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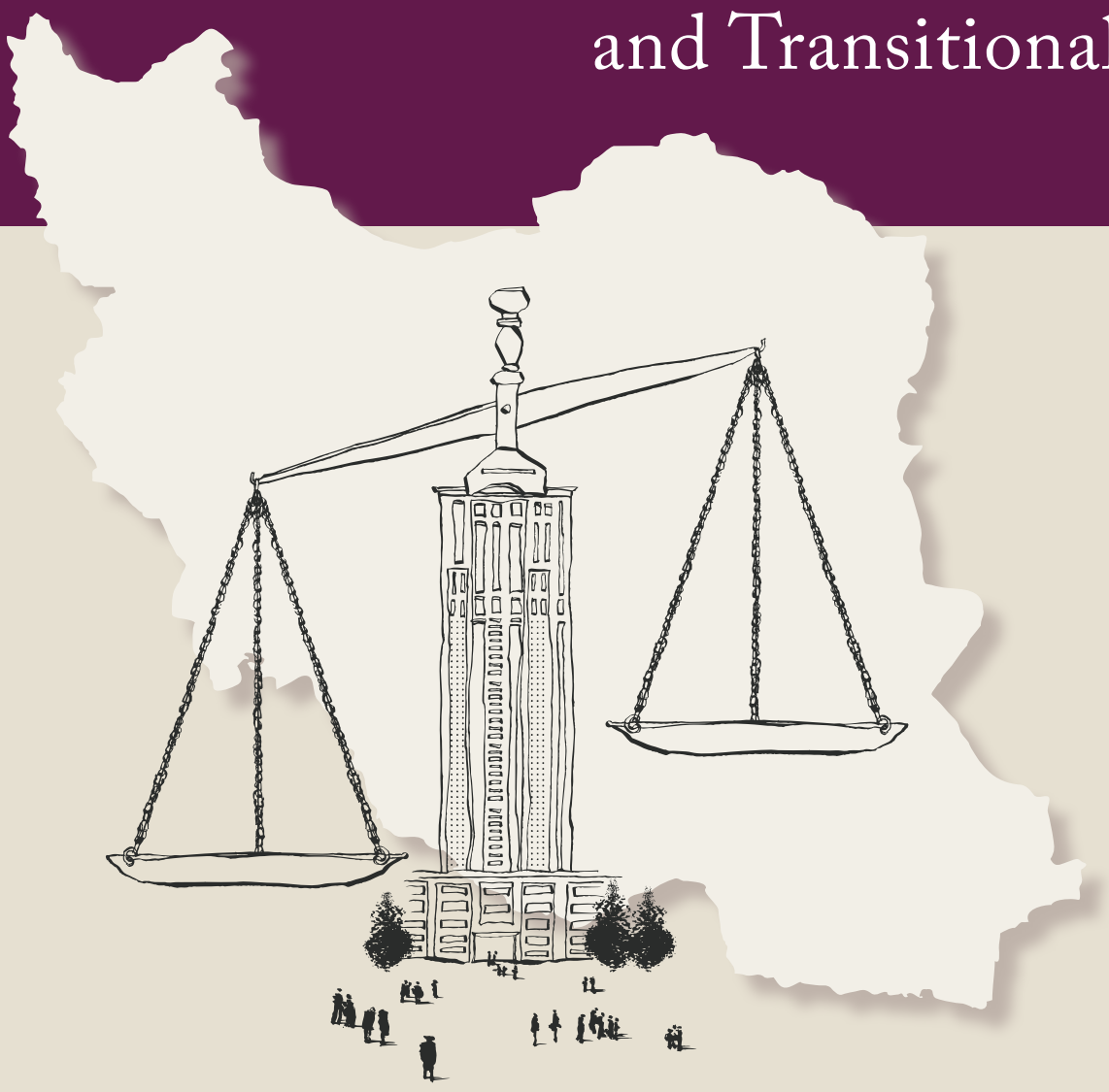
THE FUTURE OF IRAN: TRANSITIONAL JUSTICE

