

# Hybrid Courts and Multilevel Rules of Law: Some Overall Considerations, Challenges and Opportunities

Henrik Andersen\*

*Lancashire Law School, University of Central Lancashire, UK*

**Abstract:** Hybrid courts are the third generation of international criminal bodies. Their hybrid nature makes them distinctive in the international judicial order. They combine domestic and international law; legal infrastructures; personnel at national and international level etc. They are praised in literature for overcoming resource and domestic legal infrastructural challenges and at the same time they stay close to the domestic legal order, and they satisfy the application of international criminal law in the specific cases. In addition, hybrid courts are instrumental in the process of transitional justice towards rule of law based societies. The concept of rule of law is contested. It can vaguely be defined as supremacy of law and it can be approached from various angles. The article claims that rule of law is a moral and/or political maxim with substantive values as it must provide both individuals and the public access to justice; it must provide a degree of equality of the subjects of law; it must provide predictability and legal certainty; it requires transparent procedures and impartial third party dispute mechanisms; and it must ensure the functionality of the legal system. Rule of law is further challenged when it is taken into the statist international sphere and into international criminal law. Where hybrid courts can serve the rule of law, they are also faced with rule of law challenges by governmental interference and by finding a balance between national and international law.

**Keywords:** International criminal law, Hybrid courts, Rule of law.

## INTRODUCTION

The establishments of hybrid courts in international criminal law demonstrate a new development of both political and legal infrastructures at international level in the context of criminal law. They are third generation of international criminal courts after the Nuremberg and Tokyo Tribunals as first generation and the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) as second generation. Hybrid courts are considered important in transitional justice and can facilitate the establishment of rule of law in post-conflict societies. However, rule of law is not a clear concept and it is important that a pluralist approach should be adopted when hybrid courts are established in order to handle potential rule of law gaps.

This article addresses the concept of rule of law at national and international level in the context of international criminal law and with a focus on hybrid courts. The next section provides an overview of rule of law as concept as well as rule of law challenges at international level and in international criminal law. Thereafter, the article will shift focus towards hybrid courts and discuss some rule of law opportunities and challenges.

## RULE OF LAW

Rule of law is not a clear concept in international law. It is often associated with the relationship between a state and its citizens, but it is increasingly finding its way into the international sphere. The following part will first address some conceptual challenges with rule of law before it enters into a discussion about rule of law at international level and in the context of international criminal law.

### Rule of Law and its Various Definitions

Rule of law can vaguely be defined as the political and moral maxim where law is supreme. That means that government and all other political and economic powers must comply with law and all are subject to law.

The challenge with rule of law is that it lives in a political, economic, social, and cultural environment. The question is to what extent that environment can influence on the rule of law. For example, the law making institution could potentially decide to make a law which would exempt the law making institution from complying with the legal duties. An autocratic power could also award himself extra-legal authority and be beyond law and could provide himself certain additional rights compared to the population. Therefore, rule of law must have some specific political and legal infrastructure in place which can keep law supreme. Joseph Raz has suggested a non-exhaustive list of rule of law elements which can vary in degrees; 1) All laws should be prospective, open, and clear, 2) laws should be relatively stable, 3) the making of particular laws

\*Address correspondence to this author at the Lancashire Law School, University of Central Lancashire, UK; Tel: +44 1772 893085; E-mail: handersen@uclan.ac.uk

(particular legal orders) should be guided by open, stable, clear, and general rules, 4) the independence of the judiciary must be guaranteed, 5) the principles of natural justice must be observed, 6) the courts should have review powers over the implementation of the other principles, 7) the courts should be easily accessible, and 8) the discretion of the crime-preventing agencies should not be allowed to pervert the law (Raz 2009). Those rule of law elements are essential in a rule of law society on national level but may impose challenges on international level which will be discussed below.

The question is whether rule of law imposes limits on law itself; i.e. is law to be judged from the rule of law or is rule of law an empty framework which does not provide judgment of law? There is on overall level two different schools; the formal and the substantive (Craig 1997). Joseph Raz takes a formal position; rule of law is objective and value-neutral (Raz 2009). The formal position is challenged from the substantive position where rule of law has inherent value-based principles, like human rights, democracy etc. (Rawls 1999). However, both positions seem to agree on the formal elements of rule of law but differs as to whether rule of law will impose limits on law, i.e. not all law can be accepted. As this author has suggested elsewhere, the rule of law is not value-neutral and that it must have "some degree [of protection of] the individual's right to access justice (...); a degree of equality between the subjects of law (...); predictability in the sense that the individual and the public can rely on law. In the same line, law-making must go through a clear and transparent procedure and constitutional basic principles must be reflected in law (...); Such constitutional and legal bases must be observed by the law-making and law-enforcing institutions but must also be protected by an impartial institution, like a constitutional court, although other types of political institutions can provide such functions, which ensures the functionality of the particular legal system and law" (Andersen 2016). Those core elements of rule of law are substantive in nature. In spite of the fixed pillars of rule of law, it does not mean that there is no scope for various cultural and social perceptions to it. Thus different models of rules of law can all provide rule of law protection with different cultural traits.

