these lines will require more extensive and effective outreach within Rwanda than has occurred thus far. This is an uphill battle given the skepticism about the tribunal among many audiences in Rwanda. The tribunal, in short, faces a major challenge “not only to render justice, but also to make sure that Rwandans, in all their complex categories, see that justice is being done.”<sup>78</sup> Yet, so far, the ICTR has been reluctant to partner with independent civil society organizations to engage in sustained outreach, thereby missing opportunities for empowering ripple effects; instead, the ICTR has preferred to interact with the Rwandan government and “government-backed survivor groups,” whose cooperation the tribunal needs.<sup>79</sup>

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74. Gallimore, *supra* note 69, at 2-4.

75. Habimana, *supra* note 66, at 88.

76. *Id.* at 89.

77. *Id.*

78. *Id.* at 90.

79. See Peskin, *supra* note 38, at 961. Peskin notes that despite overtures from leading academics and human rights activists, including Aloys Habimana, the ICTR had not embarked on cooperative partnerships with them to engage in more extensive outreach. *Id.* at 960-61.

The ICTR also needs to do more, before its work comes to an end, to contribute to capacity-building within Rwanda's domestic justice system. But, until relatively recently, the ICTR had done almost nothing to contribute to the capacity of the Rwandan judiciary.<sup>80</sup> One of the few earlier activities led by the ICTR involving the Rwandan judiciary was a September 2003 visit by twenty senior Rwandan judicial officials (judges, prosecutors, and senior officials) to the tribunal in Arusha.<sup>81</sup> The focus was primarily on issues related to the pursuit of justice at the ICTR (e.g., witness protection, pace of proceedings, and completion strategy) rather than on capacity-building for the Rwandan justice system itself.<sup>82</sup> More recently, particularly since 2006, the ICTR has expanded its capacity-building efforts in Rwanda to include more training sessions for Rwandan legal personnel, including training in on-line legal research, evidence and case management, and other matters.<sup>83</sup> Still, one is left wondering whether some of the millions of dollars spent annually on the ICTR could have been better spent on direct domestic capacity-building, particularly given Rwanda's desire to undertake domestic criminal prosecutions and community-based accountability proceedings.

In short, both the ICTR and the ICTY have faced obstacles in leaving a positive, long-term legacy in the countries most affected by the atrocities they are prosecuting. In future international prosecutions, some of these difficulties could be addressed by earlier, more effective outreach to domestic audiences, and by more systematic efforts to design focused, well-conceived domestic capacity-building programs. International tribunals located far from the affected country with little or no involvement by national judges, prosecutors, and defense counsel are inherently limited in the direct impact they are likely to have

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80. *Id.* at 957–58. ICTR-led training sessions for Rwandan justice system personnel and other capacity-building activities have increased in 2006 and 2007. Gallimore, *supra* note 69, at 4-6.

81. The ICTR Registrar extended the invitation, and two groups of ten officials spent one week each at the tribunal. The purpose was “to strengthen the co-operation between the Rwandan judicial system and the Tribunal in what is called *appui judiciaire* to the national Rwandese judicial bodies.” Press Release, ICTR, Rwandan Judicial Officials Visit the ICTR, ICTR/INFO-9–2–360.EN (Sept. 26, 2003), available at <http://69.94.11.53/ENGLISH/PRESSREL/2003/360.htm>. The ICTR has also organized visits to the tribunal by Rwandan law students, as well as some internships. Peskin, *supra* note 38, at 950, 955–56.

82. Int'l Criminal Tribunal for Rwanda, *supra* note 81.

83. Gallimore, *supra* note 69, at 4-6. In addition, most of the new information centers that the ICTR expects to open throughout Rwanda in 2007 “will be housed in justice complexes to facilitate access for Rwandan judicial and legal staff to the jurisprudence of the ICTR and to technology which will enable them to perform legal research on-line.” *Id.* at 3.

domestically in post-conflict societies. But purely domestic proceedings may not be the answer either—at least in cases where national justice systems are devastated by conflict or unlikely to deliver fair or impartial justice. Hybrid, or mixed, tribunals with both national and international participation may, in some instances, hold more promise.

#### IV. HYBRID TRIBUNALS AND THEIR IMPACT ON DOMESTIC RULE OF LAW

Hybrid tribunals first emerged toward the end of the 1990s as an alternative to purely international or purely domestic courts. In a number of countries—Kosovo, East Timor, Sierra Leone, and Bosnia—hybrid arrangements have been established to try individuals for violations of international and sometimes also domestic law. In addition to combining national and international staff—judges and prosecutors, among others—these hybrids are located directly in the country that experienced the atrocities.

Hybrids, in many ways, are like a piece of clay that can be molded to fit the challenges and circumstances at hand. But they have been shaped by political necessity and compromise as much as by any grand theory. In the case of Kosovo, for instance, biased domestic trials provoked outcries from Kosovo's Serbian population; this led the United Nations to design a hybrid system in which panels comprised of a majority of international judges would address war crimes and other sensitive cases and international prosecutors could revive cases dismissed by domestic prosecutors.<sup>84</sup> In other situations—East Timor and Cambodia—hybrids were negotiated because critical states simply did not want to create new international tribunals even in the face of major atrocities.<sup>85</sup>

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84. MICHAEL E. HARTMANN, U.S. INST. OF PEACE, INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO 112 (2003), available at <http://www.usip.org/pubs/specialreports/sr112.html>. Hartmann was the first international prosecutor to serve under this arrangement.

85. The Cambodian government together with China, for instance, rejected calls by a group of experts for an international tribunal to try former Khmer Rouge leaders. See Rachel S. Taylor, *Better Late Than Never: Cambodia's Joint Tribunal*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 13, at 256; *China Officially Rejects International Court for Cambodia*, AGENCE FRANCE PRESSE, Mar. 19, 1999. Yet Cambodia domestic courts were in no position to provide impartial justice in such cases. See Taylor, *supra*, at 254. So the United Nations and Cambodia—with U.S. involvement along the way—negotiated a compromise hybrid tribunal with a majority of Cambodian judges, although this agreement is only now slowly being implemented. See *id.* at 258-61. In East Timor, the United Nations together with key states opted for a hybrid arrangement—joint national/international judicial panels within East Timor and domestic prosecutions in Indonesia—even though there were good reasons to doubt whether high-level Indonesian military officials would ultimately face justice under such an arrangement, at least absent sustained international pressure.

Though they differ in form and origins, hybrids have at least the potential to overcome some of the limitations of purely international or purely domestic proceedings.<sup>86</sup> They may, for instance, enjoy greater legitimacy among affected local populations than either international prosecutions far away or domestic prosecutions before a justice system of limited means or credibility. International participation and resources can help ensure that the proceedings satisfy international standards of due process, while domestic participation can give citizens of the country most affected a greater stake and sense of ownership. Thus, hybrids may demonstrate accountability in a way that resonates more effectively with local populations.

Second, hybrids may have advantages in contributing to domestic capacity-building and institutionalization of accountability norms. Locating tribunals directly in countries that endured atrocities—and including national participation in their work at all levels—provides an opportunity to build capacity and leave behind a tangible contribution to the national justice system, including resources, facilities, and training. Finally, by providing for direct interaction between national and international jurists and by enhancing opportunities for outreach to the local population, hybrids may be more effective than either international or national processes alone in fostering awareness of, and encouraging respect for, fundamental principles of international law and human rights at the domestic level among citizens and officials of the country involved. They may, to borrow from political science terminology, be more effective at “norm diffusion.”<sup>87</sup>

But whether recent hybrids are actually achieving these results is a much more complicated question. The demonstration effects and capacity-building impact of these diverse hybrids, in fact, have varied widely. The following sections review the results of hybrid systems in Kosovo, East Timor, and Sierra Leone in detail.

#### A. *Kosovo’s Hybrid Arrangement: Mixed Results*

In Kosovo, UNMIK established a hybrid judicial arrangement in 2000 to prosecute and try war crimes cases. The ICTY has primacy over such cases arising in the conflict in the former Yugoslavia, but it cannot try them all, so domestic courts also have a critical role to play in achieving

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86. For a thoughtful analysis, see Dickinson, *supra* note 19.

87. See generally Finnemore & Sikkink, *International Norm Dynamics and Political Change*, *supra* note 27 (discussing norm diffusion).



accountability.<sup>88</sup> In Kosovo, however, the local judicial system was seriously incapacitated. Most of the local judges and lawyers—of predominantly Serb ethnicity—fled the province or refused to serve in the UN-established judicial system, and newly appointed Kosovar Albanian judges lacked professional experience because of their decade-long exclusion as a result of officially sanctioned discrimination. But in ethnically divided Kosovo, the virtually monoethnic, UN-appointed judiciary was not perceived as providing—nor could it deliver—impartial justice. Only after mounting pressure from ethnic Serbs in what was increasingly viewed as a biased justice system did UNMIK introduce international judges and prosecutors to serve in Kosovo’s judicial system.

The initial deployment of these international jurists in 2000 was “crisis driven” and improvised, rather than the result of a carefully designed and implemented strategy.<sup>89</sup> Appointed to most, but not all, war crimes and other sensitive cases, including ethnic crimes and high-level organized crime, the international jurists initially had little impact: they were in the minority on judicial panels and were invariably outvoted by Kosovar Albanian judges. This only reinforced perceptions of “victor’s justice” among Kosovo’s Serbian population—now with the involvement of the international community—which reinforced resentments and ethnic tensions rather than helping to defuse them. In the face of these clear shortcomings, UNMIK issued regulations in December 2000 providing for the introduction of majority international judicial panels and empowering international prosecutors to reactivate cases abandoned by their Kosovar counterparts.

These “64 panels,” named after UNMIK’s Regulation 2000/64 establishing them, have helped to reduce perceptions of bias in the justice system and have redressed some earlier miscarriages of justice. Nevertheless, shortcomings in implementation and some subjective aspects of this arrangement have undermined their potential impact. Introduced by UNMIK without consulting and involving local jurists, the

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88. The ICTY has jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia since January 1, 1991, including war crimes, genocide, and crimes against humanity. The ICTY’s jurisdiction is concurrent with national courts, but it enjoys primacy and can request a national court to defer to it. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 9, *annexed to* The Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, 36, 39 (1993), U.N. Doc. S/25704 (1993) [hereinafter *ICTY Statute*]; ICTY R. P. & EVID. 9–11 (2005), *available at* <http://www.un.org/icty/legaldoc-e/index.htm>.

89. HARTMANN, *supra* note 84, at 13.

arrangement faced resistance by local judges, and some have refused to participate in majority international panels.<sup>90</sup> Moreover, the grounds for participation of international judges and prosecutors have been criticized as overly vague and subjective, contributing to a perception, especially among Albanians, that the system is a “parallel justice system” vulnerable to political influence and maneuvering. Also, because the regulation does not guarantee prosecution by an international prosecutor before a majority international panel, Kosovo Serb defendants also view the arrangement as vulnerable to double standards and unequal treatment.<sup>91</sup> Thus, the “64 panels” have only partially been able to address public perceptions of bias in ethnically charged Kosovo.

Viewed over the long term, the demonstration effects of the hybrid panels within Kosovo clearly have been mixed. On the one hand, the majority international panels’ ability to consider particularly delicate and divisive cases, coupled with the international prosecutors’ ability to revive and pursue cases abandoned by local counterparts, has helped to address systemic biases and miscarriages of justice in the largely mono-ethnic local justice system. On the other hand, UNMIK’s belated, ad hoc introduction of the “64 panels” was a missed opportunity to demonstrate a commitment and a capacity for impartial justice from the start.

As the first international prosecutor in Kosovo, Michael Hartmann, has observed, international participation in the judiciary would have been more successful had it been “immediate and bold” rather than “incremental and crisis driven.”<sup>92</sup> Early prosecutions and trials before majority international panels could have enhanced the real and perceived impartiality of the judiciary, increasing its legitimacy among the different sectors of the population. Rather than empowering local jurists and then belatedly stripping them of their “monopoly” over sensitive cases, such a policy would have been easier and likely less contentious to implement. Furthermore, beginning with a more systematic international role in the local judicial system could have had a broader impact by helping to limit the destructive influence and entrenchment of criminal power structures and their linkages to extremist ethnic and nationalist groups.<sup>93</sup>

Not surprisingly, the capacity-building results of Kosovo’s hybrid

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90. David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 130 (2003).

91. *See id.* at 134.

92. HARTMANN, *supra* note 84, at 13.

93. *Id.*

panels also have been less than was hoped for. Despite the potential for mutual learning when international jurists serve besides local judges, a number of the international judges, especially early on, had little background or training in international humanitarian law.<sup>94</sup> This limited their ability to contribute to local capacity-building in this area. Language barriers, the intensive workload, and the lack of systematic mentoring mechanisms all hampered potential capacity-building more generally. The hybrid arrangement in Kosovo, which places the most sensitive cases before the “64 panels,” also has delayed the day when Kosovo’s local judges have to take full responsibility for adjudicating such cases.<sup>95</sup>

All of this suggests that hybrids are more likely to be effective in demonstrating accountability and fair justice, and in developing local capacity, if they are designed in a more strategic way than was the case with Kosovo’s early experiment. It may well be, at least in circumstances where local legal capacity is absent or devastated, that turning to international jurists early on—if they possess the necessary legal background and skills—makes sense as an initial response, while local jurists are trained effectively and expeditiously to join, as soon as possible, in the task of adjudicating sensitive and difficult war crimes cases. In any event, creating standing panels with clear jurisdiction—rather than ad hoc discretionary panels—to address war crimes and other sensitive cases may be less vulnerable to perceptions of political malleability by affected populations.<sup>96</sup>

### B. *East Timor: “Independence is a Form of Justice”*

East Timor’s hybrid tribunal for serious crimes has faced tough challenges in pursuing accountability amidst the political complexities associated with the nation’s transition to independence, yielding deeply ambivalent demonstration effects. During East Timor’s historic referendum in 1999, militias operating with the aid and support of the

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94. Marshall & Inglis, *supra* note 90, at 129 (“Of the internationals that were appointed between 1999 and 2001, few had conducted trials involving serious criminal offenses and none had any practical experience in, or knowledge of, international humanitarian law.”).

