Rebuilding Judicial Capacity with Enchanted Tools

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“The antiseptic strictures and internal finality of the legal process make it a particularly tempting instrument for creating a false sense of closure within a self-absorbed utopia”
Payam Akhavan

In the East Timorese Serious Crimes Process, a mission to reconstruct the judiciary through hybrid tribunal trials failed almost completely. One of the primary reasons for this was an approach by the UN Transitional Administration in East Timor which emphasized a mechanical process of accountability for as many suspects as possible over the type of exemplary and scrupulously fair trials that can ground a new criminal justice system in a country which had never enjoyed de-politicized, uncorrupted justice.

In Sierra Leone, another hybrid tribunal was established with a similar ambition to found a new commitment to the rule of law through the trials of those most accountable for crimes of the recent decade-long civil war. However, in so doing, the Special Court for Sierra Leone engaged in only four trials with minimal capacity-building success. Here the potential existed for a larger number of cases which would not only have done justice on a larger scale, but which would have trained judges, lawyers, administrators in a wider range of skills that are

essential in judicial reconstruction. Instead, liberalizing change was presumed to flow from a handful of trials. In Cambodia and Lebanon, two countries with failing judicial systems, the opportunity for capacity-building in the hybrid courts established there has been eschewed in favour of politicized trials of octogenarian Khmer Rouge members and a once-off trial for the highly significant Hariri assassination.

In Cambodia, it is assumed the convictions of Khmer Rouge leaders can help ground a legal system committed to the rule of law, despite the ever-present risk of political manipulation which challenges rule of law values. Though all of these trials have benefited or will benefit their societies by sending a normative message about the propriety of political violence, hybrid courts were designed to do more - to build the diminished or non-existent capacity of the domestic courts to try criminals, to inculcate a cultural commitment to the rule of law and human rights, in addition to aiding the transition to a more liberal order through trials of prior political wrongdoers.

However, the experience of hybrid tribunals has seen two trends which have restricted their potential to ground judicial reconstruction. Firstly, the objective of political transformation through trials has always been advanced at the expense of building the capacity of local justice systems, even where the post-conflict environment is such that absence of functioning justice institutions is a bigger threat to sustainable peace than residual post-conflict hostilities. Secondly, it has been presumed that capacity-building and cultural commitment follow naturally from the liberalizing change transitional justice ushers in, and that there is no need to take additional measures in the trials to build capacity.

There is an assumption that convicting serious criminals alone will suffice to usher in the rule of law, and it is this assumption that is challenged herein. This article outlines one particularly important reason why capacity-building has consistently been sidelined – the preconceptions of policy-makers. This piece takes seriously the contention that “building the rule of law is a

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3 Cohen (2007), supra note 1,


profoundly human endeavour”\textsuperscript{6}. It identifies a bias among humanitarian policy-makers and lawyers for advancing political transformation through the tool of transitional justice and an over-estimation of the potential of transitional justice to ground a legal order in severely underdeveloped post-conflict states.

The capacity-building potential of hybrid courts occurs at the intersection of the fields of rule of law reform and transitional justice. As Stromseth, Wippman and Brooks suggest, the question of whether and how accountability processes can contribute to the development of domestic justice systems and the construction of the rule of law is “surprisingly underanalyzed” academically\textsuperscript{7}. To date, the two fields have been treated mostly as two separate areas of interest in both academic coverage and under UN transitional administration. As a result, the full potential of accountability proceedings to ground rule of law and institutional reform has not been met.

To a certain extent, “we are relatively early in the process of understanding the longer-term impacts of accountability processes – such as criminal prosecutions, truth commissions, reconciliation proceedings, vetting – in different post-conflict societies …… more systematic thinking and empirical research on the impact of accountability proceedings in specific post-conflict societies is a critical need”\textsuperscript{8}. The long-term effects of transitional justice on the domestic justice sector, especially capacity-building remains unclear and cannot be presumed to be an unequivocal good.

More research is needed before accountability mechanisms can be designed to fully realise their potential in judicial reconstruction. This article does attempt to expound any grand theory of judicial reconstruction, but instead points out the reification of transitional justice as one of the reasons why potential for judicial system reconstruction has not been met despite the considerable resources, organization and transitional justice experience of the UN.

Part I describes the differences between a foundational approach to transitional justice which emphasizes capacity-building over a transformational approach which focuses on accountability proceedings as a means of drawing the lines between past and present conceptions of acceptable political behaviour. Part II examines the role of hybrid courts in building judicial institutions and a rule of law culture. Part III examines the role of transitional justice in political transformation. It suggests how the fair trials which serve as an example in judicial reconstruction can harm transformational goals, thereby contributing to a diminished status in transitional for foundational trials. Part IV examines David Kennedy’s theory of “tool enchantment” as an explanation for the perpetuation of this transformational bias. It cites historical precedent and the reduction of transitional justice to a ritual process as contributing factors.

\textsuperscript{7} Id.,253
\textsuperscript{8} Id.,253
Part I: Foundational and Transformational Approaches to the Rule of Law

There are a number of essential aspects in establishing the rule of law in transition such as policing, anti-corruption programs, law enforcement and the court system, but it is on the latter that this article focuses on. A functioning court system of independent and qualified judges, prosecutors and defenders is the paramount requirement for establishing the rule of law and vindicating the fundamental rights of the people. Without such a system, democracy itself is jeopardized, as are related goals such as stability, equality before the law and economic development. As Tolbert and Solomon put it, “it is axiomatic that without functioning courts and a judiciary system, there can be no rule of law.” Indeed, in a time of social, political and economic flux, the need for a functioning court system is at its greatest. Unfortunately, it is also at these times of paradigmatic change from oppression that the courts are at their weakest and most in need of repair.

Recent reform of UN peace operations paved the way for the emergence of the hybrid court as a means of furthering rule of law reform. It had become apparent from the Cambodia and Somalia missions that temporary, ad hoc measures were not enough to restore the rule of law and that “restoring the capacity and legitimacy of national institutions is a long-term undertaking.” The UN realised it needed to exercise as many of the standard powers of state as were necessary for as long as was necessary to restore the rule of law. The Security Council began to give UN missions wide legislative, executive and judicial mandates to carry out their functions, while the aforementioned Brahimi Report and Rule of Law Report placed a hitherto unseen emphasis on strengthening the rule of law in transitional societies. So what is meant by the rule of law and how can the hybrid court advance its construction? Craig has identified two main ways of conceptualizing it. The first is a “formal” or “minimalist” conceptualization which emphasizes the rule of law’s formal and institutional content. The rule of law is satisfied where no-one can be punished except in accordance with democratically created laws adjudicated by courts observing due process and guaranteeing equality before the law and a protection of a minimum of human rights. The second is a

9 Tolbert and Solomon quote Lord Ashdown, the UN High-Representative for Bosnia-Herzegovina: “In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and the courts”.


10 Id., 45

11 UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, of 3 August 2004, 27

12 For example Security Council Resolution 1272, 54 UNSCOR (405th Meeting) UN Doc S/R/1272 (1999) of October 25, 1999 establishing the UN Transitional Administration in East Timor


14 UN Secretary General, supra note 11

"substantial" or "maximalist" conceptualization of the rule of law which incorporates the elements of the formal account but combines substantive commitments to public legitimacy, fundamental rights, socio-economic rights and democratic freedoms that the formal concept does not guarantee. As Simmons describes:

“A substantive theory is characterized by the greater substantive content it incorporates. Thus it incorporates to some degree one or more of the following: rules securing minimal welfare……., rules securing some variety of the market economy, rules protecting at least some basic rights, and rules institutionalizing democratic governance. Here, the contrast with formal theories of the rule of law is stark.”

Here, cultural change, rights protection and norm creation are as integral to rule of law reconstruction. Capacity-building should therefore reflect this.

Thus we see institutions, cultural commitment and rights promotion as functions of the rule of law. To develop judicial institutions, a number of things must be done. The central institutions of the legal system such as the courts, judges, lawyers and police are essential in upholding the rule of law, needing to be “fair, competent and efficient.” Successful reconstruction, therefore, will prioritize the development of these institutions. Training is essential, both in the classroom and from learning at the side of international judges and lawyers. Training should be both practical (opinion writing, courtroom management) and procedural (evidentiary rules, protection of defendant rights). Transparency and independence are essential. Judicial decisions must be clear and informed, with a clear route for public complaint. While in the past, the employment of judges was politically contingent, appointment must now become transparent and merit based. Credible disciplinary mechanisms must be in place to deal with allegations of judicial misconduct. Budgets must be sufficient to attract good judges and to remove the possibility of bribery, and must facilitate the smooth operation of cases. Previously disenfranchised groups must have access to the law, while the judiciary must be linked to the other aforementioned sectors involved in the rule of law.

16 As Wippman, Brooks and Stromseth contend:
Those who favour substantive theories of the rule of law argue that formal theories cannot be fully adequate because it is easy to imagine a horrifically abusive government that might fully comply with the purely formal dimensions of the rule of law. Imagine, for instance, a state in which a minority group is considered inferior by the majority; duly and democratically passed laws mandate discriminatory treatment for the minority; elected officials obediently enforce the laws…….”

Stromseth, Wippman and Brooks, supra note 6, 71

17 Summers, supra note 15, 135

18 Thomas Carothers, “The Rule of Law Revival” (1998) 77(2) Foreign Affairs 95, 96

Nevertheless, these gains cannot be end in itself. Is it essential the court protects the citizen’s universally recognized human rights\(^\text{20}\). This can be done two ways. Firstly, the courts can advance human rights generally by protecting citizens through cases, criminal and otherwise. Secondly, the trial rights of the defendant must be protected – the presumption of innocence, fair trial, due process and expedient justice. To this end, the character of the accountability process may determine how thorough a normative commitment to human rights on paper is. The capacity of the domestic justice system to protect trial rights can be judged by analysing a given process such as a hybrid court with regard to international standards as found in codes such as, inter alia, the ICCPR\(^\text{21}\), ICESCR\(^\text{22}\), UN Basic Principles on the Independence of the Judiciary\(^\text{23}\), the UN Basic principles on the Role of Lawyers\(^\text{24}\) and the Body of Principles for the Protection of All Persons under Any form of Detention and Imprisonment\(^\text{25}\). Furthermore, human rights are essential in peace operations and how the court can promote the civil, socio-economic and democratic rights more generally.

