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Hybrid Tribunals & the Rule of Law

Notes from Bosnia & Herzegovina & Cambodia

By Olga Martin-Ortega & Johanna Herman

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1. Introduction*

Following the establishment of the international ad hoc tribunals, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively), a new model of justice administration emerged at the end of the 1990s through the development of hybrid or internationalised courts. Hybrid tribunals are conceived as a mixture of international and domestic law and staff, as a way to provide the necessary resources and guarantees for justice closer to those whose work matters to most. They have different compositions and legal frameworks depending on the context of the country. The first ones were established in Kosovo, Timor Leste and Sierra Leone These first hybrid mechanisms were seen as a new experiment for international justice.

Among the arguments for its establishment of these institutions were that they would be able not only to trial international crimes in conditions of impartiality but they would also contribute to the rebuilding of the post-conflict societies in which they are integrated. And they would do so by providing a model of justice and rule of law which would impact on the nascent or reformed national institutions, contribute to the capacity building of national staff and facilitate processes of social reconciliation. Now, ten years after the first internationalised tribunals were established, the Special Panels in Timor-Leste have finished their work, the Special Court for Sierra Leone (SCSL) is entering its final stages and the international judges and prosecutors programme in Kosovo has been handed from UNMIK to the EU. It is now the time to assess whether the praised positive effects have been able to be realised and to what extend new mechanisms have learnt the lessons of the previous ones.

This paper looks at the two most recent tribunals, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the War Crimes Chamber in the State Court of Bosnia and Herzegovina (WCC) and examines their practice related to the expectations that hybrid tribunals have raised in terms of peacebuilding. Based on the authors' fieldwork in Bosnia and Herzegovina and Cambodia, this paper focuses particularly on the tribunals' impact on the rebuilding of the rule of law, the strengthening of public institutions in the countries in which they operate and the perception of the public of their work. It considers the experience of the tribunals so far, problems and ongoing challenges in order to draw some lessons which can impact both their future work and other potential tribunals in post-conflict settings.

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* About the authors: Dr. Olga Martin Ortega is Senior Research Fellow at the Centre on Human Rights in Conflict at the University of East London School of Law (o.martin-ortega@uel.ac.uk) and Johanna Herman is Research Fellow at the Centre on Human Rights in Conflict at the University of East London School of Law (j.herman@uel.ac.uk) The final version of this paper will be published as Olga Martin-Ortega and Johanna Herman, "The impact of hybrid tribunals: Current practice in Bosnia and Herzegovina and Cambodia", in Michael Reed and Amanda Lyons (eds.), *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience* (Bogota: International Center for Transitional Justice, forthcoming 2010), see www.ictj.org. We are grateful to Chandra Lekha Sriram and Iva Vukušić for their comments to earlier versions of this work.

2. Hybrid tribunals and peacebuilding

Peacebuilding and transitional justice processes take place within the same context and timeframe since they both concentrate on the post-conflict period and the needs of a recovering society. Analysis of the complicated relationship between the two fields has traditionally put them in opposition in the so-called "peace vs. justice debate". This discussion emphasises the potential disruptive effects that pursuing accountability in a post-conflict environment could have over the advancements towards peace. However, a growing practice and literature highlights the complementarities between transitional justice and peacebuilding.[1] In this regard, transitional justice initiatives could potentially be linked to peacebuilding activities, with both ultimately aiming to establish the basis for a democratic society compliant with human rights, capable of withstanding social tension and avoiding the repetition of atrocities. This link is more explicit regarding activities to restore of the rule of law and is explored further below.[2]

Since the growth of multi-dimensional peace operations in the 1990s, the international community now carries out a number of peacebuilding activities after conflict to reconstruct both physical infrastructure and social structures. Peacebuilding efforts focus on a number of activities, including among others, the disarmament, demobilisation and reintegration of ex-combatants, reform of the security sector, repatriating refugees, monitoring elections, protection of human rights and reforming or strengthening government institutions. The rule of law has been a focus for peacebuilding since the early 1990s and is highly important to UN efforts, as demonstrated by the 2004 Secretary General report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.[3] Programming in the rule of law aims to guarantee governance which is compliant with international law and international human rights norms.[4] Activities in this area depend on the particular country context but can include electoral assistance reform, restructuring, and rebuilding of police and law enforcement services; the strengthening of legal and judicial systems; and the reinforcement or rebuilding of prison system and facilities.[5] The nature of the activities

[1] See for example, Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *Transitional Justice and Peacebuilding Strategies: Considerations for Policymakers*, Policy Brief, Just and Durable Peace, No. 2, July 2009, available at www.justpeace.se (last visited 12/02/2010); Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence', *International Journal of Transitional Justice,* vol. 3, 1, 2009, pp. 28-48.

[2] This link has been acknowledged in the UN Secretary-General's report, *The rule of law and transitional justice in conflict and post-conflict societies* UN Doc. A/2004/61 (23 August 2004). However, although they often overlap, it should not be assumed that transitional justice activities automatically support rule of law programming and vice versa.

[3] UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*.

[4] On the definition of rule of law in the context of peacebuilding see, Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, "Promoting Rule of Law: from Liberal to Institutional Peacebuilding", in Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *Peacebuilding and rule of law in Africa: Just Peace?,* (Oxon: Routledge, forthcoming 2010).

[5] Robert Pulver, "Rule of Law, Peacekeeping and the United Nations", in Sriram, Martin-Ortega and Herman, *Peacebuilding and rule of law in Africa*. As the author points out in addition to criminal justice,

undertaken means that work on the rule of law is part of a long-term strategy that entails a wide range of actors and involvement in a number of sectors. The aim is to achieve a justice and security system that is effective, professionalised and compliant with human rights standards.

Hybrid tribunals fulfil one of the most important goals of transitional justice; to achieve justice after conflict through the prosecution of the perpetrators of the most serious violations of human rights.[6] They also have the potential to positively interact with peacebuilding activities, particularly the promotion of rule of law and reform of the judicial sector and the justice system as a whole.[7] These tribunals have not followed one unique model, but are all located within the country in which the atrocities took place; they have local and international staff and use a set of substantive and procedural norms based on both national and international standards. In addition, they are financially supported in whole or part by the international community. Hybrid tribunals developed as a response to both the cost and distance of the ad hoc tribunals and the impunity or bias perpetuated by domestic prosecutions. The mix of international and domestic components have been seen as better suited to address the needs of countries emerging from conflict,[8] and as having the potential to achieve the "best of both worlds" in the attempt to promote justice after conflict.[9] The presence of the international element is thought to guarantee expeditious prosecutions, impartiality and compliance with international human rights standards and international criminal law[10] as well as supply capacity if lacking in the country. Further, the fact that they take place where atrocities were committed provides the advantage that national staff are familiar with the language, territory and social behaviour of those involved in the trials and provides greater accessibility to evidence and witnesses.[11]

From a transitional justice perspective, the prosecutions could have an important potential impact in a post-conflict society. In the first place, the presence of an international element guarantees impartiality and the necessary safeguards for both victims and perpetrators. Equally, prosecution by the tribunals contributes to establishing an official record of the crimes committed by the individuals on trial and other facts pertaining to the conflict.[12] However, they also expose the local population to past atrocities, which may have a cathartic effect for the victims but could also be destabilising politically if specific communities or groups feel targeted by the prosecutions or if victims do not feel their grievances are being redressed.[13]

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peace operations engage on a wide range of non-criminal matters, which include from constitutional reform, land tenure to citizenship and identification processes.

[6] On hybrid tribunals in general see, "Hybrid Tribunals", in Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *War, Conflict and Human Rights* (Oxon: Routledge, 2009), pp. 195-213.

[7] Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, vol. 97, 2003, p. 307.

[8] Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (Oxon: Routledge, 2006), p. 80.

[9] Beth Dougherty, 'Right-sizing international justice: The Hybrid Experiment at the Special Court for Sierra Leone', *International Affairs*, vol. 80, 2004, pp. 311-328.

[10] Antonio Cassese, "The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality", in Cesare Romano, André Nollkaemper, and Jann Kleffner, *Internationalised Courts. Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004), p. 6.

[11] *Ibid.*

[12] Michael P. Scharf, "Trading Justice for Peace: The Contemporary Law and Policy Debate", in Edel Huges, William A. Schabas and Ramesh Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice* (New York, United Nations University Press, 2007), p. 251.

[13] See for example, Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal,* vol. 1000, pp. 2537-2615; Stephan Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions", *Laws and Contemporary Problems*, vol. 59, pp. 81-92.

From a peacebuilding point of view, these tribunals have a potential positive impact on the domestic justice system and human rights compliance of national public institutions.[14] They could produce a significant spill-over effect, contributing to the promotion of democratic legal training of local staff.[15] Capacity building of national staff and the provision of better facilities and increased financial resources may ensure that standards are raised after the institution's work has finished. They may also be able to contribute to broader programmes of legal reform in the country.[16] Furthermore, hybrid tribunals could have an important demonstration effect, which is important for both peacebuilding and transitional justice aims. Their activity does not only reassure victims, former perpetrators and the general public that there is no impunity for those that are responsible for perpetrating war crimes, but could have an impact by demonstrating how the proceedings take place, both impartially and in compliance with the law. This may increase public trust in justice and national institutions and reinforce the democratic process.[17]

But it is important to remember the limitations of internationalized courts and try not to set unrealistic goals or expectations.[18] What many commentators seem to forget is that first and foremost, the overall objective of these courts and other prosecutorial mechanisms is to carry out criminal prosecutions. If the limitations of hybrid courts are recognised and realistic objectives set, they may be able to contribute to the broader strategy of rule of law especially with the wide range of resources and expertise that are available to them.[19]

In this paper we will first look at the establishment and work of the WCC and ECCC and present the rule of law context in each country. We will then turn to an evaluation of their work and reflect upon whether they maximise the impact of their work on the domestic legal system through capacity building and legal reform and how they affect public perception of rule of law.

[14] OHCHR, *Rule of law tools for post-conflict states: Maximizing the legacy of hybrid courts*, 2008, p. 1; Jane Stromseth, "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?", *Hague Journal on the Rule of Law*, vol. 1, 2009, pp.87-97.
[15] Cassese, "The Role of Internationalised Courts and Tribunals", p. 6.
[16] Stromseth, "Justice on the Ground", pp. 94-97.
[17] *Ibid*, pp. 92-94.
[18] Jane Stromseth, "Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?", *Georgetown Journal of International Law,* 2006-2007, pp. 221-22
[19] *Ibid;* Stromseth, "Justice on the Ground", p. 94; OHCHR, *Rule of law tools for post-conflict states*, p. 2.