The Relationship between Supranational Criminal Courts and Tribunals and Transitional Justice

By Hirad Abtahi



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THE FUTURE OF IRAN: TRANSITIONAL JUSTICE

The Relationship between Supranational Criminal Courts and Tribunals and Transitional Justice

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INTRODUCTION

The topic of transitional justice is complex and dynamic. In its simplest form, transitional justice refers to a variety of "processes and mechanisms",[1] which enable a state to make the "difficult transition from a violent past" to a peaceful future.[2] To "carry this transformation process forward",[3] provisional legal structures are often established, which help the society "come to terms with a legacy of large-scale past abuse".[4] Accordingly, the ultimate objectives of transitional justice are to "ensure accountability, serve justice and achieve [national] reconciliation".[5]

Given the speaker's professional affiliation with the International Criminal Court (ICC) and previous experience with the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the aim of this presentation will be to address the relationship between transitional justice and supranational criminal courts. In the context of this speech, supranational will refer to courts and tribunals that transcend, or go beyond, states. For this reason, the specific focus will be on the judicial elements of transitional justice. The judicial elements referred to are: fact finding and establishing judicial truths; dispensing justice; and creating accountability as a means to ending impunity for serious crimes. In particular, the ways in which supranational criminal courts and tribunals contribute to the realization of these judicial elements will be highlighted.

Before proceeding, it is important to stress that criminal justice, which is the type of justice employed by the courts referred to, is certainly not the only form of justice envisaged by the term transitional justice. Alternatively, justice can encompasses both "judicial and/or non-judicial [measures]" and exist in many forms,[6] such as "individual criminal prosecutions, reparations, truth seeking, institutional reform, vetting" or a combination of all.[7] Therefore, while criminal justice is an important element in achieving national reconciliation, it will always be only one piece in a much bigger puzzle.

CONTRIBUTION OF HYBRID AND INTERNATIONAL CRIMINAL COURTS TO TRANSITIONAL JUSTICE

Before beginning the discussion of the contribution of supranational criminal courts to transitional justice, it is necessary to take a short journey to the past. From the start of the last century, the world has witnessed a remarkable growth in international criminal justice. Specifically, in the aftermath of the Second World War, the notion of holding individuals criminally responsible for serious crimes gained unprecedented potency. Thus, the international community embarked on a twofold mission. First, it held criminal trials in Nuremburg and Tokyo to address the issue of individual criminal responsibility for serious crimes. Second, international instruments were created and adopted, such as the Genocide Convention, the Universal Declaration for Human Rights, and the Geneva Convention, that outlined international standards and obligations in relation to serious crimes and gross human rights violations.

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Then, almost immediately, the Cold War froze for decades the development of international criminal justice. Only after the fall of the Iron Curtain was a new era born in which international criminal justice was suddenly in high demand. As such, the post-Cold War period has seen the development of three main types of supranational courts focusing on serious crimes: hybrid criminal courts; ad hoc international criminal tribunals; and the permanent International Criminal Court. Each of which has made unique contributions to transitional justice.

HYBRID COURTS

The first category of supranational courts addressed will be hybrid courts, also referred to as internationalised courts. As the name suggests, these are ad hoc institutions exhibiting features of both international and national courts. Since the end of the 1990s, no less than six hybrid courts have been established (ordered according to year of establishment): the United Nations Interim Administration Mission Court System in Kosovo; the Special Panels in East Timor; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia; the War Crimes Chamber of Bosnia and Herzegovina; and most recently, the Special Tribunal for Lebanon. While these courts belong to the same conceptual category, they differ considerably in a number of structural features, making it difficult to draw too many generalisations.