Even though rule of law must be understood in the context of cultural, economic, political and social differences in different states, rule of law has according to the UN General Assembly some common features:

"We recognize that the rule of law applies to all States equally, and to international Organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law." (General Assembly of the United Nations 2012).

The General Assembly distinguished between rule of law, human rights, and democracy although they are interlinked and mutually reinforcing. The Secretary General, however, seems to have suggested that rule of law is closely linked to human rights and which gives the rule of law a substantive dimension. The Secretary General stated:

"The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." (Secretary General of the United Nations 2004)

In spite of the conceptual and moral challenges with rule of law, it must provide a minimum level of requirements to a political and legal system in order to be a rule of law. Even though rule of law elements may vary in degree, there are some absolute elements which must be present in order to have the legal system functioning and in order to guarantee law as supreme in an often challenging political context with power oriented interests.

Rule of law protects not only individuals but also the public. In the context of international criminal law, the international, hybrid, and national courts should protect the rights of the individual who is accused of violating human rights, committing genocide etc. However, the perpetrator is not only accused of violating law, he is also accused for violation of rule of law if he exercised

power to violate fundamental rights and human dignity. Thus not only were rule of law elements violated but the general protection of a public group was ignored by an individual with military power. Rule of law keeps law supreme to protect the individual as well as the public against arbitrary decisions by a ruling power.

### Rule of Law in International Context

Even though rule of law is not value neutral but with scope for cultural differences, it is often understood in the context of the state with its vertical power-relation between citizen and state. On international level, the concept of rule of law poses some challenges as it moves away from the vertical power-relationship into a horizontal power-relationship between states, where states are considered equal and where no state can interfere into another state's internal matters.

Where the 1648 Westphalian Peace is often regarded as the starting point of an international community of states or nations, the time before that was influenced by a European divine system where the distinction between private and public, and international and nation, would not be essential as ultimately the legitimate power for law would rest with the divine system. (Vitoria 1991). Grotius' master piece, *De Jure Belli Ac Pacis*, changed the order of law from a divine system towards a secular system whose source of law would be the maintenance of social order by human beings and the law between nations based on mutual consent (Grotius, 1631 (1995)). There have consistently been challenges in establishing theories of international law as a cosmopolitan system of law detached from the political reality and theories of international law reflecting a balance of power (Morgenthau 1940). If the ultimate basis of international law is the will of the state, and if international law depends on the state to decide whether it has the will to comply with its commitments, then the rule of law problem is clear; a state can decide not to comply with a treaty and only be subject to international political pressure, or a state can decide not to ratify a treaty. Another problem concerns disputes; if states are the legitimate basis for international law and the state is supreme, how can an independent third-party institution be established to solve disputes and to enforce law? In order to have an international rule of law and its requirement of an independent, third-party institution between disputing parties, there must be international courts or tribunals to handle such disputes and with expectations that states will comply with decisions by the international courts. Lauterpacht, who

saw the international legal system as a complete system with the important roles of the courts, stated; "only through final ascertainment by agencies other than the parties to the dispute can the law be rendered certain (...). Such certainty is the essence of law (...). [I]t is essential for the rule of law that there should exist agencies bearing evidence, and giving effect, to the imperative nature of law". (Lauterpacht 1933, pp. 433-434).

After World War I, the World Court was established with the authority to handle inter-state issues. The old conference system of Europe, where European powers would attempt to establish a system of "balance of power" between states in order to avoid conflict, was outdated. With the Nuremberg Trials and the Tokyo Trials a further step was taken; the cases were brought by the international community against individuals, who in their capacities of representing Nazi Germany and the Empire of Japan had committed war crimes and crimes against humanity. International law could now impose direct obligations on the individual (Jessberger, F.; Geneuss, J. 2012). However, the cases also illustrated some rule of law problems deriving from the traditional approach to international law. For example, in the Nuremberg Trials, Nazi judges were convicted with basis in international law although they had complied with Nazi law internally in Nazi Germany. A formal approach to rule of law could here imply that, regardless of the horrific nature of Nazi law, the Nazi judges had fulfilled a rule of law by complying with national law within its own territory whereas a substantive approach would have suggested that Nazi law would infringe basic elements of rule of law, including basic human rights, and thus the Nazi judges should have rejected to follow Nazi law.

