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HYBRID CRIMINAL JUSTICE: RECONSTRUCTION AND DEVELOPMENTS OF THE PHENOMENON

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LIST OF ABBREVIATIONS AND ACRONYMS

AC	Appeals Chamber
AU	African Union
BWCC	Bosnia War Crimes Chamber
CAR	Central African Republic
CAR SCC	Special Criminal Court in the Central African Republic
CIJs	Co-Investigating Judges
CoE	Council of Europe
CRA	South Sudan Compensation and Reparation Authority
CTRH	Commission for Truth, Reconciliation and Healing South Sudan
DRC	Democratic Republic of Congo
DSS	Defence Support Section
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Court of Cambodia
ECCC Law	Kingdom of Cambodia
ECCC Agreement	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
ECOWAS	Economic Community of the West African States
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FROLINAT	Chadian National Liberation Front
FRY	Federal Republic of Yugoslavia
GUNT	Chadian Transitional National Union Government
HCSS	Hybrid Court for South Sudan
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICP	International Co-Prosecutor
ICTJ	International Center for Transitional Justice
ICTR	International Criminal tribunal for Rwanda
ICTY	International Criminal tribunal for the former Yugoslavia

ICJ	International Court of Justice
IGAD	Intergovernmental Authority for the Development
IHT	Iraqi High Tribunal
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRMCT	International Residual Mechanism for Criminal Tribunals
JCE	Joint Criminal Enterprise
JEP	Jurisdicción Especial para la Paz / Special Jurisdiction of Peace
KLA	Kosovo Liberation Army
KSC	Kosovo Specialist's Chambers
KSC Law	Republic of Kosovo, Law N. 05/L-053, *On Specialist Chambers and Specialist Prosecutor's Office*, 3 August 2015
LRA	Lord Resistance Army
MINUSCA	United Nations Multidimension Integrated Stabilization Mission in the Central African Republic
NATO	North Atlantic Treaty Organisation
NCP	National Co-Prosecutor
OA	Office of Administration
OCIJ	Office of the Co-Investigating Judges
OHCHR	United Nations Office of the High Commissioner for Human Rights
PTC	Pre-Trial Chamber
RGC	Royal Government of Cambodia
RUF	Revolutionary United Front
SCC	Supreme Court Chamber
SCSL	Special Court for Sierra Leone
SITF	Special Investigative Task Force within EULEX
SJP	Special Jurisdiction of Peace / Jurisdicción Especial para la Paz
SPLM-OP	Sudan People's Liberation Movement - In Opposition
SPO	Kosovo Specialist Prosecutor's Office
SPSC	Special Panels for Serious Crimes in East Timor
STL	Special Tribunal for Lebanon
TC	Trial Chamber

UN	United Nations
UNMIK	United Nations Mission in Kosovo
UNTAET	Unite Nations Transitional Administration for East Timor

INTRODUCTION

SUBJECT MATTER AND PURPOSE OF THE STUDY

The phenomenon of hybrid criminal justice arose at the dawn of the current millennium, with the establishment of four courts that had a mixture of structural and functional characteristics typical of both internal criminal courts and international criminal courts. Established at the same time as the International Criminal Court, the result of decades of attempts by the international community to ensure permanent oversight of the commission of international crimes, these "hybrid courts" seemed destined to give way to the ICC, which promised to become the only competent jurisdiction for the *crimina iuris gentium*, thanks to a system of complementarity that would have encouraged the domestic persecution of those responsible for mass crimes.

For this reason, excluding some attempts to systematise the phenomenon, verifying the possibility of recognizing the existence – discussed – of a unitary category of international criminal courts, scholars have tended to devote little attention to the phenomenon of hybrid criminal justice, in the general framework of international justice. The studies that offer the most comprehensive analysis of the phenomenon, in fact, are now very old, especially considering that, despite what was proposed, the use of mixed solutions of justice, at first sight not framed neither in a system of domestic courts, nor attributable to new international tribunals, has returned to be an interesting option for the fight against impunity for mass crimes.

In fact, after a period of retirement, starting in 2014, many state actors and regional and international organisations have returned to call for the establishment of new hybrid tribunals for an ever-increasing number of situations of widespread violation of human rights and international humanitarian law. This method of justice for international crimes seems, then, if not destined to remain permanent as an alternative to other means of persecution of mass atrocities, at least to play a fundamental role in the fight against impunity in the next decade.

The existing literature is extremely sparse and focused on certain aspects of the work or structure of each of these new courts. Absent, however, in all, is an all-encompassing study of hybrid criminal justice that contemplates the evolution from the dawn to today, analysing the reasons underlying the return of hybrids, contemporary trends and the latest developments of the phenomenon.

This study, then, aims to fill this gap, aspiring to systematically reconstruct the entire evolution of hybrid criminal justice and to introduce into the literary landscape an organic analysis of this phenomenon.

To achieve this result, the methodology adopted is mainly doctrinal and comparative: the study draws first of all on the legislation produced by the states affected by hybrid justice experiences, from the founding documents of the "hybrid" courts themselves, as well as from the jurisprudence developed by those jurisdictions; and finally, from existing studies on hybrid criminal justice.

The present attempt of organic reconstruction of the hybrid justice phenomenon is structured in four parts.

First, in fact, it is necessary to identify the reasons that led, for the first time between the end of 1990 and the early 2000s, to develop innovative "mixed" solutions in order to prosecute those responsible for situations of systematic and widespread violence in certain countries. These motivations, constituting the real roots of the phenomenon of our interest, must be sought not only by looking at the specific political-institutional situations of the states concerned and protagonists of this novelty, but also in the progress of international criminal justice globally understood at the time.

Once fully understood the reasons that gave impetus to the first courts qualified as "internationalized", you can proceed to attempt a definitional effort of the concept of "hybrid court". The most interesting transversal studies on the first mixed courts had focused mainly on the search for a unitarity of the phenomenon, according to different methodologies and perspectives and reaching equally disparate results. Moving, then, from a definition as generic as universally accepted of mixed court, the study adheres to a conception of the phenomenon of hybrid criminal justice as a multi-axial spectrum (*see* S. Williams), within which jurisdictions apparently dissimilar and extremely heterogeneous in their structure can be placed. The image of the phenomenon of hybrid international justice as a range of possibilities, rather than a granite category, stimulates the elaboration of an additional, original concept: that of "factor of hybridisation", namely every parameter that contributes to move a single hybrid court in the sliding scale of hybridity.

This concept assists in appreciating the variety of internationalised criminal courts and in assessing whether this diversity is a first intrinsic and typical feature of hybrid criminal justice. In the context of this analysis, we must also proceed to a systematic review of the different theories elaborated about a decade ago on the existence – or not –

of a unitary category of hybrid courts. On the basis of these data, it will then be possible to identify which jurisdictions have been part of a possible "first generation" of internationalised criminal courts, considered as a whole.

The third and fourth parts of this research work, however, contribute, on the basis of what is offered in the first two, to introduce in the contemporary doctrinal panorama an innovative analysis of the reasons that have led to the return of hybrid criminal justice after a period of quiescence and the characteristics of these new courts.

First, the study can venture into a reconstruction of the reasons that led to new proposals of mixed courts, evaluating the value of such reappearance, the legal and sociological advantages and disadvantages related to it and the possible challenges and difficulties to be faced.

To do this, it is necessary to observe the state of international criminal justice from the early 2000s to the present: first of all, a particular look must be taken at the continuing need to find solutions to promote deterrence and the fight against impunity for international crimes, which continue to affect the collective conscience of humanity; then, the expectations and the reality of the operation of the International Criminal Court, twenty years after its establishment, both at the operational level, at the level of the international relations it maintains, and at the level of the effectiveness of the principle of complementarity to which it is inspired.

Finally, a closer look must be taken onto the plurality of jurisdictions that, at different extent, have been pointed out as "new hybrid". First of all, each of these courts must be compared with the definition of mixed criminal court elaborated in the first part of the work and the diverse "factors of hybridisation" as previously particularised, with the aim of identifying whether it should be included or excluded from the list of second-generation hybrid courts.

Afterwards, having identified, therefore, what are, in fact, the new hybrid courts, it is possible to draw some conclusions respectively what are the contemporary trends characterising the phenomenon of hybrid criminal justice, in that they concern both the design and structure of each court, and this model of justice globally considered and included in the general context of international justice devoted to the persecution of international crimes.

Finally, before proceeding to the analysis according to the plan just illustrated, a terminological clarification appears necessary: for the reasons that will be explained in

the course of the study, and to which we refer, the adjectives “hybrid”, “mixed” and “internationalized” are used as a synonym in this study.

CHAPTER I

THE INVENTION OF HYBRIDITY

SUMMARY: I. Introduction. – II. The historical reasons: the affirmation of international criminal justice and the need to redress the 'shocked conscience of humanity' along the 'short century'. – 1. The raise of a culture of accountability for international crimes. – 2. After the Second World War: the proceedings before military tribunals and the development of international criminal law. – 3. The *ad hoc* International Criminal Tribunals. – 3.1. The International Criminal Tribunal for the Former Yugoslavia. – 3.2. The International Criminal Tribunal for Rwanda. – 3.3. The closure phase of the *ad hoc* international criminal tribunals: the International Residual Mechanism for the Criminal Tribunals – 4. Conclusions. – III. Historical and political reasons: the situations of the interested States. – 1. The resource war in Sierra Leone. – 2. The Khmer Rouge era in Cambodia. – 3. East Timor: a fight for independence. – 4. Kosovo: the struggle for the Europe's youngest state – 5. Conclusions. – IV. Institutional and legal reasons. – 1. Learning from the past: the expensiveness and the distance of the ICTY and ICTR. A deterrent for new fully international criminal tribunals. – 2. The lack of rule of law and the call from the states concerned.– 3. The impracticality of seizing the International Criminal Court. – V. Conclusions.

I. Introduction.

The motivations that contributed to the emergence of innovative solutions, not entirely international nor domestic, for the prosecution of international crimes are manifold.

The present investigation faces two categories of motives: the first, constituted by purely historical reasons, and the second, encompassing a series of 'institutional and legal' factors, in a wide range of aspects.

Historical reasons further differ in two different sets of circumstances that, in combination with each other, generated the environment necessary for the invention of mixed solution for the punishment of perpetrators of *crimina juris gentium*.

On one side, the affirmation of international criminal justice as a whole, along the XX Century, and the connected sensibility that affirmed in the aftermath of the Second World War, as it will be explained below, consolidated an attitude of the international community towards the fight against impunity and the attention for the needs, expectations, and role of victims of mas crimes.

On the other side, some specific countries, namely Cambodia, Sierra Leone, Kosovo, and East Timor, found themselves facing horrendous widespread violence in a historical and political context where the domestic prosecution of international crimes was not possible.

Within the variegate category of institutional and legal reasons at the basis of the creation of hybridity, the present study identified the lessons learnt from the structure and

functioning of the *ad hoc* international criminal tribunals, the condition of the rule of law in the states concerned, and the limits to the jurisdiction of the International Criminal Court.

This first chapter, thus, aims to analyse the several reasons that led to the invention of hybridity and its affirmation on the international scene from the early 2000s on, insofar that they constitute the ground over which the phenomenon developed and may still develop nowadays.

II. The historical reasons: the affirmation of international criminal justice and the need to redress the 'shocked conscience of humanity' along the 'short century'.

1. The raise of a culture of accountability for international crimes.

International criminal law, which is that «body of international rules designed both to proscribe international crimes and to impose upon states the obligation to prosecute and punish at least some of those crimes, […] also regulates international proceedings for prosecuting and trying persons accused of such crimes»[1].

It is a relatively recent field of public international law, as it progressively developed in the aftermath of the Second World War and throughout all the XX Century, encompassing a variety of experiences: the International Military Tribunal (IMT) in Nuremberg, the Tokyo International Military Tribunal for the Far East (IMTFE), and the *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda[2].

Nevertheless, some scholars recognise the origins of international criminal law in more ancient experiences of justice. Eminent scholars, such as Schabas or Cherif Bassiouni, affirmed that there is evidence that in the ancient Greek society, around the V century BC, individuals responsible for 'war crimes' *ante litteram* were held accountable

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[1] A. CASSESE, *International Criminal Law*, Oxford, 2003, p. 15.

[2] For a comprehensive understanding of the history of international criminal justice, *see* A. CASSESE, *Lineamenti di diritto internazionale penale*, Bologna, 2005; M. CHERIF BASSIOUNI, *Introduction to International Criminal Law,* Leiden, 2014; C. ÇAKMAK, *A Brief History of International Criminal Law and International Criminal Court*, New York, 2017. For a detailed analysis of the contribution that each jurisdiction apported to the development of international criminal law, *see* K.J. HELLER, *The Nuremberg military tribunals and the origins of international criminal law*, Oxford, 2011; A. BABOVIC, *The Tokyo Trial, Justice, and the Post-war International Order*, Singapore, 2019; S. DARCY, J. POWDERLY, *Judicial Creativity at the International Criminal Tribunals*, Oxford, 2011; G. BOAS, W. SCHABAS, *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, 2003; L. VAN DEN HERIK, *The contribution of the Rwanda Tribunal to the development of international law*, Amsterdam, 2005.

through proceedings, as well as was custom in ancient cultures of Japan, China, and India[3].

In search of the origins of such branch of law, academics also regard the international criminal tribunal established in Breisach in 1474 AC to try Peter von Hagenbach. In his capacity of *Land Vogt* (governor) of some Alsatian territories, Von Hagenbach was responsible for murders, sexual abuses, and perjuries, committed by him and his troops «in violation of the laws of God and man» against civilians. An *ad hoc* tribunal of twenty-eight judges from various regional city-states conducted the proceedings against him, applying some elements similar to those of a modern international criminal case: the rejection of the defence of superior orders, the formulation of an embryonic version of crimes against humanity, and rape as a war crime [4].

Nonetheless, at least three elements do not allow to label those tribunals as the precursors of contemporary international criminal court: first, those tribunals did not give impulse to a continued series of similar courts; second, the international community did not exist at the time in the form that we conceive nowadays; third, there was not a legal and binding definition of international crimes. Thus, they rather represent isolated experiences rising from a set of political, military, and social circumstances.

Although it was never approved, the first official proposal to establish a semi-permanent international criminal court in the modern era dates back to 1872, when the Swiss founder of the International Committee of the Red Cross[5], Gustave Moynier, after a first phase of scepticism towards tribunals *tout court*[6], formulated a project for a tribunal having jurisdiction over the violations of the 1864 Geneva Convention for the amelioration of militaries hounded in armed campaigns, committed during the Franco-

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[3] W. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, 2001, p. 1; M. CHERIF BASSIOUNI, *Crimes Against Humanity in International Criminal Law*, Cambridge, 1999, p. 517.

[4] G.S. GORDON, "The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law", in K. HELLER, G. SIMPSON, *The Hidden Histories of War Crimes Trials,* Oxford, 2013, p. 33.

[5] The International Committee of the Red Cross (ICRC) is an independent, neutral, international non-governmental organisation, founded in 1863 and having the mission to aid the populations involved in armed conflicts, and to promote a legislation on protection for victims of war. *See* https://www.icrc.org [Last accessed 19 July 2021].

[6] « Public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down. […] The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other», G. MOYNIER, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne*, Paris, 1870, p. 301-302.

Prussian War (1870-1871)[7]. The project contemplated a bench composed by five judges, two from the belligerent states and the remaining from three Powers members to the Convention, selected by lot[8]. The seat and the organisation of the tribunal would be completely remitted to the discretion of the nominated judges[9]. Only governments would have the power to submit complaints concerning breaches of the aforementioned Convention[10]. It would be duty of the government of the state of the offender to eventually enforce the penalties pronounced against the offender himself[11]. The belligerent states would bear the costs of the proceedings[12].

Eventually, due to the scarce interest of states towards such proposal, Moynier abandoned the initiative. Yet, he can be regarded as the first to dare to express the perilous and powerful idea that states could (and should) cede a portion of their sovereignty – namely, the power of judging certain odious crimes – in favour of a supra-national tribunal[13].

The idea of holding the "authors of war" responsible for the violations committed reappeared in the aftermath of the First World War, at the Paris Peace Conference of 25 January 1919, during which the winner Powers instituted a Commission on the Responsibility of the War and on Enforcement and Punishment, charged with the task of articulating a project to implement such idea. Thus, in March 1919, during the next session of the Peace Conference, held in Versailles, the Commission presented its work, in which it expressed the opportunity to valorise the criminal responsibility of individuals

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[7] The Convention, adopted on 22 august 1864, dictates basic principles of international humanitarian law, recognising dignity to the person wounded in war and the neutrality of camp hospitals. G. MOYNIER, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", in *Bulletin international des Sociétés de secours aux militaires blessés*, 1872, n. 11, p. 122-131.

[8] G. MOYNIER, *Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention, Geneva*, 1872, article 2.

[9] G. MOYNIER, *Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention, Geneva*, 1872, article 3.

[10] G. MOYNIER, *Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention, Geneva*, 1872, article 1 and article 4.

[11] G. MOYNIER, *Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention*, Geneva, 1872, article 6.

[12] G. MOYNIER, *Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention*, Geneva, 1872, article 9. For a further comment on the project, see C. K. HALL, "The first proposal for a permanent international criminal court", in *International Review of the Red Cross*, 1988, n. 322, p. 57-74.

[13] M. GLASIUS, *The International Criminal Court: A Global Civil Society Achievement*, Milton Park, 2007, p. 6.

for the violation of The Hague Conventions of 1899 and 1907[14], and to prosecute *Kaiser* Wilhelm II before a «high international tribunal»[15], regardless of the traditional immunities recognised to the highest representants of States. The Commission stressed out that leaving «the greatest outrages against the laws and customs of war and the laws of humanity» unpunished «would shock the conscience of civilized mankind»[16]. This position shows a changed sensibility towards the concept of international criminal justice: while forty years before Moynier deemed it superfluous to proceed through a tribunal for achieving justice, after WWI it was the fact itself of setting a tribunal that would allow such justice to be implemented; while, previously, having shocked the conscience of humanity was considered a sufficient blame and sentence for an offender, now the 'conscience of humanity' itself had become a victimised subject, claiming for a reparation.

Consequently, the final Treaty of Pace with Germany, signed in Versailles in June 1919 envisaged the establishment of an *ad hoc* tribunal, with judges from various states sitting at the bench, to proceed against *Kaiser* Wilhelm II notwithstanding the objections of the USA and Japan: the former considered preferrable maintaining the peace reached rather than pursuing justice and were sceptic about the institution of an international tribunal, being more inclined to approve proceedings before national courts; the latter declared itself concerned about the repercussions on international relations[17]. In the end, though, such efforts turned out to be vain: as the emperor fled to the Netherlands, a neutral State, whose government refused to extradite him on 23 January 1920, the provision concerning prosecuting him never came into power.

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[14] The Hague Conventions of 1899 and 1907 contain the definition of war crimes and regulate the international *ius ad bellum.*

[15] *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report", in *American Journal of International Law*, 1920, vol. 14, issue 1, p. 123

[16] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report", in *American Journal of International Law*, 1920, vol. 14, issue 1, p. 116.

[17] Treaty of Versailles, 28 June 1919, article 227: «The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy, and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.»

Notwithstanding the failure of these attempts to affirm individual criminal responsibility, the period between the First and the Second World War should be still considered significant for the establishment of a permanent system of international criminal justice: both the United Nations and non-governmental organisations proposed and evaluated various projects, (although none of the proposal was never implemented due to the lack of support by States), for a permanent international criminal court, a certain sensibility that the fight to impunity for serious crimes should be promoted progressively consolidated[18].

2. After the Second World War: the proceedings before military tribunals and the development of international criminal law.

The atrocities perpetrated by the Nazi regime during the Second World War demonstrated a change of pace in the conduct of hostilities: civilians became targets and victims, and the warfare entered into urban centres, while, until then, the war had been a matter of battlefields, trenches, and armies. The crimes committed by Germany and its allies against civilians, in particular against the Hebrew community across Europe, provoked at least three consequences on the development of international law that appears as relevant to this study.

The first consequence is the reaffirmation of the innovative concept that there is a shared 'conscience of humankind', which, as stated in the preamble to the Universal Declaration of Human Rights, was «outraged» by «barbarous act» during the World War II[19]. Just like it had happened with the tribunal against *Kaiser* Wilhelm, the conscience of humankind appeared to be an offended subject, needing justice and reparations. This is the affirmation of the perception that some crimes were of interest of the whole international community, not only of the directly concerned States, and thus deserved a new supra-national system of justice to be prosecuted.

The second consequence is that the gravity of crimes committed, through the lens of such renewed awareness towards the "conscience of mankind" led to the establishment of two courts, the military tribunals of Nuremberg and Tokyo, as well as to numerous trials before the national courts of the Allies.

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[18] It is worth mention the League of Nations' project for a permanent international criminal tribunal annexed to the Convention for the prevention and the punishment of terrorism, 16 November 1937 – which never entered into power.

[19] UN Doc. GA/Res/3/217A, A/810, *Universal Declaration of Human Rights*, 10 December 1948.

The Nuremberg Military Tribunal was established on the basis of the London Agreement, signed by Great Britain, the United States, France, and the Union of Soviet Socialist Republics on 8 August 1945[20]. The Allies considered themselves, in view of the collapse of the *Reich* after the death of Hitler, not only occupiers of German territory, but *de facto* governors of Germany, at least temporarily. The bench was composed of four justices, coming from, and appointed by the Signatories, among whom one was selected, by principle of rotation, as President[21]. The tribunal's personal jurisdiction extended to the major war criminals o the European Axis countries, while the material jurisdiction encompassed three categories of crimes, as defined by the Charter itself: a) crimes against peace, b) war crimes, c) crimes against humanity[22]. The trials took place in Nuremberg, although the permanent seat of the tribunal was in Berlin[23]. Along the proceedings, twenty-four members of the *Reich* were accused, of whom twenty-two faced trials, to eventually conclude with three absolutions, twelve sentences to death, three life sentences and a series of lower detention sentences[24]. In addition, numerous other German officers were tried before national courts[25].

The Tokyo Military Tribunal was unilaterally established by an act of General MacArthur, as Allied Supreme Commander by virtue of the powers granted to him by the Allied Powers over surrendered Japan[26]. The Tribunal, with seat in Tokyo, was established for the trial of the major criminals «in the Far East»[27]. The powers of the Supreme Commander himself over the functioning of the tribunal were extensive, as he appointed the judges, choosing among names proposed by the Signatories, selected a President, and nominated the General Secretary[28]. The Tokyo Tribunal had jurisdiction over individuals accused to have committed crimes against humanity, conventional war crimes and crimes against peace[29]. Replicating the provisions of the IMT Charter, no

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[20] *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, signed at London August 8, 1945, with Annexed Charter of the International Military Tribunal.

[21] IMT, Charter of the International Military Tribunal, article 4.

[22] IMT, Charter of the International Military Tribunal, article 6.

[23] IMT, Charter of the International Military Tribunal, article 22.

[24] Critics to the tribunals related to the selectivity of prosecution: the fact that only exponents of the German *Reich* were processed was regarded as an expression of 'victor's justice'.

[25] C. ÇAKMAK, *A Brief History of International Criminal Law and International Criminal Court*, Eskisehir, 2017, p. 55.

[26] D. MCARTHUR, *Special Proclamation – Establishment of an International Military Tribunal for the Far East*, 19 January 1946. Annexed Charter of the International Military Tribunal for the Far East.

[27] IMTFE, Charter of the International Military Tribunal for the Far East, article 1.

[28] IMTFE, Charter of the International Military Tribunal for the Far East, article 2 and article 3.

[29] IMTFE, Charter of the International Military Tribunal for the Far East, article 5.

immunities were granted before the Tokyo Tribunal, nor the fact of acting pursuant to order of a superior would liberate the accused from responsibility[30].

The nature of the two jurisdictions was innovative: for the first time, states convened to prosecute individuals, thus giving birth to a supra-national system of justice, where the traditional sovereignty was ceded in favour of a superior interest of the international community.

The International Military Tribunal in Germany and the International Military Tribunal for the Far East in Japan are mostly considered the forerunners to the international criminal courts established in the following decades. Instead, a minority of authors, such as Akande and Williams, suggest that they may rather be predecessors to the more modern mixed or hybrid tribunals[31]. On the one side, given the total surrender of Germany and the consequent collapse of its government, the four Allied powers exercised authority as *de facto* sovereign of Germany, but the source of power remained entirely domestic. Thus, the IMT would be an 'occupation' court, having a jurisdiction based on the territorial and nationality principles, representing the authority of the German state, hybridized by international elements, such as the presence of international judges[32]. On the other hand, according to Williams and Akande, since the legal basis for the Tokyo Tribunal was a declaration of General McArthur, delegated by the Allied Powers to exercise authority over Japan following its surrender, the Tokyo Tribunal was exerting it judicial power on the basis of domestic law, making it a domestic jurisdiction with international elements[33].

Notwithstanding the debate over their legal nature, though, the two courts indeed represent a milestone in the development of international criminal law, as they addressed a number of fundamental issues for any conception of a permanent international criminal court.

The trials before such courts endorsed individual criminal responsibility in the international arena; then, their statutes codified the definition of war crimes («violations

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[30] IMTFE, Charter of the International Military Tribunal for the Far East, article 6.

[31] D. AKANDE, "Prosecuting Aggression: The Consent Problem and the Role of the Security Council", in *University of Oxford Legal Research Paper Series*, 2011, n. 10, p. 30. It will be discussed further in this study the existence of a definition of hybrid court.

[32] S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Oxford, 2012, p. 136-137. See further in this study also a comprehensive description of the factors of hybridisation of a tribunal.

[33] S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Oxford, 2012, p. 138-139.

of the laws or customs of war») and crimes against humanity («Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated»)[34]; finally, the respective Charters declared the irrelevance of the circumstance of having acted in accordance with an order of a superior as a cause of justification[35], thus breaking with the tradition of war law.

A further innovation emerging by the work of the military tribunals and a signal of a new sensibility was the idea that, in order to consolidate a situation of international peace and to guarantee a democratic order to countries which had lived under totalitarian regimes, it was not sufficient to proceed against the culprits, but it was also appropriate to provide reparation to the victims, who, because of the seriousness of the wrongs suffered, risked to express violently their desire for revenge and their indignation[36]. The main solution adopted to meet this need, while remaining on a purely symbolic level, was the wide publicity given to the Nuremberg trials, so that victims could follow the development of the proceedings and, eventually, the public executions of well-known members of the regimes. Nevertheless, no official presence of the victims in front of the courts, no representation, no direct confrontation with the perpetrators were yet offered to the civilian population harmed by international crimes.

The third consequence on the development of international criminal law apported by the atrocities of World War II was the conceptualisation of the crime of genocide. The term 'genocide' itself did not exist before: it was Raphael Lemkin, a polish lawyer, who

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[34] Charter of the International Military Tribunal, article 6; Charter of the International Military Tribunal for the Far East, article 5. The London Charter for the MIT also adds, regarding the category of war crimes, that «Such violations shall include, but not be limited to, murder ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity».

[35] *The Agreement for the Prosecution and Punishment of major War Criminals of the European Axis*, (London Agreement), London, 8 August 1945. Article 8 stated that: «The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires»; MCCOUBREY, "War Crimes Jurisdiction and a Permanent International Criminal Court: advantages and difficulties"*, in Journal of Conflict and Security Law*, 1998, vol. 3, n. 1, p. 9 ff.

[36] L. ROSSETTO, "Il ruolo della vittima nello scenario della giustizia penale internazionale: aspetti politici, sociali e giuridici", in *Acta Histriae*, 2004, vol. 12, n. 1, p. 353; S. KARSTEDT, "From absence to presence, from silence to voice: victims in international and transitional justice since the Nuremberg trials", in *International Review of Victimology*, 2010, vol. 17, n. 1, 2010, p. 12 ff.

coined it by combining two words, the Greek *genos* (race, stock, kin) and the Latin *cedo* (killing), with the intent to introduce a lemma that «First, it is short. Second, it is not capable of mispronunciation. Third, it does not resemble anything […] and cannot be associated with anything else»[37]. Lemkin mentioned it for the first time in its late 1944 publication on the Nazi law of occupation laws *Axis Rule in Occupied Europe*[38]. Although the term was rapidly diffused into the common language, and was repeatedly used across the Century[39], it was not absorbed in the legal practice in time for the Nuremberg and Tokyo Trials. Neither the statutes nor the jurisprudence mentions it[40].

Lemkin's efforts, nevertheless, did not only had effects on legal and common terminology, but gave also substantial impulse to the adoption, shortly after, of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948). The Convention recognised genocide as a crime under international law « contrary to the spirit and aims of the United Nations and condemned by the civilized world»[41] and, in its article 2, defined it as:

> « any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. »

The new sensibility of the international community towards the necessity to seek accountability for crimes that offended the collective conscience of mankind led – on one side – to the affirmation of the individual criminal accountability for perpetrators of *crimina juris gentium*[42]; on the other, it produced its first results through the establishment

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[37] G. EASTMAN, *Letter to the Comptroller of the Office of the British Patent Office*, 1888. Lemkin was inspired by those criteria, adopted by the inventor of the brand "Kodak", in coining the lemma: S. POWER, *A problem from Hell: America and the age of Genocide*, New York, 2002, p. 41-42; P. S. BECHKY, "Lemkin's Situation: Toward a Rhetorical Understanding of Genocide", in *Brooklyn Law Review*, 2012, vol. 77, n. 2, p. 551-624, p. 559.

[38] R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, 1944.

[39] The term 'genocide' was, in fact, used to define a large series of situations, even falling outside of the proper legal definition, and acquired the value – never officially recognised by any source of law – as the 'crime of all crimes', the most outrageous attack to the humankind, the apical crime in a (supposed) hierarchy of atrocities. *See* M. FLORES, *Il genocidio*, Bologna, 2021; W. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge, 2000.

[40] G. DELLA MORTE, "«Il crimine senza nome». Intorno a un libro di Marcello Flores", in *Il Mulino*, 28 April 2021, available at wwww.rivistailmulino.it [last accessed 20 August 2021].

[41] UN Doc. A/RES/3/260, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, preamble, and article 1.

[42] Individual criminal accountability is recognised in the establishing documents of the international tribunals, in stating their jurisdiction over individuals. *See* IMT, *Charter of the International Military Tribunal*, 8 August 1945, article 6: « The Tribunal established by the Agreement referred to in Article 1

of the two military tribunals, the attention to the public awareness of affected populations, and the creation of two subsequent sources of law – the Genocide Convention and the Universal Declaration – protecting human beings, followed by the eventual elaboration of a series of additional rights for victims of international crimes[43].

In the aftermath of World War II, the Organisation of the United Nations, committed to the further development of international criminal justice, established the International Law Commission to codify the principles laid down in the Statute of the Nuremberg IMT and applied in the relevant judgments[44]. The project aimed to draw up a draft code of crimes against peace and against the security of humanity, and to consider the possibility of establishing a permanent international criminal jurisdiction, even within the system of the International Court of Justice, already operating.

During its second session, on July 29, 1950, the International Law Commission adopted the seven so-called "Nuremberg Principles", codifying: 1) Individual liability for crimes under international law; 2) The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law; 3) Irrelevance of acting as Head of state or responsible Government official in committing international crimes; 4) Irrelevance of acting pursuant the order of a superior; 5) Right to a fair trial; 6) Definition

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hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.»; IMTFE, *Charter of the International Military Tribunal for the Far East*, 19 January 1946, article 5: «The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses […] »; *but also* ICTY, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, article 7; ICTR, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 8 November 1994 article 6; ICC, *Rome Statute of the International Criminal Court*, 17 July 1998, article 25.

[43] L. ROSSETTO, "Il ruolo della vittima nello scenario della giustizia penale internazionale: aspetti politici, sociali e giuridici", in *Acta Histriae*, 2004, vol. 12, n. 1, p. 353; S. KARSTEDT, "From Absence to Presence, from Silence to Voice: Victims in International and Transitional Justice since the Nurember Trials", in *International Review of Victimology*, 2010, vol. 17, p. 10. The decades following the Second World War were also a fruitful period on the level of substantive law, with the promulgation of numerous international documents which, little by little, turned their attention to the interests and needs of the victims of international crimes, among which: the four 1949 Geneva Conventions of International Humanitarian Law (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War); the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms; the 1966 International Covenant on Economic, Social and Cultural Rights; the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

[44] UN Doc. A/519, GA/Res/2/174, *Establishment of an International Law Commission*, 21 November 1947.

of three categories of *crimina juris gentium* – crimes against peace, crimes against humanity and war crimes; 7) Reconnaissance of complicity in the commission of a crime against peace, a war crime, or a crime against as an international crime itself[45].

On the contrary, the International Law Commission did not succeed in the establishment of a permanent jurisdiction, due to the lack of support of the States, which would not agree to cede part of their sovereignty in favour of the maintenance of international peace and objectives of justice[46]. The failure of the project was a symptom that the new sensibility towards the urgency of enforcing international criminal justice, in fact, did not last long, especially when it required the adoption of effective measures. The reluctance of states to hand down a portion of their powers rooted in the rapid changes in international relations, with the raise of tensions between the Soviet Union and the United States across the Century, which bi-polarised the international community. Consequently, all projects to establish any permanent international jurisdiction, and requiring a widely shared ground to proceed, were temporarily abandoned.

It was necessary to wait until the 1990s, and thus after the collapse of the Soviet Union and the end of the 'Cold War', to reach the following milestone in the development of a system of international criminal jurisdictions: the establishment of two *ad hoc* international tribunals for the prosecution of international crimes committed on the territory of the Former Yugoslavia and Rwanda.

3. The ad hoc International Criminal Tribunals.

The expression '*ad hoc'* International Criminal Tribunals refers to the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

Although the two tribunals did not directly contribute to the development of victims related issues of international criminal law, they left an important legacy for the prosecution of international crimes. In addition, they both represented a paradigm for subsequent jurisdictions and shed light on substantive issues in the field of international criminal justice.

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[45] UN Doc. A/1216, *Report of the International Law Commission covering its Second Session*, 5 June - 29 July 1950. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

[46] C. ÇAKMAK; *A Brief History of International Criminal Law and International Criminal Court*, Eskisehir, 2017, p. 68 ff.

Thus, it is useful to draw a shallow overview of the two courts, for a better comprehension of the roots of international criminal justice as we know it nowadays.

3.1. The International Criminal Tribunal for the Former Yugoslavia.

After the conclusion of the 'Cold War'[47], the 1990s commenced with the fragmentation of the Socialist Federal Republic of Yugoslavia[48] and consequent declarations of independence by the Balkans states, which provoked tensions and conflicts in the region[49]. Due to the spread of violence amounting to violations of international humanitarian law, UN Security Council Resolution n. 780, on 6 October 1992, established a Commission of Experts to inquire and investigate atrocities committed on the territory of Bosnia-Herzegovina, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law committed on the territory of the former Yugoslavia[50]. The Commissions submitted its findings in two reports of 1993 and 1994[51]; observing, in the first (interim) report:

«Jurisdiction for war crimes is governed by the universality principle, and hence is vested in all State, whether parties to the conflict or not. Although the Genocide Convention emphasizes territorial jurisdiction, it also established the jurisdictional basis for an international tribunal. […] states may choose to combine their jurisdiction under universality principle and vest this combined jurisdiction in an international tribunal. […] The Commission was led to discuss the idea of the establishment of an ad hoc international tribunal. In its option, it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal in relation to events in the territory of the former Yugoslavia. The Commission observes that such a decision would be consistent with the direction of its work.»

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[47] Conventionally, the fall of the Berlin Wall, separating Eastern and Western Germany, on 9 november 1989, marks the end of the Cold War between the USA and the URSS. The following dissolution of the URSS is regarded as a further remark of the conclusion of this conflict, in 1991. *See* H. HEINTZE, P. THIELBORGER, *From Cold War to Cyber War. The Evolution of International Law of Peace and Armed Conflicts over the last 25 Years*, Berlin, 2016, p. 226.

[48] The term 'former Yugoslavia' refers to the territory that was up to 25 June 1991 known as The Socialist Federal Republic of Yugoslavia (SFRY) and made up of six republics - Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the regions of Kosovo and Vojvodina) and Slovenia. More details available at www.icty.org [last accessed 19 August 2021].

[49] Croatia and Slovenia both declared their independence on 25 June 1991, followed by Macedonia on 25 September 1991, and Bosnia-Herzegovina on 3 March 1992. The two remaining republics of Serbia and Montenegro declared the Federal Republic of Yugoslavia (FRY) on 27 April 1992. In 2003, the Federal Republic of Yugoslavia was reconstituted and re-named as a state Union of Serbia and Montenegro. This union effectively ended following Montenegro's formal declaration of independence on 3 June 2006 and Serbia's on 5 June 2006. Kosovo declared its independence from Serbia only on 17 February 2008. Such conflicts, taking place both within and between former constituent states, were recognised both a national and international dimension.

[50] UN Doc. S/Res/780, 6 October 1992.

[51] UN Doc. S/25274, Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 10 February 1993, Annex 1; UN Doc. S/1994/674, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 27 May 1994.

Acknowledging the results of the work of the Commission of Experts, the Security Council, acting pursuant Chapter VII of the Charter of United Nations[52], adopted Resolution n. 827 of 25 May 1993, establishing the first international tribunal after Nuremberg and Tokyo: The International Criminal Tribunal for the Former Yugoslavia (hereinafter also referred to as "ICTY")[53].

The ICTY had its seat in The Hague, Netherlands, and had the power to prosecute natural persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, regardless of their official position or the fact of having acted by order of a superior[54]. Its material jurisdiction extended to the Grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide, and crimes against humanity[55]. Such jurisdiction was concurrent with that of national courts, but the ICTY detained the primacy in case of a conflict[56].

The tribunal, whose official working languages were English and French, consisted of three Trial Chambers, an Appeals Chamber, the Prosecutor, and a Registry[57]. Each judge composing the bench of a Chamber had a different nationality and was selected for

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[52] It was the first time that the SC decided to establish an international criminal tribunal by a resolution, while (as noted in UN Doc. S/25704, *Report of the UN Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, paras 17-23), «the approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty». But in the case of Former Yugoslavia, the Secretary-General recommended the SC to act pursuant Chapter VII of the Charter as it would guarantee a more expeditious and effective action. The legality of such a base was assessed by the Appeals Chamber II of the ICTY itself in the *Tadić Jurisdiction Decision*, where it found that the Security Council had a wide discretion to identify a situation as a "threat to international peace and security" as well as in determining the measures adoptable under articles 41 and 42 of the UN Charter. Thus, the establishment of an international tribunal did fall within the possible actions under article 41. *See also* M. ARCARI, "Tutela dei diritti umani e misure del Consiglio di Sicurezza", in L. PINESCHI, *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Milano, 2006, p. 41 ff.; S. ZAPPALÀ; *La giustizia penale internazionale*. *Crimini di guerra e contro l'umanità: da Norimberga alla Corte penale internazionale*, Bologna, 2005, p.54-55.

[53] UN Doc. S/Res/808, 22 February 1993; UN Doc. S/Res/827, *ICTY Statute,* 25 May 1993.

[54] Statute of the ICTY, article 31 (Seat of the International Tribunal), article 6 (Personal jurisdiction), article 1 (Competence of the International Tribunal), article 7 (Individual criminal responsibility), article 8 (Territorial and temporal jurisdiction). According to Article 7, not only did the ICTY give no relevance to the order of a superior, but the fact committed by a subordinate di «not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof.»

[55] Statute of the ICTY, articles 2-5.

[56] Statute of the ICTY, articles 9-10.

[57] Statute of the ICTY, article 11, article 33. B. CONFORTI, M. IOVANE, *Diritto internazionale*, Napoli, 2021, p. 510.

his/her high-standard qualification, both in terms of moral character and experience.[58] Judges were elected by the General Assembly from a list issued by the Security Council after the nomination of candidates by Members States[59]. The Prosecutor acted independently and as a separate organ of the ICTY, was appointed by the Security Council on nomination by the Secretary-General for a four-year mandate, renewable once; he was responsible for the investigation and prosecution, which could initiate *ex officio* or on the basis of information received by thirds such as UN organs, NGOs, States[60]. The Registry, led by the Registrar, was the office responsible for the administration and servicing of the International Tribunal[61]. The ICTY relied on the cooperation and assistance of states for a number of services, such as the surrender or the transfer of the accused to the court, the collection of evidence, the enforcement of sentences; nevertheless, its expenses were entirely borne by the regular budget of the United Nations[62].

The ICTY greatly contributed to the development of international criminal law, *in primis* by shedding light on some core concepts: the principle of distinction between civilian and military targets and the principle of proportionality[63]; the definition of torture[64]; the definition and prosecution of sexual violence;[65] and a general definition of international armed conflict as opposed to a non-international armed conflict are only some examples of the legacy of the jurisprudence of the ICTY[66].

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[58] Statue of the ICTY, articles 12-13. Each Trial Chamber was composed of a maximum of three permanent judges, with the addition of maximum six *ad litem* judges; the Appeals Chamber was composed by five judges.

[59] Statute of the ICTY, articles 13*bis*-13*ter*. An amendment to the Statute underlined that neither of the judges could be of the same nationality as any judge serving for the International Criminal Tribunal for Rwanda, signalling the strong continuity and connection between the two jurisdictions.

[60] Statute of the ICTY, article 16, article 18.

[61] Statute of the ICTY, article 17.

[62] Statute of the ICTY, article 27, article 29, article 32.

[63] ICTY, *Prosecutor v. Tadić,* Case No. IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87; *Prosecutor v. Martic,* Case No. IT-95-11-I, Trial Chamber, Judgement, 8 March 1996, para. 10; *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, paras 521 ff; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Appeals Chamber, Judgement, 17 December 2004, paras 52 ff.

[64] ICTY, *Prosecutor v. Furundžija*, Case N° IT-95-17/1-A, Appeals Chamber, Judgement, paras 111 ff.

[65] For the first time, rape was recognised as constituting torture and was considered a crime against humanity; the ICTY also provided the first definition of sexual enslavement. ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23, Appeals Chamber, Judgement, 12 June 2002, paras 150-153.

[66] For a thorough overview of the innovation to international criminal law proposed by the ICTY, *see* M. STERIO, M. P. SCHARF, *The legacy of ad hoc tribunals in international criminal law: assessing the ICTY's and the ICTR's most significant legal accomplishments*, Cambridge, 2019; A. ŠKRBIĆ, "The legacy of the International Criminal Tribunal for the former Yugoslavia", in *Journal for Labour and Social affairs in Eastern Europe*, 2015, vol. 18, n. 2, p. 245 ff.; K. ROBERTS, "The Contribution of the ICTY to the Grave Breaches Regime", in *Journal of International Criminal Justice*, vol. 7, n. 4, 2009, p. 743-761; F. BOSTEDT, "The International Criminal Tribunal for the Former Yugoslavia in 2007: Key Developments in

The ICTY was never conceived as the permanent international criminal court that the United Nations had envisaged since the end of the Second World War: a completion plans constantly guided its work and a resolution, adopted in 2010, requested to take all possible measures to expeditiously complete all their remaining work no later than 31 December 2014[67]. Nevertheless, further arrests of high-ranked officials of the militia, short before such deadlines[68], required to prolong the life of the ICTY, which, eventually, closed its doors on 31 December 2017.

The Statute of the ICTY did not mention that notion of 'conscience of humanity' which led to the first development of basic principles of international criminal law after the two World Wars, nor any other "empathetic" value which may have caused the establishment of the tribunal. The 'short 20th century', with its international tensions, had swept away any trace of "poetry" within the international community, and dissolved the sense of unity, community of intents in fighting against impunity and trust into international criminal justice that had been reached.

In no fashion the ICTY had the mission to treat humanity as a beneficiary of the work of the court, and no particular attention was tributed to the affected communities or to individual victims. The funding documents of the tribunals emphasised that the international tribunal «was set up for the sole purpose of prosecuting persons responsible for serious violations of international law»[69]. Yet, the ICTY intended to assist bringing about reconciliation, but it did so only by determining individual responsibilities and issuing indictments[70]. Thus, any victims' interest in obtaining compensation or

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International Humanitarian and Criminal Law", in *Chinese Journal of International Law*, 2008, vol. 7, n. 2, p. 389-415; K. ROBERTS, Aspects of the ICTY contribution to the criminal procedure of the ICC, in R. MAY, *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald*, Alphen aan den Rijn, 2001, p. 559-572; G. BOAS, W. SCHABAS, *International criminal law developments in the case law of the ICTY*, Leiden, 2003; W. FENRICK, "The ICTY and the Development of the International Humanitarian Law", in K. KOUFA, *The new international criminal law: 2001 International law session*, Athens, 2003; W. FENRICK, "The impact of the work of the ICTY on the development of international humanitarian law", in *From territorial sovereignty to human security: proceedings of the 28th Annual Conference of the Canadian Council of International Law*, Ottawa, 2000; P. AKHAVAN, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes against Humanity and Genocide", in *Proceedings of the Annual meeting (American Society of International Law)*, 2000, vol. 94, p. 279-284; I. ŠIMONOVIĆ, "The role of the ICTY in the development of international criminal adjudication", in *Fordham International Law Journal*, 1999, vol. 23, n. 2, p. 440-459.

[67] UN Doc. S/RES/1966, 22 December 2010, para. 3.

[68] Ratko Mladić, known as the "Butcher of Bosnia," was the general commander of Bosnian Serb forces and was arrested only in 2011. The ICTY condemned him to a life sentence on 22 November 2017. ICTY, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Trial Chamber, Judgement, 22 November 2017.

[69] UN Doc. SC/Res/1993/827, 25 May 1993.

[70] A. FATIĆ, *Reconciliation via the War Crimes Tribunal?*, Aldershot, 2002, p. 102-103.

participating actively in the proceedings was excluded from the jurisdiction of the International Tribunal[71].

In fact, as Chifflet observes, in the Statute of the ICTY, «The victim is first and foremost dealt with as a witness, having no right to representation of participation – as seen in most civil law systems – and little provision for compensation. […] the regime for reparations to victims before the Tribunal is extremely limited, and victims do not have any right to participation as such in the trial process.»[72]

The issue was at debate during the drafting of the ICTY Statute: representatives of several states addressed a letter to the Secretary General advocating the inclusion of the right to a compensation and protective measures for victims[73]. Other States, such as France, argued that tasking the ICTY with victims' compensation would make its work too complex and slow, and proposed to leave victims the possibility to claim reparations before national courts on the basis of a judgement of the ICTY[74].

Article 22 of the Statute is the only provision directly referring to victims, by guaranteeing protection to victims and witnesses[75]. Victims were only regarded as a source of evidence, in need of in-court and out-court protection[76]. Although this

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[71] V. MORRIS, M. P. SCHARD, *An Insider's Guide to the International Tribunal for the Former Yugoslavia: A Documentary History and Analysis, Leiden*, 1994, p. 286.

[72] P. CHIFFLET, "The Role and Status of the Victim", in G. BOAS, W. SCHABAS, *International criminal law developments in the case law of the ICTY*, Leiden, 2003, p. 75.

[73] UN Doc. 2/25512, Letter dated 31 March 1993 from representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey to the United Nations addressed to the Secretary General, 5 April 1993.

[74] UN Doc. S/2566, Letter dated 10 February 1993 from the permanent representative of France to the United Nations addressed to the Secretary General, 10 February 1993, para. 99.

[75] « The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity».

[76] The Rules of Procedure and Evidence govern in more detail the position that victims can undergo from the procedure before the ICTY: it established, within the Registry, a "Victims and Witnesses Section", composed of qualified personnel, with the aim of suggesting the adoption of protective measures and providing witnesses and victims with assistance, especially in the case they have suffered sexual violence; the Rules also state that the Prosecutor, during the investigation phase, must ensure victims and witnesses, which he/she has the power to question, a certain degree of confidentiality and security, such that they do not risk being immediately intimidated or pressured for having cooperated with the court. Furthermore, in exceptional circumstances, each party may request that the identity of a witness or victim be kept secret until he appears at the hearing, without prejudice of the defendant's right to a fair trial. Furthermore, it was possible to order the non-disclosure of the identity and depositions of witnesses. For the determination of protective measures, in any case, the Court may consult the Victims and Witnesses Unit: any measures adopted must not affect the rights of the accused and any protective measure granted must be communicated to the interested parties and must be expressly accepted by them. Statute of the ICTY, article 15 (Rules of procedure and evidence); Article 18 (Investigation and preparation of indictment); Article 20 (Commencement and conduct of trial proceedings). Rule of Procedure an Evidence ICTY, rule 34 (Victims and Witnesses Section), rule 39 (Conduct of Investigations), rule 69 (Protection of Victims and Witnesses), rule 75 (Measures for the Protection of Victims and Witnesses).

represented an innovation in the practice of international criminal court, as before the Tokyo and Nuremberg Tribunals victims had no chance to express their views and their narratives were only marginal in the collection of evidence; it is with disregard of the principles affirmed within international conventions and treaties adopted in the previous decades of XX Century, that the ICTY did not provide victims and affected communities with a full right to reparation and remedy.

Article 24 lists the return of property among penalties that can be issued against the convicted person in addition to detention[77]: after a conviction, the Trial Chamber of the ICTY, either at the request of the Prosecutor or *motu proprio*, may hold a hearing to determine the restitution of property or the proceeds thereof[78].

Compensation to victims was only pursuable indirectly, through domestic courts: after the ICTY issued a final and binding judgement finding the accused guilty of a crime which has caused injury to a victim, after such judgment was transmitted to the competent authorities of the state concern, that victim could bring an action in a national court, pursuant to the relevant national legislation, to claim compensation[79]. « However, on its own, this procedure will not be an answer for the thousands of persons whose lost property, destroyed in the course of the wars and the various campaigns of ethnic

[77] Statute of the ICTY, article 24, para 3: « In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. »

[78] ICTY, Rules of Procedure and Evidence, rule 105: « (A) After a judgement of conviction containing a specific finding as provided in Rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, proprio motu, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. (Amended 25 July 1997, amended 10 July 1998, amended 12 Apr 2001) (B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty. (C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds. (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995) (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine. (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995. (G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F). (Amended 30 Jan 1995, amended 12 Apr 2001)»

[79] ICTY, Rules of Procedure and Evidence, rule 106. *See* UN Doc. Res/1993/827, 25 May 1993: «the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law».

cleansing, cannot be retrieved, especially in light of the lack of authority of the Tribunal to compensate them»[80].

In the latest stage of its work, the ICTY debated the possibility to issue reparations for victims. The 2010 Completion Strategy requested the Security Council to discuss the opportunity to incorporate paragraph 13 (establishment of national funds for compensation to victims) of the Declaration of Basic Principles for Victims of Crime and Abuse of Power, the 'Magna Carta' of victims' rights[81], in the Statute of the ICTY[82].

«The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieve, and one such remedy should be adequate reparations to the victims for their suffering»[83].

3.2. The International Criminal Tribunal for Rwanda.

Scholars reflect that «it is questionable whether the Rwanda Tribunal would have been established without the Yugoslav precedent»[84].

In fact, the International Criminal Tribunal for Rwanda (ICTR) presented manifold features in common with the ICTY: the legal basis, the structure, the contribute to the development of international criminal law, and the relationship with affected communities. A first project even suggested to amend the statute of the ICTY so as to extend its jurisdiction to the crimes committed in Rwanda[85].

Just like the ICTY, the ICTR was a tribunal established by the Security Council of the United Nations, following the recommendation contained in the final report of a Commission of Experts established to examine the evidence and draw conclusions about possible grave violations of international humanitarian law and acts of genocide in

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[80] P. CHIFFLET, "The Role and Status of the Victim", in G. BOAS, W. SCHABAS, *International criminal law developments in the case law of the ICTY*, Leiden, 2003, p. 102.

[81] M. BACHRACH, "The Protection and Rights of Victims under International Criminal Law", in *The International Lawyer*, 2000, vol. 34, n. 1, p. 9.

[82] UN Doc. A/Res/40/34, Declaration of Basic Principles of Justice for Victims of Crim and Abuse of Power, 29 November 1985, Annex I.

[83] UN Doc. S/2010/588, *ICTY Completion Strategy Report*, 19 November 2010, Annex I, para. 78.

[84] D. SHRAGA, R. ZACKLIN, "The International Criminal Tribunal for Rwanda", in *European Journal of International Law*, 1996, vol. 7, n. 4, p. 503.

[85] UN Doc. S/1994/1125, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, 4 October 1994, paras 133-142; UN Doc. A/49/508-S/1994/1157, Report on the Situation of Human Rights in Rwanda Submitted by the Special Rapporteur of the Commission on Human Rights, in Accordance with Commission resolution S-3/1 and Economic and Social Council Decision 1994/223, 13 October 1994.

Rwanda[86]. The Government of Rwanda had also taken initiative in such sense, by addressing a letter to the Security Council requesting the institution of an international tribunal, on the basis that the continued presence of unpunished criminals was disrupting efforts to return refugees to the country and was attenuating the question of a genocide having been committed in Rwanda[87].

Since its independence in 1962[88], Rwanda had faced continued waves of violence and tensions between its two major ethnic groups, the Tutsis, and the Hutus. In 1993, an agreement between the Rwandan government, led by Hutus, and the Tutsi paramilitary group (Rwandan Patriotic Force), was signed and implemented under the supervision of the United Nations Assistance Mission for Rwanda (UNAMIR), to share the governing power[89]. On 6 April 1994, though, the shooting-down of the airplane carrying the Hutu President Habyarimana was the trigger for the reprise of violence[90]. The Hutu group moved to eliminate the Tutsis, and the Rwandan Patriotic Force responded with its brutal counter-offensive: within three months, between 500'000 and 1 million Tutsi, and between 10,000 and 100,000 Hutus had been killed; millions of people from both groups were displaced or fled to the neighbouring countries; torture, rape, and other grave violations of human rights were systematically perpetrated on a daily basis[91]. The violence concluded in July 1994, and consequently the Security Council and the Government of Rwanda took the aforesaid initiatives to bring justice to the Rwandan community[92]. The ICTR was eventually established by Security Council Resolution 955

[86] UN Doc. S/Res/935, 1 July 1994; UN Doc. s/1994/1125, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, 4 October 1994.

[87] UN Doc. S/1994/115, Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, 29 September 1994.