95. Indeed, a recent study by the International Center for Transitional Justice argues that, thus far, the program’s “effect has been limited mainly to substituting for, rather than bolstering, domestic capacity” and that “the continued need for internationals may be undermining long-term confidence in the domestic legal system.” TOM PERRIELLO & MARIEKE WIERDA, INT’L CTR. FOR TRANSITIONAL JUSTICE, LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO 2 (2006)

96. For discussion of Bosnia’s hybrid war crimes chamber, see Part III.A of this Article.

Indonesian army perpetrated atrocities—murders, rapes, looting and burning—against pro-independence Timorese. An international commission of inquiry established at the UN Human Rights Commission in 1999 called for an international tribunal to bring those responsible to justice. But crucial states and UN leaders—involved in delicate negotiations with Indonesia to secure its consent to the deployment of an international military force, INTERFET, to stabilize East Timor after the referendum—instead pressed Indonesia to bring those responsible for the violence to justice domestically.<sup>97</sup> In opting not to establish an international tribunal for this purpose, many no doubt hoped that persistent international pressure on Indonesia might produce meaningful domestic accountability; but, at the same time, the absence of an international accountability mechanism with clear enforcement authority undermined the prospects of trying leading Indonesian suspects if Indonesia itself chose not to do so.

Within East Timor, the UN Transitional Administration (UNTAET) established an innovative hybrid tribunal in June 2000 (in lieu of an international tribunal *per se*). The Special Panels for Serious Crimes—hybrid judicial panels within the Dili District Court consisting of two international judges and one Timorese judge—were created to try cases of crimes against humanity, war crimes, and other atrocities.<sup>98</sup> UNTAET also established the Serious Crimes Unit, a UN-funded prosecutorial and investigatory office for serious crimes, to serve as the prosecutorial and investigations arm of the hybrid tribunal.<sup>99</sup> Although

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97. In an April 2000 MOU between Indonesia and the UN, Indonesia agreed to share information and transfer indictees to East Timor. Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Apr. 6, 2000, available at [http://www.jsmp.minihub.org/Resources/2000/MOU\(e\).htm](http://www.jsmp.minihub.org/Resources/2000/MOU(e).htm). INTERFET, a UN-authorized military force (with Indonesian consent) led by Australia deployed in August 1999 to restore stability to East Timor, followed by a UN provisional administration—the UN Transitional Administration in East Timor (or UNTAET) together with a UN peacekeeping force. See S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

98. The panels were given jurisdiction over genocide, torture, crimes against humanity, and war crimes; in addition, they had jurisdiction over murder and sexual offenses committed from January 1, 1999 through October 25, 1999—the period leading up to and following the referendum and before the UN became administering authority in East Timor. U.N. Transitional Administration in East Timor [UNTAET], *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000). Although the jurisdiction over crimes against humanity and the other international crimes was not time limited, the Serious Crimes Unit focused its prosecutions on the crimes surrounding the 1999 referendum.

99. UNTAET Reg. 2000/16, U.N. Doc. UNTAET/REG/2000/16 (June 6, 2000).

both the Special Panels and Serious Crimes Unit received UN funding, defense counsel received more limited, ad hoc support—an imbalance of concern from the start.<sup>100</sup> In 2002, the successor UN mission (UNMISSET) established a Defense Lawyer's Unit to provide more resources and expertise to assist in defense of suspects before the Special Panels.<sup>101</sup> Overall, however, neither political support (international or domestic) nor resources for East Timor's hybrid tribunal were ever as forthcoming as many originally had hoped.

These limitations seriously constrained the tribunal's impact both in achieving accountability for the atrocities surrounding the referendum and in capacity-building. The special tribunal faced chronic shortages of administrative, legal, and linguistic support, particularly at the beginning. In early trials, for instance, no court reporters or other means were available to produce records of the proceedings.<sup>102</sup> Interpreters frequently were unavailable in some of the four languages (Portuguese, Bahasa Indonesia, Tetum, and English) in which proceedings were conducted. Resources for defense counsel were particularly limited, and no defense witnesses were called at all in a number of the early trials.<sup>103</sup> Significant improvements certainly occurred over time, but a shortage of resources and support personnel continued to hamper the tribunal, which concluded its last trials in 2005, with appeals to be completed in 2006.<sup>104</sup>

Substantively, the hybrid tribunal's impact in terms of demonstrating accountability and fair justice has been ambiguous, at best. On the one hand, the tribunal tried a significant number of individuals for crimes against humanity and other offenses in proceedings that an international commission of experts concluded generally accorded with international standards.<sup>105</sup> A total of 87 defendants were tried, with 84

100. See David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, 61 ASIA PACIFIC ISSUES, Aug. 2002, at 4, 5, available at <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>; Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 251, 262–64 (2003).

101. For analysis of the Defense Lawyer's Unit, see *Commission of Experts Report*, *supra* note 53, at 36–37.

102. Cohen, *supra* note 100, at 5; Katzenstein, *supra* note 100, at 260.

103. Cohen, *supra* note 100, at 5–6; Katzenstein, *supra* note 100, at 253.

104. The UN Security Council decided to conclude the mandate of the special panels in May 2005 when UNMISSET's mandate ended, and it urged that all trials be concluded by then. S.C. Res. 1543, U.N. Doc. S/RES/1543 (May 14, 2004). In fact, some appeals were handled subsequently and, as of February 2006, two defendants still had appeals pending. See Judicial System Monitoring Programme, <http://www.jsmp.minihub.org/> (follow hyperlinks under SPSC Case Information).

105. *Commission of Experts Report*, *supra* note 53, ¶ 357, at 86.

convicted and 3 acquitted.<sup>106</sup> The Serious Crimes Unit also issued many indictments—a total of 95 against 440 defendants—including some against high-level Indonesian military officials.<sup>107</sup> On the other hand, the vast majority of the accused (339 individuals) are beyond the physical jurisdiction of the court (mostly in Indonesia), and they are unlikely ever to be either extradited to East Timor for trial or credibly tried in Indonesia absent sustained international pressure on Indonesia, which has not been forthcoming, particularly since 9/11. The net result is that East Timor's hybrid tribunal tried only mid- and lower-level indictees, mostly Timorese ex-militia members involved in the violence surrounding the referendum, but did not reach the higher-level suspects in Indonesia. When those at the top never face justice, it sends a very mixed message about accountability to Timorese citizens.

The situation of Indonesia's General Wiranto illustrates this dilemma. Wiranto, who was defense minister and commander of the armed forces of Indonesia at the time of the Timorese referendum, is charged, along with six other high-ranking Indonesian military officers and the former governor of East Timor, with committing crimes against humanity—murder, deportation, and persecution—in 1999.<sup>108</sup> After many months, the special court issued a warrant for his arrest, but East Timorese officials refrained from handing the warrant to Interpol for international action. Key Timorese leaders, including President Xanana Gusmao, have placed a higher priority on forward-looking reconciliation and on building a strong relationship with Indonesia

106. See Judicial System Monitoring Programme, *The Special Panels for Serious Crimes Hear Their Final Case, Justice Update*, May 12–May 20, Issue 12/2005 [hereinafter *JSMP Justice Update*], available at [http://www.jsmp.minihub.org/Justice%20update/2005/May%202005/050520\\_JSMP\\_JUissue12\(e\).pdf](http://www.jsmp.minihub.org/Justice%20update/2005/May%202005/050520_JSMP_JUissue12(e).pdf). For information on cases, see *JSMP Justice Update*, as well as American University, War Crimes Research Office, *Special Panels for Serious Crimes in East Timor Status Updates*, available at [http://www.wcl.american.edu/warcrimes/easttimor\\_status.cfm](http://www.wcl.american.edu/warcrimes/easttimor_status.cfm).

107. *JSMP Justice Update*, *supra* note 106. Those indicted include General Wiranto (former Defense Minister and Commander of the Armed Forces of Indonesia), Major General Zacky Anwar Makarim (Security Task Force Advisor), Major General Adam Damiri (former Chief of the Regional Military Command), Brigadier General Suhartono Suratman (former Military Commander for East Timor), Colonel Mohmanned Noer Muis (Commander of the Sub-Regional Command 164), Brigadier General Timbul Silaen (former Chief of Police for East Timor), and Lieutenant Colonel Yayat Sudrajat (Commander of the Intelligence Task Force of Sub-Regional Command 164). Amnesty Int'l & Judicial Sys. Monitoring Programme, *Justice for Timor-Leste: The Way Forward*, § 3.3, AI Index ASA 21/006/2004, Apr. 1, 2004, available at <http://news.amnesty.org/library/index/engasa210062004>.

108. Wiranto is charged under the principle of command responsibility. Indictment, Deputy Gen. Prosecutor for Serious Crimes v. Waranto, No. 05/2003 (D. Dili filed Feb. 24, 2003), available at <http://www.jsmp.minihub.org/Court%20Monitoring/spsscainformation2003.htm>.

than on seeking judicial accountability for the 1999 atrocities.<sup>109</sup> Gusmao, in particular, has argued that pressing Indonesia might produce a military backlash just at a moment when the country was struggling to solidify its own democratic reforms.<sup>110</sup> Indeed, Gusmao met with Wiranto—then a candidate for president of Indonesia—in 2004, just before the Indonesian elections, proclaiming that bygones should be bygones.<sup>111</sup> Although other Timorese officials, such as then Foreign Minister Jose Ramos-Horta, were critical of this meeting and its timing,<sup>112</sup> few Timorese leaders are comfortable pressuring their powerful neighbor to hand over top figures given their strong desire to improve East Timor's economy, to resolve border issues, and generally to build cordial relations with Indonesia. Even East Timor's prosecutor-general, who earlier had emphasized the importance of bringing Wiranto to justice, later backed off.<sup>113</sup>

Timorese political leaders consistently have emphasized the importance of consolidating East Timor's independence and building a strong relationship with Indonesia. Ramos-Horta has stressed, moreover, that "independence is a form of justice."<sup>114</sup> This is an important point from someone who, along with Gusmao and many others, devoted his career to East Timor's long and historic struggle for independence. Independence for the Timorese people does provide tangible vindication for their struggle and their suffering. And East Timor clearly needs to consolidate its long-sought independence and to build constructive relationships with its neighbors.

109. President Gusmao was elected overwhelmingly as East Timor's first president, and he has placed a strong emphasis on looking forward. Gusmao has focused on pursuing economic development and "social justice" in East Timor—and on achieving reconciliation and reintegrating resistance fighters and remaining remnants of opposing militias into Timorese society. See Rachel S. Taylor, *Justice and Reconciliation in East Timor, Interview: East Timorese President Xanana Gusmao*, WORLD PRESS REVIEW, Oct. 1, 2002. Gusmao has also sought to establish constructive relations with Indonesia—East Timor's powerful neighbor and key trading partner. See, e.g., *Gusmao Hopes for Better Relations with Indonesia*, ASIAN POLI. NEWS, July 8, 2002.

110. See, e.g., The Secretary-General, *Letter dated 14 July 2005 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/2005/459 annex 1 (July 15, 2005).

111. *East Timor's Foreign Minister Questions Gusmao's Meeting With Wiranto*, ASSOCIATED PRESS, May 30, 2004, <http://www.etan.org/et2004/may/22/30etmin.htm>.

112. *Id.*

113. *Forwarding Wiranto Warrant to Interpol Not in E. Timor Interest: Prosecutor*, AGENCE FRANCE PRESSE, May 25, 2004, available at <http://www.etan.org/et2004/may/22/26forwar.htm>; CAITLIN REIGER & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT 33 (2006).

114. Interview with Jose Ramos-Horta, Foreign Minister, East Timor, in Dili, East Timor (Nov. 2003).

Yet, lack of accountability has been a bitter pill to swallow. As many human rights advocates, church leaders, and civil society organizations in East Timor and elsewhere emphasize, the victims and survivors of the brutal atrocities in 1999—and during the much longer quarter century of Indonesian occupation—deserve to know the truth about who was responsible and see those who bear the greatest responsibility held accountable in some way. East Timor's Commission for Reception, Truth and Reconciliation has argued that “the crimes committed in 1999 were far outweighed by those committed during the previous twenty-four years of occupation and cannot be properly understood or addressed without acknowledging the truth of the long conflict.”<sup>115</sup> The Commission also urges that the mandate of the Special Panels and Serious Crimes Unit be renewed so that they can concentrate on key cases from the longer period of 1975–1999, and calls for a serious effort on Indonesia's part to hold major perpetrators accountable as well. Realistically, this will only happen if there is much stronger and more consistent international pressure on Indonesia to live up to its earlier commitment to pursue accountability domestically, as well as international support for an international accountability mechanism of some kind if this does not occur.