After the Nuremberg and Tokyo Trials, the international community saw a step back to more state-state based disputes with the establishment of the International Court of Justice (ICJ), and with the gradual development of a dispute settlement system in the General Agreement on Tariffs and Trade (GATT) concerning trade and tariff related disputes between states. With the increase in trade after WWII and with higher level of interaction between the GATT Members it was necessary to change the institutional and legal structure of GATT which eventually in 1995 turned into the World Trade Organization (WTO). The dispute settlement system became formalized as the Dispute Settlement Body with appeal options for the disputing parties. If they disagreed with panel decisions, they could appeal to the Appellate Body (AB). Dispute

settlement in the WTO has a much more judicialized structure compared to GATT. Nevertheless, the traditional assumption of international law will still have some space in the WTO. Panel and AB decisions can be rejected if there is full consensus among the WTO Members to reject a decision. It has not – and is not likely to – happened. However, the legal value of AB decisions have been questioned by panels; whether they are binding on panels. The AB has established that only if there are cogent reasons to derogate from principles established by the AB in previous cases, then the panel can follow a new line of argumentation. Otherwise, as a rule of law system, the panels must follow previous AB decisions (Andersen, 2016). Other international courts emerged after World War II. Under the United Nations Convention on the Law of the Sea (UNCLOS) the International Tribunal for the Law of the Sea (ITLOS) was established to handle maritime issues. The line between state sovereignty and the role of the court to protect rule of law has been contested in the recent South China Sea dispute where China, which is a member of UNCLOS, rejected the authority of ITLOS in the specific case, as it, according to China, acted beyond its mandate to handle maritime issues and instead provided judgment on territorial issues which is outside of its mandate (South China Sea Arbitration 2016). The case illustrates the challenge for a rule of law on international level in cases between states. One concerns the compliance with international courts' and tribunals' decisions, another one concerns the problem of check-and-balance of the international courts; how can it be determined whether ITLOS overstepped its mandate?

Not only would international law open up for more types of international dispute settlement mechanisms but there would also be an opening in specific sectors to allow individuals to challenge the states outside their constitutional judicial protection. The regional human rights systems make it possible for an individual to challenge the state for human rights violations. Also in the field of investments are there now possibilities for an individual to challenge a state before the International Centre for Settlement of Investment Disputes (ICSID) where the Member States must accept and enforce its arbitral awards. Thus the international order has been structured to provide for international courts or tribunals to handle state-state cases, individual-state cases and state-individual cases.

### **Rule of Law and International Criminal Law**

International criminal law poses the traditional rule of law challenges associated with public international

law. Where criminal law has had its place in the domestic systems with the right of the government to punish individuals for committing crimes, and where the domestic system would provide a criminal system to handle convictions, the international level would end up with both legitimacy and practical challenges. Legitimacy challenges would concern how to establish on international level the types of conduct which would be considered criminal – in particular when it comes to intra-state issues as they could potentially conflict with state sovereignty. It is seen in various treaties crossing into the national sphere of criminal law that the line between international criminal law and national criminal law is much in favour of leaving punishment to the national level. See for example the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Art. 4 to Art. 11, where the principles of the national criminal systems must be respected when a state criminalizes money laundering, corruption etc. Thus the link between the international and national level is one of state sovereignty where the state is constructing its internal domestic political and legal order without interference from the outside world. Nevertheless, states have agreed to comply with the UN Charter and accept the role of the Security Council which – in certain circumstances – can make Resolutions with supranational effect if peace and security are threatened by individuals or states. In addition, the principle of *jus cogens* and erga omnes obligations provide the legitimate basis for on international level to criminalize actions of genocide, war crimes, and violations against absolute human rights (Bassiouni 1996).

In addition, the special feature of international criminal law compared to other areas of public international law is the international community making a case against an individual. It steps beyond the traditional sphere of international law and its statist basis. Thus rule of law must serve various actors; the particular community which has been subject to the crimes by the perpetrators; the victims of crimes; the alleged criminals; and the international community as such. International criminal law must provide the fundamental due process protection of the alleged criminal as, for example, the fundamental principles stipulated in Art. 14 and Art. 15 of the International Convention on Civil and Political Rights in order to be in conformity with rule of law. In respect of the ICC, Part VI of the Rome Statute provides such basic rule of law protection. In addition, victims may be active participants in the trial and express their views.