3. History and composition of the hybrid tribunals and the rule of law context in Bosnia and Herzegovina and Cambodia

3.1 The establishment of the tribunals

The establishment of the WCC emerged from a firm decision of the international community with the agreement of national authorities,[20] while the development of the ECCC was a much longer and difficult process. They are both national institutions with international support; however, the WCC is conceived to ultimately become a fully operational national institution without any presence of internationals to proceed with its future work.[21] In contrast, the ECCC has a 3 year mandate and its jurisdiction is limited to those most responsible for the crimes of the Khmer Rouge with international involvement throughout the life of the ECCC. This difference is interesting because the WCC was established without consultation with national actors but is envisaged to become fully nationalised while the ECCC hit many stumbling blocks in negotiations between the UN and the Royal Government of Cambodia (RGC). The international community perceives that international involvement is crucial to the effectiveness of the ECCC's work. This means that the possibility of a similar structure to the WCC was never raised and it always had a much more limited scope for prosecutions.

Prosecutions of war crimes and crimes against humanity in Bosnia and Herzegovina (BiH) have been developed at three levels: The ICTY, the WCC, and national courts –both at cantonal and district level.[22] Together they handle several thousands of cases. The ICTY is scheduled to cease operations in 2013.[23] As part of its completion strategy, the ICTY has been transferring its functions to the national courts, including 6 cases concerning 10 accused to BiH. The WCC was established both as a response to the need for closure of the ICTY and the fact that national prosecution had previously created serious problems in terms of international justice standards and potential destabilization and ethnic tensions in the country.[24] The WCC was created as part of the

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[20] *Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as Well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex thereto* (signed 26/09/2006), www.hjpc.ba (29/01/2010).

[21] *Ibid*. The original agreement established the Transitional Council to advise and coordinate the transition of the Registry into national institutions (art. 4) and provisions to integrate the Registry staff and property (art. 7)

[22] The Dayton Peace Agreement established the current territorial and administrative division of BiH into two entities: Republika Srpska and the Federation of BiH and the autonomous district of Brčko. Each entity has its own governmental and judiciary structure. The Federation of BiH is divided in 10 cantons.

[23] ICTY, *Completion Strategy,* www.icty.org (28/01/2010).

[24] Prosecution for war crimes at domestic level in the early post-war years were tinged by fears of impartiality, especially in mono-ethnic territories, where national courts lacked independence from the

Criminal Division of the BiH State Court and was officially inaugurated on May 9 2005. It opened its first trial in September that year. The State Court in general, and therefore also the WCC, was conceived as a national institution, which was hybrid at the start but would become wholly run by national personnel over the course of five years. This was an innovation in the context of war crimes trials in neighbouring Kosovo or the Special Court of Sierra Leone and was intended to ensure greater domestic ownership of the process.

It had been intended that by December 2009 the State Court would become a fully national institution financed by the national budget. However, many called for the mandate of the international judges and prosecutors, as well as human resources and financial support, to be extended. This was mainly due to perceived risks for the Court, both from political attacks and from the uncertainty over financing of activities.[25] The issue became a highly charged political one with the High Representative taking the executive decision to impose this measure. The mandate of international judges and prosecutors at the War Crimes Chamber has been extended until December 2012. [26]

The establishment of the ECCC took many years of difficult negotiations over the nature of international participation. Prior to the establishment of the ECC there had been few attempts at justice for Khmer Rouge perpetrators.[27] The question of accountability for human rights abuses was not really addressed until 1997 when a UN appointed Group of Experts released their report on the accountability for crimes committed during the Khmer Rouge period. They found that due to the problems in the Cambodian domestic judicial system - such as government interference, corruption and lack of capacity - an international criminal tribunal would be the best option.[28] The report also stated that the best location was to be outside of Cambodia.[29] However, Prime Minister Hun Sen wanted to limit international involvement in a tribunal and the RGC refused to cooperate with any form of tribunal outside of the country leading to a period of deadlock in negotiations.[30] Finally, the suggestion of a hybrid model seemed to strike a compromise.[31] However, the UN and the RGC had very different opinions on the hybrid tribunal which set the scene for a further 7 years of fraught negotiations. The RGC wanted a majority of Cambodian judges while the UN wanted an international majority.[32] The UN hoped to avoid a situation where the Cambodian judges could potentially ignore the international judges and therefore avoid any sort of undue influence or interference by the government.

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dominant nationalistic political parties, and arbitrary arrests were a common feature. See for example, Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro*, October 2004, Vol. 16, No. 7(D); OSCE Mission to BiH, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina. Progress and Obstacles,* March 2005. This lack of impartiality prompted the creation of a system of supervision of the ICTY over national prosecution, the so-called "Rules of the Road",

[25] Author interviews, Sarajevo, August-September 2009.

[26] OHR, *Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina*, 14 December 2009, www.ohr.int (13/01/2010).

[27] In 1979 Pol Pot and Ieng Sary were found guilty of genocide *in absentia* in what has widely been considered a show trial that failed to follow due process. Suzannah Linton, "Putting Cambodia's Extraordinary Chambers into context", Singapore Year Book of International Law 11 (2007) p. 211.

[28] *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, 16 March 1999, paras. 178-179

[29] *Ibid*, para 171.

[30] Thomas Hammarberg, "Efforts to establish a tribunal against the Khmer Rouge leaders: discussions between the Cambodian government and the UN", paper presented at a seminar organised by SIDA, Stockholm, 29 May 2001, p. 13.

[31] *Ibid*, p. 16.

[32] *Ibid*, p.19.

Following a proposal from the US, all decisions would be made on the basis of a supermajority.[33] The supermajority rule meant that at least one foreign judge would have to agree with the Cambodian judges and there would at least be a basic level of consensus. The UN was still not happy with this, but ultimately, following pressure from a number of member states to compromise on the question of the majority of international judges the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea* was signed by the UN and the RGC in June 2003, and was approved by the National Assembly and Senate in October 2004.

3.2 Composition and functioning of the tribunals

As these brief histories demonstrate, the motivations behind each hybrid tribunal in each country are quite different, and this is reflected in their composition. In fact, both the models in BiH and Cambodia have unique aspects, based on their particular context, that are different to the hybrid models tried elsewhere. The WCC aims to guarantee that domestic prosecution is up to international standards, but is part of a wider strategy of strengthening the rule of law and creating national capacity, which led to several key institutions in the country to be established with a hybrid composition.[34] The ECCC, as exemplified by the need to establish the supermajority formula, was partly set up to ensure that the problems of the domestic system, such as political interference and corruption, were not replicated within the court.

An interesting fixture of both tribunals is that they combine elements of procedure of both civil and common law jurisdictions. In BiH the reform of the Criminal Procedural Code introduced elements of common law, such as the change from an inquisitive criminal procedure to an adversarial one, therefore shifting the responsibility of marshalling a case from the investigative judge to the prosecutor. It has also meant other changes such as the introduction of plea agreements or cross examination of witnesses that were completely unknown in the Bosnian legal system. Cambodia's legal system is based on civil law. The set up of the ECCC has therefore reflected the domestic legal system and certain elements have been used for the first time in a hybrid tribunal, which make this court particularly unique. These are the presence of two investigative judges (in addition to two prosecutors) and the possibility that victims can participate as *partie civiles* during the trial or can file complains. This is one of the most innovative elements of the ECCC, which can also award collective or moral reparations to the victims.

The WCC has five first-instance court panels and two appellate panels, which are currently composed by three judges. The initial composition of the chambers at the WCC was of two international judges and one national judge, who was often the president of the chamber, but in 2008 this changed to one international judge and two national judges. This transition was planned from the beginning.[35] As of January 2010 there are 41 national judges and 7 international judges. International prosecutors have not been

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[33] *Ibid*, p.22.

[34] Other institutions which have a combination of national and international staff working side by side are the Organised Crime, Economic Crime and Corruption Chamber of the State Court, the High Judicial and Prosecutorial Council (HJPC), the Constitutional Court and the now extinct Human Rights Commission.

[35] OHR, *War Crimes Chamber Project. Project Implementation Plan.Registry Project Report,* 2004, p. 8, www.ohr.int,(11/02/2010).

as numerous as international judges, and they have been a minority with regards to national prosecutors from the beginning. However, the Head of the Special Department for War Crimes of the Office of the Prosecutor (OTP) and Deputy Chief Prosecutor was international. All the internationals, including the Head of the Special Department, left the OTP in December 2010 even though their mandate was extended at the last minute. The composition of both the WCC and the Special Department of the OTP represents the main three ethnic groups in the country.[36] The Registry was originally a separate body under international leadership, which would later be integrated in the State Court and is currently composed by national staff. Finally, the Defense Office, OKO, had an international director and deputy director until May 2007 when a national lawyer took over the role of director. The rest of the staff is national, with occasional support from international lawyers.

The WCC has competence for the crimes contained in the Criminal Code of BiH, which specifically criminalises crimes against humanity, genocide and war crimes, giving it jurisdiction over a great number of cases. Since September 2005 to February 2010, verdicts have been pronounced in first instance for 35 persons and another 35 in second instance, and 118 accused have cases pending before the War Crimes Chamber.[37] This is very significant if it is put in perspective and compared, for example with the amount of cases dealt with by the ICTY.[38]

The ECCC has a mandate "to bring to trial senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognised by Cambodia that were committed during the period from 17 April 1975 to 6 January 1979."[39] The Pre-Trial Chamber and Trial Chamber both have 5 judges (3 Cambodian and 2 international). For these two chambers to reach an affirmative vote, 4 judges are required to make a 'supermajority'. The Supreme Court Chamber has 7 judges (4 Cambodian and 3 international) with 5 votes required for a 'supermajority'. As mentioned before, in addition to the two co-prosecutors, (one Cambodian and one international) there are also two co-investigating judges (one Cambodian and one international). The Defense Support Section (DSS), Office of Administration and Victims Unit have a mix of international and Cambodian staff.[40]

The ECCC began operation in February 2006 and since it has a very different mandate to the WCC only a limited number of accused are on trial. Whilst in BiH there seems to be an intention to prosecute as many perpetrators as possible, with the National War Crimes Prosecution Strategy stating that 6,000 of them remained under investigation in 2008, [41] in Cambodia only 5 individuals are on trial in the ECCC and

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[36] There have also been complaints that there is an over representation of Bosniaks among Court staff. The fact that more staff are of Bosniak origin could be explained in demographic terms, as they are the majority of the population in Sarajevo, and there are no provisions to subsidise the move from other parts of the country of Court staff or their families, which might act as a disincentive to relocate to Sarajevo to work at the State Court.