[88] Rwanda formally achieved its independence from Belgium on 1 July 1962.

[89] Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front ("Arusha Accords"), 4 August 1993.

[90] African Union, *Rwanda: The Preventable Genocide,* 2000, para. 4, available at https://www.refworld.org [last accessed 13 September 2021].

[91] A. GUICHAOUA, "Counting the Rwandan Victims of War and Genocide: Concluding Reflections", in *Journal of Genocide Research*, 2020, vol. 22, n. 1, p. 130; F. DAME, "The effect of international criminal tribunals on local judicial culture: The superiority of the hybrid tribunal", 2015, in *Michigan state International Law Review*, vol. 24, n. 1, p. 236; D. J. FRANKLIN, "Failed Rape Prosecutors at the International Criminal Tribunal for Rwanda", in *Georgetown Journal of Gender and the Law*, 2008, vol. 9, n.1, p. 182.

[92] Nevertheless, at the moment of voting the approval of the Resolution 955 establishing the ICTR, Rwanda, which happened to be a member of the Security Council at the time, voted against it (While China abstained, all the other states voted in favour). The reasons of such vote rely on the exclusion of the death penalty from the Statute of the ICTR. UN Doc. S/PV/3453, *UNSC Verbatim Record*, 8 November 1994.

of 8 November 1994, under Chapter VII of the UN Charter, after the recognition that the situation in the country constituted a threat to international peace and security[93].

As mentioned above, the jurisdiction of the Tribunal reflected that of the ICTY. The ICTR had the power to prosecute two categories of individuals: a) any person responsible for serious violations of international humanitarian law committed in the territory of Rwanda, and b) Rwandan citizens responsible for the same violations committed on the territories of adjacent States. The temporal framework spanned between 1 January and 31 December 1994[94]. The competence *ratione materiae* encompassed the crimes of genocide, crimes against humanity and – differently from the ICTY and for the first time – violations of Article 3 Common to the 1969 Geneva Conventions and the 1977 Additional Protocol II[95].

The structure of the ICTR, with its three Trial Chambers, the Office of the Prosecutor, and the Registry mirrors that of the ICTY[96]. During the first ten years of functioning, the two *ad hoc* jurisdictions shared two fundamental organs: the Prosecutor and the Appeals Chamber. Only in 2003 the Security Council, «convinced that the ICTY and the ICTR [could] most efficiently and expeditiously meet their respective responsibilities if each has its own Prosecutor» amended the Statute and nominated two distinct individuals to serve in the prosecution of the two courts[97]. On the contrary, the Appeals Chamber remained single and shared between the *ad hoc* tribunals for the whole duration of the works. The international judges sitting at the bench were recruited following the same procedure as for the ICTY[98].

Such organizational ties aimed to ensure a unity and coherence in the judicial operations of the two jurisdictions and to increase the effectiveness of the resources allocated to them[99].

The contribution of the ICTR to the development of international law was complementary to that of the ICTY, and the two tribunals, jointly, restored international

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[93] UN Doc. S/Res/955, 8 November 1994. For a thorough study of the International Criminal Tribunal for Rwanda, *see* E. DAVID, *International Criminal Tribunal for Rwanda: reports of orders, decision and judgements*, New York, 2000; V. MORRIS, M. P. SCHARF, *The International Criminal Tribunal for Rwanda*, New York, 1998; ICTR, *Introduction to the International Criminal Tribunal for Rwanda (ICTR)*, Arusha, 1998.

[94] Statute of the ICTR, article 1, articles 5-7.

[95] Statute of the ICTR, articles 2-4.

[96] Statute of the ICTR, articles 10-11, article 16.

[97] Statute of the ICTR, article 15. UN Doc. S/Res/1503, 28 August 2003.

[98] Statute of the ICTR, articles 12-13. *See* above for the ICTY.

[99] F. BOUCHET-SAULNIER, The practical guide to international humanitarian law, Lanham, 2013.

criminal law as a discipline, triggering a valuable renaissance of initiatives for the international prosecution of *crimina juris gentium*[100]. The jurisprudence of the ICTR better defined the crime of genocide, by interpreting the definition set forth in the 1948 Genocide Convention; it defined rape in international criminal law; it recognised sexual violence as a means of perpetrating genocide[101]. Dealing with an entirely non-international armed conflict, the ICTR contributed significantly to the development of the definition of war crimes and crimes against humanity in such context: it delineated the scope of the term 'attack' in the legal definition of crimes against humanity[102], and clarified that no nexus to an existing armed conflict is required to integrate crimes against humanity[103]. In addition, the ICTR clarified that command responsibility includes civilian, political, and military superiors[104]. Lastly, it was the first tribunal to hold members of the media responsible for broadcasts intended to incite the public to commit acts of genocide[105].

Similarly, to the ICTY, the ICTR did not express that concern for the 'conscience of humanity' that had inspired the international community, nor the tribunal's Statute included substantive rights for victims, if not in the quality of witnesses to whom provide protection and assistance[106]. Nevertheless, Resolution 955 assigned the ICTR a unique

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[100] M. MATHESON, D. SCHEFFER, "The Creation of the Tribunals", in *American Journal of International Law*, 2016, vol. 110, issue 2, p.177; G. SLUITER, "Ad Hoc International Criminal Tribunals Yugoslavia, Rwanda, Sierra Leone", in W. SCHABAS, *The Cambridge Companion to International Criminal Law*, Cambridge, 2016, p. 117; E. CRAWFORD, "The ICTR and its contribution to the Revivification of International Criminal Law", in *Journal of International Peacekeeping*, 2018, p. 242 ff.

[101] U. KAITESI, Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda's ordinary courts and Gacaca courts, Cambridge, 2014; A. DE BROUWER, Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR, Antwerpen, 2005.

[102] ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 918; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T , Trial Chamber, Judgement, 21 May 1999, para. 122.

[103] ICTR, *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, Case No. ICTR-98-41-A, Appeals Chamber, Judgement, 14 December 2011, para. 415.

[104] ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1-A-A, Appeals Chamber, Judgement, 3 July 2002, paras. 33-37; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgement, 21 May 1999, para. 208.

[105] ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007; G. DELLA MORTE, "De-Mediatizing the Media Case: Elements of a Critical Approach", in *Journal of International Criminal Justice*, 2005, Vol. 3, Issue 4, p. 1019-1033; S. KAGAN, "The Nahimana et al. Appeal Judgement", in *The Hague Justice Portal*, 24 April 2008, p. 4, available at www.haguejusticeportal.net [last accessed 9 November 2021]; S. KAGAN, "The "Media Case" before the Rwanda Tribunal: Nahimana et al. The Appeal Judgement", in *Hague Justice Journal*, 2008, vol. 1, p. 93-94; C.A. MACKINNON, "Prosecutor V. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-A", in *The American Journal of International Law*, 2009, vol. 103, p. 97-98.

[106] C. JORDA, J. DE HEMPTINNE, "The Status and Role of the Victim", in A. CASSESE, P. GAETA, J. R.W.D. JONES, *The Rome Statute of the International Criminal Court: A Commentary,* Oxford, 2002, p. 1391.

goal of national reconciliation, acknowledging that prosecution of individuals responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to restoration and maintenance of peace in the State[107].

Thus, the focus of the *ad hoc* tribunal was once more the prosecution of international crimes and the fight against impunity.

Only later, when the Statute of the International Criminal Court, with its notable innovations in dealing with victim's issues, was approved, the thematic of substantial rights to victims (to a remedy, *in primis*) was debated also in relation to the ICTR: the judges of the court «wholeheartedly empathize[d] with the principle of compensation for victims» but proposed that «the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal»[108] as it would make its work more complex. The proposal of establishing a specialized agency to administer a trust fund was never implemented.

To reach the general public and the broader community of victims not directly involved in the court's work, the ICTR, that had seat in Arusha, Tanzania, and thus was physically distant from the affected communities, committed to a strenuous and victim-centred outreach programme, which acquired prominence along the course of the ICTR's operations[109]. On the contrary, the success of the ICTY's activities in the territory of former Yugoslavia has been criticised: as the court's outreach efforts did not bridge the gap in knowledge, trust, and appreciation of its work at the grass-roots level, anger, disappointment, distrust, and consternation spread among victims' groups toward the tribunal[110].

3.3. The closure phase of the ad hoc international criminal tribunals: the International Residual Mechanism for the Criminal Tribunals.

Although the closure phase of the ICTY and the ICTR overlap the beginning of the activities of the hybrid tribunals, it is worth mentioning the steps that, still nowadays, are

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[107] UN Doc. S/Res/955, 8 November 1994.

[108] UN Doc. S/2000/1198, Letter of 14 December 2000 of the UN Secretary General, addressed to the President of the Security Council, 3 November 2000.

[109] V. PESKIN, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme", in *Journal of International Criminal Justice*, 2005, vol. 3 pp. 950-962.

[110] R. ZACKLIN, "The Failings of the Ad Hoc International Tribunals", in *Journal of International Criminal Justice*, 2004, vol. 2, p. 541-544; P. AKHAVAN, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", in *Human Rights Quarterly*, 1998, vol. 4, p. 541.

leading to the conclusion of any residual function concerning the prosecution of crimes committed in Former Yugoslavia, and Rwanda.

With the adoption of Resolution 1966 on 22 December 2010, under Chapter VII of the Charter of the United Nations, the Security Council established the International Residual Mechanism for Criminal Tribunals ("IRMCT" or "Mechanism"). The Mechanism represented the most decisive step toward the closure of the ICTY and the ICTR, that, at the time, were both still in activity. The ICTR branch began functioning on 1 July 2012 in Arusha, while the ICTY branch opened one year later in The Hague[111]. Following the closure of the ICTR (31 December 2015) and the ICTY (on 31 December 2017), the Mechanism continued to operate as a stand-alone institution[112].

The Mechanism preserves and promotes the legacy of the ICTY and the ICTR, carrying on their jurisdiction and their essential purposes, performing the residual functions of the *ad hoc* tribunals, following their closure[113].

The reasons behind the establishment of such institution rely on the need to accelerate the conclusion of the work of the ICTY and ICTR in the least expensive way possible. The Mechanism has assumed responsibility for*, inter alia*, the enforcement of sentences, administrative review, assignment of cases, review proceedings, appeal proceedings, contempt, requests for revocation of the referral of cases to national jurisdictions, the variation of witness protection measures, access to materials, disclosure, changes in classification of documents and requests for compensation and assignment of counsel.

In line with the provisions of the statutes of the international criminal tribunals, the Mechanism only foresees rights to protection for victims and witnesses and focuses on prosecution and the fight to impunity[114]. At some extent, it stands as a signal to the

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[111] G. ACQUAVIVA, "Was a Residual Mechanism for International Criminal Tribunals Really Necessary?", in *Journal of International Criminal Justice*, 2011, vol. 9, p. 795.

[112] "About", in *International Residual Mechanism for Criminal Tribunals*, available at www.irmct.org [last accessed 9 November 2021].

[113] UN Doc. S/Res/1966, *Resolution on the establishment of the International Residual Mechanism for Criminal Tribunals with Two Branches*, 22 December 2010, paras 1-4. The International Criminal Tribunal for Rwanda terminated its work on 31 December 2015.

[114] IRMCT Statute, article 20; Annex 2, article 5; MICT/1/Rev. 7, Rules of Procedure and Evidence, 4 December 2020, rule 32, rule 75, rule 86; G.M. FRISSO, "The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims", in *Goettingen Journal of International Law*, 2011, vol. 3, p. 1095.

fugitives from the two Tribunals that they cannot outlive justice and that the whole international community will not accept impunity[115].

4. Conclusions.

The horrors of the Second World War provoked a strong reaction in the international community and boosted the development of international law.

First, the foundation of the United Nations was a foremost milestone that provided a forum where states would meet, discuss, and produce international treaties. The Security Council played a fundamental role in promoting the prosecution of international crimes, by exerting its powers under Chapter VII of the UN Charter as to establish the ICTY and the ICTR. Nevertheless, as will be discussed further, the composition of the Security Council itself repeatedly represented an obstacle to the fight against impunity in the following decades[116]. In fact, the opposition of the USA and the Soviet Union in the 'Cold War' provoked a discrepancy within the Security Council, that only after the dissolution of the two blocks managed to unanimously establish new international criminal tribunals after those of Tokyo and Nuremberg.

Second, a new sensibility towards the protection of the civil population strengthen up and reflected in the adoption of several conventions and treaties for the protection of human rights and civilians immediately after the end of the WWII: the Universal Declaration of Human Rights, and the Convention on the Prevention and Punishment of the Crime of Genocide, in 1948; the four 1949 Geneva Conventions of International Humanitarian Law; the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. International relations did not interfere with the development of international agreements, that did not lose *momentum* along the century and the International Covenant on Economic, Social and Cultural Rights was adopted in 1966; the two Additional Protocols to the Geneva Conventions in 1977; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1984. In addition, the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, renowned as the 'Magna Carta for victims' provided a definition of 'victim' that would be central for the development of victims' rights before international

[115] B. LANDALE, H. LLEWELLYN, "The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR", in *International Organizations Law Review*, 2011, vol. 349, p. 355-357.

[116] B. CONFORTI, C. FOCARELLI, *Le Nazioni Unite*, Padova, 2015, p. 81 ff.

tribunals[117]. Notwithstanding, the affirmation of the importance of the protection and reparation of victims and civilian population promoted by those international agreements did not find place in the statutes of the ICTY and the ICTR, that only aimed to prosecute and punish the perpetrators.

Third, the work of the two *ad hoc* tribunal represented a fundamental first experience of international criminal justice after Nuremberg and Tokyo. Their jurisprudence boosted the refinement of international criminal law, but also shed light on some critical aspects of substantive law.

So, a culture of fight against impunity affirmed throughout the XIX Century and gave rise to the strenuous research of the most convenient solution for the prosecution of international crimes: from military tribunals to purely international criminal courts, pursuing the ambitious project of establishing a permanent international criminal tribunal to be the natural judge for the punishment of perpetrators.

The consolidation of international criminal liability and the interest of the international community, thus, represent two historical reasons that eventually conducted to the invention of hybridity. The historical reasons: the situations of the concerned States

III. Historical and political reasons: the situations of the interested States.

In the context of a raising sensibility for the prosecution of international crimes, as discussed above, the historical and political situation of some countries gave terrain to the flourishment of innovative forms of tribunal.

It is helpful to rapidly retrace the history of the situations where the first experiments of internationalised criminal tribunals took place for a better comprehension of the choices related to the structure and functioning of the courts themselves.

1. The Khmer Rouge era in Cambodia.

The Kingdom of Cambodia became independent from France in 1953[118]. Shortly after, King Sihanouk abdicated in favor of his father, Norodom, but remained on the

[117] UN Doc. GA/Res/40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, para 1-3 ; G. DELLA MORTE, "Victims in International Law: An Overview", in G. FORTI, C. MAZZUCATO, A. VISCONTI, S. GIAVAZZI, *Victims and Corporations. Legal Challenges and Empirical Findings*, Milano, 2018, p. 138-139.

[118] For a history of Cambodia, *see* D. CHANDLER, *A History of Cambodia*, London, 2008; D. CHANDLER, *Brother Number One. A Political History of Pol Pot*, London, 1999. For a detailed overview of the events by the ECCC, *see* ECCC, *Prosecutor v. Kaing Guek Eav*, No. 001/18-07-2007/ECCC/TC,

political scene and would always be a figure of foremost importance for Cambodian people.

Within a few years from the declaration of independence, from the end of the '60s, internal tensions spread in the country due to the regime of taxes and expropriations implemented by King Norodom. Cambodian people, who are mostly peasants and, on average, extremely poor, felt oppressed by that regime, and organised movements of rebellion in opposition to the expropriations. In the south-west of the country, a rebel movement began to form and organise: the Khmer Rouge[119]. They were headed by few Cambodians (Pol Pot, Khieu Samphan, Nuon Chea, Ieng Sary, Ieng Tirith) who had the chance to study in Paris and enter in touch with the socialist and communist ideas. They started to dream and project a socialist asset for Cambodia.

In 1970 a coup d'état brought to the government Lon Nol, a military general backed by the USA, and Sihanouk fled to China under the protection of Mao Zedong. The USA had an interest in monitoring Cambodia to ensure a certain degree of security in the area confining with Vietnam, to better control the ongoing conflict in Vietnam. Lon Nol governed Cambodia for five years, during which western culture and economy (namely, capitalism), spread in the country.

The Khmer Rouge gradually gained popularity, particularly in the south-west of the country, using the needs of the population and the highly rural nature of Cambodian society as a leverage to strengthen the opposition against the pro-American government. Meanwhile, the government of Lon Nol, which had been progressively weakening, becoming aware of the advancement of the Khmer Rouge, had abandoned the city, together with all the diplomatic representatives of other countries.

On 17 April 1975, the Khmer Rouge penetrated the Cambodian territory up to Phnom Penh, the capital, and easily entered it as liberators. But the Khmer Rouge, within a few hours, obliged every inhabitant of Phnom Penh to abandon their homes, and relocated the entire citizenship in the villages of the Cambodian countryside. Phnom Penh would remain empty for the next four years.

E188, Trial Chamber, Judgement, 26 July 2010, paras 59-82; *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E313, Trial Chamber, Case 002/01 Judgement, 7 August 2014, paras 80-302, 460-627.

[119] The name "Khmer Rouge" comes from the local language term to say 'Cambodian' ("Khmer"), while "rouge", the French word for "red", refers to the political views of the movement. King Norodom gave this name to the rebel group.

Democratic Kampuchea, the name of Cambodia under the Khmer Rouge, abolished private property, the concept of family, and religion. *Angkar*, "the organisation", provided clothes, food, and housing for everyone; family members were deployed in different villages; monks disrobed and forced to marry. International relations remained interrupted, the country borders closed, and it became impossible for foreign countries to develop an understanding of what was really happening in Cambodia.

For the sake of the purity of the Khmer people, the Khmer Rouge perpetrated dreadful crimes to purge the population: the genocide of the ethnic minority of Vietnamese origins[120]; the genocide of the Cham, the Khmer Muslims[121]; extermination of intellectuals, due to their contact with western culture[122]; extermination of Buddhist monks, for their religious choice[123]; killing of any foreign national who happened to be on the territory of Cambodia[124]; killing, enslavement, torture of those who were considered traitors or spies[125]; rape, and forced marriages[126]; extermination of former officials of the Lon Nol government[127]. From 1977, a second series of purges began, because a certain paranoia spread within the Khmer Rouge high ranks, and trusted cadres replaced suspected officials, who were killed[128]. The whole economic system showed its

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[120] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 4102-4103, 4157-4162, 4237-4239, 4291-4295. The prosecution accused other Khmer Rouge exponents of the genocide of the Khmer Krom, another Vietnamese group, in Case 004, which is now under the ECCC's consideration. Due to the stalemate of the tribunal, though, the substance of the charges may never be assessed. For an opinion of the author over the outcome of the ECCC's stall, *see* M. COGORNO, "The Extraordinary Chambers in the Court of Cambodia in the aftermath of Case 004/2: a foretold 'French leave'?", in *Diritti umani e diritto Internazionale,* 2021, vol. 1, p. 231-243.

[121] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 4200, 4153-4156, 4236, 4288-4290.

[122] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, para. 1348, 1360, 1364.

[123] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 4104-4105, 4163-4165, 4240-4243, 4296-4298.

[124] ECCC, *Prosecutor v. Kaing Guek Eav*, No. 001/18-07-2007/ECCC/TC, E188, Trial Chamber, Judgement, 26 July 2010, paras 209-2010, 386; *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 2076, 2495, 2544.

[125] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, para. 2575.

[126] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 4110-4111, 4170-4172, 4247-4249, 4303-4305.

[127] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, J Case 002/02 udgement, 16 November 2018, paras 4106-4109, 4166-4169, 4244-4246, 4299-4302.

[128] ECCC, *Prosecutor v. Kaing Guek Eav*, No. 001/18-07-2007/ECCC/TC, E188, Trial Chamber, Judgement, 26 July 2010, paras 211; *Prosecutor v. Nuon Chea and Khieu Samphan*, No. 002/19-09-207/ECCC/TC, E465, Trial Chamber, Case 002/02 Judgement, 16 November 2018, paras 4219-4235

weakness. On 25 December 1978, the Vietnamese army entered in Cambodia and, on 7 January 1979, reached and liberated Phnom Penh.

The Khmer Rouge leaders fled in the jungle along the Thai border and Vietnam established the People's Republic of Kampuchea and, in 1985, appointed Hun Sen, a former Khmer Rouge who had fled to Vietnam and come back as a liberator, to the office of Prime Minister. Cambodia remained under Vietnamese occupation until diplomatic and economic pressure from the international community urged the Vietnamese government to implement a series of economic and foreign policy reforms, and to withdraw from Cambodia in September 1989[129].

The United Nations Transitional Authority in Cambodia administrated the country until 1993, when elections established the Royal Cambodian Government (RGC) and confirmed Hun Sen as the Prime Minister[130].

2. The resource war in Sierra Leone.

A sanguineous armed conflict plagued Sierra Leone for over ten years, from 23 March 1991 and 19 January 2002. It started with the attacks by the Revolutionary United Front (RUF), led by Sankoh, a former Corporal of the Army, aiming to overthrow the All People's Congress Party (APC) government headed by Momoh[131]. Only in 1992, the APC was overthrown, and the National Provisional Ruling Council (NPRC) came to power. The first democratically elected government, in 1996, supported by the United Nations, was quickly overthrown by a new force, the Armed Forces Revolutionary Council (AFRC), that governed the country in cooperation with the Sierra Leone Army and the RUF. Nigerian and the ECOWAS Ceasefire Monitoring Group (ECOMOG) military forces restored the regularly elected government of President Kabbah, supported by the ruthless Civil Defense Forces, provoking the invasion of Freetown by the RUF and the AFRC on 6 January 1999, with violent consequences on the population. Only then the government started dialoguing with the rebel groups to negotiate a lasting peace, until the

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[129] T. CLAYTON, "Cambodians and the occupation: responses to and perceptions of the Vietnamese occupation 1979-89", in *South East Asia Research*, 1999, vol. 7, no. 3, p. 343-359.

[130] L. KELLER, "UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace", in *Max Planck Yearbook of United Nations Law*, 2005, vol. 9, p. 127-178; F. FINDLAY, *Cambodia: The Legacy and Lessons of UNTAC*, Oxford, 1995F; FROST, "Cambodia. From UNTAC to Royal Government", in *Southeast Asian Affairs*, 1994, p. 79-101.

[131] A. AYISSI, R. POULTON, Bound to Cooperate: Conflict, Peace and People in Sierra Leone, Geneva, 2000, p. 15-49.

7 July 1999 Peace Agreement between the Government of Sierra Leone and the RUF was signed, but rapidly disrespected[132]. Only in 2000, with the pressure of international actors, the RUF committed to authentic peace negotiations with the UN and the Sierra Leonean government, ultimately signing another ceasefire agreement in November 2000[133].

The nature of the conflict was debated: although it may appear as a "civil war", thus a non-international armed conflict, such classification seems an oversimplification, as, in fact, other actors stepped in the conflict along the decade.

Charles Taylor, leader of the rebel National Patriotic Front of Liberia, backed the RUF along the whole duration of the conflict[134]. He wished to contrast the presence of ECOMOG in Sierra Leone, which implemented peacekeeping operations against his movement[135]. Thus, Taylor was largely pointed out as the hidden maker of the conflict, due to the strong influence that he exerted over Sankoh.

On the other, state actors from all over Africa, along non-African states, backed or contributed to the combats[136]. Nigeria played a fundamental role in the conclusion of the combats by deploying a massive number of peacekeepers on Sierra Leone. Ghaddafi's Libya, and Burkina Faso, provided military training to the RUF combatants[137]. Guinea bolstered the Sierra Leone Army providing additional troops[138].

The United Kingdom also had a relevant interest in the development of the situation in Sierra Leone, its former colony. Several UK citizens resided and worked in the country. In the end, the UK intervened in the conflict to protect its own citizens and, with the assistance of the United Nations' peacekeeping forces and Nigeria's army, significantly contributed to set an end to the conflict. In addition, the United Nations, the African

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[132] *Lomé Agreement*, 7 July 1999, available at www.sierra-leone.org [last accessed 17 november 2021]; A. AYISSI, R. POULTON, *Bound to Cooperate: Conflict, Peace and People in Sierra Leone*, Geneva, 2000, p. 39-44.

[133] *Abuja Ceasefire*, 10 November 2000, available at www.sierra-leone.org [last accessed 17 november 2021].

[134] A. AYISSI, R. POULTON, Bound to Cooperate: Conflict, Peace and People in Sierra Leone, Geneva, 2000, p. 37.

[135] A. AYISSI, R. POULTON, *Bound to Cooperate: Conflict, Peace and People in Sierra Leone*, Geneva, 2000, p. 15; A. ADEBAJO, D. KEEN, "Sierra Leone", in M. BERDAK, S. ECONOMIDES, *United Nations interventionism 1991-2004*, Cambridge, 2007, p. 253.

[136] L. STOVEL, Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone, Cambridge, 2010, p. 83 ff.

[137] A. ADEBAJO, D. KEEN, "Sierra Leone", in M. BERDAK, S. ECONOMIDES, *United Nations interventionism 1991-2004*, Cambridge, 2007, p. 253-260.

[138] L. STOVEL, Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone, Cambridge, 2010, p. 92.

Union, and the USA exerted pressure on the parties to reach an agreement for settling the violence[139].

Beyond the traditional distinction between international and non-international armed conflict, which is relevant for the applicability of the 1949 Geneva Conventions, the conflict in Sierra Leone was a "resource war". Participants in the conflict aspired to gain the monopoly of the extraction of diamonds, titanium, and other valuable resources, of which the country is rich[140]. Taylor wanted unlimited access to the rich agricultural and diamondiferous lands for financing his war operations in Liberia[141]. During the whole conflict, illegal extractions continued, and the resources sold on the illegal market constituted a source of funding for the hostilities[142].

Mass destruction of lives, properties, settlements, and the widespread violation of human rights left the country destroyed and the government was not capable to meet the needs of its citizens, nor to bring justice to those who had been harmed, or to punish the responsible[143].

3. Kosovo: the struggle for the Europe's youngest state.

Kosovo is an independent state since its unilateral declaration of 2008[144]. Its independence resulted from several years of conflict, especially with Serbia, which that long opposed to the surrender that portion of territory. Kosovo was particularly important for Serbia's national identity but, by the late 1980s, 90% of its population was

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[139] A. AYISSI, R. POULTON, Bound to Cooperate: Conflict, Peace and People in Sierra Leone, Geneva, 2000, p. 44-46.

[140] A. ADEBAJO, D. KEEN, "Sierra Leone", in M. BERDAK, S. ECONOMIDES, *United Nations interventionism 1991-2004*, Cambridge, 2007, p. 247-248.

[141] A. AYISSI, R. POULTON, Bound to Cooperate: Conflict, Peace and People in Sierra Leone, Geneva, 2000, p. 16.

[142] M. KALDOR, J. VINCENT, *U.N. Development Programme, Case Study Sierra Leone: Evaluation of UNDP Assistance to Conflict-Affected Countries 6*, 2006, para. 10; R. KEENEN, "When All Ese Fails, Look to The Courts: Using Hybrid Tribunals to Build Judicial Capacity and End Environmental Destruction in Post -Conflict Countries", in *William & Mary Environmental Law and Policy Review*, 2019, vol. 43, n. 3, p. 951-952; A. ADEBAJO, D. KEEN, "Sierra Leone", in M. BERDAK, S. ECONOMIDES, *United Nations interventionism 1991-2004*, Cambridge, 2007, p. 265.

[143] A. AYISSI, R. POULTON, Bound to Cooperate: Conflict, Peace and People in Sierra Leone, Geneva, 2000, p. 16.

[144] Kosovo self-declared independent on 17 February 2008. The legality of the statement was assessed by the International Court of Justice in July 2010, finding that the declaration of independence was not in violation of international law. *See* ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, 22 July 2010.

Albanian[145]. Thus, Kosovar Albanians required greater autonomy and equality in the political and economic system. On the other side, Milosevic perceived this as an invasion from a foreign entity, and Albanians started to be marginalised and repressed within Kosovo, with recurrent violation of their fundamental rights.

The success of Slovenia and Croatia in achieving independence inspired Kosovar Albanians to challenge Serbian authority, and the Kosovo Liberation Army ("KLA") was established. The KLA targeted Serbian police, the military, and civilians.

Serb reprisals shortly followed, and KLA reacted with harsher actions, in an escalation of violence.

Only in 1998 the UN Security Council intervened, adopting Resolution 1160 that condemned the fighting, but it fell on deaf ears. From summer 1998, in fact, Serb forces implemented widespread sweeps in villages in search of KLA 'terrorists'.

Another Security Council Resolution (1199) of 23 September 1998 invocated an immediate ceasefire and threatened the use of the force but remained unheeded: continuous attacks from both Serbs and the KLA took place. Following an ultimatum from the international community, and a failed attempt to negotiate a durable peace, Serbian troops implemented a widespread policy of forced displacement of Kosovar Albanians.

Consequently, NATO intervened with a long-term, wide, aerial bombardment from the night of 24 March 1999, causing significant damages. As a response, the purges of Albanians accelerated.

The Kumanovo Agreement, reached on 9 June 1999 and signed by the KLA, the NATO, and the FRY, sealed the ceasing of hostilities, the end of the NATO bombardment, the gradual withdrawal of FRY forces from Kosovo and the deployment of civil forces by the United Nations[146].

Thus, only when the hostilities terminated, the UN actively intervened, acting upon Chapter VII of the Charter, and decided to deploy international personnel in Kosovo to ensure a smooth transition to peace and stability through an 'interim administration for

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[145] Kosovo was the pivotal centre of Serbian Orthodoxy, and Serbian national identity raised from the Battle of Kosovo, back in 1389, against the Ottoman Empire. The "Kosovo myth" was strongly stressed by Milosevic before the outbreak of violence in former Yugoslavia: S. ECONOMIDES, "Kosovo", in M. BERDAL, S. ECONOMIDES, *United Nations Interventionism 1991-2004*, Cambridge, 2009, p. 218-219.

[146] NATO, *Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, 9 June 1999; UN Doc. S/1999/682, 15 June 1999, Enclosure.

Kosovo'[147]. On this basis, the United Nations Mission in Kosovo (UNMIK) was established and assumed the responsibility for the civilian administration of post-War Kosovo [148].

4. East Timor: a fight for independence.

East Timor is situated on the very last island constituting the archipelagos of Indonesia, and confines with West Timor, which belongs to Indonesia.

The referendum for the independence of East Timor took place on 20 August 1999, after almost 20 years of widespread violence[149]. Indonesian armed forces were assigned to guarantee the smooth and safe execution of the voting.

Nevertheless, when it became clear that an extremely high percentage of citizens not only participated in the consultation, but also voted in favor of independence from Indonesia, the Indonesian armed forces, accompanied by an armed fringe called "partisans", began to perpetrate terrible violence against all those who were considered separatists and supporters of the independence.

Thousands of people got killed in the following two weeks, and hundreds of thousands were forced to leave the eastern part of the island and flee into Indonesian territory, in West Timor, where prison camps had been set up to detain them.

Since the statal apparatus was reduce to ashes, it was not the government of the state to demand international assistance. Scholars point out three main reasons on the basis of which the international community intervened to ensure stability and peace to East Timor from 20 September 1999[150].

First, the conducts of Indonesian forces openly violated an Agreement reached, between the United Nations, Indonesia, and Portugal, for guaranteeing the safe progression of the popular consultation[151]. Second, some members of the international

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[147] UN Doc. SC/Res/1244 (1999), 19 June 1999.

[148] UNMIK is still operational. It coordinates its action with that of the European Union Rule of Law Mission in Kosovo (EULEX), which has operational responsibility in the area of rule of law. *See* unmik.unmissions.org [last accessed 24 November 2021].

[149] M. OTHMAN, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, Berlin, 2005, p. 40-50; S. CHESTERMAN, "East Timor", in M. BERDAL, S. ECONOMIDES, *United Nations Interventionism 1991-2004*, Cambridge, 2009, p. 194 ff.

[150] L. REYDAMS, J. WOUTERS, C. RYNGAERT, *International Prosecutors*, Oxford, 2012, p. 56; A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. 20-21.

[151] UN Doc. A/53/951, S/1999/513, 5 May 1999, Annex I, *Agreement between the Republic of Indonesia and the Portoguese Republic on the question of East Timor*; Annex II, *Agreement regarding the modalities for the popular consultation of the East Timorese through a direct ballot*, Annex III, *East Timpor popular consultation.*

staff of the United Nations deployed to East Timor had fallen victim of the violence. Thus, at some extent, the UN had been directly harmed by the riots[152]. Third, the international community wished to avoid accuses of selectivity after the intervention of NATO in Kosovo, to strengthen, support, and legitimate the declaration of independence of the country[153].

Security Council Resolution 1272 of 25 October 1999, adopted under Chapter VII, established the United Nations Transitional Authority of East Timor

«To establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation of humanitarian assistance, rehabilitation and development assistance; to support capacity-building for self-government; to assist in the establishment of conditions for sustainable development.»[154]

The temporary administration, not subtracted from criticism, lasted until 20 May 2002, when East Timor was declared independent again and UNTAET passed the baton to the UN Mission of Support of East Timor, which implemented some residual peacekeeping functions until its closure in 2004.

5. Conclusions.

Sierra Leone, Cambodia, East Timor, and Kosovo share a past of widespread violence. In the aftermath of the respective conflicts, all the countries were fragmented and the state apparatus weak and unable to deal with the necessity to hold perpetrators accountable for their misconducts.

Consequently, the need to hold perpetrators accountable for their misconducts and to bring justice to victims could not be encountered by the national governments, being either new-born or reduced to ashes by the violence.

We can, thus, partially conclude that the historical reason related to each country's situation that conducted to the establishment of an internationalised criminal jurisdiction is a period of extensive conflict to which the state alone was not able to react.

[152] UN Doc. SC/Res/1264 (1999), 15 September 1999, preamble.
[153] The matter was discussed previously in this study.
[154] UN Doc. SC/Res/1272 (1999), 25 October 1999, preamble.

IV. Institutional and legal reasons.

1. Learning from the past: the expensiveness and the distance of the ICTY and ICTR. A deterrent for new fully international criminal tribunals.

The experience of the two *ad hoc* international tribunals sensibly contributed to the development of international criminal law, as we discussed previously, but it also constituted the first attempt to establish a fully international jurisdiction under the aegis of the United Nations. Thus, the ICTY and the ICTR were also regarded as a sort of parameter to look at when designing new international jurisdictions and a close observation of their functioning left a legacy about the shape that an international jurisdiction should have for better achieve its goals.

In particular, three main aspects impacted upon the choice not to establish further international tribunals in the following years: the costs, the slowness of the proceedings, and the scarce capacity to engage civil population.

The experiences of ICTY and ICTR turned out to be extremely expensive. Financial support for the ICTY mainly came from voluntary contributors being members of the United Nations, in combination with that by specialised agencies[155]. Around 700$ millions sponsored the activities of the ICTY only during its first ten years of operation, while the ICTR consumed about 2$ billion for its functioning, until the closure[156]. At one point, the expenses that the United Nations bore for the international tribunals (over 100$ millions per year) amounted to 15% of the entire UN budget[157]. The ICTY, through an *excusatio non petita, accusatio manifesta*, justifies the excessive costs of its works by comparing them with the core goals of the tribunal:

> « Budget is not small; however, the expense of bringing to justice those most responsible for war crimes and helping strengthen the rule of law in the former Yugoslavia pales in comparison to the cost of the crimes. The lives lost, the communities devastated, the private property ransacked and the cultural monuments and buildings destroyed, as well as the peace-keeping efforts by the international community are incomparably more expensive. Bringing justice and accountability to the former Yugoslavia is an investment in the peace and future of south-eastern Europe. »[158]

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[155] "Support and Donations", available at www.icty.org [last accessed 7 October 2021].

[156] "The Cost of Justice", available at www.icty.org [last accessed 7 October 2021].

[157] S. NOUWEN, 'Hybrid courts' The hybrid category of a new type of international criminal courts", in *Utrectht Law Review*, 2006, Vol. 2, Issue 2, p. 191.

[158] "The Cost of Justice", available at www.icty.org [last accessed 7 October 2021].

Although it is at some extent understandable that guaranteeing the safety and security to the staff and witnesses, deploying personnel on the field for investigations or outreach, offering the due legal aid system to those who cannot afford a counsel, and maintaining international standard of detention for those under such condition do require substantial financing, the courts largely surpassed any prevision of budget.

It may be true that the costs in terms of losses, violence, destruction, and grief is worth consistent expenses to contrast them, but to us it appears that those major expenditures do not necessarily correspond to a better achievement of justice goals. Two factors that contribute to assess the effectiveness of the courts' work rather appear to be the correct conduct of proceedings, and the engagement of the civilian population. But the ICTY and the ICTR seemed critical on both elements.

Both tribunals turned to be sensibly slow in the proceedings.

The ICTR opened 82 cases, against a total of 93 individuals, in nearly 19 years of work; 61 reached a conclusion, a few cases got transferred to national authorities, while some fugitives are still at large[159]. Although the Statute clearly affirmed the right to e tried without undue delay, in fact, the average length of a cases was superior to one year, with some more complex cases requiring several years to reach a conclusion[160]. Individuals under investigations remained in provisional detention for years[161].

Similarly, the ICTY, with indictments against 161 individuals: although the average length of a proceedings amounted to 176 days, the pre-trial phase was often exceptionally long (three years of average provisional detention), and some specific defendants waited multiple years before their case be completed, with grave consequences in terms of fair trial rights, as provided for in the statute[162].

The success of the work of a tribunal should not be evaluated by the final number of convictions, nor by their annual rates, nor by the overall duration of a sole case.

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[159] "The Cases"; "Key Figures of ICTR Cases", March 2021, available at www.unictr.irmct.org [last accessed 7 October 2021].

[160] Statute of the ICTR, article 20; E. MOSE, "Managing Trials", in *A Compendium on the Legacy of the ICTR and the Development of International Law*, 2015, p. 5, available at www.unictr.irmct.org [last accessed 7 October 2021]; P. BESNIER, "Fairness of Proceedings: A Recurring Issue before the ICTR", in *ICTR 20th Anniversary Legacy Conference 2014*, 29 October 2014, p.11-12.

[161] ICTR, *Prosecutor v. Gatete*, Case No. ICTR-00-61, Trial Chamber, Judgement, 31 March 2011, para. 54.

[162] "Key Figures of the Cases", May 2021, available at www.icty.org [last accessed 7 October 2021]; S. FORD, "Ford-Complexity and Efficiency at International Criminal Courts", in *Opinio Juris*, 27 January 2014, available at www.opiniojuris.org [last accessed 7 October 2021]; C. KAMARDI, *Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips*, Berlin, 2009; C. CLINE, "Trial without undue delay: a promise unfulfilled in international criminal courts", in *Brazilian Journal of Public Policy*, 2018, Vol. 8, N. 1, p. 56; Statute of the ICTY, article 20.

International criminal justice, in particular, deals with complex cases focusing on situations of widespread violence, where the role of victim and perpetrator may overlap, where hundreds, if not millions, of witnesses can provide a significant contribution, and where the collection of evidence is not always safe and smooth. Thus, the slowness of the proceedings itself may not necessarily be a critical aspect of the functioning of a tribunal if the respect of the right of the accused is guaranteed[163]. Undue delay in reaching a conclusion, or the small number of cases becomes problematic when it violates the rights of the accused to a fair trial or betrays the original objectives of justice with which the jurisdictional power is invested. The deterrence to the further commission of crimes, the fight against impunity, the affirmation of the rule of law, the certainty of law, were all under threat before the *ad hoc* tribunals due to their slow actioning.

The structure itself of the two tribunals certainly contributed to generate such issue: as the courts had to rely on the cooperation of the states for the arrest and surrender of the suspects, as well as for the enforcement of the sentences, the unwillingness or slowness of the states to do so, transformed them in that 'giant without limbs' with reduced capacity to enhance the quality of its operations[164].

Furthermore, the ICTY and ICTR were also perceived as distant from the population affected by the crimes that the tribunals themselves investigated and prosecuted and the states where these occurred. This distance was twofold – both geographical and in the relationship with the populations interested: the *ad hoc* tribunals have often been pointed out as 'too remote and foreign' to the communities concerned[165].

As recalled previously, the ICTY had its seat in The Hague, in the Netherlands (more than 1.500 km air distance from Sarajevo), while the ICTR worked from Arusha, Tanzania, almost a thousand kilometres away from Kigali, Rwanda's capital city. Distance made it impossible for victims, communities, and other local stakeholders to observe the course of justice, while it is extensive the scholarship upholding that 'justice

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[163] ICTR, *Prosecutor v. Karamera et al.*, Case No. ICTR-98-44-AR73, Appeals Chamber, Decision Regarding Leave to Amend Indictment, 19 December 2003, paras 13-15; *Prosecutor v. Nyramasuhuko et al.*, Case No. ICTR-98-42-A15bis, Appeals Chamber, Decision in the Matter of Proceedings Under Rule 15bis(D), 24 September 2003, para. 24.

[164] Statute of the ICTY, article 29; Statute of the ICTR, articles 26-28; A. CASSESE, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, Vol. 9, p. 13.

[165] S. RUGEGE, A. M. KARIMUNDA, "Domestic Prosecution of International Crimes: The Case of Rwanda", in G. WERLE, L. FERNANDEZ, M. VORMBAUM, *Africa and the International Criminal Court*, Berlin, 2014, p. 82.

must be seen to be done'[166]. Remoteness implies a more difficult reciprocal understanding and further difficulties in managing communities' expectations, with consequent risks fort the perceived legitimacy of the court itself[167].

In addition, the fact that neither the ICTY nor the ICTR foresaw victims' participation, if not in quality of witnesses, drawing from the tradition of *common law* systems, enhanced the obstacles to a strong and meaningful relationship between the civil population and the courts[168].

The sense of ownership of a tribunal by the concerned community may not be essential to the prosecution of international crimes, but it is the basis upon which the international criminal tribunals should have develop their strategies to reach the other goals assigned to them by the funding resolutions, related to the enforcement of peace, rule of law, and reconciliation[169].

All those three aspects considered jointly brought strong criticism to the model of full international criminal tribunal established with the sponsorship of the United Nations, to face specific situations (*ad hoc*) of widespread violence. The experience of the ICTR and ICTY shed light onto aspect of the structure and functioning of the international criminal tribunals that were to be modified in the occasion of further international jurisdictions.

2. The lack of rule of law and the call from the states concerned.

The last institutional reason that contributed to the invention of hybridity was, as partially mentioned above, the serious condition of the rule of law in the concerned States, and their own initiative to call out to the international community for assistance in the prosecution of international crimes.

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[166] B. KOTECHA, "The art of rhetoric: Perceptions of the International Criminal Court and Legalism", in *Leiden Journal of International Law*, 2018, Vol. 31, No. 4, p. 941; Grotius Centre for International Legal Studies, *The role of effective communications in fulfilling the ICC's mandate: challenges, achievements and the way ahead*, The Hague, 2010, p. 1; ICC, Strategic Plan 2013–2017, July 2015, p. 6; ICC, ICC-ASP/5/12, Strategic Plan for Outreach of the International Criminal Court, 29 September 2006, p. 3.

[167] P. MASSIDDA, "Retributive and Resotarive Justice for Victims and Reconciliation: Consideration on the Lubanga Case before the ICC", in *Peace Process Online Review*, 2015, Vol. 1, No. 1, p. 3; M. ELANDER, *Figuring Victims in International Criminal Justice. The Case of the Khmer Rouge Tribunal*, Melbourne, 2018, p. 5.

[168] R. AITALIA, *Diritto Internazionale penale*, Firenze, 2021, p.30-31.

[169] UN Doc. SC/Res/1993/827, 25 May 1993; UN Doc. S/Res/955, 8 November 1994; F. DAME, "The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal", in *Michigan state International Law Review*, 2015, Vol. 24, No. 1. p. 245; S. NOUWEN, "'Hybrid Courts' The hybrid category of a new type of international criminal courts", in *Utrecht Law Review*, 2006, Vol. 2, p. 191. The goals of establishing peace and fostering reconciliation have been previously discussed.

Sierra Leone, Cambodia, Kosovo, and East Timor all faced post-conflict situations of severe disorder and scarce functioning of the state's justice services. East Timor and Kosovo were newly born states, without a proper statal apparatus. Under Indonesian occupation, East Timor was not involved in the administration of justice, thus its citizens had no legal experience; when the UN intervened in September 1999, only sixty people in the state owned a degree in law, but none of them had professional experience in court[170]. UNMIK, given the circumstances, set a goal to establish «an independent, impartial and multi-ethnic judiciary with high standards of competence and professional ability» in Kosovo, where most of the lawyers, who were Serbs, had fled abroad and Kosovars Albanians had been prevented to participate in the administration of justice for a long time[171]. Cambodia had lost the majority of its intellectual, instructed, social class, targeted by the fury of the Khmer Rouge killing plans, who left a country with very a ridiculously small number of trained professionals able to lead effective justice services[172]. Sierra Leone had barely found a precarious balance over which building peace and promoting justice.

Thus, it was unimaginable that the national judiciary could autonomously proceed in the trials of those responsible for mass international crimes. The governments and representatives of the states were fully aware of such lack of rule of law and judiciary strength. Hence, inspired at some extent by the experiences of the ICTY and ICTR[173], with due caution, they decided to introduce international support for their judicial efforts to fight impunity and restore the rule of law in the countries.

On 21 June 1997, Prince Norodom Ranariddh, and Hun Sen, who at the time were respectively the First and the Second Prime Minister of the Government of Cambodia, jointly addressed a letter to the Secretary-General of the United Nations (Kofi Annan), explaining that, since «Cambodia [did] not have the resources or expertise» to bring those

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[170] S. KATZENSTEIN, "Hybrid Tribunals: Searching for Justice in East Timor", in *Harvard Human Rights Journal*, 2003, Vol. 15, p. 254; C. RAGNI, *I tribunal penali internazionalizzati*, Milano, 2012, p.60-65.

[171] UNMIK/PR/4, 28 June 1999; UN Doc. S/1999/779, *Secretary-General report to Security Council, On the Interim Administration Mission in Kosovo*, 12 July 1999, para. 18.

[172] J. CIORCIARI, A. HEINDEL, *Hybrid Justice: The Extraordinary Chambers in the Court of Cambodia*, Ann Arbor, 2014, p. 16.

[173] See the letters addressed to the United Nations Secretary-General, all referring to the experiences of the international criminal tribunals for the Former Yugoslavia and Rwanda: UN Doc. A/51/930, S/1997/488; UN Doc. S/2000/786.

responsible for the atrocity of the Khmer Rouge era and to establish the truth, they «believed it [was] necessary to ask for the assistance of the United Nations»[174].

Using the same phrasing as the Cambodian Ministers, the President of the Republic of Sierra Leone Alhaji Ahmad Tejan Kabbah forwarded a request to the Secretary-General of the UN on 12 June 2000, underlining that the resource war «[had] destroyed the infrastructure, including the legal and judicial infrastructure, of this country» and that there were «gaps in Sierra Leonean criminal law». He requested assistance in establishing «a court that [would] meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil»[175].

Different was the case of Kosovo and East Timor, where the national government was non-existent. The initiatives in those countries were assumed by the transitional administrations led by international actors, working as *de facto* governing power.

The example of Cambodia may have played a role in inspiring a model of justice based upon the cooperation between international and national experts: in fact, the Secretary-General was conducting the negotiations for reaching an agreement with the government of Cambodia when the UNMIK and the UNTAET started operating and searching the best solution to administer justice in the corresponding States.

In 1999, when the United Nations took on the *ad interim* administration of East Timor, the debate over the conduct of trials immediately focused on a system of cooperation between the UN and Indonesia, from which East Timor was still not officially independent[176]. The initiative for the creation of a court in this context could not come directly from the state concerned as it was in such an embryonic condition that it did not yet have its own government, and the UN acted as such. The UN Transitional Administration of East Timor, thus, in dialogue with the Secretary-General, the Security Council, acknowledging that the judicial system was not operating in the area, agreed to recruit international lawyers, to pair with nationals «in view of the knowledge and training

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[174] UN Doc. A/51/930, S/1997/488, Annex, *Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General*, 24 June 1997.

[175] UN Doc. S/2000/786, Annex, *Annex to the letter dated 0 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council*, 10 August 2000. The letter also infers that «Sierra Leone does not have the resources or expertise to conduct trials for such crimes», reproposing the exact wording formulated by Cambodians' Ministers three years before.

[176] UN Doc. S/Res/1272, 25 September 1999; UN Doc. A/54/660, *Situation of human rights in East Timor*, 10 December 1999.

requirements in the domestic judicial system» and to try those responsible for the grave violence committed in the region[177].

Correspondingly, the United Nations Interim Administration in Kosovo, that had the mission to «provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo» and to perform « basic civilian administrative functions where and as long as required», considered Kosovo unable to independently deal with the widespread violations suffered, and opted to approach international experts with local jurists to conduct trials in line with international standards of impartiality and respect for human rights[178].

3. The impracticality of seizing the International Criminal Court.

In the aftermath of the dissolution of the 'Cold War', the 1990s turned out to be the proper time fort the international community to step forward in the path of international prosecution for international crimes. An enthusiastic impetus led to establishment of the ICTY and ICTR and, to bring back the ambitious project of an international permanent criminal tribunal. Thus, in 1994, the International Law Commission succeeded in presenting a first draft statute[179].

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[177] UN Doc. S/1999/1024, *Report of the Secretary-General on the Situation in East Timor*, 4 October 1999, paras 50-56.

[178] UN Doc. S/Res/1244, 10 June 1999, paras 10-11; UN Doc. UNMIK/Reg/1999/77, *UNMIK Regulation No. 1999/7 on Appointment and Removal from Office of Judges and Prosecutors*, 7 September 1999; UN Doc. UNMIK/Reg/1999/6, *UNMIK Regulation No. 1999/6 on Recommendations for the Structure and Administratio of the Judiciary and Prosecution Service*, 7 September 1999.

[179] International Law Commission, *Draft Statute for an International Criminal Court*, submitted during the 46th session of work (2 May-22 July 1994), reprinted in *Yearbook of the International Law Commission*, 1994, vol. 2, p.1. For a detailed reconstruction of the negotiations that brought to the adoption of the final draft of the Statute of the International Criminal Court, *see* M. C. BASSIOUNI, *The legislative history of the International Criminal Court*, Leiden, 2016; F. BENEDETTI, K. BONNEAU, J.L. WASHBURN, *Negotiating the International Criminal Court: New York to Rome 1994-1998*, Leiden, 2014; G. CARLIZZI, G. DELLA MORTE, S. LAURENTI, *La corte penale Internazionale. Problemi e prospettive*, Napoli, 2013; B. FERENCZ, S. E. FRIEDEN, *From Nuremberg to Rome: towards an international criminal court*, Bonn, 1998; M. C. BASSIOUNI, *The Statute of the International Criminal Court: a documentary history*, Ardsley, 1998.

The Statute of the International Criminal Court, in its definitive version, was adopted at the diplomatic conference held in Rome in July 1998[180]. It entered into force on the 1 July 2002, after the ratification by the sixtieth State[181].

The ICC is the first permanent jurisdiction for international crimes and has its seat in The Hague[182]. It features a unique legal basis, as it was created on the basis of an international treaty, signed in the context of an apposite international organisation of States[183].

The ICC Statute was adopted when the Secretary-General of the UN and ambassador David Scheffer were busy negotiating the international assistance to be provided to Cambodia. When the government of Sierra Leone, and the transitional administration of Kosovo and East Timor sought the help of the international community to face violence, states were progressively deponing their ratifications to adhere to the International Criminal Court.

Nevertheless, statutory provisions in terms jurisdiction made it impracticable to consider the newly born ICC as a jurisdiction for those four situations.

The personal jurisdiction of the court is restricted to individuals, reaffirming, and consecrating once for all the international subjectivity of individuals for the commission of international crimes and their criminal liability[184]. The Statute of the ICC also confirmed the irrelevance of immunities[185], and of having acted by order of a superior commander[186].

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[180] UN Doc. A/CONF. 183/9, *Rome Statute of the International Criminal Court*, 17 July 1998, entered into force on 1 July 2002. Hereinafter referred as "ICC Statute" or "Rome Statute". G. DE DONATO, G. MICHELINI, *La Corte Penale Internazionale e il suo Statuto*, in *Questione Giustizia*, 1998, Issue. 4, p. 260 ff. The Rome Statute was adopted with 120 votes in favour, 7 contrary, 21 abstained. On 18 July was open for signatures and immediately adopted by 29 States. As for today, 123 state are Parties to the ICC: the last one to join is Kiribati, in 2019, while Burundi was the first state to withdraw in October 2017, followed by Philippines in March 2019.

[181] ICC, *Rome Statute*, article 126.

[182] ICC, *Rome Statute*, article 1, article 3.

[183] B. CONFORTI, M. IOVANE, *Diritto internazionale*, Napoli, 2021, p. 511.

[184] ICC, *Rome Statute*, article1, articles 25-26. The conviction of an individual by the ICC does not necessarily exclude the liability of the state to which he or she belongs. The crime of aggression, for example, must be committed by a «person in a position effectively to exercise control over or to direct the political and military action of a State» (ICC, *Rome Statute*, article 8*bis*). In such cases, it may result difficult to separate the individual and statal liability, which may overlap. (V. FANCHIOTTI, *La Corte Penale Internazionale. Profili sostanziali e processuali,* Torino, 2014, p. 19 ff. Of the opposite opinion, upholding a neat separation of those two profiles of responsibility, *see* A. TANZI, *Introduzione al diritto penale contemporaneo*, Padova, 2013, p. 322)

[185] ICC, *Rome Statute*, article 27; *see also* UN Doc. A/59/3, 2 December 2004.

[186] ICC, *Rome Statute*, article 28, article 33.

The court has jurisdiction *ratione materiae* over «the most serious crimes of concern of the international community»[187] as defined by articles 6-8*bis* of the Statute: a) genocide, b) crimes against humanity, c) war crimes, d) aggression[188].