Despite this limitation, there is one area where the hybrid courts have made comparable contributions to transitional justice; this is in capacity development within the state concerned.[8] Capacity development refers to "the ability of people, organizations and society as a whole to manage their affairs successfully".[9]

One way hybrid courts bolster capacity development is by ensuring national participation.[10] For example, in various hybrid courts, quotas were set to guarantee the involvement of national prosecutors and judges in the proceedings.[11] Additionally, some courts, such as the War Crimes Chamber of Bosnia and Herzegovina, attempted to incorporate the input of the national judiciary. For example, in Bosnia and Herzegovina international judges who were to serve in the Chamber were appointed by their national colleagues. This was intended to help maintain local involvement in the proceedings.[12] Engaging domestic authorities is indeed important in creating a sense of national ownership over the judicial process and thereby increasing the fit between the proceedings and the specific circumstances of each jurisdiction.[13] In terms of transitional justice, this engagement is vital to improving the state's ability to dispense justice, through fact finding, and helping to create a true judicial account of the events in question.

A second way that hybrid courts facilitate capacity development is through knowledge sharing and information transfer, which can function both directly and indirectly.[14] These two methods are effective in bolstering criminal proceedings by increasing the amount of information prosecutors and judges can draw from and creating the sense that "everyone has embarked on a common task".[15] For example, a knowledge-based collaboration programme between the War Crimes Chamber of Bosnia and Herzegovina and the ICTY proved effective in fostering productive working relationships between international and national colleagues.[16] In turn, it was reported that local commitment to criminal proceedings improved.

ICTY and ICTR

The second category of supranational courts, the two ad hoc international criminal tribunals—the ICTY and the ICTR—have also contributed to transitional justice. These tribunals are dissimilar to hybrid courts in that they were established unilaterally by the Security Council.[17] In addition to this, in accordance with the principle of primacy, these tribunals were given priority over national jurisdictions, which resulted in some cases being deferred to the ICTY and the ICTR over national courts. Additionally, all cases of alleged perpetrators of war crimes in Bosnia and Herzegovina had to be assessed by the tribunals before national authorities could arrest an individual.[18] According to one analysis, this approach, coupled with irregular contact, with national courts, undermined the sense of national ownership over proceedings and contributed to some resistance to the ICTY among Bosnian legal professionals.[19]

In 2003, however, in the context of the Completion Strategies of the ICTY and the ICTR, the Security Council called upon the tribunals to change their practice. As a result, both the ICTR and the ICTY focused on the prosecution of only the most serious offenders and transferred the remaining intermediary and lower-level cases to national courts.[20] As a result, a number of cases were transferred to the former Yugoslavia (13) and Rwanda (one) and France (two).[21] This new approach had two main effects. First, according to one study, both ownership of, and commitment to, the criminal proceedings increased in the former Yugoslavia and Rwanda.[22] Second, the relationship between the tribunals

and national authorities has improved, most notably between the OTP and national prosecutors.[23] In terms of transitional justice, these changes have enhanced national authorities' ability to effectively dispense justice.

This relationship, between the national authorities and international tribunals, was also improved through purposeful capacity development in the former Yugoslavia and Rwanda. In 2003, following a call by the Security Council to improve national capacity to prosecute ICTY and ICTR cases, both tribunals intensified their capacity building efforts.[24] As a result, various events were initiated, such as training workshops for prosecutors and investigators,[25] peer-to-peer sessions, and working visits.[26]

To complement the process of capacity building and involve the local population in the proceedings, outreach programmes were implemented. For example, the ICTY's Outreach Programme, translated materials into SerboCroat, launched websites with relevant information and broadcasted the proceedings on the Internet.[27] Additionally, in the Balkans region, offices were opened to facilitate regular communication with the government and diplomatic representatives, legal community, civil organizations, and victims' associations.[28]

Additionally, the interaction between the national authorities and international jurisdictions has allowed for criminal justice to reflect the various situations, cultures, and systems of justice in the States concerned.