[37] Data provided by PIOS on email exchange with the author, February 2010.

[38] The ICTY has indicted 161 persons and conducted 120 proceedings in 89 cases since 1993, ICTY Key Figures, www.icty.org (2/11/2009).

[39] *Law on the establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004*, Chapter I, Article 1.

[40] The Defence Support Section is headed by an international, the Victims Unit is headed by a Cambodian national and the Office of Administration has a Cambodian Director and international Deputy Director.

[41] According to the Bosnian National War Crimes Prosecution Strategy, approved in December 2008 by the Council of Ministers of BiH, there are 10,000 suspects, of whom 6,000 remain under active investigation. Its first objective is to prosecute the most complex and top priority war crimes cases within 7 years of the adoption of the strategy and the rest of the cases within 15 years. This document is been reproduced in

there is controversy regarding increasing this number. The case of Kaing Guek Eav or "Duch" is known as case 001 and the other four accused, Ieng Sary, Ieng Thirith Khieu Samphan and Nuon Chea will be tried at the same time in case 002.[42]

3.3 Rule of law in Bosnia and Herzegovina and Cambodia

The war in Bosnia had a significant impact on the justice system, with relocation of judges and prosecutors distorting the prior ethnic distribution of professionals and a significant number of members of the judiciary appointed for ethnic and political reasons, doubling the number of judges before the war.[43]At the end of the war, not only was there a massive backlog of cases but the judiciary had become an instrument of ethnic discrimination by implementing laws in a bias and politically influenced way.[44] The influence of nationalistic political parties was notorious before and after the war on sectors of the judiciary and the prosecution, which were open to corruption.[45] Therefore, judicial institutions were highly distrusted by the general public. The promotion of rule of law, even if neglected in the early stages of post-conflict reconstruction in BiH, has now been on the international agenda since 1998, when the UN Judicial System Assessment Programme was created, and more systematically since 2002 when the High Representative presented its strategy for the reform of the justice sector.[46] The most important reforms included vetting and reappointment of judicial staff, the establishment of independent bodies for the appointment and review of judges and prosecutors, the passing of new Criminal and Criminal Procedure Codes at state level, the passing of a law on witness protection and the establishment of the State Court, with jurisdiction in the whole of BiH. The High Judicial and Prosecutorial Council (HJPC) was established as the state body in charge of appointment and discipline of judges and prosecutors.[47] This body is central to judicial development and performs an important role in the promotion of rule of law efforts in the country. In fact, since July 2006, the HJPC is in charge of the appointment of international judges and prosecutors. As mentioned, the WCC is a Section of the State Court; therefore the establishment of the WCC was not only part of the completion strategy of the ICTY, but also embedded in the wider judicial reform of the country, and in particular, to provide the justice system with the tools and capacity to prosecute and carry out war crimes trials according to international standards.[48]

Annex 2 of the Forum for International Criminal and Humanitarian Law, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, 2009.

[42] Duch was the head of the S-21 prison, where thousands of people were tortured and killed. He is indicted with crimes against humanity and grave breaches of the Geneva Conventions. Ieng Sary, former Deputy Prime Minister and former Foreign Minister and his wife Ieng Thirith, Khieu Samphan, President during the Khmer Rouge and Nuon Chea, the second in command to Pol Pot - known as Brother Number Two- have been charged with crimes against humanity and war crimes and recently all four have been charged with the crime of genocide.

[43] UNDP, *Justice and Truth in BiH. Public perceptions*, EWS Special Report (UNDP, Sarajevo, 2006), p. 8; Doyle, Michael H., "Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina, in Charles T. Call (ed.), *Constructing Justice and Security After War* (Washington D.C., USIP, 2007), p. 248.

[44] Doyle, "Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina", p. 248. ICG, *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*, Balkans Report No. 127 (Sarajevo/Brussels: ICJ, 2002).

[45] UNMIBiH-Judicial Assessment Programme, *Thematic Report 9-Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina* (November 2000), www.esiweb.org (18/012010).

[46] OHR, *Jobs and Justice: Our Agenda*, May 2002, www.ohr.int (14/012010).

[47] Author interview, Sarajevo, August-September 2009.

[48] OHR, *War Crimes Chamber Project*.

Over the past fifteen years, Cambodia has entered a period of stability with strong economic growth. However there are still a number of concerns. The huge amount of international support to Cambodia is reflected in the $5 billion disbursed between 1991 and 2002. Despite all this foreign assistance, there are still ongoing political crises, a lack of democracy, widespread corruption, a legacy of impunity and a precarious human rights situation. Following the devastation carried out by the Khmer Rouge, the legal profession in the country was decimated.[49] During the time of the People's Republic of Kampuchea little was done to rebuild the legal system and although there was willingness to focus on the sector once Hun Sen became Prime Minister in 1989 the problem was resources and personnel.[50] The legal and judicial reform policy of the RGC was established in 1998 after the elections. Prime Minister Hun Sen stated that rule of law was one of the issues that the RGC would consider as a priority in order to establish strong sustainable political power in society.[51] Within the framework of legal and judicial reform, the RGC focused on strengthening judicial independence, justice, trust and respect for the law.[52] The Council for Legal and Judicial Reform was established in 2002 and has responsibility for monitoring the implementation of the policy and program of justice reform.[53] After the 2004 elections, the RGC again claimed that legal and judicial reform was a priority.[54] A plan of action for implementing legal and judicial reform was adopted in April 2005 with the following goal "The establishment of a credible and stable legal and judicial sector upholding the principles of the rights of the individual, the rule of law and the separation of powers in a liberal democracy fostering private sector led economic growth."[55] However, despite these strategies and goals the RGC has been criticised for its poor record on rule of law by successive Special Representatives of the Secretary-General on Human Rights in Cambodia and very little of their recommendations have been implemented.[56] In 2006 the High Commissioner for Human Rights stated that court reform was the most important area in the country requiring progress.[57] Although since the end of the UNTAC period in 1993 there has been a great amount of resources devoted to the rule of law sector, [58] there are severe problems with prosecutorial independence and the independence of the judiciary. For example, it is well known that judges accept bribes or have to submit to political interference.[59] The problems within the judiciary can be seen as the problems emblematic within post-conflict Cambodia and inherent to the wider

[49] Frederick Brown ed., *Rebuilding Cambodia: human resources, human rights, and law* (Washington: Foreign Policy Institute, 1993), p.69.
[50] *Ibid*, p.69-70
[51] Council for Legal and Judicial Reform, Office of the Council of Ministers, Bulletin: Legal and Judicial Reform, No. 01, October-December 2008, p.1.
[52] *Ibid*, p.8.
[53] *Ibid*, p.4.
[54] *Ibid*, p.8.
[55] *Ibid,* p.3.
[56] Please see for example, Yash Ghai, *Technical Assistance and Capacity-building: Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai*, 29 February 2008, UN doc A/HRC/7/42 and Peter Leuprecht, Special Representative of the Secretary-General for Human Rights in Cambodia, *Continuing patterns of impunity in Cambodia*, October 2005, www.ohchr.org (1/02/2010).
[57] Yash Ghai, *Technical assistance and capacity-building*, para. 8.
[58] There are many active donors in the rule of sector. The Program on Rights and Justice (PRAJ) is funded by USAID and implemented by the East-West Management Institute and the American Bar Association, www.ewmi-praj.org. The Cambodia Criminal Justice Assistance Project is an AusAid project improving service delivery across the legal and judicial sectors, www.ccjap.org.kh. UNDP has an Access to Justice project to bridge the gap between the formal and informal justice systems, www.un.org.kh/undp. .
[59] Author interviews, Phnom Penh, September 2009.

political system, where power is based on patronage.[60] There is also a severe lack of material and human resources.[61] With such fundamental problems within the legal and judicial sector, there is therefore a great deal of scope in terms of work to impact the weak rule of law in the country. In fact, most donors justify their financial support to the ECCC by claiming that it will improve the rule of law in Cambodia. For example, Japan the biggest donor to the tribunal, states that the process will promote democracy, the rule of law and good governance in Cambodia.[62] However, despite this rhetoric, as we will explore below it is much more difficult to implement these aims in practice.

[60] Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia" in Joakim Öjendal and Mona Lilja (eds) *Beyond democracy in Cambodia* (Copenhagen: Nias, 2009) p.95.
[61] *Ibid*, p.75.
[62] Embassy of Japan, Japanese ODA News Japanese Assistance for the project to enhance judicial process of the ECCC, June 17, 2008.

4. The impact of the WCC and the ECCC on the rule of law in Bosnia and Herzegovina and Cambodia

4.1. Impact on the domestic justice system

a) General impact over the justice system

Hybrid tribunals have the potential to impact national justice systems by strengthening national justice institutions and encouraging fairer processes.[63] The impact of the two tribunals on the national justice system has been significantly different in both countries in general. The experience of both tribunals demonstrates the difficulties in changing the legal culture or trying to form a 'rule of law culture'.[64] Therefore any attempts by hybrid courts to engage with the (re)building of the rule of law need to be realistic and more limited in scope, rather than trying to impact "rule of law" in a broad manner. The State Court in BiH plays a very significant role in developing new judicial practice under the reformed criminal laws and procedures of the country, referred to above. A systematic application of the law and coherent jurisprudential development is key in establishing regularised procedures and implementing norms in a fair way. In this sense, in BiH the role played by the WCC, and the State Court in general, has been important in order to strengthen the judiciary as a whole, especially by improving its perception regarding the application of such rules and procedures in an impartial and professional way.[65] However, such impact is diminished by the fact that it is seen as a very specialised court with its own competences and therefore unable to interact on a day-to-day basis with the rest of the judicial domestic system. Added to this fact are the tensions and competition over jurisdiction and resources that have arisen with respect to the entity courts that are involved in prosecution of human rights violations during the conflict at the local level, which are the only ones which would need to have a working relationship with the WCC.[66]

In Cambodia, the ECCC faces a real challenge in trying to change the culture of the Cambodian domestic legal system. The politicized nature of the judicial system means that most judges are perceived to serve the interest of political parties.[67] There is little legal reasoning involved in judges' decisions, which tend to be very short and trials of even serious offences can last only an hour.[68] Therefore, many international observers

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[63] Stromseth, "Pursuing Accountability for Atrocities After Conflict", p. 266. The author also considers that justice on the ground depends on the tangible capacity-building by international and hybrid courts to strengthen struggling domestic justice system. This is what she refers to as the supply side of justice on the ground, Stromseth, "Justice on the Ground", p. 94-95.