Within Indonesia, however, the recent trend has been in the exact opposite direction. In August 2004, an Indonesian court overturned the convictions of four Indonesian security officials previously found guilty of crimes against humanity in the violence in East Timor.<sup>116</sup> No reasons were given for the court's reversal. These acquittals mean that no Indonesian security officials are serving time for the horrific violence and brutality perpetrated against the East Timorese in the period surrounding its referendum.<sup>117</sup>

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115. See *Chega! Final Report of the CAVR*, *supra* note 7, pt. 11, at 23–25.

116. Evelyn Rusli, *Indonesia Court Voids 4 Convictions in 1999 East Timor Strife*, N.Y. TIMES, Aug. 7, 2004, at A2.

117. In the end, all those tried before Indonesia's Ad Hoc Human Rights Court “were acquitted either at trial or on appeal except for one, Eurico Guterres.” *Commission of Experts Report*, *supra* note 53, ¶ 171. Guterres, a former Timorese pro-Indonesian militia leader, began serving a 10-year sentence in May 2006. Shawn Donnan, *Pro-Jakarta Militia Leader Begins Sentence*, FIN. TIMES, May 4, 2006, available at <http://www.etan.org/et2006/may/01/04pro-j.htm>. The August 2004 acquittals triggered sharply divergent reactions. They caused an outcry among human rights NGOs, both domestic and international, and provoked strong statements by a number of governments. But many Timorese officials took a very different view. Foreign Minister Ramos-Horta expressed support for an international truth commission but opposed an international criminal tribunal. Prosecution of Indonesian officials, he argued, could be destabilizing within Indonesia and would undermine East Timor's efforts to improve its relations with Indonesia. Dan Eaton, *East Timor*



Meanwhile, in East Timor, the capacity-building impact of the hybrid tribunal, like its accountability record, has been mixed. Some valuable experience clearly has been gained by Timorese judges serving on the Special Panels and by Timorese investigators and prosecutors working in the Serious Crimes Unit. Moreover, because Timorese judges on the trial and appellate panels are also part of the domestic justice system, and likely will continue to serve there, their experience on the Special Panels will be of direct benefit to the national courts.<sup>118</sup> This is valuable capacity-building.

Nevertheless, language barriers among the national and international judges limited the opportunities for exchange of ideas and mutual learning. Salary and support arrangements made Timorese judges on the Special Panels sometimes feel like second-class citizens.<sup>119</sup> An early lack of systematic and well-planned training also constrained the capacity-building potential of the hybrid tribunal.<sup>120</sup>

On the prosecution side, few Timorese were integrated into top positions in the serious crimes prosecutorial office. More generally, the stark contrast in resources between the Serious Crimes Unit and East Timor's "ordinary crimes" capacity presented a constant struggle for East Timor's prosecutor-general, Longuinhos Monteiro, who headed both components and whose five district prosecutors had no land

*Urges End to Push for UN Tribunal*, REUTERS, Aug. 9, 2004; *East Timor's Foreign Minister Opposes Rights Tribunal*, ASSOCIATED PRESS, Sept. 8, 2004. For a discussion and critique of the Indonesian prosecutions before the Ad Hoc Human Rights Court, see *Commission of Experts Report*, *supra* note 53, at 38–80.

118. Although Timorese judges failed their exams to move beyond probationary status, they are engaged in intensive training programs and many passed their midterm evaluation. See DAVID COHEN, EAST-WEST CENTER SPECIAL REPORT NO. 9, INDIFFERENCE AND ACCOUNTABILITY: THE UNITED NATIONS AND THE POLITICS OF INTERNATIONAL JUSTICE IN EAST TIMOR 94 (2006), available at <http://eastwestcenter.org/stored/misc/SR00906Part4.pdf>; Security Council, *Progress Report of the Secretary-General on the United Nations Office in Timor-Leste*, ¶ 19, U.N. Doc. S/2006/24 (Jan. 17, 2006). See generally CAN MIGHT MAKE RIGHTS?, *supra* note 1, at 234-38 (discussing the challenges facing East Timor's judicial system).

119. The United Nations paid the salaries of international judges, prosecutors, and investigators. Timorese counterparts were paid at local rates by the Timorese government. It was not so much salary differentials but rather some differences in basic support—such as computers and other resources—that grated on some Timorese judges, for instance. Interviews with Timorese judges, in Dili, East Timor (Nov. 2003).

120. This has been a more general problem in the East Timorese judicial system. See Katzenstein, *supra* note 100, at 265–68. See also REIGER & WIERDA, *supra* note 113, (offering a thoughtful assessment of the limitations of the legacy and capacity-building of the Serious Crimes Process in East Timor).

phone lines by which to communicate.<sup>121</sup> Monteiro expressed concern that when the tribunal's mandate ended (as it did in 2005) and the UN departed, equipment and resources on which Timorese prosecutors in the Serious Crimes Unit had come to depend would also leave with the UN, despite the considerable domestic legal challenges that would remain.<sup>122</sup> On the defense side, the capacity-building has been even more limited. Internationals largely handled the defense in serious crimes cases, while providing some training for Timorese public defenders.<sup>123</sup> In short, although some important local capacity-building clearly has taken place, the potential offered by East Timor's hybrid arrangement has been realized only partially.

To sum up: The mixed results of East Timor's Special Panels reflect the broader ambivalence of Timorese leaders, UN officials, and major governments about pressing Indonesia too hard. Other goals—consolidating independence, forging political and economic ties, resolving outstanding border issues, counterterrorism cooperation—have consistently taken higher priority. Given how closely East Timor's fate is tied to that of Indonesia, and taking into account the broader international unwillingness to pressure Jakarta, the path chosen by East Timor's leaders is understandable. Nevertheless, disappointment within East Timor about the limited accountability for the 1999 atrocities, and more broadly for atrocities throughout the long Indonesian occupation, may fester unless more is done to seek meaningful accountability.<sup>124</sup> Furthermore, Indonesia's unwillingness to acknowledge the

121. Interview with Longuinhos Monteiro, Prosecutor-General, East Timor, in Dili, East Timor (Nov. 2003).

122. *Id.* In the end, the UN-funded Serious Crimes Unit was able to investigate only less "than half of the estimated 1450 murders committed in 1999." The Secretary-General, *Progress Report of the Secretary-General on the United Nations Office in Timor-Leste, delivered to the Security Council*, U.N. Doc. S/2005/533, para. 49 (Aug. 18, 2005). Arrangements for storing the Serious Crime Unit's original files in East Timor, and for storing a complete copy of these records at the United Nations, were negotiated by the Timorese government and the UN. *Id.* at paras. 12–14. For discussion of the conclusion of the tribunal's mandate, see *supra* note 104.

123. Katzenstein, *supra* note 100, at 263, 267. See also *Commission of Experts Report, supra* note 53, at 36–37.

124. As discussed below, many Timorese participating in the community-based reconciliation proceedings have expressed strong disappointment that many of those who committed serious crimes have not been prosecuted at all. See *Chega!: Final Report of the CAVR, supra* note 7, pt. 9, para. 170; ZIFCAK, *supra* note 12, at 41; *Community Reconciliation Process, supra* note 12, at 100–101; *Commission of Experts Report, supra* note 53, at 89 (citing a 2004 opinion poll in which "52 per cent of the population responded that justice must be sought even if it slows down reconciliation with Indonesia, while 39 per cent favoured reconciliation even if that meant significantly reducing efforts to seek justice.").

responsibility of specific Indonesian military leaders and militia forces for the violence in East Timor perpetuates a pattern of impunity that bodes poorly for its human rights accountability in other contexts.

Against this background, it is hardly surprising that the decision of East Timor and Indonesia to establish a bilateral Commission of Truth and Friendship (CTF) in late 2004 has evoked ambivalent responses within East Timor.<sup>125</sup> According to its terms of reference, the CTF aims to “resolve residual problems of the past” and to “establish the conclusive truth” regarding “the events prior to and immediately after the popular consultations,” including the “nature, causes and the extent” of the human rights violations, and to do so through “a forward looking and reconciliatory approach” that “will not lead to prosecution and will emphasize institutional responsibilities.”<sup>126</sup> The CTF ultimately will issue a report that will establish a “shared historical record” and recommend measures to “heal the wounds of the past.” Human rights and victims groups in East Timor, however, have expressed deep concern about aspects of the CTF’s mandate, particularly the idea of “amnesty for those involved in human rights violations who cooperate fully in revealing the truth.”<sup>127</sup> There is also concern that the CTF will face pressure from the Indonesian side not to call senior military leaders, and that it will backtrack on what has already been accomplished thus far in documenting the historical record and issuing indictments.

### C. *East Timor’s Innovative Community Reconciliation Procedures*

Within East Timor, the Commission for Reception, Truth and Reconciliation (CAVR) may ultimately have the greater domestic impact, particularly through its innovative community reconciliation procedures and through its comprehensive report and recommendations. An independent body supported by voluntary contributions, the CAVR included seven national commissioners and twenty-nine regional commissioners and was chaired by Aniceto Guterres Lopes, an accom-

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125. The leaders of Indonesia and East Timor met in Bali on December 14, 2004 to establish the Commission on Truth and Friendship. Information about the Commission, including its terms of reference and members, is available on its website at <http://www.ctf-ri-tl.org>. The Commission has ten members, five of whom are Indonesian and five Timorese, including the Chair of East Timor’s CAVR. About Commission, <http://www.ctf-ri-tl.org> (follow “About Commission” hyperlink).

126. Terms of Reference for the Commission of Truth and Friendship, paras. 7–14, available at <http://www.ctf-ri-tl.org> (follow “Term of Reference” hyperlink).

127. *Id.* at para. 14.

plished and widely respected Timorese human rights lawyer.<sup>128</sup> From 2001 until it completed its over-2000 page report in 2005, the Commission worked diligently to seek the truth regarding human rights violations in East Timor during the period between April 1974 and October 1999, reaching out to citizens throughout East Timor, gathering testimony from victims, and holding a series of major public hearings.<sup>129</sup> The CAVR was also charged with assisting the reception and reintegration of individuals into their communities after the long period of political conflict in East Timor.

The Commission's community reconciliation process made a unique contribution to this goal. The Commission's staff traveled throughout the country to visit communities affected by violence during the Indonesian occupation. Working with community leaders, the Commission established panels composed of a regional commissioner and local leaders before which community-based reconciliation proceedings took place. The involvement of traditional local leaders provided legitimacy within communities, but the Commission also took pains to ensure that women and young people were included in the process.<sup>130</sup> This helped to empower some new voices in traditional community settings.

Under a carefully devised procedure, individuals who committed lesser offenses—such as looting or minor assault—were able to acknowledge what they had done in a public hearing before their community, express contrition, and enter into a “community reconciliation agreement” (CRA). Prosecutors in the Serious Crimes Unit reviewed written statements from these individuals before the community hearings even took place in order to determine whether the person was eligible to participate or, instead, potentially liable for prosecution for more serious crimes. Eligible individuals who concluded CRAs are immune from civil liability or criminal prosecution for the acts underlying the agreement. The CRAs were registered with district courts, however,

128. The Commission was supported by voluntary contributions from states, nongovernmental organizations, and individuals. Established by UNTAET in 2001, the Commission's mandate was negotiated with Timorese leaders. See UNTAET Reg. 2001/10, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001), available at <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>; Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 962 (2001). The commission was headquartered at Dili's former Balide Prison, the site of horrific torture and atrocities during Indonesian rule—a location that will become a museum after the commission's work is finished.

129. See *Chega! : Final Report of the CAVR*, *supra* note 7.

130. The CAVR followed the requirement of its mandate “that a minimum 30% of all Regional Commissioners be women” and that community reconciliation panels have “appropriate gender representation.” *Id.* pt. 9, para. 154, at 43.

providing a link to the formal justice system in the event of noncompliance.

The Commission received more than 1500 statements from individuals (called deponents) wishing to participate in the process. Ultimately, 1371 deponents completed the community reconciliation process, and the CAVR estimates that up to 3000 more might have participated had the process continued for a longer time. Over 40,000 Timorese—nearly 5 percent of the total population—attended the community hearings held throughout the country.<sup>131</sup>

These community reconciliation proceedings have had three results or accomplishments, in the view of the Commission's chair, Aniceto Guterres Lopes.<sup>132</sup> First, they helped to stabilize the situation in rural areas after a very turbulent period. Second, they provided a sense of justice processes in communities throughout the country that have limited access to formal courts. The proceedings "reinforced the value of the rule of law, and contributed to the fight against impunity by resolving a significant number of cases that could not realistically have been dealt with through the formal justice system."<sup>133</sup> Third, the community reconciliation process encouraged local cultural traditions of reconciliation and conflict resolution. They also provided some valuable mediation training and capacity-building to panel members and other participants. These accomplishments are steps in building a foundation for further development of the rule of law in East Timor.

Not surprisingly, the community-based reconciliation procedures were more successful in some communities than in others. The hearings attracted significant numbers of people in many communities. Some participants confessed to specific offenses such as looting, whereas others acknowledged only a general association with Indonesian police or authorities. Some community reconciliation agreements required individuals to provide concrete restitution to victims—such as rebuilding a destroyed home, returning stolen goods, or repaying a victim for lost livestock—or to engage in forms of community service such as working on damaged school buildings or assisting orphanages or churches.<sup>134</sup> Many CRAs, however, simply involved a formal, public apology before the community.<sup>135</sup> Some individuals seemed genuinely

131. *Id.*, pt. 9, at 29, 43, 47.

132. Interview with Aniceto Guterres Lopes, Chair, CAVR, in Dili, East Timor (Nov. 2003).

133. *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, at 47.

134. *Community Reconciliation Process*, *supra* note 12, at 56.

