

Hybrid Tribunals as Capacity Building: Narrowing the Impunity Gap?

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SOA-3902

*A dissertation submitted in partial fulfillment for the degree:
Master in Human Rights Policy and Practice*

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Spring 2015

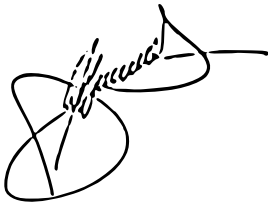
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The work I have submitted is my own effort. I certify that all the material in the dissertation which is not my own work has been identified and acknowledged. No work for a degree, which has been previously conferred to me, is included herein.

Signed:

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a series of loops and a horizontal line extending to the right.

Date: 22 May 2015

Acknowledgements

I am very much indebted to the following people for their advice, guidance, help in planning, and support throughout the process of writing this thesis: Professor Martin Shaw at the University of Roehampton (UK), Professor David Blaney at Macalester College (USA) and my colleagues at Amnesty International. I am thankful to Professor Alejandro Chehtman in the Faculty of Law, University College London for his time, patience, and willingness to answer all my questions. I am also very grateful to my EMHRPP colleagues, especially to Alison Fleming, Ida Svedevall and Phillip II for their friendship and late dinners over thesis planning. In addition, special thanks to Davide Gandolfi, Jesper Daniek Saman and Matias Britos for their sharp comments and motivating talks on the issue. Lastly, but not least, I am grateful for my family's encouragement, especially my parents, and Kasia Dybek, whose unbreakable support, pristine editing skills and patience enabled the completion of this thesis.

List of Acronyms

United Nations (UN)

International Criminal Court (ICC)

International Tribunal for the Former Yugoslavia (ICTY)

United Nations Security Council (UNSC)

International Center for Transitional Justice (ICTJ)

Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC)

Special Court for Sierra Leone (SCSL)

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Court of Bosnia Herzegovina (BiH)

Bosnian War Crimes Chamber (BWCC)

Abstract

Although the doctrine of *jus cogens* or non-derogable norms calls on every state to prosecute gross violations of human rights, a combination of power politics and lack of institutional capacity has denied the right of access to justice to countless victims, creating an impunity gap. Identified as one of the main challenges for the current international legal architecture protecting human rights, hybrid tribunals have been put forward as a novel approach narrowing the impunity gap in post-conflict states. Tasked with prosecuting war crimes, genocide and crimes against humanity, hybrid tribunals also have the potential to re-build domestic judicial capacity through the mix of applicable laws, judicial personal and their proximity to victims. Indeed, hybrid tribunals and their premise of capacity building can be understood as a contributing factor creating conditions for sustainable human rights compliance. By creating domestic ownership and locating *jus cogens* responsibilities within the state, hybrid tribunals can help narrow the impunity gap creating the conditions for a human rights normative framework including the right of access to justice.

In this context, this thesis analyzes how hybrid tribunals might contribute to narrowing the impunity gap through their capacity building premise. It asks what capacity building recommendations can be drawn from situations where hybrid tribunals have been established. The thesis analyzes the Special Court for Sierra Leone (SCSL), the ongoing trials in the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the unique judicial set up in the Bosnian War Crimes Chamber (BWCC) within the Court of Bosnia Herzegovina (BiH) with backing of the International Tribunal for the Former Yugoslavia (ICTY). Understanding that closing the impunity gap must begin at the domestic level, the extent of capacity building mechanisms developed by these tribunals will be a key parameter to conceptualize how they might create a strong domestic human rights normative framework equipped to uphold *jus cogens*. This, in turn, informs what policy recommendations might be available to strengthen the hybrid tribunal model in order to narrow the impunity gap.

1. Introduction: From Theory to Practice

The project of human rights has become a *modus vivendi* and a *modus operandi* for states, individuals and multilateral entities. Throughout this academic program, we have grappled with dimensions of human rights –political, legal, anthropological, sociological- that unveils a critical tension between the different modes of thinking about this issue. As a culmination of a path of academic discovery, this thesis intends to add to these complex debates, while trying to elucidate why we care, study and promote human rights.

The centrality of the human rights argument, Amartya Sen would note, is the urgent need for dignity among the human race (Sen, 2004). As he states, there is notably “something deeply attractive in the idea that every person anywhere in the world, irrespective of citizenship or territorial legislation, has some basic rights, which others should respect” (Sen, 2004, p.315). Indeed, the human rights normative framework has been indispensable to advance notions of equality, freedom and protection from violence around the world. In fact, the legislative exercise advancing human rights principles has become a *modus operandi* and *vivendi* of states and individuals alike.

Although there is much more to human rights than their legal dimension, we can trace the regulatory nature of human rights law back to the creation of the United Nations (UN) and the Universal Declaration of Human Rights in 1948. Even before the creation of the UN, the late League of Nations and its Permanent Court of International Justice are testaments of a long legal tradition of ideas of justice within international relations that paved the way for human rights today (League of Nations, 1919, Permanent Court of International Justice, 1920). Indeed, deriving legal sense from the United Nations Charter, new treaties have codified a set of principles that regulate and apply human rights law worldwide.

As the eminent legal scholar Antonio Cassese puts it, significant progress has been achieved by legislating human rights laws internationally and domestically (Cassese, 2004, 2012). In fact,

since the Vienna Convention on the Law of Treaties in 1969¹, the creation of the category of *jus cogens* or preemptory norms not permitting any objection or derogation by treaty (Fellmeth and Horwitz, 2009) has given way for the supremacy of a set of principles that, in turn, command the legality of certain state behaviour (Cassese, 2012).

The doctrine of *jus cogens* has developed today including key human rights norms such as: banning genocide, slavery, torture and upholding the principle individual criminal responsibility and the right of access to justice (Cassese, 2004, 2012, Sikkink, 2011, 2012). These preemptory norms² are codified in a collection of human right treaties including the Universal Declaration on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Criminal Court (ICC) statute and the large body of jurisprudence developed by the ad hoc tribunals for the former Yugoslavia and Rwanda as well as the vast number of *opinio juris* by the International Court of Justice.

1.1. The Right of Access to Justice

Based on the right of access to justice, tribunals around the world have used and upheld *jus cogens* norms to fight impunity and guarantee victims' redress. In fact, since the Second World War's Nuremberg and Japanese tribunals, as Sikkink would argue, there has been a 'justice cascade' where human rights prosecutions have influenced international politics raising the status of the fight against impunity worldwide (Sikkink, 2011). Guaranteed under international law, the right of access to justice has reached a pinnacle with the creation of the ICC in 1998 extending its jurisdiction for crimes against humanity, genocide and war crimes to 123 member states³, with the latest party to the Rome Statute being the State of Palestine.

¹ *Jus cogens* are codified under Articles 53 and 64. In the words of Jiménez de Aréchaga, rapporteur of the Vienna Convention, *jus cogens* means that: "The international community recognizes certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles" CASSESE, A. 2012. *Realizing Utopia: the future of international law*, Oxford University Press.P.171

² For a full list of treaties codifying *jus cogens* norms, see: GHANDI, S. 2012. *Blackstone's International Human Rights Documents*, Oxford, Oxford University Press.

³ As of March 2015. See: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx

However, beyond the Rome Statute, the right of access to justice can be found in several other key international and regional human rights instruments⁴. In fact, as the Special Rapporteur for the Promotion of Truth, Justice and Reparations, Pablo de Greiff sustains: “the duty to investigate and prosecute flows from the right to an effective remedy” (de Greiff, 2014, p.6). Indeed, in cases of war crimes, genocide or crimes against humanity, also known as atrocity crimes, the doctrine of *jus cogens* obligates states to prosecute such violations of human rights (Cassese, 2004). In this sense, as General Comment 32 of the International Covenant on Civil and Political Rights argues, competent, independent and effective tribunals are needed for victims’ redress (United Nations Human Rights Committee, 2007, p.5, Van Boven, 2010).

Bearing in mind Sikkink’s argument, several judicial arrangements in places like Argentina, South Africa and Tunisia have succeeded in prosecuting human rights abuses. Together with critical pressure exerted by civil society, the human rights normative framework developed within *jus cogens* has become an integral part of the international community (Finnemore and Sikkink, 1998, Keck and Sikkink, 1999, Sikkink, 2011).

However, there are more than a few examples in practice where the right of access to justice – let alone any justice mechanism – has been available for victims of human rights abuses. Since the early 2000s the human rights normative framework has suffered significantly due to geopolitical and capacity constraints in the international system. Key events signaling the deterioration of the right of access to justice include the widespread use of torture by states, the emergence and re-emergence of complex conflict situations, the denial of justice for General Franco’s crimes during the Spanish Civil War, impunity in Mexico’s drug war, Russia’s annexation of Crimea and continued fighting in East Ukraine, instability in the Middle East, violence in Libya and Yemen and the ongoing war in Syria and Iraq. These examples point at a current cross-road regarding the place the right of access to justice occupies in the international system and raises worryingly questions regarding impunity worldwide.

⁴ For example, Articles 14 & 16 of the International Covenant on Civil and Political Rights; Article 13 of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25 of the American Convention on Human Rights; Article 3 of the African Charter on Human and People’s Rights and Article 11 of the Arab Charter on Human Rights.

1.2. The Impunity Gap and the Current Debate

The ongoing crisis in Syria is a fitting example of impunity in the current global judicial architecture. According to the 9th Report from the UN Human Rights Council's Syrian Commission of Inquiry published in March 2015, since March 2011 "war crimes and crimes against humanity have been committed on a massive scale"(COI, 2014, 2015, p.8). Deliberate shelling of civilians, torture and indiscriminate attacks from non-state armed parties like the Islamic State are examples of the widespread violations of *jus cogens* norms. Indeed, other organizations like Human Rights Watch and the International Center for Transitional Justice (ICTJ) have documented gross violations of human rights in Syria (Human Rights Watch, 2013, Seils, 2013).

Remembering that attaining *jus cogens* is the primary responsibility of states and secondly of the international community, the lack of political will from each of the sides creates a dangerous impunity gap in the human rights normative framework. This impunity gap is constituted simply because sovereign governments, for example Syria, have not acted to fulfill their duty under international law to prosecute atrocity crimes while lack of membership to the ICC prevents the prosecutor from opening a case in Syria. And, even when Chapter VII powers were invoked by the UNSC to refer Syria to the ICC, countries like Russia and China have exercised their veto. Therefore, this inaction at the state level, combined with an ineffective and politically ridden UNSC leaves the Syrian victims, like many other around the world, with no other choice than to suffer impunity (Dawlaty and No Peace Without Justice, 2013, Radziejowska, 2013).

In this somber context, the failure of the international community to act has been partially answered during a recent debate organized by the ICTJ. Taking a long-term historical view, the UN Human Rights Chief Al Hussein argued that "state ownership of the fight against impunity" is paramount (ICTJ, 2015). Similarly, ICC prosecutor Bensouda noted that departing from the Rome Statute states have the primary responsibility to prosecute human rights offenses (Dancy and Montal, 2014, ICTJ, 2015). On this point, Harvard's Professor Ignatieff agreed that although the international community cannot escape the tyranny of "the vital interests of powerful states", access to justice for victims is better served when "citizens of the same country [face] each other"

(ICTJ, 2015). In this sense, we are reminded that an effective human rights normative framework is primarily a domestic one.

However, acknowledging that post-conflict states willing to adhere to the human rights normative framework typically inherit judicial systems unfit for a process of transitional justice, the international community has a role to play under the *jus cogens* doctrine (Kerr and Mobekk, 2007). By transitional justice, we mean a “range of judicial and non-judicial mechanism aimed at dealing with a legacy of large-scale abuses of human rights” (Kerr and Mobekk, 2007, p.3). In this context, hybrid tribunals have been used in recent years as a mechanism to narrow the impunity gap.