[64] Jane Stromseth, David Wippman and Rosa Brooks, *Can might make rights? Building the rule of law after military interventions* (New York: Cambridge University Press, 2007), pp. 310-316.

[65] Author interviews, Sarajevo, August-September 2009.

[66] Bogdan Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (New York: ICTJ, 2008); Author interviews, Sarajevo, August-September 2009.

[67] Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia", p.88.

[68] Author interview, Phnom Penh, September 2009.

reported that just getting basic messages across to the domestic system of fair trial principles, rights of the defence and how the prosecution should present a case would be a real achievement.[69] There is no tradition of written legal culture, so seeing the example of the drafting of legal documents may have an impact. Two issues however could diminish this potential positive effect. Firstly, the ECCC and the national judicial system are not even comparable in terms of resources. This has an impact when assessing whether elements of the court's work could be transferred to the domestic system. For example, the Ministry of Justice has 1% of the ECCC's budget to run 25 courts in the country and it is difficult to envision how replicating practices such as computerised case management could be transferred or used in the domestic system. Secondly, the reported lack of political will from the RGC in improving the rule of law sector in order to continue its control of the judiciary is a significant obstacle to any progress.[70] This fundamental block at the executive level, means that any attempts at impact by the ECCC on the rule of law may make some positive change but will be unable to build a "rule of law culture", which needs structural change.[71]

b) Capacity building and training

It is clear from the section above that it is very difficult to change the legal culture or context in the short-term and it is beyond the scope of the work of hybrid tribunals to achieve this themselves. However, one way that both tribunals can contribute is through capacity building and training. In both BiH and Cambodia it was hoped that the experience of the international judges and lawyers, some of whom have worked at other international tribunals or courts of the highest levels in their own country or even in previous international tribunals may contribute to the training of the judicial and legal profession. In particular, in BiH, three judges brought the experience of the ICTY with them, where they previously worked as prosecutors, and one other judge from the UNMIK panels in Kosovo. Therefore, one argument for hybrid composition is that it would hopefully impact the domestic system in terms of capacity building.[72] This could potentially be done in 2 complementary ways: 1) that the international staff share skills and knowledge with national staff within the court through everyday working practices and specific departmental or institution-only training 2) that the international staff, and courts as an institution train or engage with the judicial and legal domestic actors outside of the court. We explore both of these methods below.

- Capacity building and training within the institution

An important element of training that should be planned for in future internationalised tribunals or other transitional justice institutions is that training should not only be aimed at or considered necessary for only national staff. It is of course desirable that international staff have previous experience and knowledge of international law,[73] but if they do not have such a background, training needs to be formally organised in that area as well as in the national laws and procedures.

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[69] Author interviews, Phnom Penh, September 2009.

[70] Tara Urs, "Imagining locally-motivated accountability for mass atrocities: Voices from Cambodia", Sur – International journal on human rights, Issue 7, p.3, www.surjournal.org (1/02/2010).

[71] *Ibid*, p. 5.

[72] Dickinson, "The promise of hybrid courts", p. 307.

[73] As Romano points out it is surprising, considering the nature of the cases that international judges and prosecutors deal with at internationalised courts and the need to handle international legal issues of high complexity, that particular expertise in this area of law is not considered a decisive requirement for the selection of candidates, Cesare Romano "The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals", in Romano, Nollkaemper, and Kleffner, *Internationalised Courts* , p. 251.

In BiH the presence of international staff has been particularly important in terms of court management and on the implementation of the specific figures that have been introduced anew in the Bosnian legal system. The general feeling is that there has been a joint learning process than a direct teaching exercise from internationals to locals.[74] Nevertheless, some resentment has been expressed in the fact that some of the international staff themselves did not necessarily have training in international humanitarian law and international crimes.[75] The Court now has its own Judicial Education Committee, composed by 6 nationals and two internationals, with competence over the educational needs within the court.[76] Training within the Court was not highly regarded until the recently developed Judicial College, created on the initiative of two international judges in 2006.[77] It consists of the annual organisation of specialised workshops in a location outside of Sarajevo where judges, legal officers and other court staff can work and socialise together, promoting both knowledge exchange and team building.[78] The issues covered by the Colleges include efficiency, credibility of witnesses and jurisdiction of the court. It is national staff who select the topics for discussion of most interest to them. This has been an important exercise of handing over responsibility from international to national staff.[79] The Defense section, OKO, has also carried out training both for the defense lawyers acting before the court and more widely.[80] Early on at the ECCC in Cambodia there were training courses on international humanitarian law for judges and prosecutors.[81] The ECCC has also been assisted by the Open Society Justice Initiative (OSJI) and the Asian International Justice Initiative (AIJI),[82] including training for national and international staff of the Office of Co-Investigating Judges and Office of Co-Prosecutors and training on international criminal law.[83] Importantly, at the early stages they trained not only nationals, but also

[74] Author interviews, Sarajevo, August-September 2009.
[75] Author interviews, Sarajevo, August-September 2009.
[76] International judges took the initiative to create a Judicial Education Committee to take over the organisation of the Judicial College and serve over functions. The committee was endorsed by the President and set up in 2008, with international Judge Whalen as its Chair. It meets regularly to discuss the educational needs of the court, it screens the many requests for funding and training offers by donors, as well as develops criteria for who should attend trainings offered offsite and internationally. The Committee also oversees education for the legal officers, with excellent results, author email exchange, February, 2010.
[77] The Judicial College, modelled after the Vermont Judicial College, started under the impulse of Judge Fisher and was latter taken over by Judge Whalen. Author interviews, Sarajevo, August-September 2009, Brussels, February 2010. According to the UNDP project "Bosnia and Herzegovina: Support to the Establishment of the War Crimes Chamber in BiH: Training of Legal professionals" by October 2007 around 80 national and international speakers had been gathered in over 45 different capacity building exercises, see http://europeandcis.undp.org (8/02/2010).
[78] The 2007 Judicial College on "Efficiency Takes Time" was attended by over 70 participants (www.undp.ba, 8/02/2010). In 2008 the proposed Judicial College on accessing credibility of witnesses had to be held in-house without funding as UNDP's funding partner did not agree to hold the event outside of Sarajevo. In 2009 the title of the Judicial College was "Grant and Deny", author's email exchange, February 2010.
[79] In 2009 nationals took responsibility for the development and implementation of 50 per cent of the program. In 2010 and 2011 the plan is to have internationals responsible for only 25 per cent with nationals totally responsible for the College in 2012.
[80] Author's interview, Sarajevo, August-September 2009.
[81] Training carried out in association with UNDP, the Royal School of Judges and Prosecutors and the Bar Association of the Kingdom of Cambodia.
[82] AIJI asked the ECCC to come up with the key issues that needed to be covered and then brought in people with the corresponding expertise from around the world. The OSJI also produced a handbook on international criminal law.
[83] Alejandro Chehtman and Ruth Mackenzie, *Capacity Development in International Criminal Justice: A Mapping Exercise Of Existing Practice*, DOMAC/2, September 2009, Annex p.19.

international judges, as few of them had experience with other internationalized tribunals. Of the seven international judges, only one judge and two reserve judges had experience at other international criminal tribunals.[84] There has also been a great deal of training for the Defence Support Section (DSS).

An insight from both countries is that an overall strategy for mentoring and in-house training is worth considering at the set-up stage and appropriate resources made available to this end. It is essential that the necessary budget for training is provided for, as well as a systematic identification of the training needs of the organisation. As the BiH case shows the dependency on ad hoc donor support for organising training can generate difficulties. On two occasions the Court Judicial Education Committee refused funds from a donor who imposed a format of the Judicial College which the Committee considered was not conducive to achieving the expected results.[85] As a consequence, in 2008 the Judicial College took place in-house and the experience was frustrating for judges and other court staff whilst in 2009 UNDP had to urgently supply its own funds to finance it in its original format.[86] At the ECCC, the lack of systematic planning means that the individual departments differ as to what they carry out for staff. For example the Defence Support Section (DSS) carries out a number of initiatives, such as weekly briefings for all staff on international justice issues, trainings for the case managers within DSS and lawyers.[87] However, other departments are not so well organised and such activities are dependent on the initiative of the particular head of department.

Observing both cases it is clear that the structure of tribunals can either help or hinder the experience of national staff. Ensuring a productive, working relationship between national and international staff has been a challenge for other internationalised tribunals. For example, the SCSL has been criticised for its failure to share responsibilities between international and national staff and insufficiently integrated national staff with few Sierra Leoneans in positions of high responsibility.[88] In BiH, this has been less of an issue since it was always designed to give a prominent role to the national judges, and therefore increase the sense of ownership of the process.[89] The balance between international and national judges has now shifted to give the latter greater control. As the hybrid nature of the WCC was only envisioned for a few years, it has always been known that internationals were going to hand over the work to their national counterparts, which has allowed for a greater sense of ownership and responsibility. In general judges are reported to have good relationships with each other and there is a collaborative spirit of working.[90] At the ECCC, there are 10 Cambodian

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[84] The judges with international experience had previously worked at UNMIK, ICTR and ICTY.

[85] Author email exchange, February, 2010.

[86] Author's email exchange, February 2010.

[87] The mandate of DSS is quite broad compared with other tribunals. Its website states "The role of the DSS is to ensure fair trials through effective representation of the accused. The Section is responsible for providing indigent accused with a list of lawyers who can defend them, and for providing legal and administrative support to lawyers assigned to work on cases, including the payment of fees. The DSS also acts as a voice for the defence at outreach events and in the media, liaises with other tribunals and NGOs, runs training courses and organises an internship program for young lawyers," www.eccc.gov.kh (1/02/2010).

[88] Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, International Center for Transitional Justice and Sierra Leone Court Monitoring Programme (2009), pp. 30-33.

[89] Ivanešević calls it a "behind-the-scenes role", generally refraining from interfering in the control of public proceedings, Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina*, p. 11.