The Court can exercise its jurisdiction if the state in which the crime is supposed to have taken place, or the state of the suspect's nationality, ratified the Statute or, although remaining non-Party, expressly accepted the ICC's jurisdiction of the Court for a determined situation[189]. Referral by the Security Council on the basis of Chapter VII or allows prosecution in any State[190].

The temporal jurisdiction of the court posed the main obstacle to seizing the ICC four Cambodia, East Timor, Sierra Leone, and Kosovo: the Court has jurisdiction only on crimes committed after the entry into force of the Rome Statute, on 1 July 2002, or, in case of a later entry of a state in the ICC, for crimes committed after the sixtieth day after the ratification[191].

As discussed before, Cambodia, East Timor, Sierra Leone, and Kosovo, faced serious violence prior to that date[192].

Even though temporal jurisdiction was sufficient to exclude the intervention of the ICC, another ground that made the recourse to the ICC impracticable is the circumstance

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[187] ICC, Rome Statute, preamble.

[188] The definition of genocide reflects that provided by the 1948 UN Convention, article 2.

War crimes are divided in four categories: two related to a context of international armed conflict («Grave breaches of the Geneva Conventions of 12 August 1949» and «Other serious violations of the laws and customs applicable», *see* ICC, *Rome Statute*, article 8, para. 2, lett. a) and b)), and two referred to a context of non-international armed conflict (listed in ICC, *Rome Statute*, article 8, para. 2, lett. c) « Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949» and e) «Other serious violations of the laws and customs applicable in armed conflicts»). The first conviction issued by the ICC regarded crimes against humanity. *See* ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A5, Appeals Chamber, Judgement, 1 December 2014.

The crime of aggression was introduced in the ICC system with RC/Res 6, 11 June 2010. *See* UN Doc. A/Res/29/3314, 14 December 1974, article 1, adopting a definition of aggression.

International jurisprudence has always denied the existence of a hierarchy in gravity among crimes (ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, 21 July 2000, para. 247; ICTY, *Prosecutor v. Tadìc,* IT-91-1-Abis, 26 January 2000, para. 69), although some scholars reckon that genocide is the most serious crime, followed by war crimes, and crimes against humanity (W. SCHABAS, *The International Criminal Court. A commentary on the Rome Statute*, Oxford, 2010, p. 41 ff.)

[189] ICC, *Rome Statute*, article 4, article 12.

[190] ICC, *Rome Statute*, article 13.

[191] ICC, *Rome Statute*, articles 11-12, article 126.

[192] *See* section III of this chapter. The principle of non-retroactivity of the Statute enshrined therein is a consequence of the consensual nature of the Court and of the fact that it is established on the basis of an international treaty and constitutes a major difference with respect to the experience of the *ad hoc* Courts, established *ex officio* by the Security Council specifically to prosecute crimes already committed.

that a state must be «unwilling or unable genuinely to carry out the investigation and prosecution»[193].

The request of the governments of Sierra Leone and Cambodia, and the initiatives taken by the transitional administrations of Kosovo and East Timor, although waving the inability of their states to autonomously prosecute and investigate the situations, did show the will to do so.

V. Conclusions.

The reasons that led to the "invention" of hybridity rely on a combination of factors mixing historical, political, institutional, and legal circumstances.

The development of international criminal justice paved the way to a definitive affirmation of a set of common values and an «interest of the international community» to fight impunity and prosecute those responsible for such crimes that «touchent l'ensemble de la communauté internationale.»[194].

Such supreme interest and shared conscience of the international community manifested through different reactions to mass atrocities: first with the military tribunals, then with the international criminal courts, and finally with the establishment of the International Criminal Court.

The entire development of international criminal law contributed to identifying the problematics connected to each model and inspired the continue research of the ideal structure to conduct international proceedings. The accuses of upholding a 'victor's justice' and of intervening *post-factum* made it necessary to abandon the models of Nuremberg and Tokyo, ICTY and ICTR, preferring a permanent international criminal jurisdiction. The enormous costs connected to the establishment of *ad hoc* institutions led in the same direction.

Furthermore, harsh critiques to the ICTY and ICTR for being distant from the local population and thus unable to catch and manage the expectations of victim's communities stimulated a debate over how better involve them in the judicial proceeding of their concern.

From a different perspectives, some states (Sierra Leone, Cambodia, Kosovo, and East Timor), considered it necessary to seek help at an international level to better respond

[193] ICC, *Rome Statute*, article 17.
[194] ICC, *Rome Statute*, preamble, in English and French.

to the commission of international crimes over their territories, not only because international interests were involved, but also due to the positive legacy in terms capacity building and rule of law that cooperation with international lawyers leave to the domestic judiciary. In addition, the desire to maintain a certain degree of "ownership" of the prosecution of such crimes excluded the *tout court* handing of the jurisdiction over them to the international community.

Thus, negotiations between the national and the international level led to the invention of hybridity. The Extraordinary Chambers in the Court of Cambodia, the Special Court for Sierra Leone, the Regulation 64 Panels, and the Special Panels for Serious Crimes started operating, with peculiar features that will be further discussed.

CHAPTER II

THE FIRST GENERATION OF INTERNATIONALISED CRIMINAL TRIBUNALS

SUMMARY: I. Introduction. – II. Factors of hybridization. – 1. Legal basis. – 2. The composition of the staff. – 2.1. Consequences of the appointment of international and/or local personnel. – 2.2. Structural models of cooperation of international and national personnel within the bench of a hybrid court, between shared responsibility and international guidance. The peculiar structure of the Extraordinary Chambers in the Court of Cambodia. – 3. Applicable law. – 3.1. Substantive Law. – 3.2. Procedural Law – 3.3. Effects. – 4. Jurisdiction. – 4.1. Personal jurisdiction. – 4.2. Territorial jurisdiction. – 4.3. Temporal jurisdiction. – 4.4. Subject Matter Jurisdiction. – 5. Relationship with the national judiciary system and international criminal courts. – 6. Sources of funding. – 7. The seat and the working languages. – 7.1, A seat for everyone: hidden significances of a court's location. – 7.2. Working languages between efficiency and meaningfulness. – 8. Conclusion. – III. The recognition of the first generation of hybrid courts. – 1. Can we even speak of a 'generation'? – 2. Studies excluding the compactness of the phenomenon and proposed alternative classifications. – 3. Studies recognising the existence of a unique category of hybrid courts: a functional perspective. – 4. The importance of being 'first'. – IV. Conclusions.

I. Introduction.

With the invention of a new solution for the prosecution of international crimes in the early 2000s, multiple and deeply different jurisdictions were established.

The Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Regulation 64 Panels, and the Special Panels for Serious Crimes differed under several profiles. Their variety gave life to a large debate over the possibility to gather those experiences together under one label, thus acknowledging the existence of a definition of "hybrid court" or "internationalised criminal tribunal"[1].

The numerous theses presented in such regards will be assessed at the end of this chapter. All scholars developed their opinion by assessing the cases of Cambodia, Sierra Leone, Kosovo, and Timor-Leste. Only some of them, in addition, also included in their study other jurisdictions, mainly identified in the Special Tribunal for Lebanon, the Iraqi High Tribunal, and the Bosnia War Crimes Chambers.

Each of those was unique, due to the peculiar historical, political, and cultural background that characterised the situation[2].

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[1] D. RE, "International Crimes: A Hybrid Future?", in C. EBOE-OSUJI, E. EMESE, *Nigerian Yearbook of International Law 2017*, Cham, 2018.

[2] *See* Chapter I for a quick overview of the background situations in Cambodia, Sierra Leone, East Timor, and Kosovo.

Before illustrating and summing up the various theories over the existence of a unique category of hybrid courts, the first part of the current chapter proceeds to illustrate those characteristics that made them the object of these scholar studies.

To do so, we will introduce the vague definition that is unanimously accepted for the term "hybrid tribunal", and we will introduce the concept of "factor of hybridisation". Subsequently, we will transversally analyse such factors and their application in the cases of the ECCC, SCSL, Regulation 64 Panels, and Special Panels for Serious Crimes.

In the end, we will draw our conclusion over the recognition of the first generation of internationalised criminal tribunals.

II. Factors of hybridization.

The common, unanimously accepted and extremely generic boundary that has been traced around the concept of "internationalised criminal tribunal", with the aim to try to define it, is that of «some mix of local and international meeting in a judicial *forum*»[3].

It is indeed a vague definition, which does not provide a detailed description of the phenomenon of our interest. In substance, it emerges that the experience of hybridity so far corresponds to an ensemble of judicial organs, characterised, at some extent, by the coexistence of domestic and international features[4].

According to such enunciation, potentially any key element constituting a judicial *forum* can be "local", thus rooted in the national system, or "international", hence coming from non-domestic dimension.

The majority of studies over hybridity agrees that the relevant aspects that define a tribunal as "hybrid" and that, hence, constitute that "mix" meeting in a judicial *forum*, can be subdivided in: the legal basis; the composition of the staff, and the structure of the jurisdiction; the applicable law (both material and procedural); the jurisdiction (personal, material, territorial, and temporal); the relationship with the national judicial system, or,

[3] M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in S. WEILL, K. SEELINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 268; M. CHRISTENSEN, A. KIELDGAARD-PEDERSEN, "Competing perceptions of hybrid justice: International v. National in the Extraordinary Chambers in the Courts of Cambodia", in *International Criminal Law Review*, 2018, vol. 18, p. 130. .

[4] E. CIMIOTTA, "Sull'inquadramento giuridico dei tribunali penali misti", in A. ODDENINO, E. RUOZZI, A. VITERBO, F. COSTAMAGNA, L. MOLA, L. POLI, *La funzione giurisdizionale nell'ordinamento internazionale e nell'ordinamento comunitario*, Napoli, 2010, p. 227.

if the case, with other courts with potentially concurrent jurisdiction; the sources of funding; a number of additional, factual, elements, such as the language, and the location.

A judicial *forum* established within a country by a national legal act, hinged into the national judicial system, where national personnel works, applying the national procedural law and the domestic (penal) code, supplied by national funds, and mainly working in the local idiom is a domestic court.

On the opposite edge, an international court is a judicial *forum* established by multiple States or in the context of an international organisation[5], through a source of international law, upheld by a document that defines (or designs) the specific procedure and material law applicable by the judges sitting at the bench, whose nationalities can (or even must) be various, with a jurisdiction that covers situations at different extent not exclusively connected to one country, independent from any national judicial system, not funded by a State, but through independent contributions, and using a plurality of official languages[6]. An example of purely international tribunal is the International Criminal Court[7].

Moving away from those two opposite models, and according to the general definition accepted, hybridity, in other words, is about a judicial activity, taking place in a *forum*, where local and international elements cohabit, with different results, due to correspondently different modulation of the aforementioned factors, in terms of quality and quantity.

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[5] UN, *Charter of the United Nations*, 26 June 1945, article 41.

[6] The definition of international jurisdiction has been long implied. The invention of hybridity posed the necessity to observe such model more carefully as to compare it to mixed courts. Very few are the studies addressing the definition of international court. *See*, among them, R. WOETZEL, *The Nuremberg Trials in International Law*, London, 1962; A. ZAHAR, G. SLUITER, *International Criminal Law – A Critical Introduction*, Oxford, 2008, p. 12; W. SCHABAS, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford, 2012, p. 19; S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals*, Oxford, 2012; A. KJELDGAARD-PEDERSEN, "What Defines an International Criminal Court?: A Critical Assessment of 'the involvement of the International Community' as a Deciding Factor", in *Leiden Journal of International Law*, 2015, vol. 28, p. 113 ff.

[7] The International Criminal Court, with its seat in The Hague, was established by an international treaty (the Rome Statute) within an international organisation purposely established. The personnel are recruited with the precise aim to maintain a variegate and wide representation of nationalities, legal systems. The applicable law – either material and procedural – is appositely designed by the Rome Statute and the Rules of Procedure and Evidence. The jurisdiction of the ICC regards individual, responsible of international crimes, which are of concern of the entire international community (therefore, there is a supra-national interest for prosecuting them), after 1 July 2002. The regulation of territorial jurisdiction is complex and, through the mechanism of referral by the UN Security Council, allows the ICC to expand its power beyond the member States. It is both autonomous, although complementary, to any domestic system, and from the United Nations system. The official working languages are English and French. The ICC receives funding by the States party and other voluntary donors. *See* ICC, *Rome Statute*.

For this reason, we adhere to the theory of Hobbs and Williams, who proposed to view each hybrid tribunal as residing on a "multi-axis *spectrum*" with fully internationalised and fully domestic at the extremes[8].

According to such doctrine, hybridity can be represented as a sliding scale over which a single tribunal finds its position between the fully domestic model and the fully international model.

The position over such imaginary line, thus the distance from the two edges, results as depending on a plurality of factors, being, as mentioned above, in the functional characteristics of the court itself. A hybrid court can tend to a purely international model or to a domestic one, depending on its characteristics, the quality, and the quantity of those 'factors of hybridization' incorporated in a specific court.

We define such elements as 'factors of hybridization'. Each of them can contribute to outline every tribunal and help classify it.

Since scholarship is abundant in regard to each hybrid court, describing its characteristics and functioning[9], as well as it is in regard to each element constituting the court[10], the present chapter will rather briefly assess each "factor of hybridization"

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[8] S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals*, Oxford, 2012, p. 249-250; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, no. 2; M. KERSTEN, K. AINLEY, "Hybridization – A spectrum o creative possibilities", in *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 267-268.

[9] For the Extraordinary Chambers in the Courts of Cambodia: M. VIANNEY-LIAUD, T. RENOUX, M. LEMONDE, *La juridiction internationalisée des Chambres extraordinaires au sein des tribunaux cambodgiens*, Bayonne, 2019 ; N. JORGESNSEN, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia*, Cheltenham, 2018; S. M. MEISENBER, I. STEGMILLER, *The Extraordinary Chambers in the Courts of Cambodia: assessing their contribution to international criminal law*, The Hague, 2016; J. CIORCIARI, A. HEINDEL, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, Ann Arbor, 2014.

For the Special Court for Sierra Leone: C. JALLOH, *The legal legacy of the Special Court for Sierra Leone*, Cambridge, 2020; C. JALLOH, *The Sierra Leone Special Court and Its Legacy: the impact for Africa and international criminal law*, New York, 2014; International Crisis Group, *The Special Court for Sierra Leone: promises and pitfalls of a "new model"*, Freetown, 2003.

For the Special Panels for Serious Crimes of East Timor: Judicial System Monitoring Programme, *Special Panels for Serious Crimes*, Dili, 2005; A. KLIP, G. SLUITER, *Timor-Leste Special Panels for Serious Crimes: 2003-2005*, Antwerp, 2009; International Center for Transitional Justice, *Etude de cas de tribunaux hybrides: le processus relative aux crimes graves au Timor-Leste en rétrospective*, New York, 2006; W. MARIEKE, C. REIGER, The Serious Crimes Process in East Timor: In Retrospect, New York,2006.

For the Regulation 64 Panels in Kosovo: W. VAN DER WOLF, S. FENNEL, C. TOFAN, *The UNMIK and Kosovar Court system: facts, cases and materials*, The Hague, 2011; G. SERRA, *Le corti penali "ibride": verso una quarta generazione di tribunali internazionali penali? Il caso del Kosovo*, Napoli, 2007.

[10] C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004; S. WILLIAMS, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues*, OXFORD, 2012; E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009; A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015; G. SERRA, *Le corti penali "ibride": verso una quarta generazione di tribunali internazionali penali? Il caso del Kosovo*,

transversally, critically assessing, on the basis of past experiences, how the choice of each of them has an impact on the operations of the jurisdiction. The aim, in fact, is that of rapidly observing the different possible models that modern hybrid court may inherit from the first tribunals of such kind.

1. Legal basis.

The legal basis of a jurisdiction is chronologically the first "factor of hybridisation" that courts' designers must define when deciding to set up a hybrid tribunal. It corresponds to the source(s) of law establishing the jurisdiction.

Such choice has a deep meaning for shaping the hybrid court, which explains why the majority of scholars that have been observing hybrid courts in search of a compactness of the phenomenon, dedicated extensive reflections to the element of the legal basis[11]. This does not come as a surprise, if we think that identifying the legal basis of a jurisdiction help identify its legal nature. In addition, it helps understand the relationships between the court and the national or international level, the sources of power of the tribunal's activity, the possibility to impact over the domestic system, or to cooperate with other actors.

Academic studies widely discussed the further legal basis that allowed the negotiators of the ECCC, SCSL, to legitimately sit at the table of negotiations, or UNTAET and UNMIK officers to elaborate the regulations setting up the panels. It is, though, beyond the scope of this study to question the legitimacy for a UN Transitional Administration to emanate legal acts, or for the Security Council to require the Secretary-General to discuss with national governments[12].

This overview of feasible options for hybridizing a court through its legal basis rather aims to sum up the possible choices available for future courts and the correspondent relationships of power and cooperation descending from them.

Napoli, 2007; C. RAGNI, *I tribunali penali internazionalizzati. Fondamento, giurisdizione e diritto applicabile*, Milano, 2012; H. ASCENSIO, *Les juridictions pénales internationalisées*: *Cambodge, Kosovo, Sierra Leone, Timor Leste*, Paris, 2006; M. BOHLANDER, R. WINTER, "Internationalisierte Strafgerichte auf nationaler Ebene; Kosovo, Kambodscha, Sierra Leone und Timor-Leste", in S. KIRSCH, *Internationale Strafgerichtshofe*, 2005, p. 261 ff..

[11] E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009, p. 331 ff.; C. RAGNI, *I tribunali penali internazionalizzati: fondamento, giurisdizione e diritto applicabile*, Milano, 2012, p. 90 ff; S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Oxford, 2012.

[12] A. KANU, G. TORTORA, "The legal basis of the Special Court for Sierra Leone", in *Chinese Journal of International Law*, 2004, vol. 3, p. 515 ff.

Sources of international law, such as treaties, agreements, resolutions of the UN Security Council, have been the legal basis for a number of tribunals, either specialised in criminal law such as the ICTR, the ICTY, and the ICC, either dealing with other fields of justice, like ICJ, the European Union Court of Justice, the European Court of Human Rights, the American Court of Human Rights[13].

On the other hand, domestic tribunals have their roots in national legislation, as the judicial power is one of the traditional expressions of the State sovereignty.

Hybrid courts, so far, varied greatly regarding such "factor of hybridisation", that made their position in the national legal system quite varied.

The Extraordinary Chambers in the court of Cambodia demonstrate that a hybrid tribunal can be established on the basis of a national act. The ECCC were instituted by the law promulgated by the Cambodian National Assembly on 10 August 2001, on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea[14], which was eventually incorporated and emended in the 6 June 2003 Agreement between the Royal Government of Cambodia and the United Nations[15]. It was further amended by another national law in 2004[16].

The ECCC, thus, have a fully domestic legal basis, constituted by a National Assembly law. The participation of the United Nations to the drafting phase had the only effect to define shared terms of Agreement to be introduced, through amendments, in the national legislation. The Agreement has the only function to direct the adoption of certain

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[13] UN, *Charter of the United Nations*, 1945, article 7, articles 92-96; EU, *European Union Treaty*, article 19; EU, *Treaty on the functioning of the EU,* articles 251-281; ECHR, *European Convention of Human Rights*, articles 19-51; ACHR, *American Convention of Human Rights*, article 33.

[14] Cambodia, Reach Kram No. NS/RKM/0801/12.

[15] UN Treaty No. 41723. *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*, 6 June 2003 ('ECC Agreement'); UN Doc. A/58/617, *Report of the Secretary-General on the Khmer Rouge Trials*, 3 December 2003. Although the development of the negotiations definitely represented a ringing bell of alarm of the unstable ground on which the ECCC was going to be built, many scholars agree that the outcome resulted was the only and the best possible considering the conditions and the positions of the RGC and the UN: D. ORENTLICHER, "'Worth the Effort'? Assessing the Khmer Rouge Tribunal", in *Journal of International Criminal Justice*, 2020, p. 25-26; D. CIORCIARI, A. HEINDEL, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, Ann Arbor, 2014, p. 39.

[16] Cambodia, Reach Kram No. NS/RKM/1004/006, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea*, 27 October 2004, hereinafter also referred to as "ECCC Law". On 16 November 2004, the Government of Cambodia notified the United Nations of the ratification of the Agreement. The Agreement entered into force, on 29 April 2005. UN Doc. A/60/565, *Report of the Secretary-General on Khmer Rouge trials*, 25 November 2005; UN Doc. A/59/432/Add.1, *Report of the Secretary-General on Khmer Rouge trials*, 29 November 2004; ECCC, *ECCC Agreement*, article 31.

norms within the national legal system and do not seem to represent the legal basis of the ECCC. Some authors, though, theorised that the legal basis of the ECCC is rather the combination of both the ECCC Law and the Agreement, as «without *both* the *UN Agreement* and the *ECCC Law*, the ECCC would not have come into existence in its hybrid form.»[17]

An accord, nonetheless, can still be the only legal basis for a hybrid court. Such is the case of the Special Court for Sierra Leone, instituted by the «Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000»[18]. The Agreement was signed on 16 January 2002 and ratified in March of the same year, as it was required by Sierra Leonean Constitution for any international treaty to bind the State[19]. In this case, differently from the ECCC, ratification did not have the purpose to incorporate the provision of the international agreement within the national legislation, but to allow it to produce its effects properly: this is the reason why the 2002 Agreement remains the sole legal basis for the SCSL, as was confirmed by the court's jurisprudence, that themselves recognised that they had a high degree of internationalisation[20].

Nevertheless, although the court's jurisprudence, drawing from its international legal basis, declares to be a «truly international» tribunal, we agree with Cimiotta in stating that the SCSL still represent an internationalised criminal court – as its acts produced effects on the Sierra Leonean system, national police force was at the court's disposal, and other States, being third parties to the treaty, were not obliged to cooperate with it. Sierra Leone, still, featured the most internationally oriented legal basis possible for a hybrid court.

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[17] L. O'NEILL, G. SLUITER, "The Right to Appeal a Judgement of the Extraordinary Chambers in the Courts of Cambodia", in *Melbourne Journal of International Law*, 2009, vol. 10.

[18] SCSL, *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002. Hereinafter also referred to as "SCSL Agreement" or simply "Agreement". *See also* SCSL, *Statute*, Preamble. J. CERONE, "The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice", in *ILSA Journal of International and Comparative Law*, 2002, vol. 8, p. 381.

[19] Sierra Leone, *Constitution*, 1991, section 40: «Provided that any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament.»

[20] SCSL, *Prosecutor v.* Taylor, Case No. SCSL-03-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, para. 41: «The Special Court is established by treaty». *See* SCSL, *Prosecutor v. Kallon*, Case No. SCSL-04-15-AR72, *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72, *Prosecutor v. Kamara*, Case No. SCSL-04-16-AR72, Appeals Chamber, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 55.

The Pre-Trial Chamber of the ECCC itself drew conclusions about the nature of the tribunal from the legal basis that founded it, reasoning that since « A judge of the ECCC is selected upon the basis of internationally agree criteria and takes separate and distinct judicial oath» the tribunal « is a new internationalised court»[21].

Differently, Regulation 64 Panes and the Special Panels for East Timor were established upon regulations adopted by their respective transitional administration, charged by the United Nations to govern those countries *pro tempore*[22]. Their establishment was not negotiated with the State concerned, as a legitimate government was absent at the time. The United Nations Transitional Administration, at some extent, in their capacity of *de facto* government, promulgating domestic law[23].

While an agreement is plainly an act of international law, different and unclear appears the nature of such regulations. A part of the doctrine recognises them a mixed nature, both of domestic and international law. The International Court of Justice, in its Advisory Opinion on the accordance with international law of the Kosovo declaration of independence, assessed the issue, and concluded that UNMIK Regulations form « part of the international law»[24]. The ICJ, further affirmed that «the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by Resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international»[25].

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[21] *ECCC, Co-Prosecutors v. Nuon Chea and Khieu Samphan,* Case 002, C5/45, Pre -Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, paras 17-18; *ECCC, Co-Prosecutors v. Ieng Tirith, Ieng Sary, Khieu Samphan*, Case 002, D97/14/15, Pre-Trial Chamber, Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 30, para. 48; *ECCC, Co-Prosecutors v. Ieng Sary*, Case 002, D427/1/30, 11 April 2011, Decision on Ieng Sary's Appeal against the Closing Order, para. 215, paras 221-222.

[22] UNMIK/Reg/2000/6, *Regulation No. 2000/6 on the appointment and removal from office of international judges and international prosecutors*, 15 February 2000; UNMIK/Reg/2000/34, *Amending UNMIK Regulation No. 2000/6 of 15 February 2000 on the Appointment and Removal from Office of International Judges and International Prosecutors*, 27 May 2000; UNMIK/Reg/2000/64, *Regulation No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue*, 15 December 2000. Later on, UNMIK/Reg/2001/2, *Amending UNMIK Regulation No. 2000/6, As Amended, On the Appointment and Removal from Office of International Judges and International Prosecutors*, 12 January 2001 further amended the first regulation. The initial project was that of establishing a jurisdiction similar to that of Cambodia and Sierra Leone, named Kosovo War Ethnic Crimes Court, but hostilities among ethnicities made it impossible to gather together a mixed bench.

[23] S. NOUWEN, "'Hybrid Courts' – The hybrid category of a new type of international crimes court", in *Utrecht Law Review*, 2006.

[24] ICJ, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, para. 93.

[25] ICJ, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, para. 88

The legal basis of UNTAET and UNMIK, thus, appears hybrid in that it is provided by international actors, but, on the basis of their power to act ad the administrators of the countries, produces its effects exclusively in the context of the related national legal system.

It is, on the other end, disputable the possibility of founding a hybrid court on a unilateral initiative of the international community. We believe that jurisdiction established on the basis of a fully international act, *i.e.,* upon Chapter VII of the UN Charter, cannot in principle defined as hybrids[26].

The choice of the legal basis, although extremely punctual to define the nature of the jurisdiction, in sum, does not affect greatly the powers assigned to the tribunal itself and its field of action: if it is an international agreement, a treaty, it only binds the contracting parties[27], and the tribunal does not have the power to force third parties to cooperate (and that may be needed for extradite fugitives, for executing sentences or orders, or for collecting evidence); even more restrictive is the case of a legal basis constituted by an act of domestic law, exclusively producing effects inside the domestic legal system; the same result, is reached by basing the jurisdiction over regulations[28].

2. The composition of the staff.

A hybrid tribunal can be staffed by only local personnel, only international personnel, or by both components.

The mixed composition of the court's staff is a feature that several specialists depict as central (although not autonomously sufficient) for labelling a hybrid court as such[29].

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[26] This is why we exclude that the Special Tribunal for Lebanon was a hybrid court. Of the same opinion appears to be

[27] UN, Treaty Series, *Vienna Convention on the Law of The Treaties*, 23 May 1969, article 34.

[28] C. RAGNI, *I tribunali penali internazionalizzati: fondamento, giurisdizione e diritto applicabile*, Milano, 2012, p. 144; D. JACOBS, "Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo", in *Leiden Journal of International Law*, 2011, vol. 24, issue 2, p. 331; D. JACOBS, "International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion Of 22 July 2010", in *International and Comparative Law Quarterly*, 2011, vol. 60, issue 3, p. 799 ff.

[29] C. ROMANO, "The Judges and Prosecutor of Internationalized Criminal Courts and Tribunals", in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, p. 239. Romano states that the mixed composition of the bench is not enough to define a court as hybrid due to some similar national practices in the Commonwealth. S. WILLIAMS, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues*, Oxford, 2012, p. 204: Williams considers this factor of hybridization as «[p]erhaps the most clearly defining feature of a hybrid or internationalised tribunal». Of a different opinion is Nouwen, who affirmed that the compresence of local and foreign judges in the bench is the «only defining commonality» of hybrid tribunals: S. NOUWEN, "'Hybrid courts': The Hybrid Category of a New Type of International Crimes

Indeed, all hybrid tribunals established in the early 2000s benefitted of the cooperation of foreign and national experts, and the presence of both components impacted on the work of each court. While Sierra Leone, Cambodia, Kosovo, and East Timor all opted for a mixed composition of the court, as there is not a unique definition of what a mixed tribunal is, it is not a necessary scheme to implement for having one work. In that case, the composition of the court would be entirely international or entirely national.

As it will be illustrated more extensively further in this study, for example, the Kosovo Specialist Chambers did not adopt this "factor of hybridization" and maintained a bench staffed by only foreign jurists. It is a highly criticized choice, which brought serious lack of legitimacy to the court[30].

The choice to recruit exclusively domestic judges has also been disregarded by courts' designers so far. Actually, UNMIK had initially implemented a system where additional international judges could be appointed within the existent judicial system, with «the authority and responsibility to perform the function of their office»[31]. Nevertheless, international judges were a small minority and could not perform as guarantors of impartiality and independence[32]. Criticism over the fairness of proceedings were countless, thus, UNMIK, « for the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice», amended the system by introducing Regulation 64 Panels as described above.

Such brief experience demonstrated that the possibility to appoint only national judges imply the good functioning of the judicial system, its uncontested independence and fairness, and trust by the interested parties.

Courts", in *Utrecht Law Review*, 2006, vol. 2, issue 2, p. 213. *See also* L. DICKINSON, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, 2003, vol. 37, p. 1059 ff; E. R. HIGONNET, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform", in *Arizona Journal of International and Comparative Law*, 2006, vol. 23, n. 2, p. 356.

[30] A. TRIGOSO, "The Kosovo Specialist Chambers: in Need of Local Legitimacy", in *OpinioJuris*, 8 June 2020, available at www.opiniojuris.org [last accessed 4 November 2021].

[31] UNMIK/Reg/2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, 15 February 2000, section 1; UNMIK/Reg/2001/2, *Amending UNIMIK Regulation No. 2000/6, On the Appointment and Removal from Office of International Judges and International Prosecutors*, 12 January 2001, section 1; UNMIK/Reg/2000/34, *Amending UNIMIK Regulation No. 2000/6, On the Appointment and Removal from Office of International Judges and International Prosecutors*, 27 May 2000, section 1.

[32] UNMIK/Reg/2000/57, *Amending UNIMIK Regulation No. 1999/7, On Appointment and Removal from Office of Judges and Prosecutors*, 6 October 2000, section 2.

2.1. Consequences of the appointment of international and/or local personnel.

The inclusion of international personnel (not only judges, but also prosecutors, lawyers, and other experts), within a hybrid court's organs, greatly influences the functioning of the court, its legacy to the concerned State, and the perception that observers and stakeholders develop about it.

First, and mainly in the case that foreign judges sit in the bench, it allows to augment the (actual or, at least, perceived) guarantees that international standards of fair trials are respected along the proceedings[33]. International judges, in fact, are appointed for their high qualifications and as persons of distinguished moral integrity: consequently, they have the necessary expertise and character to maintain and implement those international standards required for the conduct of proceedings.

Second, it enhances the perception among the courts' observers and local communities of independence and impartiality, which eventually translate into legitimacy towards the tribunal[34]. Foreign judges do not represent any local interest and have no connection with the country concerned, and so they guarantee that they do not pursue justice in the name of any party. This is particularly meaningful in those countries that experience a deep disruption of the rule of law and serious misfunctioning of the judiciary due to the pressures by political or military groups. As a result, independence and impartiality bring legitimacy fort the court, in the sense that both the international community and local actors acknowledge that its working is due – legitimacy and bottom-up support can consequently turn into funding and cooperation with the court.

Third, the presence of international personnel (especially magistrates and prosecutors), in addition, re-affirms a connection of the court's mandate to a supranational interest for the prosecution of horrendous crimes. It reminds that making justice is something non only of local interest, but it is an urgent matter for the whole humankind[35]. It also remarks the condemnation of such acts by the entire humanity, strengthening the deterrent effect of the proceedings and the fight against impunity.

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[33] W. BETTS, S. CARLSON, G. GISVOLD, "The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law", in *Michigan Journal of International Law*, 2001, p. 119; L. DICKINSON, "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals", in *Denver Journal of International Law and Policy*, 2002, vol. 31, n.1, p. 29.

[34] L. DICKINSON, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, 2002, vol. 37, p. 1065-1068; H. HOBBS, "Hybrid Tribunals ant the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, n. 2, p. 485 ff.

[35] H. HOBBS, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol 30, issue 1, p. 195.

Fourth, the presence of international experts working alongside local officers contributes to fulfil that capacity gap that was one of the reasons for which the international community was involved in the construction of hybridity. Foreign personnel, by tightly cooperating with their national colleagues in their work, or by providing them with special training sessions, make their expertise available and transmitted to the local judiciary as a legacy[36].

Fifth, and last, all the effects just explained, together, contribute to the issue of high-quality decisions, duly developed and motivated, and contributing to the development of international criminal law[37].

On the other hand, the presence of national personnel in the organs of a hybrid court helps maintain a significant connection to the local dimension.

First, the appointment of local judges and operators reduce the risk for the tribunal of being singled out as the bearer of a sort of "legal colonialism" or "imperialism" of the western judicial tradition and practice over local habits[38]. Such critics have long accompanied international criminal tribunals and represent a threat to the widest possible prosecution of *crimina juris gentium* in the international context, leading several (developing) countries to refrain from shared mechanisms of international criminal justice[39]. In particular, on this ground, Burundi was the first State to withdraw from the Rome Statute, and other African States have been repeatedly menacing the ICC with a mass withdrawal if prosecution strategies would continue direct only against their continent[40].

Therefore, the presence of local judges ensures that domestic participation be visible and perceived, while they also contribute to develop a sense of "ownership" by

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[36] L. DICKINSON, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, 2002, vol. 37, p. 1069-1070; L. DICKINSON, "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals", in *Denver Journal of International Law and Policy*, 2002, vol. 31, n.1, p. 37-39.

[37] OSCE, *Kosovo's War Crimes Trials: A Review*, 2002, p. 37. A counterproof of this are the decisions and considerations that have been lately issued by the ECCC: the PTC national judges reasonings are often summary, poor, and thus hardly credible. ECCC, *Prosecutor v. Ao An*, Case 004/2, D359/24, D360/33, PTC, Considerations on Appeals against Closing Orders, 19 December 2019.

[38] L. DICKINSON, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, 2002, vol. 37, p. 1070.

[39] P. LABUDA, "The International Criminal Court and Perceptions of Sovereignty, Colonialism, and Pan-African Solidarity", in *African Yearbook of International Law*, 2014, vol. 20, p. 289 ff; C. JALLOH, "Regionalizing international criminal law?", in *International Criminal Law Review*, 2009, vol. 9, n. 3, p. 445 ff.

[40] M. NEL, V. SIBIYA, "Withdrawal from the International Criminal Court: Does Africa have an alternative?", in *African Journal of Conflict Resolution*, 2017, vol. 17, n. 1, p. 99; United Nations, *Rome Statute of the International Criminal Court, Rome, 17 July 1998, Burundi: Withdrawal*, 28 October 2016.

local communities towards the court, which can further turn into perceived legitimacy of its work[41].

National personnel, furthermore, play a precious role in assisting international operators to better understand local culture, the national judicial practice, the social and political background, and how to effectively communicate and engage with local actors[42]. Domestic investigators may pose better questions to witnesses if they deeply connect to local environment, and victims may feel sensibly more at ease when assisted by somebody who share their background.

The combination of international and national staff, at various extent, thus, guarantees such a series of positive side-effects to the classic operations of the courts.

2.2. Structural models of cooperation of international and national personnel within the bench of a hybrid court, between shared responsibility and international guidance. The peculiar structure of the Extraordinary Chambers in the Court of Cambodia.

As mentioned previously, all hybrid courts so far have chosen to combine international and local experts in their structure, in particular in the composition of the Chambers. While the exact balance of national and international diverged in each single tribunal, we can, yet recognize two distinguished shades of such compresence, on the basis of the relationship and powers recognised respectively to the international and national officers.

The first model, that of a "shared responsibility", is based on the parity of arms among the two components. Local and international judges sitting together at the bench are entitled the same power and their vote has the same weight in their deliberation. National and foreign lawyers jointly assist the defendants. Even prosecutorial initiative may be equally shared.

This is the case of the Special Panels for Serious Crimes in East Timor, each of which was composed by three judges (two international, one national), or, in cases of special gravity, by five judges, (three foreigners, two locals)[43]. Their appointment was

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[41] A. TRIGOSO, "The Kosovo Specialist Chambers: in Need of Local Legitimacy", in *OpinioJuris*, 8 June 2020, available at www.opiniojuris.org [last accessed 4 November 2021] demonstrates that when national judges do not sit in the bench, serious legitimacy concerns may rise among local communities.

[42] L. DICKINSON, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review*, 2002, vol. 37, p. 1070.

[43] UNTAET/Reg/2000/15, *On the Establishment of Panels with Exclusive Jurisdiction over serious criminal offences*, 6 June 2000, section 22.2.

remitted to the autonomous initiative and choice of the Transitional Administration, regardless of any consultation of the national (we must say, barely existing) magistracy.

Every judge expressed a vote, that all had the same weight over the decision. Deliberations were adopted by a majority (hence, two out of three votes or three out of five)[44]. The rule of majority applied to such combination of the bench played a role in impeding the East-Timorese judges to act alone, while, on the contrary, allowed international experts to do so. Even thought the responsibility of a decision was shared, the majority was a guarantee of a fair conduct of proceedings even in a context where the condition of the national judiciary was deeply compromised after the violence, and the qualification of national personnel minimal. Thus, the SPSC opted for a more internationalising "factor of hybridisation" to this extent.

It is also the case of the Special Court for Sierra Leone, which, nonetheless, took the greatest distance from a pre-fixed model of balancing national and international in the bench. In fact, although some judges were appointed by the Secretary-General of the United Nations, and some by the Government of Sierra Leone, no requirements in term of nationality were contemplated by the Statute: along the years, then, the Government of Sierra Leone nominated also foreign experts, making the Chambers characterised by a major international component[45]. Thus, under such aspect, the SCSL resulted as the most internationalised hybrid court. The Prosecution, instead, was characterised by the necessary cooperation of national and international: while the Prosecutor was appointed by the Secretary-General, he or she was assisted by a «Sierra Leonean Deputy Prosecutor»[46].

The Extraordinary Chambers in the Courts of Cambodia belong to this model, but their structure is unique and make them an exquisite example of a careful balance between national and international components. Such system, which was designed as a result of the strenuous negotiations to set up the tribunal, positions the court exactly mid-way between the two edges of the range of this factor of "hybridisation"[47]. It also caused

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[44] UNTAET/Reg/2000/11, *On the organization of Courts in East Timor*, 6 March 2000, section 9, section 15.

[45] SCSL, *Statute*, articles 12-13; SCSL, *Agreement*, article 2.

[46] SCSL, *Statute*, article 15; SCSL, *Agreement*, article 3.

[47] The government of Cambodia strongly desired to maintain a strict control over the development of proceedings and prosecutorial strategies. The United Nations, on the other side, were concerned that the tribunal would suffer of strong political pressure and insisted to counterbalance the power given to national judges and prosecutor. For a detailed overview of the negotiations leading to the establishment of the ECCC, *see* A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. 32-45.

severe problems to the work of the ECCC, generating a total stalemate that paralysed the initiatives of the international components and substantially led to the termination of all cases[48]. Every organ of the tribunal is made of two components: one international and one national, and the power assigned to each component respond to the aim to respect the equilibrium between the two[49].

The Pre-Trial Chamber (PTC), the Trial Chamber (TC) and the Supreme Court Chamber (SCC) are composed by a majority of Cambodian judges – three in the formers, four sitting in the latter – alongside a minority of international judges: two serving in the PTC and the TC, three in the SCC[50].

Although the judges should seek the unanimity in their decision, for the case this is not possible, a super majority applies: an affirmative vote of at least four judges is required in the PTC and TC, while at least five judges must uphold a decision of the Supreme Court[51]. This mechanism allows that every deliberation is jointly assumed by the two sides: at least one national judge, or two international judges, must agree with their counterpart for the decision to be effective. It implicitly served as a form of mutual control between the international community and the government of Cambodia.

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[48] ECCC, *Prosecutor v. Yim Tith*, Case 004, Doc. 2/1/1/1, SCC, Decision on ICP's appeal of the Pre-Trial Chamber's failure to send case 004 to trial as required by the ECCC Legal Framework, 28 December 2021; ECCC, *Prosecutor v. Meas Muth*, Case 003, Doc. 3/1/1/1, SCC, Decision on ICP's appeal of the PTC's failure to send case 003 to trial as required by the ECCC Legal Framework, 17 December 2021; ECCC, *Prosecutor v. Ao An*, Case 004/2, Doc. 1/1/2, SCC, Decision on ICP's immediate appeal of the Trial Chamber's effective termination of Case 004/2, 10 August 2020; Open Society Justice Initiative, *Dead End at Cambodia's Khmer Rouge Tribunal: Nex Steps for the UN*, New York, 2020; Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Deadlock Continues in Ao An Case*, New York, 2020; M. COGORNO, "The Extraordinary Chambers in the Courts of Cambodia in the aftermath of Case 004/2: a foretold 'French leave?'", in *Diritti Umani e Diritto Internazionale*, 2021, vol. 1; N. NAIDU, S. WILLIAMS, "The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia", in *Journal of International Criminal Justice*, 2020, p. 1-24; D. ORENTLICHER, "'Worth the Effort'? Assessing the Khmer Rouge Tribunal", *ibid.*, 15 June 2020, p. 7.

[49] ECCC, C5/45, *Prosecutor v. Kaing Guek Eav alias "Duch"*, Case 001, Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order, 3 December 2007, para. 18.

[50] ECCC, *ECCC Law*, article 9 new; ECCC, *ECCC Agreement*, article 3. The procedure of selection and appointment of judges is also symptomatic in defining the degree of internationalisation of a tribunal, and sheds light on the relationship between the court and the national domestic system. The ECCC, though, enhanced the vicinity of international judges to the local system through the rule that all the judges are nominated by the Magistracy, and all the lawyers must be enrolled in the national bar association. International judges are appointed by the national Supreme Council of the Magistracy. Lawyers are chosen from a list of national lawyers admitted to the Bar Association of the Kingdom of Cambodia (BAKC), and of foreign lawyers who qualified in a UN Member State and have been registered by the BAKC for the purposes of defending persons before the ECCC: ECCC, *ECCC Agreement*, article 3, article 26; ECCC, *ECCC Law*, article 11 new; ECCC, *Internal Rules,* rule 11.

[51] ECCC, *ECCC Law*, article 12, article 14 new; ECCC, *ECCC Agreement*, article 4.

A National Co-Prosecutor (NCP) and an International Co-Prosecutor (ICP) share the responsibility for the indictments; if they do not agree on a matter and the intervention of the PTC does not succeed in settling the divergence, «the prosecution shall proceed»[52].

Following the inquisitorial model, investigations are conducted by impartial Co-investigating judges (CIJs), one being national and the other foreign[53]. Just like in the Prosecution, in the case of a disagreement between the CIJs, «the investigation shall proceed», unless at least one of them requires a decision of the PTC, which needs the supermajority[54]. The investigation for each case concludes with the issue of a well-reasoned closing order, either carrying a dismissal or an indictment[55].

An Office of the Administration (OA), headed by a Cambodian Director and a foreign Deputy Director completes the institutional framework of the court[56]. The OA established a Defence Support Section (DSS), auxiliary to the work of the Defence Teams, a Victims Support Section, and a Civil Party Lead Co-Lawyers' Section, which are all staffed in a manner that guarantees the balance between Cambodian and international personnel.[57]

In the same way, a Cambodian and one or more foreign Co-Lawyers of his/her choice defend each accused or indicted person.

Evidently, due to their structure and composition, cooperation between the international and the national side is essential for the smooth and efficient advancing of the court's work.

The second possible model of cooperation between international and national is that of one component guiding the judicial activity.

In this sense, the judicial panels established in the Kosovar system by UNMIK Regulation 200/64 permitted that any party to a proceeding may file a petition to have international judges/prosecutors appointed to the case. Two international judges and one national judge would thus compose the panel[58].

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[52] ECCC, *ECCC Law*, article 16, article 20 new; ECCC, *Internal Rules*, rule 71; ECCC, *ECCC Agreement*, article 6.

[53] ECCC, *ECCC Agreement*, article 5.

[54] ECCC, *ECCC Law*, article 23 new.

[55] ECCC, *Internal Rules*, rule 67, rule 69, and rule 72.

[56] ECCC, *ECCC Agreement*, article 8 ; ECCC, *ECCC Law*, articles 30-32.

[57] *ECCC Law,* cit., article 30-31 new; ECCC, *Internal Rules*, rules 8-12 *ter*.

[58] UNMIK/Reg/2000/64, *On assignment of international judges/prosecutors and/or change of venue*, 15 December 2000, sections 1-2.

Such provision made the Regulation 64 Panels a kind of hybrid court with the most flexible structure. In principle, hence, it settled towards the national model regarding this "factor of hybridisation", but, in the case of threats to independence and impartiality of the judicial system, international judges would intervene to share the responsibility of a case and, just like the SPSC, may assume autonomous deliberations by a majority vote.

In sum, while in the experiences of Sierra Leone, Cambodia, East Timor, and Kosovo the balance between national and international personnel was dictated by political and historical circumstances that impacted upon the negotiation and designing phase of the tribunal, the combination chosen has precise consequences on the functioning and relationship of the tribunal with its stakeholders.

The practice of those four hybrids provided a wide example of it and allows those projecting new hybrid courts to warily opt for the best solution.

3. Applicable law.

A third factor of hybridization is the substantive and procedural law applicable by the tribunal in the proceedings, either deriving from the international or national level. The extremes of the spectrum of implementation of this "factor of hybridisation" are the application of exclusively national law on one side, and of international law on the other.

3.1. Substantive Law.

International assistance to the work of a statal judiciary system is an exceptional measure for the case that a State cannot cope autonomously with a situation of serious violence and grave violations of human rights law. Thus, the crimes committed in such situation must at some extent touch the interest of the international community, for threatening some core and universally shared values[59].

It is, thus, hard to imagine that a hybrid court may exclusively prosecute ordinary crimes as provided forth into the State's domestic law. Consequently, when we refer to the possibility for a hybrid tribunal to apply only internal legislation, such domestic legislation is likely to have incorporated international principles and customary law.

Complementarily, as commented by Swart, «it is self-evident and imperative that an internationalized court should apply the body of customary international law and treaty

[59] *See* Chapter I fort the concept of "shocked conscience of humankind", that led to the development of international criminal justice, and, eventually, to the invention of hybridity.

law that is applicable to crimes under general international law.»[60] Of the same opinion Ragni, who affirms that the application of a mixed combination of international and national law is one element characterising hybrid tribunals[61].Less decidedly, Williams, in her analysis in search of a definition of hybrid and internationalised tribunal, after severely discarding a series of features, admits that, even though she does not recognise in the applicable law a defining feature for a hybrid court, while the prosecution of national crimes is a mere possibility, it is indeed necessary that at least one international crime is prosecuted by the court, even though incorporated in national law[62].

We may then conclude that, when it comes to substantive law, the factor of hybridisation concerning applicable law necessarily slides towards the international edge, imposing a minimum threshold consisting in the application, either directly or through domestic law, of international principles and practices.

The courts' practice endorses such thesis. All hybrid tribunals established so far, in fact, set somewhere in the middle of such spectrum, since they applied both existent substantial domestic legislation and international law.

The combination of the two sets of law allows the widest and most complete reconstruction and narrative of the facts: not all the crimes effectively committed in the context of widespread violence that led to the creation of the tribunal correspond to an international crime. Some, in addition, do represent an element of international crime (conduct), but are not prosecuted as autonomous misconducts under international law: thus, lacking other elements of that crime as provided for by international law (the context, the *mens rea*), they do not come into relevance. An example is that of torture, which is not an international crime *strictu sensu*, but can amount to a crime against humanity or a war crime when it is committed in the context of a "widespread attack to civilian population" or of an armed conflict[63]. Nevertheless, for a correct exercise of justice, the culprit still needs to respond for them, and victims have the right to obtain justice widely.

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[60] B. SWART, "Internationalized Courts and Substantive Criminal Law", in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, p. 295.

[61] C. RAGNI, *I tribunali penali internazionalizzati. Fondamento, giurisdizione e diritto applicabile*, Milano, 2012, p. 238, p. 267.

[62] S. WILLIAMS, *Hybrid and Internationalised Criminal Tribunals*, Oxford, 2012.

[63] Torture amounted to a crime against humanity and a war crime in the Statutes of the ICTY and ICTR, and such it is before the ICC: ICTR, *Statute*, articles 3-4; ICTY, *Statute*, article 2, article 5; ICC, *Rome Statute*, articles 7-8. *See* Association for the Prevention of Torture, *Torture in International Law, a guide to jurisprudence*, Geneva, 2008, p. 146 ff.

For example, UNTAET Regulation 2000/15, 6 June 2000, section 3, required the Special Panels to apply the law of East Timor as promulgated by the Transitional Administration, then any subsequent regulation, and whereas appropriate, applicable treaties and recognised principles and norms of international law. In sum, SPSC applied the regulations, domestic law, and international law, in a regime of complementarity.

The statutes or founding documents of hybrid tribunals illustrate the international law and principles applicable. The definition of international crimes as applied by hybrid court was often inspired by the Statute of the International Criminal Court[64], and those of the ICTR and ICTY, or by other international conventions and treaties[65]. The founding documents of the tribunals, though, also originally contributed to the development of the definition of some international crimes[66].

International law and customs applied by the hybrid court not only limited to the traditional *crimina juris gentium*, but also regarded other misconducts contained in treaties to which the concerned State was a party, such as torture, and general principles of international law.

The Special Court for Sierra Leone, for example, included in its statute violations of article 3 common to the Geneva Conventions and the Additional Protocol II of 1977[67], and «other serious violations of international humanitarian law», identifying them as attacks against civilian population, crimes against peacekeepers, enlistment, and conscription of child soldier under 15[68].

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[64] SPSC, SCSL; ECCC, *ECCC Agreement*, article 9; ECCC, *ECCC Law*, article 5, adopt the definition of crimes against humanity.

[65] ECCC, *ECCC Agreement*, article 9; ECCC, *ECCC Law*, article 4, article 6: the definition of 'genocide' comes from the 1948 Convention of the Prevention and Punishment of the Crime of Genocide, while the definition of the war crimes comes from the 1949 Geneva Conventions.

[66] ECCC, *ECCC Law*, Chapter II; ECCC, *ECCC Agreement*, article 9; K. AMBOS, "The ECCC's contribution to Substantive ICL: the Notion of 'Civilian Population' in the Context of Crimes Against Humanity", and E. FRY, E. CAN SLIEDREGT, "Targeted Groups, Rape and *Dolus Eventualis*: Assessing the ECCC's Contributions to Substantive International Criminal Law", in *Journal of International Criminal Justice*, 2020, vol. 18, n. 3, p. 689 ff.; M. BORTOLUZZI, "Faire des affaires avec le diable: la contribution du Tribunal spécial pour la Sierra Leone en matière d'aide et encouragement", in *Revue belge de droit international*, 2017, vol. 50, n. 1, p. 215-233;R. ARNOLD, "The Judicial Contribution of the Special Court for Sierra Leone to the Prosecution of Terrorism", and A. MARONG, "Fleshing out the Contours of the Crim of Attacks against United Nations Peacekeepers – the Contribution of the Special Court for Sierra Leone", in *Sierra Leone Special Court and its legacy: the impact for Africa and international criminal law*, New York, 2014, p. 260 ff.; O. NJIKAM, *The contribution of the Special Court for Sierra Leone to the development of international humanitarian law*, Berlin, 2013; S. BUREAU, "The contribution of the Special Court for Sierra Leone to the Development of International Humanitarian Law", in *International Humanitarian Law and the International Rd Cross and Red Crescent Movement*, Abingdon, 2010, p. 78-85; C. JALLOH, "The contribution of the Special Court for Sierra Leone to the development of international law", in *African Journal of international and comparative law*, 2007, vol. 15, p. 165-207;

[67] SCSL, *Statute*, article 3.

[68] SCSL, *Statute*, article 4.

As for the applicable substantial domestic law, the founding documents of the hybrid courts all directly recall the domestic legislation, rather than reporting their content, like they do for the international applicable law.

The Special Court for Sierra Leone included selected offenses relating to the abuses of girls under the Prevention of Cruelty to Children Act of 1926, some concerning the wanton destruction of property as included in the Malicious Damage Act of 1861[69]. The jurisprudence of the national Supreme Court was a relevant guidance for the application of national law.

The Special Panels for Serious Crimes in East Timor referred to the whole Indonesian Penal Code, which was in force until 25 October 1999 in the state, as long as it was in conformity with the mandate and the legal acts of the United Nations Transitional Administration for East Timor[70]. While the national law is recalled as a whole, a regime of primacy of international law and standards remained.

The ECCC applied some of the offences (homicide, torture, religious persecution as autonomous crimes) contained in the Cambodian Penal Code 1956, since, as found by the Pre-Trial Chamber, it was «the applicable national law governing during the 1975 to 1979 period»[71].

UNMIK adopted a more domestic-oriented approach, by initially making the old Kosovo Criminal Code, in force prior to March 1989, the law applicable[72].The defendant in criminal proceedings, though, had the benefit to apply the most favourable provision in criminal laws in force between1989 and the date of establishment of the transitional administration. Eventually, with the adoption of Regulation 200/64, such panels applied international law and standards, as domestic law did not include international crimes and other serious violations of international law.

3.2. Procedural Law.

Legal systems of the world greatly differ in terms of procedural norms applied in their processes. The two major theoretical models of criminal procedure – inquisitorial

[69] SCSL, *Statute*, article 5.

[70] UNTAET/Reg/199/1, *On the Authority of the Transitional Administration in East Timor*, 27 November 1999, section 3.

[71] ECCC, *Co-Prosecutors v. Ieng Sary*, Case 002, Pre-Trial Chamber, D427/1/30, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, para. 227, para. 278; ECCC, *ECCC Law*, article 3.

[72] UNMIK/Reg/1999/24, 12 December 1999.

and adversarial[73] – combine at different extent in the procedural practice of each State, which is strictly connected to its legal tradition, as influenced by cultural, religious, political, and historical circumstances. Thus, every State present a unique criminal procedure applicable to domestic proceedings.