Bearing in mind the crucial allocation of political will from post conflict states behind hybrid tribunals, these have the potential to create opportunities for reform and domestic capacity building of the judicial sector in order to create the conditions for access to justice for victims of atrocity crimes domestically (Kerr and Mobekk, 2007, UNHCHR, 2008, Weiffen, 2012). Indeed, hybrid tribunals were specifically designed to “contribute to sustainable peace and the rebuilding of a society based on the rule of law” (Kerr and Mobekk, 2007, p.3). As will be explained throughout this project, hybrid tribunals’ mandate was envisioned part judicial and part developmental, harnessing the legal technical knowledge domestically while carrying out human rights prosecutions (Dickinson, 2003).

1.3. Defining Hybrid Tribunals

Hybrid or ‘internationalized’ tribunals “blend the international and the domestic as a product of judicial accountability-sharing” (Holvoet and de Hert, 2012, p. 229) between a host state and international organizations. To date, hybrid tribunals have been used in the context of transitional justice in Sierra Leone, East Timor, Kosovo, Bosnia Herzegovina, Cambodia and Lebanon. Born out of the experience of the ad hoc tribunals for the Former Yugoslavia and Rwanda, hybrid tribunals are mutually agreed between the post-conflict state and, typically, the UN. This type of agreement renders an accountability-sharing scheme where both the state and the international community design and implement the court’s mandate.

Explained in detail below, hybrid tribunals are designed to “offer legitimacy by providing ownership without affecting independence and impartiality... while also building domestic capacity” (Holvoet and de Hert, 2012, p.229). Moreover, key to their name, as Costi (2005) and Dickinson (2003) also explain, these tribunals mix domestic with international law in line with fair trial international standards. For example, in Sierra Leone this meant the domestic provision of prosecuting individuals below the age of eighteen years old (Perriello and Wierda, 2006, Schabas, 2008). Another key *hybrid* element is the inclusion of international and domestic judicial personal. All hybrid tribunals to date have included this mix preserving the tribunal’s independence and transparency while assuring domestic legal fluency (Schröder, 2005). These three elements of hybrid tribunals, namely: proximity to victims, blending domestic and international law as well as combining international with domestic judicial personal, is coupled with a fourth element: the premise of domestic capacity building.

As explained above by Kerr and Mobekk, post-conflict states enabling a transitional justice process, typically inherit broken and ineffective justice institutions and begin a process of rule-of-law reforms to address past human rights abuses (Kerr and Mobekk, 2007). From the adjudication of complex human rights legal cases, hybrid tribunals have the potential to spur institutional learning at the different levels of the judicial system (Chehtman, 2013). Hence, hybrid tribunals are considered an advantageous way of supporting weak post-conflict institutions while locating human rights prosecutions domestically (McAuliffe, 2009, UNHCHR, 2008). In this context, the purpose of hybrid tribunals is to “impact...local institutions [by] building capacity; rebuilding judicial systems and promoting international human rights standards throughout the local community” (Holvoet and de Hert, 2012, p.230). Emphasizing the fact that domestic prosecutions tend strengthen local judiciaries (Kim and Sikkink, 2013, ICTJ, 2015, Dancy et al., 2014), even in the tragic case of Syria, Human Rights Watch argues that “a dedicated and specialized judicial mechanism embedded in the national justice system with support from international judicial experts could work to narrow the existing impunity gap” (Human Rights Watch, 2013, p.15). Thus, hybrid tribunals, and their premise of capacity building, have the potential to play a critical role in domestic capacity building in order to narrow the impunity gap. The purpose of capacity building mechanisms within hybrid tribunals is to

embed domestically the human rights normative framework creating ownership and locating *jus cogens* responsibilities within the state

1.4. Hybrid Tribunals as Capacity Building Tools?

In this context, this thesis analyzes how hybrid tribunals might contribute to narrowing the impunity gap through their capacity building premise. It asks what capacity building recommendations can be drawn for situations where hybrid tribunals might aid narrowing the impunity gap. Thus, the thesis analyzes the Special Court for Sierra Leone (SCSL), the ongoing trials in the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the unique judicial set up in the Bosnian War Crimes Chamber (BWCC) within the Court of Bosnia Herzegovina (BiH) with backing of the International Tribunal for the Former Yugoslavia (ICTY). Understanding that closing the impunity gap must begin at the domestic level, the extent of capacity building mechanisms developed by these tribunals will be a key parameter to conceptualize how they might create a strong domestic human rights normative framework equipped to uphold *jus cogens*.

However, an important point of clarification must be made. As explained by Kerr and Mobekk, in any post-conflict effort, multiple national and international agencies participate in diverse capacity building programs, hybrid tribunals being only one of them. In this regard, borrowing from them: “is it unrealistic to expect one single mechanism” (Kerr and Mobekk, 2007, p.177) to rebuild the whole of the judicial system. In fact, what this thesis treats hybrid tribunals as a key mechanism within the universe of many others tasked with post-conflict reconstruction. This clarification is of utmost importance to keep in mind throughout the thesis because, as the reader might alert, re-building states after conflicts is a process beyond any one institution or capacity building effort. In sum, by understanding how hybrid tribunals might contribute through their capacity building premise, we might be able to learn useful lessons for on-going conflicts in places like Syria and Yemen.

1.5. Research Questions

Based on the introductory remarks above, the thesis seeks to understand whether, in a post-conflict state, hybrid tribunals and their capacity building premise can help narrow the impunity gap creating the conditions for a human rights normative framework including the right of access to justice.

Hence, the thesis will seek to answer the following research questions:

1. Have hybrid tribunals – Sierra Leone, Cambodia and Bosnia Herzegovina - implemented capacity building programs within their jurisdictions?
2. What has been the impact, if any, of Sierra Leone, Cambodia and Bosnia Herzegovina's hybrid tribunals' capacity building programs in order to narrow the impunity gap?
 - a. What are the main barriers, if any, for hybrid tribunals' capacity building programs?
3. What recommendations, including policy options, regarding the importance of capacity building to narrow the impunity gap can be derived for current and future hybrid tribunals in post-conflict situations?

1.6. Thesis Outline

The thesis is divided into six chapters.

Chapter two begins with the methods used in this project. In addition, the author elaborates on the choice of case studies. Furthermore, a discussion regarding ethics will be included. Finally, a brief note on the relevance of this thesis will conclude chapter two.

Chapter three begins discusses the theoretical framework and main contributions of the constructivist school of international relations dealing with the question of human rights

compliance and the role of capacity building. Considering the spiral model and limited statehood theory, the author will discuss how these are relevant theories to tackle the research questions.

Therefore, the **second part of chapter three** delves into the main elements of hybrid tribunals with special emphasis on their capacity building premise.

Based on the review of Sierra Leone, Cambodia and Bosnia Herzegovina's capacity building programs, **chapter four** presents the main findings vis-à-vis their impact and barriers in the context of the fight against impunity.

Chapter five, the conclusion of the thesis, will recap the main points and findings while proposing further questions for future research in this area.

Finally, **chapter six** will briefly discuss possible policy recommendations regarding hybrid tribunals' capacity building programs in the context of the fight against impunity. These recommendations will be directed at both practitioners and researchers of hybrid tribunals.

2. Methods

2.1. Data Collection and Source Criticism

Although the author recognizes the benefits of empirical work for this thesis, limitations in the research process precluded the possibility of carrying out fieldwork.⁵ Nonetheless, the absence of fieldwork does not curtail the possibility to answer our research questions based on a review of primary and secondary sources. Using mainly a qualitative method, the thesis relied on critical content analysis of key published and peer reviewed articles, books and policy documents.

The authority, authenticity and relevance of the sources used in this project correspond with widely known authors in the field of international relations, human rights, international law and development. For example, scholars like Judge Antonio Cassese, Kathryn Sikkink from the University of Minnesota and Thomas Risse from the Otto-Suhr Institute for Political Science at Freie Universität Berlin. Furthermore, data provided by the Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases research consortium (DOMAC) has been vetted by editors at the Hebrew University, Reykjavik University, University College London, and University of Amsterdam. Moreover, collection of data also included reports, policy analysis and commentaries from international organizations such as the UN and non-governmental organizations such as Amnesty International, the International Center for Transitional Justice and Human Rights Watch.

2.2. Methodology

This project carried out an in depth analysis of the spiral model (Risse et al., 1999, 2013) and limited statehood (Krasner and Risse, 2014) theories in order to locate the importance of capacity building in post conflict situations and their connection to hybrid tribunals. The second main methodology employed was a thorough literature review and document analysis of Sierra Leone, Cambodia and Bosnia Herzegovina's hybrid tribunals' capacity building programs provided by

⁵ The main explanations include limitations with time and adequate funding to carry out meaningful and relevant fieldwork.

the DOMAC project. The combination of the two allows distilling the main findings concerning whether capacity building programs have been utilized and whether they might help narrow the impunity gap. Indeed, this thesis benefits from the multidisciplinary of human rights drawing knowledge located within law, international relations, political science and development (Freeman, 2011).

Moreover, the choice of case studies under examination reflects a desire to analyze some of the most prominent cases for hybrid tribunals' capacity building premise. In this sense, the exclusion of Kosovo pertains to the exceptional involvement of a multi-national actor such the European Union in Kosovo.⁶ The hybrid tribunal for Lebanon has been discarded given the location of The Hague as the seat of court. The Special Panels of the Dili District Court in East Timor was excluded since it was administer by UN Transitional Authority (UNTAET), a non-state actor⁷.

Consequently, the Special Court for Sierra Leone was chosen because it complies with the basic conditions – local seat of the court, domestic investment, potential of capacity building – and it was the first ever hybrid tribunal created. The Extraordinary Chambers in the Courts of Cambodia also comply with the basic conditions adding an important element of time in the fight against impunity for crimes committed by the Khmer Rouge regime between 1975-1979. Finally, beyond fulfilling the main criteria, the Bosnian War Crimes Chamber's relationship with the ICTY offers important insights about the relationship between international and local courts' capacity building programs (Chehtman, 2011, Gow et al., 2013).

Finally, acknowledging the rich universe of data, the thesis benefits from multi-sited research (Marcus, 1995) as a framework guiding the interrelation between the different bodies of knowledge explored. Multi-sited research allows the researcher to follow concepts through different “paths...or juxtapositions of locations” (Marcus, 1995, p.105) to make sense of argumentative associations. Indeed, multi-sited research enabled the combination of

⁶ Another key reason for exclusion is the quasi-state status of Kosovo. See: GOW, J., KERR, R. & PAJIC, Z. 2013. *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the Former Yugoslavia*, New York, Routledge.

⁷ Since one of the conditions for the thesis is the possibility to build capacity domestically, it is difficult to assess this when hybrid tribunals are wholly administer by non-state actors like the United Nations. See: COHEN, D. 2002. *Seeking justice on the cheap: is the East Timor tribunal really a Model for the future?* *East-West Center*.

constructivist International relations theory (the spiral model), law (hybrid tribunals), institutional theory (capacity-building) and governance theory (limited statehood). Given the multi-sectoral nature of human rights *problematiques* (Cesarini and Hertel, 2009), Marcus' multi-sited description adds a valuable methodological possibility beyond a linear theoretical framework. This is of utmost importance for this project as it also reveals tensions and competing arguments present in the real world.

2.3. Ethics

Although this thesis project does not employ direct ethnographic research, Lawrence reminds us the importance of ethics for “the proper way to conduct research” (Lawrence, 2007, p.48). In this sense, it should be noted the bias of this author towards the value of human rights prosecutions. Secondly, given the sensitive nature of the conflicts researched, the policy recommendations from this study should be careful not to create false expectations for external audiences reading this project.