Building a rule of law culture also requires an acceptance of law as a culturally situated phenomenon\(^\text{26}\). This is a difficult task, and requires acknowledgement of the fact that courts do not enjoy the same primacy in some post-conflict states that they do in Western societies. Indeed, after periods of illiberal rule, there may be widespread scepticism about the value of justice institutions. Mistrust of the courts can exist among the public and the political elite. What is required is a commitment to the values that underlie functioning judiciaries – inculcating the “habits, commitments and beliefs” of citizens in the judicial process. The majority of people the majority of the time must support and trust the courts, given the obvious differences between law as written and as perceived. Tyler has examined the psychological and sociological reasons why people obey law in society\(^\text{27}\). Among these reasons are the perceived legitimacy of the law, its fairness, effectiveness and perceived morality.

Having considered what the rule of law requires in transition, it now falls to consider the role of hybrid courts in its advancement. Like all forms of transitional justice, hybrid trials are

\(^{20}\) By this is meant the norms contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of Racial Discrimination, and the Conventions Against Genocide and Torture


\(^{23}\) The UN Basic Principles on the Independence of the Judiciary were adopted at the 7th UN Congress on the prevention of Crime and the treatment of Offenders in August and September 1985 and was endorsed by the UN general Assembly in two resolutions, General Assembly Resolution 40/32, UN Doc A/RES/40/32 (November 29, 1985), and General Assembly resolution 40/146, UN Doc. A/RES/ 146 (December 13, 1985)

\(^{24}\) The UN Basic Principles on the Role of Lawyers were adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in August and September 1990 and was endorsed by the UN General Assembly in UN General Assembly Resolution 45/166, P 15 UN Doc. A/RES/45/166 (December 18, 1990)


\(^{26}\) See generally Stromseth, Wippman and Brooks, supra note 6, 310-346

\(^{27}\) Tom R. Tyler, Why People Obey the Law (New Haven: Yale University Press, 1990)
justified by forward-looking, consequentialist purposes which address the local capacity issue. It is argued that trials of the previous regime’s wrongdoers observing scrupulously fair due process standards build the rule of law by demonstrating that certain actions or omissions are proscribed by law and subject to punishment. Punishment of known wrongdoers underlines the value and legitimacy of trials. As Landsman puts it, holding violators accountable for their misdeeds makes clear to “all members of society that law’s authority is superior to that of individuals”28. After a period of repressive rule with politicized justice, fair trials are a critical response to past injustice, contrasting the beneficial nature of the new rule of law with the repressive old lawless regime29. Learning from the Argentine experience, Mendez argues: “[I]t also makes good political sense in the transition from dictatorship to democracy. In fact , the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new regime to be established, an order based on the rule of law and on respect for the dignity and worth of each human person”30.

This punishment can be said to advance the rule of law, defend human rights and contribute to democracy. Indeed, Ackerman has argued that trials are “constitutional moments” when a society is reborn31. However, to suggest that justice in the individual case, even with its broader social consequences, is the limit or even main contribution a transitional trial makes to the rule of law is to underestimate its normative and practical potential, and to undervalue what the rule of law really means. As Sriram puts it, democratization is “a process rather than a moment”32. Hybrid trials are a form of post-conflict reconstruction, and have import for the entire rebuilding process as it constructs the rule of law. Above all else, the potential a number of high-profile hybrid court trials that both captures the interest of the public and that involve the post-conflict state’s judges, lawyers and administrators to demonstrate how fair, competent and efficient criminal trials are to be operated under international supervision can make an enormous contribution to building domestic criminal justice sector capacity.

While hybrid trials are a means of reconstruction, it should not be forgotten that they are also a form of transitional justice, defined by Teitel as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”33. To this end, it may be understood as a response to ongoing hostility in the post-conflict society. However, all transitional justice is also a form of post-conflict reconstruction. In the case of trials, Teitel argues that “modernization and the rule of law were equated with trials by the nation-state to legitimate the successor regime and

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29 One is reminded of Vaclav Havel’s famous words “We are not like them” (Quoted in The Centre for Security Policy, ‘Free’ Czechoslovakia? Shadows Over the Transition http://www.security-policy.org/papers/1990/90-55.html (Date accessed: 1 May, 2008)
31 Bruce Ackerman, We, the People: Volume I, Foundations (Harvard: Belknap Press, 1991)
advance nation-building”34. This reconstruction was not effected through exemplary trials or professional capacity-building (though these may have been ancillary benefits), but through political messages the trials conveyed about the nature of the prior and current regimes. Trials construct an “identity politics”35 in the new state. In the immediate post-war era, transitional justice tended to be framed in terms of retributive trials of criminals and leaders and in universalizing terms. In the post-Cold War era where there were more limited opportunities for justice owing to domestic balances of power, this policy appears “abstracted”36 from local needs. Thus more localized and diverse conceptions of the rule of law which emphasized the need for rehabilitation and reconciliation emerged and responses such as the truth and reconciliation commission were developed which advanced a nation-building project best-suited to contemporary conditions. This Phase II era of transitional justice became most associated with successful nation-building37. Significantly, this is also the era in which trials played second fiddle to other transitional mechanisms in reconstruction, as transitional process took precedence over any perceived need for fair trials. In these periods, the challenge of democratic institution-building was seen as difficult for the state weakened by conflict, and Teitel notes that transitional justice in this period was more backward-looking than forward-looking or constructive. It marked a turn away from the sort of progressive politics of institutional reconstruction38. This ethos would go on to affect the direction of hybrid courts even in markedly different circumstances. Though Teitel is correct to argue that debates about transitional justice “are generally framed by the normative proposition that various legal responses should be evaluated on their prospects for democracy”39, this discussion usually focuses on how trials contribute to the absence of hostility that would jeopardize democracy instead of on how trials contribute to the development of institutions and processes that would foster and support it.

Transitional justice is never an end in itself, but is instead a means to the achievement of larger societal goals. Thus we see two different conceptions of transitional justice in rule of law reconstruction. The first is an idea of the rule of law reconstruction focussed around the use of exemplary hybrid court transitional trials to rebuild the court system as one which protects rights, serves as a model for future court processes (criminal and otherwise) and which develops the skills of lawyers, judges and administrators. Only when these functions

34 Id., 76
36 Id., 896
37 “... In recent decades of heightened transition, the conception of transitional justice has been closely associated with diverse Nation-building projects and related local understanding of the rule of law and legitimacy” Id., 893
38 “Post Cold War transitional justice has, in large part, displaced broader reform projects, and appears to represent a move away from progressive politics...... Weak and failed states accept the difficulties of extensive political and institutional change ..... This orientation is also seen in the persistent emphasis in transitional justice on a historical, rather than prospective, orientation in society – on the emphasis on preservation and record-keeping, which put off robust reforms for the future. The direction also reflects the diminished expectations of law and politics, associating post-Cold War transitional justice with a globalizing politics” Id., 901
39 Ruti G. Teitel, Transitional Justice (Oxford: Oxford University Press, 2001),
are fulfilled can the court system enjoy the moral and popular legitimacy that will allow it to serve as the cornerstone of the reconstructed state which protects citizens’ rights in the long-term. This approach I call foundational, as it concerns itself with laying the foundations for a liberal regime of human rights. The second is an idea of the rule of law concerned with the use of successor trials in a more short-term form of transitional justice nation-building with the shorter-term, but no less necessary goals of pacifying society after conflict, retribution, reconciliation and rehabilitation, stripping legitimacy from prior illiberal rule and vindicating human rights by prosecuting and punishing those who have deprived citizens of those rights in the past. This approach I call transformational, as it is influence by traditional ideas of transitional justice, and is more concerned with mediating the liminal stage between conflict and peace than building a long-term, sustainable peace as such.

One needs to be aware of the potential for these goals to conflict, and to look at competing interests. For example, the need to protect defendant rights as part of exemplary trials may conflict with the need to prosecute as many alleged wrongdoers as possible. The need to shed light on the historical and social context of criminal acts may conflict with the defendant’s protection from hearsay or uncorroborated evidence. This article does not argue that these goals are irreconcilable. In fact, it argues quite the opposite – that done correctly, both ideas reinforce the other and that a hybrid court can promote both as complementary conceptions of the rule of law. Nothing builds the legitimacy and capacity of courts like trying that society’s greatest criminals. Nothing adds legitimacy to a transitional justice process that scrupulous fairness. The processes can, however, be balanced in favour of one goal over the other. Striking this balance depends on a number of local conditions forming a peace-building ecology which will decide which of the two approaches is the most beneficial to the state in question, and this will inform and vary the rule of law goals. Equally, it is not the case that one conception of the rule of law is necessarily better than the other in all cases, though in certain peace-building ecologies where ethnic or political tensions are relatively low or where there is a clear victor in conflict combined with low local capacities, it will be clear that capacity-building must be a priority in any scheme of transitional justice. The problem identified here is where a transformational approach to justice is presumed to be the correct one in all cases. The UN will expend scarce resources in Lebanon and Cambodia on processes which may do very little to encourage rule of law reform. There is no one correct approach to transitional justice. A society-specific approach should be taken whose course will depend on the nature of the prior regime, its legal culture, contemporary political circumstances, the type of transition undergone, the most pressing contemporary social needs and not least of all, the human factors motivating those who are responsible for co-ordinating the hybrid court process. In the words of Richard Goldstone, the “correct approach to the past will depend on a myriad of political, economic and cultural factors in which all operate and interact with each
other”40. Similarly, to this end, Aukerman has argued for “goal- and culture-specific responses to mass atrocity”41.