### **General Problems with Legal Certainty**

Rule of law serves legal certainty. In that line, law must not be retrospective and law should be clear. A society built on arbitrary decisions by government and with use of political force over law is not a rule of law society. Instead, individuals and the public should be able to know in advance that certain conduct carries sanctions. Legal certainty does not only provide the public and individuals with the knowledge of certain unwanted conduct but it also creates expectations to the legal system that their rights – if violated – can be enforced through the legal system. However, in the real world, it may not be the rational choices which run the legal system if it has been broken down by a civil war. Armed conflicts are loaded with emotions and can be a challenge from a legal perspective due to their complex nature (Kastner 2015). To give an example; in 1930 capital punishment was officially abolished in Denmark. However, capital punishment was introduced retrospectively by the Danish Parliament after World War II for treason committed by Danish citizens against the Danish state after 9 April 1940 when Denmark became occupied by Nazi Germany. At the time after World War II, where emotions were high in Denmark, there was public demand for executions of traitors and the Danish Parliament followed those wishes. Retrospective law might serve justice – depending on how one approaches and defines justice – but it is a violation of fundamental rule of law principles and it in the case of Denmark left the alleged traitors with punishments against them which they could not have anticipated by law when they committed the crimes. It should be mentioned here as time passed by more and more of the traitors had their convictions changed from capital punishments to life in prison (Skov Kristensen and Tamm 2008). Interestingly, Denmark is in the 2016 Rule of Law Index by the World Justice Project ranking as number 1 in the World for strongest rule of law (World Justice Project 2016), which also indicates that even though a state in a chaotic period has low or no rule of law compliance, it can shift over time.

Not only can retrospective law in post-conflict areas be a rule of law problem, but law itself – when it is not clearly defined or is open in the sense to cover all types of future unexpected grave situations. Where the principle of *jus cogens* can cover the gravest of crimes it does not have a clear definition (Bassiouni 1996). Even though rule of law on the one side can be challenged by lack of clear definitional guidance of principles of *jus cogens*, it can on the other side be fulfilled if the resort to *jus cogens* follows a clear

methodology, like, for example general implementation of the principles into national law, basis in treaties, or basis in customary law. In addition, international criminal law is developed by the courts. In the interrelationship between national and international courts concerning international criminal law, it appears that a body of law is being developed through frequent reference by national courts to the case law developed by the international courts which in literature has been named an emergence of a “community of courts” (van der Wilt 2013). That brings some legal certainty into international criminal law.

### **Procedures for Establishments of Criminal Tribunals and Enforcement**

Both the establishments of international criminal tribunals as well as enforcement of international criminal law may pose some rule of law challenges. From a rule of law perspective, the establishment of legal orders and courts must follow clear procedures. Without clear rules, there is the risk that the legal order or courts will be made arbitrarily to only handle issues of specific political character and not to generally provide justice. The procedures for establishing ad hoc criminal tribunals have not always been clear from a legal perspective. The advantage with the ICC is that it has basis in treaty whereas the ad hoc tribunals ICTY and ICTR were based on Security Council Resolutions thus adding a political element to it. For example, one can ask what are the specific criteria the Security Council would apply in order to establish the need for an international criminal tribunal and why would there since 1945 only have been established 2 of such tribunals? When the Security Council established the ICTY, while the conflict was ongoing, it was debated whether the UN Charter provided the mandate for the Security Council to establish international tribunals. In the case of the ICTR, it was based on a Chapter VII resolution by the Security Council even though the civil war had ended and it could be questioned whether there was a threat to international peace and security (Shraga, D.; Zacklin, R. 1996). As will be seen below, there are similar issues – as well as other establishment challenges – with hybrid courts.

The ICC's mandate is based on the Rome Statute and it has jurisdiction in 4 types of crimes; genocide, crimes against humanity, war crimes, and crime of aggression. Even though the ICC has the advantage of a clear treaty basis for its establishment, its limitations lie in the lack of ratifications by some of the globally influential states like the US, which was one of the

main proponents of establishing the ICC, and China, which traditionally has had reservations towards international courts. For example, China has not signed a declaration recognizing the ICJ as compulsory. However, China has recently showed an opening towards international judiciaries like the WTO Dispute Settlement Body and the International Tribunal for the Law of the Sea.