2.4. Relevance

This thesis aims at contributing to the scholarly discussion about the role of hybrid tribunals in the fight against impunity. Analyzing how the current global accountability architecture promotes or hinders a human rights framework is crucial to conceptualize what policies are most pertinent in situations like Syria and Yemen. Thus, the findings of this thesis intend to contribute to questions of human rights compliance narrowing the impunity gap. Additionally, theorizing the spiral model, limited statehood theory and hybrid tribunals together can contribute to the human rights research agenda. In the most practical sense, however, lessons emanating from this project will be shared with relevant actors dealing with the impunity gap.⁸

⁸ A fitting example of this thesis contribution to an external audience is the author's commitment to turn the lessons learned in this project into a comprehensive policy oriented paper in collaboration with the Syria Justice and Accountability Centre (SJAC). See: <http://syriaaccountability.org/about/>

3. Review of the Literature: From Norm Commitment to Compliance

This chapter is divided into two parts. The first half begins setting up the theoretical framework for the thesis discussing the main contributions of the spiral model developed by Risse, Sikkink and Ropp (1999; 2013), and limited statehood theory developed by Risse (2011) and Krasner (2014) in terms of capacity building. The second half of the literature review probes the main components of hybrid tribunals focusing on the premise of capacity building. In sum, this chapter summarizes the key theoretical ideas for this thesis regarding human rights norm compliance, their connection to capacity building and their relationship with hybrid tribunals in the context of the fight against impunity.

3.1. The Return to Norms: Human Rights Compliance

In the context of *jus cogens*, the constructivist school of international relations led by Finnemore, Keck, Risse, Ropp, and Sikkink, has tried to develop models describing the conditions in which compliance with human rights norms occurs among states. By examining the pressure of transnational networks as well as socialization strategies among states, the above-mentioned authors highlight the importance of norms and reputation in the international system (Finnemore and Sikkink, 1998, Risse et al., 1999, 2013). Indeed, in a seminal paper published in 1998, Finnemore and Sikkink explained that “shared ideas... about appropriate behavior are what give the world...order and stability” (Finnemore and Sikkink, 1998, p.894). Challenging the presumption that international relations scholarship should not enter normative debates, the objective of norm theory is to show “how the ‘ought’ becomes the ‘is’” (Finnemore and Sikkink, 1998, p.916).

As a striking difference with realist conceptions of international relations, Finnemore and Sikkink force an “ideational turn” (Finnemore and Sikkink, 1998, p.888) in the study of state behavior by trying to understand how norms are created and what are the mechanism for compliance, beyond simple state strategic interest. Building on institutional sociology (Finnemore and Sikkink, 1998, p.907), they argue that states’ particular strategic interests can be challenged by larger normative

framework developed by international organizations such as the UN and transnational activist networks⁹ (Keck and Sikkink, 1998). For them, the language and policies of human rights developed since 1948 constitute a powerful normative framework states cannot escape without considerable diplomatic damage.

Using human rights treaties as an example, when states face conditionality in the international system regarding their accession to certain norms, their reputation and legitimacy as relevant actors might be jeopardized (Finnemore and Sikkink, 1998). Examples of this include states such as Argentina during the 1970s, Belarus in the context of the European Union and Sudan, where the ICC has investigated genocide in Darfur, indicting President Omar Al-Bashir (Sikkink, 2014). Finnemore and Sikkink have famously coined this process of norm recognition as a “norm cascade”. This is when “norms may become so widely accepted that they...achieve a ‘taken-for-granted’ quality” (Finnemore and Sikkink, 1998, p.904). With the creation of the UN and the subsequent codification of a variety of treaties, the right of access to justice has cascaded significantly throughout the international system creating a ‘justice cascade’ (Freeman, 2011, Sikkink, 2011). In this context, Risse and Sikkink’s spiral model dealing with human rights norms offers valuable insights to understand under which conditions a justice cascade occurs.

3.2. The Spiral Model: Able and Willing to Comply?

The spiral model describes a series of steps where actors at the society, state and international stage engage in narratives and actions for conformance with a particular human right norm (Risse et al., 1999). It does so while trying to understand the conditions under which “international human rights regimes are internalized and implemented domestically” (Risse et al., 1999, p.3). Taking empirical evidence from, among others, Argentina, Tunisia and South Africa, they explain how a state moves from being a norm-violator to a norm-follower. Here, they assume a norm-violator states possess the capacity to internalize human rights norms but are unwilling to do so since this would threaten their mere existence. Norm internalization for unwilling repressive states occurs in five phases: repression, denial, tactical concessions, prescriptive status and rule-consistent behavior.

⁹ Examples of them include Amnesty International, Human Rights Watch, the Federation of Human Rights and certain UN-specialized bodies. See: ALISON BRYSK, A. J. 2012. The Globalization of Law: Implications for the Fulfillment of Human Rights. *Journal of Human Rights*, 11, 4-16.

The first phase includes repression of domestic human rights networks that demand change. For example in Argentina activists demanding the halt of forced disappearances to the junta government in the 1970s were severely tortured and some of them murdered (Sikkink, 2011). At a second phase, with the strategic collaboration of international civil society (i.e.: Amnesty International), domestic groups gain prominence and force the repressive state to issue a statement. Generally, this statement denies any violation showing unwillingness to conform (Risse et al., 1999).

However, continued pressured from below and above pushes the repressive state to grant tactical concessions in order to protect its regime and reputation in the international system (Risse et al., 1999, Finnemore and Sikkink, 1998). At this third stage, human right networks gain public prominence and legitimacy (Keck and Sikkink, 1999, Risse et al., 1999). What follow might be further changes in policy creating the conditions for possible regime change from repressive to democratic. The fourth and fifth stage of the spiral model assumes assured willingness to adhere to the human right norm in question for its long-term validity (Risse et al., 1999). In other words, once there has been a change in policy (i.e.: sign the convention banning enforced disappearances) or regime (i.e.: democratic elections) human rights networks monitor the situation to assure compliance and rule-consistent behavior. In sum a combination of pressure and engagement with the discourse of human rights norms in the international system leads to changes in domestic policy allowing for a cascade to take place.

Nonetheless, the spiral model presents a series of fundamental under theorized flaws. Chief among them is the assumption that human rights compliance and internalization is “a matter of state...willingness rather than institutional capacity” (Risse et al., 2013, p.4). Acknowledged by the authors of the spiral model in a new book published in 2013, new research showed that compliance with human rights norms depends not only on willingness of states but also on their institutional capacity. Thus, the authors conclude that capacity building processes must be included as one of the mechanisms to garner compliance with these norms (see figure 1).

MECHANISMS	MODEL OF SOCIAL (INTER-) ACTION	UNDERLYING LOGIC OF ACTION
Coercion	Use of force Legal enforcement	Hierarchical authority <i>(Herrschaft)</i>
Incentives	Sanctions Rewards	Logic of consequences
Persuasion	Arguing Naming / shaming Discursive power	Logic of arguing and / or logic of appropriateness
Capacity-building	Institution-building education training	Creating the preconditions so that logics of consequences or of appropriateness can apply

Figure 1 (Risse et al., 2013, p.16)

Thus, while the 1999 spiral model employed modes of socialization such as coercion, incentives and persuasion to change state willingness to comply with human rights norms, the revised spiral model focuses on institutional building, education and training. Therefore, in order to understand better what capacity building for human rights compliance means, the next section delves into the main ideas used by Risse, Ropp and Sikkink. From this analysis we are able to locate the question whether hybrid tribunals can contribute creating the conditions for human rights compliance narrowing the impunity gap.

3.3. Building Capacity for Compliance

For Risse, Ropp and Sikkink, capacity building means a “highly institutionalized process of social interaction aiming towards education, training and the building up of administrative capacities to implement and enforce human rights law” (Risse et al., 2013, p.15). This definition is in line with earlier scholarship developed by Chayes and Chayes in the ‘management school’ of compliance research. For them, issues of capacity have been infrequently recognized as the root cause for non-compliant behavior of human rights norms (Chayes and Chayes, 1993, Chayes

et al., 1998). In the context of human rights prosecutions, this means a strong judicial system able to adjudicate complex crimes involving, in some instances, the complicity of the state. However, states committed to transitional justice usually inherit a broken judiciary (Kerr and Mobekk, 2007) where involuntary non-compliance with human rights norms can be understood as the “lack of administrative capacity to enforce decisions” (Risse et al., 2013, p.15) rather than their unwillingness to abide by such norms.

In the same vein, limited statehood theory posed by Risse (2013) utilizes the concept of “involuntary non-compliance” (Chayes and Chayes, 1993), noting that states might be unfairly judged for low compliance impact when they do not possess the right governance capabilities to enforce any type of laws (Krasner and Risse, 2014). Hence, as opposed to *consolidated* statehood presupposing full capacity to implement and enforce rules throughout the territory, Risse and Borzel point out to the necessity of capacity building initiatives for “democratic regimes with weak institutions” (Risse, 2013, p.18). In this sense, limited statehood theory complements the spiral model insofar it explains issues of involuntary non-compliance pointing out at failing governance structures and the critical role of capacity building for long-term human rights compliance.

3.4.Limited Statehood and Shared Sovereignty: Compliance Investment?

Risse derives the notion of statehood from Max Weber’s ideas of institutional authority and the ability of states to “steer hierarchically” (*Herrschaftsverband*) (Risse et al., 2013, p.65) legitimately controlling the monopoly of violence. From this, *consolidated* statehood corresponds with the ability to make, implement and enforce rules throughout the territory using the institutional channels previously established by the machinery of the state. Areas of *limited* statehood, on the other hand, corresponds to several dimensions where the central authority lacks the ability to enforce rules (Risse et al., 2013, p.66).

The ability to enforce rules, can be restricted along three dimensions (1) territorial, (2) sectoral, “with regard to specific policy areas” (Risse et al., 2013, p.68), and (3) social “with regard to specific parts of the population” (Risse et al., 2013, p.68). For Risse and Borzel most countries in the world have areas of limited statehood where laws from the central authority cannot be

enforced in relation to certain parts of the territory, a specific segment of the population or in connection to a particular policy area. For example, access to justice has been identified as a policy area of limited statehood in Sierra Leone, Bosnia Herzegovina and Cambodia corresponding with the creation of hybrid tribunals in each of these countries as means to build institutional capacity in their judicial systems (Risse et al., 2013, p.71).

In this context, external actors such as the UN, play a significant role building domestic capacity for the right of access to justice as a policy area of limited statehood (Lake, 2014). Indeed, limited statehood scholarship in countries undergoing a process of transitional justice such as Congo (Lake, 2014), Georgia (Risse et al., 2013) and states with severe administrative capacity constraints such as Kosovo (Börzel, 2011) and the Salomon Islands (Matanock, 2014), have emphasized the participation of external actors assisting with the process for consolidating statehood (Risse and Lehmkuhl, 2006). Krasner and Risse call this “state-building” efforts aimed at complementing state functions “where [it] does not have the administrative capacity to exercise effective control” over the territory (Krasner and Risse, 2014, p.546).

If we take the example of the Cambodian hybrid tribunal, Krasner and Risse’s terminology would apply as the UN and the government identified deficiencies in the state’s judicial system precluding the adjudication of human right abuses during the Khmer Rouge, thus, proposing the creation of a hybrid tribunal (ECCC, 2015). The same could be mentioned in Bosnia Herzegovina with the UN and the ICTY assisting the hybrid court and the government over human rights prosecutions. These examples show how external actors engage in a process of co-governance with the host state sharing sovereignty over human rights prosecutions as a policy area of limited statehood.