**Part II: The Role of Hybrid Courts in Reconstruction**

Before studying hybrid courts specifically, it is worth examining the usually parlous state of the rule of law after conflict or illiberal rule.

**The Rule of Law after International Intervention**

In transitional societies so divided and devastated that UN involvement is required for rebuilding, the prospects for the return of the rule of law to those societies are usually far from promising.42 In these situations, society has just emerged from a period of repression and frequently, conflict. Victims of the prior regime must mix in society with groups who administered and profited from the regime, while the latter must now come to term with the new balance of power. These post-conflict societies are disordered and most of the physical infrastructure of the state is destroyed, including that which is necessary for the administration of justice. Society is on the verge of collapse, typified by “an abundance of arms, rampant gender and sexually-based violence, the exploitation of children, the persecution of minorities and vulnerable groups, organized crime, smuggling, trafficking in human beings and other criminal activities”43.

It is at these times that the need for law, order and stability is at its greatest. Unfortunately, it is at these times that the institutions of governance, the administration of justice included, has broken down, thus necessitating UN territorial administration. Not only has the physical infrastructure of the judicial system been destroyed, but it is also tainted by association with the former regime, a microcosm of the social and political divisions existent in the country. This has two main consequences. Firstly, in oppressive regimes, justice may have operated either as instruments of the prior rulers in vindicating and upholding persecutory and discriminatory laws, or failing to prevent them. Secondly, in the aftermath of such regimes,
the public has little or no conception of what justice fairly administered means, with predictable results for public trust in the judicial system. The transitional state may know neither democracy nor justice. Law frequently means little more than discriminatory emergency decrees or is unknown to the people. The political machinery has broken down, while there is little technical or financial capacity to remedy the situation. Justice is the product of political distortion and contrived weakness, reflecting neither human rights norms not procedural fairness. Ideas of judicial independence are anathema in illiberal rule.

For hybrid court states, the major difficulty is capacity itself. Frequently in states subject to foreign rule or ethnic supremacy, there are either very few judges remaining due to necessary purges and lustration of the judiciary, or those that are not removed for wrongdoing have few qualifications and little experience. Lawyers may also be low on qualifications and face other impediments. This capacity deficit becomes more worrying when one considers the highly complex nature of international criminal law cases to be tried in transition. Kosovo and Sierra Leone serve as examples of the breakdown of societies occasioning UN territorial administration. In Kosovo, the departure of the Serbs following UN intervention created a political and judicial vacuum. The physical infrastructure of court buildings, law offices, libraries and equipment was largely destroyed. The judiciary had been dominated by ethnic Serbs leaving few of the ethnic majority Kosovar Albanians skilled enough to administer justice. All the time the threat of revenge killings and further civil disorder loomed. Sierra Leone had not enjoyed stable rule for over fifteen years of civil strife and war. So weak was the Sierra Leonean government that the president, Ahemd Tejan Kabbah, could not risk trying rebel leaders on their own. The Sierra Leonean judiciary had been racked with corruption and most judges and lawyers had fled the country due to chaos.

44 As Teitel puts it: “When it is the state that is complicit in persecution, fundamental notions of criminal justice are turned on their head: state complicity, cover-up, and other obstructions affect the very possibility of justice”, Teitel, supra note 39, at page 99
45 One of the most pertinent examples of this is Judge Maria Gusmao Perreira of the Special Panels in East Timor. An ethnic East Timorese, she was forbidden by the Indonesian regime from practising law, despite a law degree from a University in Bali. She had never worked as a judge and had no experience of international law, and yet was one of the first local judges appointed
46 Tolbert and Solomon examine the position of lawyers under repressive rule and find them unsuitable for roles in successor trials, holding that lawyers are usually “subservient”, “in a legal hierarchy dominated by the state prosecutor” and that their ability to practise law has long been compromised by “excessive regulation” and disciplinary rules”, as well as a “lack of independence” from the Ministry of Justice (Tolbert and Solomon, supra note 9, 49)
50 Cockayne, supra note 2
B. Hybrid Courts

The hybridity of the court stems from the fact that the institutional mechanism and the applicable law consist of a combination of international and domestic components. In theory at least, hybrids combine the expertise of both international and domestic judges, prosecutors and sometimes defence counsel, usually with an international majority. For example, in Sierra Leone and East Timor, two thirds of the judges are international, with the remaining third made up of local agents 51. In Kosovo and Cambodia, however, there are majorities of domestic judges. Hybrid tribunals sit in the territory of the state where the crimes were committed and are rooted in the domestic justice system. The international crimes dealt with by the courts are typically those contained in the list of international crimes in the Rome Statute of the International Criminal Court 52. The domestic crimes covered are usually those not included or covered differently in the Rome Statute on account of qualitative differences (such as murder or rape) and crimes with additional resonance in the aftermath of repressive rule, such as kidnapping minors 53 in Sierra Leone, or cultural crimes in Cambodia 54. The use of domestic law fulfils the transitional goal of continuity in the law. Such is the long-term emphasis on local ownership of the process even where the UN initially operates the courts, hybrid courts are, by virtue of location, purpose and jurisdiction, more in the nature of internationalized domestic tribunals than domesticized international tribunals. While in the past it was felt that only international tribunals were suitable venues for the trial of international crimes, the advent of the hybrid tribunal can be seen as a reaffirmation of the principle of complementarity – this it is the duty of all states to exercise jurisdiction over those responsible for international crimes, and that fully international tribunals will not seize jurisdiction from domestic courts 55.

Hybrids owe their genesis to two separate developments. The first, noted earlier, was a shift in the emphasis of UN peace operations in approaching the challenges that typically face post-conflict societies towards the establishment of judicial institutions, the creation of cultural commitment to the rule of law and rights protection. The second development was the gradual realisation that a purely international or purely domestic paradigm contributed little to a

51 See article 12 of the Statute of the Special Court for Sierra Leone, and UNTAET Regulation No. 2000/15, Section 22.2
52 Rome Statute of the ICC, Articles 5 to 8
53 Article 7 of the Statute of the SCSL includes the following crimes under Sierra Leonean law: “Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act 1926 (i) Abusing a girl under 13 years of age, contrary to article 7, (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7, (iii) Abduction of a girl for immoral purposes, contrary to section 12
54 Article 7 on the Law on the Establishment of Extraordinary Chambers In the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides: “The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979”
55 These principles are enshrined in the Preamble and Article 1 of the Rome Statute. The Preamble states that it is the duty of all states to exercise jurisdiction over those responsible for international crimes. Article 1 and the Preamble provide that the ICC “shall be complementary to national criminal jurisdiction”. See also the 2001 Princeton Principles on Universal Jurisdiction which states that “The primary burden of prosecuting... perpetrators of [international] crimes will .... Reside with national legal systems.
foundational approach to justice due to a lack of capacity building potential or contribution to norm penetration, and indeed ran the danger of exacerbating injustice due to legitimacy issues. It became apparent that the costs and benefits of international and domestic trials were in conflict with each other. “As the benefits of supra-national adjudication are realised, those of domestic adjudication are lost”56, and vice versa. Hybrid courts were formed as much to mitigate the weaknesses of purely international or domestic courts as to harness their strengths.

C. Building the Rule of Law Through Hybrid Courts

Hybrid tribunals are the synthesis of two competing theories of international criminal accountability. One theory emphasizes purely international proceedings, while the other advocates domestic processes. Hybrid courts blend the advantages of international expertise and resources with local location and participation to aid capacity-building, cultural acceptance, norm penetration and of course transformational goals such as punishment and social catharsis after misrule and conflict. When international judges help a state try its own serious criminals, hybrid courts mitigate the capacity and legitimacy deficits of either system. The primary reason for the emergence of hybrid courts at the turn of the century was the now-apparent failings of the ad hoc international tribunals for Rwanda and Yugoslavia in the 1990s57. Indeed, hybrid courts can best be understood as a critical response to these trials. As Linton puts it, hybrids were “designed primarily in response to criticisms of ad hoc tribunals”58.

As noted earlier, legitimacy is essential in building a cultural commitment to the rule of law. So what then does legitimacy mean in the context of transition? Dickinson sees the question not as a formal one of political or democratic legitimacy, but rather looks at perceived legitimacy in a more observable sense, namely “which factors tend to make the decisions of a

58 Lipscomb, supra note 57, 205
judicial body acceptable to the various populations observing its procedures. If hybrid trials are viewed as legitimate, it follows that criminal justice as a whole will enjoy public acceptance and even support. The key question is whether the local population consider that justice is genuinely and honestly being done, though it must be noted that legitimacy is an “amorphous” concept – different societal groupings will have different notions of what is acceptable. The presence of the UN and the international component bring more than just funding, resources and personnel. It also brings legitimacy, for a number of reasons. Firstly, the presence of international judges and prosecutors (and defenders, where provided) can ease any fears of impartiality on the part of the international community and more importantly, the local population. This is especially the case where there is a majority of international judges. Because international personnel are removed from domestic politics (and hence have no personal interest in them) and because they are paid by the UN in whole or in part, the process is infinitely less likely to be manipulated by governments and other factions. Mixed hybrid proceedings are “insulated from domestic political factors”. This serves to prevent the bias visible in the Indonesian East Timorese trials and the original Kosovo trials. Frequently, the existing make-up of the judicial system is the result of the exclusion of ethnic or political minorities. Previously warring groups will not trust the decisions of judges who hail from the other or different national groups. If judges propped up the prior regime, their decisions will have no legitimacy in the eyes of the local population. Where the judiciary operated in the narrow interests of ruling elites rather than the population as a whole, there exists no expectation that justice can be done through the courts. Even lawyers have legitimacy

