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David Cohen:
War crimes tribunals and the limits of accountability[*]

In the past years hybrid tribunals have been created as institutional mechanism to implement accountability measures in transitional contexts. The tribunals are set up by an agreement between the UN and the host country and involve both national and international personnel. Based on the cases of Sierra Leone, East Timor, Indonesia, and Cambodia, David Cohen discusses the value and limitations of these tribunals.

Aims

Hybrid tribunals have been advocated on several grounds. It has been claiamed that, as a response to widespread violations of human rights, they are superior to international tribunals because they are held in proximity to the people whom they are meant to serve. In virtue of their proximity, they can be fully appropriated by the wronged community and in this way serve as *vehicles for truth-elucidation, closure, and reconciliation*.

It has also been said that hybrid tribunals serve as *legal models*. In the case of Cambodia, where the Special Tribunal will try only a handful of cases which occurred over three decades ago, it has been claimed that the trials will be a model for the Cambodian justice system and a mechanism for capacity building in the judiciary; it will also show the Cambodian public what a fair trial is like.

These aims are certainly valuable but the important question is whether the institutions created to fulfil them are indeed capable. It has not been sufficiently realized how much investment and work the pursuit of these aims entails. International organs and the international community have rarely provided sufficient resources and made the arrangements necessary for the success of hybrid tribunals, particularly their outreach programmes. The key factors that determine the success of these tribunals are a strong political will, a clear mandate, sufficient resources, and awareness of their intrinsic limitations.

Political will

This is the most important factor determining a tribunal's failure or success.

Political will is necessary to create and make a tribunal work in a way that provides justice for victims and meets international standards of fairness. Often political will is sufficient to create a tribunal but not to carry its trials through. Typically there are high expectations and lofty aspirations when setting up a tribunal but little discussion of the issues that must be solved in order to succeed. These issues are left vague in the tribunal's mandate and come to haunt it later on.

There must be a strong political will on the side of all actors whose participation is necessary for the success of the tribunal. This is difficult in hybrid tribunals because they are enmeshed in domestic political processes. In Indonesia there was a strong political will on the part of judges to convict but not on the part of the Attorney General to prosecute; this was the chief cause of its failure. The will of the international community is necessary to assure that defendants are brought to trial, particularly those who bear the larger responsibility.

Clearly defined mandates

The tribunals' main goals and the burdens of responsibility should be specified clearly from the onset. The UN has often lacked sufficient will to define a clear mandate that provides sufficient accountability and oversight mechanisms, which are indispensable to guarantee the tribunal's proper functioning.

A good mandate should:

- Contribute to develop an efficient prosecutorial strategy and in so doing help to avoid the waste of scarce resources.

- Set a clear benchmark of accountability and performance. As hybrid tribunals are located within a national legal system, there is considerable tension about the standards that ought to be followed.

- Make clear who bears responsibility for the success of the tribunal and for the satisfaction of its standards. As hybrid tribunals are created through a process of international agreement, there is often lack of clarity about ownership and consequently a high risk of "bucket-passing". The question of ownership — to what extent the tribunal is international and to what extent it is domestic and owned by the local judiciary — has to be resolved early enough.

Resources

Resources must be sufficient to fulfil the tribunal's mandate. This seems obvious but so far hybrid tribunals have been crippled by resource problems from the start. It is necessary to recognize that these tribunals are fundamentally different from ordinary criminal courts. The scale of the crimes, the lapse of time, and the number of cases, victims and perpetrators pose challenges that ordinary prosecutors rarely face. It is necessary to provide the tribunals with human, material, and technical resources sufficient to deal with their special and difficult cases.

Key areas that have typically been deprived of resources are outreach programs, witness protection and support programs (including security assessment and psychological treatment), services of translation and interpretation, transcription, and capacity building. There has to be active work in capacity building. Merely working side by side with international experts does not build the necessary capacities.

Awareness of limitations

When creating tribunals it is easy to set up unrealistic goals, particularly given the political context in which these tribunals must operate. The rhetoric of reconciliation, closure, and promotion of democracy and stability tends to obfuscate thinking about what tribunals can actually achieve. There must be from the start a clear grasp of the limitations and goals that can be realistically achieved.

Hybrid tribunals are created in the aftermath of widespread, large-scale and atrocious violence. Violence often draws upon governmental resources and is directly sponsored by the State, and typically involves thousands of perpetrators. It is clearly outside the capacity of any internationalized justice mechanism to try all cases. There will inevitably be a small number of perpetrators tried relative to the total number of perpetrators and to the demands of victims for justice.

Victims are less interested in how justice applies to high-ranking officers than in seeing justice done in their village and to what happened to their family. Trying high-level cases can be meaningful to victims but making it so puts a heavy burden on tribunals. It is crucial and difficult to communicate what happens in the legal processes to local communities in a meaningful way; the proximity of the tribunal makes communication easier, but communication does not happen on its own. Proper resources must be allocated to make it happen. Very few courts have done this so far.

Key points

- A sizable portion of the literature on hybrid tribunals deals with how to structure different models, but this is not the most important issue. What truly determines the success or failure of tribunals is political will, clear ownership of the process, and effective leadership and management. Individuals make a big difference in these processes, which is why good recruitment is crucial.

- If the aims of truth elucidation, education, and reconciliation are taken seriously, then provision has to be made in the budget for outreach programs. It is easy to convince managers to provide resources to punish perpetrators but difficult to make them see the necessity of spending resources in outreach. It is necessary to communicate to local communities in a meaningful way what the tribunal is and what it does. This is a difficult task in countries where a large portion of the population is illiterate and lacks access to national media. The ICC will face a big challenge in this area.

- Success and failure depend on the context and its possibilities; what is possible in one context may not be possible in another. There is no "cookie-cutter" approach to tribunals: the goals that can be pursued by one tribunal do not carry on automatically to another. Hybrid tribunals can do valuable work, but only if we are realistic and clear sighted about what they can and cannot do.

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