135. *Id.* As Zifcak explains, as the reconciliation process unfolded over time, "simply apology" became more common as the basis of reconciliation agreements: "A straightforward apology

contrite in these reconciliation proceedings, others far less so. Thus, the impact of the proceedings no doubt has varied in different communities and among different participants.

Most of the deponents who entered into community reconciliation agreements have expressed clear satisfaction with the process. A number of former militia members, for instance, have felt that the procedures helped them integrate more effectively into their communities.<sup>136</sup>

The response among victims has been more mixed, however, for a number of reasons. For some, the confessions of the deponents were not as forthright as hoped for, and the CRAs in many cases were not very demanding.<sup>137</sup> Victims hoping for more information about the fate of their loved ones were sometimes disappointed. Some victims found the proceedings and the public apology before the community to be constructive and affirming, but others felt a certain sense of pressure or community expectation to reconcile with perpetrators.<sup>138</sup> The CAVR acknowledges that clearer guidelines regarding the role of victims in the proceedings and a greater focus on their needs would have been beneficial.<sup>139</sup>

Despite the range of reactions to the community reconciliation procedures, they do seem to have brought some sense of justice procedures to rural communities that have little access to the country's formal justice system. The emphasis on confession, forgiveness, and reconciliation also had deep cultural resonance in predominantly Catholic East Timor. Problematic, however, is a lingering sense of injustice and inequity that many Timorese feel because of the failure of the Serious Crimes Unit and Special Panels to bring to justice many

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embodied in a legal document signed by all parties combined with a commitment not to take part in any similar activities became, then, the quickest and easiest means of obtaining some form of closure, which in turn signaled 'success.'" ZIFCAK, *supra* note 12, at 22. For additional reflections on why only apology was required in many CRAs, see *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, at 33.

136. *Community Reconciliation Process*, *supra* note 12, at 81; *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, at 33–34.

137. *Community Reconciliation Process*, *supra* note 12, at 81–83; ZIFCAK, *supra* note 12, at 20–22, 25–26.

138. ZIFCAK, *supra* note 12, at 20–22, 25–26; *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, para. 132, at 39.

139. *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, para. 133, at 39 (noting that “[g]uidelines establishing a right of victims to a say in the decision on what ‘acts of reconciliation’ the perpetrator should perform, and a stronger place for victims in the formal decision-making structure of the CRP would have helped to ensure that their interests were not overlooked”).

who committed more serious offenses. For many Timorese, support for the community reconciliation process was tied to expectations that serious offenders living within their communities would be brought to justice. Yet the vast majority have not been investigated or charged. When lesser offenders conclude reconciliation agreements but more serious offenders often face no process at all, the resulting “justice deficit” disappoints public expectations of fair accountability.<sup>140</sup>

Unfortunately, the circumstances surrounding the release of the CAVR’s final report also created a sense of injustice in East Timor. In late 2005, the CAVR completed and presented its report to President Gusmao, who subsequently presented it to the Timorese parliament. But, as of February 2006, the report had not been publicly released within East Timor, despite the fact that it had been presented to UN Secretary-General Annan and was available in full or in part on various international Web sites.<sup>141</sup> The fact that the report had not yet been presented publicly in East Timor—when it was otherwise widely available—was perplexing and upsetting to many Timorese human rights and victims organizations and to members of the public. Subsequently, although violence in the country delayed the efforts, the post-CAVR secretariat worked hard to disseminate the report throughout all the districts of East Timor by the end of 2006. Also, by late 2006, the CAVR posted the full report on its official website in three languages (English, Bahasa Indonesia, and Portuguese), with the introduction and executive summary available in Tetum.<sup>142</sup> The extent to which the Commis-

140. For analysis of this problem, see *Chega!: Final Report of the CAVR*, *supra* note 7, pt. 9, para. 170, at 48; ZIFCAK, *supra* note 12, at 41; *Community Reconciliation Process*, *supra* note 12, at 100–101. Less than half of the 1450 murders estimated to have been committed in 1999 were ultimately investigated by the Serious Crimes Unit. The Secretary-General, *Progress Report of the Secretary-General on the United Nations Office in Timor-Leste*, ¶ 49, submitted to the Security Council, U.N. Doc. S/2005/533 (Aug. 18, 2005).

141. The commission submitted its report on October 31, 2005 to President Gusmao, who presented it to East Timor’s parliament and cabinet in November 2005. Amnesty Int’l, *Timor-Leste: Denial of Justice?*, AI Index ASA 57/005/2005, Nov. 29, 2005. In January 2006, President Gusmao presented the report to UN Secretary-General Annan. *Gusmao Presents Annan with Report on East Timor Atrocities*, AGENCE FRANCE PRESSE, Jan. 20, 2006, available at <http://www.etan.org/et2006/january/14/20ri.htm#Gusmao%20presents>. Yet, as of February 2006, the report had not been publicly released in East Timor, even though the CAVR’s mandate provides that the report “shall be immediately available to the public and shall be published in the Official Gazette.” UNTAET Reg. 2001/10, *supra* note 128, at § 21.3. The report has been available in full on the Web site of the International Center for Transitional Justice since January 30, 2006. See <http://www.ictj.org>, in English and Bahasa Indonesia.

142. See CAVR—Homepage, <http://www.cavr-timorleste.org> (last visited Feb. 7, 2007).

sion's important and innovative recommendations are taken up by the Timorese government and by other states remains to be seen.

#### D. *Sierra Leone's Special Court: A Promising Hybrid*

Though it faces many challenges, Sierra Leone's Special Court is probably the criminal tribunal that has been best able, thus far, to begin realizing in practice the potential benefits of a hybrid accountability mechanism. The tribunal has made a reasonably strong start in its primary mission of seeking justice and accountability for the brutal atrocities that marked Sierra Leone's decade-long civil war—a war that claimed the lives of an estimated 75,000 people and displaced a third of the country's population.<sup>143</sup> Two major trials began in summer 2004. These include the trial of three leaders of the Revolutionary United Front ("RUF") who are accused of horrific crimes against humanity and war crimes, including terrorizing the civilian population, rape, murder, amputations, abduction of women into forced "marriages," and forced recruitment of child soldiers.<sup>144</sup> Also on trial are three leaders of the Civilian Defense Forces ("CDF") who are on trial for multiple counts of crimes against humanity and war crimes, including murder, inhumane acts, terrorizing the civilian population, and conscripting child soldiers.<sup>145</sup> A third trial against three members of the

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143. INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS 1 (2004), available at <http://www.ictj.org/images/content/1/0/104.pdf>. For a discussion of the conflict, see Avril D. Haines, *Accountability in Sierra Leone: The Role of the Special Court*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 13, at 176–92.

144. The RUF leaders on trial are Issa Hassan Sesay, Morris Kallon, and Augustine Gbao. See <http://www.sc-sl.org/RUF.html>. In his opening statement, Special Court prosecutor David Crane described a meeting on February 27, 1991, in which Liberia's Charles Taylor, along with RUF General Foday Sankoh and others, planned the invasion of Sierra Leone and the capture of its diamond-rich areas—an invasion that set in motion the devastating decade-long conflict in Sierra Leone. Transcript of Trial at 22, *The Prosecutor of the Special Court of Sierra Leone v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, (Special Court of Sierra Leone July 5, 2004) (No. SCSL-04-15-T), available at <http://www.sc-sl.org/Transcripts/RUF070504.pdf>.

145. Sam Hinga Norman, former Commander of the Civilian Defense Force (CDF) and former Deputy Defense Minister and Minister of Internal Affairs, was one of the three accused in this case. The other two accused are Allieu Kondewa and Moinina Fofana. The Prosecutor of the Special Court of Sierra Leone *v. Sam Hinga Norman, Allieu Kondewa and Moinina Fofana*, (Special Court of Sierra Leone June 3, 2004) (No. SCSL-04-14-T), available at <http://www.sc-sl.org/CDF.html>. The three members of the AFRC on trial are Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu. The Prosecutor of the Special Court of Sierra Leone *v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, (Special Court of Sierra Leone Mar. 7, 2005) (No. SCSL-04-16-T), available at <http://www.sc-sl.org/AFRC.html>.



Armed Forces Revolutionary Council (“AFRC”) for similar crimes began in March 2005. One year later, in March 2006, former Liberian President Charles Taylor was finally taken into custody by the Special Court, where he stands charged with eleven counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law, including terrorizing the civilian population, murder, rape, sexual slavery, and use of child soldiers.<sup>146</sup>

The Special Court, established in 2002 by agreement between the government of Sierra Leone and the United Nations, was a deliberate effort to design a tribunal that could overcome some of the limitations of purely international or purely domestic proceedings.<sup>147</sup> In many ways, the Court’s structure and mandate reflected the lessons—the “accountability learning curve”—of the previous decade. As a hybrid tribunal supported by the United Nations—with both international and domestic judges, prosecutors, investigators, defense counsel, and administrators—the Special Court has greater resources and credibility than Sierra Leone’s struggling domestic justice system.<sup>148</sup> Yet the Court’s physical location in Sierra Leone, with nationals participating in each of its components, provides important opportunities for building domestic capacity—and for extensive outreach efforts designed to deepen public understanding and expectations of accountability and fair justice, producing a more direct impact on the local population. In contrast to the enormous expense and open-ended time frames of the ICTY and ICTR, Sierra Leone’s Special Court has a mandate focused on those who bear “the greatest responsibility” for serious violations of international humanitarian law. The Court’s original prosecutor, David Crane, argued this mandate is manageable and achievable in a time

146. For a copy of Taylor’s indictment and a summary of the charges against him see the web site of the Special Court for Sierra Leone, <http://www.sc-sl.org/Taylor.html>. Taylor was taken into custody by the Special Court on March 29, 2006, and was arraigned on April 3, 2006. His trial is due to begin in June 2007.

147. The court’s design also reflected political compromises as, for example, in the time frame of its jurisdiction. Haines, *supra* note 143, at 214–15. See also J. Peter Pham, *Politics and International Justice in a World of States*, 4 HUM. RTS. & HUM. WELFARE 119, 131–32 (2004).

148. The court has primacy over Sierra Leone’s domestic courts and is a “mixed” or “hybrid” tribunal in at least two ways: its staff includes both international and national personnel, and it has authority to prosecute certain offenses under international law and under Sierra Leonean law. As a treaty-based court explicitly empowered to try those bearing “the greatest responsibility for violations of international humanitarian law” committed in Sierra Leone since November 30, 1996, the tribunal can prosecute those shielded from domestic prosecution by the amnesty of the 1999 Lome Agreement. Haines, *supra* note 143, at 213.

frame that should allow both justice to be done and wounds to begin to heal as Sierra Leone moves forward.<sup>149</sup>

The Special Court has faced some but not all of the practical challenges of earlier hybrid tribunals. Maintaining adequate and reliable funding has been an ongoing concern, because the Special Court depends primarily on voluntary donations.<sup>150</sup> Nevertheless, starting up its operations with voluntary rather than UN-assessed funding actually proved to be beneficial because it gave the Court flexibility in hiring, enabling it to assemble an extremely talented staff very quickly. The Court has also managed to blend national and international staff quite well,<sup>151</sup> avoiding some of the disparities in salaries and support that created tensions, for instance, in East Timor.<sup>152</sup> Language barriers between international and national staff have not been an issue here, so easier exchange and give-and-take between staff is more possible. The Special Court's Defense Office also represents an important (and earlier) effort to achieve greater equality between the prosecution and the defense lacking in other tribunals.<sup>153</sup> Still, the many practical

149. Interview with David Crane, Prosecutor of the Special Court for Sierra Leone, Freetown, Sierra Leone (June 2004). Crane argued that the mandate, in his view, was achievable within a time frame of three to five years. *Id.* See also David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords, Current Lessons Learned and Challenges*, in COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS, ARUSHA 4-5 (2004) [hereinafter Crane, *Dancing*], <http://69.94.11.53/ENGLISH/colloquium04/Crane.htm>.

150. For instance, insufficient voluntary contributions led to a budget shortfall of about U.S. \$20 million in the tribunal's third year of operations, requiring a one-time UN contribution of over \$16 million. *Commission of Experts Report*, *supra* note 53, para. 103, at 29.

151. Each of the Special Court's four components—chambers, office of the prosecutor, defense office, and registry—is an interesting blend of international and national staff. As of February 2006, for example, the three-member Trial Chambers I and II together included a total of six judges: a Sierra Leonean national and a Samoan national each appointed by the government of Sierra Leone, and nationals of Northern Ireland, Cameroon, Uganda, and Canada appointed by U.N. Secretary-General Annan. The Special Court for Sierra Leone—Chambers, <http://www.sc-sl.org/chambers.html>. The Appeals Chamber included five judges: a Sierra Leonean and a British/Australian jurist, both appointed by Sierra Leone, and three judges—a Nigerian, a Sri Lankan, and an Austrian—appointed by the Secretary-General. *Id.* The Special Court's first prosecutor was an American and, by June 2004, approximately 50 percent of the prosecutor's office (which includes investigators) was Sierra Leonean. The first registrar was an experienced British court administrator. The head of outreach is a Sierra Leonean, as are almost all of her staff. The defense office, an innovative component of the court, includes as part of its structure three duty counsel (two were Sierra Leonean and one Gambian, as of June 2004). *Id.*

152. The fact that living allowances for local Sierra Leonean jurists are less than for international judges has nevertheless been criticized by some Sierra Leoneans.