Correspondently, there is not a unique procedural standard for proceedings taking place before international jurisdictions, that is, an international criminal procedure does not exist in principle. Indeed, authors are addressing its development and affirmation on the basis of past experiences, such as that of the *ad hoc* tribunals, and the current activity of the International Criminal Court[74].

Therefore, such "factor of hybridisation" is incorporated by the founding documents of hybrid tribunals not on the basis of a dichotomy national/international but can rather be assessed based on the discrepancy or similarity to the national tradition. The edges of the spectrum, here, are represented by the mere domestic criminal procedure, entirely recalled by the hybrid court, on one side, and an appositely predisposed set of procedural rules, contained in a document that is not included in domestic legislation.

The Special Court for Sierra Leone initially took a sensible distance from the national traditions and applied (*mutatis mutandis*) the Rules of Procedure and Evidence adopted by the ICTR. It is an interesting example of drawing procedural law from the international level and the only practice of hybrid courts completely disconnected from the national system. The reason for such a choice is that the court was explicitly autonomous from the national judiciary, hence the legal acts establishing it did not belong to the corpus of law of Sierra Leone.

SCSL judges, though, were recognized the possibility to amend such Rules «where the applicable Rules do not, or do not adequately, provide for a specific situation»[75].In such a case, they could search guidance in the Criminal Procedure Act of Sierra Leone, hence in the domestic procedure[76].

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[73] M. BOHLANDER, "Accusatoire/Inquisitoire", in O. BEAUVALLET, *Dictionnaire encyclopédique de la Justice Pénale Internationale*, Paris, 2017.

[74] L. CARTER, F. POCAR, *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, 2013; C. SAFFERLING, L. BUNGENER, *International criminal procedure*, Oxford, 2012; International Criminal Procedure Expert Framework, *Towards the Codification of General Rules and Principles*, Amsterdam, 2011.

[75] SCSL, *Statute*, article 14, article 19, .

[76] Sierra Leone, Criminal Procedure Act, 1965; SCSL, *Statute*, article 14.

Such asset signals a high degree of internationalisation of the SCSL, where the relationship to the national level was only secondary and residual[77].

Eventually, the judges of SCSL did amend the Rules of Procedure and Evidence, in 2003, making them more in line with the national tradition of the country[78]. The SCSL, then, swiped towards a more national-connected asset of procedure along its functioning. International law, yet, maintained its primacy, as the Rules of Procedure and Evidence, as amended in 2004, still made it clear that «general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone» are only applicable «provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards»[79].

On the same vein, UNTAET, acknowledging the complete lack of legal traditions in East Timor, opted for the application of an appositely designed set of rules: a Code of Penal procedure, adopted by UNTAET Regulation 30/2000, later amended by Regulation UNTAET 25/2001. That would eventually remain as a legacy to the national judicial system once the Transitional Administration would cease. The degree of internationalisation in such case is less incisive: since UNTAET represented the *ad interim* power in the country, the norms that it adopted became immediately part of the national corpus of law, and the two dimensions – national and international – simply overlapped.

The ECCC, instead, apply a combined regime of procedural norms.

Specific rules arise from the ECCC Law[80], and pair with the national criminal procedure as long as it is in conformity with international standards, which functions as a 'gap filler'. The Internal Rules of the ECCC form a self-contained regime of procedural

[77] The same approach can be observed in the statutory provision affirming that «The Special Court for Sierra Leone Rules of Procedure and Evidence list the Statute, the Agreement, and the Rules, other treaties and the principles and rules of international costumery law, and general principles of law derived from national laws of legal system of the world as appropriate, the national law of the Republic of SL, as long as they are consistent with the Statute, the Agreement, international customary law, and internationally recognised norms and standards», SCSL, *Statute*, article

[78] Sierra Leone Bar Association/No Peace Without Justice, *Report on the Special Court: Rules of Procedure and Evidence Seminar*, Freetown, 3 December 2002, where suggestions are made to keep into consideration Sierra Leonean practices of law.

[79] SCSL, *Rules of Procedure and Evidence*, article 72 *bis*, adopted 29 May 2004.

[80] ECCC, *ECCC Law*, articles 23-24, articles 33-37.

law related to the unique circumstances of the ECCC, but trials had to be conducted in accordance with the existing Cambodian procedural law[81].

In sum, Cambodian procedure has primacy, but when Cambodian law does not deal with a matter, international standards provide guidance[82]. Recurse to the guidance of international standards and norms is an *extrema ratio* for the cases in which there are severe lacunae in the provisions appositely drafted for the ECCC and in the national law.

And, last, UNMIK in Kosovo attempted to maintain a strict connection with the national domestic system, as long as it was feasible. This is why prosecutorial activities before Regulation 64 Panels of Kosovo was regulated by selected articles of the Yugoslavian Criminal Procedure Code, as validated by UNMIK Regulation 2001/2[83]. Beside that, a number of UNMIK regulations applied, regulating minor aspects of the procedure[84]. In this case, thus, domestic procedure had primacy, and it was endorsed by the international community as represented by the UN Transitional Administration in the country.

3.3. Effects

The choice of applicable law by hybrid courts does not only affect the form of the proceedings before them. In reality, it potentially produces a series of consequences deriving from the propensity of the structure adopted towards an international or domestic perspective.

A primacy of international standards may produce positive spill over effects for the domestic legal system. First, if criminal procedure shaped upon international standards and appositely drafted for the court is to remain in force for criminal proceedings in the country at the end of the hybrid's court mandate, it enormously contribute to restore the country legal system, provide capacity-building, and enhance the respect for the rule of law[85]. In addition, it introduces international standards of fair trials in the proceedings, as

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[81] ECCC, *Co-Prosecutors v. Khieu Samphan*, Case 002, Doc. 2, Pre-Trial Chamber, Decision on Khieu Samphan's Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, para. 20; Cambodia, Law on Criminal Procedure, 8 February 1993.

[82] ECCC, *ECCC Agreement*, article 12.

[83] UNMIK/Reg/2001/2, *Amending UNMIK regulation no. 2000/6, as amended, on the appointment and removal from office of international judges and international prosecutor*, 12 January 2001, section 1.

[84] UNMIK Reg./2000/46, 15 August 2000 (working languages); 2001/1, 12 January 2001 (exclusion of trials *in absentia* for serious crimes); 2000/17, 23 March 2000 (admissibility of witness statements), 2001/21 and 2001/20, 19 September 2001 (protection of witnesses),2002/6, 18 MRCH 2002, 2002/7 28 March 2002 (technical tools for investigation and interviews).

[85] H. FRIMAN, "Procedural Law of Internationalized Criminal Courts", in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, p. 317.

set forth primarily in the 1966 ICCPR, in the national legal system, in the most natural way possible: national judges, prosecutors, court's staff, but also the public, have the time to get acquainted to a new standard of trial rights, and to see them put in practice by international experts, or can experiment international guidance if they themselves form part of the court's personnel.

On the other side, a careful attention must be directed, when in force, to local judicial traditions of the State concerned. Applying domestic procedure increases the sense of ownership of the proceedings by local jurists and fades away the perception of "judicial imperialism" coming from international actors.

Moreover, the highest degree of adhesion to national practice makes it easier for local communities to understand the development of the proceedings and reduce the need for the hybrid court to set up outreach programs focused on the explication of the applicable law to concerned groups.

The potentiality to modulate procedure according to the local traditions, while respecting international standards of fair trials, is one of the most impactful possibilities that hybrid courts deal with. It is an enormously powerful vehicle of judicial knowledge and affirmation of the rule of law, and a possible tight link between international and national. Hybrid courts should hear local stakeholders when it is time to design the applicable law, to better understand their expectations and customs, and act accordingly in the most creative manner possible for keeping those two dimensions together.

4. Jurisdiction.

4.1. Personal jurisdiction.

In line with the tradition of international criminal law, all hybrid courts so far had jurisdiction only on individuals[86]. Yet, scholars are discussing the opportunity to introduce corporate liability for international crimes before international criminal jurisdictions, to deal more correctly with the actual responsible of such crimes[87].

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[86] SCSL, *Statute*, articles 1-5; ECCC, *ECCC Law*, article 1, article 29; UNTAET/Reg/2000/15, section 14 ; UNMIK/Reg/2003/25, 6 July 2003, article 99.

[87] P. LAMBRIDIS, "Corporate Accountability: Prosecuting Corporations for the commission of International crimes of atrocity", in *International Law and Politics*, vol. 53, p. 144 ff; W. KALECK, M. MIRIAM SAAGE-MAAß, "Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges", in *Journal of International Criminal Justice*, 2010, vol. 8, p. 699 ff.; K. ROBERTS, "Corporate liability and complicity in International Crimes", in S. JODOIN, M. CORDONIER SEGGER, *Sustainable development, international criminal justice, and treaty implementation*, New York, 2013, p. 190 ff; J. APARAC, "Which International Jurisdiction for Corporate

Dealing with mass crimes, and in some cases entitled to a jurisdiction complementary to that of domestic courts or international tribunals, or even simply to orientate the prosecutorial strategy[88], hybrid courts foresaw some limitations to their jurisdiction *ratione personae*.

The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, acting in countries where the penal system was effective, introduced a minimum threshold of responsibility for indicting individuals before them.

The Special Court, for example, limited its personal jurisdiction to those individuals who bore «the greatest responsibility […] including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone»[89]. The Trial Chambers, trying to specify the content of the personal jurisdiction, underlined that such wording «denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime»[90].

Similarly, the ECCC admitted trials only against «senior leaders and those most responsible» for the crimes committed during Democratic Kampuchea[91]. While the term "leaders" refers to the highest ranks of the Khmer Rouge party, the phrasing concerning "those most responsible" is quite cryptic and generated different interpretations before the Chambers, deeply dividing international and national judges[92]. The international component of the Pre-Trial Chamber affirmed that:

«The identification of those who were amongst the 'most responsible' entails the assessment of both the gravity of the crimes alleged or charged and the level of responsibility of the suspect. In the Undersigned

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Crimes in Armed Conflicts?", in *Harvard International Law Journal*, 2016, vol. 57, p. 40 ff.; N. JORGENSEN, *The International Criminal Responsibility of War's Funders and Profiteers*, Cambridge, 2020.

[88] SCSL, *Prosecutor v. Fofana,* Case No. SCSL-04-14-PT, Trial Chamber, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, paras 21-27.

[89] SCSL, *Statute*, article 1; SCSL, *Agreement*, article 1.

[90] SCSL, *Prosecutor v. Fofana,* Case No. SCSL-04-14-PT, Trial Chamber, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, paras 21-27.

[91] ECCC, Agreement, articles 1-2, article 5; ECCC, *ECCC Law*, cit., article 1: «*The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979*» and article 2 new.

[92] M. CHRISTENSEN, A. KIELDGAARD-PEDERSEN, "Competing perceptions of hybrid justice: International v. National in the Extraordinary Chambers in the Courts of Cambodia", in *International Criminal Law Review*, 2018, vol. 18, p. 130; R. DEFALCO, "Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law", in *Genocide Studies and Prevention: An International Journal*, 2014, vol. 8, issue 2, p. 45 ff.

Judges' view, this assessment must be done from both a quantitative and a qualitative perspective. There is no exhaustive list of factors to be considered in undertaking this review; nor is there a mathematical threshold for casualties, or a filtering standard in terms of positions in the hierarchy. The determination of personal jurisdiction rather requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect.»[93]

The conflict over the meaning to assign to such formula brought the National Co-Prosecutor to refrain from cooperating with the International Co-Prosecutor in 2009, when the latter announced his intention to open investigations against five more individuals, thus opening Cases 003 and 004[94]. The point eventually led to a deep disagreement between the Co-Investigating Judges, with the final issue of two distinct Closing Orders in each case (one dismissing, and the other indicting): the national CIJ reckoned that those individuals were not "most responsible", contrarily to the international judge. In the end, the diatribe ended up before the Supreme Court Chambers that promptly terminated all cases[95].

On the other side, Kosovo and East Timor's hybrid courts did not expressly pose any limitation connected to the level of responsibility of the individuals, since their work developed within the ordinary criminal system. Nevertheless, the regulation 64/2000 panels implicitly dedicated their work to "small fishes" as the most important culprits of the crimes committed in Kosovo were prosecuted before the ICTY[96]. East Timor's panels,

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[93] ECCC, *Prosecutor v. Im Chaem*, Case 004/1, D308/3/1/20, Pre-Trial Chambers, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Opinion of Judges Baik and Beauvallet), 28 June 2018, para. 321, para. 327. *See also* ECCC, *Prosecutor v. Ao An*, Case 004/2, D559/24, Pre-Trial Chambers, Considerations on Appeals against Closing Orders, 19 December 2019, paras 140-141; ECCC, *Prosecutor v. Meas Muth*, Case 003, D266/27, Pre-Trial Chambers, Considerations on Appeals against Closing Orders, 7 April 2021, paras 65-67; ECCC, *Prosecutor v. Yim Tith*, Case 004, D381/45, Pre-Trial Chambers, Considerations on Appeals against Closing Orders, 17 September 2021, para. 53.

[94] ECCC, *Statement of the Acting International Prosecutor*: *Submission of Two New Introductory Submissions*, 8 September 2009.

[95] Yim Tith, Meas Muth, Ao An, Sou Met, and Im Chaem. Sou Met, former Air Force Commander, died during the investigations, while the Co-Investigating Judges jointly found that Im Chaem did not fall within the Court's personal jurisdiction, and dismissed the case: ECCC, *Prosecutor v. Im Chaem*, Case 004/1, D308/3, Co-Investigating Judges, OCIJ Closing Order (Reasons), 10 July 2017. The cases against the remaining three Khmer Rouge were terminated by the SCC on the basis following an extenuating debate among court's organs: ECCC, *Prosecutor v. Ao An*, Case 004/2, E004/2/1/1/2, Supreme Court Chamber, SCC Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020; ECCC, *Prosecutor v. Meas Muth*, Case 003, D275, Supreme Court Chamber, SCC's Decision on International Co-Prosecutor's appeal of the Pre-Trial Chamber's failure to send Case 003 to Trial as required by the ECCC Legal Framework, 17 December 2021; ECCC, *Prosecutor v. Yim Tith*, Case 004, D2/1/1/1, Supreme Court Chamber, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021.

[96] ICTY, PR/P.I.S/437-E, Press Release, *'Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the Investigation and Prosecution of crimes committed in Kosovo*', 29 September 1999; E. BIGGONET, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform, in Arizona Journal of International and Comparative Law, 2006, vol. 23, p. 379.

instead, lacking the complementary jurisdiction of an international court in a context of disruption, were largely criticised for allowing the Indonesian military and militia leaders to scape prosecution[97].

Hybrid courts have incorporated further limitations in their personal jurisdiction, concerning the age of the individuals, the recognition of amnesties, the value of immunities, or included particular categories of persons.

Concerning juvenile jurisdiction, the ECCC did not set any limitation to the prosecution of individual under 18 years. The lack of such provision is probably due to the fact that all negotiators had in mind who should be prosecuted by the Chambers, and none of them were minors. East Timorese panels, Kosovar panels, and the Special Court, instead, did set some restrictions concerning juveniles.

Regulation UNTAET 2001/25, excluded the possibility for a minor under 12 (at the time of the alleged commission of a crime) to be subjected to criminal proceedings, while a minor between 12 and 16 years old may be prosecuted for «murder, rape, or a crime of violence in which serious injury is inflicted upon a victim», with particular guarantees, in respect of his/her rights as provided for in the United Nations Convention on the Rights of the Child[98].

The UNMIK provisional penal code excluded criminal liability for those under the age of fourteen years, while persons between the age of 14 and 18 could be prosecuted, to the extent that the applicable law on juvenile justice did not provide otherwise[99].

The SCSL faced greater difficulties in shaping the personal jurisdiction as in regard to minors: in Sierra Leone, many of those responsible for the worst atrocities were, in fact, children, since they were conscripted on large scale by the armed groups active in the violence. Notwithstanding, the SCSL's Statute posed limitations to the jurisdiction over children, similar to that adopted by the Special Panels for Serious Crimes in East Timor: the minimum age for being indicted was 15 years (at the time they committed the

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[97] H. BOWMAN, "Letting the Big Fish Get Away: The United Nations Justice Efforts in East Timor", in *Emory International Law Review*, 2004, vol. 18, p. 389.

[98] UNTAET/Reg/2001/25, Annex 1, *On the Organization of Courts in East Timor*, 14 September 2001, section 45; UN Doc. A/RES/44/25, *Convention on the Rights of the Child*, 20 November 1989, entered into force 2 September 1990.

[99] UNMIK/Reg/2003/25, Annex 1, article 11, article 105; UNMIK/Reg/2004/8, *Juvenile Justice Code of Kosovo*, 20 April 2004. A minor Serb Kosovar had been prosecuted for genocide, for having caused the escape of a large group of Albanian families from their houses. The intervention of international judges in the panels helped recognising the absence of the *dolus specialis* as required, and the accused changed to minor domestic crimes: Regulation 64 Panels, Case Juvenile "Z", 23 December 1999; OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review*, 2002, p. 15-16.

crimes), wile minors between 15 and 18 years would enjoy particular attentions and guarantees if subjected to a proceeding[100]. As a matter of fact, the limitation turned out to be irrelevant, as no child was prosecuted before the SCSL, following an express prosecutorial choice[101].

The Special Court, though, was the only hybrid court so far to be entitled with a wider jurisdiction including the category of «peacekeepers and related personnel […] in the event the[ir] sending State is unwilling or unable genuinely to carry out an investigation or prosecution», subject to authorisation by the UN Security Council[102]. This jurisdiction, expressed through a wording similar to that allowing the ICC's jurisdiction[103], results as complementary and secondary to that of the domestic courts of the States of nationality of the peacekeepers[104]. The other hybrid courts here observed did not need to expand their jurisdiction over such a type of individuals, as they no peacekeepers were directly involved in the fights in their country.

Each court may evaluate the validity of a domestic amnesty under international law.

The ECCC, while stating that no amnesties or pardons would be granted by them, faced the issue of an amnesty previously awarded by the Royal Government of Cambodia to a Khmer Rouge leader, Ieng Sary, in 1979. On the matter, the Pre-Trial Chamber, under article 40 new of the ECCC Law[105], found that:

> «Absent any inconsistency or absurd result having been demonstrated, the Pre-Trial Chamber shall adhere to the grammatical and ordinary sense of the words used in the Decree, concluding that the amnesty granted to Ieng Sary was confined to the specific sentence pronounced in 1979. In the context where it is related to a sentence, the sole effect of the amnesty was to 'abolish' and 'forget' the 1979 sentence, thus ensuring that it would not be put into effect. It had no effect on the possibility to institute future prosecutions as the amnesty was not related to the 'acts' allegedly committed»[106].

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[100] SCSL, *Statute*, article 7, article 15. SCSL, *Prosecutor v. Norman*, Case No. SCSL-04-14-AR72, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras 26-51.

[101] I. BEAH, *A long way gone: Memoirs of a Boy Soldier*, New York, 2008; "Special Court will not indict children – Prosecutor", in *The New Humanitarian*, 4 November 2002, available at www.thenewhumanitarian.org [last accessed 14 January 2022].

[102] SCSL, *Statute*, article 1.

[103] ICC, *Rome Statute*, article 17.

[104] S. GROVER, *Prosecuting International Crimes and Human Rights Abuses Committed Against Children. Leading International Court Cases*, Berlin, 2010, p. 70-71.

[105] ECCC, *ECCC Law*, article 40 new : «The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.»

[106] ECCC, *Prosecutor v. Ieng Sary*, Case 002, D427/1/30, Pre-Trial Chamber, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, paras 190-201.

The same happened to the Special Court for Sierra Leone, whose jurisdiction was challenged based on the 1999 Lomé Accord, that, in its article 9, provided for «absolute and free pardon» for Sankoh (the head of RUF) and «all combatants and collaborators»[107].

The SCSL, with a complex and harshly criticised reasoning, assessed the issue in four cases, to find that the amnesties offered by the Lomé Peace Accord was inapplicable before the SCSL, as the court was not bound by the provision of the agreement[108]. In its Statute, furthermore, article 10 added that an amnesty granted to a person under the court's jurisdiction for international crimes, would not be a bar to prosecution.

The Kosovar Panels and the Special Panels in East Timor, absent a legitimate government from the moment of widespread violence until the establishment of the court (except for the Transitional Administration), did not encounter the problem of pre-existing amnesties or pardons, and simply adopted relevant regulation concerning them: UNMIK avoid excluding *a priori* the possibility to award them, while UNTAET did, not by not mentioning those measure in the regulation setting up the panels[109].

Finally, a court should take a position in regard to immunities from prosecutions granted to persons in positions of power, such as the Head of State, Head of the government, and other State senior officials. Growing scholarship and jurisprudence do agree over the existence of a customary law excluding the validity of immunities for *crimina juris gentium*[110].

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[107] Sierra Leone, *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999, article 9, available at www.sierra-leone.org [last accessed 14 January 2022].

[108] SCSL, *Prosecutor v. Kallon, Kamara*, Case No. SCSL-04-15-AR72, SCSL-04-16-AR72, Appeals Chambers, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 85, para. 90; SCSL, *Prosecutor v. Norman, Fofana, Kondewa ("C.D.F. Case")*, Case No. SCSL-04-14, Appeals Chambers, Decision on Preliminary Motion on Lack of Jurisdiction – Illegal Delegation of Jurisdiction by Sierra Leone, 25 May 2004. *See* a critical comments to the SCSL's decisions on amnesties in S. WILLIAMS, "Amnesties in International Law: The Experience of the Special Court for Sierra Leone, in *Human Rights Law Review*, 2005, vol. 5, n. 2, p. 271 ff; S. MEINSENBERG, "Legality of amnesties in international humanitarian law. The Lomé Amnesty Decision of the Special Court for Sierra Leone", in *International Review of the Red Cross*, 2004, vol. 86, issue 856, p. 837 ff.

[109] UNMIK/Reg/2003/25, article 87; UNTAET/Reg/200/15.

[110] ICC, *Prosecutor v. Al-Bashir*, Case N. ICC-02/05-01/09 OA2, Appeals Chambers, Judgement, 6 May 2019, paras 1-2 («such immunity has never been recognised in international law as a bar to the jurisdiction of an international court»); R. PEDRETTI, *Immunity of Heads of State and State Officials for International Crimes*, Leiden, 2013, p. 232 ff.; L. M. CAPLAN, "State Immunity, Human Rights, and Jus Cogens: a Critique of the Normative Hierarchy Theory", in *American Journal of International Law*, 2003, vol. 97, p. 741 ff; B. CONFORTI, *Diritto internazionale*, Napoli, 2021, p. 265, p. 352.

The funding documents of the ECCC, SPSC, SCSL, and the Kosovar panels, did not recognise any value to immunities for those crimes prosecuted[111].

The choice about how to delineate the personal jurisdiction of a hybrid court, then, should keep in consideration a number of factors related to the characteristics of the situation that the court itself must address.

4.2. Territorial jurisdiction.

The delimitation of the territorial jurisdiction of a hybrid court has strong links with the purposes that the court's proceedings wish to reach. The sliding scale, thus, develops between the choice of maintaining a territorial jurisdiction strictly connected to the territory of the State concerned, and that of a wider approach, even on the ground of universal jurisdiction, which expands beyond the boundaries of the country.

The SCSL and the panels established by Regulations 64/2000 limited their action to the territory of the State concerned – Sierra Leone and Kosovo[112].

The ECCC implicitly looked to crimes committed on the territory of Cambodia, although their founding documents did not mention anything in such regard. Based on this absence of express jurisdiction *ratione loci*, Cimiotta correctly observes that the territorial delimitation of their jurisdiction depends on the nature and the modalities of execution of the crimes, and that, accordingly, the ECCC in principle may have been competent over international crimes committed on the territory of Vietnam, against persons who did not take part in the combats[113]. The court's jurisprudence, nevertheless, has never been challenged on the point and all crimes sites investigated were on the territory of Cambodian provinces. Yet, linking the exercise of a court's jurisdiction to a context, rather than to a delimited territory, may be more effective for a complete narrative of the happenings, producing better effects of reconstruction of a collective memory.

For similar purposes, some tribunals may adopt a mixed territorial delimitation, according to the nature of crimes. Such was the case foreseen by UNTAET Regulation n. 15/2000: while national crimes could only be prosecuted when committed on the territory

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[111] UNTAET/Reg/200/15, section 15; SCSL, *Statute*, article 6; SCSL, *Prosecutor v. Charles Taylor*, Case N. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, paras 53-54.

[112] SCSL, *Statute*, article 1, SCSL, *Agreement*, article 1. Kosovo was comprehended within the jurisdiction *ratione loci* of the ICTY; thus, the jurisdiction was concurrent in such region of the Balkans. Acting the UNMIK's panels as national courts, their territorial jurisdiction is necessarily that assigned to the Kosovar district courts within which they could be established: UNMIK/Reg/2003/26, articles 27-28.

[113] E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009, p. 320.

of the State, international crimes and torture were submitted to universal jurisdiction[114] - that is, the Panels were able to exercise their jurisdiction «irrespective of whether: a) the serious criminal offence at issue was committed within the territory of East Timor; b) the serious criminal offence was committed by an East Timorese citizen; or c) the victim of the serious criminal offence was an East Timorese citizen»[115].

4.3. Temporal jurisdiction.

The definition of the temporal limits to the exercise of a hybrid's court jurisdiction reveals to be essential since the context in which the crimes are committed is often very expanded. There are threats possibility descending from excluding crimes that led up to (and perhaps ex-acerbated) the atrocities. However, if the temporal jurisdiction is overly expanded, the tribunal risks to be charged with an unreasonable mandate.

If the period of violence is concluded, it is helpful for the court to delineate an initial and a final day marking the jurisdiction *ratione temporis*. Not only this technique allows the prosecution to focus on a defined parenthesis, but also enables to evaluate more easily who can be entitled to be a witness, a victim, or a civil party in the proceedings.

The ECCC applied this method, as they had jurisdiction over (international or domestic) crimes committed between 17 April 1975 (the day the Khmer Rouge entered and occupied Phnom Penh, and 6 January 1979, the day Phnom Penh was liberated by the Vietnamese forces)[116].

Some tribunals, instead, distinguished the temporal jurisdiction upon the nature of crimes concerned, whether international or domestic.

The SCSL, for example, adopted a differential, open-ended, approach to temporal framework: it prosecuted international crimes from 30 November 1996, and ordinary crimes from 7 July 1999[117].

UNTAET, instead, adopted a mixed technique: it assigned the Special Panels jurisdiction for international crimes committed from 7 December 1975 (date of the entry of the Indonesian Army in East Timor), and for domestic crimes committed between 1

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[114] UNTAET/Reg/2000/11, section 7, section 10. For a comprehensive overview of the concept and last development of universal criminal jurisdiction, *see* M. LAMANNA, *La giurisdizione penale universale*, Milano, 2021.

[115] UNTAET/Reg/2000/15, section 2. According to the regulation, "serious criminal offences" meant genocide, war crimes, crimes against humanity, and torture.

[116] ECCC, *ECCC Agreement*, article 5 ; ECCC, *ECCC Law*, articles 1-3 new.

[117] SCSL, *Statute*, article 1, SCSL, *Agreement*, article 1. 30 November 1996 is the date of the Abidjan Peace Accord, the first agreement between the government of Sierra Leone and the RUF, shortly fell void, while 7 July 1999 is the date of the Lomé Peace Accord, the second and more effective agreement between those parties, with additional signature of the United Nations as a witness.

January and 25 October 1999[118]. The delimitation of the sole ordinary crimes is connected to the purpose of capacity-building of the presence of international judges in the panels: ordinary crimes committed outside the scope delimited by those two dates would be simply prosecuted before the national courts[119].

The case of UNMIK is that of a hybrid court working not only in regard of a specific context of violence, but of panels included within the ordinary national criminal system, potentially dealing with «New and pending […] investigations or proceedings/cases»[120]: their temporal jurisdiction goes beyond the parenthesis of the conflict.

4.4. Subject Matter Jurisdiction.

The material jurisdiction of a hybrid tribunal defines the types of crimes that the court would prosecute: thus, it is of primary importance that the list of crimes submitted to the court's jurisdiction corresponds to all the aspects of the background circumstances.

The subject matter jurisdiction of a court may include international crimes, domestic crimes, and even transnational crimes, in different combinations. The Special Court for Sierra Leone, first hybrid court to commence its works, was also the first tribunal to present a mixed jurisdiction *ratione materiae*, including both international and national crimes.

International crimes traditionally refer to genocide, crimes against humanity, war crimes. While the concept and the tripartition is widely affirmed[121], the exact definition of each of them as provided in the court's statute may be different.

First, a court may recall a definition as provided in other international legal sources: this allows a clear and shared understanding of each crime, benefitting especially international stakeholders and court's observers.

The ECCC used this method extensively. The Extraordinary Chambers, in fact, integrated in their material jurisdiction «the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948»[122], «the destruction of cultural property during armed conflict pursuant to the 1954 Hague

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[118] UNTAET/Reg/2000/15, section 2; UNTAET/Reg/2000/11, section 10; . FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015.

[119] C. RAGNI, *I tribunal penal internazionalizzati*, Milano, 2012, p. 187-189.

[120] UNMIK/Reg/2000/6, section 1; UNMIK/Reg/2000/34, section 1.

[121] *See* Chapter I on the matter.

[122] ECCC, *ECCC Law*, article 4. The article not only recalls the Convention, but transcripts the definition on genocide therein included: *see* UN Doc. A/Res/260(III), *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, article 2.

Convention for Protection of Cultural Property in the Event of Armed Conflict»[123], the «crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations»[124], and the «grave breaches of the Geneva Conventions of 12 August 1949»[125]. The SCSL did the same in recalling article 3 common to the 1949 Geneva Conventions and the 1977 II Additional Protocol[126].

Second, a statute may, instead, delineate a proper definition for a category of international crimes. This was necessary for the case of the crimes against humanity, for which there is not an universally adopted definition, nor a convention like it is the case of genocide, war crimes, and other offenses[127]. The result is a slightly different list of acts amounting to crimes against humanity before each court.

The SCSL and the ECCC, for example, provided a long catalogue of acts, which differ slightly: the ECCC required an additional element of context (that crimes be committed on national political, ethnical, racial, or religious grounds), while the Special Court added posed a strong accent to sexual-related offenses, adding a detailed

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[123] ECCC, *ECCC Law*, article 7; UNESCO, *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954. *See* F. SIRONI DE GREGORIO, "Attacking cultural property to destroy a community: heritage destruction as a crime against humanity and genocide", in *Ius in Itinere*, 2020, vol. 1, p. 3 ff.

[124] ECCC, *ECCC Law*, article 8; UN, *Treaty Series*, vol. 500, *Vienna Convention on Diplomatic Relations*, 18 Aprile 1961.

[125] ECCC, *ECC Law*, article 6. Each of the four 1949 Geneva Conventions contains an articled entitled "Grave Breaches": *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, article 50; *Convention (II) for the Amelioration of the Condition of the Wounded and Shipwrecked Members of Armed Forces at Sea*, article 51; *Convention (III) relative to the Treatment of Prisoners of War*, article 130; *Convention (IV) relative to the Protection of Civil Persons in Time of War*, article 147. The dictate of the ECCC Law gathers all the acts considered "grave breaches by the four Conventions into one single list, included in the text: wilful killing; torture or inhumane treatment; wilfully causing great suffering or serious injury to body or health; destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or civilian the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; taking civilians as hostages.

[126] SCSL, *Statute*, article 3; *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, article 3; *Convention (II) for the Amelioration of the Condition of the Wounded and Shipwrecked Members of Armed Forces at Sea*, article 3; *Convention (III) relative to the Treatment of Prisoners of War*, article 3; *Convention (IV) relative to the Protection of Civil Persons in Time of War*, article 3. The list included in the SCSL's Statute is extracted from article 4 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of non-international armed conflicts*, 8 June 1977.

[127] Nevertheless, the Washington University in St. Louis in 2008 launched "The Crimes Against Humanity Initiative" to research on the need for, and propose a draft of, a comprehensive convention on the prevention and punishment of crimes against humanity: "Crimes Against Humanity Initiative", in *Washington University St. Louis*, available at www.sites.wustl.edu [las accessed 14 January 2022]. *See* L. SADAT, *Forging a Convention for Crimes Against Humanity*, New York, 2014. The concept of crimes against humanity was introduced with the International Military Tribunal in Nuremberg but was connected to the context of an armed conflict. The so-called "war linked" was eventually abandoned, together with the requirement of a discrimination.

enumeration of them – not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence[128]. Th jurisprudence of the SCSL, along the year, proceeded in defining more in details the profiles of each crime[129].

The definition of "other serious violations of international humanitarian law" before the SCSCL, instead, represents a selection of war crimes as enumerated by article 8 of the ICC's Statute, as the Trial Chamber subsequently recalled[130].

Third, if the State concerned incorporated international crimes in its domestic penal legislation, the founding documents may recall the definition as provided in the national law. This allows to enhance the perception of vicinity of the jurisdiction to the national domestic system and make it easier for national personnel to lead the proceedings, as they are acquainted to the exact content of each crime.

This is at some extent the case of the UNTAET and UNMIK panels: as they produced legislation which was meant to remain in force as national law, the definition of international crimes prosecuted before the bench technically came from it.

In practice, UNTAET Regulation 2000/15 did not invent those definitions, as it listed genocide, crimes against humanity, and war crimes as outlined in the ICC's Rome Statute[131].

Similarly, Regulation 64 Panels, extended their jurisdiction to international crimes when the Provisional Penal Code was adopted in 2004, including a chapter dedicated to "Criminal Offences Against International Law". It defined genocide on the model of the 1948 Convention[132], while crimes against humanity and war crimes mirror the definitions

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[128] SCSL, *Statute*, article 2; ECCC, *ECCC Law*, article 5.

[129] SCSL, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL- 04-14-T, Trial Chambers, Decision on Motions for Judgment of acquittal Pursuant to Rule 98, 21 October 2005, paras 55-59 (delineating the elements of such crimes); SCSL, *Prosecutor v. Sankoh*, Case No. SCSL-03-02-PT, Trial Chamber, Ruling on the Motion for a Stay of Proceedings Filed by the Applicant, 22 July 2003, p. 9-11 (on the difference between torture and inhumane and degrading treatment); SCSL, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL- 04-14-T, Trial Chamber, Reasoned Majority decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 19 (relationship between the category of "any other form of sexual violence" and the residual formula of "other inhumane acts"). A problem of *nullum crimen sine lege* rose regarding the proscription and enlistment of child soldiers. The United Nations strongly pushed towards the inclusion of those crimes in the SCSL's jurisdiction.

[130] SCSL, *Statute*, article 4; ICC, *Rome Statute*, article 8; SCSL, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL- 04-14-T, Trial Chamber, Decision on Motions for Judgment of acquittal Pursuant to Rule 98, 21 October 2005, paras 123-124.

[131] UNTAET/Reg/2000/15, sections 4-6; ICC, *Rome Statute*, articles 6-8. In the end, the panels never prosecuted anybody for genocide and war crimes. E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009, affirmed that the definition as adopted by the Regulation 2000/15 may amount to customary law.

[132] UNMIK/Reg/2003/25, Annex I, article 116.

offered by the ICC's Statute, the 1949 Geneva Conventions, and 1977 Additional Protocols[133].

In addition, a hybrid court may also include in its material jurisdiction some domestic crimes. This helps draw a more complete narrative of the happenings, and to prosecute some conducts even when the element of context that would make it an international crime is absent or hard to prove.

As we mentioned before, the SCSL was the first tribunal to include some ordinary crimes within its own subject matter jurisdiction and it did so by directly recalling two sources of Sierra Leonean Law – the 1926 Prevention of Cruelty to Children Act, relating to the abuse of girls, and the 1861 Malicious Damage Act, for what concerned the wanton destruction of property[134]. Nevertheless, ultimately, the SCSL's prosecutor did not use these crimes under national law to charge anyone throughout the Court's existence. Reasons may be that none of the conducts for which suspects were charged was insufficiently covered by international crimes, a risk of discrimination deriving from the fact that only girls were protected by the articles of the Prevention of Cruelty Act recalled by the Statute, the major familiarity of international staff with international crimes[135].

The ECCC ha jurisdiction on selected crimes under the 1956 Cambodian Penal Code, which was in force during the Khmer Rouge era. Homicide, torture, and religious persecution are simply mentioned in the ECCC Law, that directly recalls the relevant article of national law for their outlining[136].

Regulation 64 Panels, oppositely, were entitled a jurisdiction that potentially covered the whole criminal law, thus crimes under national law had a primary role in their sentencing[137].

UNTAET Regulation 2000/11 gave the special panels in Dili jurisdiction not only over international crimes, but also homicide, sexual abuses, and torture[138]. The technique to outline such crimes was different: while torture was shaped transposing the dictate of

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[133] UNMIK/Reg/2003/25, Annex I, articles 117-127.

[134] SCSL, *Statute*, article 5.

[135] C. JALLOH, *The Legal Legacy of the Special Court for Sierra Leone*, Cambridge, 2020, p. 68-73; E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009, p. 217.

[136] ECCC, *ECCC Law*, article 3; Kingdom of Cambodia, Kram no. 933NS, *Criminal Code of the Kingdom of Cambodia*, 21 February 1955, articles 209-210, articles 500-501, articles 503-508.

[137] UNMIK/Reg/2000/6, section 1.2, section 1.3; UNMIK/Reg/2000/34; UNMIK/Reg/2000/64, section 1.1., section 1.2, section 1.3.

[138] UNTAET/Reg/2000/11, section 10.

the UN Declaration against Torture of 1975, and the following Convention of 1984[139], the regarding murder and sexual offences «the provisions of the applicable Penal Code in East Timor [would], as appropriate, apply»[140].

Last, hybrid courts may even include transnational crimes such as terrorism, or human trafficking. The best example of this choice is the Regulation 64 Panels, which had a wide jurisdiction over a number of transnational crimes, such as piracy, smuggling of migrants, trafficking in persons[141].

In conclusion, the material jurisdiction of a hybrid court may be very incisive as "factor of hybridisation". Not only the court may prosecute a varied mix of national and international crimes (and the extent of this mixture contributes greatly to move the court on the sliding scale of hybridity), but also the provenance of the definition of each crimes renders a tribunal more attached to the international dimension or to the national domestic system.

After all, the intentions of the negotiations of a court can easily guide the court's work through the delimitation of its personal, temporal, territorial, and subject matter jurisdiction. It is, hence, of utter importance that it reflects the complete narrative of the events investigated, to better acknowledge the responsibilities and contribution of every individual suspected.

5. Relationship with the national judiciary system and international criminal courts.

The relationship with the national judicial system is a very incisive "factor of hybridisation" since it defines the position and the powers of the hybrid court in respect to the domestic exercise of judicial authority.

The examples of the ECCC, SCSL, Regulation 64 Panels, and Special Panels for Serious Crimes are useful to observe for identifying the two edges of the sliding scale concerning this "factor of hybridisation".

On one side, the nomenclature of the *Extraordinary* Chambers *in* the Courts of Cambodia suggests that this hybrid jurisdiction substantially belongs to the national

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[139] UN Doc. A/Res/3452(XXX), *Declaration on the Protection od All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, article 1; UN Doc. A/Res/39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, article 1.

[140] UNTAET/Reg/2000/15, sections 7-9.

[141] UNMIK/Reg/2003/25, Annex I, articles 134-145.

judiciary system, although carrying functions that are out of the ordinary judicial activities. Thus, they are *prima facie* national chambers, made extraordinary by a series of "factor of hybridisation"[142]. A symptom of this tight bound with the national system is that all judges, being international or national, are officially nominated by the Cambodian Supreme Council of Magistracy, and all the counsels need to be enrolled in the national bar[143]. Nevertheless, as recognised by the jurisprudence of the Pre-Trial Chambers, at some extent the ECCC remain distinct from other ordinary Cambodian courts, since there is no provision any decision of the ECCC to be reviewed by Cambodian courts outside its unique structure, and *vice versa*[144]: there is no possibility of interaction between the court and any other judiciary body; for all practical and legal purposes the ECCC is, and operate as, an independent entity[145]. This is the reason why the amnesty granted to Ieng Sary was void before the ECCC [146].

Another example of a hybrid court with a meaningful connection to the national system are the Special Panels for Serious Crimes in East Timor, which were established within the District Courts and the Appeals Court in Dili. Hence, such panels were activated only once a case concerning serious criminal offences would be submitted to the national criminal system.

Oppositely, on the other extreme, a tribunal can be an entity completely autonomous from the national system.

Such is the case of the Special Court for Sierra Leone, which did not hold a tight relationship with the national level. In fact, the SCSL was entitled with its own judicial capacity and subjectivity[147]. It is formally not part of the domestic organisation, and it is fully independent from the United Nations system. Thus, the SCSL court's jurisprudence

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[142] *ECCC, Co-Prosecutors v. Im Chaem*, Case 004/1, D308/3/1/20, Pre-Trial Chamber, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, para. 72.

[143] *See* in this Chapter, "Composition of the Staff".

[144] ECCC, C5/45, Pre -Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, paras 17-18.

[145] *ECCC, Co-Prosecutors v. Duch*, Case 001, C5/45, Pre -Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, para. 19; *ECCC, Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case 002, C11/29, Pre-Trial Chamber, Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, para. 30.

[146] *See* this Chapter, "Jurisdiction". ECCC, *ECCC Agreement*, article 10 ; ECCC, *ECCC Law*, article 40 new; ECCC, *ECCC, Co-Prosecutors v. Ieng Sary*, Case 002, D427/1/30, Pre-Trial Chamber, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, para. 131.

[147] SCSL, *Agreement*, article 11.

itself wondered whether it would be even possible to catalogue the SCSL among fully international criminal tribunals, rather that hybrid courts[148].

Another shade of the relationship between the domestic system and hybrid courts is that of who is entitled to primacy in case of concurrent jurisdiction. All tribunals, so far, opted for giving primacy to the hybrid courts, and it is indeed hard to theorise a different choice: once a hybrid court is established for a precise purpose and a limited jurisdiction, there is no reason for subtracting such competence in favour of national courts.

However, primacy does not exclude complementarity. Now that the ECCC are concluding their work, it may be time for the domestic system to collect the legacy and the cases that did not make it to trial and prosecute the former Khmer Rouge[149].

The relationship with international tribunals, already functioning, or yet to be established, with potentially concurrent jurisdiction, must be also assessed.

The Transitional Administration in East Timor, for example, regulated the relationship of the Special Panels for Serious Crimes with a potential international court, assigning primacy to the latter: «the establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established»[150]. Such court, though, was never established and the provision never produced its effects.

The Regulation 65 Panels, instead, partially shared their jurisdiction with the ICTY, which had primacy. In substance, though, the panels never struggled with the matter, since, as we mentioned before, the ICTY directed its attention to the "big fishes", while the panels focused on minor offenders.

Finally, the principle of *ne bis in idem* also obeys and descends to such relationships.

The choice of how a hybrid court relates to the national system is not only essential for the best understanding of its powers and functions. In the future, it will be central for better understanding the possible relationship between such hybrid tribunal and the

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[148] SCSL, *Prosecutor v. Kallon, Kamara*, Cases No. SCSL-04-15-AR72, SCSL-04-16-AR72, Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 85, para. 88.

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[149] ECCC, *Co-Prosecutors v. Im Chaem*, Case 004/1, D308/3/1/20, Pre-Trial Chamber, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, paras 74-80; para. 340.

[150] UNTAET/Regulation/2000/11, section 10.

International Criminal Court, should the prosecutor open an investigation over the same situation that the hybrid court is established to deal with. If a court is strongly linked to the national system, it would be easier to affirm that the ICC needs to assess the hybrid court's activities to evaluate whether there is ground to intervene, in respect of the complementarity of the ICC. The case of the Special Criminal Court for the Central African Republic may represent a first in this regard, as it will be explained further in this study.

6. Sources of funding.

A feature that significantly affects the functioning of a hybrid court is the amount and provenance of funding to support its work.

The courts for the former Yugoslavia and Rwanda were representing such a heavy expenditure element for the United Nations budget, on which they were entirely based, that the search for a more cost-efficient formula was one of the factors that led to the invention of hybridity[151]. And so, in fact, it was: the Special Panels for Serious Crimes costed around 6 million USD per year; the SCSL costed about 300 million overall, meaning around 19 million USD per year; the ECCC around 6-7 million per year; the Kosovar Panels maximum 15 million USD[152]; all compared to the ICTY and ICTR that costed more than 100 million USD per year, each[153].

Nevertheless, all the hitherto operational mixed courts have been faced with severe crises caused by the lack of funds, whatever the financing system each of them adopted.

In principle, of course, it remains a viable option for all expenditure on a hybrid court to be supported by an international organisation, such as the United Nations. Nevertheless, this could be reconfirmed an expensive system.

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[151] *See* Chapter I on the point. G. TORTORA, "The Financing of the Special Tribunals for Sierra Leone, Cambodia, and Lebanon", in *International Criminal Law Review*, 2013, vol. 1, p. 93 ff.

[152] L. GBERIE, "The Special Court for Sierra Leone rests – for good", in *Africa Renewal*, available at www.un.org/africarenewal [last accessed 13 January 2022]; C. JALLOH, "Special Court for Sierra Leone: Achieving Justice?", in *Michigan Journal of International Law*, 2011, vol. 39, issue 3, 430; D. COHEN, "Justice on the cheap Revisited: The Failure of the Serious Crimes Trials in East Timor" in *Asia Pacific Issues*, 2006, n. 80, p. 5, p. 11; UNMIK/Reg/2000/50, 23 August 2000; UNMIK/Reg/2000/67, 29 December 2000.

[153] UN Doc. S/2004/616, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary-General,* 23 August 2004, para. 42.

An alternative solution, which removes the funding of the court from the sole responsibility of an international organisation and, at the same time, does not place it on the budget of the State concerned, is that adopted by the Special Court for Sierra Leone.

The SCSL, in fact, was the first hybrid court based exclusively on voluntary contributions from the international community[154]. A Management Committee composed by international exponents and national representants of the government administered the budget and reported to the State donors[155].

On the other hand, a hybrid court could potentially be powered exclusively by national funds of the State concerned. This approach could, however, damage the budget of a State, especially if not particularly prosperous. If, in fact, the court wishes to recruit highly qualified international personnel, it must be able to guarantee wage standards that are competitive with those of international courts, in order to avoid struggling to attract experienced operators. High expenditure on staff and the functioning of the court, however, could raise strong criticism of the way national funds are allocated and used.

This is the case, for example, with the Panels in East Timor and Kosovo. Both jurisdictions were initially funded from the budget of UNTAET and UNMIK, which at the time funded the entirety of State activities, and then received further financial support from the country's government, once established[156]. A circumstance that generated fierce criticism of the management of funds for the Special Panels for Serious Crimes was linked to the exorbitant expense for bottled water for international personnel: the only expense for water, in fact, it amounted to over USD 4 million, while the total cost incurred for the 2000 units of the national staff, exceeded only USD 5 million; if it were entrusted to a local purification company, or to a national bottled water company, up to 1000 jobs would be generated in favour of East Timorese citizens[157].

In both cases, due care should be taken to ensure that the source of funding does not turn into a channel to influence the court's work, mining its independence. Assessed contributions are the preferred means of resourcing a tribunal[158]: it diminishes the risk of

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[154] SCSL, *Agreement*, article 6.

[155] P. MOCHOCHOKO, G. TORTORA, *The Management Committee for the Special Court for Sierra Leone*, in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, 141-156.

[156] UNMIK/Reg/2000/50, 23 August 2000; UNMIK/Reg/2000/67, 29 December 2000; UNTAET/ Reg/2000/20, *On Budget and Financial Management*, 1 July 2000.

[157] N. LEMAY-HÉBERT, "The Bifurcation of the two Worlds: assessing the gap between internationals and locals in state-building processes", in *Third World Quarterly*, 2011, vol. 32, n. 10, p.1833.

[158] M. KERSTEN. K. AINLEY, "Hybridization – A spectrum of creative possibilities", in *The President on Trial: prosecuting Hissène Habré*, Oxford, 2020, p. 277.

threat to the autonomy of the institution. Nevertheless, most of them have been supported by voluntary contributors.

A separate system of funding upheld the functioning of the ECCC, consistently with the unique structure of the tribunal: while the expenses for the national components are sustained by governmental funds[159], those related to international staff relied on voluntary contributions, mainly coming from governments, international institutions, NGO, and even individuals[160].

Over the years, the ECCC have proved to be much more expensive than was anticipated, having to go through repeated crises linked to the lack of funds, with periodic episodes of serious delays - even of several months - in the payment of personnel. According to some ECCC scholars, the problems related to the financing of the court were closely linked to the broader landscape of growing political opposition to the hybrid court[161].

The choice to base the court's activities mainly on international, or national, or even a mixed system should keep into consideration the necessity to avoid to maximum extent possible the risk of external pressures on the court's work, and of interruption of the stream of financing.

7. The seat and the working language.

Two additional attributes, finally, define the degree of closeness of the court to a national or international model, and help position it on the sliding scale of hybridisation: the seat(s) of the court and the official working languages that it adopts.

7.1. A seat for everyone: hidden significances of a court's location.

The seat of the institution may appear to be a minor, purely operational, factor, but it is not. Such a choice is dictated by security and safety reasons, as well as the will to pursue objectives of capacity building, and transitional justice, which may suggest that justice «must be seen to be done». A tribunal may have its seat within the State concerned or abroad, either in the region or farther.

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[159] ECCC, *ECCC Agreement*, article 15.

[160] ECCC, *ECCC Agreement*, article 16; ECCC, *Summary of Contributions to Date by Donors*, 31 July 2021.

[161] D. CIORCIARI, A. HEINDEL, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, Ann Arbor, 2014, p. 101.

A research project conducted by the London School of Economics on determining standardised guidelines for the establishment of new hybrid courts suggests that «as a general principle, the court should be located as close to the location of the alleged crimes as possible.»[162]

We agree with that, insofar the presence of the court as proxime as possible to the territory of the State concerned, presents a number of advantages[163].

First of all, the choice to establish the hybrid court in the territory of the State affected by the crimes pursued, ensures a high degree of visibility of the existence and the work of the court. Visibility, which in itself is a neutral characteristic, becomes, in the context of international justice, advantageous, as a catalyst for a series of positive consequences in the territory concerned and among the affected communities[164].

The possibility of observing the presence of a jurisdiction specifically dedicated to the persecution of serious crimes should transmit to local communities a meaningful and credible testimony of the fight against impunity. The visible presence of operators actively pursuing the objective of justice should therefore be a deterrent to the commission of further violence in the area[165].

In addition, the ability to closely follow the work of the hybrid court, including through public participation in court hearings, plays an implicit and natural outreach role towards the community. The efforts of the Court to devote specific projects and resources to outreach operations are, in this case, extremely facilitated and, in the eyes of the recipients, more comprehensible and credible. Indeed, they find immediate confirm of what is happening on a daily basis in the courtrooms and, through the operators on the field, in the areas where crimes have been committed[166].

Finally, the visibility of the court reinforces a sense of ownership and legitimacy of the ongoing processes[167]. In fact, it conveys the message that the international community is endorsing and supporting the path to justice, not usurping it, by bringing it far away from concerned communities[168].

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[162] K. AINLEY. M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 39.

[163] E. WATCHOWSKI, "The Hybrid Court of South Sudan : Progress Towards Establishment and Sustainable Peace", in *Loyola University Chicago International Law Review*, 2017, vol. 15, issue 1, p. 129.

[164] M. KERSTEN, "Outreach, In-Reach, or Beyond Reach? Lessons Learned from Hybrid Courts", in *Justice in Conflict*, 15 March 2018, available at www.justiceinconflict.org [last accessed 9 January 2022].

[165]

[166] B. KOTECHA, "The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism", in *Leiden Journal of International Law*, 2018, vol. 31, issue 4, p. 939-962.

[167] A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. ix.

[168] K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 36.

A second advantage linked to a location of the court close to the crime's sites, and, at a certain level, complementary to that of visibility, is accessibility, consisting in the possibility for observers and potential interested parties, to contact the staff of the court.

Access to justice is asserting itself internationally as a human right. It is therefore the task of hybrid court negotiators to ensure that those who might be interested in them have easier access to the court[169].

In particular, accessibility benefits victims, witnesses, and others who wish to cooperate with the court[170]. Victims, if the court allows it, have the opportunity to present their "views and concerns" during the proceedings. In addition, if the statute of the Court so permits, they may be able to form as civil parties and, if so, to apply for reparations, precisely indicating their complaints and materially representing their wishes with respect to the reparation measures that the court should order[171].

Even those who wish to assist in the proceedings of the tribunal as witnesses shall enjoy easier access to the court where it is present in the territory of the State concerned, both by meeting with the staff of the court located even in the most distant regions, both by presenting their testimony during the hearings, and submitting, whereas appropriate, also to cross-examinations.

The seat of the court in the territory concerned corresponds, in essence, to the proximity to the crime sites. This greatly facilitates the work of court practitioners who have to go into the field and who, in any case, operate outside the courtrooms where the hearings are held.

Investigators, for example, have a greater opportunity to move within the territory even if there are unforeseen urgencies; moreover, it is clear that it is easier for them to enter into a connection with the communities concerned and to build and maintain a relationship of trust and collaboration with witnesses. In addition, the collection of physical evidence, which may involve complex and burdensome activities such as the exhumation of mass graves, the cataloguing of bone finds, the visit of detention centres,

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[169] P. SCHMITT, *Access to justice and international organisations: the case of individual victims of human rights violations*, Cheltenham, 2017; C. SAMPFORD, P. KEYER, V. POPOVSKI, *Access to International Justice*, New York, 2015; A. TRINDADE, *The access of individuals to international justice*, Oxford, 2011; F. FRANCIONI, *Access to Justice as a Human Right*, Oxford, 2007.

[170] J. CIORCIARI, A. HEINDEL, *Hybrid Justice: The Extraordinary Chambers in the Court of Cambodia*, Ann Arbor, 2014, p. 231 ff.

[171] C. SAFFERLING, G. PETROSSIAN, *Victims before the International Criminal Court: Definition, Participation, Reparation*, Berlin, 2021, p. 276.

the photographic tracing of places, are evidently simpler if the presence of the court in the area is constant and not linked to temporary missions[172].