[90] Author interviews, Sarajevo, August-September 2009. International prosecutors, on the contrary, have played a more visible role. As Ivanešević explains they have argued most of the Rule 11 bis cases and have jointly prosecuted with their national counterparts complex cases related to the genocide in Srebrenica, *Ibid*, pp. 11-12.

judges and 7 international judges, with a mix of Cambodian and international staff in the prosecution and defence support section and office of administration. The split between the national and international side means that it depends on the particular circumstances how both sides work together. For example, the work on the additional prosecutions was only done by the international prosecution side, which is a lot of work for only half the department to do.[91] However, staff within the defence section report that they work very well together.[92] Even the Office of Administration is structured in this split way with Cambodian staff reporting to the Cambodian head and international staff reporting to the international deputy head of the office. This structure does not necessarily facilitate integration where it is not being actively promoted on a particular department initiative.[93]

The aim of capacity-building and training by the tribunals is most importantly to help the national staff. In this way, it can be said that both courts have been successful with their various initiatives. Both international and national staff report that in both courts, the national staff have become more confident and able to carry out their work.[94] Although, doubts have been raised over whether the national staff in BiH have embraced the new working practices fully and whether they still lack certain case management capacities,[95] some national staff have expressed the view that they are ready to take over and the experience and knowledge of the internationals is no longer needed.[96] In Cambodia, it has been noted that the Cambodian President of the Court has become much better at taking charge during proceedings and running the trial.[97] One international judge noted that when they first began there was a gap between the national and international judges in terms of knowledge and expectations, but there is now a common language and their work should be termed 'collaborative' rather than capacity building.[98]

- Capacity-building and training by the institution to external domestic actors

Building the capacity of national staff within the institution is perhaps the minimum that can be expected from the two courts, and from any hybrid court in general. Ensuring that national staff "learn on the job" comes from having good relationships between nationals and internationals, which is an obvious goal for both courts. However, the engagement with the broader judicial and legal communities outside of the institutions has been mixed. This was a criticism of the SCSL, which has reportedly had minimal impact on the national judiciary, mainly due to being separated from national legal institutions.[99] Lack of engagement with national justice institutions could be seen as a missed opportunity, especially where the needs of the judiciary at national level were so apparent, both in terms of resources and capacities.[100] The experience of the WCC and

[91] Author interview, Phnom Penh, September 2009.
[92] Author interviews, Phnom Penh, September 2009.
[93] UNAKRT (United Nations Assistance to the Khmer Rouge Trials), which represents the international side of the court, carried out a number of expert assessments and audits throughout 2007, including an evaluation on the ECCC's capacity for judicial proceedings. The final report was leaked to the press, with newspaper reports stated that the divided nature of the court was detrimental to the functioning of the court. See for example, Erika Kinetz, "Another delay for justice?", Newsweek Web Exclusive, October 6, 2007, www.newsweek.com (1/02/2010).
[94] Author interviews, Sarajevo and Phnom Penh, August-September 2009.
[95] Author interview, Sarajevo, August-September 2009.
[96] Author interviews, Sarajevo, August-September 2009.
[97] This was noted in a number of author interviews, Phnom Penh, September 2009.
[98] Author interview, Phnom Penh, September 2009.
[99] Cruvellier, *From the Taylor Trial to a Lasting Legacy*, pp. 35-37.
[100] Stromseth, "Pursuing Accountability for Atrocities After Conflict", p.266.

the ECCC do not, at first glace, seem to have improved on the engagement with the wider domestic justice system. This reinforces the need for future internationalised tribunals to have a more coherent strategy on how to interact with domestic institutions to materialise the alleged "spill-over" effect in terms of capacity building of the international investment in material and human resources.[101]

In BiH the limited contribution of State Court staff and resources to the development of other sectors of the legal profession has been balanced out by the fact that rule of law reform in the country has included the development of specific institutions to undertake such tasks and several programmes assure funding for it. The HJPC coordinates central components of support to the judiciary, and specific judicial and prosecutorial training centres have been set up to undertake capacity building in both entities, including in war crimes prosecution[102]. This makes it less important that the WCC or the State Court, in general, participate in direct capacity building to the rest of the members of the judiciary. Therefore, so far it is difficult to assert that the Court has had an immediate impact in capacity building for the wider judiciary.[103] This might start to change, however, as new initiatives emerge. For example, in 2009 a conference for entity court staff was organised in which national judges at the State Court presented workshops on witness protection which reflected the matters addressed in the previous internal Judicial College.[104] In the case of Cambodia, the interaction of the court with the wider domestic justice system has been quite restricted. The Supreme Council of Magistracy has the authority to appoint judges and prosecutors to the ECCC and some observers state that has been the extent of the interaction.[105] There may be ways for the ECCC to engage with the Royal School for Judges and Prosecutors or the national trial chamber, but these are still at the idea stage.[106]

It is important to highlight how in both cases the bodies in charge of the defence have played an important role in capacity building. In BiH, OKO does not only support defence councils acting before the Court but also organises trainings for other defence councils, which are considered to have had important repercussions.[107] In Cambodia, DSS has also carried out training for other lawyers, training several hundred between 2006-8.[108] DSS has also conducted outreach presentations to the NGO community providing information on defence rights, and the context, structure and laws relating to the ECCC.[109] It is within the mandate of DSS to train, and the department interpreted this obligation broadly to mean that they could train local lawyers too.[110] This is a really

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[101] Similar to the other internationalised tribunals both the WCC and ECC have received great support from the international community, both in terms of material and human resources. In BiH donors pay not only international lawyers and prosecutors, but also an array of international legal officers and interns who support the work of the State Court, and the WCC in particular. In Cambodia, UNAKRT provides technical assistance to the ECCC, and is the international side of the ECCC. For an organisational chart, www.unakrt-online.org (1/02/2010).

[102] Funding has been provided for specific training in this area, for example, the three year programme from UNDP (2008-2011) on "Building Capacities of Cantonal and District Prosecutors and Courts in BiH to Process War Crimes".

[103] Author interview, Banja Luka, August 2009.

[104] Author email exchange, February 2010.

[105] Author interviews, Phnom Penh, September 2009.

[106] These include, taking the judgements and detention orders and using them at the Royal School for Judges and Prosecutors and bringing the national trial chamber to watch the judgement for the Duch trial. There have also been some visits by law students and some private universities may take the judgements to discuss in class. Author interview, Phnom Penh, September 2009.

[107] Author interview, Sarajevo, August-September 2009.

[108] This was supported by the International Bar Association, British Embassy and University of Berkeley. Author Interview, Phnom Penh, September 2009.

[109] Author interview, Phnom Penh, September 2009.

[110] Author interview, Phnom Penh, September 2009.

important development in both courts, since a criticism of other international and hybrid tribunals is equality of arms,[111] and often rights of defence are neglected in a post-conflict context. This work by the defence sections can provide a good basis on which to build knowledge of these rights and contribute to a crucial aspect of stronger rule of law.

Finally, it is important to consider the contribution that the national staff currently working at both courts could have when they return to their previous jobs or they undertake new ones. In this regard it would be important to asses in the longer term the effect that the training of national legal officers and trainees working alongside international judges and international legal officers has, given that they are potentially the judges and prosecutors of tomorrow.[112] However, in order for capacity building of national staff within the tribunal to have an impact on the domestic system the "brain drain" needs to be avoided with former court staff actually staying in the country.[113] Whether national lawyers, judges and prosecutors will return to the domestic judicial system with their newly acquired skills is a question that will need to be returned to.[114]

4.2. Building public perception of the rule of law and trust in institutions

Conflict ended in both countries less than 20 years ago but the situation in each is quite different. Most of the population in BiH has been affected by the conflict. Many politicians active today played a role during the conflict and political discourse is very polarised with constant appeals to underlying resentments. A significant generation of young professionals has been particularly traumatised by the events they lived as teenagers, whilst today's young people seem disaffected towards the past. Cambodia on the other hand, was in conflict until the mid 1990s, but the Khmer Rouge period, which the ECCC is focused on, ended in 1978. 68% of the population is under 30 and so they have no memory or knowledge of the atrocities perpetrated by the Khmer Rouge.[115] It was therefore obvious from quite early on that a concerted outreach strategy would be needed to ensure that young people who were not alive during the period would feel engaged.

The ICTY and ICTR were criticised for their lack of outreach and it was hoped that the hybrid tribunals would be at an advantage because of their locations.[116] It is therefore important to evaluate the WCC and ECCC to see whether they have improved upon the performance of the ad hoc and other internationalised tribunals and provide good practice on outreach for other tribunals. The ultimate goal of these tribunals is to prosecute those responsible for the most serious crimes and to render justice for their victims. But they can have related effects with regards as to the trust of the wider

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[111] Cassese, "The Role of Internationalised Courts and Tribunals", p. 10.
[112] Author interview, Brussels, February, 2010.
[113] On the potential impacts of brain-drain in Sierra Leone see, Chandra Lekha Sriram, "Wrong-sizing international justice? The hybrid tribunal in Sierra Leone" *Fordham International Law Journal,* vol. 29, 2006, pp. 502-503.
[114] In BiH there has been concern over the incentive for national staff to stay at the Court after the internationals have left given the continuous political attacks and the lack of economic support for their relocation to Sarajevo.
[115] Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, *So we will never forget: A population-based survey on attitudes about social reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, (Berkeley: Human Rights Center, University of California, 2009), p. 2.
[116] See for example, Mirko Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia", *Journal of International Criminal Justice*, vol. 9, 2009, pp. 89-96 and Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme", *Journal of International Criminal Justice*, vol. 3, 2005, p. 950-961.

population over their work both as justice institutions and more broadly as public institutions and representatives of the rule of law. Firstly, the work of these institutions can send the powerful message that new safeguards are in place and old patters of impunity and exploitation are no longer tolerated.[117] Secondly, they can generate demand from society for accountability norms and proceedings.[118] The extent to how legitimate both the victims and the wider population perceive the institutions depends both on their transparent and accountable internal functioning and their capacity to demonstrate and convey this aspect of their work. This gives credibility to the accountability process as a whole.[119] In BiH the Court has had to act in an environment of distrust towards the judiciary as a whole and disillusionment over the work of the ICTY.[120] The presence of the international staff in the Court has been essential to provide an aura of legitimacy.[121] Even if the State Court is criticised by groups which attempt to politically manipulate its every decision, as will be discussed below, there is a general perception that this is an independent and impartial institution.[122] In Cambodia, there are signs that there is some impact from the work of the ECCC on communicating the impartiality and effectiveness of the institution. A recent 2009 opinion survey by the Human Rights Center at the University of California, Berkeley found that 87% of those who had some knowledge of the ECCC believed that it would respond to the crimes committed.[123] This should be compared to the fact that only 36% of respondents replied that they trusted the national criminal justice system.[124]