153. The Special Court's registrar, Robin Vincent, was a strong early advocate of establishing a defense component modeled on a public defender's office. His evaluation of the ICTR

disparities between support for the prosecution and for the defense have been a continuing issue.<sup>154</sup>

Sierra Leone's Special Court is very much a work in progress, so it is too early to determine whether, in fact, it will ultimately succeed in delivering meaningful justice to the people of Sierra Leone or in helping to improve domestic capacity for fair justice and the rule of law. A number of positive signs already exist, but there are also areas of concern. In any event, the theoretical benefits of an in-country hybrid do not flow automatically; they require astute planning, considerable resources, and sensitivity to the many practical and political challenges that can arise when a tribunal locates directly in the country most affected by the atrocities.<sup>155</sup>

So far, the glass is at least half full. By indicting those who bear the greatest responsibility for starting and orchestrating the brutal conflict in Sierra Leone, the tribunal helped to disempower and prevent them from committing such atrocities again. Sierra Leoneans agree to a remarkable extent who these people are. In outreach meetings all across the country held by the Special Court's prosecutor, Sierra Leoneans put former Liberian president Charles Taylor at the top of the list. He was followed by two others: RUF commander Foday Sankoh and General Sam Bockarie. All three have been indicted, but only Taylor is still alive to stand trial. (Sankoh died of natural causes in custody; Bockarie and his family were killed in Liberia, allegedly on Taylor's orders.<sup>156</sup>)

influenced his views about the need for a more robust defense capacity in Sierra Leone. At Sierra Leone's Special Court, duty counsel in the defense office assist defendants before they have obtained independent counsel; they also provide research support to defense counsel and assist in building a defense and formulating arguments. In addition, the defense office has established a list of qualified defense counsel, and it administers contracts for attorneys appointed to represent indigent defendants and for defense investigators. Still, the Court's administrators will frankly acknowledge that they wish they had built up the defense office earlier and provided it with a greater budget. Nevertheless, it is a considerable and dramatic improvement over the limited support offered to the defense in other tribunals, both hybrid and international.

154. See James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT'L L. J.* 616, 669–74 (2005).

155. See, e.g., *id.* at 674–75.

156. The chief of investigations for the Special Court stated in May 2003 that he had "credible information" that Bockarie's family had been killed on orders from Taylor, which "casts serious doubts about [Taylor's] claims regarding the circumstances of Sam Bockarie's death." Press Release, Office of the Prosecutor, Special Court for Sierra Leone, *Bockarie's Family Alleged Murdered; Office of the Prosecutor Demands Full Cooperation from Taylor* (May 15, 2003), available at <http://www.sc-sl.org/Press/prosecutor-051503.html>. See also U.S. State Dep't, Bureau of Intelligence & Research, *Background Note on Sierra Leone*, (May 2006), available at <http://>

Charles Taylor presents the biggest challenge in the struggle for accountability and for peace in West Africa. Virtually everyone agrees that he bears the greatest responsibility for the violence that engulfed Sierra Leone and much of the rest of West Africa. Preventing him from ever again exercising power directly in Liberia—or behind the scenes—is a critical goal in bringing lasting peace to the region. Throughout Sierra Leone, people overwhelmingly support prosecuting him before the Special Court.<sup>157</sup> For two and a half years, however, Taylor was in Nigeria under a grant of asylum brokered as part of his departure from power in Liberia. During this period, the Nigerian government, along with some other African and international leaders, resisted handing Taylor over, arguing that to do so would undermine future negotiated departures of dictators as a way to end conflicts.<sup>158</sup> Others, in contrast, argued strongly that ending the impunity of high-level leaders for atrocities—such as those of which Taylor is accused—is an essential step in preventing their recurrence in the region.<sup>159</sup> In the end, as international pressure grew for holding Taylor to account, and after a newly elected government in Liberia called for his prosecution, Nigeria handed Taylor over to the Special Court in March 2006.

As Taylor arrived and was taken into custody in Sierra Leone, hundreds of Sierra Leoneans gathered in the hills of Freetown near the Special Court to commemorate the dramatic day. At that moment, whether Taylor's trial would occur in Sierra Leone, as many hoped, or instead would take place in The Hague before a panel of the Special Court for Sierra Leone assembled there, had not yet been determined. Taylor's trial raised issues of security and stability as a result of his role in West Africa's conflicts. In the end, the Special Court and the government of Sierra Leone requested that his trial be held at The Hague, and Taylor was transferred there in June 2006.

Although it has made considerable progress, the Special Court faces

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[www.state.gov/r/pa/ei/bgn/5475.htm](http://www.state.gov/r/pa/ei/bgn/5475.htm) (stating Taylor “probably” directed Bockarie’s killing to keep him from testifying).

157. Sierra Leone’s Parliament in February 2006 unanimously adopted a resolution calling for Taylor’s trial before the Special Court. See Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Prosecutor Welcomes Sierra Leone Parliamentary Resolution Supporting Taylor’s Trial at the Special Court (Feb. 9, 2006), available at <http://www.sc-sl.org/Press/prosecutor-020906.pdf>.

158. For discussion of the controversy over the Special Court’s unveiling of the sealed indictment against Taylor during a peace negotiation in Ghana and subsequent differences of view over Nigeria’s offer of amnesty to Taylor, see Pham, *supra* note 147, at 131–33.

159. See Zainab Bangura, Op-Ed., *Flouting the Rule of Law*, WASH. POST, June 25, 2004, at A29.

some distinct challenges in demonstrating meaningful accountability for atrocities to the people of Sierra Leone. To demonstrate credibly that justice is fair, the court's proceedings must be widely viewed as legitimate both in terms of their substance (who is being prosecuted for what offenses) and in terms of process. The fact that the prosecution indicted Charles Taylor as well as leaders from all the major groups in Sierra Leone's conflict—the RUF, the AFRC, and the CDF—is important in demonstrating that no one is above the law and in avoiding the perception of “victor's justice.”

Still, there are difficult, lingering issues that may affect the perceived legitimacy of the trials among the Sierra Leonean population. For one, Charles Taylor's long-awaited prosecution before the Special Court has raised public expectations of accountability that may be disappointed, at least to some extent, by the decision to hold the trial outside of Sierra Leone, thus making the proceedings less accessible to the local population.<sup>160</sup> Second, the trial of CDF leader and former Interior Minister Sam Hinga Norman generated controversy, at least initially, because many regarded him as a hero who acted to defend Sierra Leone from the RUF. The court's outreach staff had to work hard to explain that he was being tried for serious atrocities in violation of international law—that regardless of one's cause, there are clear limits on how one can fight. Third, many Sierra Leoneans express frustration that many individuals who did the actual chopping, raping, and killing remain free. As one amputee put it, “the person who chopped off my hand lives down the street; if there is no justice, my children may seek vengeance.”<sup>161</sup> Or as one local TV journalist, critical of the peacekeeping forces of the Economic Community of West African States, exclaimed: “ECOMOG forces killed my brother and raped my sister, so why aren't they being tried?”<sup>162</sup> In other words, although Sierra Leoneans support trying those who bear “the greatest responsibility” for the atrocities, there remains frustration that other, lower-level offenders are not

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160. See John E. Leigh, Op-Ed., *Bringing It All Back Home*, N.Y. TIMES, Apr. 17, 2006, at A25. Leigh, who is Sierra Leone's former ambassador to the United States, argues that transferring Taylor to The Hague for trial “would defeat a principal purpose behind the establishment of the special court in Sierra Leone—namely, to teach Africans, firsthand and in their own countries, the fundamentals of justice and to drive home that no one is above the law.” *Id.*

161. Notes from Town Hall Meeting, Amputee Association, in Freetown, Sierra Leone (June, 2004).

162. Interview with TV Journalist, in Freetown, Sierra Leone (June 2004). ECOMOG is the acronym for forces of the Economic Community of West African States (ECOWAS) that deployed to Sierra Leone in response to the conflict. See *ECOMOG: Peacekeeper or Participant?*, BBC NEWSFILE, Feb. 11, 1998, available at <http://news.bbc.co.uk/2/hi/africa/55719.stm>.

being held accountable as well.

The Special Court's processes also need to be perceived as fair to credibly demonstrate a norm of accountability and impartial justice. The fact that both international and national jurists and staff participate in the work of the Special Court has enhanced its legitimacy among the local population. But even so, the Special Court's local outreach officers have encountered skepticism in both directions: some Sierra Leoneans, based on negative perceptions of the country's own judicial system, needed reassurance that the Sierra Leonean jurists on the court would, in fact, be impartial; others wondered whether the court was being forced upon Sierra Leone by international actors. Still, the tribunal seems to enjoy considerable support and legitimacy in Sierra Leone.<sup>163</sup>

To sustain this support, the tribunal needs to conduct demonstrably fair trials. The prosecution team is extremely skilled and well resourced. A significant concern is whether defense counsel will be effective enough and have sufficient resources to mount a high-quality defense or to effectively assist defendants who opt to represent themselves, such as former Interior Minister Sam Hinga Norman, who died in February 2007 before his trial concluded.<sup>164</sup> Ensuring that the defense has the personnel and resources to present a credible defense will be important to the legitimacy of the proceedings. Beyond the issue of a technically skilled defense, whether Sierra Leoneans ultimately will regard the Special Court as demonstrating meaningful accountability and fair justice will depend on whether they are convinced—through outreach and other efforts—that defendants such as Sam Hinga Norman are fairly and appropriately tried for conduct that violates agreed rules.<sup>165</sup> Finally, the trial of Charles Taylor raises a whole host of issues that will demand an extremely disciplined handling of the proceedings

163. For example, in one poll conducted by the Campaign for Good Governance, a Sierra Leonean NGO, before the trials even began, 67 percent of those surveyed had heard of the court, 62 percent found it necessary, and 61 percent thought the court was intended to benefit the people of Sierra Leone. See Int'l Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a "New Model"* 17, Africa Briefing No. 16, Aug. 4, 2003, available at <http://www.crisisgroup.org/home/index.cfm?id=1803&l=1>.

164. Sam Hinga Norman died on February 22, 2007 in a Senegalese hospital following surgery and before a verdict was issued in his case. Press Release, Special Court for Sierra Leone, Court Indictee Sam Hinga Norman Dies in Dakar (Feb. 22, 2007), available at <http://www.sc-sl.org/Press/pressrelease-022207.pdf>.

165. For a skeptical assessment emphasizing the political nature of accountability proceedings, see Tim Kelsall, Politics, Anti-Politics, International Justice: Notes on the Special Court for Sierra Leone (Oct. 15, 2004) (submitted at the conference "Settling Accounts: Truth, Justice and

by the Special Court's judiciary. The tumultuous trials of former leaders Slobodan Milosevic and Saddam Hussein have made clear that such proceedings face the ever-present risk of turning into highly-charged political drama, and thus require judges who can walk a fine line between protecting the accused's rights to speak and maintaining courtroom dignity, order, and efficiency.

### 1. Outreach: Demonstrating Accountability and Fair Justice

Even though Charles Taylor's trial poses special challenges, it also provides a long-awaited opportunity to demonstrate meaningful accountability and fair justice to the people of Sierra Leone. In fact, systematic outreach to the population of Sierra Leone has been central to the Special Court's work from the very beginning. In September 2002, shortly after he arrived in Freetown, prosecutor David Crane began traveling throughout the country to hear what the Sierra Leonean people had to say about who bore "the greatest responsibility" for the atrocities committed during the brutal conflict. A month later, the office of the prosecutor and the registry conducted outreach together. In the spring of 2003, a chief of outreach was hired, and the outreach office, under the registry, now also has ten district offices throughout Sierra Leone. This substantial outreach program has been vital in engaging the Sierra Leonean people in the work of the court and stands in contrast to the lack of systematic outreach in other post-conflict contexts.

The explicit goal of the Special Court's countrywide outreach program is to "promote understanding of the Special Court and respect for human rights and the rule of law in Sierra Leone."<sup>166</sup> Thus, in addition to providing basic information about the court—how it came about, its authority, structure and procedures, who is indicted for what offenses, and an update on the trials—the outreach office raises broader issues. In community town hall meetings and focused workshops around the country, outreach officers aim to demonstrate and illustrate, based on the actual proceedings before the court, that no one is above the law, that law can and should be fair, and ultimately that

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Redress in Post-Conflict Societies," Weatherhead Centre for International Affairs, Harvard University, Nov. 1–3, 2004).

166. Special Court for Sierra Leone, Outreach Mission Statement. *See also* UNIV. CAL. BERKELEY WAR CRIMES STUDIES CENTER, INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE 33, n.153 (2005) (citing an interview with the head of the Outreach section, Apr. 8, 2005).

the rule of law is more powerful than the rule of the gun.<sup>167</sup> In a society with limited mass media and a strong oral tradition, these meetings are critical to convey the importance of accountability.

Outreach meetings and workshops frequently involve lively, intense, and wide-ranging conversations on vital, difficult issues. The court's outreach officers work hard, for example, to explain what "fair justice" looks like. A prosecution and defense before an impartial tribunal is an important concept to convey to a population deeply skeptical of the fairness of justice systems and inclined, from bitter experience, to believe that people are simply "on the take." The outreach staff uses the concrete cases before the Special Court to illustrate key principles. For instance, when the appellate chamber ruled that Charles Taylor was not entitled to immunity from prosecution as head of state, this illustrated the concept that no one is above the law. The indictment and trial of former Interior Minister Sam Hinga Norman—controversial in some quarters—illustrated, the outreach officers stressed, that the Special Court is not a court controlled by the government. When pressed—as they often are—by victims who ask why the person who chopped off their hand is not being prosecuted, the outreach staff discusses the principle of command responsibility to explain that somebody is answering for the crime. These discussions—led by dynamic Sierra Leonean outreach officers—are often not easy, but they do wrestle forthrightly with the difficult challenges of justice and accountability.