Lawyers, whether at the service of defendants or victims, whine having an office at their disposal on the territory, can perform their task more efficiently, given the possibility of frequent and in person meetings with their clients, with the consequent, better, ability to outline their own defence strategies and to better intercept the expectations, desires, and frustrations of the assisted party with regard to the conduct of the proceedings[173].

Finally, an enormous advantage resulting from the location of the seat of the court in the state concerned is linked to the lower cost of the court's work. In fact, until now all hybrid courts have concerned countries in which the cost of living is extremely lower than that of Western countries, so the expenses of daily maintenance of court structures are inevitably reduced[174].

The court also avoids having to bear the costs of transport and accommodation of its international operators travelling on the territory to carry out their activities that cannot be separated from the contact with the local reality[175]. It also saves on witnesses' travels to the court (which may be very numerous, given the nature of mass crimes of the cases under the jurisdiction of the courts) for being examined in the context of the hearings[176].

In regard to the localization within the State, the hybrid court experiences examined so far opted for establishing the tribunal on the territory of the State concerned: the premises for the ECCC, provided by the Royal Government of Cambodia, are located in Phnom Penh[177]. The SCSCL, with his seat in Freetown, as provided for in the founding Agreement, was the first tribunal to deal with international crimes based in the same countries as to where the violations investigated were committed[178]. Regulation 64 Panels

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[172] B. VAN SCHAACK, "The Building Blocks of Hybrid Justice", in *Denver Journal of International Law and Policy*, 2016, vol. 44, n. 2, p. 241-243.

[173] M. PENA, G. CARAYONY, "Is the ICC making the most of victim participation?", in *International Journal of Transitional Justice*, 2013, vol. 7, issue 3, p. 534.

[174] S. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vol. 52, p. 358-359.

[175] ICC, ICC-ASP/11/40, *Report of the Court on the Revised strategy in relation to victims: Past, present, and future*, 5 November 2012, para. 39.

[176] F. DAME, "The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal", in *Michigan State International Law* Review, 2015, vol. 24, p. 240.

[177] ECCC, *ECCC Agreement*, article 14; ECCC, *ECCC Law*, article 43 new.

[178] SCSL, *Agreement*, article 10; SCSL, *Headquarters Agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone*, 21 October 2003, preamble ; B. NASCIMBENE, "L'individuo e la tutela internazionale dei diritti umani", in S. M. CARBONE, R. LUZZATTO, A. SANTA MARIA, *Istituzioni di diritto internazionale*, Torino, 2016, p. 420.

and the Special Panels for Serious Crimes worked within the existing structures around the respective countries.

However, they adhered to two different models: the first, adopted by the ECCC and the Special Court for Sierra Leone, is to centralize the work of the court in a specially dedicated structure, which visibly carries its signs, and which provides adequate space to accommodate all the organs, and - potentially - a wide audience wishing to attend open-door hearings.

The second model, instead, embodied by the panels of Timor-Leste and Kosovo, is that, as we have already seen, to include international personnel specialized in ordinary structures (already in operation or to be established in countries of recent institution) designated for criminal trials.

To the primary purpose of the hybrid court – the prosecution of mass crimes – the option for one model or the other may not have substantial effects, but it does in regard to secondary goals connected to the exercise of justice, such as reconciliation, transitional justice, and capacity building. The assignment of an *ad hoc* structure like for SCSL and ECCC, is a better choice for achieving side-effects of reconciliation: the building becomes a symbol of justice being made, enhance the visibility and the accessibility in the terms discussed above, and at the end of the court's work can be converted to a memorial and host the archives of the tribunal. This was done with the Special Court for Sierra Leone's compounds, after its closing down, and the Sierra Leone Peace Museum is now a permanent national institution dedicated to preserving the truth, honouring the conflict's many victims, and promoting lasting peace[179].

On the contrary, a widespread enclosure of international elements in the court's ordinary structure may have a greater force in term of capacity-building, if international personnel are involved, as they be more easily in strict cooperation with their national colleagues, either working in the same bench, either working in other field of law.

[179] "Peace Museum", in *Sierra Leone Truth and Reconciliation Commission*, available at www.sierraleonetrc.org; "Legacy Projects" and "The SCSL and RSCSL Archives", in *Special Court for Sierra Leone – Residual Special Court for Sierra Leone*, available at www.rcsl.org [last accessed 9 January 2022]; S. MOTHA, H. VAN RIJSWIJK, *Law, memory, violence: uncovering the counter-archive*, Abingdon, 2016.

A third model, implemented in Democratic Republic of Congo, is that of establishing "mobile courts", driven by both international and local actors, around the country, significantly joining transitional justice goals and prosecutorial aims[180].

The opposite choice – to set up the court abroad, also carries some advantages.

Being distant from the context of violence where the crimes took place ensures a greater degree of safety and security for the personnel, witnesses, and victims, who are less exposed to the risk of reprisal for seeking justice, especially if atrocities have note cease, and culprits with their supporters are still acting[181].

Second, it guarantees a higher independence of the court, which is in such way kept distant from political pressures[182].

Last, if the court is located in cities like The Hague, or Arusha, where many other international organisations work, it is much more feasible to involve foreign professionals for temporary appointments should specific expertise being needed.

To the extent it is possible, if the court is to have seat in a foreign country, it should be in a confining State, or, however, within the region, to maximise the beneficial effects that proximity provides. This was done with the Extraordinary African Chambers, working in Dakar, Senegal, for the investigation and prosecution of crimes committed in Chad[183].

If the dichotomy between a location inside or outside the concerned country represent the two edges of the spectrum regarding the "factor of hybridisation" of the location of the courts, there are also possible intermediate solutions.

The Special Court for Sierra Leone, for example, while having its seat in the country's capital city, decided to prosecute Charles Taylor in The Hague, based on the concerns for public disorder expectable from such a high-profile proceeding[184]. Thus,

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[180] T. KHAN, J. WORMINGTON, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice", in *Oxford Transitional Justice Research Working Paper Series*, 2011, p. 1-42; M. MAYA, "Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?", in *American Bar Association Rule of Law Initiative*, 3 December 2012; Open Society Foundations, *Justice in DRC: Mobile courts combat rape and impunity in Easter Congo*, 14 January 2013, available at www. justiceinitiative.org [last accessed 10 January 2022].

[181] K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 36.

[182] J. BERNATH, "Political violence as a time that is past? Engaging with non -participation in transitional justice in Cambodia, in *Social and Legal studies*, 2019, vol. 28, issue 5, p. 600-624.

[183] E. CIMIOTTA, "The First Steps of the Extraordinary African Chambers. A new Mixed Tribunal?", in *Journal of International Criminal Justice*, 2015, vol. 13, issue 1, p. 177-197.

[184] P. FLORY, "International Criminal Justice and Truth Commissions: From strangers to partners", in *Journal of International Criminal Justice*, 2015, vo.. 13, issue 1, p. 35; M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in S. WEILL, K. SEELINGER, K. CARLSON,*The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 278.

envisaging the possibility for a court to hold specific trials in a different location, may be a costly-effective and practical options to deal with emerging needs of safety and security. A similar provision is dictated by the ICC Rules of Procedure and Evidence, which admit that the Court sis in a State other than The Netherlands, to hear a case, «where [it] considers that it would be in the interests of justice»[185].

Another viable option, needing a higher financial support, would be that adopted by the Kosovo Specialist Chambers of having two seats, one abroad (The Hague), and one in the country (Pristina)[186]. The latter has the only function to host ceremonies. Such model makes the court visible, safe, and secure, but offers to the general public only predisposed shows, possibly mining the legitimacy of the court[187].

A demonstration that the position of the hybrid court is perceived as central and meaningful to the work and effectiveness of the tribunal is the location of the ECCC: when it was time to assign them proper premises, the Royal Government tried committedly to place the court as far as possible from the capital city centre; when international negotiators claimed that the Agreement provided for a seat in Phnom Penh…the RGC simply moved the borders of the city farther away, and the court found place in some military compounds 17 kilometres asway from the city centre, beyond the airport[188]!

7.2. Working languages between efficiency and meaningfulness.

The official working language is another factor that highly impacts upon the level of hybridisation of a court.

The principles to be considered in making the choice of the language to be used relate, broadly in the terms already discussed, the quality and effectiveness of the relations that the court maintains with stakeholders.

First of all, the protection of the accused is of fundamental importance, and he must always be guaranteed the possibility of fully expressing his/her rights to a fair trial, including at the linguistic level.

Then, the victims, the witnesses, and the public, who must be offered efficient, rapid, and comprehensible communication, in order to better understand, and possibly

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[185] ICC, *Rules of Procedure and Evidence*, article 100.

[186] KSC, Law No. 05/L-053, *Law on Specialist Chambers and Specialist Prosecutor's Office* ("KSC Law"), 3 August 2015, article 3.

[187] K. AMBOS, *Treatise on International Criminal Law*, vol. I, Oxford, 2021, p. 68.

[188] R. GIDLEY, "Trading a Theatre for Military Headquarters: Locating the Khmer Rouge Tribunal", in *Contemporary Southeast Asia*, 2018, vol. 40, n. 2, p. 279 ff.

cooperate, the conduct of proceedings. As previously discussed several times, a greater public understanding fosters ownership and a sense of legitimacy of the judicial institution.

Finally, the international community, which in some way is affected by the atrocities spread on the territory, and whose interest and participation in the persecution of international crimes requires that the possibility of following the proceedings of the tribunal be facilitated. Therefore, at least one between English and French should be included to grant a fast and wide understanding by the international community.

For this reason, although a court may decide to adopt only a widely known but unofficial language of the State concerned - such as English and French - or, on the contrary, to limit itself to the use of local languages, the best choice would appear to be a mix of local and international languages coexist within the tribunal.

At the Special Panels for Serious Crimes, official languages were English, Portuguese, Tetum, and Indonesian[189]. The SCSL exclusively adopted English as the official language of the court, but the choice is understandable in that English is a widely spoken idiom in Sierra Leone[190]. ECCC the Agreement states that the official language is Khmer; while the official working languages are English, French, and Khmer. A possibility to provide further translation in Russian was provided, but never used[191]. Every document must be submitted in at least two of the official languages, and the translation in the third follows[192]. The Regulation 64 Panels, differently, elected English as the official languages of those proceedings where international judges would be part of the bench[193].

The use of multiple languages, however, has inevitable consequences on the length of the trials and their cost, as each document should be translated into all the official languages of the hybrid court.

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[189] UNTAET/Reg/1991/1, *On the authority of the Transitional Administration in East Timor*, 27 November 1999, article 5; D. COHEN, "Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor", in *East-West Center Special Reports*, 2006, n. 9.

[190] SCSL, *Statute*, article 24; SCSL, *Rules of Procedure and Evidence*, rule 3; SCSL, *Agreement*, article 18.

[191] ECCC, *ECCC Agreement*, article 26; ECCC, *ECCC Law*, article 45 new.

[192] ECCC, Practice Direction ECCC/01/2007/Rev.8, *Filing of Documents before the ECCC*, article 7.

[193] UNMIK/Reg/2000/46, *On the used of language in court proceedings in which an International Judge or International Prosecutor Participates*, 15 August 2000.

8. Conclusions.

The variety of parameters that characterise a hybrid court are manifold. Every court, in fact, can present factors fully adherent to the model of international court or, on the contrary, in all respects, taken from the model of domestic criminal court. What "hybridizes" a criminal jurisdiction is, therefore, a negative factor of full non-accession to one of the two aforementioned models.

A court may be hybridised by any of the factors which characterise it: the legal basis, the applicable law, the jurisdiction, the relationship with the national legal system or with certain international organisations, the sources of financing, and even the choice of the official languages and the location of its seat. For this, we named such elements "hybridization factors". Each of them contributes, then, to place, ideally, the court, on the sliding scale that has for extremes the two pure models that can inspire it.

A court is, in substance, all the more hybrid the more numerous are the factors in which elements deriving from the international system coexist with elements typical of the local legal system.

It is entirely understandable, having reviewed the many possible arrangements characterising a hybrid court, that each of the past experiences has been profoundly different from the others, unique and experimental, that is, differently hybrid.

III. The recognition of the first generation of hybrid courts.

Due to variety of experiences and the fragmentation of each jurisdiction observed, as we mentioned in the introduction to this chapter, it does not exist an official and legal definition of 'hybrid court' as well as there is not a single model universally adopted to establish mixed jurisdictions. As we have previously discussed, each tribunal was a *unicum*, each contributed to the development and innovation of international criminal law and justice.

The debate about the possibility of comprehending all the hybrid court within a unitary legal category was complex, no absent the doubt that it may simply represent a mere scholar speculation with no grip on reality. In fact, as we will discuss below, the hybrid courts have a non-exclusively jurisdictional function: next to the express and

primary goal of conducting proceedings, they generate effects in terms of peacebuilding and capacity-building, based on the idea that «justice must be seen to be done»[194].

We have quickly summarised what may be the different "factors of hybridisation" of a mixed court, and we have recognised that the degree of hybridisation of a court, namely the number of mixed characteristics (not entirely domestic or international), that a court can present, is extremely variable. It is, now, natural to turn the reflection on whether it is even possible to gather all those courts under a single label, which be more descriptive than "a mix of local and global meeting in a judicial forum".

1. Can we even speak of a 'generation'?

It is impelling to start our analysis of the studies over the existence of one single category of hybrid tribunals by acknowledging that not all scholars dedicated to internationalised tribunals drove their attention to assessing the definition of hybridity.

In fact, some authors simply accepted that hybrid courts are a comprehensive group with shared paradigms.

Professor Fichtelberg, for example, even though underlining that there is no «single template laid down […], one of the defining features of the hybrid tribunals is that power in the context is shared between the domestic governments "hosting" the tribunals […] and the international bodies» and that «domestic presence is what defines the hybrid courts as a unique category of international tribunals»[195]. On such basis, he simply opens affirms that he wishes to study the formation of the "hybrid, uncritically including under such definition the SCSL, the ECCC, the UNTAET Special Panels, the Regulation 64 Panels, together with the Bosnia War Crimes Chamber and the Special Tribunal for Lebanon[196].

Seemingly, the major London School of Economics' research project on proposing guidelines for the establishment of future hybrid courts implicitly accepts that hybrid courts do represent a unitary group, whose first generation includes the Regulation 64

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[194] B. KOTECH, "The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism", in *Leiden Journal of International Law*, 2018, vol. 31, p. 941.

[195] A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. 75, p. 181.

[196] A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. vii; *see also* A. FICHTELBERG, "Identity politics and hybrid tribunals", in *Leiden Journal of International Law*, 2020, vol. 33, p. 993 ff.; A. FICHTELBERG, "Transitional justice and the end of impunity", in C. LAWTHER, L. MOFFETT, D. JACOBS, *Research Handbook of Transitional Justice*, 2019, p. 328 ff.; A. FICHTELBERG, "Outreach at the Hybrid Tribunals: The Cases of the Sierra Leone and Cambodia", in *Journal of Global Justice and Public Policy*, 2020, vol. 6, p. 33 ff.

Panels, the East Timor panels, the SCSL, the ECCC, together with the Bosnia War Crimes Chamber, the Special Tribunal for Lebanon, the Iraqi High Tribunal[197]. The Guidelines, too, do not explain why such courts are recognised as belonging to the same *genus*, neither they do make reference to academic literature doing so. Such study is based on the position «The hybrids blended different elements and varying degrees of national and international law and staff»[198].

The definitions over which such research works rely, although appropriate for the purposes of those investigations, remain quite simplistic, with the consequent risk of resulting too broad for actually catching the essence of the phenomenon: «Hybrid tribunals are internationalised courts comprising domestic and international substantive and procedural law, as well as national and international actors in the tribunals themselves.»[199]; «A hybrid tribunal […] is a unique blend of national and international»[200].

In substance, they do not add much to that "mix of the local and the global meeting in a judicial forum" from which we started and that we considered too generic for the study of hybridity as such.

Consequently, it is useful for this study to move to analyse the works of those authors who deeply faced the issue over whether there is a possible unitary category of hybridity, and to what definition it responds.

Several other scholars, in fact, did focus their research on the recognition of a single category encompassing all jurisdictions at different extents considered as "hybrid". The outcomes of their studies are varied: while some reached the conclusion that there is indeed a unique category of hybrid courts, some others arrived at the opposite solution by concluding that the phenomenon has no compactness, and, consequently, proposed several possible classifications.

We will first address this latter position, and only eventually we will move to approach those studies that did recognise the unicity of the category.

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[197] K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 2.

[198] K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 2.

[199] R. KEENEN, "When All Ese Fails, look to the Courts: Using Hybrid Tribunals to Build Judicial Capacity and end Environmental Destruction in Post-Conflict Countries", in *William & Mary Environmental Law and Policy Review*, 2019, vol. 43, n. 3, p.965.

[200] F. DAME, "The effect of international criminal tribunals on local judicial culture: The superiority of the hybrid tribunal", in *Michigan State International Law* Review, 2015, vol. 24, p. 214, p. 247-248; inspired by A. COSTI, "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations", in *New Zealand Universities Law Review*, 2006, vol. 22, p. 214.

2. Studies excluding the compactness of the phenomenon and proposed alternative classifications.

Some authors, at the end of their studies, assumed that there is no possible ground to acknowledge the compactness of the phenomenon of hybridity, and consequently rejected the possibility to provide a definition of it, other than that "mix of national and international" that we mentioned repeatedly. They affirm that «hybrid courts are essentially different»[201].

Professor Chiara Ragni, for example, concluded that internationalised criminal tribunals do not inaugurate a distinct category of courts and rather promote to observe each of them separately, in respect to the two traditional model of international and domestic tribunal. She upholds that the hybrid nature itself (descending from the unique asset of political, historical, and legal circumstances that led to their establishment) is what makes such jurisdictions extraneous to every possible categorisation[202].

Seemingly, after comparing some "factors of hybridisation" such as the legal framework, the jurisdiction, the organisational structure, and the regulation of possible "conflict of laws" of the mixed tribunals for Sierra Leone, Cambodia, East Timor, Kosovo, and the Bosnia War Crimes Chamber, Shraga concludes that «no single model of internationalised jurisdiction has yet emerged»[203]. She excludes the existence of a category based on the circumstance that each tribunal examined differs in its legal basis, due to the different historical-political circumstances that led to its establishment.

A third scholar, adhering to the same vein, Robert Muharremi, strongly rejected the thesis of the existence of a *tertium genus* of jurisdiction, other than national and international. He argued that «The idea of hybrid court is [..] conceptually misleading as it creates the perception of hybrid courts as a separate institutional category» and that «perceiving hybrid courts as some form of third pillar of justice between international and domestic courts […] is prone to causing misunderstandings and legal uncertainty». He consequently concluded that «there is not third legal sphere which could be filled by hybrid courts as a different category of courts»[204].

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[201] S. NOUWEN, "Hybrid courts": The Hybrid Category of a New Type of International Crimes Courts", in *Utrecht Law Review*, 2006, vol. 190, n. 2, p. 212-213.

[202] C. RAGNI, *I tribunali penali internazionalizzati*, Milano, 2012, p. 346-347.

[203] D. SHRAGA, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction", in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, p. 36.

[204] R. MUHARREMI, "The concept of hybrid courts revisited: The case of the Kosovo specialist chambers", in *Journal of International Criminal Justice*, p. 2018, vol. 18, issue 4, p. 626, p. 637.

Some authors, instead, drawing from the conclusion that hybridity does not represent a new unique category of criminal jurisdictions, still do recognise that some of the tribunals have strong similarities that male them parts of a same *genus*. Thus, although not recognising one single category, they go further and proposed alternative and articulated classifications for labelling those tribunals initially observed as "hybrid".

Sarah Williams, in her research, subdivides the tribunals in two species, assigning a different meaning to two terms that are otherwise used interchangeably – "hybrid" and "internationalised". Williams defines a "hybrid tribunal as «a true blending of the national and international in one institution […] a tribunal operates on the basis of international law directly, and will generally been established by a treaty between the affected state and the United Nations or by the Security Council acting under Chapter VII of the United Nations Charter»[205], and includes under such definition the SCSL and the Special Tribunal for Lebanon. An "internationalised criminal tribunal", instead, is an «essentially domestic [institution] but with significant participation from other states or from international organisations including the United Nations»[206], like – according to the author – Regulation 64 panels, and the Special Panels for Serious Crimes.

The same distinction was also proposed by Professor Angela Del Vecchio, who, yet, assigned different labels to each court. According to her, and differently from Williams, hybrid courts encompass the SCSL, the ECCC, and the UNTAET panels, while UMIK courts, Special Tribunal for Lebanon, and the Iraqi High Tribunal would rather be "internationalised criminal tribunal"[207].

Nevertheless, the same authors seem to imply the existence of such category in other studies: R. MUHARREMI, "The Kosovo Specialist Chambers and the Specialist Prosecutor's Office", *in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2016, vol. 76, p. 967 ff. («Hybrid courts are, in very general terms, courts of mixed composition and jurisdiction, which include national and international elements, and which usually operate within the jurisdiction where the crimes occurred»).

[205] S. WILLIAMS, *Hybrid and Internationalized Criminal Tribunals*: *Selected Jurisdictional Issues*, Harth, 2012, p. 249; S. WILLIAMS, "The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia", in *Journal of International Criminal Justice*, 2020, p. 24.

[206] S. WILLIAMS, *Hybrid and Internationalized Criminal Tribunals*: *Selected Jurisdictional Issues*, Harth, 2012, p. 250. This approach is criticised by A. KJELDGAARD-PEDERSEN, *The International Legal Personality of the Individual*, Oxford, 2018, because it relies too substantially on the criterion of the participation of the United Nations to the design, establishment, and functioning of the tribunals. *See also* A. KJELDGAARD-PEDERSEN, "What defines an international criminal court?: A critical assessment of 'The involvement of the International Community' as a Deciding Factor", in *Leiden Journal of International Law*, 2015, vol. 28, p. 113 ff.

[207] A. DEL VECCHIO, *I tribunali internazionali tra globalizzazione e localismi*, Bari, 2009, p. 203-230.

Partially different, in this regard, is the position of Caitlin Reiger, who, after confirming the separation of hybrid and internationalised tribunals, still assesses their functioning and effects indistinctly[208].

Stahn proposed a further diversification, among hybrid («internationalized forums of justice, including mixed national–international courts operating as independent criminal institutions outside the traditional realm of domestic jurisdiction» identified with the SCSL), internationalised (e mixed court chambers differ from hybrid courts due to the fact that they lack a separate international legal identity of their own, distinct from the legal personality of the domestic state. They are internationalized domestic institutions, which have jurisdiction over special categories of crime. They apply both domestic and international law. Moreover, domestic judges may, under some circumstances, overrule international judges» like UNMIK and UNTAET panels, the ECCC, and the Bosnia War Crimes Chambers), and internationally assisted criminal tribunals (A jurisdiction that «derives its authority formally from a delegation of occupation authority […] domestic judges are formally in charge of the trials. But [non-nationals] may act as 'observers'» and that would be the unique case of the Iraqi High Tribunal)[209].

All authors who reached the conclusion that there is not a unique definition of hybrid jurisdiction, *tout court*, and those who preferred to recognise and classify jurisdictions relating to the phenomenon of hybridity into multiple categories, have mainly assumed a perspective based on the combination of the factors of hybridity in each court. As we observed in this chapter, though, such factors of hybridisation are numerous and deeply impacting over the structure and the functioning of a tribunal. It is, thus (like Ragni found) innate in the nature of hybridity to allow a multiplicity of solutions, that inevitably differ and are unique.

Hence, we do not consider it correct to deny the existence of a sole category of hybrid court on the basis of one of its very characterising features, namely the possibility to apply a range of "factor of hybridisation" and adapt each jurisdiction to the case concerned.

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[208] C. REIGER, "Hybrid and Internationalized Tribunals", in C. GIORGETTI, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, Leiden, 2012, p. 283 ff.

[209] C. STAHN, "The Geometry of Transitional Justice: Choices of Institutional Design", in *Leiden Journal of International Law*, 2005, vol. 18, p. 4436-441; C. STAHN, "Justice under Transitional Administration: Contours and Critique of a Paradigm", in *Houston Journal of International Law*, 2005, vol. 27, p. 312 ff.

Drawing from this assumption, it is important for our study to analyse on which basis some authors, rather, reached the opposite conclusion.

3. Studies recognising the existence of a unique category of hybrid courts: a functional perspective.

While scholars refuse to recognise one model of hybrid court, due to the fact that each of them is the result of a specific set of "factors of hybridisation", most of such observers still do agree over the possibility of considering hybrid courts a unitary, adopting a distinct perspective.

The major study of Emanuele Cimiotta shed light on the point. Although he rejected the idea of considering all the internationalised criminal tribunals as belonging to a unitary legal *genus*, he still recognised them as a unitary category under the profile of the extra-judicial effects that they provoke, proposing the idea that hybrid courts, on the top of all, are a functional category: jurisdictional organs with a specific role to play in the international order – to promote the pacification processes of territorial communities torn apart by heavy civil wars, and to contribute to the incorporation into national legal systems such elements as to enable State organisations in formation to exercise independent criminal jurisdiction over crimes affecting universal values, in the best interests of the international community[210].

In this perspective, Cimiotta goes further, adding that the involvement of the UN a one of the most relevant features of the tribunals, and sufficient to gather all those experiences together under one category[211]. While this might have been correct at the time of the first experiences of hybridity, this may reveal to be changed in current times, as the present study will later assess.

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[210] E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009, p. 461: «Se da un lato i tribunali misti agiscono formalmente come organi interni, dall'altro essi denotano una comune matrice internazionalista, giacché si pongono come strumenti *della* Comunità internazionale, e di cui la Comunità internazionale si serve per tutelare i propri interessi fondamentali. Detto in altre parole, i tribunali penali misti configurano a nostro avvio una nuova e autonoma categoria *funzionale*, caratterizzata dal fatto di essere formata da organi in grado di esercitare un'identica funzione sul piano dell'ordinamento internazionale»; E. CIMIOTTA, "Sull'inquadramento giuridico dei tribunali penali misti", in A. ODDENINO, E. RUOZZI, A. VITERBO, F. COSTAMAGNA, L. MOLA, L. POLI, *La funzione giurisdizionale nell'ordinamento internazionale e nell'ordinamento comunitario*, Napoli, 2010, p. 245 («Organi caratterizzati dallo svolgimento di una specifica funzione che rileva sul piano dell'ordinamento internazionale: promuovere i processi di pacificazione delle comunità territoriali lacerate da pesanti guerre civili, contribuendo ad inserire negli ordinamenti giuridici nazionali elementi tali da permettere alle organizzazioni statali in formazione di esercitare autonomamente la giurisdizione penale sui delitti lesivi dei valori universali, nel superiore interesse della Comunità internazionale»).

[211] E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009, p. 462.

Cimiotta believes, however, that the unity of the phenomenon should not be exaggerated, and so excludes from the category of mixed criminal courts a number of experiences that other authors did include: the Special Tribunal for Lebanon, the Iraqi High Tribunal, and the War Crimes Chamber in Bosnia and Herzegovina[212].

Cimiotta, overall, concludes that a rigid model of mixed criminal court reconstructed on abstract normative parameters is non-existent, while a functional model can be reconstructed[213].

Several are the authors adhering to such thesis and focusing their research about hybridity on the activities od the courts, and their consequent effects both on the territory and in the relationship with the international community.

Higonnet affirms that «ultimately, hybrid criminal bodies form a family of their own, apart from other judicial entities», with the ability to incorporate and influence local culture and to boost local empowerment through the implementation of post-atrocity justice activities[214].

Hobbes and McAuliffe reconstruct the compactness of the varied experiences of hybrid tribunals by observing that «they offered the potential for a catalytic transition to normalcy, based on a tri-partite grounding of legitimacy, capacity building and norm-penetration»[215].

Keenen appreciates and underlines the hybrid courts' «unique ability to shape the judicial culture of the affected country. Hybrid tribunals build domestic judicial capacity and create sustainable long-term peace because they involve local judges and are located in-country. This provides legitimacy, buy-in, and a "spill-over" effect on local judicial culture»[216]. Laura Dickinson, similarly, suggests that hybrid courts have the potential to enjoy a high degree of legitimacy, and to boost the capacity-building in favour of the local

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[212] E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009, p. 555 ff.

[213] E. CIMIOTTA, *I tribunal penali misti*, Padova, 2009, p. 567.

[214] P. E. HIGONNET, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform", in *Arizona Journal of International and Comparative Law*, 2006, vol. 23, p. 356.

[215] H. HOBBES, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol. 30 p. 177-178; P. MCAULIFFE, "Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan", in *Journal of International Law and International Relations,* 2011, vol. 7, n.1, 1-65.

[216] R. KEENEN, "When All Ese Fails, look to the Courts: Using Hybrid Tribunals to Build Judicial Capacity and end Environmental Destruction in Post-Conflict Countries", in *William & Mary Environmental Law and Policy Review*, 2019, vol. 43, n. 3, p. 966.

judicial system, but also that they amount to a new transitional justice mechanism, able to shape the narrative of the past and to build a more stably peaceful future[217].

Raub, instead, focuses on the effects of hybrid courts as a whole towards victims' communities and as a legacy for future experiences of internationalised tribunals. Drawing from the consideration that the primary benefit of hybrid tribunals is their flexibility, highlights that each tribunal can learn from previous experiences to improve its functioning, for being more efficient in meeting the needs and the expectation of the victimised society[218].

Ochs, in the end, advocating for the maintenance of the hybrid prosecution of crimes at the largest extent possible, upholds that hybrid courts are able to involve victims in the adjuratory process, providing an element of local involvement or ownership[219]. She underlines that accountability goals can be paired with transitional justice and restorative initiatives[220].

While previously observing each single "factor of hybridisation", we could not avoid evaluating the effect that each choice in the design of a hybrid court may impact over a number of circumstances that do not strictly deal with the prosecutorial activities and the classic development of the proceedings. We repeatedly assessed that some "factors of hybridisation" can benefit victims, concerned communities, or rather the local judiciary system, and even the functioning of the state's administration. And such beneficial effects are not diminished, but rather strengthened, by the unicity of each tribunal. On the contrary: the capacity of adapt to the needs of each situation is as effective as the structure and the functioning of the tribunal is appositely designed for that.

Consequently, we agree with the authors that affirm that hybridity is a category, characterised by functional goals and effects, and by the possibility to modulate its legal features for achieving them at the best.

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[217] L. A. DICKINSON, "The Promise of Hybrid Courts", in *Amsterdam Journal of International Law*, 2003, vol. 97, p. 295, p. 303–304.

[218] L. RAUB, "Positioning Hybrid Tribunals in International Criminal Justice", *in International Law and Policy*, 2009, vol. 41, p. 1043-1044; L. RAUB; United Nations Human Rights Office of the High Commissioner, *Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo*, 2010, paras 1052-1054 (« un mécanisme de poursuites mixte - composé de personnel international et national - est nécessaire pour rendre justice aux victimes»), available at www.ohchr.org [last seen 9 July 2021].

[219] S. L. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020,vol. 52, n. 2, p. 359-360.

[220] S. L. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020,vol. 52, n. 2, p. 355-356.

Drawing from here, it is possible to doubt over the correctness of contemplating within the count of hybrid courts some jurisdictions that are variably included by scholars: the Special Tribunal for Lebanon[221], the Iraqi High Tribunal, and the Bosnia War Crimes Chambers[222].

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[221] The Special Tribunal for Lebanon is a jurisdiction whose nature was long discussed among scholars. Some authors, keeping in mind the function of peacebuilding as a distinctive feature of internationalised tribunals, tend to exclude the Special Tribunal for Lebanon from such group. Furthermore, the STL is not unanimously mentioned among hybrid courts due to the circumstance that it was established on the basis of Chapter VII of the Charter of the United Nations, and it is thus not the result of negotiations between the State and the international community. The Special Tribunal for Lebanon was set up in response to a series of terroristic attacks, in the number of fifteen, that took place in Beirut, the capital city of Lebanon, between 2004 and 2005. Among these, the most famous and grave episode is the attack to the life of R. Hariri, former Prime Minister, on 14 February 2005. Mr. Hariri was killed by the explosion of a bomb, which was installed inside a car and active from remote. Even in the case of Lebanon, the episode was just the indicator of a climate of international tension in the Middle East region, in which several international actors were involved. On the one side, Iran, and Syria; on the other France, the USA, and Saudi Arabia, hiding behind a movement that had the objective of destitute the Lebanese dominant political class. The intervention of the United Nations was activated by a request of the government of Lebanon. In a rather smooth way, an agreement leading to the establishment of the Special Tribunal for Lebanon was reached. Difficulties rose during the following phase, in which the Lebanese Parliament should have approved the proposal and the project for such court; the Islamic component within the Parliament strongly opposed and voted against the institution of the tribunal, and the agreement was never validated. Once realised that there was no possibility for the agreement to be ratified by the political forces, the Security Council of the United Nations, unanimously, decided to proceed according to the Chapter VII of the Charter of the United Nations, thus establishing the Special Tribunal for Lebanon *ex officio*, without the direct participation of Lebanon.

Assessing the achievements of the STL is not easy. Before the jurisdiction, no accused appeared, and all the proceedings were conducted *in absentia*, as no one of those considered responsible of the wage of terroristic attacks was ever arrested or showed up by any mean in the courtroom. This is a very peculiar characteristic of the STL, with significant consequences in terms of fair trial and right to a defence. In case a person accused before the STL will ever be captured, an entirely new proceeding should be commenced *ex novo*. Although the features of the STL – its composition, the location in The Hague, its establishment by the United Nations on Chapter VII, the lack of a connection to the Lebanese judicial system – may eliminate it from the count of hybrid courts on the opinion of most scholars, to the goals of the present study, we intend to maintain it under observation, on the basis of its functional role of reconciliation and capacity-building, due to the strenuous plan of outreach implemented by the STL.

[222] Literature is abundant in regard of each of them. For the Special Tribunal for Lebanon: A. ALAMUDDIN, N. JURDI, D. TOLBERT, *Special tribunal for Lebanon: law and practice*, Oxford, 2014; A. BILALA, *Le Tribunal spécial pour le Liban : une juridiction hybride d'un genre nouveau*, Paris, 2014; M. CATALETA, *Il tribunale speciale per il Libano*, Napoli, 2014; O. ALTERMAN, *A Guide to the Special Tribunal for Lebanon*, Tel Aviv, 2011; M. BOHLANDER, "'Statute?: What Statute?': Norm Hierarchy and Judicial Law-Making in International Criminal Law at the Example of the Special Tribunal for Lebanon", in *Statute law review*, 2015, vol. 36, n. 2, p. 186 ff.

For the Iraqi High Tribunal: M. SCHARF, G. MCNEAL, *Saddam on trial : understanding and debating the Iraqi high tribunal*, Durham 2006; W. WILEY, *Societal reconciliation, the rule of law and the Iraqi High Tribunal*, Brussels, 2015; M. SCHARF, "The Iraqi High Tribunal: A Viable Experiment in International Justice?", in *Journal of International Criminal Justice*, 2007, vol. 5, n. 2, p. 258 ff.; J. PETERSON, "Unpacking show trials: Situating the trial of Saddam Hussein", in *Harvard International Law Journal*, 2007, vol. 48, p. 457; M. BOHLANDER, "Can the Iraqi Tribunal sentence Saddam Hussein to Death?", in *Journal of International Criminal Justice*, 2005, vol. 3, n. 2, p. 463 ff.

For the War Crimes Chambers for Bosnia and Herzegovina: M. BOHLANDER, "Last exit Bosnia: transferring war crimes prosecution from the International Tribunal to domestic courts", in *Criminal law forum*, 2003, vol. 14, n. 1, p. 59 ff; J. MEERNIK, J. BARRON, "Fairness in National Courts Prosecuting International Crimes: The Case of the War Crimes Chambers of Bosnia-Herzegovina", in *International Criminal Law Review*, 2018, vol. 18, n. 4, p. 712 ff; O. MARTÌN-ORTEGA, "Hybrid Tribunals and the Rule

This approach shapes a definition of hybridity that goes beyond that generic mixture of local and international from which we departed. Hybridity, in the end, appears to be a phenomenon dealing not only with prosecutorial activities taking place in a forum uniquely structured by a different combination of "factors of hybridisation", but also with those extra-judicial effects that such jurisdictions provoke on the territory over which they operate: transitional justice, capacity-building, and peacebuilding.

4. The importance of being 'first'.

Having delimited a comprehensive definition of hybridity as an autonomous phenomenon, and not as a series of random outcomes for the prosecution of international crimes, it is relevant to place them in the correct relationship with the other solutions that developed and affirmed over the time, mainly corresponding to the establishment of fully international criminal tribunals[223]. The importance of correctly classifying the phenomenon is motivated by the possibility to study further developments in the category of hybrids. For doing so correctly, it is impellent to place the category in the correct position in the galaxy of international criminal justice.

Some authors classified the phenomenon of hybridity as the "second generation of *ad hoc* international tribunals", in respect of the ICTY and ICTR, that would represent the first[224]. Others, instead, present a more complex classification by considering the ECCC, SCSL, SPSC, Regulation 64 Panels as "the fourth generation of international criminal tribunals"[225] and labelling the International Military Tribunals would in Nuremberg and Tokyo as the first generation, the ICTY and ICTR as the second, and the ICC as the third.

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of Law: War Crimes Chamber of the State Court of Bosnia and Herzegovina", in H. CAREY, S. MITCHELL, *Trials and tribulations of international prosecution*, Lanham, 2013, p. 195 ff.; K. UHLIROVA, "War Crimes Chamber of the Court of Bosnia and Herzegovina: Seeding 'International Standards of Justice'?", in E. KRISJANSDOTTIR, A. NOLLKAEMPER, C. RYNGAERT, *International Law in Domestic Courts: Rule of Law Reform in Post-conflict States*, Cambridge, 2012.

[223] *See* Chapter I for a brief overview of the International Military Tribunals and the *ad hoc* international tribunals (ICTY and ICTR). For a thorough study of the International Criminal Court, *see* A. NOVAK, *The International Criminal Court: an introduction*, Cham, 2015.

[224] B. VAN SCHAACK, "The Building Blocks of Hybrid Justice", in *Denver Journal of International Law and Policy*, 2016, vol. 44, n. 2, p. 171-172.

[225] G. SERRA, *Le corti penali "ibride": verso una quarta generazione di tribunali internazionali penali? Il caso del Kosovo*, Napoli, 2007.

Such divisions appear to be inaccurate. All those tribunals enclosed in the first and/or the second generation according to this classification, in fact, fully embody their legal nature of *international* criminal jurisdictions.

On the contrary, listing the *hybrid* courts as a generation of *international* tribunals represents a contradiction in itself. In fact, as we previously assessed, hybrid (or *internationalised*, or *mixed*) courts simply are not international tribunals: they have a peculiar, *mixed*, nature, in reason of their own features and goals. As we demonstrated above, they represent a unitary category, different from the model of international court, both from that of domestic jurisdiction: they express a *tertium genus*. Saying that they are a "generation of international tribunals" implicitly means positioning all those experiences (some of which had a strong tie to the national judicial system) in that category, without having that nature. Thus, based on their innovative nature, derived from those combinations of circumstances that we observed in the previous chapter, internationalised criminal tribunals are a distinct phenomenon from that of international courts. We can discard such thesis on this assumption and thus conclude, then, that hybrid courts are not a generation of international tribunals.

Other theories, instead, identify hybridity as "International Criminal Justice 3.0"[226]. According to this approach, there is a subsequence of solutions, gathered by the activity of prosecution of international crimes – the first manifestation being the International Military tribunals, followed by the ICTY and the ICTR. In this optic, in addition, the ICC is the expression of a fourth dimension of international criminal justice. Such studies, though, are based on the necessary sequence of phenomena called, in which one is preceded or followed by others, almost as if in search of an ideal system to be consolidated and maintained. Hybridity, though, as we discussed in the first chapter, develop parallelly to the purely international prosecution of *crimina juris gentium*, and it cannot, therefore, be incardinated in such a supposed temporal linearity.

A third theorisation, in addition, rather observe the phenomenon underlining the connection to the United Nations: the first generation of "UN-based tribunal" (ICTY and

[226] R. DE LA BROSSE, "Les trois générations de la Justice pénale internationale. Tribunaux pénaux internationaux, Cour pénale internationale et tribunaux mixtes" in *Annuaire français de relations internationales*, 2005, vol. VI, p. 154 ff. ; H. HONGJU KOH, "International Criminal Justice 5.0", in *Yale Journal of International Law*, 2013, vol. 38, p. 531; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, issue 2, p. 489.

ICTR) would in this view be followed by a second generation, that of hybrid courts[227]. This is a correct categorisation, in principle: it is true that all hybrid courts considered in this study – and a few of those that some scholars include in the category, like the Special Tribunal for Lebanon – were created with the cooperation of the United Nations, at different extent. Nevertheless, the involvement of the United Nation is supposedly only one possibility of applying a "factor of hybridisation" to the design of the tribunal: hybrid courts, according to the definition that we accepted above, can be established also with the participation of the international community in other forms, namely other international or regional organisations[228].

To top it all, the most convincing classification is that upheld by a majority of eminent scholars, according to which the ECCC, the Special Court for Sierra Leone, the Special Panels for Serious Crimes, and UNMIK Panels represent an innovative phenomenon for the prosecution of international crimes. It is a form of prosecution developed as an alternative to purely international jurisdictions, and to intervene whereas the state alone cannot act; it presents a multiplicity of expression; it pursues objectives that are not strictly typical to international criminal courts (transitional justice, peacebuilding, capacity-building). As such, the hybrid courts observed in the present chapter simply embody nothing else than "the first generation of internationalised criminal tribunals"[229].

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[227] D. SHRAGA, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction", in C. ROMANO, A. NOLLKAEMPER, J. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004, p. 15; S. NOUWEN, "'Hybrid Courts' – The hybrid category of a new type of international crimes court", in *Utrecht Law Review*, 2006, vol. 2, issue 2, p. 210-211; C. JALLOH, "Regionalizing International Criminal Law?", in *International Criminal Law Review*, 2009, vol. 9, p. 445 ff.

[228] It will be discussed further in this study the trend of establishing hybrid courts with the assistance of regional organisations.

[229] D. RE, "International Crimes: A Hybrid Future?", in C. EBOE-OSUJI, E. EMESE, *Nigerian Yearbook of International Law 2017*, Cham, 2018; K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 1-2; M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in S. WEILL, K. SEELINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020; A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015; A. FICHTELBERG, "Identity politics and hybrid tribunals", in *Leiden Journal of International Law*, 2020, vol. 33; S. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vol. 52. Harry Hobbs adopts a double position: in the context of the general development of international criminal justice, he inserts hybridity as the "third generation", but contemporarily he does recognise that hybridity has unique features and acknowledges that there is a "first generation" (and a second, arising) of hybrid courts, as an autonomous option of fight against impunity: *see* H. HOBBS, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, vol. 30, n. 1 p. 178.

IV. Conclusions.

The Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the UNMIK Regulation 64/2000 panels, and the Special Panels for Serious Crimes in Dili inaugurated an innovative approach to the prosecution of international crimes, at the dawn of the new millennium.

They were initially observed jointly thanks to a general definition of hybridity – "a mix of the local and the global meeting in a judicial *forum*" – that allowed a comparative study of each tribunal but was not sufficient to appropriately describe the legal phenomenon. The aim of the chapter was, hence, that of finding a more comprehensive definition od hybridity and to place the phenomenon in the correct position in the universe of international justice.

Thus, welcoming the representation of hybridity as a sliding scale, proposed by Sarah Williams, we introduced the concept of "factor of hybridisation", which assisted in analysing every possible choice that court's designer can opt for in establishing an internationalised tribunal. While assessing each "factor of hybridisation", we found that the multiplicity of possible combinations gives life to jurisdictions with deeply varied features, with implications over their functioning and relationship with third actors.

Thus, we can conclude that variety is an inner characteristic of hybridity.

Furthermore, thorough the analysis of the "factors of hybridisation", we detected several implications connected to them, in terms of transitional justice, capacity-building, and peacebuilding. Comparing such effects to the several theories exploring the possibility to recognise a unitary category of hybrid courts, we can determine that hybridity is indeed a category, shaped by those extra-judicial effects descending from its activities.

The comprehensive definition of hybridity, in the end, appears to be that of a phenomenon dealing not only with prosecutorial activities taking place in a forum uniquely structured by a different combination of "factors of hybridisation", but also with those extra-judicial effects that such jurisdictions provoke on the territory over which they operate: transitional justice, capacity-building, and peacebuilding.

This category of courts, therefore, considered as unitary because of the peculiar nature outlined above, appears to propose a new dimension, compared to the purely international or domestic one, of the fight against impunity for international crimes. So,

it can be concluded that the four jurisdictions mentioned above, and hereby studied, represented the first generation of internationalised criminal courts.

CHAPTER III

THE RESURGENCE OF HYBRIDS

SUMMARY: I. Introduction: the quiescence and renaissance of hybridity. – II. Reasons underpinning the proposition of new hybrid courts. – 1. The continued necessity of international criminal law – 2. The "giant without limbs". – 2.1. The lengthiness of the operations before the ICC. – 2.2. The International Criminal Court's indelicate early prosecutorial strategies. – 2.3. Beyond Africa: few State members and the veto power of the UN Security Council. – 2.4. Not only a gap-filler: the "positive complementarity" of hybrid courts. – III. Advantages and expected achievements in connection to the establishment of new hybrid courts. – 1. Legal benefits deriving from the judicial activity of the hybrid courts. – 2. Sociological" benefits deriving from the entire complex of activities of the hybrid courts. – 2.1. Hybrid courts and capacity building– 2.2. Ownership and cultural compatibility – 2.3. Hybrid courts and transitional justice. – IV. Not all of it 'sunshine and roses'. Weaknesses, flaws, and critics: hybrid courts and political influence**.** – V. Conclusions.

I. Introduction: the quiescence and renaissance of hybridity.

The first generation of internationalised criminal tribunals that we identified in the previous chapter has almost completed its operations.

The special panels instituted by the Transitional Administrations in Kosovo and Timor-Leste have been gradually ceasing their judicial hybrid functions in favour of a purely national management of justice. The Special Panels for Serious Crimes continued their work until May 2005, when the UN support to the State was withdrawn and the operations indefinitely adjourned, after Timor-Leste reaching the full independence in May 2002[1]. The Regulation 64/2000 panels, instead, lasted until 2008, when UNMIK personnel withdrew, and EULEX intervened in assisting Kosovo to pursue effective independence[2].

The Special Court for Sierra Leone, instead, closed its doors on 2 December 2013, leaving a residual mechanism the duty to perform remaining functions[3].

Much more complex was the final stage of the works of the Extraordinary Chambers in the Courts of Cambodia. After smoothly conducting the trial against Duch, the director of the infamous prison S-21, and managing to convict Nuon Chea and Khieu Samphan in the first of two cases concerning them, the hybrid court stranded into three further cases concerning middle-level Khmer Rouge officials. International personnel,

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[1] R. WILDE, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford, 2010, p. 83 ff.

[2] Kosovo, Law n. 03/L- 053, *on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo*, 13 March 2008.

[3] Residual Special Court for Sierra Leone, www.rscsl.org [last accessed 27 January 2022].

either in prosecutions, in the office of co-investigating judges, and in the Pre-Trial Chambers, did recognise Meas Muth, Yim Tith, and Ao An as falling within the ECCC's jurisdiction and thus being eligible for a trial; their Cambodian counterpart, instead, upheld the opposite choice. Due the incapacity for the court's organs to reach an agreement on the point, it experienced a tremendous deadlock, that only concluded in 2021, when the Supreme Court Chamber terminated all three remaining cases on procedural grounds[4].

None of them has been particularly proliferous in terms of adjudications: while the SPSC and the Regulation 64 panels conducted a few tens of trials, the SCSL and the ECCC limited prosecution to a much smaller number of defendants[5].

The initial expectation and projects around the establishment of this first generation of hybrid courts, as we discussed, was that of a temporary solution, to fall out of utility for new rising situations with the operativity of the International Criminal Court[6]. Hybrid courts of the first generation, technically, had been evaluated as a gap-filler for the lack of jurisdiction of the International Criminal Court: the first generation was rather conceived as the only generation of hybrid.

Between 2000 and 2006, four hybrid courts were created. For those who consider the Special Tribunal for Lebanon and the Bosnia-Herzegovina War Crimes Chambers as hybrid court, the count amounts to six courts along seven years[7].

Then, no further hybrid courts were set up for almost a decade, during which the *ad hoc* ICTY and ICTR moved towards their closure and the International Criminal Court was essentially the only international criminal jurisdiction in the world charged with a wide possibility to pursue accountability for *crimina juris gentium*.

Things changed in 2015.

All in the same year, the Special Criminal Court for the Central African Republic was established, shortly after followed by the Kosovo Specialist Chambers; the Extraordinary African Chambers initiated their trial against Chadian Hissène Habré; the

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[4] The episode was discussed in greater details in Chapter II. For the author's comment on the situation and an updated overview of the procedural vicissitude: M. COGORNO, "The Extraordinary Chambers in the Court of Cambodia in the aftermath of Case 004/2: a foretold 'French leave'?", in *Diritti umani e diritto Internazionale*, 2021, vol. 1.

[5] J. HUBRECHT, "Imaginer l'avenire de la Justice pénale internationale malgré sa régression", in *Le Seuil Communications*, 2019, vol. 104, n. 1, p. 182.

[6] *See* Chapter I: "The impracticability of seizing the International Criminal Court".

[7] H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, n. 2, p. 485.

United Nations Office of the High Commissioner for Human Rights issued a report recommending Sri Lanka to adopt specific legislation establishing an *ad hoc* hybrid special court; and the government of South Sudan signed a peace agreement foreseeing the establishment of a hybrid court for the investigation and prosecution of individuals responsible for atrocities in the country[8].

In the following years, similar initiatives have been envisaged or called upon for several other situations in Syria, Israel, Myanmar, the Democratic Republic of Congo, Colombia, Ukraine, ISIS, North Korea.

Hence, in the field of international criminal justice, it appears that we are currently assisting to a resurgence of popularity of the hybrid courts[9]. A second wave of internationalised criminal tribunals is now operational, and hybridity remains an appealing solution for pursuing accountability. Apparently, hybridity is here to stay and assume its definitive place inside the international criminal justice toolbox.

While literature was limited in regard to the first generation of hybrid courts, due to the perspective that it would be a temporary trend destined to extinguish, it is, nowadays, imperative to dedicate the appropriate attention to the phenomenon. This is the goal of the present and following chapters. We intend to initially analyse the reasons why hybrid courts came back to vogue since 2015, after a period of quiescence. Then, we will go through an assessment of the value of this resurgence in the context of international justice, namely the advantages and expected achievements connected to the option of prosecuting mass crimes through hybridity, and, on the other side, the possible challenges to face, related to the inner weaknesses of hybrid courts and critics that can be moved against them. The analysis will necessarily be conducted keeping an eye on the practice of the first generation of mixed tribunals, yet with the achieved awareness that each jurisdiction, as it is typical of hybridity, can be unique and tailored on the concerned situation. Accomplishments and failures linked to the functioning of hybrid courts hereby considered may undoubtedly recall those pros and cons that we hypothesised as intrinsically connatural to the options of the varied "factors of hybridisation" explored in

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[8] Intergovernmental Authority on Development, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, Addis Ababa, 17 August 2015, chapter V. *See* Chapter IV for a detailed discussion over each of these measures.

[9] H. HOBBES, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol. 30, p. 177; H. HOBBES, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, p. 488-489; S. L. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vol. 52, n. 2, p. 352.

the previous chapter: the scrutiny, in this case, will take a more wide-ranging approach, related to the actual unfolding of these effects, starting from the experiences of the first generation, as a litmus test.

This study may eventually lead to identifying a customary set of circumstances underpinning the establishment of criminal tribunals labelled as "internationalised criminal".

A thorough observation of each new tribunal, which will be conducted in the next chapter, then, will complete the analysis of the "new generation" and assist tracing possible consolidating practices in the establishment of mixed courts.

II. Reasons underpinning the proposition of new hybrid courts: the unfulfilled promises of international criminal justice.

The continuous proposition of establishing new internationalised criminal tribunals since 2015 is not a casual trend, motivated by random mutations in the choices of the international community's main actors. In fact, while the history of international criminal justice is paved with attempts to depict the ideal model to prosecute international crimes and built on variegate experiments, we are now assisting to a conscious era of consolidation based on past experiments.

The return to the hybrid dimension of persecution of mass crimes, consequently, has root in the comparison with the different experiences of international criminal justice (the *ad hoc* courts, a permanent international criminal court, and the first generation of hybrids) and the results they have achieved, with particular reference to the last two decades. This is accompanied by a further rooting of the return to hybrids in the historical and geopolitical context that has always been both impulse and limit for the fight against impunity[10].

We can, therefore, continue the analysis of the motives that led to the return of the hybrids, addressing two sets of reasons: the general causes related to the development of geopolitics in the last two decades, and the experience of international criminal justice since the opening of the International Criminal Court, to date.

[10] The tight connection between international criminal justice and geopolitics is well delineated by ICC's judge Aitala, in his recent publication: S. AITALA, *Diritto internazionale penale*, Firenze, 2021. *See also* B. SANDER, *Doing justice to history: confronting the past in international criminal courts*, Oxford, 2021; P. KASTNER, *International criminal law in context*, Abingdon, 2018.

1. The continued necessity of international criminal law.

Far from attempting to propose an in-depth analysis of international relations and geopolitics over the past two decades, which is beyond the scope of the current work and requires specialist expertise from political scientists, it is still possible, however, with the inexperienced eye of the jurist, to strike a rapid balance of the situations leading to the creation of international and mixed tribunals[11].

Mass crimes and violence, either connected to international or non-international armed conflicts, or implemented by political regimes as part of their policies and strategies, still are a widespread practice.

While the traditional war between countries may be progressively becoming an obsolete practice, the threat of violence is still an effective way to orient international relations and state policies[12]. The most common causes of the eruption of violence nowadays must be recognised in regional tensions, breakdowns of the rule of law, the co-options or absence of state institutions, illicit economic gains, and scarcity of resources further exacerbated by climate change[13].

Between 2002 and 2022, a total of 99,442 violent events (battles, attacks to the civilians, explosions/remote violence, and riots) were registered[14].