The tribunals have also had normative impacts on countries within their jurisdiction. One way this impact has been observed, as cited by a recent article, is in the increase in the number of "domestic courts undertaking trials involving international crimes".[29] Furthermore, national legal systems have undergone a number of reforms, which, to a certain extent, were shaped by the tribunals. Most notably, in Bosnia and Herzegovina, new criminal procedure codes were adopted and the War Crimes Chamber within the State Court was established.[30] In Serbia and Croatia,[31] the impact on domestic legislation was more limited. However, the very conduct of domestic prosecutions in Serbia was inspired by the ICTY and with support from other actors such as the European Union.[32]

The ICTR, too, has had normative effects. For example, in order for national courts to receive cases, Rwanda was required by the tribunal to ensure international fair-trial standards to defendants.[33] In 2007, legislation was adopted to this effect, and in response, cases were transferred to Rwanda from the ICTR.[34] This reform was followed by a comprehensive reorganization of the domestic legal system in 2003 to 2004.

Again, both these normative reforms contribute to transitional justice by strengthening states' capability to hold individuals criminally responsible for the commission of serious crimes and/or gross human rights violations. Additionally, the interaction between the national authorities and international jurisdictions has allowed for criminal justice to reflect the various situations, cultures, and systems of justice in the States concerned.

C. ICC

Finally, it is necessary to discuss the relationship between the ICC and transitional justice. Compared to the ICTY and ICTR, the ICC is a court of "last resort". This means that only when a state is either unable or unwilling to investigate and prosecute, can the ICC exercise its jurisdiction. This notion is codified in the ICC Statute as the principle of complementarity and regulates the interaction between national legal systems and the court.

For instance, while in 1993 and 1994, the Security Council denied the former Yugoslavia and Rwanda primary jurisdictions over serious crimes, the ICC Statute created a system of voluntarily accepted rights and obligations in which it intervenes only if states fail to meet their obligations. As a result, the principle of complementarity reinforces, rather than undermines, national courts' abilities to prosecute serious crimes.

One example of this reinforcement can be seen in Colombia. It has been suggested that the OTP's preliminary examination into Colombia's serious crimes was instrumental in tailoring the Justice and Peace Law, which is Colombia's primary transitional justice framework.[35] In 2005, following criticism from the US and the UN on the previous drafts of this legislation, the Prosecutor publicly requested that the Colombian Ambassador to the Netherlands provide information about the proposed law.[36] The strong involvement of the OTP contributed to the adoption of a law allowing for more comprehensive prosecutions than its earlier drafts.[37] The monitoring role of the OTP did not end at this stage, as the Prosecutor continued to follow the implementation of the Justice and Peace Law.[38] Thus, as a result of the principle of complementarity, the OTP was able to interact with the judicial systems of Colombia, without formally pursuing an investigation, and ensure provisional legal structures were established to effectively dispense justice.

The ICC has also influenced the criminal law framework and jurisprudence of States Parties. This has resulted from both the implementation of the ICC Statute into domestic legislation as well as the integration of international legal concepts into national proceedings. Again, Colombia serves as a good example. The regular interaction between the OTP and Colombia's criminal justice system led to the inclusion of important substantial legal concepts in domestic law. The most notable contribution was the recognition of criminal responsibility to individuals in leadership positions,[39] therefore ending impunity for those orchestrating serious crimes. Historically, Colombia's Supreme Court has not recognized joint criminal enterprise or command responsibility as entailing individual criminal responsibility. As a result, regardless of the fact that a serious crime was aided and abetted by a commander, he could not be held criminally responsible, as only the direct perpetrator of the crime could be held accountable. In this sense, those highest in the chain of command were the most likely to enjoy impunity.

By contrast, international law favours holding commanders responsible for their subordinates' actions.[40] Therefore, with the ICC acting as a monitoring body, and overseeing the situation in Colombia, the Supreme Court changed this practice in 2009. This paved the way for a progressive erosion of impunity for commanders and leaders' who commit serious crimes, as Colombian courts now had a body of substantive law to draw on when considering these cases. In terms of transitional justice, this amendment has provided Colombia with the ability to hold all individuals responsible for serious crimes.