In fact, coined as “delegation agreements” (Matanock, 2014), external actors bring multiple resources and expertise in an effort of state building. For Risse, such delegation agreements represent “multilevel governance” (Risse, 2013, p.3) where local, regional and international actors delineate a program for joint action. In regards to our case studies, the agreements signed between the UN and the government of Sierra Leone, Cambodia and Bosnia Herzegovina, could be seen in effect as multilevel governance (BiH, 2014b, SCSL, 2015, ECCC, 2015). Therefore,

with the objective of strengthening the rule of law and supporting domestic capacity, hybrid tribunals can be understood as external actors engaging in state building. In this sense, Krasner and Risse evaluate the success of domestic capacity building in terms of its legitimacy, complexity of tasks and institutionalized channels with local structures, including the provision of adequate resources (Krasner and Risse, 2014).

3.5. Three Determinants for Capacity Building Impact

3.5.1. Legitimacy

Bearing in mind shared sovereignty agreements, domestic capacity building activities must be legitimate and relevant to local populations' needs in order to achieve impact (Krasner and Risse, 2014, p.547). For example participation of victims locally rather than in The Hague legitimizes the judicial process while it enables institutional learning in terms of witness protection (Dickinson, 2003, Michel and Sikkink, 2013). Therefore, creating avenues for local participation and ownership of capacity building activities would, in Krasner and Risse's model, increase the chances of success for consolidated statehood.

Moreover, input legitimacy, meaning the ability to create channels of participation and ownership of the planning process of any capacity building activity is important for this project as it evaluates whether local judicial personal can shape the domestic capacity building agenda (Krasner and Risse, 2014).

3.5.2. Task Complexity

Krasner and Risse argue that "the simpler the task, the more likely it is to be provided" (Krasner and Risse, 2014, p.547). Perhaps an obvious claim, unlike development projects where inadequate resources might halt efforts to provide public goods, the preemptory quality of *jus cogens* norms obligates the state, even when limited, to take action and implement human rights norms (Cassese, 2004). Therefore, when considering domestic judicial capacity building strategies, task complexity is an appropriate marker of success. The ECCC is an example of this where after more than thirty years since the Khmer Rouge regime, the state is still under the

obligation to investigate and prosecute human rights abuses. In this sense, “where indigenous state capacity hardly exists” (Krasner and Risse, 2014, p.547), the complexity of capacity building tasks must also correspond with the responsibility and ability of states to deliver on human rights norms.

3.5.3. Institutional Design

Institutional design points out at the communication channels between external actors and local stakeholders in the activity carried out. In other words, for successful capacity building, the design of such activity must also incorporate channels enabling “those being governed to have a say in the rule- or decision- making process” (Krasner and Risse, 2014, p.556). This, in turn, strengthens input legitimacy explained above. Moreover, and more importantly, institutional design including active local participation renders positive results in the long run as the activities carried out are not only legitimate in the eyes of the local population, but also implemented in ways familiar with local stakeholders. Thus, bearing in mind that the objective of capacity building is to create the right conditions for consolidated statehood, local stakeholders can continue with institutional building processes within their own terms developing their own bureaucratic culture.

In sum, Krasner and Risse’s three determinants of success for capacity building impact can also be applied to hybrid tribunals. These institutions created from shared sovereignty agreements with a capacity building premise within the domestic judiciary can consolidate statehood, which in turn, narrows the impunity gap. Therefore, before moving to the second part of the literature review examining the main features of hybrid tribunals focusing on their premise of capacity building, we must highlight the following three points.

First, based on the spiral model we learn that non-compliance with *jus cogens* norms might be an issue of institutional capacity of states rather than one of willingness. Therefore, mechanisms involving capacity building (education, training, administrative capacities) are needed.

Secondly, that limited statehood theory explains involuntary non-compliance as states lack central enforcement powers. We also learn from limited statehood theory that right of access to justice is an area of limited statehood in Sierra Leone, Bosnia Herzegovina and Cambodia, our

three hybrid tribunal examples (Risse et al., 2013, p.71).

Third, we observe from Krasner, Risse and Matanock that capacity building activities in areas of limited statehood need to be based on shared sovereignty agreements that are legitimate, aim for low complexity of tasks and are institutionally designed for local adaptability. These three lessons are important to remember as they confirm that hybrid tribunals might be seen as capacity building institutions creating conditions for *jus cogens* compliance.

3.6. Core Elements of Hybrid Tribunals

As explained in the introduction, hybrid tribunals have been created as a direct response to geopolitical and capacity constraints of the international and domestic legal architecture creating an impunity gap (UNHCHR, 2008). The core elements of hybrid tribunals tackling access to justice as a policy area of limited statehood can be divided in four: proximity to victims, domestic and international applicable laws, mix of local and international judicial personal and capacity-building.

3.6.1. Proximity to Victims

As seen in Sierra Leone, Bosnia Herzegovina and Cambodia, hybrid tribunals have been created through negotiations between governments and the UN in order to secure a legitimate and transparent mechanism for victims' redress (UNHCHR, 2008, PILPG, 2013). Unlike the ICC located in The Hague, the advantage of hybrid tribunals is their proximity to victims and what this means for the effective exercise of their right of access to justice. Indeed, attending and participating in court proceedings can "allow the affected population to better understand the conflict and can contribute to the social reconstruction process" (PILPG, 2013, p.6). Moreover, witnessing the proceedings in the local language adjudicating international and domestic law may improve the perceived legitimacy of the tribunal (PILPG, 2013). In this sense, Mendez also argues that this reinforces the "moral imperative to make victims and affected communities the primary focus of international humanitarian law enforcement"¹⁰ (Mendez, 2009, p.73). Others

¹⁰ Even the International Criminal Court struggles with this. In a recent novel decision, the trial chamber of Bosco Ntaganda of the Democratic Republic of Congo, requested the Registrar of the Court to evaluate the possibility of

like Raub and Nouwen argue that local trials can lead to a cathartic process for victims and have the advantage of unrestricted and immediate access to evidence and witnesses for complex human rights prosecutions (Nouwen, 2006, Raub, 2008)

In relation to hybrid tribunals as domestic capacity building institutions, Costi clearly points out that “an international tribunal located far away from the affected country and operated by foreigners cannot train local actors in necessary skills” (Costi, 2005, p.11). Indeed, capacity building can only take place if the seat of the court is invariably located within the post-conflict state and in proximity to victims.

3.6.2. Applicable Laws and International Standards

A second core element of hybrid tribunals is the applicability of international and domestic laws. In practice this means the combination of international law covering war crimes, genocide and crimes against humanity with domestic laws equally important for the adjudication of human rights abuses. For example, in Cambodia the statute of the ECCC included genocide and crimes against humanity as well as “three specific crimes under the 1956 Penal Code of Cambodia: homicide, torture and religious persecution” (Nouwen, 2006, pp.206-207). In Sierra Leone, domestic laws in the Special Court included lowering the age of trial from 18 to 14 years old in response to the use of child soldiers during the civil war (Kerr and Mobekk, 2007).

One advantage of including *jus cogens* norms into the legal statutes of hybrid tribunals is the avoidance of non-retroactivity or *ex post facto* judgments where individuals cannot be tried for crimes that were not outlawed at the moment they were committed. As explained before, through the *jus cogens* doctrine, every state is obligated to prosecute such crimes irrespective if these are present in their domestic legal code (PILPG, 2013, p.20). This way, the right of access to justice for victims of human rights abuses is always guaranteed (de Greiff, 2014). Moreover, by applying international and domestic laws in parallel, hybrid tribunal secure international trial

hosting the opening of the trial in Ituri. The trial chamber argued that the change of trial location is in line with the Rome Statute and “serve to meaningfully bring the proceedings closer to those most affected” INTERNATIONAL CRIMINAL COURT 2015. Recommendation to the Presidency on holding part of the trial in the State concerned: THE PROSECUTOR v. BOSCO NTAGANDA. *In: TRIAL CHAMBER VI* (ed.). The Hague: International Criminal Court.P, 12.

standards while moving away from a victor's justice characterization by local skeptical actors (Costi, 2005, p.25).

In terms of capacity building, Dickinson (2003) and Gibson (2009) point out how the interaction between these two sets of laws offers the opportunity to develop local jurisprudence on atrocity crimes using international law while adding expertise and further case law for the validity of *jus cogens* domestically.

3.6.3. Judicial Personal: Transparency, Impartiality and Local Fluency

Closely related with the mix of international and domestic laws, hybrid tribunals are also characterized by the mix of international and domestic judicial personal. All hybrid tribunals to date have followed this composition. The hybrid nature of the judicial personal corresponds to two main objectives: ensure the international standards of transparency and impartiality of the procedure while warranting local fluency of domestic laws. The presence of international judicial personal contributes to the objective of safeguarding international trial standards at the same time domestic judicial personal might be protected from government interference of their own investigations (PILPG, 2013). For example, in Cambodia, international judges have constantly battled with the Cambodian government in order to preserve impartiality and the appropriate application of international law (Scully, 2011).

On the other hand, the inclusion of international judges and prosecutors enhances the “perception of the independence of the judiciary and therefore its legitimacy” (Dickinson, 2003, p.306). Moreover, authors like Mendez (2009) and Costi (2005) argue that collaboration between local and international personal may enable a process of institutionalization of international norms within domestic judicial systems. This, in turn, raises domestic trial standards to ensure impartiality and transparency for the accused and victims alike. Similarly, domestic judicial personal is crucial to garner local fluency of laws and judicial culture needed for appropriate prosecutorial and defense investigations (Costi, 2005, pp.18-19).

In terms of capacity building, as noted by Mendez, Costi and Dickinson, working side by side with domestic and international judicial personal contributes to cross-fertilization of advocacy

and legal expertise. In this sense, the UN Office on Drugs and Crime argues that capacity building amongst judicial personal is inherently a two-way process “with internationals joining a hybrid initiative being required to learn about a country’s history, culture and legal tradition” (UNODC, 2011, p.35) and domestic personal learning new investigative and trial techniques. Nonetheless, it is worth mentioning that cross-fertilization can happen at any time and without any planning or capacity-building design. Thus, it is hard to quantify or monitor in the daily activities of hybrid tribunals. However, when planned, capacity building activities between local and international judicial personal might render positive results (Chehtman and Mackenzie, 2009b, Chehtman, 2013).

3.6.4. Capacity Building: Judicial Romanticism?

The last and most important core element of hybrid tribunals for this thesis is their capacity building dimension. Bearing in mind that post-conflict states typically suffer from systemic problems including a broken judiciary “too poor to deliver meaningful post-conflict justice” (Holvoet and de Hert, 2012, p.238), hybrid tribunals were envisaged to, while carrying out human rights prosecutions, build domestic capacity within the judiciary (UNHCHR, 2008). From the literature, we gather that hybrid tribunals “have the potential for greater impact on nation-building” (Mendez, 2009, p.73) while “promoting international human rights standards throughout the local community” (Holvoet and de Hert, 2012, p.230).

However, there has not been a systematic process of defining what capacity building means in the context of hybrid tribunals. Thus, while all of the authors surveyed in this section mention capacity building in some ways, their definition and application of the term varies according to the examples they use or the point they are trying to convey. It seems that capacity building is a byproduct of hybrid tribunals’ inclusion of international and domestic judicial personal and the material resources earmarked for infrastructure. For example, while Stromseth argues that “capacity-building is important...to [prevent] future atrocities and to building a stable rule of law” (Stromseth, 2009, p.89), her assessment and that of Dickinson (2003), Costi, (2005) Raub (2008), Kerr and Mobekk (2007), Mendez (2009) and Holvoet and de Hert (2012) does not go further enough to explain what is meant by capacity building, what kind of specific activities

contribute to building the rule of law and how they measure human rights impact and internalization. Similarly, despite that a 2008-policy tool published by the UN High Commissioner for Human Rights describes in some detail what capacity building might entail, it does not offer concrete evidence or programmatic details (UNHCHR, 2008, p.2).