There is no doubt that these outreach efforts are having an impact. In a society where travel to rural areas is difficult and access to media is limited, the outreach staff has reached out to engage the population on critically important issues. An early opinion poll indicated that significant majorities were aware of the court and viewed its work positively.<sup>168</sup> As the three combined trials of RUF, CDF, and AFRC leaders have proceeded, moreover, the Special Court's public affairs office has produced weekly audio summaries highlighting critical developments

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167. With a chief of outreach and substantial staff in Freetown and ten district offices, the Special Court's outreach office conducts its outreach in a variety of ways. These include "community townhall meetings," held after making arrangements with local chiefs; workshops for special groups (for instance, school pupils and university students, military forces, police, market women, victims, ex-combatants, youths, teachers); and radio discussion programs, among others. Sierra Leonean outreach officers lead these discussions in the local dialects that allow them to best communicate with the participants. Interviews with Binta Mansaray, Chief of Outreach, and with district outreach officers, in Freetown, Sierra Leone (June 2004). *See also* Special Court for Sierra Leone—Outreach, <http://www.sc-sl.org/outreach.html> (last visited Feb. 7, 2007).

168. *See* Int'l Crisis Group, *supra* note 163, at 17.



in the proceedings, which are widely broadcast over the radio throughout Sierra Leone.

The outreach and public affairs efforts have not been immune from criticism. Some members of the defense staff at the Special Court have expressed frustration that they have not had more opportunity to engage in outreach, particularly after the early efforts by the prosecution.<sup>169</sup> The weekly radio broadcasts of trial proceedings have not been as frequent as some observers would like. And the ability of most Sierra Leoneans to actually attend Special Court proceedings in the capital remains limited, despite court-sponsored programs to bring groups of citizens to Freetown to attend the trials.<sup>170</sup> As outreach efforts continue, additional survey research hopefully will enable fuller analysis of public perceptions of the Court and its work.<sup>171</sup>

Ultimately, whether the demonstration effects of the trials—and the outreach office's efforts to convey norms of accountability and fair justice throughout the country—will have a longer-term impact within Sierra Leone remains to be seen and is linked to the broader issue of capacity-building and institutionalization of accountability norms.

## 2. Capacity-Building in Sierra Leone

The Special Court, by virtue of its location and substantial local participation, is in a position to help build domestic capacity directly by increasing the skills and experience of local professionals. The Sierra Leoneans who work at the court as prosecutors, investigators, defense counsel, judges, administrators, outreach officers, and other staff are learning a great deal about international humanitarian law and its basic principles, about the conduct of fair trials, and about substantive issues in their specific areas of responsibility. Interactions between international and national staff are a valuable two-way street of mutual learning—as the international investigators who work hand-in-hand with their Sierra Leonean counterparts are the first to attest. The unanswered question, however, is how many of the local judges, prosecutors, defense counsel, investigators, and other court staff actually will remain

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169. Cockayne, *supra* note 154, at 672–73.

170. HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE: ACCESSIBILITY AND LEGACY 2 (2004), available at <http://hrw.org/reports/2004/sierraleone0904/8.htm>.

171. The European Union has provided some funds to the Court for survey research. TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 37 (2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>. Perriello and Wierda provide helpful analysis of the Court's outreach efforts, legacy, and public perceptions of the Court. *Id.* at 35-40.

in Sierra Leone after the court completes its work—and consequently continue to use their valuable skills in the national justice system.

The Special Court engages in a second kind of capacity-building, namely, working with NGOs that share a common commitment to accountability. By linking up with organizations committed to advancing fundamental human rights principles, the court can potentially have larger ripple effects within Sierra Leone and help to educate and empower citizens and civil society organizations more broadly.

Two examples illustrate these effects. First, the Special Court's outreach officers worked hard to help establish "Accountability Now Clubs" across the country—clubs of university students to discuss issues of accountability, justice, human rights, and good governance, with the expectation that club members will visit secondary and elementary schools to address these issues and communicate the critical importance of accountability past, present, and future.<sup>172</sup> Second, the outreach staff, along with other court personnel, participate in the Special Court Interactive Forum, a gathering of local and international NGOs that focus primarily on the work of the court and how it can be improved, but that also can network on additional accountability and human rights issues.

Finally, the Special Court is in a position to contribute expertise and training to Sierra Leone's domestic justice system. International investigators at the Special Court, for instance, have trained a number of Sierra Leonean police officers in witness management and protection—a critical issue given the long-term dangers that witnesses take on in coming forward to testify before the Special Court. A number of the court's judges and other legal professionals have lectured on law reform and related topics at local universities and bar associations. More generally, the Special Court has worked with the Sierra Leone Bar Association and with various organizations, both domestic and international, to identify and develop projects aimed at "helping to rebuild a devastated judiciary."<sup>173</sup> The Special Court's resources and the time of its personnel are understandably focused on its core mission of trying those who bear the greatest responsibility for the atrocities committed in Sierra Leone; but there is no doubt that more systematic efforts to provide training and to share expertise with

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172. See Special Court for Sierra Leone—Outreach, <http://www.sc-sl.org/outreach.html> (last visited Feb. 7, 2007).

173. Crane, *Dancing with the Devil*, *supra* note 149, at 6–7.

participants in the local justice system would be beneficial.<sup>174</sup> Through its Legacy Working Group, the Special Court is working to identify and carry out a number of projects designed to have a lasting effect.<sup>175</sup>

In the end, whether the Special Court's capacity-building efforts—the professional skills development of its own staff, the ripple effects of working with local NGOs, and the training and sharing of expertise with local jurists and legal personnel—will make a lasting and sustainable impact on Sierra Leone's domestic justice system and political culture will depend on longer-term reforms within Sierra Leone. The jury clearly is still out on this, and the challenges are immense. Still, the degree of outreach and serious dialogue about accountability that the Special Court has inspired is impressive and has indeed sent some ripples of hope through Sierra Leonean society. But the enormous challenge of institutionalizing principles of accountability—including strengthening a weak and underresourced domestic justice system and addressing deep and pervasive problems of corruption and governance—ultimately will determine how sustainable these efforts prove to be.

#### E. *Sierra Leone's Truth and Reconciliation Commission*

Sierra Leone's Truth and Reconciliation Commission (TRC) highlighted these broader challenges in its final report. The commission focused on the deeper and more systemic causes of grievance in Sierra Leone—such as lack of transparency and accountability in the use of governmental power, few opportunities for young people, and perva-

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174. A joint UNDP/ICTJ report recommended that as part of its "legacy" efforts, the Special Court should focus additional attention on substantive law reform in Sierra Leone, on professional development for domestic justice personnel, and on programs to raise greater awareness in the provinces of the Special Court as an example of fair, effective legal process. INT'L CTR. FOR TRANSITIONAL JUSTICE & U.N. DEVELOPMENT PROGRAMME, *supra* note 23, at 1–2. The Special Court's outreach staff has provided training, for instance, to lay personnel working in the customary law system. Interview with Binta Mansaray, Director of Outreach, Special Court for Sierra Leone, in Freetown, Sierra Leone (June 2004). Working together with the UN Development Programme, the Special Court's outreach staff offered training on fundamental human rights principles to lay magistrates, court clerks, court bailiffs, and other participants in the customary law system. *Id.* The outreach staff provided information on the Special Court and linked principles that are supposed to govern the application of customary law ("equity, good conscience, and natural justice") to human rights principles of equality, independence, and impartiality. *Id.* Developing a fairer, more transparent, more equitable system of dispute settlement in the customary law system remains a very long-term challenge, however. *Id.*

175. Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF., 107, 111–22 (2006).

sive corruption.<sup>176</sup> Stressing that many of these causes of conflict have not yet been addressed adequately, the commission recommended reforms to strengthen Sierra Leone's legal and political system, including greater transparency and public access to information and greater accountability of government officials.<sup>177</sup>

As in East Timor, Sierra Leone's TRC gained significant national participation in its work, collecting over 8000 statements from civilians and combatants in Sierra Leone and neighboring countries.<sup>178</sup> Local NGOs and human rights leaders supported creation of the TRC, in part to address the complexity of the conflict and its devastating effects, including on children who often were victimized and forced to take up arms. A Sierra Leonean NGO estimates that up to 70 percent of combatants were children.<sup>179</sup> Moreover, 72 percent of combatants claimed to have been forcibly conscripted, with more than 80 percent of the female soldiers reporting that status.<sup>180</sup> The Special Court's prosecutor made clear early on that he did not intend to prosecute child soldiers, so other approaches to accountability—such as the TRC's emphasis on truth-telling, restorative justice, and reconciliation—were a means to engage this large and significant group of former combatants and to provide a forum for addressing the needs of victims.<sup>181</sup>

At least in some areas, the commission had some success in promoting community-based healing ceremonies and in helping to reintegrate

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176. The commission emphasized that "it was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable," that "[d]emocracy and the rule of law were dead" by the start of the conflict, and that only the "slightest spark" was required for "violence to be ignited." WITNESS TO TRUTH, *supra* note 17, vol. 1, intro., para. 11. Sierra Leone's TRC submitted its report to the Security Council in October 2004, and the report is available at <http://www.trcsierraleone.org/drwebsite/publish/index.shtml>.

177. WITNESS TO TRUTH, *supra* note 17, at vol. 1, intro, para. 12.

178. INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION: REVIEWING THE FIRST YEAR 3 (2004), available at <http://www.ictj.org/images/content/1/0/100.pdf>; INT'L CRISIS GROUP, *supra* note 163, at 10.

179. POST-CONFLICT REINTEGRATION INITIATIVE FOR DEV. & EMPOWERMENT, EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT OF SIERRA LEONE 13 (2002), available at <http://www.ictj.org/images/content/0/9/090.pdf>.

180. *Id.*

181. The TRC and the Special Court operated concurrently and tensions developed between the two bodies on various matters, highlighting the need for careful planning regarding the relationship between such different accountability mechanisms. In the case of East Timor, the relationship between the Special Panels and the CAVR was addressed much more systematically and was more constructive.

perpetrators into society through symbolic acts of reconciliation.<sup>182</sup> Moreover, in response to the specific concerns and needs of victims, the commission recommended a reparations program that would include free health care to amputees, war wounded, and victims of sexual violence; monthly pensions; and free education to the senior secondary level for specific groups affected by the conflict, such as amputees, children of amputees, children who were abducted or conscripted, victims of sexual violence, and others groups.<sup>183</sup>

But the impact of the TRC remains uncertain and contested. No government reparations program had yet been implemented as of late 2006. Moreover, some scholars dispute whether the public hearings and reconciliation proceedings were, in fact, beneficial to many Sierra Leoneans. Anthropologist Rosalind Shaw argues, based on her extensive research throughout the country, that many communities had already engaged in reconciliation in their own way before the TRC's hearings began and that asking people to publicly recount and relive their war-time experiences disrupted ongoing efforts to heal and move on.<sup>184</sup> Scholar Tim Kelsall, who observed a number of public reconciliation proceedings, questions whether the truth emerged in any clear or full way, although in some instances the rituals that concluded the proceedings did, in his view, suggest an opening for some degree of reconciliation.<sup>185</sup> These scholarly reports highlight the importance of

182. Unlike in East Timor, the mandate of Sierra Leone's commission did not explicitly create a community reconciliation mechanism. However, the act establishing the TRC did provide that the commission "may seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation." See Truth and Reconciliation Commission Act 2000, section 7(2), available at <http://www.sierra-leone.org/trcact2000.html>. Thus, after building relationships with community leaders, the TRC's hearings in the districts often concluded with symbolic, customary, and religious healing ceremonies in which perpetrators "came forward to ask their communities for forgiveness, which was granted by local traditional leaders." Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 763 (2004).

183. WITNESS TO TRUTH, *supra* note 17, vol. 1, intro., paras. 51-52.

184. ROSALIND SHAW, U.S. INST. OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE (Feb. 2005), available at <http://www.usip.org/pubs/specialreports/sr130.pdf>.

185. Based on his observations, Kelsall questions whether perpetrators presented a fully truthful account of their role or even whether victims have been willing to tell the whole truth of their experience. See Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 361 (2005). Nevertheless, he argues that "the addition of a carefully staged reconciliation ceremony to the proceedings, a ritual that created an emotionally charged atmosphere that succeeded in moving many of the participants

understanding the aspirations and cultural traditions of the people most affected by atrocities in order to design accountability mechanisms that will be responsive and constructive. The mixed reports regarding the TRC's impact also underscore the continuing need for careful study of the actual effects of such accountability mechanisms on the ground.

V. DOMESTIC APPROACHES TO ACCOUNTABILITY AND THE POTENTIAL IMPACT OF THE ICC

The explicitly hybrid tribunals established in Sierra Leone and East Timor, coupled with truth and reconciliation commissions, have not proven possible in many other situations. Rwanda, disappointed that the ICTR was located elsewhere, has tried thousands of individuals for genocide and related crimes before its under-resourced domestic courts. It also has begun to try large numbers of people in a community-based process that builds upon traditional dispute settlement practices known as *gacaca*.<sup>186</sup> Indonesia largely insisted on handling cases arising out of the violence in East Timor on its own in a special domestic ad hoc human rights court, but a lack of political commitment ultimately undermined these efforts, yielding no effective accountability in the Indonesian domestic courts for the atrocities in East Timor.<sup>187</sup>

Domestic prosecutions, if they are conducted in a credible manner that is widely viewed as legitimate and fair, can help demonstrate accountability in a very direct way to domestic audiences. But an unwillingness to pursue accountability in a serious and balanced way, a lack of resources, or both, can undermine these domestic efforts.