Enforcement of international criminal law can also pose rule of law challenges. Where easy access to courts and the functioning of the legal system are fundamental elements of rule of law, the reality is that the mandate of the ICC is limited and unless an international crime tribunal is established through the Security Council, it can be difficult to provide justice to victims of international crimes. The road to justice may then go through the national courts. In that respect, the ICC has been called a 'watchdog court' as it, besides handling cases against individuals for violating international criminal law, also intervenes if a state violates *erga omnes* obligations to prosecute and punish international crimes (Jessberger, F.; Geneuss, J. 2012). However, there can be practical problems if a state in a post-conflict area does not have the political and legal infrastructure to pursue the criminals (Kestenbaum, J. 2016). Rule of law is difficult to uphold if the national or international systems do not provide sufficient enforcement mechanisms to give justice to victims. Hybrid courts might to some extent close that rule of law gap as they may provide support to a damaged legal infrastructure on national level. The next part concerns hybrid courts.

### **HYBRID COURTS AND THEIR RULE OF LAW CHALLENGES AND OPPORTUNITIES**

As some states do not have the political and legal infrastructure after a time of conflict to charge perpetrators, the hybrid courts offer a solution. The following part will discuss the components of hybrid courts, their role in transitional justice in the context of rule of law, before some rule of law challenges are considered.

#### **The Components of Hybrid Courts**

Hybrid courts emerged in the late 1990s as a result of shortcomings on international level by the ad hoc tribunals and the ICC, like its limited mandate and jurisdiction, and at national level in post-conflict areas with the politically and judicial infrastructural problems and with lack of capacity to handle criminal cases. The

hybrid solution was an experiment by the UN and they have been applied in some post-conflict areas like the Special Court for Sierra Leone (SPSL), the extraordinary Chambers in the Courts of Cambodia (ECCC), Special Panels of the Dili District Court (SPD), the Special Tribunal for Lebanon (STL), and the Supreme Iraqi Criminal Tribunal (SICT) although the categorization of the cases mentioned here as "hybrid courts" is not clear in literature. That might reflect the very nature of hybrid court. The concept does not have a single clear definition as their mandates, composition and balance between national and international law have varied depending on the particular need as well as the political will (Jain 2008). The lack of clear definition makes an assessment of hybrid courts – both as to their promising prospects as well as the critical issues – a challenge and thus must be made with some reservations (Nouwen 2006). Hybrid courts share some of the characteristics of the international courts by having a composition of international judges and they may apply international law to humanitarian and human rights violations although it depends on the specific mandate provided to them. For example, for the STL, it is the Lebanese Criminal Code which is applicable and not international law (Statute of the Special Tribunal for Lebanon, Art. 2). The difference between hybrid courts and the international courts are the inclusion of national features. For example, it can include national judges, national staff, national law etc. But the specific combination of international and national features depends on the specific case (Nielsen 2010). There are no specific requirements in law which must be met in order to establish a hybrid court. For example, the SPSL has basis in UN Security Council Resolution 1315 after a request had been forwarded to the UN General Secretary Kofi Annan by President Ahmed Tejan Kahmed of Sierra Leone (United Nations Security Council Resolution 1315 (2000)), whereas the ECCC has basis in an Agreement between the UN and Cambodia based on a request from the Cambodian authorities and endorsed by the UN General Assembly (Agreement between the United Nations and the Royal Government of Cambodia 2003).

The combination of national and international judges can strengthen the legitimacy in the local community although its legitimacy would be even stronger if the international judges originated or were based in the same region as the post-conflict area with shared legal cultural perceptions and shared language as the local judges (Hobbs 2016). Furthermore, the President of the ICTY, Judge Theodor Meron, has

stated that trials in the area of the crimes would have the greatest resonance as they would be close to the victims and close to the people (Nielsen 2010). Where the ICC cannot guarantee that local judges will participate in the trials, and where both the ICTY and the ICTR lacked local representation, the hybrid courts close that gap (Hobbs 2016). However, the combination of local and international legal influence can also potentially be a challenge to rule of law if the application of law and interpretation of law and general methodological approach to law are radically different between local and international judges. For example, the international judges in STL must apply the Lebanese Criminal Code but they may come from different legal traditions than the Lebanese judges. Furthermore, in both the Trial Chamber and Appeal Chamber of the STL, the international judges will be in majority compared to local judges (Statute of the Special Tribunal for Lebanon, Art. 8). The risk is that the international judges may follow methodologies which are different from the local judges but still be in a position to provide a majority in the judgment which can potentially create legal uncertainty in respect of Lebanese criminal law.