In this context, one wonders whether authors dealing with the capacity building dimension of hybrid tribunals have engaged in “judicial romanticism” (Akhavan, 2001, p.31) idealizing what courts engaged in complex human rights prosecutions can achieve vis-à-vis substantial constraints on the ground. Certainly, we can agree at the conceptual level that hybrid tribunals possess the potential to be capacity building tools in the context described by limited statehood theory. Yet, more research is needed to understand the range of activities carried out and their intended impact on human rights compliance narrowing the impunity gap. Nevertheless, the literature does point out at a clear trend considering hybrid tribunals as capacity building actors in post-conflict states.

Departing from this trend, the following chapter examining our case studies utilizes empirical data published by DOMAC. Their data on Sierra Leone, Cambodia and Bosnia Herzegovina allows this thesis to evaluate the opportunities and challenges of capacity building activities in the context of the impunity gap. For that, in an attempt to unify concepts with the findings of this literature review, the next chapter employs Risse, Ropp and Sikkink’s capacity building definition on our case studies.

4. Findings

This chapter sets out the main findings of this thesis in relation to the research questions. First, it provides a summary of the main points raised in the literature review to later answer whether hybrid tribunals – in light of the definitions employed here – have implemented capacity building activities. Secondly, it evaluates in detail the case studies proposed for examination: the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Bosnian War Crimes Chamber (BWCC). Consequently, in order to answer the second research question about the impact of capacity building activities narrowing the impunity gap in our case studies, an analysis of key barriers and opportunities follows.

4.1. Applying Definitions

From the analysis presented above, we gather that hybrid tribunals have been created as a direct response to geopolitical and capacity constraints of the international and domestic legal architecture creating an impunity gap (UNHCHR, 2008, ICTJ, 2015). In the context of the spiral model and limited statehood theory, hybrid tribunals can be considered as external actors born out of shared sovereignty agreements engaged in domestic judicial capacity building activities in order to create the conditions for consolidated statehood (Risse et al., 2013). This institutional building process, as explained by Risse, Ropp and Sikkink, contributes to human rights compliance in states willing to adhere by such norms (Rodman, 2014). However, in instances of involuntary non-compliance, enforcing *jus cogens* norms- including the right of access to justice- might be an issue of institutional capacity of states rather than one of willingness (Samuels, 2006, Risse et al., 2013). Therefore, mechanisms involving capacity building (education, training, administrative capacities) are needed (Chayes et al., 1998, Risse et al., 2013).

For the authors of the spiral model, capacity building means a “highly institutionalized process of social interaction aiming towards education, training and the building up of administrative capacities to implement and enforce human rights law” (Risse et al., 2013, p.15). Their definition does not qualify specific context-dependent changes but offers a generalist view of what capacity building activities *might* entail in order to create the conditions for human rights compliance of

willing states constrained by institutional weakness. In this sense, as explained in the literature review, hybrid tribunals and their premise of capacity building can be understood as a factor advancing the creation of conditions for compliance. Indeed, the purpose of capacity building mechanisms within hybrid tribunals is to embed domestically the human rights normative framework creating ownership and locating *jus cogens* responsibilities within the state (Katzenstein, 2003, Hall, 2005, Sriram, 2005).

However, capacity building as a programmatic aim of hybrid tribunals has not been specifically defined. The authors surveyed in this project offer ample examples of capacity building activities in light of Risse, Ropp and Sikkink's explanation, yet, an ontological definition is lacking from their analysis. Indeed, in order to avoid this issue, DOMAC research group uses a definition by the Organisation for Economic Co-operation and Development (OECD) (Chehtman and Mackenzie, 2009b, p.12). In this definition, capacity building simply means "the ability of people, organisations and society as a whole to manage their affairs successfully" (OECD, 2006, p.12). Unlike Risse, Ropp and Sikkink's definition naming education, training and administrative capacity activities, DOMAC employs an even more general description of capacity building. Therefore, this section explores capacity building in light of Risse, Ropp and Sikkink's definition dividing it into knowledge transfer (education, training) and investment in critical infrastructure (administrative capacities).

In this context, evaluating Sierra Leone, Cambodia and Bosnia Herzegovina's hybrid tribunals will be crucial to dispel the level of policy importance assigned to capacity building activities by the architects of these tribunals at the state and international stage. Keeping in mind the theoretical background of this project, capacity building activities are as important as applying *jus cogens* for the right of access to justice. Thus, while some authors claim that states' engagement in hybrid tribunals could be "considered a reclamation...of its...duty to live up to its international commitments...under Article 14 of the ICCPR" (McAuliffe, 2011, p.16), the right of access to justice equally depends on the sustainability of domestic capacities for long term success (Nouwen, 2006, Skinnider, 2007).

4.2. Three Hybrid Experiences: Implementing Capacity Building?

A report from the UN High Commissioner for Human Rights notes that hybrid tribunals should not be considered “a quick fix in tackling the immense challenges of building or restoring justice systems in the post-conflict context”(UNCHR, 2008, p.2). However, as identified above, hybrid tribunals have the potential to develop domestic capacity for lasting impact in collaboration with an active state and with the support from other actors. What follows next is an evaluation whether the capacity building premise of hybrid tribunals in Sierra Leone, Cambodia and Bosnia Herzegovina has been implemented with the appropriate resources and seriousness it requires. By doing so, this thesis intends to develop recommendations aimed at policy experts, practitioners and researchers of hybrid tribunals. Each case study starts with a brief discussion of the history of the conflict and the creation of the court to later describe the main capacity building activities.

4.3. The Special Court for Sierra Leone (SCSL)

Between 1991 and 2002, Sierra Leone went through one of the most notorious civil wars of the decade. Fuelled by the invasion of the Liberian Revolutionary United Front (RUF) in 1991 commanded by Foday Sankoh, but de facto controlled by the now-convicted Charles Taylor, it claimed the lives of more than 75,000 people (Higonnet, 2005). Although there is disagreement over what started the civil war, Perriello and Wierda claim that competition over natural resources, namely diamonds, attracted different militias into the conflict (Perriello and Wierda, 2006). Throughout the civil war, the various factions engaged in systematic war crimes and crimes against humanity.

Crimes committed during the conflict include widespread and indiscriminate killing, the pervasive use of an estimate of 7,000 child soldiers (Perriello and Wierda, 2006, p.9), and horrific gender crimes including “opening the abdomens of pregnant women in order to settle bets of rebels concerning the sex of the fetus” (Horovitz, 2009, p.17). Other infamous crimes committed during the civil war in Sierra Leone are the intentional amputation of extremities and large-scale destruction of civilian property (Perriello and Wierda, 2006, p.9).

International and regional pressure culminated in the Lomé Peace agreement in 1999. This included a power-sharing structure for the various factions as well as amnesties for all crimes for all fighters (Perriello and Wierda, 2006, p.7). However, following the doctrine of *jus cogens*, the UN refused to recognize the amnesties for crimes against humanity, war crimes and other serious violations to international law (Cohen, 2007, SCSL, 2015). Through resolution 1315, the UNSC requested Secretary General Annan to negotiate the creation of a special court tasked with prosecuting human rights abuses. After less than two years of negotiations, the agreement creating the SCSL was signed in 2002 (Perriello and Wierda, 2006). The Court was tasked to prosecute those who bear the greatest responsibility for “crimes against humanity, war crimes, and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law” (Higonnet, 2005, p.32). The SCSL was created as an independent entity from the UN and outside the national court system (Chehtman and Mackenzie, 2009b, p.31).

In terms of capacity building, the agreement between the UN and the government of Sierra Leone did not mention any specific activities to be carried out nor the roles to be taken by the local and hybrid judiciary (McAuliffe, 2011, p. 30). Yet, in 2004, Robin Vincent, the first Registrar of the court noted that the hybrid would improve the “capacity of Sierra Leoneans working at the Special Court” (Hussain, 2004, p.570). However, McAuliffe argues that, despite the impressive infrastructure erected for the court chambers in Freetown, capacity building was minimal because so few nationals were involved” (McAuliffe, 2011, p.36). In the next two sub-sections we examine this claim for activities related to knowledge transfer (training, education, mentoring, etc.) and investments in critical infrastructure (buildings, IT systems, etc.).

4.3.1. Knowledge Transfer

In a field mission to Freetown in 2003, key stakeholders delineated the expectations of the court’s capacity building program. According to the report by the UN Development Programme (UNDP) and the ICTJ, the Special Court was supposed to provide “(1) courses at the law school taught by the Chief Prosecutor; (2) court-based trainings in advocacy tools; (3) training for media, prison guards, and judges; and, (4) a Legal Reform Initiative” (UNDP & ICTJ, 2003, pp.5-7). Departing from these benchmarks, capacity building in the SCSL has not been specifically emphasized as provided by the 2003 field mission and, according to Perriello and Wierda, these activities have

mainly been “on the job” as incidental learning (Perriello and Wierda, 2006, pp.39-40).

As documented by DOMAC, lectures given by the Special Court’s prosecutor to local law students at the Fourah Bay College Law School, have been, at best, “on an ad hoc basis rather than through a formal program” (Horovitz, 2009, p.60). Furthermore, although the Defence and Prosecution offices did recruit legal interns and volunteers, the lack of funding and further training precluded successful internships “because they had to keep other jobs” (Chehtman and Mackenzie, 2009b, p.24).

In regards with training, the Special Court carried out several sessions on “elements of war crimes, crimes against humanity and genocide” (Chehtman and Mackenzie, 2009b, p.15). However, such trainings were not open for domestic legal personal working in other courts in Sierra Leone. As DOMAC documents, whenever such trainings were offered, they were mostly available for specific target groups including judges and prosecutors, excluding mid-level professionals (Chehtman and Mackenzie, 2009b, p.16). In other words, not only the trainings were restricted to personal working inside the Special Court, but also within, other relevant key actors in the delivery of justice such as mid-level investigators were excluded. For example, two years after the establishment of the court, defence investigators did not receive a single training course on substantive matters of international criminal and humanitarian law (Chehtman and Mackenzie, 2009b). In other words, only high-ranking judicial personal such as judges and prosecutors benefited from trainings carried out in the Court. Thus, unlike the UNDP and the ICTJ report, capacity building did not reach domestic personal within and outside the hybrid tribunal.

On the other hand, training of police and prison officers has been considered as positive. According to DOMAC, Sierra Leone’s police force assigned to the court was trained in witness protection while prison officers received courses on detention standards and treatment of prisoners (Chehtman and Mackenzie, 2009b). Nonetheless, contrary to the premise of ‘spill over’ effect into domestic capacities, police and detention training was only set up for personal working within the Special Court. It is unclear whether all police officers trained were from Sierra Leone, but Perriello and Wierda note that the initial policing of the Court and the subsequent training was done by professionals from the United Kingdom (Perriello and Wierda, 2006).

In terms of overall legal reforms, the Sierra Leonean Parliament has been successful in criminalizing human rights abuses and promoting gender and protection for women (Perriello and Wierda, 2006, p.39). Moreover, accession to the ICC and the subsequent talks to incorporate the Rome Statute into domestic legislation can be added as progress (Horovitz, 2009, 2013). Nonetheless, the Special Court has not been directly involved in any of these improvements in overall legal reform, thus, failing to deliver the robust capacity building program promised in 2003.