59 Dickinson, supra note 57, 301. Hall uses the same definition (Hall, supra note 57, 46 -47)
60 David M. Gersh “Poor Judgement: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law” (2004) 33 Georgia Journal of International and Comparative Law 273, 294
61 Burke-White, supra note 56, 99
62 The most relevant example of how human rights trials can be corrupted by domestic influences in that of the Indonesian trials of crimes committed in only three of the thirteen districts of East Timor in April and September of 1999. The trials were only established in 2003. Eighteen defendants were charged, none of whom was General Wiranto, the Defence Minister and Commander of the Indonesian army at the time of the atrocities. Of these eighteen, twelve were acquitted, while the other six received inappropriately low sentences. The controller of all armed forces in East Timor in 1999, General Damiri, missed four of his trial hearings as he was on military operations for the government in Aceh at the time. He was sentenced to three years in prison, despite the fact that the tribunal statute required minimum ten-year sentences. Several of the judges had close links to the army, witnesses were intimidated by a significant military presence at the trial, while “the official court record portrays the violence in East Timor as a purely East Timorese conflict in which Indonesia benevolently intervened to separate two fighting parties” (Frease, supra note 1, 288)
63 In Kosovo, the UN established a mixed court in the domestic legal system, where one international judges sat with two domestic judges. After international intervention, ethnic Serbs refused to sit on the court, meaning that the process was dominated by ethnic Albanians. This obviously posed legitimacy problems. That was not all, however – it appears that an element of bias entered the process, and cases were decided amidst “concerns about the lack of due process and insufficient evidence” (Dickinson, supra note 57, 302). Ultimately, the situation deteriorated to the stage where UNMIK had to alter the make-up of the court, relegating domestic judges to a minority to guarantee impartiality, and a number of earlier decisions were thrown out. Significantly, Tarin found that “with this change, the quality of the courts’ decisions increased” (D. Tarin, “Prosecuting Saddam and Bungling Transitional Justice in Iraq” (2005) 45 Virginia Journal of International Law 467, 518)
64 As Tolbert and Solomon put it:
“…..standards and procedure are particularly important in a post-conflict situation, where formerly warring groups do not trust one another to act in accordance with local professional practises”. Tolbert and Solomon, supra note 9,
The political atmosphere in a society can militate against fair trials if there are high levels of conflict-related hostility.66

Secondly, the trials will enjoy greater legitimacy in the eyes of the local population as judges of their “own kind are present as actors in the tribunal”67. One of the major problems of the Yugoslav and Rwandan trials in the Netherlands and Tanzania respectively was the removal of judges from the cultural context of the crimes. With hybrids, because of the presence of local judges, their foreign counterparts can confer with them and gain a greater sensitivity to local attitudes, history, and culture, and can put crimes in context. This co-operation helps create a “framework for consultation that may have enhanced the general perception of the institution’s legitimacy”68. The physical and psychological distance between the sites of the atrocities in Yugoslavia and Rwanda and the courts in The Hague (Netherlands) and Arusha (Kigali) meant there was little or no connection between the affected population and the trials. Connections with the ICTY were at best piecemeal rather than the type of consistent constructive engagement that would have made the trials relevant to the local population. There are a number of studies that confirm that remoteness engenders negativity and apathy towards trials.69 Too much international control insensitive to local needs can see legitimacy tainted by perceptions of imperialism or that the Tribunal is the instrument of big powers. These fears can easily be stoked up by certain parties in transitional states, who frequently have historic experiences of imperialism or manipulation by larger states. International tribunals may be seen as reflecting the goals of the international community rather than those of the society affected by the past repression.70

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65 Like judges, lawyers can be part of the repressive state machine, deprived of independence, while bar associations are sometimes divided on ethnic and political lines.

66 For example, even in post-Milosevic Serbia and democratic Croatia, indicted war criminals are hailed as heroes of patriotic wars. It was politically unacceptable to transfer Milosevic to the Hague, let alone try him or his accomplices in Belgrade. He was transferred as late as 2001 only due to US economic pressure. Hall writes of how thousands of supporters flocked to a Belgrade farewell rally for the indicted criminal Vojislav Seselj (Hall, supra note 57, 52). It is difficult to see how anyone could be tried in that atmosphere. Indeed, in relation to possible purely domestic trials in Serbia, Hall writes: “It would be political suicide for any Serbian government to legitimately prosecute those suspected of war crimes”. (Id., 56) In former Yugoslav states, war criminals were only arrested when it was politically acceptable, years after the ICTY was established. Most post-conflict societies cannot afford to wait that long to reckon with the past.

67 Id., 57

68 Dickinson, supra note 57, 306

69 For example, a 2000 study of Bosnians from every ethnic group in the judiciary and legal professions and their perceptions of the ICTY found that they were ignorant and suspicious of much of its processes (The Human Rights Cent and International Human Rights Law Clinic, University of California, Berkeley, and the Center for Human Rights, University of Sarajevo, “Justice, Accountability and Social Constructions– An Interview Study of Bosnian Judges and Prosecutors”, (2000) 18 Berkeley Journal of International Law 102, 136-140). Turner draws a negative comparison between how closely domestic trials in France, Argentina, South Korea and Israel were followed by the local people with how the distant trials at the ICTY and ICTR were tracked (Turner, supra note 57, 27-28).

70 Burke-White cites a 2000 Croatian survey which found that a “high percentage of Croats believed that The Hague was biased”, 52% believed it wanted to “criminalize the Homeland War”, and 78% believed it should not extradite citizens to it (Burke-White, supra note 56, 736) With purely international courts and no domestic input or control, it is all to easy for the likes of Slobodan Milosevic to argue that trials are political instruments and illegal and prejudice domestic opinion. The top-down imposition of the international courts were not attuned to the needs and wishes of the local population (which were at best an afterthought in the creation of the ad hoc
Thirdly, hybrid courts, with the weight of both the state and the UN behind it, can be more effective than international courts in processing cases. The operations of the ICTY and ICTR adversely affected their acceptability to the local population. The fact that trials were slow and tried only a fraction of the criminals involved in the strife and leaving thousands of lesser offenders who committed horrendous crimes to go free, undermined legitimacy. In response, for example, the Kosovo trials and East Timorese Serious Crimes Process (SCP) have been far more successful in completing trials. Turner, in comparing both types of court, found that in the first three years of the SCP, more cases were completed than in the first fourteen years combined of the two ad hoc international tribunals combined. These figures, she puts it, “underscore the efficiency of mixed courts, particularly given the significantly larger budgets of the international tribunals.” This improved efficiency is due to the closer proximity of the location and the ability to co-ordinate with other organs of the state and other transitional justice mechanisms like the Truth and Reconciliation model in East Timor. Because hybrid courts can handle more cases, it is economically and practically viable to pursue both high and low-level criminals. The more criminals that are tried and the more victims can tell their stories, the more skills are developed and the more legitimate the trials are in the eyes of the population. Bearing this in mind, it calls into question the limited number of cases in the Sierra Leone, Cambodian, and Lebanese processes and how much of an impact they can make in terms of skills transfer and public legitimacy.

In terms of capacity-building, hybrid courts theoretically have much to offer to the nascent justice system. Purely domestic systems frequently have no capacity, while the ad hoc tribunals did very little to improve domestic capacity. The lack of any sort of sustainable connection meant that Rwandan prosecutors played no part in investigating the crimes with their international colleagues, Bosnian judges played no role in adjudicating the trials of their compatriots, and Croatian defence counsel were completely sidelined in defendants’ trials, while the courts were staffed and administered completely by foreigners. This becomes all the more unfortunate when one considers how the sheer size and complexity of the cases and the qualifications of the staff involved could have trained domestic actors in almost all conceivable skills that a domestic criminal court requires. It is not that the capacity-building function was sidelined or pushed down the agendas of the ICTY and ICTR. Incredibly, in courts seized with a duty to develop the long-term security and stability of two post-conflict

tribunals) can easily incurred local enmity, especially when the local courts were given no opportunity to pronounce as to the legitimacy of the trials. When there is no perception of legitimacy or victors’ justice, it makes it difficult for the domestic government to co-operate, as has been seen in Serbia and Croatia. It is worth remembering that the ICTY was established by a Security Council Resolution without the consent of the Yugoslav government of the time.

71 “In less than three years, in spite of delays, language problems and inexperienced lawyers impeding its work, the Serious Crimes Unit in East Timor obtained thirty-two convictions and issued 58 indictments involving 240 people. By contrast, in its first eight years, the ICTY issued nineteen judgements, while the ICTR issued only eight judgements in its first six years”, “Nationalizing International Criminal Law”, Turner, supra note 57, 39

72 Id., 39
societies, there was no specific mandate of training or judicial reconstruction for the self-evidently shattered domestic systems\textsuperscript{73}.

Above all else, the side-by-side working environment of hybrid tribunals can develop the skills of domestic actors. Local judges deliberate and draft decisions in consultation with international judges who have knowledge of international law and procedural norms. Local prosecutorial offices work with international prosecutors, forensics analysts and researchers. This on-the-job training is likely to be more effective than what Dickinson calls “abstract classroom discussion of formal legal rules and principles\textsuperscript{74},” or indeed from merely observing a purely international mission. These first, most important trials in the era of liberal rule, benefit from the presence of a majority of international judges as it means that a majority of those deciding are qualified to deal with international law and its complexities\textsuperscript{75}. In theory, there is no limit to what training domestic actors can receive – investigations, defence, translation, victim support, refugee law, research etc. Hybrids also build the administrative of the government. Hybrids are a recognition of the limitations of post-conflict judicial systems. While the idea of foreign experts teaching law on a step-by-step basis seems almost paternal, it is also a reclamation by the state of its responsibility and duty to enforce the rule of law from the international community to where it more properly belongs. It is an affirmation of the state’s willingness to develop a full capacity for itself. If the local government has experience of the practical running of a high quality special court, it follows that it can use these lessons in operating an international-standard domestic system. One capacity-building advantage of hybrid courts international courts is that their proximity facilitates the engagement of the local population. Nationals can attend the trials and the media can report on them. All of this fosters public debate and discussion, increasing both the social understanding of law and it’s import\textsuperscript{76}. Both Minow and Burke-White note “the value of the process of public deliberation in creating legitimacy for the undertaking”\textsuperscript{77}.