### Transitional Justice

Hybrid courts play an important part in transitional justice where a state with legally and politically infrastructural problems – and here implied problems with upholding rule of law – can import rule of law elements into its domestic system from the international level. A rule of law cannot function without access to justice which requires that the political and judicial infrastructure can handle cases, and that the courts are independent. If the political and judicial infrastructure is collapsed, there is high risk of corruption among those who are in place to handle cases as the monitoring of the judicial independency is limited, and the procedures for appointing judges will be unclear.

The UN defines transitional justice as: “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law” (Guidance Note of the Secretary-General 2010).

Transitional justice contributes to the strengthening and development of rule of law in post-conflict areas

which have been under regimes with arbitrary decisions and violence and where the national judiciary and enforcement system is broken. As the national system cannot alone provide justice and uphold rule of law, there is need to include international actors. The UN transitional justice principles are guided by the following:

“1. Support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms 2. Take account of the political context when designing and implementing transitional justice processes and mechanisms 3. Base assistance for transitional justice on the unique country context and strengthen national capacity to carry out community-wide transitional justice processes 4. Strive to ensure women’s rights 5. Support a child-sensitive approach 6. Ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms 7. Coordinate transitional justice programmes with the broader rule of law initiatives 8. Encourage a comprehensive approach integrating an appropriate combination of transitional justice processes and mechanisms 9. Strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights 10. Engage in effective coordination and partnerships” (Guidance Note of the Secretary-General 2010)

Rule of law plays a central role in the UN transitional justice principles. The rule of law is not rigidly defined as it must take into consideration the specific cultural and social characteristics of the country. The hybrid courts can convey conformity with international obligations to a state which has been subject to a system of abuse and violations of human rights. Transitional justice is reflecting transnational rule of law as it will export not just any rule of law but a rule of law which has some substantive elements into the state in transition.

However, a few points must be made concerning the concept of transitional justice. It is not the aim to go into a discussion on the concept of justice itself but Call has suggested that transitional justice may only be 1) “victor’s justice”, 2) that powerful and wealthy states enjoy immunity from international criminal prosecution, and 3) the transitional justice depends on a choice made by donor states to provide justice (Call 2004). The problem with the concept of transitional justice is what and whose justice is the post-conflict area moving

towards? If one assumes that the UN definition of transitional justice is applied, it will imply a choice of what justice is. The definition provided by the UN seems to suggest a system of justice based on rule of law – and as mentioned above, rule of law cannot be completely detached from some substantive elements, like some human rights elements of access to courts and fair trial. Thus the UN definition will not fit with a post-conflict area which is moving into a totalitarian system. In addition, even if the post conflict area is moving towards a rule of law based society, will a hybrid court truly provide fairness for the “losers”? For example, in the SPD there were more prosecutors than defenders and the prosecutors were more competent than the defenders (Call 2004). Furthermore, the fact that some states enjoy immunity from international criminal law is a problem from a rule of law perspective as it leaves some states above law – not under it – which reflects the statist nature of international law. Call’s final point about the choices of donor states is a rule of law problem as some post-conflict areas might not get support from donors to provide justice to the victims regardless of the protection under national and international law they otherwise would have expected.

### **Rule of law and Hybrid Courts**

The hybrid courts touch the tension between a national sovereign order and the international legal system. The legal basis for a hybrid court is through agreement by the international community and the state itself. The balance between the international and national components cannot be reduced to a single formula but must depend on the particular conflict, willingness of cooperation by local governments, and resources. As mentioned above, there are no specific legal requirements concerning the establishments of hybrid courts. The basis for a hybrid court may be – as mentioned above – UN Security Council Resolutions. The rule of law problem is that such resolutions may be politically motivated and thus difficult to anticipate whether a court will be established to provide justice to victims.

Furthermore, rule of law cannot apply to all types of national political orders. In a place with unrest, where there is severe rule of law violations against the people, including the abolishment of citizens’ right to seek justice through an independent third party institution against their government, the problem becomes further increased if an opposition also ignores basic rule of law principles as well. In a place where the opposition forms shadow political system with enforcement of their

rule, citizens might be in the middle of the conflict and in the tension between two different systems of rules – the question is which rule or political system will be considered the legitimate system with authority to make an agreement with the international community.

In addition, one of the main problems with hybrid courts is the interference by national governments in the establishment of the hybrid courts. For example, in the case of the SPD, there was a lack of ownership and thereby avoidance of responsibility between the Timorese government and the UN which had the effect of undermining the work of the SPD. Also in the case of Iraq when the SICT was established in 2005 it was subject to strong political influence by Iraqi senior officials which eventually led to questions about the independent nature of the SICT (Nielsen 2010). Thus, where the local judges in the hybrid courts on the one hand provides a stronger legitimacy for the court, it may on the other hand create rule of law gaps if the composition of judges is under heavy political influence from local governments. Where the international influence may improve and re-establish rule of law in a certain post-conflict area, it may at the same time be subject to strong political powers from local level which undermines the rule of law. However, as mentioned above, the international influence can also be problematic from a rule of law perspective. For example, as the case with the STL where the majority of judges in the tribunal and appeal chambers are international judges who may not be familiar with Lebanese criminal law.