CONCLUSION

This presentation has briefly outlined the development of supranational justice, as embodied in the relevant courts and tribunals, and discussed the relationship between criminal justice and transitional justice. Accordingly, the ways in which both international and national criminal proceedings positively contribute to the process of addressing wrongs for serious crimes and helping states move forward have been highlighted. From this analysis it seems that there are two common ways that supranational criminal courts and tribunals influence domestic legal systems: through national capacity building and fostering constructive relationships with national courts, prosecutors, defence, victims, civil society, and the general population.

For this reason, justice and accountability are part and parcel of transitional justice. As stated at the beginning of this presentation, the ultimate goal of transitional justice, which is to bring about national reconciliation, necessitates that a government consider more than just criminal retribution. While each country's transition towards stability has its own features, and there is no single "fit-all" guarantee for successful transformation,[41] governments should focus on numerous fundamental elements of transitional justice. For example, social and structural factors must be considered, as well as the economic, educational and democratic systems existing in the state.

Furthermore, addressing the difficult transition towards national stability may require mechanisms additional to supranational criminal justice be employed, such as truth and reconciliation commissions (TRC).[42] This was the case in both Sierra Leone and Timor-

Therefore, in the interest of transitional justice, the most effective relationship between TRCs and supranational criminal courts would be one of complementarity.

Leste, where TRCs and hybrid courts were both established.[43] TRCs operate under the important recognition that to move a society forward, and re-thread the fabric of society, more than criminal retribution is required. As a result, TRCs focus on tools such as: truth seeking and systematic statement taking; holding public hearings for perpetrators of less serious crimes;[44] and implementing community-based reconciliation programmes. All of these methods are intended to facilitate a collective dialogue, help reconstruct a sense of national identity, and ultimately bring about a sense of renewed unity.[45]

Therefore, in the interest of transitional justice, the most effective relationship between TRCs and supranational criminal courts would be one of complementarity.[46] Depending on the circumstances, criminal justice and TRCs could be pursued in tandem, bearing in mind that they are not mutually exclusive. Moreover, care should be taken to appreciate the delicate differences between their two missions.[47] For this reason, fostering a constructive and conducive relationship between TRCs and criminal justice will often be an important step in the future of transitional justice.[48]

Furthermore, the international community would be remiss if it did not realize that to effectively contribute to transitional justice, international criminal justice, and

its proceedings, must complement rather than circumvent national proceedings. As mentioned repeatedly, the goal of transitional justice is to reconcile wrongs and promote national stability. This cannot be achieved if the unique situation of each relevant state is not taken into account. Additionally, considering that a critical element of this reconciliation process is creating a truthful judicial story, including the concerned population and authorities in the process is necessary for authentically achieving this goal.

It is needless to say that an enormous amount of work remains to be done. The most pertinent task will be the empowerment of national jurisdictions to prosecute, judge and contribute to the prevention of genocide, crimes against humanity and war crimes. This is one of the most relevant challenges of the evolving system of supranational criminal justice. The ICC, various actors within the international community and civil society, will need to work collaboratively to root a system of norms outlawing atrocities within national legal systems. This is a primary step in addressing the challenges posed by the impunity of perpetrators of the most serious crimes of concern to the international community.