However, the most apparent failure to live up to the premise of capacity building has been the limited relationship between the tribunal and the domestic judiciary. As explained before, the SCSL was established as a separate entity from the UN and the national judiciary. However, the government of Sierra Leone was entitled to nominate and appoint four Sierra Leoneans to three judgeships and to the influential position of deputy prosecutor (Chehtman and Mackenzie, 2009b). Yet, the government chose to appoint a foreign deputy prosecutor, only two judges and pushed for an amendment to the agreement granting the possibility to appoint foreign judicial personal over domestic ones (McAuliffe, 2011). As such, the inability by choice to influence the agenda of the court further weakened the prospects of a robust capacity building program directed towards the domestic judiciary. In fact, if a limited number of Sierra Leoneans participate in the hybrid tribunal, the purpose of their expertise later to be applied domestically falls completely in jeopardy. This arrangement created a tense relationship with the local judiciary which “has felt removed from the workings of the Special Court and resentful of the funds donated to it” (Perriello and Wierda, 2006, p.40, Chehtman, 2013).

Interviews carried out with domestic legal personal reveals two concerning conclusions. First, that “lessons and techniques learned in the international setting cannot necessarily be put to use when staff members return to the national system” (Cruvellier, 2009, pp.35-36) and “there are too few national legal practitioners involved in the SCSL process to be able to influence national criminal proceedings” (Horovitz, 2013, p.364). These two conclusions point at the lack of strategic planning of capacity building activities for an improved judicial system in Sierra Leone. The impossibility to take on the skills learned in a hybrid context to the domestic room, defeats the entire purpose of hybrid tribunals. In fact, as Horvitz documents, former SCSL local lawyers have been rejected from national courts because their “approach was too foreign” (Horovitz,

2013, p.264).

Abdul Tejan-Cole, former member of the SCSL's Office of the Prosecutor and current executive director of the Open Society Initiative for West Africa, argues that despite the fact the court "was expected to be an instrument for transforming the local judiciary, sadly, the impact...on the local judiciary has been minimal" (Cruvellier, 2009, p.33). Antonio Cassese also shared this somber assessment on a special report for the Secretary General in 2006. Cassese wrote "I do not think that it is realistic to expect that the Court's legacy will directly: (a) ensure greater respect for the rule of law in Sierra Leone; (b) promote or inspire substantive law reforms" (Cassese, 2006, p.61).

Regarding Cassese's report we wonder whether the UN and the government of Sierra Leone considered capacity building as a necessary and relevant objective of the court. It is unclear from this analysis whether the narrow mandate of the court to only prosecute human rights abuses and the absence of a mandate to fulfill the capacity building premise has resulted in failure described by Cassese. Nonetheless, we can argue that the court was not the appropriate institution to develop and carry out capacity building activities in the country. Despite the fact that the literature on hybrid tribunals points out at their capacity building potential, evidence from Sierra Leone shows that, in the absence of strategy, hybrid tribunals are ill-equipped to support domestic capacity building in situations of limited statehood.

4.3.2. Infrastructure

The agreement between the UN and the government of Sierra Leone included the construction of a state-of-the-art courthouse. As Perriello and Wierda note, apart from the building, the court has been fully equipped with furniture, computers and electric generators (Perriello and Wierda, 2006, p.39). Yet, following the lack of strategic planning for the court's capacity building program, the government of Sierra Leone is unsure what to do with the modern building given it costs \$1,066,300 per year to maintain (Cruvellier, 2009, p.40). With such astronomical costs for a country like Sierra Leone, the building can be seen as the symbol of the failure to address the critical importance of capacity building strategically. As Cruvellier argues, the court was built "with little regard to the country's ability to take care of it" and not fit "for the specific needs of the national judiciary" (Cruvellier, 2009, p.40). Perriello and Wierda have called this "the

spaceship phenomenon” as the court is seen by Sierra Leoneans “as an irrelevant, alien anomaly” (Perriello and Wierda, 2006, p.2). Unfortunately, as explained in the last sub-section, the ‘spaceship phenomenon’ can be applied to most of the Special Court’s capacity building premise.

4.4. The Extraordinary Chambers in the Courts of Cambodia (ECCC)

In the height of the Cold War, between April 1975 and January 1979, the Khmer Rouge regime led by Pol Pot in Cambodia was responsible for the death of 1.7 million Cambodians either by execution, starvation or disease (Higonnet, 2005, p.36). As the regime carried out its plan to turn the country into a completely agrarian society, policies of extermination and force migration were implemented disregarding human rights law completely (Bertelman, 2010, p.334). In 1978 a Vietnamese armed intervention prompted the fall of Pol Pot and the Khmer Rouge regime capturing Phnom-Penh in 1979.

Although the regime suffered a military defeat, it was not until 1996 with a law granting amnesties in exchange for mass defections, that the Khmer Rouge regime finally perished. The disintegration of the movement came after the death of Pol Pot in 1998 (ECCC, 2015). In 1997, a year after the amnesty laws, then co-prime ministers Hun Sen and Norodom Ranariddh requested assistance from the UN to set up a transitional justice mechanism for individuals responsible for atrocity crimes, including genocide (Higonnet, 2005, ECCC, 2015). The negotiations between the government of Cambodia and the UN suffered from a series of setbacks because of substantial disagreement over the balance between the international and domestic component of the hybrid court. While the government pushed for more control of the tribunal, the UN remained suspicious of the willingness of the government to prosecute all responsible perpetrators of atrocity crimes.

In 2002 the UN withdrew from the negotiations claiming the court’s structure put forward by Cambodia “would not guarantee the independence, impartiality and objectivity that a court established with the support of the UN must have” (McAuliffe, 2011, p.27). However, pressure from the UN General Assembly and some changes in the proposed structure re-launched the negotiations in 2003. Unlike the SCSL created by the UNSC through a binding resolution, the ECCC was the result of a bilateral agreement between the UN and the government of Cambodia (Cohen, 2007, Bertelman, 2010). Such agreement was signed in June 2003, entered into force in

2005 and paved the way for the office of the prosecutor to start its work in 2006 (ECCC, 2015).

In terms of capacity building, similarly to the Sierra Leonean hybrid, the agreement in Cambodia did not include any specific provisions mandating the development of institutional capacity or inclusion of infrastructure. Nonetheless, within months of the 2003 agreed memorandum between the UN and the government of Cambodia, then-Secretary General Kofi Annan forecasted that the ECCC would have “considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel” (Ciorciari and Heindel, 2014, p.66). The following two sub-sections will address this claim and describe the main activities and barriers to capacity building in the court.

4.4.1. Knowledge Transfer

Departing from Kofi Annan’s claims, DOMAC’s documentation of capacity building in the ECCC points at a series of training activities since the court became operational in 2006. These include introductory training courses in international humanitarian law and atrocity crimes (2005, 2006 and 2007) and several discussion roundtables or colloquiums on topics crucial to the development of international criminal law (2007 and 2006) (Chehtman and Mackenzie, 2009a, Section E). In total, DOMAC documents less than 15 trainings or roundtable activities in four years of the court’s existence. In a recent article, Ciorciari and Heindel (2014) add to this list: internships for young Cambodian legal professionals and training sessions for local prosecutors and defence counsels wanting to appear in front of the ECCC.

However, lack of strategic and systematic planning of capacity building activities within the ECCC has meant the limited cooperation between different court organs. For example, as Martin-Ortega and Herman (2010) show, many of the successful capacity building activities carried out within the hybrid were largely dependent on the leadership of a particular head of section. While the Defence Support Section developed a strong program of weekly briefings about international justice issues for both mid-level and high-level positions (defense counsel and investigators), other sections like the Office of the Prosecutor did not offer a similar program (Ciorciari and Heindel, 2014, pp.68-69)

On this point, DOMAC's conclusion of the assessment of capacity building in the ECCC is that "on the whole, little interaction appears to have taken place between local and international staff" (Martin-Ortega and Herman, 2010, p.18). Indeed, DOMAC's data suggests that trainings and roundtable discussions were overall targeting either domestic judicial personal preparing to enter the ECCC or international staff learning about the court, jurisprudence and Cambodian culture (Chehtman and Mackenzie, 2009a, Section E). Hence, similar to our analysis of the SCSL, it appears that government and UN officials expected the ECCC's domestic legal staff and the whole of Cambodia's judiciary to benefit from capacity building as a mere byproduct of the hybrid characterization of the judicial personal. However, without previous need assessments, serious planning for effective delivery and strong monitoring and evaluation frameworks, capacity building is unlikely to succeed in the context of the ECCC. On this point, DOMAC strongly criticizes the belief that judicial capacity building can occur without systematic planning as if supporting weak judiciaries "could occur by osmosis" (Chehtman and Mackenzie, 2009b, pp.19-20).

Despite claims in 2013 from Cambodia's Deputy Prime Minister that "Cambodian judicial staff have gained considerable experience in working in an environment of modern judicial administration" and that "practices and procedures are being introduced in domestic courts" (Sperfeldt, 2013, p.1125), there is little evidence supporting this statement. For example, Bertelman (2010) explains that experienced foreign lawyers typically take forward most of the everyday judicial work. This is seen in the documents submitted at the ECCC where English and French documents dominate over Khmer ones even though the three languages are of official use. And, when decisions or documents are submitted by Cambodian legal staff, these "tend to be very short" unveiling "little legal reasoning involved" (Martin-Ortega and Herman, 2010, p.15). The absence of active participation of domestic legal personal perhaps points out at a lack of appropriate training on substantive international law and trial proceedings for atrocity crimes.

However, it has been noted that interaction with international trial standards including the need for transparent procedures has influenced the local legal community (Ciorciari and Heindel, 2014, pp.68-70). This has included, as pointed out before, the involvement of young Cambodian legal professionals in the ECCC through internships and entry-level jobs replacing older

generations of “incompetent and corrupt political appointees” (Scully, 2011, p.314). In fact, rampant corruption in the Cambodian legal system precludes the talent developed at the ECCC to spill over domestic structures. Indeed, the Cambodian judiciary and the ECCC have been marred with accusations of corruption (Kent, 2013, Ciorciari and Heindel, 2014, p.70). This includes, for example the current President of the ECCC, Judge Nil Non who has been accused of taking bribes¹¹ (Bertelman, 2010, p.374).

Another barrier facing institutional capacity has been political interference threatening the independence and impartiality of the ECCC. The most eloquent example are the words of Prime Minister Hun Sen in 2009 stating: "I would pray for this court to run out of money and for the foreign prosecutors and judges to walk out. That would allow for Cambodia to finish the trial by itself" (Bertelman, 2010, p.373). In this context, even if capacity building were systematically tackled, the program would be seriously compromised by political interference. Moreover, in the political context described by Prime Minister Hun Sen, there are minimal incentives for Cambodian judicial personal to evoke their skills and knowledge acquired at the ECCC in front of domestic legal proceedings. Thus, even if capacity building at the ECCC were ultimately successful, the skills developed by domestic judicial personal would represent a risk rather than an advantage.

In this sense, while words from Kofi Annan and the Deputy Prime Minister of Cambodia point at an initial willingness to plan for capacity building, the ECCC suffers from serious political setbacks and lack of strategic planning. Ciorciari and Heindel (2014) also add the confusion as to whose responsibility it is to develop capacity building in a hybrid context. However, as explained before, the political and administrative context in Cambodia precludes any further planning in terms of capacity building. In fact, there is agreement between non-governmental organizations that corruption and political interference leaves the ECCC with little hope it will enable a genuine change in Cambodia’s judiciary (Scully, 2011).

¹¹ See: <https://www.cambodiadaily.com/archives/nine-court-officials-face-corruption-charges-47453/>

4.4.2. Infrastructure

In terms of infrastructure with potential impact on the local judiciary, Cambodia's hybrid tribunal has also been disappointing. Data from DOMAC suggest that several buildings have been rehabilitated to host some offices and the main ECCC headquarter has been newly constructed (Chehtman and Mackenzie, 2009b). However, it has already been determined that the Royal Cambodian Armed Forces will occupy this brand-new building once the court's mandate concludes (Sperfeldt, 2013, p.1125). This points out at the little value seen in critical and adequate infrastructure for the domestic judiciary by the government. Nonetheless, on the positive side, and unaware of a change of occupancy plans, the Government of Cambodia received donations from India and Japan to build a new detention facility (2007) in consultation with the Red Cross (Chehtman and Mackenzie, 2009a, Section E).