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\textsuperscript{73} Scholars and domestic actors have been critical of this inertia. Tolbert, in a review of the ICTY, states that the tribunal suffered from “a strategic failure in that [it] has not had much impact on the development of courts and justice systems in the region” (Tolbert, supra note 57, 12), while Alvarez makes similar criticisms of the ICTR: “Each time the Rwandan legal system is denied the right to put on trial a prominent member of the former regime, the international community is sending an implicit (if perhaps intended) message that Rwandan institutions cannot be trusted or that its judiciary is not ready to implement the rule of law ……… given the scarcity of international resources, one suspects that each dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts - and it is certainly one dollar that is not spent on establishing the joint tribunal on Rwandan soil that Rwanda’s post-genocide government originally sought” Alvarez, supra note 57, 99

\textsuperscript{74} Dickinson, supra note 57, 39

\textsuperscript{75} This statement may be qualified twice. Firstly, as Cambodia shows, not all hybrids will have an international majority. However, the UN has stated a preference for an international majority there, as it did in East Timor, Sierra Leone and Kosovo. Secondly, the presumption that international judges have qualifications sufficient to deal with international criminal law, or are experienced in international law, has proved sadly rebuttable in East Timor, as can be seen later.

\textsuperscript{76} Local media can cover the cases with ease and in the local language(s). Hybrids have developed publicity campaigns and outreach programmes to make people aware of proceedings

\textsuperscript{77} Martha Minow, \textit{Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence} (Boston: Beacon Press, 1998) 55
The aspiration for the capacity building in hybrid courts goes beyond training and administration by the state, however. It is hoped that hybrid courts are constructive of a rights culture where none existed before. Ratner and Abrams describe this element of “a culture of respect for the fairness and impartiality of the process and the rights of the accused” as the most important in a developed domestic justice system after transition. Hybrid courts are mostly concerned with crimes against humanity and war crimes. However, the development of a legal culture cannot be limited to the treatment of crimes which ordinarily should not occur after the successful transition special courts are designed to help provide. It must go beyond the crimes themselves and into the realm of how a court system approaches issues like injustice, impunity, due process and defendants’ rights. Hybrid trials with domestic should not only provide a guide to the proper trial of international crimes. They must serve as a platform on which the local people build the entire criminal justice system in their state. Turner explains the relationship between capacity building and norm penetration as follows: “Encouraging national communities to supplement these broad international norms with more concrete rules and interpretations of their own is consistent with ideals of autonomy and self-determination. It provides those communities with the opportunity to influence, in accordance with their core values, the laws and institutions which govern them.” The development of a legal culture goes beyond those responsible for and employed in the justice sector. One capacity-building advantage of hybrid courts international courts is that their proximity facilitates the engagement of the local population.

The use of hybrid courts for the development of the domestic legal sector is the core concept of a foundational approach to post-conflict justice that uses trials of the previous regime to ground a rule of law understood as properly-functioning courts with skilled professional actors enjoying public acceptance. As part of a liberal reconstruction effort, it must above all else protect the rights of defendants and deliver uncompromised justice. While hybrid courts are primarily concerned with the criminal law, it is only by demonstrating its competence in this crucial area that it can be ready in future for the key tasks of affirming the negative, democratic and socio-economic rights on which a successful transition is built.

**Part III: Transitional Justice and Reconstruction**

While the foregoing sections have examined the broad rule of law impact of hybrid trials, successor justice is just as much, or even more, transitional. Though criminal trials may be instruments of stability in terms of adherence to settled law, they also engineer social change in that they alter the social understanding of history, values, status, norms and responsibilities. These changes are affected by political goals which may emphasize fair trials, unfair trials, speedy trials, strict prospectively or even ordinarily illegal retrospectivity. As Teitel puts it, “the conception of law in transition is extraordinary and constructivist: Its is alternately

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79 Turner, supra note 57, 22
constructed by, and constructive of, the transition.” In such times, the conception of justice is “contextualized and partial” – what is deemed just is contingent on contemporary needs and prior injustice. It is these factors which determine hostility levels in the post-conflict state. Justice retains a liminal quality of being both backward-looking to past repression and forward-looking to a more liberal future and mediating the transition through both periods via the courtroom process. Law is an instrument to transform society, but sometimes liberal legal conventions limit the transformative potential. The central dilemma here is to what extend the shift to liberal rule is advanced or inhibited by adherence to conventional notions of due process and fair trials inherent in democratic, rule of law systems. This section describes how the Western model of criminal trials became the dominant means of transitional justice, but how the fair trial and high due process standards that would ordinarily accompany it in the liberal state have not reached the same normative status.

The traditional approach to transitional justice is that trials are the optimal response to past atrocities and draw the brightest line between past repression and future legitimate rule. Debates about transitional justice are constantly framed in terms of whether to prosecute or to use some other means. The primacy of trials reflects the Western liberal dominance of transitional justice discourse emphasizing individual freedom and individual responsibility. Both Aukerman and Minow have noted the analogy of mass human rights violations to ordinary crimes such as rape, murder and torture that constitute them have led to a bias in favour of the trial model of domestic criminal justice systems. The discussion is framed in terms of prosecution or an inferior alternative. Even more explicitly than in domestic trials, the goals of the trial are social, rather than individual. This section examines the three main transitional goals – retribution, reconciliation and rehabilitation, and deterrence and social pedagogy – and how they are advanced in trials. This section also, however, goes on to show how the exemplary trials which might ground judicial reconstruction are not strictly necessary to the achievement of these goals, and indeed how they might even conflict with them.

Retribution

In transition, it is always assumed that justice must be pursued. The argument is usually posed as a counterfactual – what if there is no justice? It is argued that a health polity cannot be built on a foundation of impunity and injustice. Serious crime is perpetrated against society as a whole and so that society must ascertain the perpetrators’ guilt and assign a proportionate

80 Transitional Justice, supra note 39, 6
81 Id., 6
82 “Some critics suggest that international law imposes a duty to prosecute a former regime’s atrocious crimes, and contend that states have overstated claims that prosecutions are impossible…… Other scholars, however, criticize the proponents of prosecutions for assuming that prosecutions will be possible in the wake of human rights disasters …. While participants in this debate disagree as to when trials are possible in practise, they generally share a basic presumption: prosecuting perpetrators of injustice is the optimal method for dealing with past atrocities. This assumption that prosecutions are preferable, while perhaps not always feasible, has fostered a belief that alternative approaches, such as truth commissions, are an inferior substitute for prosecution”
Aukerman, supra note 41, 40
83 Id., 41
84 Minow, supra note 77
punishment.\textsuperscript{85} This is retribution – all that matters is that wrongdoing on a mass scale be punished, regardless of any deterrent or pedagogical effect. Impunity is unthinkable as it mirrors the policies of the previous regime. Retribution is justified on the basis of its effect on society and the nature of the crime. Punishing crime vindicates the experience and anger of the victim and society, “an armature for the rage and courage of individuals and nations devastated by mass atrocities”\textsuperscript{86}. Though no punishment can be equal to the crime itself, only the sentencing power of prosecution can guarantee a penalty of sufficient severity.

However, it is easy to see where fair trials and due process can interrupt the retributive process. If evidence or witness testimony for events that happened in the distant past is challenged vigorously, it can stall or call into question the punishment process. If the defence takes advantage of technicalities or breaches of due process to quash the conviction of offenders known to be criminals or members of a criminal group or conspiracy, there is a good chance the guilty might go free, creating social resentment. Likewise, it is easy to see how a mechanical process of accountability is both easier and cheaper than the long-term undertaking that is judicial reconstruction.

Reconciliation and Rehabilitation

The role of prosecution in transitional periods transcends that of conventional punishment. While it maintains order, it also transforms. There is a strong case that trials are necessary for societal wounds to heal and that both goals complement and reinforce each other. Retribution is seen as a precondition for reconciliation with elements of the prior regime. Landsman contends that prosecution is essential to healing a society’s wounds after periods of widespread abuse because “one cannot forgive what one cannot punish”\textsuperscript{87}. A perpetrator of a serious crime can be seen by society as having been rehabilitated after a finding of guilt and the serving of a sentence proportionate to the crime. This works in both the individual case, and for society as a whole when it sees a group of people associated with illiberal rule punished, thereby lifting the collective guilt from those associated with prior rule and facilitating their re-integration into society. Trials not only rehabilitate offenders, however. After a period of state-sponsored violence, the victim lacks a sense of security, is isolated, fearful and marginalized by a society that has failed to protect him in the past. These people also need re-integration into society. Trials also reaffirm the dignity of the victims through the judicial proceedings where victims are given a central role and can interact with the perpetrators. The trial can both “denounce the violation of the victim’s humanity and vindicate her rights”\textsuperscript{88}. Truth is an essential part of this process. Exposure of the truth about

\textsuperscript{85} As Crocker puts it, “ethically defensible treatment requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment” (David A. Crocker, “Reckoning With Past Wrongs: A Normative Framework” (1999) 13 Ethics and International Affairs 43, 53)
\textsuperscript{86} Minow, supra note 77, 8
\textsuperscript{87} Landsman, supra note 28, 84
past repression vindicates the experience of victims, educates the public about the manipulation of power and can even serve as a non-monetary form of reparation. Though many argue that Truth and Reconciliation Commissions can generate the reconciliation necessary to heal individual or societal wounds without prosecutions, forgiveness does not obviate the necessity of punishment. Also, advocates of trial argue that truth is best discovered through the trial process than through commissions as the prosecution and the judge can guide the trial process to shed light on areas of the past with political significance or reconciliatory and revelatory potential.