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3. Lindermann. "Transitional Justice and the International Criminal Court" 318.
4. Ambos. "The Legal Framework of Transitional Justice" 21.
5. Ambos. "The Legal Framework of Transitional Justice" 21.
6. Report Secretary General the rule of law and transitional justice in conflict and post-conflict societies, S2004/61 6, August 23 2004, para. 8; See also Ambos, The Legal Framework of Transitional Justice I CC 21.
7. Ambos. "The Legal Framework of Transitional Justice" 21.
8. Chehtman and Mackenzie. *Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice* [2009] DOMA C/2, available at: www.domac.is, 8 31-32.
9. Chehtman and Mackenzie. Capacity Development in International Criminal Justice 11.
10. Chehtman and Mackenzie. Capacity Development in International Criminal Justice 34.
11. Chehtman and Mackenzie. Capacity Development in International Criminal Justice 29.
12. Chehtman and Mackenzie. Capacity Development in International Criminal Justice 29.
13. It is important to note though, that not all hybrid courts were created with direct participation from local government officials or legal professionals. For example, the Special Panels of East Timor did not involve local authorities but rather were created entirely by the United Nations Transitional Administration in East Timor. Likewise, in Kosovo the development of the Panels totally excluded the local authorities and was instead created by the United Nations Interim Administration in Kosovo. Chehtman and Mackenzie. Capacity Development in International Criminal Justice 29.
14. However, according to one study, indirect methods such as, "watching how international lawyers work" and simple proximity to international law procedures and processes was not as effective in contributing to transitional justice as genuine engagement from the lawyers and judges, Chehtman. Developing Local Capacity for War Crimes Trials: Insights from BIH, Sierra Leone, and Colombia' [2011] DOMAC/9. available at: www.domac.is. 9 25.
15. Chehtman. Developing Local Capacity for War Crimes Trials 29.
16. In this programme, local prosecutors travelled to The Hague for "study visits" were permitted to ask "concrete questions about concrete files or problems"; worked with their international colleagues to create a common language to address requests for assistance; and were all owed to liaison with prosecutors from the ICTY to "assist investigations before the local courts'". Interestingly it has been noted by one study, that when hybrid courts did not focus on information sharing, such as in the Special Court of Sierra Leone, international principles had notably less of an effect on domestic practices, Chehtman, Developing Local Capacity for War Crimes Trials 29.
17. The ICTY with resolution 827 and the ICTR with 955.
18. For example, between 1996 and 2004 of the 4,985 suspects files reviewed only 848 files were approved ICTY website (n.d.) Working with the region available at: www.icty.org/sid/96
19. Human Rights Center. International Human Rights Law Clinic (University of California Berkley) and Sarajevo. Justice, Accountability and Social Reconstruction as cited in Chehtman and Mackenzie, Capacity Development in International Criminal Justice 23-24.

20. The Completion Strategy also stipulated that no new indictments could be issued by the tribunals and existing investigations were to be transferred to local authorities, with "the view that they would pick up where the OTP left off", Michaeli, The Impact of the International Criminal Tribunals of Yugoslavia on War Crime Investigations and Prosecutions in Serbia, [20 I I] DOMAC/13. 9 55. See also. Chehtman and Mackenzie, Capacity Development In International Criminal Justice 23-24.

21. See, Bucyibaruta Laurent (ICTR-05-85) (France), www.unictr.org/tabid/128/Default.aspx?id=56&mnid=7; n yesh yaka Wencclas (ICTR-05-87) (France) www.unictr.org/tahid/128/Default.aspx?id=57&mnid=7; Uwinkindi Jean Bosco (ICTR-01-75) www.unictr.orglt abidl128Default.aspx?id =75&m nid=7.

22. Michacli. "The Impact of the International Criminal Tribunals in Serbia" 55.

23. Ibid.

24. UNSC Res 1503 called on "the international community to assist national jurisdictions as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents. Prosecutors, and Registra rs to develop and improve their outreach Programmes".

25. Chehtman. Developing Local Capacity for War Crimes Trials 15. See also. Horovitz. Rwanda: International and National Responses to the Mass Atrocities and their Interaction·[2010] DOMAC/6. available at: www.domac.is, 9 74-78, see also ICTY website (n.d.) "Capacity Building" available at: http:www.ict.org/sections/Outreach/CapacityBuilding

26. ICTY "Capacity Building" (n.d.), available at: www.icty.org/sections/Outreach/CapacityBuilding.

27. Michaeli. "The Impact of the International Criminal Tribunals in Serbia" 49.

28. Michaeli. "The Impact of the International Criminal Tribunals in Serbia" 49-50.

29. Ellis. "The International Criminal Court and Its Implications for Domestic Law and national Capacity Building" [2002-2003]15 Fla. J. Int'L. 215 220.