In addition to the detention unit, the ECCC has planned a new building to be a repository of all legal and historical records, including digital copies, from the justice process for educational and remembering purposes. Although plans for its location and future maintenance have not been completed yet, the Government of Cambodia has already received funds from the Japanese government (Sperfeldt, 2013, p.1125). However, despite the importance of keeping historical and legal records from the Khmer Rouge regime and their criminal convictions, the UN has manifested certain reservations to the project alerting the Cambodian government's ability to decide on the content of the site and its public representation (Sperfeldt, 2013).

4.5. The Bosnian War Crimes Chamber (BWCC)

Following the disintegration of the former Yugoslavia in 1991, Bosnia Herzegovina was one of the countries most affected by the multi-lateral conflict. In total, 100,000 people were killed, including 16,000 children; 2.2 million became refugees and 1.3 million were internally displaced (Ivanisevic, 2008) in what is considered the worst armed conflict in Europe since World War Two (Gow et al., 2013). The conflict in Bosnia Herzegovina is infamous for its horrific human rights violations including widespread rape, imprisonment in concentration camps, ethnic cleansing and, as ruled by the ICTY, genocide when 8,000 Bosniak men were killed in

Srebrenica in 1995 (Gow et al., 2013).

After the Dayton Peace Agreements in 1995, with the establishment of the ad hoc ICTY, violations of human rights were mainly investigated in The Hague. However, in 2003, with Resolution number 1503, the UNSC mandated the ICTY to develop an exit strategy commencing preparations to end all its operations by 2010 (Ivanisevic, 2008, BiH, 2015). Alleging donor fatigue, partial ineffective delivery of justice away from victims and the conclusion of high-level trials, the UNSC's mandate included "transferring cases involving those who may not bear [the highest] level of responsibility to competent national jurisdictions" (McAuliffe, 2011, pp.25-26). Therefore, the establishment in 2005 of the BWCC within the Court of Bosnia Herzegovina (BiH) and the subsequent creation of the Special Department for War Crimes in the BiH Prosecutor's Office was the result of the exit strategy (Ivanisevic, 2008, BiH, 2012, Gow et al., 2013, BiH, 2014b). Similar to the ECCC, the BWCC was located within the national judiciary structure and enjoys from the support of several other national judicial institutions, like the above-mentioned offices (Chehtman, 2011).

The BWCC, however, has not been the only domestic judicial institution investigating the crimes committed during the Balkan war. Very much in line with the doctrine of *jus cogens*, abuses committed between 1992 and 1995 have also been investigated by 10 cantonal (or municipal) courts (Ivanisevic, 2008, Chehtman, 2013). Thus, with the creation of the BWCC, human rights abuses have been prosecuted at the international level with the ICTY, at the national or federal level with the BWCC and at the local level with cantonal district courts. In fact, as it will be further explained below, cantonal courts have acquired significant experience in the prosecution of human rights, though, "they [have] never been provided with the appropriate resources to process war crimes cases effectively" (Barria and Roper, 2008, Ivanisevic, 2008, p.7).

Currently, the BiH including the BWCC is comprised of 246 employees, including hybrid judicial personal with 50 national judges (BiH, 2012, p.9). In terms of capacity building, DOMAC's Alejandro Chehtman, who has carried extensive empirical work on the BWCC claims that progress "has been impressive" (Chehtman, 2011, p.2). Moreover, Tarik Abdulhak, former Head of Court's Management and Senior Advisor sustains that in comparison with the SCSL and the ECCC, the BWCC has a significant capacity building focus completing a higher number of cases at a much lower cost (Abdulhak, 2009, p.347). Perhaps, a suitable explanation for the

higher degree of success attributed to the BWCC can be found in early and continuous support from the European Union paving the way for improved systems of capacity building (Chehtman, 2011, Börzel, 2011).

But, as it is explained below, without disregarding the important progress achieved by the BWCC, capacity building as conceived by Risse, Ropp and Sikkink has not been fully actualized. On this, DOMAC's assessment mentions the lack of "a clear long-term or coherent approach to training" (Chehtman and Mackenzie, 2009b, p.14). Thus, despite its characterization as the most successful of the three hybrid tribunals explored here, the BCWW also suffers from the lack of strategic planning and overall coordination of capacity building activities.

4.5.1. Knowledge Transfer

On the initiative of two foreign judges, the BWCC established in 2006 its own judicial education committee (BiH, 2012). Comprised by six national members and two international judicial staff, the committee organizes training sessions on topics selected by national staff in an effort to foster national ownership (Schröder, 2005, Martin-Ortega and Herman, 2010, p.17). In fact, some of the issues covered since 2006 correlate directly with the handover process from hybrid to national, for example: efficiency in proceedings, credibility of witnesses and jurisdiction of the court (BiH, 2012). Furthermore, beyond the judicial college, national and international judges, legal advisors, legal officers and interns have benefitted from seminars and professional development sessions organized by nationally owned centers for the training of judicial personal sponsored by the European Commission, the Norwegian Bar Association and the Dutch Government (Chehtman and Mackenzie, 2009a, Section A, BiH, 2012, p.59). In addition to in-house training and external support, judges have benefited from study visits to the ICYT and other institutions like the ICC. However, it is not clear whether such visits contributed to any form of knowledge transfer apart from attending relevant proceedings at the ICTY (Chehtman, 2011, pp.20-21).

However, several flaws have been identified in the training scheme including irrelevance of some topics based on needs, overlap with previous trainings and lack of technical knowledge of some of the lecturers (Chehtman, 2011, p.4,20). Furthermore, capacity and time constraints at the BWCC meant less rigorous training for national judicial personal outside the court hampering the

development of sustainable skills beyond the hybrid tribunal (Chehtman, 2013). These issues can be added to the fact that international judges have not been offered the same training intensity leaving out key topics like “how to transfer knowledge...and a formal briefing on the cultural, professional and personal issues” (Chehtman, 2011, p.6) within the BWCC. In this sense, it is not surprising the claim by some national judges saying that “the most difficult part is to explain [to my foreign counterpart] the mentalities [and] the way things are perceived here” (Ivanisevic, 2008, p.40). Therefore, while more opportunities have been afforded to training in comparison to the SCSL and the ECCC, the lack of strategic planning, need assessment and impact monitoring has weakened the prospects of capacity building in Bosnia Herzegovina.

Better results can be found on the design and development of institutional structures. On this, the court’s Registry and the Criminal Defence Section (OKO) have been remarkable. Created in 2004 to provide project management expertise and absorbed by the BiH in 2006, the Registry’s main responsibilities include the overall management of the court as well as overseeing the appropriate handover from a hybrid court to a national one. Indeed, the Registry has created internal processes that “[build] into the state institutions sustainable capacity” (Abdulhak, 2009, p.340). This has meant the creation of the Administrative Section of the Registry responsible for professional development in terms of inductions, career development and performance evaluation (BiH, 2012, p.55). Moreover, the Legal Department Section of the Registry has engaged in further legal training and research support for judges and trial panels. Within this section, it is worth noting the decision of the Registry to include interns providing them “an opportunity to gain the necessary knowledge and experience” for domestic work (BiH, 2012, p.46).

Similarly, the Criminal Defense Support Section (OKO) created in 2005 has been lauded as an example to follow in other tribunals (Ivanisevic, 2008, p.15, Chehtman and Mackenzie, 2009b, pp.14-15). OKO has supported defence counsel inside and outside the BWCC with training in substantive and procedural issues, case analysis, expert witness examination, strategies for effective advocacy, and classes on the role of defence counsel in upholding fair trial standards (Chehtman and Mackenzie, 2009b, p.15). Between 2005 to 2007, a critical time for the newly established BWCC, OKO trained more than 350 defense lawyers (Barria and Roper, 2008, p.327,

McAuliffe, 2011, p.38). Some of them have appeared in front of the BWCC while others have taken roles at the federal and cantonal level (Ivanisevic, 2008).

On the other hand, the Office of the Prosecutor also created an internal structure meant to support the work of law clerks and prosecutors by reviewing the quality of all indictments produced in the office. This activity was meant for national prosecutors to develop their “understanding and experience with the legal and evidentiary elements of complex cases” (Chehtman, 2011, p.20). However, as seen in the ECCC, this activity was the result of the active leadership of a particular judge wishing to raise the quality of indictments (Chehtman, 2011). In this sense, contrary to the structural steps taken by the Registry and OKO, the Office of the Prosecutor failed to establish an internal mechanism that incorporates capacity building in its daily activities.

Yet, there is good reason to think the BWCC might solve these issues in due time. One important piece of evidence is the National War Crimes Strategy developed in 2008 with the support of the Organization for Security and Co-operation in Europe’s mission to Bosnia Herzegovina. According to the BiH 2014-2016 strategic plan, the following issues will be tackled:

- The overall number of courts, prosecutorial offices, judges, and prosecutors in BiH necessary to deal with war crimes cases.
- The allocation of funds to various courts and prosecutorial offices, depending on their caseload.
- Coordination between the relevant ministries, judicial institutions, law enforcement agencies, penitentiaries, and civil society on investigation and prosecution of war crimes (Ivanisevic, 2008, p.32, Schroeder and Friesendorf, 2009, BiH, 2014a, OSCE, 2015).

Aiming at replacing all international judicial staff with local expertise by 2016 (Chehtman, 2011, BiH, 2014a), the strategy has received praise from local judicial personal benefiting from capacity building opportunities and investment in critical infrastructure (Chehtman and Mackenzie, 2009b). In the words of an international judge, he claimed it is positive “nationals take responsibility [because]...in the long-term it is the only way to restore public confidence in the judiciary” (McAuliffe, 2011, p.38). Indeed, with similar financial and technical resources

poured into the SCSL and the ECCC, the positive results achieved in Bosnia Herzegovina point at the active involvement of the state and multilateral organizations investing time and resources into developing a coherent strategy. Here, the main difference between the BWCC and the Sierra Leone and Cambodia's hybrids has been the deliberate attempt to tackle capacity building in an organized, strategic and sustainable manner¹². The clear vision from the BiH also enabled a process of capacity building planning and execution from the highest administrative levels of the court as seen with the Registry. This, in turn, benefited the appropriation of the court as national project extended beyond the hybrid tribunal with the National War Crimes Strategy. It is, therefore, apt to conclude that Bosnia Herzegovina's hybrid tribunal is perhaps the most successful model to date in terms of domestic capacity building.

4.5.2. Infrastructure

The investment in critical infrastructure has also been impressive. Photos of new and re-developed buildings can be appreciated at the website of the court and its brochure online (BiH, 2012, BiH, 2014b). The current buildings occupied by the BiH will remain assigned to host the all-national courthouse. The legacy aspect of infrastructure was planned at the same time proceedings were taking place in the ICTY, giving ample time for edifice refurbishments.

Moreover, DOMAC has documented the increasing use of information technology in court proceedings and for administrative capacities (Chehtman and Mackenzie, 2009b). Resources donated from European multilateral agencies have signified the modernization of the BiH with hopes to transform paper record keeping and document administration into digital archiving (OSCE, 2015). Nonetheless, the progress of infrastructure remains ultimately located in the BiH disregarding cantonal district courts also engaged in prosecuting atrocity crimes (Barria and Roper, 2008). With the danger of creating animosity between different court jurisdictions, like in the case of Sierra Leone, investment in infrastructure as capacity building for human rights prosecutions needs to be equitable throughout all jurisdictions.