Therefore, the role of outreach is crucial and is considered more and more an important component of prosecutorial institutions. Following the example of the SCSL, both courts have a section devoted to Public Affairs or Information.[125] The State Court incorporated outreach as part of its budget from the beginning, in clear response to the lessons learnt from the ICTY experience.[126] The body in charge of public outreach in the State Court is the Public Information and Outreach Section (PIOS), and the OTP has its own public relations department, called the Press Office, whose work is limited to relations with the media.[127] It has been pointed out however, that the outreach of the WCC has not been as effective as it could be, both due to the lack of staff in PIOS, that has resulted in a limited capacity to implement certain activities, [128] and internal battles for

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[117] Stromseth, "Pursuing Accountability for Atrocities After Conflict", p. 262.
[118] *Ibid,* p. 264.
[119] *Ibid,* p. 263.
[120] In a UNDP survey published in 2006, most people responded they distrusted the judicial system overall, almost half believed in neither the laws nor the judges applying them and twenty percent of those interviewed expressed faith in the law but not in the judges. Public perceptions of the ICTY and its performance differed greatly between the two entities, but even in the Federation a significant segment of the population considered that it has not done a good job, but was necessary. The State Court faced, before its started its work, the difficult challenge of a population not particularly confident in its abilities and a significant fraction considering that it would not make any difference, UNDP, *Justice and Truth in BiH: Public Perceptions*, pp.15-16.
[121] Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina*, p. 11
[122] Author interviews, Sarajevo, August-September 2009.
[123] Phuong Pham et al, *So we will never forget, p.3.*
[124] Phuong Pham et al, *So we will never forget, p.4.*
[125] The Special Court for Sierra Leone has a dedicated outreach section staffed by Sierra Leonean nationals and a network of District Outreach Officers, see Rachel Kerr and Jessica Lincoln, "The Special Court for Sierra Leone: Outreach, Legacy and Impact. Final Report", February 2008, p.11, www.kcl.ac.uk (1/02/2010).
[126] Lara Nettelfield, "Localizing War Crimes Prosecutions: The Hague to Sarajevo and Beyond", in Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge, Cambridge University Press, 2010, forthcoming).
[127] See,www.tuzilastvobih.gov.ba (12/11/2009).
[128] *Ibid*.

the extra-legal functions of the Court.[129] The Public Affairs office of the ECCC has staff working in Public Information, Media Relations and Outreach departments. Since the ECCC is so far away from Phnom Penh, there is a second Public Affairs office in the centre of the city so that the court is more accessible to the public. This is an initiative that could be replicated in other countries where relevant because it provides easier access to Court staff. Both the PIOS at WCC and Public Affairs office at ECCC aim to enable communication with national and international media and with the general public in order to enable a wider understanding of their work and a general awareness of its importance. The courts have tried to use a number of reports and publications related to explaining their work to the public. PIOS produces a booklet on the weekly activities and the Registry published a brochure in 2007 of the work of the Court, both in English and Bosnian.[130] Court room audio recordings are available upon request. The Public Affairs office at the ECCC produces a court report every month and has published a booklet explaining the work of the court.[131] It has also distributed posters across the country publicising a number of messages including clarifying who will be prosecuted and the fact that both international and national judges will have to agree.[132] In addition to this widely-distributed publicity material, the Public Affairs office has also produced literature that is given to those who visit the trial, both in Khmer and in English. These information sheets describe the background to the Duch trial and also include photos of all the lawyers and judges involved with the trial and their bios.[133] This is useful for those attending the court to understand who they are seeing. There are weekly press briefings and sometimes the audio is available online.

a) Media, civil society and general public engagement

The various strategies of opening the courts to the general public, such as producing publications and providing recordings need to take into account the challenges of reaching the population and the needs of the public. For example, issues such as the literacy rate of the population, the accessibility to the location of the courts and the general awareness of the legal procedures need to be considered. In this regard it is crucial that these issues are combined with specific media outreach strategies. The role of media initiatives in connecting the general public with the work of both tribunals is important. Similar to the SCSL, which engaged with radio and even carried out training to promote effective reporting of the Charles Taylor trial,[134] both the ECCC and WCC have built relationships with the media. In BiH, the mainstream media has not paid great attention to the trials and interest in war-crimes reporting is decreasing.[135] The mainstream media tends to focus only on scandals that undermine the credibility of the Court. It is the work of a specialised organisation which reports on the trials – the Balkan Initiative Reporting Network (BIRN) of BiH-, which has made a significant contribution to public information on the functioning of the State Court in general and on every specific war crimes trial in particular. Through its Justice Report programme they cover every single trial before the WCC. They have started a radio programme,

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[129] The fact that the Court Support Network project, referred to below, lost financial support from the Registry at one point, illustrates one of these obstacles, Nettelfield, "Localizing War Crimes Prosecutions".
[130] See, www.sudbih.gov.ba (1/02/2010)..
[131] See, www.eccc.gov.kh (1/02/2010).
[132] Poster slogans are "Every decision must have the support of both Cambodian and International judges", "Everyone can be involved in the process", "It's time for the record to be set straight" and "Only the senior Khmer leaders and those most responsible for committing serious crimes will be tried",www.eccc.gov.kh.
[133] Copies with author.
[134] Kerr and Lincoln, "The Special Court for Sierra Leone", p.16-17.
[135] This seems to be a regional trend, with commercial media in Croatia and Serbia also losing interest, see BIRN, *Decreasing Interest in War-crimes Reporting,* 19/09/2009, www.bim.ba (1/02/2010).

Radio Justice, and a TV show, TV Justice, to bring the work of the WCC closer to the public.[136] BIRN has also organised two conferences in Sarajevo on the role of the media reporting on war crimes, the latest one on Transparency of the Courts and Responsibility of the Media, with the attendance of regional representatives of courts prosecuting war crimes, public information offices, international donors and organisations, media and civil society. Even if the media has open access to the Court, there have been complaints about the lack of availability of judges and prosecutors for comment as well as lack of access to documents, video recordings and photographs.[137] In Cambodia, there are a number of initiatives carried out by NGOs and international organisations to ensure media coverage. The AIJI and East-West Center prepare a weekly report "Duch on trial" that is broadcast to 2-3 million people, which is shown on Channel CTN every Monday lunchtime.[138] The AIJI also produced a 3 part educational programme called "Time for Justice", which was widely shown before the trial started.[139] There are a number of organisations monitoring and providing expert commentary on the Duch trial and ECCC in general. Among these, the Cambodia Tribunal Monitor and OSJI are the most active in providing summaries of proceedings and legal analysis.[140]

Importantly, both courts have had to rely upon the work of NGOs to maximise their impact due to lack of resources. Their experience shows that this should be thought about beforehand so that such relationships can be developed early to ensure a fruitful engagement. At a very early stage in BiH, the State Court approached several NGOs to establish a network of civil society organisations with the purpose of creating "such a climate that will be motivating for all citizens across communities and in which citizens will relate to the judicial system in BiH with a trust, which this country enormously lacks".[141] The network has four regional information centres, which work independently of the Court and serve as a link between the citizens and the Court. It is composed of extremely varied organisations.[142] There is however no public information on specific activities undertaken which makes the impact of this initiative very difficult to asses. In Cambodia, a national NGO, the Center for Social Development (CSD) held a number of community forums to inform the public about the court.[143] Many staff from the ECCC were present at these events, not just from Public Affairs, but also from DSS and international or national co-prosecutors. Other NGOs such as ADHOC and the Documentation Center of Cambodia (DC-Cam) have carried out similar outreach activities.[144] However, there has been criticism that the ECCC has relied too much upon external activities rather than carrying out its own activities.[145] The Public Affairs office

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[136] Author interview, Sarajevo, August-September 2009. For Justice Report and TV Justice, www.bim.ba.

[137] See for example, BIRN, *Public Outreach Section Letter,* 23 October 2009, where the Association of Court Reporters states that the selectiveness that the Court shows in providing photographs to the reporters undermines their capacity to provide information to the general public about the proceedings.

[138] See http://forum.eastwestcenter.org/Khmer-Rouge-Trials/

[139] *Ibid*.

[140] See Cambodia Tribunal Monitor, www.cambodiatribunal.org, and OSJI, www.soros.org

[141] Website of Centre for Civil Initiatives (CII), which is in charge of the Court Support Network information office in Mostar, see www.ccibh.org.

[142] *Ibid*. As Ivanešević states there is no restriction on membership and the NGOs vary considerably, from social welfare providers to volleyball teams, Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina*, p. 36.

[143] Due to internal management problems within the organisation, these stopped mid-2009 and future activities seemed uncertain.

[144] Under its Khmer Rouge Trials and International Criminal Court program, ADHOC provides information on the ECCC and ICC nationwide. DC-Cam holds meetings under its Victim Participation project, which briefs communities on the proceedings and developments of the ECCC as well as their right to participate. Author interviews, Phnom Penh, September 2009.

[145] Author interviews in Phnom Penh, September 2009

has acknowledged that it has been unable to carry out a comprehensive strategy due to financial constraints and that it will improve its work over the next year.[146] Even if the initiatives at both courts show good practice, they also underline that it is not enough for the outreach sections to merely rely on NGOs to create and promote public awareness and positive engagement. Specific activities and initiatives are necessary so that civil society and the general public are engaged.