30. Ronen. "Bosnia and Herzegovina: The Interaction Between the ICTY and Domestic Courts in Adjudicating International Crimes" [20 I I] DOMAC/8. available at: www.domac.is. 9 82.

31. Michacli. "The Impact of the International Criminal Tribunals of Yugoslavia on War Crime Investigations and Prosecutions in Croatia" (20 II) DOMAC/10. available at. www.domac.is. 9 58 and 94. See also Michaeli, "The Impact of the International Criminal Tribunals in Serbia" 94.

32. Michacli. "The Impact of the International Criminal Tribunals in Serbia" 94. See also Michaeli. "The Impact of the International Criminal Tribunals in Croatia" 9-1.

33. J Horovitz. "Rwanda: International and National Responses to the Mass Atrocities" 65.

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37. Chehtman. "The ICC and Its Normative Impact" 19-20.

38. Chehtman. "The ICC and Its Normative Impact" 19-20.

39. Chehtman. "The ICC and Its Normative Impact" 25.

40. Chehtman. "The ICC and Its Normative Impact" 19-26.

41. Lindcrmann. "Transitional Justice and the International Criminal Court" 31 8.

42. Ellis. "The International Criminal Court and Its Implications for Domestic Law" 229.

43. Truth and reconciliation techniques have been used in Timor-Leste and Sierra Leone. In TimorLeste, The Timor-Leste Commission Reception, Truth and Reconciliation, (A Comissao de Acolhimento, Verdade e Reconciliacao in Portuguese) was established in 2001 and functioned until its dissolution in December 2005. It was an independent, statutory authority led by seven East Timorese Commissioners and mandated by UNTAET Regulation 2001/l0. Its primary objectives were to undertake truth seeking for the period 1974-1999; facilitate community reconciliation for less serious crimes: and report on its work and findings and make recommendations. See www.cavrtimorleste.org/po/home.htm. In Sierra Leone the Truth and Reconciliation Commission worked alongside Special Court for Sierra Leone and performed complementary roles in ensuring accountability, deterrence, a story-telling mechanism for victims an perpetrators, national reconciliation, reparation and restorative justice for the people of Sierra Leone [S/2001/40, para. 9; see also S/2000/1 234] and Truth & Reconciliation Commission Report, "Witness to Truth: report of the Sierra Leone Truth and Reconciliation Commission" [2004) vol. 1-38 363 available at, www.sicrra-leone.org/TRCDocumcms.html. See also Knoops, "Truth and reconciliation commission models and international tribunals: a comparison" presented at the Symposium on "The Right to Self-Determination in International Law" Organised by Unrepresented Nations and Peoples Organiza tion (UN PO), Khmers Kampuchea-Krom Federation (KKF), Hawaii's Institute for Human Rights (HIHR), [29 September - 1 October 2006).

44. With the ultimate objective to help these individuals reintegrate into the communities that they have become estranged from as a result of their involvement in the conflict.

45. www.ictv.org/sid/7985/cn.

46. For example, in Timor-Leste, the Timor-Leste Commission for Reception, Truth and Reconciliation, called for the international community to maintain their commitment to the Special Panels and ensure that the Panels continued to do their work, most notably in ending impunity for serious crimes. The Commission regarded this work as necessary to the overall objectives of national reconciliation and stability, and therefore crucial to transitional justice, www.cavr- timorleste.org/chegafiles/finalReportEng/11-Recommendations.pd1.

47. www.icty.org/sid/7985/en.

48. One place where the objectives of transitional justice and supranational criminal justice can be seen to intersect is in the ICC's victims participation scheme. While of course the capacity in which victims are permitted to participate in the proceedings is limited to the judicial cases, some outcomes may be similar to the TRC schemes, such as truth-telling. Ellis. "The International Criminal Court and Its Implications for Domestic Law" 229.

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