Even though the tolls of war deaths have been declining since the Second World War, conflict and violence are currently on the rise: in 2016, more countries experienced violent conflict than at any time in the previous 30 years[15]. As per 2021, a total of 41 situations identifiable as armed conflicts was catalogued, out of a total of around 80 conditions of widespread violence[16].

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[11] *See* for specialist studies: K. DODDS, *Geopolitics: a very short introduction*, Oxford, 2014; G. LUNDESTAD, *International Relations Since the End of the Cold War: New and Old Dimensions*, Oxford, 2013.

[12] H. STRAND, H, HEGRE, "Trends in Armed Conflict, 1946-2020", in *Conflict Trends*, 2021, vol. 3; J. PALIK, S. RUTAD, F. METHI, *Conflict Trends: A Global Overview*, Oslo, 2020. Armed conflicts are progressively more combated between armed groups, while States recur to other forms of menace to manage their non-peaceful international relations. Nevertheless, the attack to Ukraine by Russia in February 2022 goes in the opposite direction.

[13] A. KOOP, "Mapped: Where are the World's Ongoing Conflicts Today?", in *Visual Capitalist*, 4 October 2021, available at www.visualcapitalist.com [last accessed 27 January 2022].

[14] Data extrapolated from the disaggregated data collection, analysis and crisis mapping platform *The Armed Conflict Location & Event Data Project*, available at www.acleddata.com [last accessed 27 January 2022].

[15] "A New Era of Conflict and Violence", in *United Nations 75. 2020 and beyond. Shaping our future togetger*, available at www.un.org*/en/un75*.

[16] The *Rule of Law in Armed Conflict* online portal systematically qualifies situations of widespread violence using the definitions of armed conflicts provided by international humanitarian law and identifies the parties to the conflict. Data available at www.rulac.org [last accessed 27 January 2022].

Consequently, as trivial as it may be to say, the necessity of countering mass spread violence, diffusing a culture of peace and stability, promoting accountability for those responsible, fighting impunity, protecting human rights, fostering the fundamental values of the international community, and bringing justice to victims is still of primary importance.

Accordingly, such objectives to be achieved need dedicated strategies and mechanisms, which are found (also) in in the conduct of proceedings in the field of international criminal justice. The International Criminal Court, to this regard, is a valuable institution that, in the last two decades, set a "centre" to the "galaxy" of international criminal law, with the implicit aim of centralizing the functions of persecution of international crimes, once passed the complementarity test[17]. After twenty years of functioning, it is possible assess the effectiveness of the ICC and the goodness of the solution of relying one permanent international criminal jurisdiction.

2. The "giant without limbs".

The International Criminal Court, in the intention of its creators, ideally represented a definitive solution to the international prosecution of mass crimes. While it undeniably constitutes a milestone in the universe of international criminal justice, the first two decades of its functioning revealed a number of difficulties and flaws that may contribute to the re-affirmation of alternative solutions for the fight against impunity, such as hybrid courts. The ICC was depicted as a "giant without limbs", for its incapacity of effectively acting alone and the necessity to rely on States cooperation, without which it remains a limited institution[18].

In 2020, the International Criminal Court entire system submitted to a panel of independent experts for a general review of its operations, whose final report was eventually published and represents an in-depth critical assessment of the Rome Statute

[17] S. HOUWEN, *Complementarity in the Line of Fire: The Catalysing effect of the international criminal court in Uganda and Sudan*, Cambridge, 2013; C. DE VOS, *Complementarity, catalyst, compliance: the International Criminal Court and the Democratic Republic of Congo*, Cambridge, 2020.

[18] J. MAOGOTO, "A Giant without Limb: The International Criminal Court's State-centric Cooperation Regime", in *University of Queensland law journal*, 2004, vol. 23, n. 1, p. 102 ff. The definition was inspired to that given by Cassese to the ICTY («a giant without arms and legs»): A. CASSESE, "On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, vol. 9, n. 1, p. 13.

System, upon which drawing interesting conclusions for our study[19]. In addition, the prosecutorial strategies of the International Criminal Court, the development and the outcome of the proceedings led before it, and the behaviour of both the States parties and non-members states, are meaningful indicators of the impact of the ICC on international criminal justice globally considered.

2.1. The lengthiness of the operations before the ICC.

In its first 20 years of operations, the International Criminal Court opened 30 cases, some of them regarding more than one suspect, for a total of 46 defendants. Only seven were concluded with the issuance of an appeals judgement (Four convicting the eight defendants[20], and three acquitting the four defendants)[21]. One case is currently submitted to the Appeals Chambers[22].

Based on these counts, the International Criminal Court has been criticised for being an inefficient, slow, and ineffective jurisdiction[23].

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[19] ICC, ICC-ASP/19/16, *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, 30 September 2020.

[20] The Appeals Chambers convicted: Narcisse Arido, Fidèle Babala Wandu, Aimé Kilolo Musabmba, Bemba, Jean-Jacques Mangenda Kabongo; Germain Katanga; and Thomas Lubanga Dylio. Mr. Al Mahdi, instead, was convicted by the Trial Chamber VIII and no appeals was proposed against the decision, but the Appeal Chambers pronounced its judgement on the victims' appeals against the reparation order. ICC, *The Prosecutor v. Thomas Lubanga Dylio*, ICC-01/04-01/06/3122, Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dilyio against the "Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171, Trial Chamber, Judgment and Sentence, 27 September 2016; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-259-Red2, Appeals Chamber, Public redacted Judgment on the appeal of the victims against the "Reparations Order", 8 March 2018; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Appeals Chamber, Judgement, 8 March 2018.

[21] The Appeals Chambers acquitted: Jean-Pierre Bemba Gombo, reversing the Trial Chamber decision on the case; Laurent Gbagbo and Charles Blé Goudé; and Ngudjolo Chui, confirming the decisions of the Trial Chambers. The Appeals Chamber. ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1400, Appeals Chamber, Judgement in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Red, Appeals Chamber, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgement pursuant to Article 74 of the Statute", 8 June 2018; ICC, *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-271-Corr, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015.

[22] ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762-Red**,** Trial Chamber, Trial Judgment**,** 4 February 2021. On 21 July and 26 August 2021, the Defence filed its appeal briefs against the conviction and the sentence, respectively. The Appeals Chamber held hearings in the case on 14 - 18 February 2022 to hear submissions and observations by the parties and participants on these appeals.

[23] A. MURDOCH, *UK Statement tot he ICC Assembly of States Parties 17th session*, 5 December 2018 («But as an Assembly of States Parties to the Statute, we cannot bury our heads in the sand and pretend everything is fine when it is not. The statistics are sobering. After 20 years, and 1.5 billion Euros spent we have only three core crime convictions»); D. GUILFOYLE, "This is not fine: The International Criminal Court in Trouble", in *EJIL: talk!*, 21 March 2019, available at www.ejiltalk.org [last accessed 27 January 2022]; D. GUILFOYLE, "Lacking Conviction: is the International Criminal Court Broken? An Organisational Failure Analysis, in *Melbourne Journal of International Law*, 2019, vol 20, p. 401 ff.

Whether it be the lack of cooperation by states, the considerable extent of the case, the high number of victims and witnesses, the struggle of the courts' organs to advance in their operations, the insufficiency of funding, however, this is not the appropriate place to assess the profound reasons behind these numbers, nor whether they are acceptable, understandable, or not. Nor this is the place to assess whether the success of a court is measured in the number of cases concluded or, indeed, in the number of sentences handed down. The ICC's prosecutor, on the point, even observed: «As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success»[24].

For the purpose of research of the reasons why the phenomenon of hybrid courts has returned to assert itself in recent years, however, these data still turn out to be relevant.

Of course, the International Criminal Court is not the first court to be accused of being "too slow" – the *ad hoc* courts had already faced up to these accusations. Nevertheless, as noted by some scholars, while «[a]cquittals are part of a healthy system of criminal justice, […] the low rate of successful prosecutions suggests systemic dysfunctions» [25] and also has consequences in terms of the credibility of the Court, especially in regard to its role as deterrent to the further commission of international crimes and the fight against impunity. The awareness that, in view of the practice, it is particularly unlikely for a perpetrator to be brought before the International Criminal Court and, even more so, to be convicted by it, contributes, on the contrary, to generate a sense of disillusionment with the centralised mechanisms of persecution of international crimes.

The need to respond efficiently and quickly to situations of widespread violence, therefore, could be one of the factors linked to the work of the International Criminal Court, which may have helped to stimulate the search for alternative solutions outside the system of the Rome Statute, and the return of hybrid courts[26].

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[24] L. MORENO-OCAMPO, *Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor*, 16 July 2003.

[25] R. CRYER, D. ROBINSON, Sergey VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2019, p. 169.

[26] B. VAN SCHAACK, "International Justice Year-in-Review: Looking Backwards, Looking Forwards", in *Just Security*, 19 January 2016, available at www.justsecurity.org [last accessed 27 January 2022].

2.2. The International Criminal Court's indelicate early prosecutorial strategies.

The International Criminal Court, under the whole mandate of the first prosecutor, Luis Moreno Ocampo, addressed the first situation in 2003, as a consequence of a self-referral by the government of Uganda, shortly after imitated by the Democratic Republic of Congo and the Central African Republic[27]. Later on, the Security Council of the UN referred the situations in Darfur (Sudan) and Libya, while the first ICC prosecutor, *motu proprio*, opened preliminary investigations on the Republic of Kenya[28].

Consequently, the initial case before the International Criminal Court developed against Thomas Lubanga Dylo, a citizen of the Democratic Republic of Congo, thus African, just as Africans were all the defendants appeared before the ICC to date[29].

The circumstance that all initial cases – and most of the cases, overall – conducted before the ICC dealt with situations in Africa, gave rise to harsh critiques of the court having an "African bias"[30]. As a consequence, growing numbers of African stakeholders began to see the early prosecutorial strategy of initiating investigations only against African situations as reflecting selectivity and inequality[31].

In this view, in 2017, Burundi was the first country to withdraw from the Rome Statute, motivating such choice by suggesting that the ICC had «deliberately been

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[27] ICC, *Situation in Uganda*, ICC-02/04, Presidency, Decision Assigning the Situation in Uganda to the Pre-Trial Chamber II, 5 July 2004; ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04, Presidency, Decision Assigning the Situation in the Democratic Republic of Congo to the Pre-Trial Chamber I, 5 July 2004; ICC, *Situation in the Central African Republic*, ICC-01/05, Presidency, Decision Assigning the Situation in the Democratic Republic of Congo to the Pre-Trial Chamber III, 19 January 2005.

[28] ICC, *Situation in Darfur, Sudan*, ICC-02/05-1, Presidency, Decision Assigning the Situation in Darfur (Sudan) to the Pre-Trial Chamber III, 21 April 2005; ICC, *Situation in the Republic of* Kenya, ICC-01/09-1, Presidency, Decision Assigning the Situation in the Republic of Kenya to the Pre-Trial Chamber II, 6 November 2009; ICC, *Situation in Libya*, ICC-01/1, Presidency, Decision Assigning the Situation in Libyan Arab Jamahiriya to the Pre-Trial Chamber I, 4 March 2011.

[29] ICC, *Prosecutor v. Thomas Lubanga Dylo*, ICC-01/04-01/06; ICC, ICC-PIDS-CIS-DRC-01-017/21_eng, *Case Information Sheet: Situation in the Democratic Republic of the Congo. The Prosecutor v. Thomas Lubanga Dylo*, July 2021; P. SANNA, "La giustizia internazionale e il reato di reclutamento, coscrizione e impiego attivo di minori in conflitti armati: il caso Lubanga", in *Cahiers di Scienze Sociali*, 2020, n. 13, p. 95 ff. The International Criminal Court so far summoned six DRC nationals, five from Uganda, seven from CAR, seven from Darfur (Sudan), nine from Kenya, five from Libya, three from the Republic of Côte d'Ivoire, and two from Mali: *see* "Defendants", in *International Criminal Court*, available at www.icc-cpi.it [last accessed 27 January 2022].

[30] G. DANCY, Y. DUTTON, T. ALLEBLAS, E. ALOYO, "What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya", in *Journal of Conflict Resolution*, 2020, vol. 64, p. 1444-14445.

[31] V. DITTRICH, "The International Criminal Court: Between Continuity and Renewal", in A. HEINZE, V. DITTRICH, *The Past, Present and Future of the International Criminal Court*, Brussels, 2021, p. 6; J. DUGARD, "Palestine and the International Criminal Court: Institutional Failure or Bias?", in *Journal of International Criminal Justice*, 2013, vol. 11, issue 3, p. 563 ff.; J. GOLDSTON, "More Candour about Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court", in *Journal of International Criminal Justice*, 2010, vol. 8, issue 3, p. 383 ff.

targeting Africans for prosecution»[32]. Previously, South Africa and Gambia had alerted the court that they would withdraw from the Rome Statute, but they eventually revoked their notification of withdrawal and remained as States party[33].

More broadly, instead, the African Union as a whole backed such initiatives, and in 2017 it even adopted a non-binding but official collective withdrawal strategy, for its states members to consider as an exercise of their own sovereignty. The proposal had the express objectives to:

> «a) Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
> b) Institution of legal and administrative reforms of the ICC;
> c) Enhance the regionalization of international criminal law;
> d) Encourage the adoption of African Solutions for African problems;
> e) Preserve the dignity, sovereignty, and integrity of Member States.»[34]

Even though the mass withdrawal remained not implemented, it appeared as a clear signal of the bad relation evolving between the regional organisation and the international jurisdiction, and of the highly political value of the acts of the International Criminal Court, especially through its prosecutor. Regardless of the fact that prosecutorial strategies in the initial cases before the ICC may have been indelicate from a diplomatic perspective, addressing exclusively African countries, it is also important to underline that the court is first of all a judicial forum, a place for proceedings to take place in the case a country is unable or unwilling to do it autonomously.

The mantra "African Solutions for African problems", progressively, took an increasing role also in international criminal justice, emphasizing the need to regionalize the matter and assume, thus, initiatives (independent from a Western-centric system), for the punishment of those responsible for large-scale crimes on the continent. The African Union, in particular, has become the bearer of this initiative and has, thus, provided for the search and elaboration of alternative solutions to that of being subjected to the

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[32] UN Doc. C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification), *Burundi: Withdrawal*, 28 October 2016; ICC, *Rome Statute*, article 127; "Burundi leaves International Criminal Court amid row", in *BBC*, 27 October 2017, available at www.bbc.com [last accessed 27 January 2022].

[33] UN Doc. C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification), *South Africa: Withdrawal of Notification of Withdrawal*, 7 March 2017; UN Doc. C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification), *South Africa: Withdrawal*, 25 October 2016; UN Doc. C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification), *Gambia: Withdrawal*, 11 November 2016; UN Doc. : C.N.62.2017.TREATIES-XVIII.10 (Depositary Notification), *Gambia: Withdrawal of Notification of Withdrawal*, 16 February 2017.

[34] African Union, *ICC Withdrawal Strategy*, 12 January 2017, para. 8.

perceived Western legal colonialism of which the International Criminal Court would be a representative[35].

2.3. Beyond Africa: few States members and the veto power of the UN Security Council.

To date, out of 195 sovereign states in the world, 123 are parties to the Rome Statute to date[36]. 72 states, thus, have not ratified the Statute of the International Criminal Court; among these, 41 states have neither signed nor acceded to the Statute.

Consequently, there is a sizeable portion of countries upon which the ICC's jurisdiction may be exercised only if such states willingly accept the jurisdiction of the ICC, or if their case is referred to the prosecutor by the United Nations Security Council, upon Chapter VII of the UN Charter, according to article 13(b) of the Statute[37].

Some major powers, in particular, remain stranger to the system[38]. China openly opposed the court upon five official arguments: that the Rome Statute would violate the principle of state sovereignty imposing obligations on non-states parties through its jurisdiction; the definition of war crimes would go beyond the customary law definition as it includes also the context of non-international armed conflicts; the inclusion of crimes against humanity without the link to the conflict; the inclusion of the crimes of aggression would weaken the powers of the UN Security Council; the possibility for the prosecutor to act *motu proprio* would expose the ICC to political influence[39]. India abstained from adhering to the court by stating that «it could be misused for political purposes», that it would allow the Security Council to exert powers beyond those assigned to it by the UN, and because the definition of crimes against humanity is too broad, and nuclear weapons are not explicitly banned[40]. Russia, Sudan, the United States, and Israel, after signing,

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[35] K. MILLS, A. BLOOMFIELD, "African Resistance to the International Criminal Court: Halting the advance of the anti-impunity norm", in *Review of International Studies*, 2017, vol. 44, p. 101 ff.

[36] United Nations, *Treaty Series*, vol. 2187, p. 3, n. 38544, 1 July 2002; "Rome Statute of the International Criminal Court", in *Status of Treaties*, available at www.treaties.un.org [last accessed 27 January 2022]. 193 states are also members to the United Nations – while Palestine (that is an observer) and the Holy See remain excluded.

[37] ICC, *Rome Statute*, articles 12-14.

[38] The USA and the Russian Federation are signatories, but not parties; China, instead, never signed the Statute, just like India. Other States that are only signatories are (for a total of 137): Algeria, Angola, Armenia, Bahamas, Bahrain, Cameroon, Egypt, Eritrea, Guinea-Bissau, Haiti, Islamic Republic of Iran, Israel, Jamaica, Kuwait, Kyrgyzstan, Monaco, Morocco, Mozambique, Oman, São Tomé and Príncipe, Sudan, Syrian Arab Republic, Thailand, Ukraine, United Arab Emirates, Yemen, and Zimbabwe.

[39] L. JIANPING, W. ZHIXIANG, "China's Attitude Towards the ICC", in *Journal of International Criminal Justice*, 2005, vol. 3, p. 608 ff.

[40] D. LAHIRI, *Explanation of vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court*, 17 July 1998; U. RAMANATHAN, "India and the ICC", in *Journal of International Criminal Justice*, 2005, vol. 3, p. 627 ff

informed the UN Secretary General that they no longer intended to ratify the treaty, and, consequently, no more legal obligations would arise from their signature[41].

Nevertheless, such powers remain at significant extent connected to the International Criminal Court system: the USA, Russia, and China, sitting as permanent members of the UN Security Council, may refer alleged atrocity crimes committed in any country to the prosecutor of the ICC, by passing a resolution authorised by the UN Charter. It did so twice, so far: in March 2005, for Darfur, Sudan, and in February 2011, for Libya[42].

But there is more: permanent members of the Council are entitled a power of veto under the provisions by article 27 of the United Nations Charter[43]. Should any of their votes be negative towards a draft resolution, it cannot be adopted. Accordingly, in the context of the Rome Statute, if a permanent member of the Security Council vetoes a resolution to refer a situation to the ICC, the Court cannot gain jurisdiction[44]. In May 2014, for example, Russia and China vetoed the referral of Syria to the ICC, since they both support the violent administration of President Bashar al-Assad; scholars, in addition, are widely convinced that the USA's veto will protect Israel from ICC's investigations[45]. It is a clear demonstration that permanent members of the Security Council can influence the activities of the ICC, based on their alliances and interests[46]. India critically addressed the problem in the statement released at the end of the Rome Conference: «what the [Security] Council seeks from the ICC through the Statute […] is

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[41] United Nations, *Treaty Series*, vol. 1155, p. 331, *Vienna Convention on the Law of the Treaties*, 23 May 1969, article 18; United Nations, *Treaty Series*, vol. 2187, p. 3, n. 38544, 1 July 2002; "Rome Statute of the International Criminal Court", in *Status of Treaties*, available at www.treaties.un.org [last accessed 27 January 2022].

[42] UN Doc. S/Res/1593 (2005), *Sudan Referral*, 31 March 2005; UN Doc. S/Res/1970 (2011), *Libya Referral*, 26 February 2011.

[43] United Nations, *Charter of the United Nations*, article 27: « 1.Each member of the Security Council shall have a vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.» Consequently, a negative vote from any of the permanent members is able to block the adoption of a proposed resolution. However, if a permanent member abstains or is absent from the vote will not block the approval of the resolution. Hence, even though the "power of veto" is not expressly mentioned in the article, it is implicit in the requirement of all concurring votes from the permanent members.

[44] The permanent members of the UN Security Council are China, France, Russia, United States of America, and United Kingdom.

[45] UN Doc. S/Res/2014/348, 22 May 2014; G. DELLA MORTE, F. LATTANZI, J. DUGARD, Y. ROEN, in C. MELONI, G. TOGNONI, *Is There a Court for Gaza? A Test Bench for International Justice*, The Hague, 2012, p. 51 ff.

[46] "Security Council – Veto List", in *Dag Hammarskjöld Library*, available at www.research.un.org [last accessed 27 January 2022]. The table thereby offered clearly indicates the widespread practice of vetoing a resolution when in contrast to a permanent member's political interests and alliances.

the power to refer, the power to block and the power to bind non-State Parties»[47]. Seemingly, the African Union suggested that the resolutions of the United Nations Security Council relating to possible referrals to the ICC are proposed on the basis of the interest of the five permanent members, regardless of the principles of justice and legality[48].

The mechanism of the veto power related to the referral by the Security Council, in conjunction with such a high number of non-state parties, makes the ICC sensibly less effective, making it necessary to rethink solutions for rapid responses to mass atrocities.

2.4. Not only a gap-filler: the "positive complementarity" of the hybrid courts.

The ICC's struggles connected to the lengthiness of its operations, the political backlash by the African Union and the African continent in general, the low number of ratifications of the Rome Statute, and the possibility for the UN Security Council to influence the opening of a case, all represent factors that made the International Criminal Court not meet the initial expectations of it being the unique, permanent, and definitive institution for the prosecution of international crimes, beyond national tribunals.

Therefore, in a challenging time for the ICC, internationalised criminal tribunals have come back in vogue.

If the first deduction from the criticism of the International Criminal Court is that the mixed courts have returned in order to escape from the system of the International Criminal Court and to remedy the shortcomings of its functioning, nevertheless, new hybrid courts did not simply come back as a filler for the ICC's flaws[49].

First, because the ICC's was born as a complementary system[50]. This means that it is a court of last resort, which only intervenes on a situation when the state concerned is «unable or unwilling» to proceed[51]. The court, thus, does recognise that states have the

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[47] D. LAHIRI, *Explanation of vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court*, 17 July 1998, p. 2.

[48] African Union, *ICC Withdrawal Strategy*, 12 January 2017, paras 3-4. The mechanism, according to the African Union, would hence be generating a sort of "double standard" against African continent.

[49] M. KERSTEN, "On the rebirth of hybrid tribunals", in *Justice in Conflict*, 22 January 2016, available at www.justiceinconflict.org [last accessed 27 January 2022].

[50] ICC, *Rome Statute*, article 17, article 53. For a general overview of the ICC's complementarity, *see* G. DELLA MORTE, "La potestà giurisdizionale della Corte penale internazionale: complementarità, condizioni di procedibilità, soggetti legittimati a richiedere l'esercizio dell'azione penale e *ne bis in idem*", in G. CARLIZZI, *La Corte penale internazionale: problemi e prospettive*, Napoli, 2003; G. Della Morte, "La complementarità della Corte penale internazionale alla prova dei fenomeni extra o quasi giudiziali: il caso delle amnistie e delle commissioni di verità e riconciliazione", in S. MARCHISIO, *Corte penale internazionale: Aspetti di giurisdizione e funzionamento nella prassi iniziale*, Milano, 2007, p. 69 ff.

[51] ICC, *Rome Statute*, article 17.

primary responsibility and the right to prosecute international crimes, and that domestic prosecution remains the ideal solution, based on considerations of efficiency and effectiveness – not only domestic jurisdictions have the best access to evidence and witnesses, but the ICC, as it is demonstrated, has limited resources[52]. That is, the design of the International Criminal Court, despite the expectations upon it, made it a jurisdiction that innately should not cover all situations of widespread violence.

The same Court, according to some of its critical observers, has progressively entrenched itself behind the complementarity mechanism to minimize the difficulties in opening or managing certain situations. Houwen comments that the emergence of a non-legal "pro-ICC ideology" – based on the beliefs that the international dimension is the optimal solution of the prosecution of crimes, that an international criminal court is the correct *forum* for such crimes as they offend the entire mankind, and that the ICC should be seen to succeed in the cases – contributed to weaken the perceived value of complementarity. In conjunction, Houwen, brilliantly, observes that the court is trapped in a sort of "normative paradox of complementarity"[53]: complementarity underlines the primary responsibility of the states to prosecute international crimes, but the institution of the ICC and the way the Statute has been implemented so far may rather lift the pressure on states to discharge this responsibility. Such paradox, additionally, has been intensified by the Prosecutor's initiative to warmly invite states to refer situations on their territories to the ICC; the Prosecutor, in addition, encouraged majorly complementary national proceedings in those situations and cases in which cooperation is more difficult to obtain for the ICC, while it promoted referrals whereas essentially cooperation was foreseeable and the support of the world's great powers granted. Of the same opinion is hybrid courts expert Kersten, who suggests that only when it is unable to bring its targets into custody in The Hague, the ICC typically employs this rhetoric of "positive complementarity" in order to claim that it supports domestic proceedings[54].

Well, hybrid courts can intervene in this mechanism of complementarity, not only to fill the holes left by the weaknesses of the Court, as it has been said, but also, and above all, to strengthen the belief that "complementary is beautiful". In short, the return to the

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[52] ICC, *Informal expert paper: The principle of complementarity in practice*, 2003, para. 1.

[53] S. HOUWEN, *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*, Cambridge, 2013, p. 13 ff.

[54] M. KERSTEN, "As the pendulum swings – the revival of the hybrid tribunal", in M. CHRISTENSEN, R. LEVI, *International Practices of Criminal Justice: Social and Legal Perspectives*, London, 2017, p. 251 ff.

hybrid model favourably contributes to reducing pressure on the International Criminal Court and to eliminating the sharp dichotomy between the domestic and international dimension of the search for justice. In this way, hybrid courts become one of the elements of a desirable network of international justice, which knows a plurality of solutions and dimensions, erasing the myth that there is a single "universal" solution, suitable for all needs. An interesting board of proof is now provided by the Central African Republic, where a Special Criminal Court is now operational[55], and two distinct investigations of the International Criminal Courts have been conducted, the first leading to trials against former rebel commander and later Congolese Vice-President Jean Pierre Bemba; the second to the opening of two cases[56]. But, once more, hybrid courts have not only resurged because of the flaws of contemporary international criminal justice; their return cannot only be justified through negative arguments, but also because they carry unique advantages and attain achievements that are proper to their own characteristics.

III. Advantages and expected achievements in connection to the establishment of new hybrid courts.

«Hybrids offer something that other tribunals do not: an opportunity to continuously reimagine and problem-solve international criminal justice»[57]. So far the present study addressed all reasons for the reinstatement of mixed criminal tribunals that are connected to their judicial activities as an alternative and a complement to that of both domestic courts and the International Criminal Courts. It emerged that, to this regard, the establishment of hybrid courts bring advantages and achievements whereas the ICC struggles the most.

But further reasons that have led to the birth of a new generation of internationalised criminal courts can be found in advantageous features of the category "hybrids" itself, which make them a valuable type of jurisdiction as such, and not only in opposition to other dimensions of crime persecution. Those advantages, reconnected to the characteristics of the mixed courts, seem to be placed, and to act, on two different

[55] *See* further in this study for a comprehensive presentation of the CAR Special Criminal Court.

[56] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; ICC, *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/21; ICC, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18.

[57] M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in S. WEILL, K. SEELINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 281.

dimensions: one more purely juridical; another, of a wider scope, referring to a "sociological" plan.

Some of these advantages have already transpired, transversally, in the course of the analysis of the single factors of hybridisation that a court can embody: it is, therefore, now, easier to reconnect such benefits to the specificities of a court; to understand more clearly from which characteristics they derive; and, consequently, which hybridisation factors it is appropriate to adopt for a new hybrid to achieve certain results throughout its work.

1. Legal benefits deriving from the judicial activity of the hybrid courts.

Among the advantageous aspects of hybrid courts that can be traced back to a more strictly legal plan, which contributed to their re-emergence, it is possible to distinguish four particular elements.

The first legal advantage that makes the option for hybrid courts favourable relates to the prosecutorial and investigative activity of the court. Hybrid courts are set up specifically to intervene in a single situation in a country, therefore, the full process is addressed to this factual and legal context; the "zoom" on the circumstances on which they are asked to rule, so, is particularly accurate. More precisely, hybrid courts (discarded the option of purely international and *ad hoc* tribunals) remain the only judicial dimension that has jurisdiction over only one certain situation: the International Criminal Court, in fact, on the one hand, finds itself dealing simultaneously with a plurality of cases relating to different countries and, for each of them, with an almost symbolic number of suspected; the domestic courts of the country, on the contrary, are competent for the entire criminal matter of that particular legal system, with the consequence that, conducted before them, the trials relating to international crimes risk becoming only one of the possible areas of jurisdiction of the judiciary, without specific attention.

Such consideration has practical consequence on the conduct of the judicial activities. *In primis*, an internationalised criminal tribunal can investigate and prosecute a larger number of suspected, positioned at different ranks and having varied gradations of responsibility[58]. Furthermore, the project establishing the tribunal initially, or the

[58] M. KERSTEN, "As the pendulum swings – the revival of the hybrid tribunal", in M. CHRISTENSEN, R. LEVI, *International Practices of Criminal Justice: Social and Legal Perspectives*, London, 2017, p. 251 ff.

deputed organs along the course of the proceedings, can develop prosecutorial strategies and investigation tactics in the most advantageous way for the context in which the court operates. It guarantees a high degree of flexibility of the prosecutorial activity, that best adheres to the circumstances of the particular case and responds both to the need of the domestic systems, bot to the interest of the international community[59].

The second element of legal benefit is once more connected, from a distinct perspective to the flexibility of the court's activities: hybrid courts, as it is now well-recognised, carry the enormous advantage of possibly combining domestic and international legislation, and to prosecute both domestic and international crimes. This is beneficial insofar that the entire reconstruction of the facts remains under the investigation of a sole jurisdiction; thus, there is no limit to the comprehension and analysis of the facts, with the advantage that the court's jurisprudence results, as a consequence, completer and more comprehensive, depicting in detail the manifold facets of an individual's accountability for the alleged crimes[60].

The third element, instead, that is worth only mentioning, since it was detailly analysed previously in this study, is connected to the choice of a court to have its seat on the territory of the state concerned or in its proximity, allowing court's officers to benefit of a broader and easier access to the evidence and the witnesses[61]. In fact, being the tribunal located closed to the concerned community, there is less difficulty to deploy personnel for short trips on the field, or to summon witnesses and civil parties for an interview or a hearing in the courtroom.

The fourth and last legal benefit that makes it advantageous to establish new hybrid courts is the so-called ability of "norm penetration"[62]. It is linked to the ordinary judicial

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[59] S. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vo. 52, n. 2, p. 396.

[60] S. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vo. 52, n. 2, p. 396.

[61] *See* a detailed reflection on the advantages of having the seat of a hybrid court on the territory of the state, in this study, Chapter II, "A seat for everyone: hidden significances of a court's location". S. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vo. 52, n. 2, p. 397; UN Doc. S/2000/915, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, para. 54; A. CASSESE, *International Criminal Law*, 2008, p. 332-33; S. RATNER, J. ABRAMS, J. BISCHOFF, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, Oxford, 2009, p. 248; L. RAUB, "Positioning Hybrid Tribunals in International Criminal Justice", in *International Law and Policy*, 2009, vol. 41, p. 1042.

[62] L. A. DICKINSON, *The Promise of Hybrid Courts*, in *Amsterdam Journal of International Law*, 2003, vol. 97, p. 296; P. LOBBA, N. PONS, "Rethinking the Legacy of the ECCC. Selectivity, Accountability, Ownership", in *Journal of International Criminal Justice*, 2020, p. 12; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, n. 2, p. 485.

activity of the tribunal, since hybrid courts, dealing with international crimes in relation to a localized situation, deal with violations that are found both in the international and in the local dimension. Mixed tribunals, substantially, contribute to introduce international legislation and principles in the domestic system, and to make it acquainted with a high-standard conduct of proceedings[63].

2. "Sociological" benefits deriving from the entire complex of activities of the hybrid courts.

The definition of hybridity that arose from the analysis of the phenomenon[64] exhibits a peculiar component connected to extra-judicial effects that such jurisdictions provoke on the territory over which they operate: transitional justice, capacity-building, and peacebuilding. Hybrid courts, it appears, offer the potential for «catalytic transition to a normalcy based on a tripartite grounding of legitimacy, capacity building, and norm penetration»[65].

McAuliffe, instead, more pragmatically, rather asserted that hybrid tribunals were primarily invented and established to fight impunity, and not for the purpose of achieving other extra-judicial goals, that he considers having amounted only to «an afterthought at best»[66].

While this might have been the reality for the first generation of hybrid courts, their non-judicial effects are now proved and can deliberately be envisaged as a desirable consequence – or even a goal – to enjoy or achieve through the establishment of new internationalised criminal tribunals. In fact, it appears that such complex of non-judicial effects, constituting a sort of "societal legacy", belongs to the ensemble of advantages that encourages the recourse to hybrid courts again, under three distinct aspects[67].

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[63] E. BAYLIS, "Cosmopolitan Pluralist Hybrid Tribunals", in P. SCHIFF BERMAN, *The Oxford Handbook of Global Legal Pluralism*, Oxford, 2020, p. 603.

[64] *See* Chapter II.

[65] L. A. DICKINSON, "The Promise of Hybrid Courts", in *Amsterdam Journal of International Law*, 2003, vol. 97, p. 300; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, n. 2, p. 485.

[66] P. MCAULIFFE, "Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan", in *Journal of International Law and International Relations*, 2011, vol. 7.

[67] C. MCCAFFRIE, S. KUM, D. MATTES, L. TAY, *So We can Know What Happened. The Educational Potential of the Extraordinary Chambers in the Courts of Cambodia*, Stanford, 2018, p. 4; J. CIORCIARI, A. HEINDEL, *Hybrid justice: The Extraordinary Chambers in the Courts of Cambodia*, Ann Arbor, 2014; C. STAHN, "The Geometry of Transitional Justice: Choices of Institutional Design", in *Leiden Journal of International Law*, 2005, vol. 18, issue 3, p. 440 ff.

2.1. Hybrid courts and capacity building.

Capacity building in international criminal justice is defined mainly as the process of enhancing the ability of national authorities to investigate and prosecute relevant crimes by engaging with the legal community[68].

Hybrid courts, that, regardless on their peculiar characteristics, are established on the basis of the interaction and the exchange of ideas of the international level with the local judicial system, have the potential, during the course of their works, to leave a lasting positive impact and to foster the development of the rule of law and judicial culture[69]. The International Center for Transitional Justice ("ICTJ"), defining the concept of "legacy" in legal terms, poses a strong accent to the capacity building components of the notion: «A hybrid or international court's lasting impact, most notably on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so.»[70]

Local judges, both participating or observing the proceedings of a hybrid court, can receive mentorship and training opportunities, which they can eventually autonomously apply once working in the ordinary domestic legal system; mixed tribunals, in addition, can provide domestic system with a model for conducting trials that uphold and preserve international standards of fair trials[71]. While, according to several scholars, the ideal model of prosecuting international crimes and pursuing accountability is entirely within the interested State, international assistance is often required in order to achieve valuable results. Such assistance can be given in manifold ways, by providing financial resources, technical assistance, direct involvement of international personnel[72]. Hybrid courts can easily offer capacity-building by gathering international personnel and local actors, in different ways: at the Extraordinary Chambers in the Court of Cambodia, for example, the structure of the court reflect a 'co-' model, whereas for each national actor there is an international counterpart; the Special Panels for Serious Crimes in East Timor adopted a different model by nominating an international prosecutor assisted by a national vice

[68] K. Ainley, M. Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 78.

[69] F. DAME, "The Effect of the International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal", in *Michigan State International Law Review*, 2015, vol. 11, p. 250; Al. CHEHTMAN, "Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia", in *Stanford Journal of International* Law, 2013, vol. 49, p. 303.

[70] C. REIGER, "Where to from Here for International Tribunals? Considering Legacy and Residual Issues", in *International Center for Transitional Justice Briefing*, New York, 2009, p. 1.

[71] S. Ochs, p. 389.

[72] E. RE, "International crimes: a hybrid future?", in C. EBOE-OSUJI, E. EMESE, *Nigerian Yearbook of International Law 2017*, Cham, 2018, p. 183.

prosecutor[73]. The conduct of fair and credible trials, and the reinforcement of domestic capacity is also stressed by other studies[74].

The capacity-building potential of the internationalised criminal courts, however, is not limited to the strictly considered judicial activity and, therefore, does not only impact on the national judicial system, but expands to varied fields of expertise, making it a transversal and shared benefit for the whole concerned society. The UN Office of the High Commissioner for Human Rights ("OHCHR") defines the legacy of hybrid tribunal as providing «lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity» and identifies three areas of legacy: human resources and professional development; physical infrastructure or materials; law reform and the promotion of the rule of law[75].

The activity of a hybrid court, indeed, can impact over local judicial reform strategies in relation to different aspects, such as the protection of rights and individual freedoms, (as the right to a fair trial, the right to reparations, and greater access justice for women); modernisation of the legal framework; providing people with access to court information and laws; the provision of quality legal proceedings and other related services; strengthening the judicial services including the judiciary and prosecution which help improve the court monitoring; the introduction of alternative dispute resolution; the transfer of knowledge and expertise between specialists in the fields of psychology, finance management, computer science, standards of detentions, and national security, all areas with which a mixed tribunal deal to properly function and to engage with witnesses, victims, and civil parties[76].

Another aspect that makes capacity building a part of that set of societal advantages provoked by an internationalised criminal tribunal is that not only those directly involved

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[73] "Core Activities", *Extraordinary Chambers in the Courts of Cambodia*, available at www.eccc.gov.kh [last accessed 27 January 2022].

[74] L. DICKINSON, "Transitional justice in Afghanistan: The Promise of Mixed Tribunals", in *Denver Journal of International Law and Policy*, 2002, vol. 31, n. 1, p. 36-37; Amnesty International, AFR 65/4742/2016, *Looking for Justice: Recommendations for the Establishment of the Hybrid Court for South Sudan*, London, 2016, p. 11 ff.

[75] UN OHCHR, HR/Pub/08/2, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, New York, 2008.

[76] O. JEUDY, B. CHIA-IUNG TAI, S. SOTHUN, *Workshop Report: Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform*, Phnom Penh, 2013, p. 8; SCSL, *Eleventh and Final Report of the President of the Special Court for Sierra Leone*, Freetown, 2014, p. 29; [76] SCSL, *Tenth Report of the President of the Special Court for Sierra Leone*, Freetown, 2013, p. 19, p.31; International Centre for Transitional Justice, "A Court for victims: Podcast on the Special Court for Sierra Leone", 27 January 2012, in SCSL, *Press Clippings as at 1 February 2012*, Freetown, 2012, p. 6.

in the day-to-day court's operations can benefit of the potential in terms of capacity building. The general plethora of professionals can benefit from that: the ECCC, for example, organised training workshops for the whole Cambodian lawyers' bar association[77].

The effectiveness of such effects was registered in documents such as the final reports of the courts and recognised by the personnel of the first generation of courts; it does not remain a purely theoretical and unproved potential[78]. Stephen Rapp, who served as a prosecutor at the Special Court for Sierra Leone[79], affirmed: «From my own experience at the SCSL, I have seen how the mixing of national and international personnel was a "win-win" in building capacity because we were able to learn from each others' knowledge and experience in ways not easily achieve by any other means.»[80] At the same time, UNTAET withdrew from East Timor leaving an independent state able to self-governing, and the Special Panels are recognised as laying important foundations for the judicial system[81].

Not all are satisfied with the outcomes of mixed court's capacity building: while some courts' evaluators appear disappointed by the results achieved by the first generation of hybrid courts in terms of capacity building, it is, yet, important to understand that it is unrealistic to place upon one single mechanism, namely a mixed jurisdiction, the expectation that it rebuild the whole judicial system of a country[82].

Capacity building does not come out automatically, but, for achieving it satisfactorily, there is a need for a systematic effort, both from the court's operators, and

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[77] E. WIEBELHAUS-BRAHM, "The Concept of Resilience and the Evaluation of Hybrid Courts", in *Leiden Journal of International Law*, 2020, vol. 33, p. 1025; "Legacy", in *Extraordinary Chambers in the Courts of Cambodia*, available at www.eccc.gov.kh [last accessed 27 January 2022].

[78] SCSL, *Eleventh and Final Report of the President of the Special Court for Sierra Leone*, Freetown, 2014, p. 29; [78] SCSL, *Tenth Report of the President of the Special Court for Sierra Leone*, Freetown, 2013, p. 19, p.31; International Centre for Transitional Justice, "A Court for victims: Podcast on the Special Court for Sierra Leone", 27 January 2012, in SCSL, *Press Clippings as at 1 February 2012*, Freetown, 2012, p. 6 – referring to the successful conduct of capacity building workshops in the fields of finance management, standards of detentions, national security, law-making.

[79] Stephen Rapp (born on 26 January 1949) served with the ICTR as the prosecutor in the "Media Trial" and in 2005 became the ICTR Chief of Prosecutions; eventually, in 2007, he moved to the CSL, where he led the prosecution; in 2009 he was appointed as US Ambassador-at-Large for War crimes Issues for the State Department's Office of Global Criminal Justice, until 2015. *See* "Hon. Stephen J. Rapp", in *International Criminal Court Project*, available at www.aba-icc.org [last accessed 27 January 2022].

[80] S. RAPP, "A Legal Legacy that Opens the Way to Justice in Challenging Places and Times", in *FIU Law Review*, 2021, vol. 15, issue 1, p. 61.

[81] E. STROMSETH, "The International Criminal Court and Justice on the Ground", in *Arizona State Law Journal*, 2011, p. 437; C. YANG, "Accounting for Accountability: a post-conflict role for transnational advocacy network in East Timor", in *Georgetown Journal of International Law*, 2014, vol. 45, p. 12-13.

[82] R. KERR E. MOBEKK, *Peace and Justice*, Cambridge, 2007, p. 177.

the general domestic system: positive change can be registered only if there is a positive attitude towards it by the political actors and those who shape the national judiciary and legislation. It requires projecting, as capacity building activities must be worked for, and built purposely[83].

2.2. Ownership and cultural compatibility.

The second aspect making it sociologically advantageous to recur to internationalised criminal tribunals is their ability to foster a sense of ownership in the concerned public, and to adapt more sensibly to the culture of the State interested[84]. The possibility to enhance the sense of local ownership of the process is recognised as being a part of the appeal of hybrid courts, which can be strengthened by the use of the local language and granting a wide accessibility of proceedings[85].

It is possible to recognise two significances of ownership: the first is popular acceptance of the court's work, which also measures the tribunal's credibility and the extent to which it is perceived to have brought justice, and that, thus, supports the legitimacy of the process itself; the second, instead, is peculiar for hybrid courts, and relates to «The degree to which the national and international components "buy in" to the process […]. Ultimately, the degree to which each accepts and acknowledges its share of ownership in the tribunal will affect the allocation of responsibility, and thus accountability, within and for the criminal process.»[86]

Ownership is not a goal *per se*, but it is important insofar that different stakeholders feel that the tribunals at some extent represent them and their fight for justice[87]. As a matter of fact, ownership is deemed essential fort the successful work of a hybrid tribunal[88].

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[83] Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Court of Cambodia*, New York, 2016, p. 51-55; P. Mendez, "The new Wave of Hybrid Tribunals: a Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution With Empty Promises?", in *Criminal Law Forum*, 2009, vol. 20, p. 74 ff.; P. McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone to The Hague defeats the purposes of Hybrid Tribunals", in *Netherlands International Law Review*, 2008, vol. 55, issue 3, p. 376.

[84] M. HOLVOET, "The continuing relevance of the hybrid or internationalised justice model: the example of the Kosovo Specialist Chambers", in *Criminal Law Forum*, 2017, vol. 28, issue 1, p. 45.

[85] C. MCCAFFRIE, "An educational legacy: Exploring the links between education and resilience at the ECCC", in *Leiden Journal of International Law*, 2020, vol. 33, issue 4, p. 981.

[86] P. RAPOZA, "Hybrid Criminal Tribunals and Ownership", in *Amsterdam University International Law Review*, 2006, vol. 21, p. 526.

[87] A. FICHTELBERG, "Outreach at the Hybrid Tribunals: The Cases of the Sierra Leone and Cambodia", in *Journal of Global Justice and Public Policy*, 2020, vol. 6, p.43.

[88] Amnesty International, AFR 19/5425/2017, *The long wait for justice*. *Accountability in Central African Republic*, London, 2017, p. 38.

Ownership, in fact, corresponds to taking responsibility of the process – its consequences are a wider accessibility, accountability, and perceived legitimacy for the general affected community[89]. It also promotes the sense for local populations that they are participants in the mixed courts, and such a thinking allows the judgements of the tribunal to have more domestic resonance than they might otherwise have[90]. Responsibility of the processes also means that the national government is committed to providing the hybrid courts with the premises, the infrastructures, or the security services that it needs[91]. In addition, hybrid courts, by offering the possibility of a shared responsibility between the international and the local, can help achieve the legitimacy of the process[92].

For achieving the purpose of a robust ownership, there is a need for commitment to involve local actors at a wide extent, since the earliest phases of establishment of a court[93].

It can be achieved through, for example, the presence of local judges, which is a factor of hybridisation ensuring that domestic participation be visible and perceived by local communities[94]. In addition, an effective communication strategy, giving visibility of the court, reinforces the understanding and support for the ongoing proceedings[95]. In fact, making it clear that the hybrid courts merges international and national elements conveys the message that the international community is endorsing and supporting the path to justice, not usurping it, by bringing it far away from concerned communities[96]. Then, victims, witnesses, and the public, enjoying efficient, rapid, and comprehensible communication, are likely to better understand, and possibly cooperate, with the development of the proceedings before the courts.

The potential to achieve a valid level of ownership for hybrid courts, overall, passes through the possibility of greatly adapting to the culture of the country concerned, both with regard to legal uses, both for ceremonies, symbols, habits, and traditions. For

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[89] L. RAUB, "Positioning Hybrid Tribunals in International Criminal Justice", in *International Law and Polic*y, 2009, vol. 41, p. 1036, p. 1044.

[90] A. FICHTELBERG, Hybrid Tribunals. A Comparative Examination, New York, 2015, p.181.

[91] P. RAPOZA, "Hybrid Criminal Tribunals and Ownership", in *Amsterdam University International Law Review*, 2006, vol. 21, p. 532 ff..

[92] L. DICKINSON, "Transitional justice in Afghanistan: The Promise of Mixed Tribunals", in *Denver Journal of International Law and Policy*, 2002, vol. 31, n. 1, p. 37.

[93] S. NOUWEN, "'Hybrid courts'. The hybrid category of a new type of international crimes courts", in *Utrecht Law Review*, 2006, vol. 2, issue 2, p. 214.

[94] A. TRIGOSO, "The Kosovo Specialist Chambers: in Need of Local Legitimacy", in *OpinioJuris*, 8 June 2020, available at www.opiniojuris.org [last accessed 4 November 2021] demonstrates that when national judges do not sit in the bench, serious legitimacy concerns may rise among local communities.

[95] A. FICHTELBERG, *Hybrid Tribunals: A Comparative Examination*, New York, 2015, p. ix.

[96] K. AINLEY, M. KERSTEN, *Dakar Guidelines on the Establishment of Hybrid Courts*, 2019, p. 36.

instance, a traditional house benediction ceremony was conducted at the ECCC for the inauguration of the Administration Building, Buddhist monks blessed the ECCC vehicles, and the courtroom too was opened with a Buddhist ritual[97].

Hybrid courts can maintain a greater respect of a nation's vision of justice, its choice of means of bringing it about, and its ownership of the judicial process, since they are established *ad hoc* and do not have to provide a standardised justice[98]. To this extent, the possibility to include local experts in the court's personnel ensures a broader understanding of «the intricacies of local cultural norms[99]». The stronger connection to the concerned country lends greater local ownership – an, thus legitimacy – to the processes[100]. On the other side, a careful attention must be directed, when in force, to local judicial traditions of the State concerned. Applying domestic procedure increases the sense of ownership of the proceedings by local jurists and fades away the perception of "judicial imperialism" coming from international actors.

In conclusion, the objective of ensuring a high sense of ownership of the work of hybrid courts by the community concerned has very practical implications, which relate primarily to the network of cooperation on which each court can rely in the course of its work (both in terms of structures and resources, and in terms of participation) and, secondly, the binding force of the decisions which the court itself produces. This second element, moreover, not only leads to the correct and credible enforcement of decisions – and therefore the material punishment of the perpetrators and reparation of the victims – but also the possibility that they become an esteemed guide for the work of purely domestic criminal courts. Finally, the appreciation and confidence in the work of the mixed court also makes valuable the reconstruction of the facts following the investigations, with the possibility that on this narrative a path of reconciliation and transition to a reconstructed society is built.

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[97] "Traditional house blessing of the ECCC Administration Building (3)", "Blessing of the cars", and "Blessing of the Courtroom", in *Extraordinary Chambers in the Courts of Cambodia*, available at www.eccc.gov.kh [last accessed 27 January 2022].

[98] F. DONLON, "Hybrid Tribunals", in W. SCHABAS, N. BERNAZ, *Routledge Handbook of International Criminal Law*, London, 2011, p. 85.

[99] R. KEENEN, "When All Ese Fails, Look to The Courts: Using Hybrid Tribunals to Build Judicial Capacity and End Environmental Destruction in Post-Conflict Countries", in *William & Mary Environmental Law and Policy review*, 2019, vol. 43, n. 3, p. 967. *See also* J. ALMQVIST, "The impact of Cultural Diversity on International Criminal Proceedings", in *Journal of International Criminal Justice*, 2005, n. 1, p. 15.

[100] B. VAN SCHAACK, "The building blocks of hybrid justice", in *Denver Journal of International Law and Policy*, 2016, vol. 44, issue, 2, p. 242.

2.3. Hybrid courts and transitional justice.

The third element of the set of "sociological advantages" of establishing a hybrid court" is its likelihood to work as a mechanism of transitional justice. Internationalised criminal tribunals can, in principle, function as transitional justice tools[101].

Indeed, there is an undoubtable tight bound connecting the concept of international criminal justice and transitional justice. Transitional justice, in fact, is:

> «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. It consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.»[102]

Transitional justice results particularly important in those countries or situations where the parties in conflict are meant to keep living next to each other and when it is complicate to trace a line in order to establish a separation between victims and perpetrators. It is, in these cases, crucial to activate a process involving all the relevant parties to find a balance allowing them to live in a more stable peace – such is the basic aim of transitional justice.

Transitional justice is first of all a political and social process – thus, legal institution can play a significant role in it only if they remain aware of such fact and act accordingly[103]. Ownership and capacity building, in the terms that we mentioned above, are essential components over which fostering transitional justice processes[104]. Hybrid courts, hence, on the one side, through their cultural adaptability, can shape their approach to accountability, and provide a form of justice which is not only retributive, but also restorative.

Practically, hybrid courts participate into transitional justice processes through judging past atrocities and punishing the perpetrators[105]. With their decisions, they

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[101] D. APRO, S. SUDARMO, "Hybridity in Transitional Justice: Legacy of the 'Khmer Rouge Tribunal'", in *Mimbar Hukum*, 2018, vol. 30, n. 2, p. 349 ff; B. PATHAK, "Generations of Transitional Justice in the World", in *Advances in Social Sciences Research Journal*, 2019, vol 6, issue 7, p. 38-39.

[102] UN Doc. S/2004/616, UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 2004, p. 4.

[103] A. FICHTELBERG, "Identity politics and hybrid tribunals", in *Leiden Journal of International Law*, 2020, vol 33, p. 1014.

[104] A. FICHTELBERG, "Identity politics and hybrid tribunals", in *Leiden Journal of International Law*, 2020, vol 33, p. 993 ff.

[105] D. APRO, S. SUDARMO, "Hybridity in Transitional Justice: Legacy of the 'Khmer Rouge Tribunal'", in *Mimbar Hukum*, 2018, vol. 30, n. 2, p. 355; Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Court of Cambodia*, New York, 2016, p. 95.

"assign blame", thus helping speed up the processes of reconciliation[106]. At the SCSL, for instance, with the implicit purpose to achieve a stable peace, the Court opened a balanced total number of cases, against the exponents from each party that took actively part to the hostilities. This represents an interesting choice, which transmitted a message of equity, balance, and shared responsibility among all the parties to the conflict. From another perspective, though, the narration built up in such way levelled the responsibility and ignored the different apports brought in by the parties, with no regard toward the different degrees of involvement. Nevertheless, the choice had a profound impact in terms of dialogue and relationship between the Court and the affected population, together with a relevant effect of transitional justice: Sierra Leoneans recognised that the court contribute significantly to the transition to peace[107].

At the ECCC, instead, discussion on the genocidal charges helped erode the current negative connotation of differences between targeted groups (Cham, Vietnamese, Khmer Krom) and addressed the pattern of discrimination still persistent nowadays[108].

Mixed courts are recognised to be particularly successful in contexts of systematic violence – due to their flexibility and the possibility to easily adapt to the situation's needs, especially in post-conflict countries, internationalised jurisdictions can adhere and manage «expectations of the local people and judiciary while still maintain core fair trial principles»[109].

It is also important to acknowledge the limits of the transitional justice potential of mixed tribunals. Flory, for instance, underlined the limits deriving from placing exclusively over a hybrid court the duty to foster national reconciliation, both through judicial and non-judicial activities. He acknowledges that hybrid courts embody the attempt to enlarge the goals of a court's work, flagging a renewed perspective over international criminal justice. The attempt to merge transitional justice and international

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[106] A. FICHTELBERG, "Transitional justice and the end of impunity: Hybrid tribunals", in C. LAWTHER, L. MOFFET, D. JACOBS, *Research Handbook of Transitional Justice*, Cheltenham, 2017, p. 333; M. VAGIAS, "Hybrid court resilience and the selection of cases", in *Leiden Journal of International Law*, 2020, p. 17-18.

[107] F. DAME, "The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal", in *Michigan State International Law Review*, 2015, vol. 24, p. 264.