The public interest in the work of the WCC and ECCC has been somewhat different. In terms of promoting the rule of law by informing the population of the trial proceedings, it is problematic if there is not much interest by the population. For this reason, it is important to think about how to open the courtrooms' doors, both physically and virtually, and promote attendance and engagement early. Both courts have been quite successful in setting up websites and keeping them up to date, and the resources available there are very valuable.[147] The ECCC has also now set up a Facebook and Twitter account and in the future, there may be other innovative ways of communicating.[148] The promotion of attendance to the trials by the general public however, was not really considered in BiH. The Court is completely open to the public and the schedule of the ongoing trials is updated daily in the website. However, Bosnian society has not demonstrated a pressing interest in following the trials, and the general public is rarely present in the trials. Most days the only presences in the courtrooms are those of BIRN reporters and OSCE war crimes monitors, and often there are more foreign researchers than local citizens.[149] On many occasions, the limited interest of the general public on the trials in BiH has been blamed on fatigue of the Bosnian civil society shows with war-related themes.[150] Whilst in Cambodia, although the beginning of the Duch trial was not very well attended, by the end of August 2009 over 20,000 people had attended the hearings, which is very high compared not only to BiH but also to other internationalized tribunals.[151] The initial lack of attendance was partly due to the location of the court which is 16km outside of Phnom Penh. However, a few weeks into the trial buses to the Court were organised and widely publicized by the public affairs section. Currently, court sessions are attended by 500 people, with many getting up in the early hours of the morning to reach the court.[152] There is scope for implementing similar programmes to encourage attendance both for other internationalised courts and truth commission hearings. However, it is important to remember that a full court room is not enough. Beyond the people attending the trials in Cambodia, around 20% of the population is watching the TV programme "Duch on trial".[153] Although this is a real achievement in terms of the numbers, there is still a large proportion of the population who may not really know what is going on or be keeping up with developments. This demonstrates the challenges posed by a youthful population as well as very pressing daily needs in Cambodia, such as poverty and current human rights abuses.[154]

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[146] Author interview in Phnom Penh, September 2009.
[147] As Nettelfield points out in relation to the BiH State Court website, the information is more up to date than the websites of the courts of Western nations, Nettlefield, "Localizing War Crimes Prosecutions".
[148] ECCC facebook page: www.facebook.com/pages/Phnom-Penh-Cambodia/Khmer-Rouge-Tribunal-ECCC/114491277840 and ECCC twitter account is http://twitter.com/krtribunal (1/02/2010).
[149] Nettlefield, "Localizing War Crimes Prosecutions".
[150] Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina*, p. 33.
[151] Author interviews in Phnom Penh, September 2009.
[152]For the closing statements in the Duch trial, for which there was wide interest, the majority of seats were allocated to the *parties civiles* and the general public and the rest divided between national and international NGO representatives, media and diplomats, ECCC, Invitation to attend the Closing Statements in the "Duch" Trial, 23-27 November 2009, www.eccc.gov.kh (15/022010).
[153] Christophe Shay, "Cambodia's Trial of the Century, Televised", TIME, September 11th 2009.
[154] Cambodia ranked 131 out of 177 countries in the 2007 Human Development Index and remains one of the poorest countries in Asia.

It is too early to properly assess the impact of the outreach strategy in either country, however, the experience so far, in these and other courts, shows how necessary it is to have a strategy in place early, and to be realistic about the resources available. If this is not done, outreach activities will not start in time to have the full impact that they could potentially have.

b) Public perceptions of truth

The work of the courts is limited in terms of establishing a narrative of the conflict which could serve as shared basis for peace and reconciliation in both countries. It is often pointed out that international trials fail in terms of assisting national reconciliation,[155] and in general, the outcome of a criminal trial in terms of truth is restricted to the needs of the case, which can be unsatisfactory for victims and society as a whole. Even more, in both Cambodia and BiH the approach to accountability for past atrocities has so far been limited to a retributive justice model. Complementary transitional justice activities, especially truth seeking ones, are not officially promoted or recognised and have come mainly from civil society groups.

In BiH all of the truth finding initiatives have been lead by civil society and only undertaken in a limited manner by public authorities. There have been two failed initiatives to establish a Truth and Reconciliation Commission[156] and there is currently a regional proposal (RECOM) on the table led by civil society organisations from Serbia, Croatia and BiH, which is gathering a significant amount of support. However, until recently wider society has been quite reluctant to accept initiatives of this sort, with certain victims associations strongly opposed.[157] This opposition is grounded in a punitive approach towards justice and suspicion over the possibility of amnesties.[158] The word reconciliation is often avoided and at the same time it is constantly suggested that there does not exist one single truth, but three.[159] It is encouraging that the latest consultations seem to show a more extended support for the possibility of establishing a regional truth commission.[160] Other initiatives have been more limited fact-finding efforts. Some have come from public authorities, such as the Commission for Investigation of the Event in and around Srebrenica between 10 and 19 July 1995 (Srebrenica Commission), which had to be established in 2003 by the Republika Srpska authorities in response to a resolution of the Human Rights Chambers of BiH, and the establishment of the State Institute for Missing Persons in 2008 in substitution of three separate public bodies which where undertaking these tasks on the basis of ethnicity.[161] Among the civil society initiatives an interesting example are the efforts by the Research and Documentation Centre of Sarajevo to create the most comprehensive database of events that occurred during and after the war, from sites of massacres to attacks of buildings, displacements, concentration camps, etc.[162]

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[155] Sriram, "Wrong-sizing international justice? The hybrid tribunal in Sierra Leone", p. 497.

[156] The first initiative was launched by a coalition which included a great number of organisations, in 1997 and in 2000 a draft Law on the Truth and Reconciliation Commission was submitted to the Parliamentary Assembly of BiH, but never adopted. In 2005 a second initiative was pushed to revive the draft law, but all talks related to such initiative were suspended in March 2006, see UNDP, *Transitional Justice Guidebook for Bosnia and Herzegovina,* Executive Summary, available at www.undp.ba (9/11/2009), p. 26-28.

[157] UNDP, *Transitional Justice Guidebook for Bosnia and Herzegovina,* p. 28, www.undp.ba (9/11/2009),.

[158] *Ibid*.

[159] Author interviews, Sarajevo, August-September 2009.

[160] Nataša Kandić, "The RECOM Initiative: From a Non-Governmental Challenge to a State Programme", in Denisa Kostovicova (ed), *The European Union and Transitional Justice: From Retributive to Restorative Justice in the Western Balkans* (Belgrade: Humanitarian Law Centre, 2009).

[161] UNDP, *Transitional Justice Guidebook for Bosnia and Herzegovina*, p. 31.

[162] Author interviews, Sarajevo, August-September 2009.

In Cambodia there has been no official truth commission process, however a number of NGOs have been carrying out informal programmes for memorialisation and reconciliation. DC-Cam first started as Yale University's Cambodian Genocide Program to conduct research, training and documentation on the Khmer Rouge regime and is now run by Cambodian nationals. Its wide range of activities and prominence in the field has led to it being called an "unofficial truth project".[163] DC-Cam aims to record and preserve the history of the Khmer Rouge regime for future generations and to compile and organize information that can serve as potential evidence in a legal accounting for the crimes of the Khmer Rouge.[164] It has the largest collection of primary documents on the Khmer Rouge.[165] A smaller but no less interesting initiative is by the organisation Youth for Peace (YfP), which started the Youth for Justice and Reconciliation project in 2007.[166] YfP carries out Understand, Remember and Change workshops where they discuss the root causes of genocide, looking at both internal and external factors to examine the mobilization of the Khmer Rouge. Following these workshops, there is a village dialogue where YfP facilitates discussion within the community, where the youths listen and ask questions. This provides a space for survivors and victims to tell their stories. This has been a successful project with good response from both older and younger participants who were grateful for the learning and sharing experience,[167] with some communities stating that they want to compile the stories of their victims.[168] There is increasing work being done on memorialisation, with visits organised by NGOs to the sites of the Killing Fields and Tuol Sleng or the prison S-21, which are currently visited more by tourists than by Cambodians.[169] Importantly, DC-Cam has been working on getting a textbook on the Khmer Rouge period introduced, which is currently going through the government approval process.[170] This is very important because until 2000 there was only one paragraph on the whole Khmer Rouge period in high school textbooks and even this disappeared after 2002.[171] The Genocide Education project will not only produce textbooks but also train around 3,000 teachers in how to use the book.[172] This may go some way to ensure that young people have knowledge and care about the period.

The fact that these activities have been initiated shows that there is space and need for other transitional justice mechanisms and that prosecutions and a hybrid tribunal on its own are not enough. It also shows how important it is to conceive the prosecution activity in the context of a wider transitional justice strategy which provides complementary means to dealing with the past. Hybrid courts, and national prosecution in general, would have more chances to make any impact on public perceptions of truth and awareness over needs of reparations and memorialisation if accompanied by both official and civil society initiatives.

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[163] Louis Bickford, "Unofficial Truth Projects", *Human Rights Quarterly*, 29 (2007), p.1020.
[164] DC-Cam website, History and Description of DC-Cam, no date,www.dccam.org (1/02/2010).
[165] The archive has over 155,000 pages of primary Khmer Rouge documents and more than 6,000 photographs. *Ibid.*
[166] Author interview, Phnom Penh, September 2009. See Youth for Peace, www.yfpcambodia.org (1/02/2010).
[167] Mark Channsitha, *Evaluation Report for Youth for Peace 2008*, (Phnom Penh, 2008) Copy with author.
[168] Author interview, Phnom Penh, September 2009.
[169] Louis Bickford, "Transforming a legacy of genocide: Pedagogy and Tourism at the Killing Fields of Choeung Ek", (New York: ICTJ, 2009) p.13.
[170] Author interview, Phnom Penh, September 2009. See, www.dccam.org. .
[171] See, www.dccam.org/Projects/Genocide/Genocide_Education.htm (1/02/2010)
[172] Author interview, Phnom Penh, September 2009.