Not only will international judges be faced with application and interpretation of national law, but both national and international judges in those hybrid courts with mandate to apply both national and international law, like in the case of the SPSL with mandate to apply international humanitarian law and Sierra Leonean law (Statute of The Special Court for Sierra Leone, Art. 1), are faced with a potential overlap between national and international law and must thus strike a balance between two sets of law in order to provide legal certainty. The hybrid courts can facilitate the transition from conflict to a rule of law based society, but it must be balanced with area specific norms and traditions in order to not being a rule of law violation in itself when different types of rule of law systems interact with one another. However, those differences should meet the basic rule of law requirements as mentioned above regardless of the specific local or international norms in order to provide legal certainty.

Where rules of law develop with different weight on the rule of law elements as a result of the different cultural and political environments in different jurisdictions on national level, there must on international level be some expectations of coordination between the ICC, the ad hoc tribunals and the hybrid courts regardless of their specific legal cultures they develop. Coordination is not just limited to intra-sectorial issues in international criminal law. In cross-sectorial issues the rule of law must balance between the specific traits of the respective sectors. For example, if the WTO AB must include issues from criminal law – for example if a state rejects to do trade with another state due to its alleged violations of international criminal law – in its decisions concerning WTO law, it must be expected that it within its constitutional setting will be able to interpret WTO law in a manner which does not render any obligations or rights a state has under international criminal law invalid and that it in a hierarchy of norms refers to *jus cogens*. There is constitutional basis for such views in the Vienna Convention on the Law of Treaties as well as the WTO Treaties (Andersen 2015). The combination of national and international level is also a question of how the rule of law development should be at national level. The question is whether a rule of law on national level developed through the international level and facilitated by the hybrid courts will reflect the particular cultural and political diversity of the importing country. The challenge is that the rule of law development at national level will lose its legitimacy if it does not sufficiently reflect the national specificities. In addition, if the importing state has had a functioning rule of law society before the conflict, the particular legal culture should be reflected in the hybrid court in order to guarantee the legal certainty from the pre-conflict system. Nevertheless, the hybrid courts must in line with the ICC guarantee that fundamental rule of law requirements concerning fair trials etc. are met even if the post-conflict state has not made any of such commitments under international law or if there are no such requirements under its constitutional system.

## CONCLUDING REMARKS

Rule of law has become a central element in transitional justice and is channelled into post-conflict areas by hybrid courts. The idea of law's supremacy provides legal certainty in society and provides a protection of the individual against government and potential arbitrary decisions. However, the concept of rule of law cannot be clearly defined but it must contain some minimum requirements concerning access to

justice in order to keep law supreme. The rule of law is further challenged when it is taken into the international sphere as it touches the tension between on the one side national law and state sovereignty and on the other side international law and its assumed horizontal power relation.

International criminal law is special in the international context as it provides the means for the international community to charge individuals for violation of international crimes. The hybrid courts are instrumental in transitional justice in post conflict areas and should protect fundamental rule of law requirements in order to guarantee a fair trial of the individuals. Where hybrid courts on one hand seem to close some rule of law gaps, they on the other hand open some other; the legal basis for establishing hybrid courts does not have clear procedures; the composition of national and international judges may pose challenges if international judges are not familiar with the specific methodologies of national law; interference by local governments and political pressure in the work of the hybrid court; and finding a balance between local law and norms and international law. If hybrid courts are instruments in the ideal of transitional justice towards a rule of law based society, they should to a greater extent reflect the basic rule of law requirements by closing those additional rule of law gaps.