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and spectators . . . arguably opened an avenue for reconciliation" in a number of communities. *Id.* at 363.

186. For a discussion of both the potential benefits and due process concerns raised by the *gacaca* proceedings, see Strain & Keyes, *supra* note 21, at 117–22; Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004). As the process has unfolded, suicide has increased among suspected perpetrators. Craig Timberg, *In Rwanda, Suicides Haunt Search for Justice and Closure*, WASH. POST, Feb. 17, 2006, at A1.

187. See *Commission of Experts Report*, *supra* note 53, at 38–80. Early on, when international pressure was stronger, Indonesia did take some initial positive steps toward accountability, including an investigation and report by a national commission of inquiry, KPP-HAM. Laura A. Dickinson, *The Dance of Complementarity: Relationships among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in ACCOUNTABILITY FOR ATROCITIES, *supra* note 13, at 332–35, 352, 358–60. Although the terms of reference for the Commission of Truth and Friendship established by Indonesia and East Timor indicate a clear focus away from criminal prosecution, paragraph 8 states that the “unprecedented judicial process” in Indonesia “has not yet come to its completion.” Terms of Reference, *supra* note 126.

International assistance—and pressure—may be critical to bolster both domestic will and capacity. Even so, the ability of outsiders to ensure complete fairness in the conduct of domestic proceedings is likely to be limited, as the Iraq experience suggests.

A. *Iraq's Special Tribunal: Trying Saddam Hussein*

Iraq tried Saddam Hussein and others accused of serious crimes before the Iraqi Special Tribunal for Crimes Against Humanity, which was established for this purpose;<sup>188</sup> trials before the tribunal are ongoing. Iraqis serve as the tribunal's judges and prosecutors, although the Iraqi government can, "if it deems necessary," appoint non-Iraqis to serve as judges as well.<sup>189</sup> The tribunal's statute requires the appointment of international experts to serve as advisors or observers "to provide assistance to the judges with respect to international law and the experience of similar tribunals . . . and to monitor the protection by the Tribunal of general due process of law standards."<sup>190</sup> International advisors also assist investigators and prosecutors.<sup>191</sup> American lawyers have worked closely with Iraqis, for instance, in reviewing and preparing evidence, but European and UN officials generally have

188. The Iraqi Governing Council, working closely with the U.S.-led Coalition Provisional Authority (CPA), in December 2003 issued a statute creating the Iraqi Special Tribunal for Crimes Against Humanity ("Tribunal"), available at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm). The statute was issued and took effect on December 10, 2003. The elected Iraqi government reaffirmed the statute in 2005. The tribunal has jurisdiction over Iraqi nationals or residents accused of genocide, crimes against humanity, war crimes, and certain violations of Iraqi law (manipulation of the judiciary, waste of national resources and squandering of public assets, and abuse of position leading to war against an Arab county) committed between July 17, 1968, and May 1, 2003. Statute of the Iraqi Special Tribunal, Arts. 1, 11–14 (2003), [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm). The definitions of the international crimes are taken from the Statute for the International Criminal Court (ICC), and in interpreting those provisions, "the Trial Chambers and the Appellate Chamber may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions." *Id.* art. 17(b). Article 35 provides that "[t]he expenses of the Tribunal shall be borne by the regular budget of the Government of Iraq." *Id.* art. 35.

189. *Id.* art. 4(d). The Tribunal's Trial Chambers consists of five judges. *Id.* art. 4. The Appeals Chamber consists of nine judges. *Id.* Article 28 provides that: "[t]he judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals." *Id.* art. 28. Article 33 further provides that "No officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party." *Id.* art. 33.

190. *Id.* art. 6(b). Article 6(b) further provides that "[i]n appointing such non-Iraqi experts, the President of the Tribunal shall be entitled to request assistance from the international community, including the United Nations." *Id.* art. 6(b).

191. *Id.* arts. 7(n), 8(j).

declined to assist, largely because they oppose the tribunal's authority to impose the death penalty.<sup>192</sup> Many human rights groups also criticized the failure to create an international tribunal for Iraq or at least a hybrid court with more substantial international participation.<sup>193</sup>

Iraqi leaders, however, wanted a largely domestic process.<sup>194</sup> Some no doubt hoped that an essentially domestic tribunal would allow for prosecutions that Iraqis would view as more legitimate than trials before an explicitly hybrid court in which international jurists played a major and visible role. Iraqi leaders emphasized the importance of bringing Saddam Hussein to justice in order to "heal[] the wounds" in Iraqi society,<sup>195</sup> and large numbers of Iraqis from families and groups victimized by his regime followed the trials with great interest. But the tribunal has faced extraordinary obstacles from the start: several defense counsel were murdered; the presiding judge stepped down and was replaced by a judge initially contested by the defense; and Saddam Hussein stridently mocked and challenged the court's authority. The trial of Saddam and other defendants accused of the torture and murder of 148 Iraqi men and boys in the town of Dujail following a 1982 assassination attempt was marked by turmoil since it began. The proceedings took on a more sober tone after the court affirmed that the defendants would face charges for crimes against humanity, which carried a possible death sentence.<sup>196</sup> Saddam and two co-defendants ultimately were sentenced to death in the Dujail case for crimes against humanity, and the tribunal upheld this judgment on appeal.<sup>197</sup>

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192. Marlise Simons, *Iraqis Not Ready for Trials; U.N. to Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A11.

193. See, e.g., Human Rights Watch, *Saddam Hussein's Trial: Bringing Justice for the Human Rights Crimes in Iraq's Past*, Dec. 2003, available at <http://hrw.org/english/docs/2003/12/19/Iraq6770.htm>; Kenneth Roth, *Try Saddam in an International Court*, Dec. 15, 2003, available at <http://hrw.org/english/docs/2003/12/15/iraq12973.htm>; Press Release, Human Rights First, *Iraq Special Tribunal Could Bring More Stability: Challenges to Tribunal's Legitimacy Must Be Faced* (Dec. 12, 2003), available at [http://www.humanrightsfirst.org/media/2003\\_alerts/1212.htm](http://www.humanrightsfirst.org/media/2003_alerts/1212.htm).

194. Susan Sachs, *The Prosecution of a Dictator: A Decade's Digging is Already Done*, N.Y. TIMES, Dec. 17, 2003, at A24; Peter Landesman, *Who v. Saddam?*, N.Y. TIMES MAG., July 11, 2004, at 34. An Iraqi-led rather than an international tribunal was also supported by the Bush Administration. Landesman, *supra*, at 38.

195. John F. Burns, *For Hussein, A Spartan Life at His Former Palace*, N.Y. TIMES, Sept. 19, 2004, at 1, 6 (quoting human rights minister Bakhtiar Amin: "Without justice, I don't see any possibility of healing the wounds in this society.").

196. John F. Burns, *Surprise: Hussein Acts as if He's on Trial*, N.Y. TIMES, May 21, 2006, at 3.

197. For an English translation of the judgment, see <http://www.law.case.edu/saddamtrial/> (follow "English Translation of the Dujail Judgment, Dec. 2006" hyperlink). For an English



The controversial circumstances surrounding Saddam Hussein's execution on December 30, 2006 marred the potential demonstration effects of his conviction and punishment. To be sure, Saddam's trial in the Dujail case, problems notwithstanding, afforded him far more due process than the victims of his cruel tyranny and brutal atrocities ever received. Yet the failure to complete his trial for the 1988 Anfal campaign against the Kurds and for other horrific offenses deprived his victims of a chance to see him held directly accountable for those atrocities.<sup>198</sup> Also, the circumstances of his rushed execution at the beginning of a Muslim holiday, Id al-Adha, and the taunting and epithets that preceded his hanging, made the punishment, in Thomas Friedman's words, "resemble[] a tribal revenge ritual rather than the culmination of a constitutional process in which America should be proud to have participated."<sup>199</sup> Although Saddam's execution inevitably would have triggered strong—and conflicting—emotions among different segments of Iraq's population, the particular circumstances of his final moments certainly undercut the demonstration effects of what many hoped would be a "considered act of 21st century official justice" holding a brutal dictator to account.<sup>200</sup> Moreover, while some domestic capacity-building has no doubt occurred at the tribunal—with domestic judges and lawyers playing central roles—the problems, tensions, and difficulties in the proceedings thus far show the enormous and continuing obstacles of sectarian violence and disillusionment facing Iraq's justice system.

At this point, it remains to be seen whether the prosecutions of other major figures before the Special Tribunal will be conducted in a fair and credible manner,<sup>201</sup> and whether the proceedings will have, on

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translation of the appellate decision in the Dujail case, see <http://www.law.case.edu/saddamtrial/> (follow "Unofficial English Translation of the Dujail Trial IHT Appellate chamber opinion" hyperlink). Other defendants convicted of crimes against humanity in the Dujail case were sentenced to jail terms for their crimes. <http://www.law.case.edu/saddamtrial/> (follow "Unofficial English Translation of the Dujail Trial IHT Appellate chamber opinion" hyperlink).

198. In the Anfal case, chilling tape recordings of Saddam Hussein "justifying the use of chemical weapons against the Iraqi Kurds in the late 1980s" and predicting that thousands would be killed were played in the courtroom when the trial resumed after his execution. John F. Burns, *Hussein's Voice Speaks in Court In Praise of Chemical Atrocities*, N.Y. TIMES, Jan. 9, 2007, at A1.

199. Thomas L. Friedman, *A Hanging and A Funeral*, N.Y. TIMES, Jan. 3, 2007, at A23.

200. *Id.* (quoting John Simpson of the BBC). For a discussion of reactions to Saddam's execution in the region, see Hassan M. Fattah, *Hanging Images Make Hussein a Martyr to Many in Arab World*, N.Y. TIMES, Jan. 6, 2007, at A1.

201. The statute of the tribunal affirms fundamental due process rights of the accused, including the presumption of innocence. Statute of the Iraqi Special Tribunal, Art. 20 (2003).

balance, a positive domestic impact. Furthermore, as instability, sectarian violence, and insurgency continue to wrack so much of the country, new atrocities—murders, kidnapping, torture, rape—are perpetrated with impunity on a daily basis, undermining prospects for a stable rule of law built on a reliable system of accountability. Instead, a spiral of violence and impunity is profoundly eroding public confidence in the rule of law in much of Iraq, overshadowing the significance and potential impact of the continuing proceedings before the Special Tribunal.

### B. *Afghanistan: Evolving Prospects for Accountability*

In Afghanistan, the public has expressed strong support for accountability processes that can remove from power those who have committed serious human rights abuses.<sup>202</sup> Criminal trials for the most serious offenders accompanied by vetting and removal from power of lesser offenders are cited by many Afghans as essential to stability, security, and public trust in the rule of law. Afghanistan's government has shown more ambivalence about this path—not surprising when some of those who wield power, including in Afghanistan's parliament, are among those widely viewed as responsible for serious human rights abuses.<sup>203</sup> The Karzai government took an important step forward in December 2005, however, when it adopted a five-point plan for accountability. Although the issue of criminal prosecution was finessed at that time, the government affirmed that “no amnesty will be granted for gross violations of human rights.”<sup>204</sup> Moreover, drawing on an action plan developed by Afghan officials and the Afghan Independent Human

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That article explicitly affirms the right of the accused “to defend himself in person or through legal assistance of his own choosing” and “to have legal assistance assigned to him, in any case where the interests of justice so require.” *Id.* art. 20(d)(4). It also provides that the “accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi.” *Id.* art. 20(d)(2). As of mid-September 2004, “the tribunal ha[d] found no Iraqi lawyers to defend Mr. Hussein and his associates.” Burns, *supra* note 195, at 6. Subsequently, Hussein's primary defense counsel was Baghdad-based Khalil Dulaimi, though his trial was marked by turmoil since it began in 2005. See, e.g., Jamal Halaby, *Saddam Lawyer: U.S. Blocking Meeting*, ASSOCIATED PRESS, Feb. 5, 2006; Sabrina Tavernise, *Hussein Trial Resumes, But He Stays Away*, N.Y. TIMES, Feb. 2, 2006, at A10.

202. See *A Call for Justice*, *supra* note 9, at 17–21, 27–29, 34, 46–47 (reporting on the surveys and focus groups conducted by the Afghan Independent Human Rights Commission (AIHRC)).

203. See *Afghanistan: Where's the Justice?*, ECONOMIST, Jan. 21, 2006, at 42.

204. Press Release, Afghan Independent Human Rights Commission, Truth-seeking and Reconciliation in Afghanistan (Dec. 15, 2005), available at [http://www.unama-afg.org/news/\\_pr/\\_english/Others/2005/05Dec15%20-%20AIHRC.doc](http://www.unama-afg.org/news/_pr/_english/Others/2005/05Dec15%20-%20AIHRC.doc).

Rights Commission, with international and UN support, the government adopted a five-part strategy for peace, justice, and reconciliation in Afghanistan. The plan included measures to tangibly acknowledge and commemorate the suffering of the Afghan people during the long period of civil war; measures to increase public confidence in state institutions through fair and transparent vetting procedures and institutional reform; development of a truth-seeking mechanism, after fuller consideration of the potential contours of such an effort; exploration of measures to promote reconciliation and national unity; and strengthening of Afghanistan's criminal justice system, along with an affirmation that amnesty will not be granted for gross human rights violations.<sup>205</sup>

The challenge, of course, will be how seriously these goals are pursued, and whether major offenders are ever held accountable and removed from positions of power and intimidation. These are hard issues that will depend on the commitment and priorities of Afghanistan's leaders, in both government and civil society, on international support for accountability, and on the success of gradual efforts to extend governmental authority to remote areas of Afghanistan where local commanders and warlords still operate largely with impunity.