However, if trials are defended competently and the defendant is given the opportunity to assert his account of events, this truth-revealing mission can be damaged, or called into question. A single transitional narrative is impeded when victim testimony can be dismissed as hearsay and evidence which would clarify the wider context of the crime can be challenged as irrelevant. The adversarial nature of a vigorously contested trial can undermine potential for reconciliation.

Social Pedagogy

Transitional justice must not only deter serious crimes, but render such actions completely outside the pale of legitimate political activity. This is the pedagogical role of transitional justice. Teitel argues that transitional criminal justice mediates a normative shift in values and the principles “underlying and legitimating the exercise of state power” 89. Trials can highlight, define and condemn past injustice and atrocities, while at the same time engage in a moral and psychological reconstruction of identity of the new liberal rule. Similarly, Durkheim views trial and punishments as a communication of socio-moral outrage and a condemnation of proscribed acts, which at the same time articulates shared moral sentiments which tend to reaffirm a more liberal social identity or solidarity 90. Trials unequivocally condemn certain behaviours as wrong, which reflects and reinforces a popular belief that such action is unacceptable, and in the process emphasizes liberal norms. Condemnation becomes as important in the individual trial as retribution, and applies to only to the individual actor but to all similar acts and ideologies or social conditions which gave rise to the act. The criminal law is best placed to do this. As Cassel puts it, “there is no more powerful social condemnation of evil than to label it a serious crime, for which serious punishment might be imposed” 91.

89 Transitional Justice, supra note 39, 213
Again, vigorously contested trials that uphold due process may limit the pedagogical potential of such trials. A properly contested trial might force the prosecution to seek a conviction for the individual rather than to use it as a means of expressing popular consensus on past violence. Where a crime becomes about an individual crime by an individual person, the opportunity for kick-starting a public discussion about the legitimacy of political violence or discrimination is weakened.

It is assumed that meeting retributive, reconciliatory and pedagogical goals are enough to usher in the rule of law. This is not the case. Though necessary in all post-conflict societies, accountability only signals a willingness to obey the rule of law. Capacity-building, norm penetration and the creation of a cultural commitment in society as a whole to the rule of law is what is needed to make it a reality. Successfully prosecuting Hariri’s killers or less than a dozen Sierra Leonean criminals can only make limited impacts on the rule of law in the long term if judges and prosecutors are not trained in a wider array of necessary skills. Convicting over eighty East Timorese criminals may pacify society, but where defendant’s rights are routinely breached and where equality of arms is such that prosecution is a fait accompli, the ability of the court to protect citizens’ rights is called into question. Cambodians may well ask whether their monies are better spent on the trials of octogenarian war criminals from twenty and thirty years ago when their judiciary remains notoriously corrupt.

Part IV: How Transitional Justice Became Enchanted

Having explained the necessity and complexity of the task of capacity-building through hybrid courts and having identified a potential clash with transformational goals, what then explains the prioritization of the transformational paradigm of post-conflict justice in states such as East Timor, Kosovo, Cambodia and arguably Sierra Leone where the long-term absence of the rule of law provides a greater threat to the peace than hostility between armed factions? In cases of state collapse where the world’s largest organization intervenes in a war-weakened nation, the bias is explicable more in terms of the human factor than as a result of material shortages at the organizational level, irresistible (and indeed partial) local demands or residual violence. David Kennedy, one of the foremost critics of policies after humanitarian intervention, has cited the human factor as critical in any successful intervention. He argues that in intervention (such as transitional administration), there are no unified theories and no “correct positions” in humanitarian intervention. He instead argues for an “attitude of

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92 In his report to the General Assembly on the agreement to found the Extraordinary Tribunal, Secretary-General Kofi Annan cited as a serious concern the “precarious” state of the judiciary in Cambodia. He stated that both the UN Special Representative to Cambodia and the General Assembly had found serious "problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary." (Report of the Secretary-General on Khmer Rouge Trials, at 11, U.N. DOC. A/57/769 of 2003). See also Human Rights Watch, Serious Flaws: Why the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement, Apr. 2003, http://hrw.org/backgrounder/asia/cambodia040303-bck.htm (date accessed : July 5, 2007)

responsibility”94, where those who intervene are attentive to the costs, as well as the benefits, of their work. In this sense, it can be said that he supports context- and society-specific approaches to transitional problems. Kennedy argues for a “pragmatism of consequences”95, where attention is focused on good outcomes rather than good intentions, and where the key guiding principle is to ask the question of who benefits and does not from any given action. He argues that humanitarian policy-making should be evaluated in the same way as other governance projects, with a “careful assessment for particular initiatives of the costs and benefits, likely risks, outcomes and distributional consequences for various groups”96. Kennedy believes the best interventions are those that combine a fidelity to humanitarian ends with a level of pragmatism about means97. However, this combination has not been in evidence in these successor trials, where ends and means have been confused and humanitarian blind spots have restricted the capacity-building potential of transitional justice.

A number of explanations may be proffered. Certainly, a short-term programme of transitional justice, though difficult, is a less demanding task in terms of effort and time than root-and-branch reconstruction of an entire judicial system. It is arguable that the very conceptualization of peace-building as a “post-conflict” phenomenon has had the effect of limiting the ambition of these missions and diverting the attention of humanitarian policy-makers from long-term rebuilding to more short-term hostility-related projects. It implies that transitional administrations are primarily concerned with addressing the immediate causes of conflict, i.e. existing or residual hostility98. Kennedy has criticized the dominant vocabulary of rights, arguing that it has crowded out the “field of emancipatory potential”99 and marginalized solutions based on economics, politics or institutional reform. This has had two main consequences which have impacted adversely on judicial reconstruction. The first is a reluctance to recognize responsibilities of leadership and its distributional consequences in society. Peace operations have historically been seen as a deviation from the non-intervention principle, with a resultant determination to interfere with local conditions or allocate stakes in society as little as possible100. The second consequence, and the focus of this piece, is the tendency to “enchant” or attach unrealistically optimistic expectations on humanitarian tools such as trials. This is the result of what Goldsmith describes as “the deep formalistic

94 Id., xix
95 Kennedy, supra note 93, xxii
96 Id., 111
97 Id., 330
98 Wilde argues that the normative implication of this purely post-conflict view is that each policy “is being pursued because it leads to peace and an end to conflict and not because of its independent value” (Ralph Wilde, “Representing International Territorial Administration: A Critique of Some Approaches” (2004) European Journal of International Law 71, 88). The danger here is that a policy might be rejected or neglected as a priority on the basis that it is not directly related to the conflict.
99 Id., 8
100 Kennedy notes that in military interventions, policy-makers stayed outside the decision-making process of violence. They became pre-occupied with justifications for intervention, and fled from the responsibility for intervention and power struggles. This reluctance to lead has led to “the perplexing sense that efforts to influence matters in faraway places are not normally legitimate – that international governance, where necessary, should be exceptional, temporary … and … should seek to leave local culture and politics as undisturbed as possible” (Kennedy, supra note 93, 116) . This is even the case under the extensive powers of transitional administration.
commitment to the emancipatory potential” of law and rights, where problems are decontextualized through the assertion of universality. The potential for transitional justice is exaggerated – not only can it mediate the shift between regimes, but it can guarantee a more liberal order without recourse to capacity-building or rule of law reform.

Where Kennedy’s work is particularly strong is his treatment of the fetishizing or privileging of humanitarian tools – how the presumptions, biases, blindspots and professional vocabularies of humanitarians lead them to attach an “inherent humanitarian potency” to a particular tool such as transitional criminal justice. Kennedy argues that that in the humanitarian brain, there is a map of the world which influences the decisions and policies they make. These maps are “marked by the exaggerated size of well-known political and historical hotspots”. In terms of transitional justice, the hotspots are Nuremberg, Argentina, Spain and so on. The map causes policymakers to attach to their tools a humanitarian potential abstracted from the context of its application. The particular peace-building ecology of the area is overlooked as myths of progress substitute for reasoned application of tools to contexts and the evaluation of consequences. Fealty to an idea or policy redirects humanitarians from consequences to mythological progress narratives about the particular tool.

“Progress narratives of this sort can become policy programmes, both by solidifying a professional consensus about what has worked and by defining what counts as progress for the international governance system as a whole. This can redirect policy-makers from solving problems to completing the work of a mythological history, orienting or shaping their efforts to rebuild the international system”.

As Kennedy puts it, “fidelity to humanitarian ideals comes before pragmatism about consequences” – instead of studying the relationship between a given tool like transitional criminal justice and an outcome like judicial reconstruction, humanitarian policy makers have a blind faith in the appropriateness of standardized processes and objectives. Another point Kennedy makes is that humanitarians “worry more about the defensibility of international

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101 Andrew Goldsmith, “‘We, The Redeemers”: Hubris and Humility in International Humanitarianism” (2005) 29 Melbourne University Law Review 598, 599
102 Kennedy, supra note 93, 119
103 Id., 130
104 “International humanitarian policy makers operate with a map of the world in their heads which affects the type of proposals they make, the outcomes they expect, and the consequences of their work. Each profession involved in international policy making has a map of its own: the one foregrounding central banks and currency flows, the other troop movements and supply lines, yet another trade flows and productivity measurement” Id., 131
105 “Their shared mythology presents international policy making as a grand story of the slow and unsteady progress of law against power, policy against politics, reason against ideology, international against international, order against chaos in international affairs over 350 years. In this story, international governance is itself a mark of civilization’s progress ….. Through setbacks and breakthroughs, international policy-making has always been or aspired to be the same thing: a humanitarian, rational and civilized alternative to the messy worlds of national politics” Id., 141
106 Id., 141 - 142
107 Id., 330
humanitarian actions than the potential for humanitarian results”\textsuperscript{108}. In the context of successor trials, the question seems to be posed in terms of whether it is justifiable or not to ignore serious crimes than how trials can benefit society in the long-term. He criticizes the attachment of the human rights community to legal machinery\textsuperscript{109} such as a transitional trial and as a critical legal scholar criticizes the greater legitimacy attached to law over politics\textsuperscript{110}. In advancing either transformational or foundational purposes, such distinctions are unhelpful. In large part, the justification for successor trials has been their political import in achieving transformational goals. However, because it happens in a court of law applying codes, it is seen as law and not politics. Paradoxically, and perhaps counter-intuitively, an insistence by humanitarians for the use of scrupulously fair trials to ground cultural change and to establish institutions may be seen as overly political. A commitment to legal machinery over politics or a willingness to embrace certain political products of law over others can diminish the potential for emancipatory change.