5. Potential risks for the rebuilding of the rule of law

It should not be assumed that the courts will only have a positive impact in terms of educating the public about the rule of law. The experience of both countries demonstrates that there can be possible negative effects and the courts should work to pre-empt these problems before they begin to undermine their work. In Cambodia, there have been a number of problems with the ECCC which may actually have a negative impact on the public perception of rule of law. There has been a widely-publicised controversy regarding alleged kickbacks. Cambodian staff reported that they had to give a percentage of their salary to their superiors.[173] This was reported widely in the international press following the Open Society Justice Initiative (OSJI) work on the subject. An audit commissioned by UNDP found several problems in human resources management, with salary inflation and unnecessary creation of posts (although it did not investigate the kickbacks claim).[174] Despite the UN and the RGC working on an agreement in order to tackle these problems, the negotiations stalled and allegations of corruption continued to gather press interest.[175] Furthermore, donors withheld funding from the ECCC until the issue was resolved. Finally, in August 2009 a range of anticorruption measures were agreed upon, including the establishment of an Independent Counsellor who will be available to hear all complaints of corruption.[176] Nevertheless, the OSJI still argued that better protection was needed for staff.[177] With these problems, it is unclear whether the ECCC is providing the expected demonstration effect that public institutions should be transparent. If a UN backed internationalized court is unable to overcome corruption, then this could possibly undermine public perception of institutions and raise scepticism that things will never change. However, it could also be the case that the ECCC has a positive impact through demonstrating that problems existed but were dealt with properly. A 2008 audit found that most of the problems in the 2007 audit had been dealt with. This may show that these sorts of corruption problems can be overcome, solutions are possible and they should therefore not just be accepted as facts of life. As mentioned above, the survey by the Human Rights Center at the University of California, Berkeley shows that the majority of those who

[173] OSJI, "Corruption allegations at the Khmer Rouge Court must be investigated thoroughly", Press release February 14, 2007, www.soros.org (1/02/2010).
[174] UNDP, Interoffice memorandum on Special audit of the human resources management at the Extraordinary Chambers in the Courts of Cambodia, Report No. RCM0172, 4 June 2007, www.unakrt-online.org (1/02/2010).
[175] For problems with negotiations please see Seth Mydans, "Corruption allegations affect Khmer Rouge Trials", *The New York Times*, April 10, 2009. For general coverage of corruption, please see *The Economist*, "The court on trial", April 2nd 2009.
[176] UN Department of Public Information, "Joint statement on establishment of independent counsellor at Extraordinary Chambers in Courts of Cambodia", (New York, 12 August 2009), www.un.org (1/02/2010).
[177] OSJI, "New anticorruption measures at Khmer Rouge Tribunal are insufficient", Press release, August 17, 2009,,www.soros.org (1/02/2010).

know about the ECCC believe in its potential to provide a response to the crimes committed and two thirds believed that the judges would be fair or the ECCC would be neutral.[178] The question of how the court is perceived requires further investigation as the ECCC continues its work in case 002 and a follow-up survey is currently planned.

Further to these claims and criticisms, the controversy over additional prosecutions also has the potential to limit the impact of the work of the court. In December 2008, the Cambodian Co-Prosecutor Chea Leang opposed the submission of an additional 6 suspects for prosecution by the former International Co-Prosecutor Robert Petit. Leang stated that further investigations should not proceed because of the past instability of the country, the spirit of the agreement between the RGC and the UN and the limited duration and budget of the court.[179] Petit filed a Statement of Disagreement in order for the Pre-Trial Chamber to decide on this matter, the procedure for resolving such disputes. In September 2009 it was announced that the pre-trial judges had failed to reach a supermajority and therefore to reach a decision on the matter.[180] In such a case, the Internal Rules provide that the submission proposed by the Co-Prosecutor automatically moves to the next stage, which is that the Co-Investigating judges open judicial investigations. The considerations of the pre-trial chamber show that the three Cambodian judges agree with Leang while the two international judges found that Leang's reasoning was not sufficient to block the submissions.[181] It remains to be seen whether the Cambodian half of the tribunal cooperates if the additional prosecutions go ahead. Prime Minister Hun Sen has stated that these additional prosecutions would lead to a civil war with hundreds of thousands of deaths.[182] The reputation of the Court rests on whether the prosecutions are able to go forward or if it is perceived that the Cambodian side is making decisions based on political interference.

One of the risks of trials that could result in a counterproductive effect is if they are perceived as biased.[183] Courts can be vulnerable to political attacks and accusations that can undermine both their prosecutorial activity and the wider impact in the rebuilding of the rule of law in the country. In BiH, politicians' attempts at using the work of the Court to further their own agendas puts the State Court at risk of being perceived as partial. Serbian political leaders have been very vocal in their rejection of the Court arguing that it has focused more strongly on the prosecution of Serbs. The fact that the State Court is located in a former detention facility for Serbs during the war has not helped to refute their arguments that "it is a Court to condemn Serbs".[184] In line with the discourse of Serb political leaders, Serb victim associations have led protests against the Court and several demonstrations have taken place in front of the building. Their attacks also undermine public opinion towards judges and prosecutors at the state level, as the accusations of lack of integrity and professionalism have an important impact on people's perception of their work and of the very constitutionality of the existence of the

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[178] Phuong Pham, *So we will never forget, p. 39.*
[179] ECCC, "Statement of the co-prosecutors", 5 January 2009, www.eccc.gov.kh (1/02/2010).
[180] ECCC, Press Release 2 September 2009, www.eccc.gov.kh (1/02/2010).
[181] ECCC, "Annex I: Public redacted version. Considerations of the pre-trial chamber regarding the disagreement between the co-prosecutors pursuant to internal rule 71". 18th August 2009, www.eccc.gov.kh (1/02/2010).
[182] Cheang Sokha and Robbie Corey-Boulet, "ECCC ruling risks unrest: PM", *Phnom Penh Post*, Tuesday, 8th September 2009.
[183] Stromseth, "Pursuing Accountability for Atrocities After Conflict", p. 263.
[184] Author interviews, Sarajevo, August-September 2009. For the initial protests regarding the use of such a location and the Courts success in dealing with them, see Nettelfield, "Localizing War Crimes Prosecutions: The Hague to Sarajevo and Beyond."

Court and OTP themselves, and more widely the judicial reforms undertaken so far.[185] Therefore public outreach work is crucial to explain to society how the prosecutorial process works. The efforts by the Court so far do not seem to have been able to counterbalance the political attacks. The WCC cannot change the reality that Bosniaks constituted the majority of victims during the war and Bosniak organisations were also very active during and after the war in gathering evidence about the crimes, which has inevitably resulted in a predominance of cases concerning crimes against Bosniaks. [186] However, the WCC could work harder to explain not only the prosecutorial strategy but also why certain cases can or do not progress. In this regard, many issues on how to implement the National Prosecution Strategy adopted in December 2008 and assure the necessary will to do so, remain to be dealt with. The fact that this Strategy was not adopted through a victim inclusive process left many disappointed.[187] The lesson for BiH is also applicable to other future courts. Public outreach efforts need to pay further attention to the impact that specific trials could have on the affected communities, where the crimes were committed or where the victims and perpetrators currently live, and try to pre-empt political manipulation by facilitating information in an accessible language. Furthermore, it is also important to take other kinds of protective measures to preserve the reputation of the institution and the public and shield judges from politically motivated claims of bias or even corruption, and protect the tribunals and the judicial systems as a whole when they are vulnerable to political attacks. In this sense, mechanisms to safeguard the independence of the judiciary should be strengthened. In the case of BiH, protective procedures against defamation of judges, for example within the HJPC, would not only preserve their independence but contribute to public perception of the State Court as an impartial, non-politically motivated institution, and send a message of strength from the judiciary as a whole.

[185] OSCE, Mission to BiH, *Universal Periodic Review of Bosnia and Herzegovina "Stakeholder's submission"*, 2009, www.lib.ohchr.org (9/02/2010).
[186] Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina*, p. 34.
[187] Nettelfield, "Localizing War Crimes Prosecutions", highlights some of the complaints of local family associations.

6. Conclusions

This paper has explored the impact that both the WCC and ECCC are having and could potentially have on rule of law in their countries. As we have argued, expectations for hybrid tribunals must be realistic, they cannot transform national institutions and procedures and conjure up systems governed by the rule of law on their own but must be considered as part of the broader strategy concerning the sector. Further, the experiences in both Cambodia and BiH show that expectations should also take into account the political context that has shaped the tribunals and that in which they will have to develop their activities. Although a strength of hybrid tribunals is that they can be adapted to suit a particular national context, as Stromseth states, they also will "have been shaped by political necessity and compromise."[188] This may not only limit their work but also their capacity to impact on the wider rule of law sector.

Both courts have had to overcome difficult challenges to successfully carry out trials. From our analysis we can conclude that even considering the positive development that both courts mean for accountability in their respective countries, in both cases there needs to be more concerted efforts to ensure engagement with the domestic judicial actors in order for a wider impact on the rule of law to materialise. Similarly, although some lessons to do with outreach have been learnt, there is still more engagement that could be achieved. Only time will tell whether they will be able to make sufficient changes to ensure that the long-term impact is beneficial. One particular lesson to highlight is that to achieve constructive engagement, the necessary objectives and competences must be reflected in the institution's mandate. In future hybrid tribunals the necessary provisions should be made and accompanied by the appropriate human and economic resources in order to maximise the capacity building potential of international staff from the offset. The reliability on ad hoc initiatives, always vulnerable to changes in funding priorities, undermines their full potential

Further to the impact that the WCC and ECCC have on rule of law, there is a question of how much impact hybrid tribunals can have in the absence of other transitional justice initiatives. In both countries there has been a neglect of other initiatives, mainly due to political sensitivity and lack of prioritisation. The fact that a number of civil society initiatives in both BiH and Cambodia are trying to promote alternatives demonstrates that there is support and a need for activities regarding truth-seeking and reconciliation.

The experience of both countries shows that a hybrid tribunal cannot be considered enough on its own both to impact the rule of law in the countries. The BiH experience shows that inserting the work of the internationalised courts within a wider rule of law reform strategy can allow the court to fulfil some of the broader expectations for its impact, such as contributing to capacity building in the wider justice sector. Equally, the work of the courts in isolation, without a wider transitional justice strategy with a multi-faceted approach becomes limited in terms of their possible contribution to broader reconciliation processes in the country. If consideration is given to how other

[188] Stromseth, "Pursuing Accountability for Atrocities After Conflict", p. 263, 280

rule of law reform processes and transitional justice mechanisms engage with each other the Courts should be able to maximise the assistance and effort that is invested in their work.

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What is Just and Durable Peace?

The research project Just and Durable Peace by Piece (JAD-PbP 217488) is funded by the Seventh Framework Programme of the European Commission. It aims to shed new theoretical and conceptual light on the *problematique* of building just and durable peace. It examines the effectiveness of general peacebuilding strategies and evaluates to what extent they enhance self-sustainable peace. In addition, it analyses and compares EU's peacebuilding strategies in the Western Balkans and the Middle East. JAD-PbP applies an interdisciplinary approach, drawing on insights in peace and conflict research, international law, political science and international relations in order to make contributions to science, policy-making and the causes of just and durable peace.

The project comprises seven partners: Lund University (coordinator), Bath University, Hebrew University, Jordan Institute of Diplomacy, University of St Andrews, University of East London, Uppsala University.

For more information:
www.justpeace.eu

Contact:
Department of Political Science, Lund University, Sweden.
Karin.Aggestam@svet.lu.se
Annika.Bjorkdahl@svet.lu.se
Phone: +46 46 2224923, alt. +46 46 2220162

SEVENTH FRAMEWORK PROGRAMME

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