## REFERENCES

- Agreement Between the United Nations and The Royal Government of Cambodia Concerning The Prosecution Under Cambodian Law of Crimes Committed During The Period Of Democratic Kampuchea, 2003, UN Treaty Collection, Number 41723, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202329/Part/volume-2329-I-41723.pdf> (retrieved 22 January 2017).
- Andersen, Henrik, 2015, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions', *Journal of International Economic Law* 18 (2), p. 383. <https://doi.org/10.1093/jiel/jgv020>
- Andersen, Henrik, 2016, 'China and the WTO Appellate Body's Rule of Law', *Global Journal of Comparative Law* 5, p.146. <https://doi.org/10.1163/2211906X-00501007>
- Bassiouni, M. Cheriff, 1996, 'International Crimes: Jus Cogens and Obligatio Erga Omnes.' *Law and Contemporary Problems* 59 (4), p. 63. <https://doi.org/10.2307/1192190>
- Call, Charles T., 2004, 'Is Transitional Justice Really Just?', *Brown Journal of World Affairs*, XI (1), p. 101.
- Craig, Paul, 1997, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' *Public Law*, Autumn, p. 467.
- General Assembly of the United Nations 2012, 'Declaration of the high-level meeting of the General', *Resolution adopted by the General Assembly on 24 September 2012, A/RES/67/1\**

- Grotius, 1631, *De Jure Belli Ac Pacis Libri Tres*, translated by Francis W. Kelsby, Buffalo, New York: William S. Hein & Co., Inc., 1995.
- Guidance Note of the Secretary-General, 2010, United Nations Approach to Transitional Justice.
- Hobbs, Harry, 2016, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy', *Chicago Journal of International Law*, 16 (2), pp. 482-522.
- Jain, Neha, 2008, 'Conceptualising Internationalisation in Hybrid Criminal Courts', *Singapore Year Book of International Law*, 12, p. 81.
- Jessberger, F.; Geneuss, J., 2012, 'The Many Faces of the International Criminal Court', *Journal of International Criminal Justice* 10 (5), p. 1081.  
<https://doi.org/10.1093/jicj/mqs070>
- Kastner, P., 2015, 'Domestic War Crimes Trials: Only for Others Bridging national and International Criminal Law', *University of Western Australia Law Review* 39 (1), 29-50.
- Kestenbaum, J., 2016, 'Closing Impunity Gaps for the Crime of Aggression', *Chicago Journal of International Law* 17(1), 51-79.
- Lauterpacht, Hersch, 1933, *The Function of Law in the International Community*, Oxford: Oxford University Press.
- Morgenthau, Hans J., 1940, 'Positivism, Functionalism, and International Law', *American Journal of International Law* 34 (2), p. 260.  
<https://doi.org/10.2307/2192998>
- Nielsen, Elisabeth, 2010, 'Hybrid International Criminal Tribunals: Political Interference and Judicial Independence', *UCLA J. Int'l L. Foreign Aff.*, 15 pp. 289-326.
- Nouwen, Sarah M. H., 2006, 'Hybrid Courts' – The Hybrid Category of a New Type of International Crimes Court', *Utrecht Law Review*, 2 (2), p. 190.  
<https://doi.org/10.18352/ulr.32>
- Rawls, John., 1999, *A Theory of Justice*, Revised ed., Cambridge, Massachusetts: The Belknap Press of Harvard University Press.
- Raz, Joseph, 2009, 'The Rule of Law and its Virtue', in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed., Oxford: Oxford University Press.
- Secretary General of the United Nations, 2004, *Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies*, *United Nations Security Council*, S/2004/616, 23 August 2004.
- Shraga, D.; Zacklin, R., 1996, 'The International Criminal Tribunal for Rwanda', *European Journal of International Law* 7 (4), 501-518.  
<https://doi.org/10.1093/ejil/7.4.501>
- Skov Kristensen, Henrik; Tamm, Ditlev, 2008, *Dødsdømt – Flemming Helweg-Larsens beretning*, Copenhagen: Gyldendahl.
- South China Sea Arbitration, The Republic of the Philippines v The People's Republic of China (South China Sea Arbitration), PCA Case N° 2013-19, Award by the Arbitral Tribunal on 12 July 2016.
- Statute of the Special Tribunal for Lebanon, available at STL's website; <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon> (retrieved 22 January 2017).
- Statute of The Special Court for Sierra Leone, available at SCSL's website; <http://www.rscsl.org/Documents/scsl-statute.pdf> (retrieved 22 January 2017).
- United Nations Security Council Resolution 1315 (2000), Adopted by the Security Council at its 4186th meeting, on 14 August 2000, S/RES/1315 (2000).
- van der Wilt, H., 2013, 'Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections', *Israel Law Review* 46 (2), 207-232.  
<https://doi.org/10.1017/S0021223713000046>
- Vitoria, F. 1991, 'On the American Indians (De Indis)' in A. Pagden & J. Lawrance, (eds), *Vitoria – Political Writing*, Cambridge: Cambridge University Press, 1991.  
<https://doi.org/10.1017/CBO9780511840944.012>
- World Justice Project 2016, Rule of Law Index, retrieved 27/11/2016: [http://worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf)

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