The tool of transitional justice has been enchanted and has seen what is ordinarily understood as a fair trial sidelined in favour of more immediately transformative processes which is perceived as having the potential to usher in a more liberal regime. The map of the humanitarian brain has been altered in two main ways. Firstly, the legacy of Nuremberg has meant that questionable legality of trials is seen as no impediment to political transformation. Secondly, transitional justice has changed from being trial driven to become a ritual process where any number of mechanisms may be employed to draw a line in the sand between regimes, none of which strictly require the normal rule of law norms of fairness, equality before the law or due process most of which do not even use trials.

**The Legacy of Nuremberg**

The ambiguous legacy of the Nuremberg trials, where strict legality was at times eschewed, has in turn led leaders in most subsequent transitions to compromise on standards of fair trials and due process. The lessons of Nuremberg, “self-consciously styled” as the foundation of modern transitional justice\textsuperscript{111}, has informed the goals and notions of propriety of post-conflict trials. Indeed, as Teitel puts it, it wrote the “normative vocabulary of transition”\textsuperscript{112}. It has dominated the international community’s understanding of transitional justice to such an

\textsuperscript{108} Id., 138
\textsuperscript{109} “The strong attachment of the human rights movement to the legal formalization of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself” Id., 12
\textsuperscript{110} “The human rights movement promises that ‘law’ – the machinery, the texts, the profession, the institution – can resolve conflicts and ambiguities in society by resolving those within its own materials, and that this can be done on the basis of a process of ‘interpretation’, which is different from, more legitimate than, politics” Id., 22
\textsuperscript{112} Id., 1616
extent that there exists now a danger that approaches to transitional justice under international transitional administration will neglect national experiences and needs. Aukerman has noted this threat:

“[W]e must ask whether or not the international community even agrees what the most important goals should be. An indiscriminate duty to prosecute assume that the international community shares a fixed hierarchy of goals, agrees that these goals are best served by prosecution and feels comfortable imposing such a vision on the society in question”113.

In the modern era, the lessons of the post World War I Leipzig trials had a profound impact on the approach to transitional justice. The national trials of 45 officers for war crimes in Germany were a “whitewash”114 with limited punishment, and today, “this failure of accountability is itself considered to cause the failure of liberalization”115. Furthermore, the collective sanctions against Germany fuelled resentment against the Allies that contributed to the rise of National Socialism. At Nuremberg, trials would establish individual accountability instead of collective for heinous violations of human rights in war time, and would establish a preference for international trials over national ones. The International Military Tribunal tried 22 Nazi officials, of whom seven were sentenced to prison, twelve were sentenced to death, and three acquitted. The four occupying powers had thousands of other trials in their own zones with hundreds of death sentences116. Death sentences aside, Nuremberg failed to adhere to conventional notions of legality in a number of respects. In retrospect, these deviations may not seem hugely serious in the extraordinary contemporary conditions, but they paved the way for the erosion of the commitment to scrupulously fair trials in international criminal law. The trials did not allow defences that relied on past Nazi law and convicted individuals of crimes that did not exist at the time of commission such as crimes against peace and crimes against humanity, raising concerns about retroactivity. Moral necessities took precedence over strict legality, as so many other necessities would be justified in later transitions. McAdams in particular has questioned the ex post facto invalidation of the entire German legal system in that it deprived German citizens of reasonable notice of what conduct would later be regarded as criminal117. Nuremberg also raised the prospect of victor’s justice in that it used exclusively Allied judges and tried no Allied officers for crimes. Where the leaders of a regime are tried, there are of course political consequences. Nuremberg was evidence of what Teitel calls “the likelihood of the inherent politicization of punishment policy”118 or the “explicit politicization”119 of transitional criminal law.

113 Aukerman, supra note 41, 46
114 Crocker, supra note 88, 536
115 Transitional Justice, supra note 39, 31
116 American military tribunals convicted 1814 (with 450 death sentences), the UK convicted 1085 (240 death sentences) and the French convicted 999 (104 death sentences), Jon Elster, Closing the Books: Transitional Justice in Historical Perspective (Cambridge UK, New York: Cambridge University Press, 2004), 54
117 James A. McAdams, “Communism on Trial: The East German Past and the German Future” in Transitional Justice and the Rule of Law in New Democracies, supra note 30, 239 at 243
118 Teitel, supra note 39, 63
119 Id., 217
The level of Nazi atrocities and their widespread nature created a hitherto unknown international consensus and so the resulting Nuremberg trials “shaped the dominant scholarly understanding”120. Teitel notes that academic study of international law has leaned in favour of international responses rather than contextualized domestic responses121. Since the 1940s heyday of international law, Nuremberg has been “mythified”122. Teitel outlines four key Nuremberg ideas which have given the trials an exalted place in transitional justice discourse123. It made individual judgement with due process and convictions based on evidence paramount (though retroactivity remains a concern). Secondly, it reconceived criminal responsibility. It linked individual and organizational ability, while neither act of state nor due obedience would suffice as a defence. Thirdly, it redefined the interaction between serious crimes and both sovereignty and jurisdiction. In theory at least, no longer would a state’s treatment of its own citizens within its own borders attach only domestic jurisdiction. Now, such atrocities were a matter of international concern and individuals could be made accountable internationally. The final Nuremberg legacy is visible in international law developments. It framed the individual accountability and its definition of the crimes influenced the codification of crimes against humanity and those in the Genocide Convention and the Geneva Conventions. Nuremberg is the progenitor of the ad hoc tribunals and the ICC, which are modelled on it. Indeed, Teitel argues that now transitional justice has been “normalized”, and provides a guiding rule of law even in peacetime124.

Problematic as some elements of Nuremberg were, it remained legal justice, albeit compromised, and not political justice. Elster distinguishes between the two125. Pure political justice is where the Executive branch of the successor government “unilaterally and without the possibility of appeal designates the wrongdoers and decides what shall be done with them”126. Show trials, with their what Kirchheimer call “mechanical certainty”127, are the most obvious example of political justice. Nuremberg, on the other hand, conformed to legal justice in that there was uncertainty about the outcome, acquittals and due process. Elster argues that pure legal justice has four characteristics128. Firstly, the law applied must be as unambiguous as possible to reduce the scope for judicial discretion. Secondly, the judiciary

120 Id., 31
121 “A historiographical look reveals the precedent [of Nuremberg]’s substantial impact on scholarly literature, in particular, how accountability is largely conceptualized in terms of international law. Review of the bibliographies concerning accountability for grave state crimes reveals that literature about international law responses to atrocities since World War II, particularly in the English language, has grown rapidly, while the comparative study of national experiences is, by contrast, virtually ignored” Id., 32
123 Teitel, supra note 111, 1618-1630
125 Elster, supra note 116, 84-93
126 Id., page 84. Elster offers the decision of the Allied powers to exile Napoleon to St. Helena as the paradigm example
128 Elster, supra note 116, 86
must be independent of the influence of other branches of government. Thirdly, judges and jurors should be unbiased in interpreting the law in a given case. Fourthly, legal justice adheres strictly to the principle of due process – adversarial and public hearings, the right to choose one’s legal representation, the right to appeal, non-retroactivity, respect for statutes of limitation, individual guilt, the presumption of innocence, the right to due deliberation and the right to a speedy hearing. Elster is quick to point out that lack of one or part of any of these characteristics does not amount to political justice. There is a scale. Significantly, however, he also points out that these requirement of legal justice are “routinely violated” out of transitional necessity.

The history of transitional criminal justice is pockmarked by such breaches. At various stages after Nuremberg, transitions have seen collective guilt, illegal internments, denial of appeal, lack of adversarial proceedings, de facto presumptions of guilt, biased selections of judges and jurors, selectivity, coercive plea bargaining and egregious delays of justice. The most obvious example is the post-war International Military Tribunal for the Far East in Tokyo. Again, it was an all-Allied judiciary trying only no Japanese criminals with no acquittals and flagrant breaches of due process. The Allies also created their own military tribunals that tried over 1000 suspects of crimes against their own personnel. In Bolivia, the national congress tried a number of high-profile accused is absentia. The Rwandan Gacaca trials have proven deficient in a number of areas, not least of all the excessive periods of detention in awful conditions and questionable adherence to fair trial standards. Only the ad hoc tribunals for Rwanda and Yugoslavia have met the challenge of full legal justice in a post-conflict context, and even these trials are dogged by delays and a degree of selectivity. The problems with the ad hoc tribunals were described in the previous sections.