[108] J. BERNATH, "The politics of difference in Transitional Justice: Genocide and the Construction of Victimhood at the Khmer Rouge Tribunal", in *Journal of Intervention and Statebuilding*,

[109] C. STAHN, "The Geometry of Transitional Justice: Choices of Institutional Design", in *Leiden Journal of International Law*, 2005, vol. 18, issue 3, p. 443; F. DAME, *The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal*, in *Michigan State International Law Review*, 2015, vol. 24, n. 1 , p. 211-278, p. 271. *See* L. RAUB, "Positioning Hybrid Tribunals in International Criminal Justice", in *International Law and Policy*, 2009, vol. 41, p. 1043.

criminal justice reveals a more open-minded strategy. Nevertheless, he underlines the risk that the punitive goal of international justice restricts the search for truth to the mere acts committed by the defendants, and social truth becomes irrelevant. The evidence-collecting strategy, too, enhances such a risk, focusing on that material useful for the establishment of the facts under the court's jurisdiction, greatly reducing the cathartic potential for witnesses to provide their statements of facts[110].

Thus, internationalised criminal tribunals can be *one* tool for fostering such transition, but they cannot be the only one[111]. In fact, transitional justice strategies better work when they are holistic, and incorporate integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform[112]. Hybrid courts, in that they innately include elements connected to the national system, become valuable elements of reconciliation processes, even when transitions are led by international actors, as their presence diminish the risk that a perception of pursuing a victor's justice or western imperialism spread among communities[113].

The experience of Sierra Leone, which worked in combination with a Truth and Reconciliation Commission, may represent a good example to include internationalised criminal tribunals in a network of mechanisms aimed to accompany the transition. Both South Sudan and Central African Republic advanced project of combining the prosecution before a mixed court with a truth-seeking non-judicial commission[114].

Truth and reconciliation commissions alone, indeed, constitute a valuable mean of achieving transitional justice goals, as it was proved with their establishment in several

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[110] P. FLORY, "International Criminal Justice and Truth Commissions. From Strangers to Partners?", in *Journal of International Criminal Justice*, 2015, vol. 13, issue 1, p. 19 ff.

[111] Open Society Justice Initiative, *Performance and Perception: the Impact of the Extraordinary Chambers in the Court of Cambodia*, New York, 2016, p. 99; M. VAGIAS, "Hybrid court resilience and the selection of cases", in *Leiden Journal of International Law*, 2020, p. 17; P. MENDEZ, "The New Wave of Hybrid Tribunals: A sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?", in *Criminal Law Forum*, 2009, vol. 20, p. 95.

[112] UN Doc. S/2004/616.

[113] E. NIELSON, "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence", in *UCLA Journal of International Foreign Affairs*, 2010, vol 15, p. 321.

[114] Intergovernmental Authority on Development, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, Addis Ababa, 17 August 2015, chapter V; E. WATCHOWSKI, "The Hybrid Court of South Sudan: Progress Towards Establishment and Sustainable Peace", in *Loyola University Chicago International Law Review*, 2017, vol. 15, issue 1, p. 125 ff; J. PEREZ-LEON-ACEVEDO, "Victims at the Central African Republic's Special Criminal Court", in *Nordic Journal of Human Rights*, 2021, vol. 39, p. 16; P. MENDEZ, "The New Wave of Hybrid Tribunals: A sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?", in *Criminal Law Forum*, 2009, vol. 20, p. 92; G. MUSILA, "The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations", in *International Nuremberg Principles Academy Occasional Paper*, 2016, n. 2, p. 35.

situations in the past decades: one of the most famous experiences is that of South Africa, in the aftermath of the apartheid regime, aiming to reconciliate and find a balance for the black and white communities to live together in the country. Nevertheless, the cooperation between truth commissions and jurisdictions may result difficult in terms of contribution from the local population: a sort of "witness-fatigue" (witnesses refusing to tell their story before both the mechanisms), and the impossibility for truth commissions to hear from people in provisional detention, are problematics that were registered in Sierra Leone[115].

Other than through prosecution and decision-making, internationalised criminal tribunals are advantageous tools for fostering reconciliation in a country under two further aspects: the engagement with victims and the construction of collective memory through their archives.

First, hybrid courts can involve victims in the adjudicatory process, providing a further element of local involvement or ownership[116]. To the purpose of this work, the relationship with and the involvement of the general population and victims' communities is one of the most interesting elements in support of hybridity, making it a truly valuable alternative to an international court. Victims' participation in the proceedings is a key factor for making a court a functional tool of transitional justice[117].

«The ECCC has made victim support and participation a major feature of its legacy»[118] and represented the most progressive model of victim's participation. The ECCC, thus, represent an interesting yardstick for addressing the transitional justice potential of hybrid courts. An exceptional number of Cambodians assisted to the hearing from the courtroom public gallery, and that is largely pointed out as a major achievement of the Chambers. Nevertheless, non-participation is as interesting to observe as participation: Bernath conceptualised three dimensions of victims' non-participation in Cambodia – those opposing to the idea that political violence is past and thus fear the

[115] P. FLORY, "International Criminal Justice and Truth Commissions. From Strangers to Partners?", in *Journal of International Criminal Justice*, 2015, vol. 13, issue 1, p. 19 ff.

[116] S. L. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vo. 52, n. 2, p. 355.

[117] A. FICHTELBERG, "Outreach at the Hybrid Tribunals", in *Journal of Global Justice and Public Policy*, 2020, vol. 6, p. 66; M. PENA, G. CARAYONY, "Is the ICC making the most of victim participation?", in *International Journal of Transitional Justice*, 2013, vol. 7, p. 518-519; J. PEREZ-LEON-ACEVEDO, "Victims at the Central African Republic's Special Criminal Court", in *Nordic Journal of Human Rights*, 2021, vol. 39, p. 4 ff.

[118] R. MUZIGO-MORRISON, "The rights of Victims", in A. DE BROUWER, A. SMEULERS, *The Elgar Companion to the International Criminal Tribunal for Rwanda*, 2016, p. 392.

consequences deriving from cooperation with the court; those using non-participation to openly contrast the court, criticising it for a perceived lack of independence, and a waste of money; and, the third and most interesting, those who lack awareness of the court. In fact, it emerged that most rural people remained unfamiliar with the formal proceedings and the law of the ECCC. These communities made extremely limited use of the formal legal system, being intimidated, or marginalised in court and, therefore, experiencing the decisions coming out of the courts as being diametrically opposed to their own powerful sense of right and wrong[119]. This demonstrated that the implementation of outreach programs with the aim of raising the awareness of population is essential for the correct engagement with victims' communities, and the sole participation scheme as included in the statute of a tribunal is not sufficient for promoting reconciliation through judicial initiatives. It appears that the hybrid courts system, only through the implementation of generous outreach initiatives, has the potential to foster the participation of victims, in line with the reconciliation finalities and the symbolic value of participation[120].

Reparations to victims, moreover, provide healing and are important for the reconstruction of the society: if reparations are absent, truth-seeking remains only symbolic[121].

Yet, transitional justice processes do not target only victims' communities: for reconciliation to successfully function, it is also important to speak to defendants' communities too, as well as others: consequently, hybrid courts must commit to avoid or diminish the risk of a perceived arbitrary or one-sided prosecution[122].

Second, both during the course of their operations, but mainly at their closure stage, hybrid courts can leave a significant legacy to future generations: through the

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[119] J. BERNATH, "Political Violence as a Time That is Past? Engaging With Non-Participation in Transitional Justice in Cambodia", in *Social and Legal Studies*, 2019, vol. 28, issue 5, p. 601 ff.

[120] A. MANGIARACINA, "Le vittime nel procedimento penale internazionale: verso un ampliamento degli spazi partecipativi", in *Conflitti inter-etnici e tutela delle vittime. Fra Corte penale internazionale e giurisdizione nazionale*,

[121] Open Society Justice Initiative, *Performance and Perception: the Impact of the Extraordinary Chambers in the Court of Cambodia*, New York, 2016, p. 95; J. PEREZ-LEON-ACEVEDO, "Victims at the Central African Republic's Special Criminal Court", in *Nordic Journal of Human Rights*, 2021, vol. 39, p. 5; R. JEFFREY, "The Role of the Arts in Cambodia's Transitional Justice Process", in *International Journal of Politics, Culture and Society*, 2020.

[122] E. BAYLIS, "Extreme Cases in Hybrid Courts", in *Temple International and Comparative Law Journal*, 2021, vol. 95, p- 105-106. Baylis moves further and argues that the modes of liability themselves can shape the court's potential to contribute to transition processes: she affirms that doctrines of Joint Criminal Enterprises III (JCE) «the strain of culpability or legality may create a perception that the tribunal is unfairly blaming members of those communities or may create a fear of arbitrary prosecution even among those at a significant remove from the concerned crimes».

predisposition of public archives, memorials, or educational programs[123]. Mixed tribunals, in doing so, help shaping a narrative and framing conflicts in a way that promote transitional justice[124].

In Cambodia, for instance, whereby almost two thirds of the population are under the age of 30, the legal acts of the ECCC provide authoritative sources of information about a historical period of their country that the did not witness in person, and that entered in the educational programs only in very recent times[125]. The contribution of the ECCC to leaving a legacy to the future generations has been deemed another of the major achievements of the court's work[126]. In Sierra Leone, instead, the Peace Museum was purposely established for ensuring that the events of the war be properly documented to preserve the integrity and authenticity of the related history. An exhibit of victims' narrations contributes to strengthen people's understanding of the value of peace and monitor the ongoing process of reconciliation, helping to generate new knowledge, with the hope to construct a better future[127].

In conclusion, often, it is said that unrealistic expectations are place upon hybrid courts: achieve justice, promote reconciliation, offer reparations to victims, fight impunity, implement capacity-building and the rule of law[128]. Those expectations remain unrealistic as long as they do not enter in the tribunals' completion plans and action strategies. Indeed, if such non-judicial goals are envisaged to be achieved, in addition to justice, through a mixed court, like it seems to happen in present times, the hybrid court's activities will be projected accordingly, making hybrid tribunals a formidable, and appealing, mechanism of justice and reconciliation.

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[123] C. MCCAFFRIE, S. KUM, D. MATTES, L. TAY, *The Educational Potential of the Extraordinary Chambers in the Courts of Cambodia*, Stanford, 2018; V. DE WILDE D'ESTMAEL, "The use of the archives of the Tuol Sleng Genocide Museum and the Documentation Centre of Cambodia by the Extraordinary Chambers in the Courts of Cambodia", in *Archives and Human Rights*, 2021, p. 178 ff.

[124] A. FICHTELBERG, "Outreach at the Hybrid Tribunals", in *Journal of Global Justice and Public Policy*, 2020, vol. 6, p. 68.

[125] C. MCCAFFRIE, "An educational legacy: Exploring the links between education and resilience at the ECCC", in *Leiden Journal of International Law*, 2020, vol. 33, issue 4, p.976.

[126] C. MCCAFFRIE, "An educational legacy: Exploring the links between education and resilience at the ECCC", in *Leiden Journal of International Law*, 2020, vol. 33, issue 4, p. 975 ff.

[127] "Peace Museum", in *Sierra Leone Truth and Reconciliation Commission*, available at www.sierraleonetrc.org [last accessed 27 January 2022].

[128] C. MCCAFFRIE, "So We can Know What Happened? The Curious Impact of Hybrid Courts on Education", in *Justice in Conflict*, 15 March 2018, available at www.justiceinconflict.org [last accessed 27 January 2022].

IV. Not all of it 'sunshine and roses'. Weaknesses, flaws, and critics: hybrid courts and political influence.

Having reconstructed all the advantageous aspects of the hybrid courts that have contributed to bring this type of jurisdiction back into vogue, it is necessary to turn this investigation also to the negative aspects - and to which they are - of the reaffirmation of the phenomenon.

The main risk, reconnected to the use of hybrid courts, is represented by the greater possibility for state actors and stakeholders of each hybrid court to influence the direction of the court proceedings. Hybrid courts, being the necessary product of negotiations, find themselves being susceptible to political influence, bias, and selectivity since the earliest stage of their institution[129]. The threat, as a consequence, is that such jurisdictions become an easy tool for shaping on-sided narrations of a country's history, to determine partial responsibilities, or to drive the outcomes of the proceedings, through the appointment of judges, the endowment of resources to the court, and the diminishment of cooperation to the work of the tribunal.

A second risk, instead, in a broader perspective, concerning the whole complex of international law, is the danger of a hyper-fragmentation of international criminal justice, namely the increasing emergence of specialised and relatively autonomous spheres of social action and structure[130]. In fact, the establishment of new internationalised criminal tribunals, having a purposely tailored jurisdiction, can be also regarded as the delimitation of new «self-contained systems» in the universe of international criminal law[131]. The "self-standing" nature of each court and tribunal is, consequently, potentially a factor of fragmentation, as it may provide equally valid different interpretations of the law concerning the same crimes[132]. There is a risk that such process results in «certain fragmentation of international justice, allowing for different interpretations of the law and resulting in unharmonized case law, which, given the specifics of the international legal

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[129] M. KERSTEN, "On the rebirth of hybrid tribunals", in *Justice in Conflict*, 22 January 2016, available at www.justiceinconflict.org [last accessed 27 January 2022].

[130] UN Doc. A/CN.4/L.682, ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *Report of the Study Group of the International Law Commission*, 13 April 2006, para 8.

[131] ICTY, *Prosecutor v. Tadić*, Case IT-94-1 -AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 11.

[132] T. TREVES, "Fragmentation of International Law: The Judicial Perspective", in *Agenda Internacional*, 2009, vol. 27, p. 234.

system, challenges the legal certainty and equality before the law» and causes problems of coherence with international law[133].

V. Conclusions.

The resurgence of hybrid tribunals in the last few years was triggered by a combination of reasons.

First of all, the continued and renewed necessity for jurisdictions that hold perpetrators responsible for horrendous crimes that harm millions of victims and still deeply touch the interest in peace, security, and the respect of human rights fostered by the international community.

Second, the difficulties encountered by the Rome Statute system after twenty years of functioning of the International Criminal Court – limited and lengthy proceedings; a difficult relationship with African States and the African Commission, cause by the early prosecutorial initiatives; and the dependency of the ICC from the choice of the States (not last those sitting at the Security Council of the UN) to support its work. Since the ICC is particularly slow and prospects of its interventions slim, such belief lost its strength and actors of the international community have started again look at the hybrid courts. When the ICC opened is doors in 2002, there was a shared conviction that it would be the definitive international criminal tribunal, and that there would be no need to implement other solutions for the prosecution of international crimes[134]. Hybrid courts, which had been conceived for those situations that did not fall within the ICC's jurisdictions, too, were destinated to extinguish. On the contrary, the weakness of the ICC's system provided the ground for an escape from the 'centre', 'the heart' of the galaxy, which was intended to be the International Criminal Court, despite the attitude to complementarity[135].

Third, the work of the first generation of internationalised criminal tribunals shed light on the fact that such jurisdictions present unique legal and sociological advantages

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[133] N. SMAILAGIĆ, "Diversity of Internationalised Criminal Courts: Fragmentation or Consolidation of International Criminal Justice?", in M. BARUFFI, M. ORTINO, *Trending Topics in International and EU Law: Legal and Economic* Perspectives, 2019, vol. 27, p. 146; H. OLÀSOLO, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice*, Leiden, 2018, p. 154.

[134] M. KERSTEN, "Why Central African Republic's Hybrid Tribunal Could be a Game-Changer", in *Justice in Conflict*, 14 May 2015, available at www.justiceinconflict.org [last accessed 27 January 2022].

[135] H. HOBBES, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol. 30, pp. 177–197, p. 178.

for the national domestic system and the affected communities, and can conduct to certain peculiar achievements, that a fully international – or a fully domestic – tribunal *in se* is not able to seek. It is, reasonably, questionable whether it is necessary to intentionally pursue these extra-judicial objectives by adapting the mixed courts to the legal system concerned and to the customs of the community. A court, one might indeed reason, must in itself achieve the sole objective of exercising justice, through the conduct of fair and impartial trials, in line with universally recognized standards of justice.

Indeed, hybrid courts are far from being ideal, as they are extremely exposed to political influence, and their diversity, which is, as we previously demonstrated, peculiar to their nature, provoke a risk of fragmentation of international criminal law, and of standards of human rights[136]. Nevertheless, advantages and achievements outweigh flaws and problematics; some authors, even critically acknowledging the imperfection of hybridity, theorised a proposal for a "permanent hybrid court", demonstrating the value of such alternative[137].

For all the reasons observed in this chapter, then, hybrid tribunals have become a consolidated option of the international criminal justice toolbox[138]. As Kersten observes, «we should embrace the growing marketplace of international criminal justice but avoid reifying a hierarchy of tribunal types. Once again, the ultimate goals should be to establish a healthy and sustainable system of global justice»[139].

The different conformations of the new hybrid courts that are emerging today represent an interesting field of observation for three purposes: *first of all*, to ascertain whether these expectations have actually been reflected in the instruments establishing these jurisdictions; then, to observe, also, whether these new mixed tribunals can fit harmoniously into an international criminal justice network; finally, to assess whether a certain combination of "factors of hybridisation" is affirming as a preferred structure of a standardised internationalised criminal court.

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[136] S. L. OCHS, "A Renewed Call for Hybrid Tribunals", in *New York University Journal of International Law and Politics*, 2020, vol. 52, n. 2, p. 351-414, p. 353.

[137] M. KERSTEN, "The case for a permanent hybrid tribunal for mass atrocities", in *Justice Hub*, 6 January 2016.

[138] M. VAGIAS, "Hybrid court resilience and the selection of cases", in *Leiden Journal of International Law*, 2020, p. 1.

[139] M. KERSTEN, "On the rebirth of hybrid tribunals", in *Justice in Conflict*, 22 January 2016, available at www.justiceinconflict.org [last accessed 27 January 2022].

CHAPTER IV

THE SECOND GENERATION OF INTERNATIONALISED CRIMINAL TRIBUNALS

SUMMARY: I. Introduction: How are hybrid the new hybrids? – I. The Extraordinary African Chambers. The first 'second generation' hybrid? – 1. Legal basis: the Agreement between the African Union and the Republic of Senegal. – 2. Structure and the composition of the staff: the significative contribution of Senegal. – 3. Applicable law, between African traditions and internationality. – 4. EAC's Jurisdiction. – 4.1. Personal, territorial, and temporal jurisdiction. – 4.2. – Subject Matter Jurisdiction. – 5. Relationship with the national judiciary system. – 6. Sources of funding, the seat, and the working languages. – 7. Conclusion and critical remarks. – III. The Kosovo Specialist Chambers and Specialist Prosecutor's Office. – 1. Legal basis. – 2. The strongly national-alike structure and the international composition of the staff: opposites attract. – 3. Applicable law and the reference to the jurisprudence of "other criminal courts". – 4. Jurisdiction. – 4.1. Personal, territorial, and temporal jurisdiction. – 4.2. Subject matter jurisdiction. – 5. The formally tight relationship with the national judiciary system and the potential concurrence with other international criminal courts – 6. Sources of funding, the seat, and the working languages. – 8 Critical remarks. – IV. The Central African Republic Special Criminal Court – 1. The background of never-ending violence. – 2. Legal basis. – 3. The structure: lesson learnt from the experience of the ECCC. – 4. Applicable law. – 5. Personal, temporal, territorial, and material jurisdiction. – 6. Relation with the domestic system and the International Criminal Court. – 7. Funding, seat, and official language. – 8. Conclusion: CAR, a terrain for evaluation the complementarity of the ICC. – V. The Hybrid Court for South Sudan. – 1. Legal basis. – 2. Structure and composition of the organs. – 3. Applicable law and jurisdiction. – 4. The relationship with the national system and international jurisdictions. – 5. The seat, the funding, the official languages. – 6. Non-prosecutorial programs of the HCSS. – 7. Critical remarks. – VI. Other calls for courts. – VII. Conclusions.

I. Introduction: How are hybrid the new hybrids?

The re-emergence of hybridity is a phenomenon largely affirmed and currently increasing[1]. As we found at the end of the previous chapter, it is not a random resurgence, but, on the contrary, it has roots in a combination of reasons that currently makes it an ideal asset for prosecuting large-scale crimes. In particular, instituting new mixed tribunals can positively contribute to the construction of a network of mechanisms of international criminal justice, able to intervene to various extent and levels, and contrast impunity and the repetition of mass crimes. Such contribution is at first theoretical, insofar that, as we previously found[2], its realisation passes through the introduction of specific

[1] M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in S. WEILL, K. SELLINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 281; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, vol. 16, n. 2, p. 485; S. BRAMMERTZ, "Criminal Law Goes International: 20 Years of Accountability and the Future of International Criminal Law", in *Australian National University*, 7 July 2014, available at www.law.anu.edu.au [last accessed 18 April 2022].

[2] *See* Chapter II and Chapter III.

disposition, and the adoption of certain factors of hybridisation, in the project and funding documents of each tribunal.

It is, thus, essential to verify in concrete the design and functioning of every new internationalised criminal court, as to assess whether – and in which manner – they become part of such a network and which goals they pursue. Such evaluation will be conducted focusing on each jurisdiction separately, observing which "factors of hybridisation" have been adopted in every case, and which strategies are being implemented with the prosecutorial and non-judicial activities of each court.

The analysis, furthermore, will also enable to assess whether, building on the diverse experiences of the first generation of hybrid criminal courts, certain "factors of hybridisation" are affirming themselves as typical and if, consequently, even a standardised unitary model, or at least a uniform trend, is emerging as preferred within the new generation of mixed courts in the international community.

Just like it happened for the attempts to list the hybrid courts from the first generation, also the catalogue of those jurisdictions that fall within the "second generation of mixed courts" vary greatly, depending on the subject shaping the limits of the group. Not all studies include the same number of new hybrid courts and propose differentiated modulations of inclusions and exclusions.

Hence, for a broader understanding of the constituents of the new generation of internationalised criminal tribunals, after briefly reassuming the events that led to the institution of each tribunal, and analysing in details the choices related to the "factors of hybridisation", it will be necessary to evaluate whether the jurisdiction actually is a hybrid court, according to the definition previously obtained in this study – that of a phenomenon dealing not only with prosecutorial activities taking place in a forum uniquely structured by a different combination of "factors of hybridisation", but also with those extra-judicial effects that such jurisdictions provoke on the territory over which they operate: transitional justice, capacity-building, and peacebuilding[3].

[3] *See* Chapter II for the entire reasoning that led to the acceptance of such a definition.

II. The Extraordinary African Chambers. The first 'second generation' hybrid?

While some authors do list the EAC as the prime example of the resurgence of the hybrid model[4], some other tend to exclude that such jurisdiction features this nature[5].

Chad became independent in 1960, but shortly after a lengthy period of political instability commenced, and, in 1975, a military coup allowed the killing of the President Tombalbaye, who was replaced by Christian General Malloum. A Muslim rebel leader of an armed dissident faction, belonging to the ethnic group of Goranes, and who had studied in Paris, Hissène Habré, joined forces with the government in 1978 and was named prime minister[6]. Not much later, a conflict between supporters of Malloum and of Habré erupted, on religious and ethic grounds, generating cleavages within the citizenship. The Chadian National Liberation Front ("FROLINAT"), a group created in Sudan in 1960s to protest against the Chadian governments, entered the capital city and removed the military from the government, establishing a Transitional National Union Government ("GUNT"), in which a Muslim ex-rebel leader, Oueddei, was the President, while Habré was minister for defence. Stability lasted truly short, as a violent conflict broke out between Oueddei's and Habré's supporters, causing thousands of deaths. Only on 7 June 1982 Habré seized power and remained as the President of Chad. He appointed persons of his trust, all of Goranese ethnicity, in the most important administrative positions, as to control the country, which was divided into security zones. The political police, the Directorate of Documentation and Security, directly attached to the Office of the Presidency, maintained the population under strict surveillance, as to purge alleged opponents, through a capillary chain of command and control[7]. The population was distinguished in two classes: the rulers on the one side, and the oppressed on the other; the latter was continuously subjected to persecutions, humiliations, and arbitrary actions. Pillages, arbitrary arrests and detention, torture, summary executions were widespread practices, harming thousands of Chadian citizens.

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[4] M. KERSTEN, A. , "Hybridization – A spectrum of creative possibilities", in *The President on Trial*, 2020, p. 281.

[5] E. CIMIOTTA, "The first steps of the Extraordinary African Chambers: A new mixed criminal tribunal?", in *Journal of International Criminal Justice*, 2015, vol. 13.

[6] "Largest Ethnic Groups of Chad", in *World Atlas*, available at www.worldatlas.com [last accessed 18 April 2022]. The Goranes are sometimes referred to as Dazaga.

[7] Chad, Decree No. 005/PR, 26 January 1983.

International since the very beginning: Amnesty International, for instance, continuously forwarded letters to Habré in person, warning him to interrupt the continued violations of human rights[8]; Human Rights Watch, instead, strongly committed to investigations over the gross violations perpetrated by the political police[9]. On the contrary, some countries like the USA and France backed Habré since the initial stages of his operations, as to contrast Ghaddafi taking power in Libya[10].

On 1 April 1989, Colonel Idriss Déby, who was Habré's forces commander in chief, launched his rebellion against the government, and obtained that, on 1 December 1990, Habré was forced to flee to Cameroon, after killing all the political prisoners detained at the presidency's compound, and eventually moved to Senegal[11].

On 29 December 1990, the new government led by Déby established a commission of inquiry to investigate the crimes allegedly committed between 1992 and 1990, to collect documentation, to confiscate and secure evidence useful to determine the truth, to preserve the crimes site in their condition, to hear from witnesses[12]. The Commission concluded its operations in May 1992, issuing the final report, which found Habré responsible for the death of more 40.000 persons, and alleged that Habré's crimes even amounted to genocide against all ethnic groups different from the Goranes[13].

Hissène Habré was tried before the Extraordinary African Chambers, and was first found responsible for crimes against humanity (rape, forced enslavement, murder, summary execution, torture, and other inhumane acts), torture as an autonomous crimes, and war crimes (murder, summary executions, kidnapping, enforced disappearance, unlawful transfer, confinement, and torture) on 30 May 2016 by the Trial Chamber, as eventually confirmed by the Appeals Chamber on 27 April 2017[14].

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[8] Amnesty International, AFR 20/004/2001, *Tchad: L'héritage Habré*, 2001, p. 13 ff.

[9] R. BRODY, "Bringing a Dictator to Justice. The Case of Hissène Habré", in *Journal of International Criminal Justice*, 2015, vol. 13, p. 211 ff.

[10] Human Rights Watch, *Enabling a Dictator. The United State and Chad's Hissène Habré 1982-1990*, 2016.

[11] N. KRITZ, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, 2009, vol. 3, p. 52-53.

[12] Chad, Decree No. 014/P.CE/CJ/90, *Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories*, 29 December 1990: M. ABAKAR, "The Making of Chad's Truth Commission", in S. WEILL, K. SELLINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 24 ff.

[13] Chad, *Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories, Investigation of Crimes Against the Physical and Mental Integrity of Persons and their Possession*, 7 May 1992.

[14] EAC, *The Prosecutor v. Hissène Habré*, Trial Chamber, Judgement, 30 May 2016, paras 2330 ff.; EAC, *The Prosecutor v. Hissène Habré*, Appeals Chamber, Judgement, 27 April 2017, paras 943 ff. Habré was found guilty of crimes against humanity (rape, sexual slavery, murder, summary execution and

1. Legal basis: the Agreement between the African Union and the Republic of Senegal.

The first attempts to bring Habré to trial came from a Senegalese prosecutor, who obtained that the dictator was indicted; the Court of Appeal of Dakar and the Supreme Court of Senegal, though, ruled that Senegalese law did not provide for universal jurisdiction, and cancelled the indictment[15]. In 2001, a group of Chadian victims of Habré's regime, who had fled to Belgium, having acquired the correspondent citizenship, recurred to the Belgium's judiciary system for opening an investigation against Habré, on the basis of a national legislation that enabled the universal jurisdiction over war crimes and crimes against humanity, regardless of where the crimes had taken place, or the nationality of the victims and the accused[16]. After five years of investigations, Belgium issued an international arrest warrant to arrest, but Senegal did not hand Habré, declaring itself incompetent to rule on the extradition request[17].

The African Union, considering that it had no legal organ competent to try the dictator, mandated Senegal «to prosecute and ensure that Hissène Habré is tried, on behalf of Africa», and the State adopted the national legislation as necessary to proceed[18]. Habré filed a complaint before the ECOWAS Court of Justice, alleging that Senegal ha violated his human rights in the proceedings against him (first of all the principle of non-retroactivity): the court issued its decision on 18 November 2010, noting the existence of evidence of possible prejudice of Habré's fair trial rights, but also acknowledging the mandate given to Senegal by the AU, and recommended the State to «follow the international practice which has become customary in such situations to create ad hoc or special courts»[19].

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inhuman acts) and war crimes – murder, torture, inhumane treatment, unlawful detention, and cruel treatment.

[15] Supreme Court of Senegal, *Association des Victimes er Répressions Politiques au Tchad (AVCRP) et al. V. Hissène Habré*, No. 14, Judgement, 20 March 2001.

[16] I. SANSANI, The Pinochet Precedent in Africa: Prosecution of Hissène Habré, in *Human Rights Brief*, 2008, vol. 2; R. BRODY, "The Prosecution of Hissène Habré – An "African Pinochet", in *New England Law Review*, 2001, vol. 35, p. 321 ff.

[17] Court of Appeal of Dakar, *Opinion of the Court of Appeal of Dakar on the Extradition Request for Hissène Habré*, 25 November 2005, available at www.asser.nl [last accessed 18 April 2022].

[18] African Union, Doc. Assembly/AU/3 (VII), *Decision on the Hissène Habré Case and the African Union*, 2 July 2006, paras 4-5.

[19] Court of Justice of the Economic Community of States of West Africa, *Hissène Habré v. Republic of Senegal*, Case No. ECW/CCJ/JUD/06/10, Judgment, 18 November 2010, paras 58 ff; J.A. HESSBRUEGGE, "ECOWAS Court Judgement in Habré v. Senegal Complicates Prosecution in the Name of Africa", in *American Society of International Law*, 2011, vol. 15, issue 4.

In the meanwhile, Belgium introduced proceedings against Senegal before the International Court of Justice ("ICJ") for having Habré kept under domiciliary arrest. On 20 July 2012, ICJ issued its decision on the case *Belgium v. Senegal*, recognising that Senegal had the obligation of *aut dedere aut judicare* Habré under the Convention Against Torture and, therefore, should proceed to try or extradite him[20].

At last, in compliance with the ECOWAS and the ICJ rulings, and the African Union's decision, on 22 August 2012, the African Union and the government of Senegal reached and signed an agreement on the establishment of the Extraordinary African Chambers, with a statute annexed[21]. The Agreement was ratified by Senegal in December that year and consequently entered into force[22].

The subjects signing the agreement make it a 'first' in the universe of international criminal justice: on one side there is the Republic of Senegal, a State that has no direct connection with the crimes and the situation to prosecute, excluded the presence of Habré on its territory. In fact, Senegal negotiated the agreement on the basis of universal criminal jurisdiction.

On the other, there is an organisation different from the United Nations, the African Union. An Expert Committee, established by the AU Assembly, had recommended that the preferred way to prosecute Habré was through national initiative of Senegal, thus, on the basis of it, the AU initially demanded to Senegal to independently prosecute Habré «in the name of Africa»[23]. The position of the organisation changed after the judgement of the Court of ECOWAS, and the AU Assembly required the AU Commission to consult Senegal for identifying the modalities for a trial of Habré through a «special tribunal with

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[20] ICJ, *Belgium v. Senegal*, General List No. 144, Questions relating to the Obligation to Prosecute or Extradite, Judgement, 20 July 2012, para. 122; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 10 December 1984, articles 6-7; C. GALWAY BUS, "Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture, in *American Society of International Law*, 2012, vol. 16: E. CIMIOTTA, "*Aut dedere aut judicare*, universalità 'condizionata' e Convenzione contro la tortura: a margine del Caso *Belgio c. Senegal*", in *Diritti Umani e Diritto Internazionale*, 2013, p. 105 ff; M. I. PAPA, "Interesse ad agire davanti alla Corte internazionale di giustizia e tutela di valori collettivi nella sentenza sul caso *Belgio c. Senegal*", in *Diritti Umani e Diritto Internazionale*, 2013, p. 79 ff.

[21] *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990* (hereinafter also referred to as EAC Statute).

[22] Senegal, Law N. 2012-25, *Autorisant le Président de la République à ratifier l'Accord entre le Gouvernement de la République du Sénégal et l'Union africaine sur la création de Chambres africaines extraordinaires au sein de juridictions sénégalaises*, 28 December 2012.

[23] AU, *Report of the Committee of Eminent African Jurists on the Case of Hissene Habré*, 2 July 2006, paras. 17-26; AU Doc. Assembly/AU/3 (vii), *Décision sur le procès d'Hissène Habré et l'Union africaine*, 3 August 2006, para. 5.

an international character»[24]. Last, the AU does not expressly have the power to establish, either unilaterally or through an agreement, criminal jurisdictions – but we agree with those scholars who reconduct such initiative to the "right of intervention" to which the African Union is entitled in force of its Constitute Act: «The Union shall function in accordance with the following principles […] the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of graves circumstances, namely: war crimes, genocide and crimes against humanity»[25].

The legal basis of the EAC, therefore, is an international treaty signed on 22 August 2012 between the African Union and the government of the Republic of Senegal, to which the Chambers' statute is annexed. The option adopted for such "factor of hybridisation", hence, is the most international possible.

The Senegalese legislation approving the accord, instead, cannot be recognised as the legal basis of the tribunal, since the ratification did not have the purpose to incorporate the provision of the agreement within the national law, but only to allow that the treaty may produce its effects properly, full fledging implementing the provisions therein contained[26].

2. Structure and the composition of the staff: the significative contribution of Senegal.

The Extraordinary Chambers were attached to the Senegalese national system, adopting its conformation. They were composed by an investigation chamber(*Chambre*

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[24] AU Doc. Assembly/AU/Dec.340 (XVI), *Decision on the Hissène Habré Case*, 31 January 2011, para. 9.

[25] African Union, *Constitutive Act of the African Union*, Lomé, 11 July 2000, article 4; D. L. TEHINDRAZANARIVELO, "The African Union and the Reactions to International Crimes", in W. KALIN, R. KOLB, C. SPENLÉ, M. VOYAME, *International Law, Conflict and Development. The Emergence of a Holistic Approach in International Affairs*, Leiden, 2010, p. 555 ff.; F. MUSSO, "Le Camere africane straordinarie in seno alle corti senegalesi: un esempio di giurisdizione penale particolare?", in *Diritti Umani e Diritto Internazionale*, 2013, p. 558. On the right of intervention, *see:* B. KIOKO, "The right of intervention under the Africa Union's Constitutive Act: From non-interference to non-intervention", in *International Review of the Red Cross*, 2003, vol. 85, n. 852, p. 807 ff; C. WYSE, "The African Union's Right of Humanitarian Intervention as Collective Self-Defense", in *Chicago Journal of International Law*, 2018, vol. 19, n. 1, p. 297 ff.

[26] The same conclusion is reached, among many, by R. ADJOVI, "Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese judicial system between the government of the Republic of Senegal and the African Union and the Statute of the Chambers", in *International Legal Materials*, 2013, vol. 52, n. 4, p. 1021; E. CIMIOTTA, "The first steps of the Extraordinary African Chambers: A new mixed criminal tribunal?", in *Journal of International Criminal Justice*, 2015, vol. 13, p. 197. Of a different opinion seems to be S. WILLIAMS, "The Extraordinary African Chamber in the Senegalese courts: An African solution to an African problem?", in *Journal of International Criminal Justice*, 2013, p. 1144, identifying the Senegalese legislation as the legal basis of the EAC.

d'instruction), an indicting chamber (*Chambre d'accusation*), a trial chamber (*Chambre d'assise*), and an appeals chamber (*Chambre d'assises d'appel*).

The investigating chamber, according to the Senegalese code of criminal procedure, collected evidence and issued its closing order, on 13 February 2015, indicting Habré for crimes against humanity, war crimes, and torture[27]. It was staffed with four judges and two substitutes, all Senegalese. The indicting chamber, instead, encompassed three Senegalese judges and one Senegalese substitute, and had jurisdiction over the acts adopted by the investigating judges[28]. All magistrates sitting in the investigating and indicting chamber were nominated by the President of the African Union Commission upon proposition of the Senegalese Minister of Justice[29].

Seemingly, the prosecution was led by a General Prosecutor and three substitutes, all nationals of Senegal, chosen by the President of the AU Commission, and the Registry was run exclusively by Senegalese personnel[30].

The only element of internationalisation was introduced in the Trial and Appeals Chambers, that, instead, were both manned by two Senegalese judges and one Senegalese auxiliary, appointed through the same procedure as for the other chambers (nomination by the President of the African Union Commission under proposal of the Minister of Justice of Senegal), but whose respective Presidents were a national of another member State of the African Union[31]: Judge Wafi Ougadeye, previously sitting at the Supreme Court of Mali, presided the Appeals Chamber, and Burkinabe Gustave Kam Gberdao from Burkina Faso led the Trial Chamber. There was, thus, a neat prevalence of Senegalese personnel, and a deep control of Senegal Minister of Justice on the appointment of magistrates[32]. The "model" adopted for the cooperation of Senegalese judges with their foreign colleagues was that of a "shared responsibility" over the decisions, as the vote of the Presidents had the same value as that of the Senegalese magistrates[33].

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[27] Senegal, Loi N. 65-61, *Code de procédure pénale*, 21 July 1965 ("Code of Criminal procedure"), articles 39-44 ; EAC, *The Prosecutor v. Hissène Habré*, Investigating Chamber, D2819, Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre d'assises, 13 February 2015.

[28] Senegal, Code of criminal procedure, article 179, articles 185-209.

[29] EAC, *Statute*, articles 11-12.

[30] EAC, *Statute*, article 13.

[31] EAC, *Statute*, article 11.

[32] F. MUSSO, "Le Camere africane straordinarie in seno alle corti senegalesi: un esempio di giurisdizione penale particolare?", in *Diritti Umani e Diritto Internazionale*, 2013, p. 556.

[33] *See* Chapter II, "Composition of the staff" for the theorisation of two opposite models of cooperation between judges and their consequences.

The dichotomy between international and national, here, but also related to the others "factors of hybridizations" applied to the Extraordinary African Chambers, results different from that theoretically developed as the sliding scale over which setting a hybrid court: the "national" personnel involved was citizen of a country largely extraneous to the situation of mass crimes under investigations, to which it was linked by the rulings of regional and international jurisprudence rather than by factual matters, excluded the circumstance that Habré was in exile in Senegal.

While in the first generation of internationalised criminal tribunals the mixed composition of the bench and of other organs ensured a double control over the development of proceedings, and the exchange of expertise, in a perspective of capacity building for the country concerned, at the EAC the inclusion of the two non-Senegalese presidents did not respond to such intentions, since they did not hold any connection with Chad. Such a composition of the personnel, though, offered an elevated level of independence and impartiality: potentially interested to influence the development of the proceedings, in fact, are the groups of the country concerned (in this case, Chad) that, however, in the case of the EAC, could not find a direct representation in the chambers. In addition, the fact that the EAC were established for exercising universal criminal jurisdiction underscores the universally shared value of the fight against impunity and the interest of the whole humankind for the prosecution of international crimes.

The appointment of two non-Senegalese judges, though, does not seem inspired by any goal wider than prosecution, and can rather be explained as the strategy to comply with the request of the ECOWAS Court of Justice that Habré had to be tried by a «special court», as well as a sign of participation and "ownership" from the African Union[34].

3. Applicable law, between African traditions and internationality.

Even the law applied by the EAC remained completely outside the legal system of Chad, both in substantive and procedural terms: in fact, article 1 of the Agreement establishing the Chambers states that « the Extraordinary African Chambers shall apply

[34] Open Society Justice Initiatives, *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes*, New York, 2018, p. 239-240.

its Statute, international criminal law, the Criminal Code and Criminal Code of Procedure of Senegal and other relevant Senegalese laws»[35].

As for the substantive law applicable by the EAC, the Statute lists four categories of international crimes – genocide, crimes against humanity, war crimes, and torture. The exclusion of any domestic crime was dictated by the circumstance that the sovereign state conducting the trial was extraneous to the state where crimes had been committed: Senegal could not extend its domestic criminal jurisdiction over ordinary crimes outside its territory, and on a territory of another sovereign state. Different is the case of *crimina juris gentium*, that, being of concern of the whole humankind, can be prosecuted before a jurisdiction other than that of the State in which territories the crimes took place – an international tribunal, a national court, under universal jurisdiction.

While the Agreement offers an indistinct list of applicable sources of law, without any indication about which should have been preferred, the EAC statute clarifies a sort of hierarchy in the application of such norms: the statute *in primis*, and, for those cases not provided for in it, Senegalese law[36]. Crimes against humanity, genocide, torture, and war crimes were, indeed, defined in the EAC Statute, although they had previously been introduced in the national legal system when Senegal had attempted to prosecute Habré autonomously, before being stopped by the ECOWAS Court's judgement[37].

Therefore, although Chad, the concerned State, did not gain any positive spill-over effect on its own judicial system by the Habré's trial, Senegal, previously to the establishment of the EAC, took the opportunity to try to punish Habré in order to develop its domestic criminal law, including in it international crimes as defined in the corresponding conventions: it modified the national penal code by introducing genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law; and it recognised universal criminal jurisdiction over such crimes[38].

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[35] EAC, *Agreement*, article 1; Y. DIALLO, "L'Interaction normative entre le Chambres Africaines Extraordinaires (CAE) et le Système Juridique National Sénégalais", in *African Journal of International Criminal Justice*, 2018, vol. 3, issues 1-2, p. 23.

[36] EAC, *Statute*, article 16.

[37] On 31 January 2007, clearly to the purpose of bringing Habré to trial, the Senegalese National Assembly adopted the legislation allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes, and torture, even when committed outside of Senegal. Later on, on 23 July 2008, the Parliament passed an amendment to the Senegalese Constitution clarifying that Senegalese courts have jurisdiction over crimes against humanity committed in the past

[38] Senegal, Law 2007-02, 12 February 2007; Senegal, Law 2007-05, 12 February 2007 (universal jurisdiction was admitted only upon the existence of one of the following criteria: the suspect was arrested or resided in Senegal, a victim of the crimes allegedly committed by the suspect resided on in Senegal, the suspect is extradited to Senegal); [38] B. KIOKO, "Creatin the EAC in Senegal", in in S. WEILL, K. SELLINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 75.

For what concerned procedural law applicable by the EAC, similarly, the provisions contained in the Statute had primacy, and only in case of lacunae the Senegalese Code of Criminal Procedure and all international conventions ratified by Senegal intervened and integrated it[39]. As a matter of fact, the Statute was rather essential concerning the criminal procedure before the EAC, and the court did not develop and adopt its own internal rules of procedure and evidence, such had been the case for Sierra Leone and Cambodia. Thus, the national Senegalese criminal procedure played a relevant role in shaping the conduct of the trial of Hissène Habré.

Senegal featured a system of criminal procedure inherited from the French civil law "inquisitorial" model[40]. Shaping the proceedings over the Senegalese procedure yet rendered the trials more understandable also for Chadian population, since Chad largely shared its legal tradition with Senegal, due to their common past as former French colonies[41].

Prosecution could be triggered *ex officio* or following a request by governments, international organisations, NGOs, or victims, with not prejudice of their place of residence[42]. Such rule, in principle, allowed Chadian victims to activate a case before the EAC, but, in reality, this never happened as the only case committed to trial was that against Hissène Habré, that was opened by the General prosecutor on 30 June 2013[43].

An element that introduced internationality into the EAC system was the provision that the judges of the Extraordinary African Appeals Chamber could draw upon the jurisprudence of international criminal courts and tribunals for developing their decisions[44].

In conclusion, the EAC largely applied Senegalese procedural law, and, again, they find a peculiar place over the theoretical sliding scale concerning such "factor of hybridisation": there is a meaningful national components, which makes the Chambers

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[39] EAC, *Statute*, article 17.

[40] Human Rights Watch, *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, 27 April 2015, p. 7; S. JOIREMAN, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy, in *The Journal of Modern African Studies*, 2001, vol. 39, n. 4, p. 577.

[41] A. WEKERLE, "Modern African Criminal Law and Procedure Codes", in *The Quarterly Journal of the Library of Congress*, 1978, vol. 35, n. 4, p. 282 ff.

[42] EAC, *Statute*, article 17.

[43] EAC, *The Prosecutor v. Hissène Habré*, Appeals Chamber, Judgement, 27 April 2017, para. 7.

[44] EAC, *Statute*, article 25. The Appeals Chamber cited numerous international judgements of the ICTR, ICTY, ICC, and of internationalised criminal tribunals of the first generation such as the ECCC, in addition to the decisions of other regional courts (the ECHR, the IACHR).

definitely more oriented towards the domestic model, but the domestic system is completely extraneous to that of the country touched by the violence.

4. EAC's jurisdiction.

The EAC have jurisdiction over « le ou les principaux responsables des crimes et violations graves du droit international, de la coutume internationale, et des conventions internationales ratifiées par le Tchad, commis sur le territoire tchadien du 7 juin 1982 au 1er décembre 1990.»[45]

4.1. Personal, territorial, and temporal jurisdiction.

The EAC had the power to bring to trial «le ou les principaux responsables » of the crimes[46]. Even though the EAC had been originally established for the sole purpose of holding Hissène Habré responsible for his misconducts, as it had been attempted in Belgium and Senegal, the personal jurisdiction of the court delineated in the Statute resulted wider[47]. The formulation is quite unusual, introducing the disjunctive "or", while it could have simply used the plural, but it was probably functional to open the possibility of prosecuting other defendants in case circumstances required so, while the original intention was to try only Habré[48].

In fact, in July 2013, the General prosecutor filed five additional requests of indictment against as many officials from Habré's administration, suspected of being responsible for international crimes: two former directors of the DDS, Saleh Younous and Guihini Korei; the director of the DDS prison service Abakar Torno; Mahamat Djibrine, who served as a torturer, and a former special security adviser to the presidency, Zakaria Berdei. Chad refused to execute or even present such arrest warrants against these suspects and hence they were never charged[49].

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[45] EAC, *Agreement*, article 1; EAC, *Statute*, article 3 (the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990). The Agreement, instead, mentions the international conventions ratified by Chad *and Senegal* (emphasis added).

[46] EAC, *Agreement*, article 1; EAC, *Statute*, article 3.

[47] D. KABIRA, "The AU and International Criminal Justice: Genuine Commitment or Sleight of Hand?", in *Head of State Immunity under the Malabo Protocol*, Leiden, 2021, p. 356.

[48] R. SAVADOGO, "Les Chambres africaines extraordinaires: compétences, définition des crimes, modes de responsabilité et participation des victimes", in *International Criminal & Humanitarian Law Clinic*, 2013, p. 5.

[49] M. FALL, "Prosecuting International Crimes in Senegal", in S. WEILL, K. SELLINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*, Oxford, 2020, p. 107.

Some other considerations are worth saying: first, in principle, the formulation of the jurisdiction *ratione materiae* opened to legal persons (or, at least, did not exclude it), but the option was never contemplated in the intentions of the prosecution. Second, there is a minimum threshold of responsibility required for being indicted before the EAC, implied in the adjective "principal" – thus, minor officials of Habré's regime had never been a target of the tribunal. Third, instead, there are no age restrictions set: just like it was the case of the ECCC, such limit is absent because all negotiators had in mind who should be tried before the EAC, and the suspect was not a minor. The responsibility threshold, additionally, contributed to exclude that juvenile perpetrators, in their capacity of minor officials of the government, would be involved in the proceedings.

Having committed the crimes in the capacity of official and under the order of a superior did not exonerate a person from criminal liability, neither it mitigated the sentence[50]. Any amnesty granted to a person falling within the personal jurisdiction of the EAC, for the crimes under the tribunal's jurisdiction, did not represent a valid barrier to the prosecution: the EAC did not recognise any value to domestic amnesties[51]. However, Hissène Habré was never granted an amnesty by Chad, that, instead, sentenced him to death with a trial *in absentia*[52].

The territorial scope of the EAC corresponds to the territory of Chad[53]. This study theorised that the sliding scale for the "factor of hybridisation" concerning the jurisdiction *ratione loci* of a tribunal spans from an edge being the territory of the State concerned, to the opposite side, corresponding to the hybrid court having universal jurisdiction. The EAC do not settle anywhere in between: while limiting the jurisdiction to the territory of Chad, Senegal and the African Union simultaneously adopted a criterium based on the universal criminal jurisdiction and being restricted to the concerned State, since such a State is third to the parties establishing the tribunal. In respect to this "factor of hybridisation", the EAC fall outside the axis of hybridity.

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[50] EAC, *Statute*, article 10.

[51] EAC, *Statute*, article 20.

[52] On 15 August 2008, Habré was sentenced together with 11 chiefs of the armed rebellion in Chad, by a criminal court in N'Djamena, for undermining the constitutional order and the integrity and security of the territory. The sentence was never executed, and Hissène Habré died of Covid-19 on 24 August 2021, at the age of 79, in Senegal, while he was rather serving the sentence pronounced by the EAC. Amnesty International, AFR 49/006/2010, *Senegal: President Wade Must Keep Up His Word and the Judiciary Investigate Hissène Habré*, 14 December 2010; .

[53] EAC, *Agreement*, article 1; EAC, *Statute*, article 3.

The temporal jurisdiction of the EAC, instead, is delimited by an initial and a final day: from 7 June 1982 to 1 December 1990[54]. The two dates respectively correspond to the day Hissène Habré seized power and to that he was overthrown: the entire and only Habré's regime is covered. As a matter of fact, though, violence did not finish with Habré's exile: Human Right Watch observed that in the following years, the killing of civilians had been a widespread practice, and many suffered harm from the action of armed group targeting people on an ethnic basis[55]. It is thus clear that the delimitation of the temporal jurisdiction responded to political strategies: that of prosecuting only Habré's regime, ensuring cooperation by Chadian current government, which would instead have refrained from giving support to the tribunal should its representatives be exposed to the risk of being brought to trial[56].

4.2. Subject matter jurisdiction.

The Extraordinary African Chambers only prosecuted crimes under international law. There is no provision for the prosecution of domestic crimes: this is explained by the fact that there is no correspondence between the State exercising the jurisdiction and the State in whose territory the offences were committed[57]. Thus, no domestic crime falls within the court's jurisdiction, for the reasons previously explained and pertaining to the fact that the only national legislation that EAC could apply was the Senegalese penal code, but it could not be applied for crimes committed in Chad by Chadians. The jurisdiction *ratione materiae*, hence, is strongly international, and adopted a "factor of hybridisation" on the international edge of the theoretical axis.

The EAC founding documents list genocide, crimes against humanity, war crimes, and torture[58]. The definitory technique used by the drafters is different for each crime.

Article 5 of the Statute, in the only official language (French) defines genocide as

«l'un quelconque des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national ethnique, racial ou religieux, comme tel :

a) l'homicide volontaire de membres du groupe ;

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[54] EAC, *Agreement*, article 1; EAC, *Statute*, article 3.

[55] Human Rights Watch, *Ils sont venus pour nous tuer : Attaques de milices et agressions ethniques contre les civils dans l'Est du Tchad*, 2007; Human Rights Watch, *Trop jeunes pour la guerre : Les enfants soldats dans le conflit tchadien*, 2007.

[56] R. SAVADOGO, "Les Chambres africaines extraordinaires: compétences, définition des crimes, modes de responsabilité et participation des victimes", in *International Criminal & Humanitarian Law Clinic*, 2013, p. 4.

[57] F. MUSSO, "Le Camere africane straordinarie in seno alle corti senegalesi: un esempio di giurisdizione penale particolare?", in *Diritti Umani e Diritto Internazionale*, 2013, p. 556.

[58] EAC, *Statute*, articles 4-8.

b) l'atteinte grave à l'intégrité physique ou mentale de membres du groupe ;

c) la soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle

d) les mesures visant à entraver les naissances au sein du groupe ;

e) le transfert forcé d'enfants du groupe à un autre groupe. »

The formulation, thus, echoes that of the 1948 Genocide Convention, and replicated in the Statute of the International Criminal Court, with one difference regarding the underlying offences[59]. In fact, while the typical definition of genocide, in French, enounces the «meurtre de members du groupe» (murder), the EAC's Statute mentions «l'homicide volontaire de members du groupe» (voluntary killing). Scholars acknowledged that such terms are interchangeable[60], since the ICTR had declared that it would be incorrect to translate the term «meurtre» (murder) with «killing», since the English term is too generic and could also include non-intentional homicides[61]; thus, insofar that the EAC's statute talks about *voluntary killing*, the meaning does not differ from that of the Convention and the ICC's Statute. Yet, the choice of picking a different word remains unexplained and unjustified.

The definition of crimes against humanity[62], instead, is more limited than that of the Rome Statute, but is clearly inspired by that, although no direct reference is made to the ICC's provisions[63], but some divergences can be registered also to this regard.

First, while the EAC do require a contextual element that refers to a widespread or systematic attack directed against any civilian population, it differs from the ICC's

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[59] EAC, *Statute*, article 5. The definition provided by the 1948 Convention, article 2, states as follows: «l'un quelconque des actes ci-après, commis dans l'intention de détruire, ou tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel : *a) Meurtre de membres du groupe;* b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe; c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle; d) Mesures visant à entraver les naissances au sein du groupe; e) Transfert forcé d'enfants du groupe à un autre groupe». [Emphasis added] *See also* ICC, *Rome Statute*, article 6.

[60] R. SAVADOGO, "Les Chambres africaines extraordinaires: compétences, définition des crimes, modes de responsabilité et participation des victimes", in *International Criminal & Humanitarian Law Clinic*, 2013, p. 8; W. SCHABAS, "Senegal's Chambres africaines extraordinaires to judge Habré, in *PhD studies in Human Rights*", 5 February 2013, available at www.humanrightsdoctorate.blogspot.com [last accessed 11 February 2011].