¹² As mentioned before, European governments like Norway and Germany have significantly invested in establishing robust foundations for the BiH in comparison to the SCSL or the ECCC. See: IVANISEVIC, B. 2008. *The war crimes chamber in Bosnia and Herzegovina: From hybrid to domestic court*, International Center for Transitional Justice, CHEHTMAN, A. 2011. Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases Critical Notes on a 'Success Story'. *Journal of International Criminal Justice*.

4.6. Barriers and Options Forward: Narrowing the Impunity Gap through Capacity Building?

Despite BWCC's successes, the premise of capacity building in light of Risse, Ropp and Sikkink's definition lacked strategic planning, coordination and appropriate investment of resources in Sierra Leone, Cambodia, and to a lesser extent, in Bosnia Herzegovina. In sum, we can conclude that while hybrid tribunals have the potential to develop local judicial capacity, these institutions are ill equipped to carry out such activities. Thus, the lessons boarded here can be useful for thinking about new models of hybrid tribunals that include capacity building at its core mandate with appropriate internal structures able to deliver on domestic needs.

4.6.1. Have hybrid tribunals – Sierra Leone, Cambodia and Bosnia Herzegovina- implemented capacity building programs within their jurisdictions?

The literature on hybrid tribunals and the case studies point out to the initial plans to develop capacity building programs in our case studies. Despite the vast differences of scope, implementation and impact between them, we can answer our first research question affirmatively. However, we can only arrive at this answer by unifying the meaning of what capacity building means for narrowing the impunity gap under Risse, Ropp and Sikkink's definition. This is done because, as explained in the literature review, policy makers and academics consider capacity building as a core tenant of hybrid tribunals but fail to define markers of success or give concrete examples of what this means for the right of access to justice. Therefore, bearing in mind the right of access to justice as a human right embedded in *jus cogens*, both the spiral model and limited statehood theory provides tools to understand capacity building for compliance of norms through a “highly institutionalized process of social interaction aiming towards education, training and the building up of administrative capacities to implement and enforce human rights law” (Risse et al., 2013, p.15). In this context, all three cases have implemented capacity building to some extent.

However, competition between a mandate to prosecute human rights and another to build domestic capacity has hindered the potential of these tribunals to narrow the impunity gap in the

long run. Ill equipped for domestic capacity building, hybrid tribunals have neglected an opportunity to narrow the impunity gap through adequate national institutions. From our case studies, we might conclude saying that only the BWCC has succeeded in transitioning from a hybrid to a national model prioritizing the fight against impunity. The 2008 National War Crimes Strategy is a testament of Bosnia Herzegovina's intention to secure the legacy of the ICTY continuing with their *jus cogens* obligations. However, the complementary work between the ad hoc, hybrid and domestic tribunals is rather unique. In Cambodia issues of corruption and political interference threatens the ability of the court to fulfill its even most narrow mandate of human rights prosecutions. And, in Sierra Leone, the disengagement of the national government from the workings of the court represented the other extreme of what is observed in Cambodia. If hybrid tribunals are to narrow the impunity gap, these issues must be seriously considered.

4.6.2. What has been the impact, if any, of Sierra Leone, Cambodia and Bosnia Herzegovina's hybrid tribunals' capacity building programs in order to narrow the impunity gap? What are the main barriers, if any, for hybrid tribunals' capacity building programs?

Continuing with the analysis above, our findings indicate that hybrid tribunals have the potential to achieve substantial impact in narrowing the impunity gap when capacity building is deemed as a strategic objective of the court. The BWCC has successfully diffused knowledge centered at the hybrid tribunal to judicial personal at the federal and national level. In this instance, national ownership has been strengthened by the development of key capabilities in terms of knowledge transfer and investment on critical infrastructure in the local judiciary. Bosnia Herzegovina's success is also the result of continued support from key external actors investing in a process of judicial reconstruction.

Furthermore, recalling Krasner and Risse's determinants of success for capacity building activities, the BWCC has been successful in developing institutional channels, like the Registry, between international and domestic legal staff. With the National War Crimes Strategy supported by external actors, tasks to transition from a hybrid to a national model have been completed despite their complexity. This, in turn, has allowed national actors to view the court's working as

legitimate welcoming the capacity building program and the process of national ownership. In sum, the application of Krasner and Risse's benchmarks on the BWCC points out at the success of the model.

In comparison, several barriers explained above have hindered the impact of capacity building in the local judiciary in Sierra Leone and Cambodia. In both cases capacity building activities were seen as a byproduct of the hybrid personal assuming that mere interactions between domestic and legal professionals would rebuild the national judiciary. In Sierra Leone, lacking institutional channels between the Special Court and the national judiciary meant that domestic legal personal, despite if appropriately trained, could not use their expertise at the local level. This, in turn, damaged the legitimacy of the Special Court among legal professionals skeptical of the purposes of the hybrid tribunal. The premises of the court – the spaceship phenomenon – are the perfect example of how strategic capacity building was not deemed a priority in the mandate of the court.

In Cambodia, systemic corruption and political interference hindered the capacity building agenda. With the challenges facing the ECCC on its primary mandate of human rights prosecutions, capacity building has not been considered a priority. A clear example has been the impossibility of young Cambodian professionals to join the court to replace “incompetent and corrupt political appointees” (Scully, 2011, p.314). In this sense, the task of strengthening national judicial systems through capacity building in order to narrow the impunity gap has been seriously compromised.

However, despite these issues, this does not mean that the hybrid tribunal model *per se* is at fault. In fact, as explained in the introduction, hybrid tribunal's capacity building must be understood as complementary to other rule of law efforts. The BWCC is an example of this where international and multilateral aid agencies worked in tandem with the court and government officials to deliver the National War Crimes Strategy. In this instance, coordination and strategic planning of all actors involved was a key variable for success. In fact, the absence of this very strategic input for long-term objectives in Sierra Leone and Cambodia resulted in ad hoc capacity building with little impact on the national judiciary. Therefore, we can conclude saying that while

hybrid tribunals have the potential to develop local judicial capacity, these institutions have been ill equipped to carry out such activities.

In this sense, **chapter six** outlines the main recommendations for policy makers and hybrid tribunal researches emanating from these findings. The author proposes the institutional design and creation of a capacity building unit within the Registry of all hybrid tribunals in charge of strategic planning, coordination, impact monitoring and evaluation as well as effective delivery of capacity building activities to meet local needs. The main precedent for such recommendation is based on the positive experience of the Registry of the BWCC. This recommendation would ensure that in the long run the national judiciary truly benefits from the hybrid model narrowing the impunity gap. In other words, the right of access to justice for victims of human rights violations might encounter redress when states, and by extension local judiciaries, are able and willing to abide by the *jus cogens* doctrine. If this principle is respected, hybrid tribunals must be seriously considered as an option for post conflict situations where the impunity gap persists.

5. Concluding Thoughts

The problem of the impunity gap has been presented as one of the main challenges for the current international legal architecture protecting human rights. Although the doctrine of *jus cogens* calls on every state to prosecute gross violations of human rights, a combination of power politics and lack of institutional capacity has denied the right of access to justice to countless victims. Thus, in an attempt to transcend instances when repressive governments are not members of the ICC or *realpolitik* dominates the UNSC, the novel approach of hybrid tribunals has been used as a strategy to prosecute atrocity crimes in Sierra Leone, Cambodia and Bosnia Herzegovina while emphasizing the role of domestic capacity building.

However, aware that post-conflict states willing to adhere to the human rights normative framework typically inherit judicial systems unfit for a process of transitional justice (Kerr and Mobekk, 2007), re-building domestic judicial systems is key to narrow the impunity gap (Kim and Sikkink, 2010, ICTJ, 2015). Hence, this project has asked whether hybrid tribunals can be seen as capacity building tools in post-conflict rebuilding efforts. In sum, noting their strategic location within the judicial system and expertise based on *jus cogens*, hybrid tribunals have the potential to carry out transformative capacity building activities narrowing the impunity gap.

Yet, evidence from the SCSL, the ECCC and the BWCC has proven that hybrid tribunals are ill equipped to carry out effective capacity building. Based on the case studies explored here, two main reasons have been identified. First, when hybrid tribunals do not include substantial capacity building programs as part of the mandate of the court, critical transfer of knowledge and investment in key infrastructure falls short of meeting the local needs for a strong judiciary. The second reason is the lack of strategic planning, coordination and needs assessment of capacity building activities.

With the exemption of Bosnia Herzegovina benefiting from the previous work of the ICTY, the hybrid tribunals in Sierra Leone and Cambodia did not tackle capacity building as a strategic objective of the court. Seen, as a byproduct of the interaction between international and domestic legal personal, capacity building was not considered as an investment for long-term human rights

compliance. These barriers have precluded principally Sierra Leone and Cambodia and Bosnia Herzegovina to a lesser extent from developing sustainable domestic judicial capabilities.

On this point, hybrid tribunals must be seen as a key mechanism within the universe of many others strategies tasked with creating the conditions to narrow the impunity gap. In this sense, the lack of coordination between hybrid tribunals and other rule-of-law development agencies represents a huge missed opportunity. Thus, this thesis has recommended the need to design and create institutional channels located in the Registry of hybrid tribunals tasked with planning effective capacity building programs based on local needs and in cooperation with other relevant actors. This has to be done in order to facilitate a handover process where the local judiciary is empowered to enforce *jus cogens* in the long run. This way, hybrid tribunals can be seen as capacity building tools narrowing the impunity gap.

In fact, as mentioned in chapter four, the hybrid tribunal model continues to be relevant in the fight against impunity. At the time of writing this thesis, a new hybrid tribunal has been proposed in the Central African Republic (Amnesty International, 2015). With the special note to the active jurisdiction of the ICC in the Central African Republic, the proposed hybrid court would focus on cases not already investigated in The Hague (Kersten, 2015, CICC, 2015). Beyond the reservations this author might have on whether a system of shared accountability between an international and hybrid tribunal might work, it is worrying that not a single mention of the importance of capacity building has been noted in the draft law setting the CAR special court (Prosperi, 2015).

Thus, as a timely reminder of the need for strategic planning and coordination around capacity building in hybrid tribunals, this thesis intends to bring forward questions of sustainability and long-term thinking for effective human rights compliance. Therefore, further research on this topic should concentrate on developing institutional models that foster planning and coordination of capacity building activities within hybrid tribunals. As proposed in this project, the role of the Registry could be a starting point. As such, reclaiming the importance of justice delivery as an objective beyond mere human rights prosecutions including domestic capacity building, hybrid tribunals will be better equipped to close the impunity gap.

6. Recommendations

The policy recommendations developed below are in response to the lack of a mandate for hybrid tribunals to include capacity building as one of the core objectives in the same way human rights prosecutions is. Limiting hybrid tribunals to just human rights prosecutions represent a missed opportunity to their capacity building potential identified in this project. For this, an honest reshuffle of policy priorities equalizing human rights prosecutions with capacity building meeting local needs is imperative for strengthening the judiciary sector.

This thesis, therefore, recommends following the model set up in Bosnia Herzegovina with a resourceful and adaptive court Registry that plans and coordinates with internal and external actors a capacity building strategy meant to strengthen the local judiciary meeting their needs for long term success. Therefore, a holistic approach to capacity building within hybrid tribunals in order to narrow the impunity gap is possible through the creation of a central body in charge of strategic planning, coordination, impact monitoring and evaluation as well as effective delivery of capacity building programs to meet local needs.

In this sense, a capacity building unit within the Registry should be tasked with overseeing the handover of locally relevant capabilities from the hybrid model to a purely national one. In this sense, carrying out need assessments to inform on the expertise needed for capacity building would be a primary task of this unit. As a central organism of the hybrid court in close cooperation with the local judiciary and other relevant external actors, the Registry is placed in the strategic position to organize and implement strategic trainings, needed educational programs and identifying areas where investment in critical infrastructure would benefit the domestic judiciary.

Word Count: 16, 828

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