In March 2007, the government adopted a controversial new amnesty law, the implications of which are not completely clear.<sup>206</sup> The law appears to shield "belligerent groups" who fought during the decades-long conflict from being "pursued legally or judicially" by the government.<sup>207</sup> But President Karzai has stressed that the amended law also "safeguards the victim's rights and punishment of an individual

205. *Id.* The government-adopted plan was based on a plan developed by the Government of Afghanistan together with the Afghan Independent Human Rights Commission with assistance from the United Nations Mission in Afghanistan. See GOV'T OF AFGHANISTAN, ET AL., PEACE, RECONCILIATION, AND JUSTICE IN AFGHANISTAN, ACTION PLAN OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (2005), available at [http://www.aihrc.org.af/tj\\_actionplan\\_19\\_dec\\_05.htm](http://www.aihrc.org.af/tj_actionplan_19_dec_05.htm). The issue of criminal prosecutions—and the question of a possible hybrid tribunal for this purpose—was not addressed directly by the government in adopting its five-part plan. The AIHRC survey found considerable support among the Afghan population for a hybrid tribunal within Afghanistan. See *A Call for Justice*, *supra* note 9, at 24–26.

206. Ron Synovitz, *Afghanistan: Amnesty Law Draws Criticism, Praise*, RADIO FREE EUROPE/RADIO LIBERTY, Mar. 14, 2007, available at <http://www.rferl.org/featuresarticle/2007/03/69572C45-D232-4FC4-B4BE-A5DE9F9FB97C.html>; *Amnesty Bill Clears Hurdle in Kabul*, N.Y. TIMES, Mar. 11, 2007; *Amnesty Bill to Allow War Crimes Trials*, WASH. POST, Mar. 11, 2007, at A21.

207. An earlier version of the law is available at [http://www.aihrc.org.af/charter\\_national\\_reconciliation.htm](http://www.aihrc.org.af/charter_national_reconciliation.htm). For analysis, see [http://thecenturyfoundation.typepad.com/aw/2007/03/barnett\\_rubin\\_r.html](http://thecenturyfoundation.typepad.com/aw/2007/03/barnett_rubin_r.html). Subsequently, President Karzai made amendments to the bill before it was re-passed. See Synovitz, *supra* note 206 (discussing revised bill).

who committed crimes against an individual.”<sup>208</sup> What is clear is that many of Afghanistan’s citizens regard meaningful accountability for abuses—past and present—as critical to their trust and confidence in the country’s developing legal and political institutions. Demonstrating accountability, in short, although complicated and difficult, is an integral part of moving forward to build the rule of law.

### C. *The Potential Impact of the ICC*

Most of the conflicts discussed in this Article took place before the International Criminal Court (ICC) was up and running.<sup>209</sup> In future conflicts, however, the ICC may have some leverage in encouraging credible national investigations and prosecutions of major atrocities. The ICC is designed explicitly to complement and encourage domestic legal action—not replace it. The Court will have jurisdiction over individuals accused of genocide, crimes against humanity, or war crimes only if states with jurisdiction are “unable or unwilling” “genuinely” to investigate or prosecute these cases.<sup>210</sup> The primacy of national jurisdiction—and the principle that the ICC is to be complementary to, not a substitute for, national action—reflects a realist core at the heart of the ICC statute: awareness that effective national action, including domestic political will and capacity, is an essential component of lasting accountability. The ICC does, however, provide a potential check—and a judicial forum—if domestic action falls short.

208. *Amnesty Bill Clears Hurdle in Kabul*, *supra* note 206 (quoting President Karzai). The amended bill provides that the amnesty “shall not affect individuals’ . . . criminal or civil claims against persons with respect to individual crimes;” but, under current circumstances, victims are unlikely to step forward and bring claims in the absence of support from the state. J. Alexander Thier & Scott Worden, Op-Ed, *Path to Peace, Justice in Afghanistan*, CHRISTIAN SCI. MON., Mar. 13, 2007, available at <http://www.csmonitor.com/2007/0313/p09s02-coop.html>.

209. The jurisdiction of the ICC took effect on July 1, 2002. This discussion of the ICC draws directly on Stromseth, *supra* note 13, at 3–4, 26–32, 36.

210. Rome Statute of the International Criminal Court art. 17, July 17, 1998, U.N. Doc. A/CONF. 183/9\*, 37 I.L.M. 999. Under the complementarity provisions of the ICC, a case is inadmissible if a state with jurisdiction has genuinely investigated the matter and prosecuted or made a good faith determination not to prosecute. States wishing to avoid ICC jurisdiction under the Rome Statute thus can take steps to ensure that they are able and willing to investigate and, if appropriate, to prosecute individuals domestically for ICC crimes. So ideally the impulses of sovereignty should combine with the prospect of international action to produce more effective national accountability efforts. For discussions of complementarity, see generally Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001); David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator’s Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 10–11 (2001).

In principle, the threat of possible ICC prosecution can help to prod and encourage responsible domestic investigation and prosecution of atrocities. Many states already have adapted their domestic criminal law to provide for national prosecution of genocide, crimes against humanity, and war crimes. This may be the ICC's most significant impact to date on strengthening domestic rule of law. In practice, however, the effectiveness of the ICC's prodding abilities will depend on the court's own credibility and legitimacy—and on domestic will and capacity in particular states.

Domestic reformers may sometimes welcome the threat of international action as a means to spur and support their own indigenous efforts.<sup>211</sup> But “there is a fine line between pressure that strengthens the hand of internal reformers and pressure that results in greater domestic resistance to perceived foreign interference.”<sup>212</sup> Also, domestic reformers must be in a position to translate international pressure into influence and effective national action. Even when there is domestic will to prosecute and to prevent atrocities, national capacity to do so effectively may be sorely lacking.

Gaps will exist, in any event, in the ICC's ability to serve as a lever to prod and encourage responsible domestic accountability processes. Many of the worst atrocities in recent memory occurred during internal conflicts. When perpetrators of atrocities come from the state on whose territory the crimes occurred, the ICC will be in a position to assert jurisdiction only if that state is a party to the ICC statute or otherwise consents.<sup>213</sup> Thus, many situations of internal conflict in which atrocities occur may not be amenable to the ICC's prodding function. In addition, atrocities committed before the ICC's jurisdiction took effect on July 1, 2002, will not be subject to prosecution before the Court.

Thus, the necessity of mechanisms and initiatives to encourage effective domestic accountability will persist. States will continue to differ profoundly in their willingness and capacity to hold individuals accountable for atrocities and take effective measures to prevent future atrocities. Different methods of strengthening and reinforcing domestic capacity—and different combinations of mechanisms and of national and international roles—will be needed, moreover, in response

211. See Dickinson, *supra* note 187, at 358–65.

212. *Id.* at 372. As in Indonesia, internal reformers can play the “nationalist card” in encouraging domestic accountability processes as an alternative to international action, but those resisting reform can do so as well.

213. Rome Statute of the International Criminal Court art. 12, July 17, 1998, U.N. Doc. A/CONF. 183/9\*, 37 I.L.M. 999.

to the particular goals, needs, and specific circumstances of states in the aftermath of atrocities. Finding an optimal relationship between domestic and international actors will not be easy in many cases, but the need for innovative hybrid accountability mechanisms will continue.<sup>214</sup>

#### CONCLUSION

To revisit this Article's basic question: can the pursuit of accountability for atrocities through criminal prosecutions and other methods help to build the rule of law and strengthen domestic justice systems in post-conflict societies? The answer is "yes, but." As argued here, accountability processes clearly are having a positive impact in a number of societies, but the effects of these efforts on domestic rule of law have been mixed, complex, and often unclear, and more research is needed to fully understand their longer-term impact.

Whether accountability processes have helped to strengthen the rule of law domestically depends, in part, on their demonstration effects and their capacity-building impact. On the positive side, criminal trials of major perpetrators can help disempower destructive actors and, if widely viewed as fair, can demonstrate that even leaders with political and economic clout are not above the law and that pervasive impunity for serious atrocities will no longer be tolerated. Trials can also provide some solace to victims or their families and help to remove impunity as a source of grievance more broadly. But if trials are seen as biased, they can have negative demonstration effects, reinforcing rather than diluting skepticism that law can be fair and reinforcing grounds for grievance. On the issue of capacity-building, an infusion of international resources can have positive effects, especially in hybrid tribunal arrangements that provide valuable direct experience to participating judges, prosecutors, investigators, defense counsel, and other staff, many of whom may then contribute to the domestic legal system. But, in the case of purely international tribunals, about two billion dollars have been spent with little discernible impact on domestic capacity-building. More specifically:

- The ICTY and the ICTR have accomplished a great deal in terms of bringing to justice, in fair legal proceedings, individuals accused of

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214. For a discussion of potential national and international roles and relationships in the pursuit of accountability, see Kritz, *Coming to Terms with Atrocities*, *supra* note 13, at 144–52; Turner, *supra* note 20; Stromseth, *supra* note 13, at 26–36. For a cautionary account of the potential pitfalls of national efforts, see BASS, *supra* note 15, at 304–10.

major atrocities. Nevertheless, these tribunals have had only a limited impact on demonstrating the importance of accountability and fair justice to critical domestic audiences or on helping to build capacity in the relevant national justice systems. With earlier and more effective outreach to local populations and more systematic capacity-building programs, these tribunals could have accomplished much more. They still have an opportunity to make a greater domestic impact if their completion strategies focus more attention and resources on the systematic strengthening of domestic capacities to handle complex war crimes cases.

- Even the hybrid tribunals have struggled to realize in practice their theoretical potential. By combining national and international staff and operating in the country that directly experienced the atrocities, hybrids—in principle at least—offer important benefits. But if they are not given adequate resources and support, hybrid arrangements may fall short of satisfying standards of legitimacy and credibility among international and domestic audiences alike. At a practical level, language barriers and less-than-systematic efforts at cross-fertilization and training can limit the prospects for genuine capacity-building. Kosovo's hybrid arrangement has suffered from a lack of legitimacy among domestic audiences. In East Timor, the hybrid tribunal's contributions both in accountability and capacity-building were constrained significantly by limited resources and by lack of political support.

- If they are designed and implemented well, however, hybrid tribunals can have significant, positive domestic effects. As the experience in Sierra Leone suggests, hybrid tribunals can pursue accountability fairly and credibly while strengthening local capacity and reaching out systematically to local populations. The longer-term impact of the Special Court's work remains to be seen, especially the impact of the trial of Charles Taylor. Although more remains to be done, the Special Court and its innovative outreach program have strengthened public awareness of the importance of accountability and contributed to domestic capacity-building.

- Still, criminal trials alone, even with ambitious outreach programs, are—at best—only part of what is needed to grapple with past atrocities or to build local capacity for justice. Combined approaches that also include truth and reconciliation mechanisms are more likely to produce more effective and far-reaching demonstration effects and capacity-building than trials alone. The truth and reconciliation commissions in East Timor and Sierra Leone—which operated contemporaneously with the hybrid criminal tribunals—played

a critical role in addressing the larger factors that led to atrocities, reaching out to victims, and recommending systemic reforms.

- Particularly in post-conflict societies where formal justice systems have limited geographic reach, community-based accountability proceedings that both enjoy local legitimacy and respect human rights can have an important immediate impact and also contribute to the longer-term goal of strengthening the rule of law. East Timor's Commission for Reception, Truth and Reconciliation, in particular, has made a difference in rural areas with limited access to formal justice: the commission's innovative reconciliation procedures have helped integrate individuals back into their communities, and the commission's deliberate effort to involve women and young people alongside traditional community leaders helped cultivate some potential new leaders.

This exploration of the links between accountability processes for past atrocities and forward-looking rule of law reform leads me to offer two final thoughts. First, more research is needed on the impact of accountability proceedings in different post-conflict societies. Seeking justice by holding major perpetrators legally accountable, of course, can and should be pursued as a matter of principle. Yet knowing more about the impact of different kinds of accountability mechanisms can help in designing approaches that can seek justice fairly and also contribute more effectively to building the rule of law domestically and to strengthening justice systems in post-conflict societies.

Second, international actors involved in designing accountability processes need to be both more bold and more humble at the same time. They need to be bolder in working to link accountability proceedings more clearly to longer-term efforts to build domestic capacity for the rule of law. Accountability processes should not be simply an endeavor totally apart from ongoing processes of reform: fair justice can be provided while also working to engage in innovative outreach to local communities, to build local legal capacity, and to develop synergies with local NGOs. Vision, energy, and resources are required to press ahead on multiple fronts.

Yet, international actors also need to show more humility and modesty regarding the ability of accountability processes to bind up the wounds of those who have suffered atrocities. The needs and aspirations of the people who endured the atrocities must be appreciated more fully, and their goals must be given greater attention in designing accountability efforts. Meaningful accountability for atrocities takes time, and communities may in fact need to move forward for awhile before they can effectively look backward. Furthermore, claiming too



much for accountability processes alone in meeting the often complex expectations of local communities can lead to deep disappointment. Even the fairest and most credible trials of those responsible for severe atrocities, the most systematic efforts at judicial capacity-building, or the best-designed reconciliation procedures will have only a limited long-term impact if the deeper cultural underpinnings of the rule of law—and the deeper obstacles to strengthening the rule of law in particular post-conflict societies—are not understood or addressed more effectively.