Transition as Ritual

Equal, if not more, damage to the principle of maximizing legality has been done by what Teitel coined “the limited criminal sanction”. The limited criminal sanction applies to transitional criminal justice where prosecution processes do not culminate in either a trial or a punishment. It is associated with transitions where the outgoing regime retain enough power to jeopardize the peace, where there is no organized campaign for justice or where the judiciary is too tainted by association to the prior regime or not competent enough to try the

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129 Id., 91
130 Id., 88. He goes on to write: “As we shall see, violations may be unavoidable and on occasion even desirable, and even when they are neither, they may be understandable and perhaps forgivable. When many violations accumulate or where core criteria are violated, there comes a point, however, when legal justice is replaced by political justice” Id., 88
131 Elster has described the Tokyo trials as “perhaps the closest approximation to pure political justice in the universe of cases”, (Id., 85-86)
132 Sriram, supra note 32, 47
134 Teitel, supra note 39, 46-51
cases. This reluctance or inability to punish is seen in most post-war transitions. The Allied Control Council No. 10 trials and the German national trials shared a tendency towards clemency, mass commutations of sentences and general punitive forbearance\textsuperscript{135}. After the fall of the Greek military regime in 1974, the new Karamanlis government began an extensive series of trials\textsuperscript{136}. However, the process eventually ended in suspended and commutable sentences after conviction. In the Argentina transition, there was a similarly vigorous start before pardons limited punishment\textsuperscript{137}. Other Latin American and East European transitions led to pardon and amnesty. Teitel notes that the surprising thing about the limited criminal sanction is the social perception that justice, or at least enough justice, has been done: “Despite the absence of full or lasting punishment, the transitional criminal sanction appears to constitute a symbol of the rule of law”\textsuperscript{138}. It advances the same punishment-related purposes of trials described earlier. The limited criminal sanction won favour because it advances the normative shift of political transformation, even where it makes a mockery of the trial process. It follows then that similar mockeries are acceptable when the transition is advanced by reducing hostility. Teitel recognizes that transitional justice is associated with unfair procedures such as “the levelling of evidentiary standards” and “de-differentiation” in law\textsuperscript{139}. Transitional justice is understood as non-ideal and compromised but symbolic. Indeed, it is even welcomed as such. This does not argue that such compromise is wrong. As the successful transitions in the likes of Greece, Poland or Germany suggest, the cause of peace can be furthered by tailoring justice to compelling political realities. However, the argument is not so straightforward where there is no delicate transitional power balance and where a powerful UN peace operation controls the state.

While this section has shown the primacy of prosecution in transitional justice discourse, it has been the case especially since the Phase II post-Cold War transitions that alternative avenues have been pursued. This thesis has already examined how transitional justice rejects universal or ideal norms in difficult transitions. While advocates of trials state that states should take risks, other such as Landsman have argued that “many fledgling democracies have simply not had the power, popular support, legal tools or conditions necessary to prosecute effectively”\textsuperscript{140}. In transition, there exists “a close relationship between the type of justice pursued and the relevant limiting political conditions”\textsuperscript{141}. While in ordinary times peace and justice go hand-in-hand, in times of transition, the balance of society may be such that the former regime has enough power to endanger the transition or return to authoritarian rule if full accountability is pursued\textsuperscript{142}. The reasons for abandoning prosecution are legion, in

\textsuperscript{135} Id., 47
\textsuperscript{136} Sriram, supra note 32, 49-51
\textsuperscript{137} Id., 107-126
\textsuperscript{138} Id., 49
\textsuperscript{139} Id., 222
\textsuperscript{140} Landsman, supra note 28, 84
\textsuperscript{141} Teitel, supra note 33, 69
\textsuperscript{142} It becomes an argument for the sacrifice of justice for stability, summarized by former Argentine President Alfonsin:
addition to the aforementioned stability versus justice debates that have led to the limited criminal sanction and amnesty. These are what Elster calls “hard constraints”, which make justice unfeasible. Also, there exist soft constraints where other social goals conflict with justice and requires a careful balancing. Individuals and societies respond differently to atrocities based on prevailing circumstances. If the population is poor and the outgoing elite economically powerful, economics will restrict justice. Similarly, justice may be constrained where the potential objects of prosecutions might be essential to the reconstruction effort due to their skills, such as the East European nomenklatura after 1989. Insistence on justice can delay a peace that look inevitable by “stiffening the will to resist” of authority figures in negotiations. Phase II transitions, with their move from retribution to social rebuilding, recognized the dilemma of periods of flux and became “concededly contextual”. Highly divergent approaches to transitional justice reflected both local culture and political exigencies, but left the matter of long-term reconstruction for another time in another form.

The most famous alternative form is the truth and reconciliation commission. Here, an official body is set up by the state to investigate, document and report on human rights abuses of the prior regime. Elements of the old leadership and their agents reveal the truth of their role in the past repression, benefiting society and allowing them to avail of amnesty or decreased punishment. It has been popular in Latin America where militaries have retained power, though its classic form remains the South African model. Here, amnesty was given for confessions for political acts related to apartheid rule. It gives a broader historical context than trials, focuses on a larger number of events, and can use things like photographs, film and hearsay which might prejudice a trial but advances the revelation of truth and pursuit of knowledge. It is felt that telling the truth alone can provide the social catharsis that can mediate the shift to liberal rule. While trials may give a smaller truth forged in the adversarial process, the commission offers more truth with a wider span. Access to historical records, rather than unifying truths was the path followed in Eastern Europe. Purges and lustration were pursued with varying determination in the former Communist states, often followed by reform of institutions.

“Our common sense seems to support both positions; that a voluntarily committed act is deserving of punishment, and that the social consequences of applying this punishment must be considered. It would be irrational to impose a punishment when the consequences of doing so, far from preventing future crimes, may cause greater social harm than that caused by the crime itself or by the absence of punishment”. After a number of trials, the military in Argentina attempted three separate coups, forcing the government to introduce amnesty laws.

143 Elster, supra note 116, 188
144 Id., 93. For example, The apartheid regime might have refused to handover power if guarantees on accountability were not given to them. Indictment of leaders complicated the Balkan peace process, while amnesty remained a useful bargaining piece in the Latin American peace negotiations.
145 Teitel, supra note 33, 78
146 Richard Goldstone has argued that “the only hope of breaking cycles of violence is by public acknowledgement of such violence and the exposure of those responsible for it” Goldstone, supra note 40, 615
147 Truth commissions were eschewed in the East European transitions as manipulation of the truth was seen as an element of the previous regime
All of these alternatives fall far short of real accountability and punishment which might ground judicial reconstruction, but nonetheless are cited as successes in advancing democracy. This is even the case where crimes against humanity go unpunished. However, as Minow points out, they all share one feature: They “depart from doing nothing”\textsuperscript{148}. Insufficient as these responses may seem at first, doing nothing is unthinkable. Without some form of accountability, however weak, past atrocities will lead to future ones. With these weaker mechanisms, a legal culture of sorts is created and society stumbles towards peace. “Something” has to be done, and in situations where an efficient state machinery and institutions exist (South Africa, Poland, Brazil etc), peace will thrive as it is natural for societies to want to avoid more bloodshed once a threshold accountability is reached. Thus transitional justice becomes merely a necessary ritual, using the known fixed processes of whatever model is chosen, drawing a line in the sand between past and present. Teitel argues that it is “above all symbolic – a secular sanctification of the rituals and symbols of political passage”\textsuperscript{149}. Similarly, Walzer writes: “Revolutionaries must settle with the old regime: that means they must find some ritual process through which the ideology it embodies ….. can be publicly repudiated”\textsuperscript{150}

In transition, something must be done – not necessarily trials, and not necessarily adhering to due process, defendants’ rights or a proportional response to atrocity - and the liberal future is seen as secure. This is never more obvious when even amnesty become the ritual. The most obvious example is the Spanish transition, where there was a deliberate decision to abstain from any type of transitional accountability, a decision which enjoyed public favour. In these cases, it is argued that such mercy shows a restraint in punitive power that signals the return to the rule of law. Teitel contends that “punishment’s waiver can advance transitional aims”\textsuperscript{151}. The main point here is that the trial, and by extension, fair and exemplary courtroom processes, have moved to the periphery in transitions where there are power imbalances in society. The problem, in the context of this thesis, is that these lessons are still being applied in UN territorial administrations, where the societal balance is radically different.

**Conclusion**

Contemporary transitional justice bears all the hallmarks of tool enchantment, where the process is assumed to have a greater potency than warranted by empirical review or by local conditions. While transitional justice can make a valuable contribution to rendering the past past through accountability and through outlawing repressive practises, successor trials based on the compromised processes of the past can make only a limited contribution to the more difficult task of grounding the new legal order and building the skills and legitimacy needed

\textsuperscript{148} Minow, supra note 77, 99
\textsuperscript{149} Teitel, supra note 39, 220
\textsuperscript{151} Of course, “democratic amnesties” such as those of Spain and Uruguay are obviously more in keeping with the rule of law than the auto-amnesties military regimes grant themselves. The democratic amnesty assented to by society also constitutes a “collective public ritual” (Teitel, supra note 39, 59).
for the successful operation of the court long after the transition is completed. Incorrect presumptions have been made about the normative import of successor trials - functioning institutions and cultural commitment do not follow automatically from successor trials unless they are exemplary. If the ultimate aim of hybrids is leaving a legacy of a domestic justice system that is capable of fair trials, protecting rights and creating a cultural commitment to the rule of law, then it is counterintuitive to expect that unfair trials (as in East Timor) or too few trials (Sierra Leone) or trials open to governmental interference (Cambodia) can do this. Only where the tool of transitional justice is enchanted with a greater potency than any rational examination would warrant can a handful of frequently unfair trials of senior criminals ground the development of the courts which in years to come will consider other criminal trials, constitutional cases or family cases. Building domestic institutions and rule of law culture requires fair trials, skills transfer, creation of norms (especially as regards defendants rights) and the public legitimacy that comes from genuinely contested trials if it is to help reconstruct the national criminal justice system in the long term. Transitional justice is a tool enchanted if such reconstruction is presumed to follow naturally from its processes, or if its normal transformational outcomes are presumed to be most necessary regardless of the given peace-building ecology. A commitment to legal machinery over politics might diminish the potential for emancipatory change. When construction or reconstruction of a judiciary that can assume a responsibility to protect its citizens is at issue, a strict or even naïve adherence to law as a fair process instead of a fetishized political tool is both appropriate and necessary. In highlighting humanitarian tool enchantment, Kennedy has offered a valuable means of critiquing existing approaches to hybrid courts and opened up the possibility that conventional assumptions might be questioned.