[61] ICTR, *Prosecutor v. Akayesu*, Case N. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 500; C. EBOE-OSUJI, "Murder as a Crime against Humanity at the Ad Hoc Tribunals: Reconciling Differing Languages", in *The Canadian Yearbook of International Law*, 2005, vol. 43, p. 145 ff; R. SAVADOGO, "Les Chambres africaines extraordinaires au sein des tribunaux sénégalais. Quoi de si extraordinaire?" in *Etudes internationales*, 2014, vol. 45, p. 120.

[62] EAC, *Statute*, article 6; ICC, *Rome Statute*, article 7.

[63] H. MARCOS, "The Effectivity of Hybrid International Courts: A Study of the Extraordinary African Chambers in the Hissène Habré Case", in W. MENEZES, *Tribunals Internacionais e Implemetacao Procedimental de suas Decisoes*, Belo Horizonte, 2018, p. 222.

provisions also because the former does not require the awareness of such attack as an element of context.

Second, the crime of persecution is not expressly mentioned in the EAC's Statute, but Savadogo reconducts it to the last category of underlying offences, as stated in letter g) of article 6: «g) la torture ou les actes inhumains causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique et psychique inspirées par des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste»[64]. Such category yet is innovative and does not seem to have any precedent[65].

Third, the deprivation of physical liberty in violation of fundamental rules of international law, and the imprisonment, are not implicitly nor expressly envisaged[66]. Fourth, the EAC's article appear to be an exhaustive list because it does not include the final clause as contained in Article 7 of the Rome Statute « Other inhumane acts of a similar character» which allows the expansion of the category.

As Schabas noticed, the Statute of the EAC lists the punishable acts in «a rather original form» which is largely inspired by existing definition but presents innovation and peculiarities proper to the EAC[67].

War crimes are defined for the EAC through two different techniques: the first part of article 7 lists a series of acts constituting a war crime, while the second directly recalls grave violations of article 3 Common to the 1949 Geneva Conventions and the Second Addition Protocol of 1977. Violations contained in the Additional Protocol I, instead, are not contemplated. The definition is not inspired by that of the Rome Statute, as "other serious violations of the laws and customs applicable in armed conflict", that constitute a category of war crimes before the ICC, are not included[68]. Yet, the EAC Statute introduced two innovative underlying offences: the collective punishments and the threat of committing the underlying acts, making the menace itself an international crime.

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[64] R. SAVADOGO, "Les Chambres africaines extraordinaires au sein des tribunaux sénégalais. Quoi de si extraordinaire?" in *Etudes internationales*, 2014, vol. 45, p. 121.

[65] W. SCHABAS, "Senegal's Chambres africaines extraordinaires to judge Habré", in *PhD Studies in Human Rights*, 5 February 2013, available at www.humanrightsdoctorate.blogspost.com [last accessed 18 April 2022].

[66] R. SAVADOGO, "Les Chambres africaines extraordinaires: compétences, définition des crimes, modes de responsabilité et participation des victimes", in *International Criminal & Humanitarian Law Clinic*, 2013, p. 8-9.

[67] W. SCHABAS, "Senegal's Chambres africaines extraordinaires to judge Habré", in *PhD Studies in Human Rights*, 5 February 2013, available at www.humanrightsdoctorate.blogspost.com [last accessed 18 April 2022].

[68] ICC, *Rome Statute*, article 8.

Last, torture, which was included as an underlying offence of both crimes against humanity and war crimes, was also recognised as an autonomous misconduct. The definition offered by the EAC Statute is that provided by article 1 of the related Convention[69]. Further, it differs from the ICC's Statute insofar that it must be committed by a person in the capacity of official. The inclusion of torture as an autonomous crime is explained by the necessity to reconstruct the whole narration of the violence: the autonomous misconduct of torture allows to cover such acts that, lacking a context element that would make them a war crime or a crime against humanity, would otherwise remain unpunished[70].

The EAC, however, for the clear purpose to allow smooth and timely proceedings, were entitled with the possibility to focus only on the most serious crimes within their jurisdiction[71].

The subject matter jurisdiction, thus, made the Extraordinary African Chambers definitely more similar to an international criminal tribunal than to a domestic court.

5. Relationship with the national judiciary system.

The name of the EAC itself underlines that they are incardinated «Au sein des juridictions sénégalaises» (within the Senegalese jurisdictions), but, in appearance contradictorily, the Chambers are also pointed out as being «de caractère international»[72]. What is, then, the relationship between the Extraordinary African Chambers and the Senegalese judiciary system? A close observation of the EAC's features and powers allows to draw a hypothesis in this regard.

First, the EAC are structured in a way that each level of jurisdiction is attached to the corresponding chamber in the Senegalese domestic system: the Extraordinary African Investigating Chamber within the Dakar Special Regional Court; the Extraordinary African Indicting Chamber, the Extraordinary African Trial Chamber, and the Extraordinary African Appeals Chambers within the Dakar Court of Appeals[73]. The

[69] UN, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, article 1; EAC, *Statute*, article 8.

[70] R. SAVADOGO, "Les Chambres africaines extraordinaires: compétences, définition des crimes, modes de responsabilité et participation des victimes", in *International Criminal & Humanitarian Law Clinic*, 2013, p. 11.

[71] EAC, *Statute*, article 3.

[72] EAC, *Agreement*, article 1; EAC, *Statute*, article 2.

[73] EAC, *Statute*, article 2.

prosecutorial initiative before the EAC is only actionable by the prosecutor appointed thereby, who acts with the same powers and duties of a national prosecutor[74]. As its was illustrated above, all judges sitting at the bench, though, were appointed by the President of the AU Commission upon choice of the Senegalese Ministry of Justice.

The EAC can directly order Senegalese police to act, hence immediately impacting on an individual's legal sphere: there is no need for further local assistance for enforcing its decisions and execute orders[75]. Thus, the tribunal does not seems having its own judicial capacity and subjectivity, since the powers exercised and the orders given to the local forces straight descend from the judicial power of Senegal, and not from an entity extraneous to the system. Another element that suggests that is that the Registrar could assists the EAC to establish judicial cooperation mechanisms between Senegal and other States: at some extent, thus, the EAC act in the name of Senegal itself in committing to collaborate with other States for a better development of the judicial and investigative activities[76].

In addition, there was no problem of concurrent jurisdiction, with national courts, since the jurisprudence that led to the establishment of the EAC had already excluded that a Senegalese national court was competent for the case of Hissène Habré. Thus, the interaction with ordinary chambers in the national system remained limited. Nevertheless, national jurisdictions were indicated as being in charge for any issue related to the EAC's jurisdiction should it rise following the EAC's closure – it is a clear sign of continuity between the work of the EAC and the Senegalese system, which suggests their national character once more[77].

Thus, in this regard the Extraordinary African Chambers strongly pended towards the national model of tribunal and appeared as a national jurisdiction carrying functions that were diverse from the ordinary judicial activities.

6. Sources of funding, the seat, and the working languages.

Three remaining "factor of hybridisation" can provide further indication of whether the Extraordinary African Chambers can be regarded as a hybrid court or not: the way the

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[74] EAC, *Statute*, article 18, article 12.

[75] E. CIMIOTTA, "The first steps of the Extraordinary African Chambers: A new mixed criminal tribunal?", in *Journal of International Criminal Justice*, 2015, vol. 13, p. 190.

[76] EAC, *Statute*, article 15.

[77] F. MUSSO, "Le Camere africane straordinarie in seno alle corti senegalesi: un esempio di giurisdizione penale particolare?", in *Diritti Umani e Diritto Internazionale*, 2013, p. 559.

EAC were funded, the place where they had seat, and the language that they used in their work.

The Extraordinary Chambers were financed by the budget approved by a roundtable of donors, led and presided by the Minister of Justice of Senegal, and composed of representatives of the African Union and by the Minister for human rights of Chad, together with a number of foreign State, the EU, the UNHCHR, UNOPS[78]. The Statute allowed that additional financing resources could be searched for in case of need. The framework and the management of the economic sources are decided by the AU, the Senegalese government, and the donors[79]. The budget, summing the donations and the funding provided by Senegal, amounted to a total of almost nine million Euros for the whole duration of the trial and appeal[80]: the whole operation was rather cost-effective in comparison with the international tribunals[81]. Although Senegal was the main responsible for the budget of the EAC, it was alimented by voluntary contributions from the international community (both States and international organisations) – under such an aspect, then, the EAC depart from the purely internal model.

The language and the choice of the seat, on the contrary, reconnect them to a domestic model. The only working language of the court was French because it is the official language of Senegal, and it is used by the administration[82]. The seat of the Chambers was Dakar, the capital of Senegal, and there was not any branch office in Chad, the concerned State. The EAC, actually, did not even deploy permanent personnel in Chad, but they limited to organise some temporary fieldtrips, for the conduct of investigations and outreach activities. Given the crucial importance of these two factors of hybridisation for the non-prosecutorial goals of a hybrid court, it is, then, reasonable to believe that side-objectives of capacity-building, ownership, transitional justice were not of concern of the Extraordinary African Chambers.

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[78] EAC, *Agreement*, article 3 «par le budget approuvé par la Table ronde du 24 novembre 2010»; *Table ronde des donateurs pour le financement du procès de Monsieur Hissène Habré, Dakar*, 24 November 2010, paras 3-5. A trust fund was also established for the better management of the budget, that after the initial donations, amounted to almost 8.600.000€.

[79] EAC, *Agreement*, article 4.

[80] D. KABIRA, "The AU and International Criminal Justice: Genuine Commitment or Sleight of Hand?", in *Head of State Immunity under the Malabo Protocol*, Leiden, 2021, p. 356.

[81] B. KIOKO, "Creatin the EAC in Senegal", in in S. WEILL, K. SELLINGER, K. CARLSON, *The President on Trial: Prosecuting Hissène Habré*,, Oxford, 2020, p. 75.

[82] EAC, *Statute*, article 30.

7. Conclusion and critical remarks.

The trial of Hissène Habré was the first proceeding conducted in Africa upon universal jurisdiction. For the first time, in addition, a former rule was prosecuted in the courts of another country for international crimes[83]. EAC operated between 8 February 2013 and 27 April 2017: their *ad hoc* and temporary nature was clearly foreseen in the Statute: «Les Chambres africaines extraordinaires sont dissoutes de plein droit une fois que les décisions auront été définitivement rendues»[84]. Although at first sight it seems that the EAC can be easily introduced into the multi-axial spectrum of hybridity, in reality, as it emerged from the above analysis conducted on the different possible factors characterizing the court, they do not.

A neat difference from the entire first generation of mixed tribunals resides in the finalities that the EAC pursued: having Senegal, and not Chad, hosting and managing the proceedings, it did not aim to those goals of capacity building, or peace-building and transitional justice that turned out to be beneficial in Cambodia, Sierra Leone, Timor-Leste, and Kosovo[85]. Senegal participated in the prosecution of crimes committed by Habré's regime for purely prosecutorial objectives, deriving from the indications of the ICJ and the ECOWAS Court of Justice. This was further demonstrated by the fact that no provision of residual functions or a legacy was foreseen – they simply concluded their mandate after the trial of Hissène Habré[86].

The limited international features of the EAC did not allow to achieve much beyond the trial of Habré, neither with respect to Chad nor to Senegal[87]. It is true that an agreement for cooperating with Chad was signed in the very few months of the court's work[88], but Deby, Chad's president after Habré, and former Habré's ally, used the trial to

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[83] K. CARLSON, "Trying Hissène Habré 'On Behalf of Africa': Remaking Hybrid International Criminal Justice at the *Chambres Africaines Extraordinaires*", in J. NICHOLSON, *Strengthening the Validity of International Criminal Tribunals*, Leiden, 2018, p. 342; "Chambres Africaines Extraordinaires/Extraordinary African Chambers", in *Hybrid Justice*, available at www.hybridjustice.com [last accessed 18 April 2022].

[84] EAC, *Statute*, article 37.

[85] F. MUSSO, "Le Camere africane straordinarie in seno alle corti senegalesi: un esempio di giurisdizione penale particolare?", in *Diritti Umani e Diritto Internazionale*, 2013, p. 557.

[86] Y. DIALLO, "L'Interaction normative entre le Chambres Africaines Extraordinaires (CAE) et le Système Juridique National Sénégalais", in *African. Journal of International Criminal Justice*, 2018, vol. 3, issues 1-2, p. 42-43.

[87] S. WILLIAMS, "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?", in *Journal of International Criminal Justice*, 2013, vol. 11, issue 5, p. 1147.

[88] H. MARCOS, "The Effectivity of Hybrid International Courts: A Study of the Extraordinary African Chambers in the Hissène Habré Case", in W. MENEZES, *Tribunals Internacionais e Implemetacao Procedimental de suas Decisoes*, Belo Horizonte, 2018, p. 219.

remark that his government was a pro-democratic force, but repression continued under his regime, and officials of Habré's administration retained their positions[89].

The EAC, in the end, simply represented the first African national court operating under the principle of universal jurisdiction and prosecuting the former ruler of another State for the violation of human rights[90].

Thus, contrarily to what many scholars observe[91], we cannot recognise the Extraordinary African Chambers in the definition of "hybrid court": the EAC, in conclusion, were not the first tribunals of the second generation of internationalised criminal tribunals.

III. The Kosovo Specialist Chambers and Specialist Prosecutor's Office.

The Kosovo Specialist Chambers ("KSC") and Specialist Prosecutor's Office ("SPO") are another jurisdiction that has been pointed out as a "new hybrid court".

The background situation concerns the non-international armed conflict between the Kosovo Liberation Army ("KLA") and the Serbian government and the international armed conflict between the NATO member states and Serbia. After the ICTY and the Regulation 64/2000 panels, they represent the third jurisdiction dealing with the events occurred during the war in Kosovo from 1998 and 2000[92].

The initiative to investigate once more over such context is rooted in the publication of memories by former ICTY Prosecutor Carla Del Ponte, in which she alleged that during the mentioned conflict people were subjected to enforced disappearance followed by organ-harvesting for criminal gain, by Kosovo Albanians and with the knowledge and

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[89] K. CARLSON "Trying Hissène Habré 'On Behalf of Africa': Remaking Hybrid International Criminal Justice at the *Chambres Africaines Extraordinaires*", in J. NICHOLSON, *Strengthening the Validity of International Criminal Tribunals*, Leiden, 2018, p. 354.

[90] H. MARCOS, "The Effectivity of Hybrid International Courts: A Study of the Extraordinary African Chambers in the Hissène Habré Case", in W. MENEZES, *Tribunals Internacionais e Implemetacao Procedimental de suas Decisoes*, Belo Horizonte, 2018, p. 211

[91] H. MARCOS, "The Effectivity of Hybrid International Courts: A Study of the Extraordinary African Chambers in the Hissène Habré Case", in W. MENEZES, *Tribunals Internacionais e Implemetacao Procedimental de suas Decisoes*, Belo Horizonte, 2018, p. 207 ff. S. WILLIAMS, "The Specialist Chambers of Kosovo. The limits of internationalization?", in *Journal of International Criminal Justice*, 2016, vol. 14, p. 30-32 recognises four different internationalised mechanisms for the prosecution of crimes on the territory of Kosovo: the Kosovo War and Ethnic Crimes Chamber; UNMIK Regulation panels; EULEX panels; and the KSC/SPO.

[92] M. CROSS, "Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes: Remarks on Independence and Cooperation", in *Journal of International Criminal Justice*, 2016, vol. 14, issue 1, p. 74.

involvement of officials from the Kosovo Liberation Army (that had *de facto* took control of the country after the war)[93].

As a consequence, some member states of the Council of Europe ("CoE") proposed a motion to the CoE Committee on Legal Affairs and Human Rights of the Council of Europe to start an inquiry about those circumstances[94].

Mr. Dick Marty, at the time Special Rapporteur of the Committee resolved to act accordingly and on 12 December 2010 the Committee issued a report on inhuman treatment of people and illicit trafficking in human organs in Kosovo ("Marty Report")[95]. Shortly after, on 7 January 2011, Mr. Dick Marty presented a memorandum to the Parliamentary Assembly of the CoE, presenting his findings on the matter[96]. Marty had found that during summer 1999, when Serbian troops had abandoned Kosovo and NATO's forces were slowing taking control of the country, the KLA had effective, although not well-structured, control on a substantial portion of territory between Kosovo and North Albania. In such context, KLA officials committed horrendous crimes against both Serbs and Kosovar Albanians suspected to be traitors[97]. Acting with the modalities of organised crime, the KLA controlled a number of detention facilities for unlawful activities such as "interrogating" captives, punishing them by beating and gratuitous mistreatment, enforced disappearances, sourcing human organs for illicit transplant[98].

The Parliamentary Assembly recommended that Kosovo investigate and adjudicate the allegations of serious crimes committed during the conflict in Kosovo, and the European Union to further implement EULEX. As a consequence, in the context of the European Union Rule of Law Mission in Kosovo ("EULEX"), a Special Investigative Task Force ("SITF") was instructed with the investigations over such crimes alleged in the Marty Report in 2011. On the basis of the work carried by the SITF, the government of Kosovo and the European Union began to cooperate for addressing the matter.

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[93] C. DEL PONTE, C. SUDETIC, *La caccia: Io e i criminali di guerra*, Milano 2008.

[94] Council of Europe, Parliamentary Assembly, Doc. 11574, *Inhumane treatment of people and illicit trafficking in human organs in Kosovo*, 15 April 2008.

[95] Council of Europe, Parliamentary Assembly, Doc. AS/Jur (2010) 46, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, 12 December 2010.

[96] Council of Europe, Parliamentary Assembly, Doc. 12462, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, 7 January 2011 ("CoE Report"); Council of Europe, Parliamentary Assembly, Resolution 1782 (2011), *Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo*, 25 January 2011.

[97] Council of Europe, Parliamentary Assembly*, CoE Report*, Explanatory memorandum by Mr Marty, rapporteur, paras 3-4.

[98] Council of Europe, Parliamentary Assembly*, CoE Report*, Explanatory memorandum by Mr Marty, rapporteur, paras 29 ff.

As an outcome of such entire procedure, the Kosovo Specialist Chambers were finally established, for the purpose of shedding light over the events, and to promote accountability through the course of justice, while guaranteeing the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo and to ensure secure, independent, impartial, fair, and efficient criminal proceedings[99].

1. Legal basis.

Kosovo and the European Union exchanged letters to reach an agreement over the establishment of the KSC and SPO.

On 14 April 2014, the President of the Republic of Kosovo addressed a letter to the EU High Representative for Foreign Affairs and Security Policy demanding to end the EULEX mandate and inviting the EU to assist Kosovo in the establishment of a jurisdiction within the Kosovo national judicial system to investigate, prosecute, and adjudicate allegations originating from SITF's work.

The Law on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo of 23 April 2014 ratified the international agreement achieved through the exchange of instruments between the Republic of Kosovo and the European Union on EULEX[100].

On 3 August 2015, Kosovo amended its Constitution by adding article 162 that stated that, to comply with its international obligations in relations to the Marty Report, Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo[101]. The Kosovo Specialist Chambers and Specialist Prosecutor's Office, thus, were established by a national law[102], adopted on the same day, and empowered with the special force of prevailing over any other conflicting law or

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[99] KSC Law, article 1.

[100] Republic of Kosovo, Law N. 04/L-274, *On Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo*, 2 April 2014, hereinafter also referred to as "Law on ratification of the international agreement".

[101] Republic of Kosovo, Law N.. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015. The Constitutional Court acknowledged that the Constitutional Amendment No. 24, introducing article 162, does not undermine any of the fundamental rights and freedoms protected by the Kosovo Constitution: Constitutional Court of the Republic of Kosovo, Case No. K026/15, judgement, 15 April 2015.

[102] Republic of Kosovo, Law N. 05/L-053, *On Specialist Chambers and Specialist Prosecutor's Office*, 3 August 2015, hereinafter also referred to as "KSC Law". S. WILLIAMS, " The Specialist Chambers of Kosovo. The limits of internationalization?", in *Journal of International Criminal Justice*, 2016, vol. 14, p. 27.

regulation in Kosovo[103]. The KSC, hence, rely on a legal basis that is strongly nationalised, placing, under such factor of hybridisation, the jurisdiction on the domestic edge of the imaginary spectrum of hybridity.

Yet, similarly to the case of the ECCC, a source of international law – the agreement between Kosovo and the European Union, reached through the exchange of letters – backs the adoption of the domestic legislation (both at the constitutional and ordinary level) necessary for the proper establishment of the jurisdiction. The initial mandate was 5 years, but in the absence of notification of completion, it continues until such a notification is made, in consultation with the government[104].

2. The strongly national-alike structure and the international composition of the staff: opposites attract.

The KSC is structured according to the levels of the court system in Kosovo – a Basic Court Chamber, a Court of Appeals Chamber, a Supreme Court Chamber, and a Constitutional Court Chamber, led by a president and a vice-president[105]: the structure makes the court highly adherent to the national model.

The composition of the chambers depends on the functions that each of them is required to exercise and vary from a monocratic work to a bench of three judges. For each case, there is one Pre-Trial Judge who examines the supporting material in relation to the charges and determines whether they lead to a well-grounded suspicion against the suspect, by confirming or dismissing the charges in whole or in part and ensures that the proceedings develop timely [106]. The Specialist Chamber of the Constitutional Court is composed of three magistrates and deals exclusively on referrals relating to the KSC and SPO[107].

A Registry supports the work of the Chambers, by administering all auxiliary functions, including detention facilities – it is composed of offices for the defence, victims' participation, witness protection, detention management and an innovative Ombudsperson[108]. The KSC are the first court considered in this study to encompass the

[103] KSC Law, article 3.

[104] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para. 13-14.

[105] KSC Law, article 2, article 24, article 32; KSC, *Rules of Procedure and Evidence*, rule 13

[106] KSC, *Rules of Procedure and Evidence*, rule 86, rule 95.

[107] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 3; KSC Law, article 2.

[108] KSC Law, article 3, article 24, article 34 ; KSC, *Rules of Procedure and Evidence*, rules 23- 29.

figure of the ombudsperson, that has the duty to receive complaints from persons interacting with the KSC and SPO and alleging their human rights to be violated; enter and inspect detention facilities, make referrals to the Specialist Chamber of the Constitutional Court with respect to questions of the compatibility of law with the Constitution of Kosovo; participate as *amicus curiae* to the cased before the KSC, upon invitation. A number of interns, experts, and counsels assist the organs of the courts[109]. The SPO is an independent office, with its seat in the Netherlands[110].

Both the KSC and the SPO are entirely staffed with personnel, having a citizenship different from that of Kosovo[111].

Such choice was dictated by the perceived need to offer the highest degree of impartiality and safety to witnesses, and to subtract the court from any chance of political interference and corruption[112]. Though, it may have contributed to a widespread scepticism towards the genuineness of the court's work, conducting to a lack of legitimacy and grassroot support[113]. Furthermore, this feature makes the jurisdiction decidedly international-alike and excludes, in principle, the possibility to enjoy the potential of capacity-building deriving from a direct cooperation of Kosovar and non-Kosovar experts. Yet, the circumstance that the structure of the KSC mirrors that of the national judiciary system may path the way to a form of expertise-penetration between Specialist Chambers and ordinary chambers placed at the same level within the judiciary.

Judges are selected following a procedure that start with a panel of three experts (two being judges with an international background) producing a list of international magistrates to forward to the head of EULEX, who appoints those candidates as judges for the KSC and place them in a Roster of in International Judges, from which the President of the KSC draws for assigning personnel to each Chamber[114]. In other words, the power to select (only foreign) judges for the KSC, a jurisdiction established by

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[109] *Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands*, 26 January 2016, articles 20-22; *Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial institution in the Netherlands*, 15 February 2016, articles 22-24.

[110] KSC Law, article 24, article 35.

[111] KSC Law, articles 25-26.

[112] E. MAHR, "Local contestation against the European Union Rule of Law Mission in Kosovo", in *Contemporary Security Policy*, 2018, vol. 39, issue 1, p. 72 ff.; R. MUHARREMI, "The Kosovo Specialist Chambers from a Political Realism Perspective", in *International Journal of Transitional Justice*, 2019, p. 1 ff.

[113] A. HEHIR, "Lessons learned? The Kosovo Specialist Chambers' Lack of local Legitimacy and its Implications", in *Human Rights Review*, 2019, vol. 20, issue 3, p. 270.

[114] KSC Law, article 26, article 28.

domestic legislation and fully mirroring the Kosovar judicial system as for its structure and thus propending towards the national-edge of the spectrum of hybridity, is assigned to a fully foreign entity, EULEX: the appointment of judges, *per se*, turns out to be a hybrid mechanism[115].

Consequently, it is not the case to question which model of coexistence between national and international personnel the KSC adopted. All international judges share the responsibility for the decisions of the panel to which they belong: they envisage to obtain the unanimity, but whereas it is no possible, a reasoned decision or judgement is adopted by a majority[116].

3. Applicable law and the reference to the jurisprudence of "other criminal courts".

The KSC adjudicate accordingly with the Constitution of Kosovo, the KSC Law as a *lex specialis*, customary international law, international human rights law, as given superiority over domestic laws by the Constitution itself[117]. The KSC has primacy over all other national law or regulation.

Sources of international law, as well as the jurisprudence from the ICTY, ICTR, ICC, and other hybrid courts can assist the KSC in determining the customary international law at the times crimes were committed. The text does not explicitly mention other mixed tribunals, but it states "other criminal courts" within the group of "subsidiary sources" of international law: thus, it does not refer to purely national criminal courts, that are, instead, explicitly recalled. Hence, the KSC are the first jurisdiction that seeks guidance in the decisions of other hybrid tribunals.

As for the substantial law, the Kosovo Specialist Chambers apply a wide range of sources of law, that are listed in hierarchical order within the KSC Law. First, the Constitution of the Republic of Kosovo; second, customary international law and international human rights instruments setting criminal justice standards; third, the KSC Law itself; fourth and last, the substantive criminal law of Kosovo as long as it complies with customary international law, as applicable at the times the crimes were committed[118]. In addition, the KSC Law recalls that, in accordance with UNMIK Regulation 1999/24,

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[115] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 486.

[116] KSC, *Rules of Procedure and Evidence*, rule 78.

[117] KSC Law, article 3.

[118] KSC Law, article 12.

the substantive criminal laws in force under Kosovo law during the temporal jurisdiction of the Specialist Chambers were the Criminal Code of the Socialist FRY (1976), the Criminal Law of the Socialist autonomous Province of Kosovo (1977), and any more lenient substantive criminal law in force between 1989 and July 1999/27 October 2000.

Such material law should be considered in light of article 7(12) of the European Convention on Human Rights and article 15(2) of the International Covenant on Civil and Political Rights[119]. The inclusion of such provisions appears to allow the KSC to apply any source of law that may seem to it as falling under the scope of such articles, even though they did not exist as such in the FRY at the time of the commission of the crimes, as long as they were generally recognised by the international community[120].

Thus, the substantive law applicable by the KSC sets in line with the practice of the hybrid courts from the first generation, including a mixture of existent domestic legislation and international law. It allows to cover both *crimina juris gentium* as well as transnational crimes, and misconducts connected to organised crime.

The KSC, instead, procedure-wise, determined their own rules of procedure and evidence, in accordance with international human rights standards, and guided by the Kosovo Code of Criminal Procedure; and the KSC Law too contains procedure-related provisions[121].

Initially, the Special Chamber of the Constitutional Court reviewed the rules for ensuring compliance with the Constitution[122], then all KSC judges, expect those of the Constitutional Court, adopted them[123].

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[119] Council of Europe, *European Convention on Human Rights*, 1950, article 7(2): «This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations»; UN Doc. GA/Res/2200A(XXI), *International Covenant on Civil and Political Rights*, 16 December 1966, article 15(2): « Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.»

[120] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 491.

[121] KSC Law, Chapter VI; A. HEINZE, "The Kosovo Specialist Chambers' Rules of Procedure and Evidence. A Diamon Made under Pressure?", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 985-1009.

[122] Republic of Kosovo, Law N. 05/D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 6.

[123] KSC Law, article 19; KSC, KSC-BD-03/Rev1/2017, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers*, 17 March 2017, revised on 29 May 2017, entered into force on 5 July 2017. The original version was superseded by an updated version on 5 May and, eventually, on 2 June 2020. Hereby we make reference to the newest version of the text: KSC, KSC-BD-03/Rev3/2020, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers*, 29-30 April 2020, hereinafter also referred to as "KSC Rules of Procedure and Evidence".

The procedural law applicable by the KSC, then, is at some extent autonomous from the rules existing for the Kosovo national judiciary system, but, on the other side, they result influenced by domestic procedure. Not only the Special Chamber of the Constitutional Court verified the compliance with the Kosovar Constitution, but, as a general practice, the appositely designed KSC Rules of Procedure and Evidence must be interpreted according with article 3 of the KSC Law, and the Kosovo Criminal Procedure Code[124]. The Specialist Constitutional Court Chamber has its own set of procedural rules[125].

In conclusion, both the substantive and procedural applicable law at the KSC is the result of a contamination of national and international, setting in between the two edges, and thus, in this regard, the court can be considered as "hybrid".

4. Jurisdiction.

The KSC and SPO were established in 2015 to investigate and prosecute crimes committed by the KLA, or against Kosovo nationals, between 1 January 1998 and 31 December 2000, during and after the Kosovo War[126]. The KSC try those individuals who, acting as members of the Kosovo Liberation Army, allegedly committed atrocities against Serbs, Roma, and Kosovo Albanians.

4.1. Personal, territorial, and temporal jurisdiction.

The jurisdiction of the KSC is directed at natural persons, with few limitations. It is restricted to individuals of Kosovo/FRY citizenship or persons who committed crimes against persons of Kosovo/FRY citizenship wherever those crimes were committed, since is consistent with the national laws as in force between 1 January 1998 and 31 December 2000[127]. On the other side, there is not a minimum threshold to be encountered in order to select "big fishes" for the prosecution: a person appearing before the KSC may have been placed at any level of a criminal organisation and acted with different gravity. Neither there are limitations connected to a minimum age or the affiliation to, for example, the KLA.

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[124] KSC, *Rules of Procedure and Evidence*, rule 4.

[125] KSC, *Rules of Procedure and Evidence*, Part II, Rules of Procedure for the Specialist Chamber of the Constitutional Court.

[126] Republic of Kosovo, Law N. 05/L-053, *On Specialist Chambers and Specialist Prosecutor's Office*, 3 August 2015.

[127] KSC Law, article 9.

In line with the tradition of international criminal law, the position of official does not relieve a person from his responsibility, nor mitigate the punishment and having acted in compliance with an order of a superior does not lift the responsibility. Even amnesties are not recognised as a bar to prosecution[128].

The strong connection with the concept of FRY/Kosovo citizenship makes the KSC decidedly nation-oriented on such regard.

The KSC have jurisdiction over those crimes that were either commenced or committed in Kosovo: this is consistent with the territorial jurisdiction of Kosovo national courts as in force between 1 January 1998 and 31 December 2000[129]. The territorial jurisdiction, thus, although can expand beyond the national territory if a crime was commenced there, is significantly connected to the national land, setting, the KSC close to the national model[130].

A further confirm of such very nationalised jurisdiction, last, come from the fact that the KSC can address crimes occurred between 1 January 1998 and 31 December 2000[131]. Marty's Report alleged that crimes of interest of the KSC were committed even after the conclusion of the conflict in June 1999; yet, the jurisdiction is granted a wide temporal scope of intervention, much longer than the actual duration of the hostilities. Thus, the KSC cannot be considered a simple war crimes tribunal, since they can address facts occurred after the end of the warfare[132]: it rather appears to have a special mandate of dealing with such events in place of other national courts, making it very much linked to the ordinary administration of justice within Kosovo. Having jurisdiction on an extended timeframe may provoke an interesting side-effect, partially counterbalancing the choice of not placing national and international judges together at work in the Chambers: that of a further opportunity for capacity-building. In fact, ordinary courts of Kosovo justice system may draw inspiration and example by the international experts of the KSC for the conduct of proceedings concerning not only crimes committed in the extraordinary times of a conflict, but also the daily misconducts that can still be perpetrated in peacetime.

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[128] KSC Law, article 18.

[129] KSC Law, article 8.

[130] M. CROSS, "Equipping the Specialist Chambers of Kosovo to try Transnational Crimes: Remarks on Independence and Cooperation", in *Journal of International Criminal Justice*, 2016, vol. 14, p. 86-88.

[131] KSC Law, article 7.

[132] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 489-490.

4.2. Subject matter jurisdiction.

The KSC have a mixed jurisdiction over a catalogue of crimes related to the CoE Assembly Report, including both international and national misconducts[133].

International crimes are distinguished into two categories – crimes against humanity and war crimes. To the purpose of the KSC, crimes against humanity are defined by the KSC Law as any of a series of acts (murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds; enforced disappearance of persons; and other inhumane acts) when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[134].

The list is non-expressly recalling the definition of crimes against humanity provided by the Rome Statute, but it is clearly inspired by that, with minor changes (namely, the absence of the crime of apartheid, the exclusion of persecution on cultural or gender basis).

War crimes, seemingly, are identified according to the four sub-categories elaborated by the article 8 of the statute of the ICC: greave breaches of the Geneva Conventions of 1949; other serious violations of the laws and customs applicable in international armed conflict, recognised as such in customary international law; in the case of non-international armed conflict, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949; and other serious violations of the laws and customs applicable in armed conflicts not of an international character, recognised as such in customary international law. Those two last categories, just like before the ICC, do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, but need to meet the minimum threshold to consider a situation as a conflict that take place in the territory of a state when there is protracted armed conflict between the organs of authority and organised armed groups or between such groups[135]. In the KSC statute, though, larger credit is given to the affirmed customary law, while the ICC gives room to the "established framework of international law".

[133] KSC Law, article 6.
[134] KSC Law, article 13.
[135] KSC Law, article 14.

In addition to that, and in order to comply with the findings of the Marty's Report, the KSC have jurisdiction also on a number of national crimes, listed as a selection of offences under the Kosovo Criminal Code of 2012, with the limit that such crimes related to its official proceedings and officials: failure to report preparation or commission of criminal offenses or perpetrators, providing assistance to perpetrators after the commission of criminal offenses, false report or charge, false statements (under oath and of Cooperative Witnesses), obstruction of evidence or official proceedings, intimidation during criminal proceedings, retaliation, tampering with evidence, falsifying documents, violating secrecy of proceedings, contempt of court, failure to execute court decisions, legalization of false content, uprising and (facilitate the) escape of the persons deprived of liberty, unlawful release of persons deprived of liberty, obstructing official persons in performing official documents, attacking official persons performing official duties, call to resistance, taking or destroying official stamps or official documents, impersonating an official, unlawful provision of legal assistance, damaging graves or corpses, misusing official information, conflict of interest[136]. Henceforth, for what concerns national crimes, there is a direct reference to the Kosovar criminal code.

In conclusion, both in terms of crimes prosecuted before the KSC, both of the definitory technique for describing them, the jurisdiction of the Kosovo Specialist Chambers is mixed and places the jurisdiction quite in the middle of the imaginary sliding scale of hybridity.

5. The formally tight relationship with the national judiciary system and the potential concurrence with other international criminal courts.

The KSC are attached to each articulation of the national system of Kosovo, which encompasses four levels: the Basic Court of Pristina, the Court of Appeals, the Supreme Court, and the Constitutional Court[137]. On 3 August 2015, Kosovo amended its Constitution by adding article 162 that stated that to comply with its international obligations in relations to the Marty Report, Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office *within* the justice system of Kosovo but entitled with

[136] Republic of Kosovo, Law N. 04/L-082, *Kosovo Criminal Code*, 2012, articles 384-386, article 388, articles 390-407, articles 409-411, article 415, article 417, article 419, article 421, articles 423-424; KSC Law, article 16; R. MUHARREMI, "The Kosovo Specialist Chambers from a Political Realism Perspective", in *Heidelberg Journal of International Law*, 2016, vol. 76, p. 985.

[137] KSC Law, article 3.

full legal and juridical personality[138]. It is the same article 162 that identifies the KSC as a "specialized court" as opposite to an "extraordinary court", by explaining that the former «means a court within a specifically defined scope of jurisdiction, and which remains within the existing framework of the judicial system of the Republic of Kosovo and operate in accordance with its principles», while the latter is a jurisdiction «placed outside the structure of the existing court system» operating without reference to the existing systems[139].

The KSC have primacy over national courts of Kosovo in case of concurrent jurisdiction: a case can be deferred at any stage of the proceedings to the KSC[140]. An entire section of the KSC Law is dedicated to the interaction between the KSC and Kosovo courts and entities[141]. Alle entities and persons in Kosovo must co-operate with the KSC and the SPO and comply with any request for assistance or any decision or order issue by them, since an order/warrant of arrest by the Specialist Chamber has the same force and effect as if it was issued by any *other Kosovo court or judge* – thus, The Law expressly equates the KSC/SPO to all other Kosovo courts. In the case of a warrant of arrest, the national police must comply with it and transfer the arrested person into the custody of the KSC, which eventually assigned him/her to the Kosovar detention facilities or to the Specialist Chambers Detention Facilities[142]. Hence, they do not need the intermediation of the ordinary national system to enforce their decision within the territory. The KSC and the SPO have the authority to order the transfer of proceeding within its jurisdiction from any other prosecutor or any other court in the territory of Kosovo to them.

Nevertheless, a series of indicia set the KSC/SPO outside the purely national model. The KSC are expressly recognised full legal capacity, including that of concluding international agreements[143]. Even though the KSC can enter into an international treaty with a third state, they must still seek the agreement of the Government[144]. This is not necessarily contradictory against the provision that the court is attached to the national

[138] KSC Law, article 1.

[139] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162.

[140] KSC, *Rules of Procedure and Evidence*, rule 203; KSC Law, article 10, article 54.

[141] KSC Law, Chapter VII.

[142] KSC Law, article 53; KSC, *Rules of Procedure and Evidence*, rules 52-55.

[143] KSC Law, article 4.

[144] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 5; KSC Law, article 4.

system: it acts at the international level as a branch of the government of Kosovo[145]. In addition, the Chambers can benefit of any mutual legal assistance agreements of which Kosovo is a party[146]. Such circumstance, which implies that the KSC/SPO cannot in principle order assistance and cooperation to third states, further underlines that the KSC are not embedded in the international legal order, but rather in the Kosovo national system[147].

The KSC/SPO can develop arrangements with other states, international organizations, and other entities for ensuring cooperation and assistance in the conduct of the investigations and prosecutions: they have all the necessary powers and mandate for their operation, judicial co-operation, assistance, witness protection, security, detention, and the service of sentence outside the territory of Kosovo for anyone convicted, as well as in relation to the management of any residual matters after finalization of the mandate[148]. The President of the Specialist Chambers, the Registrar and Specialist Prosecutor represent their respective organs in the exercise of their functions. As we mentioned before, the KSC can also adopt their own rules of procedure and evidence, different from those provided by the Kosovo criminal procedure law[149]. Orders and decision of other Kosovo courts are not binding on the KSC/SPO[150].

The SPO can exercise its powers and functions in Kosovo, in The Netherlands, and in any other state which agrees to that[151]. It can seek the assistance of Third States and international organisations or other entities[152].

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[145] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 484.

[146] KSC Law, article 55; KSC, *Rules of Procedure and Evidence*, rule 198, rules 208-210.

[147] E. CIMIOTTA, "The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The 'Regionalization' of International Criminal Justice in Context", in *Journal of International Criminal Justice*, 2016, vol. 14, issue 1, p. 64; F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 484-485.

[148] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 4; *Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands*, 26 January 2016, article 3; *Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial institution in the Netherlands*, 15 February 2016, article 6; KSC Law, article 4.

[149] KSC Law, article 19.

[150] KSC, *Rules of Procedure and Evidence*, rule 207.

[151] KSC Law, article 35.

[152] KSC, *Rules of Procedure and Evidence*, rule 30.

In conclusion, regardless the declaration that the KSC are entrenched *within* the national system, such jurisdiction rather appears as parallel to Kosovo's judicial system, and its decisions are not reviewable by ordinary national courts, but only by the diverse levels of its own structure[153]. Thus, such attachment to the national regular courts can be regarded as to be only formal, because, in practice, the KSC and the national courts are completely separate and do not interact in any way[154].

Instead, for what concerns the international level, a peculiarity distinguishes the KSC from the first generation of hybrid courts: the lack of direct involvement of the United Nations, in favour of the EU, as part of its European Union Rule of Law Mission in Kosovo (EULEX).

Further, some authors observe that the KSC's jurisdiction may not exclude concurrent jurisdiction with other international criminal tribunals[155]. Such a clause, at the moment, appears to us to be unnecessary. In principle, the International Criminal Court cannot be seized of the same matter as the KSC, since the temporal scope of the latter is limited to a framework between 1998 and 2000, while the ICC has jurisdiction on events occurred after 2 July 2002. In addition, it does not seem likely that another (*ad hoc*) international criminal tribunals may be establish for dealing with the same matter, thus, it does not appear to us as urgent to shape the regime of complementarity of the KSC with a potential international criminal jurisdiction.

6. Sources of funding, the seat, and the working languages.

Funding is regulated by an international agreement allowing proper financing of the KSC's work, with no financial implications for Kosovo[156]. Kosovo, indeed, does not contribute to the KSC in any way. The major supporters of the KSC are the EU (The EU accorded financial support to the jurisdiction with a contribution of €300 million[157]).

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[153] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 485.

[154] R. MUHARREMI, "The concept of hybrid courts revisited: The case of the Kosovo Specialist Chambers", in *International Criminal Law Review*, 2018, vol. 18, p. 641.

[155] F. KORENICA, A. ZHUBI, D. DOLI, "The EU-engineered hybrid and international specialist court in Kosovo: how 'special' is it?", in *European Constitutional Law Review*, 2016, vol. 12, issue 3, p. 488-489.

[156] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 12.

[157] "Kosovo's New War Court: Major Challenges Ahead", in *Balkan Transitional Justice*, 5 October 2016, available at www.baljkaninsight.com [last accessed 18 April 2022].

On the other hand, the KSC are not subjected to audit by the Auditor of Kosovo, and they are not required to comply with Kosovo legislation on public finance, setting outside of Kosovo's public economic management and accountability system[158].

This is a very international-oriented factor of hybridisation, which pushes the jurisdiction away from the model of a national criminal jurisdiction entrenched within its domestic system.

The KSC Law affirms that both the Specialist Prosecutor's Office and «The Specialist Chambers shall have seat in Kosovo» and that also «shall have a seat in the Host State outside Kosovo but may sit elsewhere on an exceptional basis if necessary in the interests of proper administration of justice», or to fulfil the SPO's mandate effectively[159]. They may perform their functions at either sit or elsewhere, as required[160].

The KSC and SPO were relocated to the Netherlands and their functioning in the host state is regulated by an agreement, for ensuring the stability and independence of the court and facilitate its smooth and efficient functioning[161]. The SPO, instead, has its sole seat in The Netherlands[162]. The choice of moving the court's functions to another seat may be dictated by the necessity to preserve law and order in Kosovo, with the aim to promote the rule of law[163]. It is, though, interesting the representative role assigned to the seat that is still placed in Pristina: even though the whole proceedings do not advance there, official ceremonies, and other non-operational moments can happen there, thus guaranteeing at least a symbolic connection with the community affected by the crimes. The "*pied-à-terre*" in Pristina, and the relocated seat in The Netherlands place the court quite mid-way between national and international, in such regard.

Last, the official languages are Albanian, Serbian, and English, but each organ and Chamber determined the official use of language for the exercise of their mandate, in full respect of the rights of the accused: since all judges come from countries different from

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[158] KSC Law, article 63.

[159] KSC Law, article 3.

[160] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 7.

[161] *Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands*, 26 January 2016, articles 2-3; *Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial institution in the Netherlands*, 15 February 2016, articles 2-3.

[162] KSC Law, article 36.

[163] KSC Law, article 59.

Kosovo, the choice fell on English before all Chambers[164]. Nevertheless, international judges are only required to be fluent in English, and the English version of the Rules of Procedure and Evidence is authoritative[165]. Yet, any suspect or accused has the right to use a language that she or he understands and speaks, upon authorisation of the Panel before which he or she appears[166]. The website of the court is offered in English, Albanian and Serb.

While the official work of the courts take place in English, importance is still given to two national idioms, indicating that the KSC adopted a mixed approach for such factor of hybridisation.

7. Critical remarks.

Being one of the oldest jurisdictions belonging to the "second wave" of hybridity, the recognition of the Kosovo Specialist Chambers as a mixed, a national, or an international tribunal was at some extent subject to scholarly discussion, with different conclusions reached.

Some authors, in fact, promote the idea that the KSC are a full international criminal jurisdiction. Professor Muharremi, for example, recognised the KSC as a «fully internationally controlled judicial body which is formally established within a domestic justice system»[167]. Some others endorse the recognition of the KSC as a *sui generis* domestic tribunal, departing from the concept of internationalised criminal tribunals, since «The Specialist Chambers will apply mostly domestic law and will be incorporated in the domestic judicial system, despite the fact that it will remain independent from the Kosovo judiciary»[168].

Others, instead, doubt that the KSC can be reconducted to a pure model of court and, for instance, laying on the co-existence of national and international elements in the

[164] Republic of Kosovo, Law N. 05-D-139, *Amendment of the Constitution of the Republic of Kosovo*, 3 August 2015, article 162, para 9; KSC Law, article 20; KSC, *Rules of Procedure and Evidence*, rule 8.

[165] KSC Law, article 27.

[166] KSC, *Rules of Procedure and Evidence*, rule 8.

[167] R. MUHARREMI, "The concept of hybrid courts revisited: The case of the Kosovo Specialist Chambers", in *International Criminal Law Review*, 2018, vol. 18, p. 644.

[168] S. SELIMI, "The Specialist Court for Kosovo: continuity or departure from the hybrid courts model?", in *Academicus International Scientific Journal*, 2016, vol. 13, p. 27.

organisational structure and jurisdiction of the KSC and SPO, conclude that they cannot be categorised as a fully domestic nor a fully international criminal judicial body[169].

Based on structural and organisational features, namely the factors of hybridisation that were addressed previously, the KSC appears *prima facie* to be hybrid indeed: a strong orientation towards the model of international courts influences the composition of the staff, the means of funding, and the languages used, while the legal basis, the structure of the Chambers, and the individual, temporal and territorial jurisdiction make the KSC rather nation-oriented. In addition to those, the mixed applicable law, the jurisdiction over a commixture of national and international crimes, the double seat, and the controversial relationship with the national judiciary system place the KSC in the middle of the spectrum of hybridity.

Yet, according to the definition of hybrid court that this study developed, and against which we must compare each "new" court in order to address its belonging to the panorama of hybrids, it is impellent to verify also whether the KSC were established with a view to extra-judicial effects in the fields of transitional justice, capacity-building, and peacebuilding.

The participation of the EU and the CoE in the construction of the Kosovo Specialist Chambers may help ensure and enhance the stability and the rule of law in Kosovo. EU's participation provide assistance in the wider context of an internationally driven state-building process, wishing to promote the reconstruction and strengthening of governance institutions of the country[170]:

«In light of their internal features and mandate the SC and the SPO have the potential to positively influence national reconciliation and state-building processes. They might entail long-term effects in Kosovo, at the normative and institutional levels. Their national origins bring them close to the society massacred by the crimes, imparting a sense of local ownership to criminal proceeding for the atrocities committed during the war in Kosovo»[171].

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[169] M. HOLVOET, "The Continuing Relevance of the Hybrid or Internationalized Justice Model: the Example of the Kosovo Specialist Chambers", in *Criminal Law Forum*, 2017, vol. 28; E. CIMIOTTA, "The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The 'Regionalization' of International Criminal Justice", in *Journal of International Criminal Justice*, 2016, vol. 14, issue 1, p. 59-60 («the first example of […] a 'regional' mixed criminal tribunal»).

[170] M. MUSANOVIC, "The Specialist Chambers in Kosovo: A Hybrid Court between Mounting Expectations and Domestic Contestation", in I. ARMAKOLAS, A. DEMJAHA, A. ELBASANI, S. SCHWANDNER-SIEVERS, *Local and International Determinants of Kosovo's Statehood*, Pristina, 2021, p. 185 ff.

[171] E. CIMIOTTA, "The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The 'Regionalization' of International Criminal Justice", in *Journal of International Criminal Justice*, 2016, vol. 14, issue 1, p. 70.

The domestic identity of the KSC, clearly, indeed, is intended to maintain a significant link to the population and to enhance legitimacy within the State[172].

The reconciliation and transitional justice purposes, while may not be expressly stated in the founding documents of the tribunal, are not absent. The Marty Report, which triggered the entire operations of designing and instituting the court, makes it clear that a partial narration had been offered by the ICTY and the Regulation 64/2000 panels on the conduct of the conflict, based on an implicit as much as affirmed presumption that on one side were the victims and on the other side were the culprits. Serbs had always been fingered out as the oppressor, while Kosovar Albanians were the innocent victims, but the reality turned out – through Del Ponte's allegations and Marty's investigation – to be far more complex than that[173]. Such a perspective, based on a "victor's justice", had to be abandoned, while «the duty to find the truth and administer justice must be discharged in order for genuine peace to be restored, and for the different communities to be reconciled and begin living and working together»[174].

In addition to that, the KSC appear to have a clear understanding of the utter importance of outreach, and intensified implementation plans after having acknowledged a struggle in engaging local community: with the support of Switzerland, in particular, the court committed to intense activities in this direction[175]. Observers noted that the court, so far, has been doing quite well[176]. Nevertheless, the public perception of the KSC is continuously under threat[177], hence the court should maintain a tight eye on the relationship with the local communities, in order to ensure transitional justice and reconciliation.

It is thus not possible to deny a series of non-judicial effects to the KSC and SPO.

The Kosovo Specialist Chambers, thus, indeed inaugurated a second generation of internationalised criminal tribunals.

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[172] M. CROSS, "Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes: Remarks on Independence and Cooperation", in *Journal of International Criminal Justice*, 2016, vol. 14, issue 1, p. 75.

[173] Council of Europe, Parliamentary Assembly, *CoE Report*, Explanatory memorandum by Mr Marty, rapporteur, para. 3.

[174] Council of Europe, Parliamentary Assembly, *CoE Report*, Explanatory memorandum by Mr Marty, rapporteur, para. 6.

[175] "KSC and SPO Launch a 2-Year Outreach Programme Supported by Switzerland", in *Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 30 January 2018, available at www.scp-ks.org [last accessed 18 April 2022]; .

[176] A. SMITH, "Outreach and the Kosovo Specialist Chambers: A Civil Society Practitioner's Perspective", in *International Criminal Law Review*, 2020, vol. 125, issue 1.

[177] K. SCHENKEL, *The Kosovo Specialist Court and Transitional Justice. Public Perceptions on the KSC and the need from a comprehensive TJ approach*, Utrecht, 2021.

IV. The Central African Republic Special Criminal Court.

1. The background of never-ending violence.

The Central African Republic has faced continued waves of violence dating back to the colonial period and the independence from France on 13 August 1960, and a succession of coups d'état combined with attempts of violent repression[178]. In 2003, following a coup d'état placing Francois Bozizé to power and characterized by a pattern of abuses, the Central African authorities required the International Criminal Court to open an investigation into such violations of human rights: the ICC eventually opened a case, known as "CAR I", against Mr Jean-Pierre Bemba[179].

In 2013, Michel Djotodjia, belonging to an alliance of militia group called Séléka and composed mainly by Muslims, seized power in CAR, and waged a harsh campaign targeting most Christian members of the population, committing killings, torture, widespread sexual violence, forced marriages, recruitment of children as soldiers, pillaging of private property. As a reaction, some self-defence movements, the so-called "anti-Balaka", mainly Christians, organised to protect villages from the violence of the regime, causing their own set of abuses, in addition to those committed since 2010 in the territory of the Central African Republic by the Ugandan LRA (Lord's Resistance Army): attack on the communities, torture, sexual violence, exploitation of women and girls[180]. Up to 46,000 persons, mostly from Islamic communities fled abroad and around 385,000 people displaced internally[181].

In December 2013, clashes between Séléka and Anti-balaka forces in Bangui, the capital city, cause the death of almost 1,000 civilians, activating an international cry, and President Djotodia was forced to resign on 10 January 2014[182]. Such situation attracted the attention of the Security Council of the United Nations that, upon Chapter VII of the UN Charter, having recognised the existence of a threat to peace and security in the

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[178] J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 131.

[179] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber, Judgement pursuant to Article 74 of the Statute, 21 March 2016.

[180] G. MUSILA, *The Special Criminal Court and Other Options for Accountability in the Central African Republic: Legal and Policy Recommendations*, Nuremberg, 2016, p. 8-9.

[181] "Deadly Raid on Displaced People", in *Human Rights Watch*, 1 November 2016, available at www.hrw.org [last accessed 18 April 2022].

[182] G. MUSILA, *The Special Criminal Court and Other Options for Accountability in the Central African Republic: Legal and Policy Recommendations*, Nuremberg, 2016, p. 5-7.

country, established the United Nations Multidimensional Integrated Stabilization Mission in the Central African ("MINUSCA")[183].

The same year, ICC's Prosecutor Fatou Bensouda announced that she would open a second investigation ("CAR II") into the situation in the country and shortly after, Ms. Catherine Samba-Panza, *interim* President of the Central African Republic ("CAR"), self-referred the situation to the ICC: CAR II investigations commenced in September that year, marking the first time that the ICC had two situations opened in the same country[184].

In the meanwhile, the UN and the government of CAR signed a memorandum of intent on the establishment of a special court and the negotiations began; on the 3rd of June 2015, Ms. Catherine Samba-Panza, promulgated a law establishing a special jurisdiction with the purpose to prosecute war crimes and crimes against humanity committed in the State since 2003 «in a climate of total impunity»[185].

Repeated violence and insecurity within CAR delayed the effective establishment of the tribunal. The assistance of international peacekeeping forces facilitated the implementation of peaceful democratic elections in February 2016, terminating the transitional government[186].

The SCC was finally established in 2017, with an initial mandate of five years, renewable whereas needed, upon a decision jointly adopted by the UN and the government of CAR[187]. After years of investigations, the first trial before the Special Criminal Court began on 18 April 2022[188].

2. Legal basis.

On 7 August 2014, the government of the Central African Republic and the United Nations Multidimensional Integrated Stabilization Mission in the Central African

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[183] UN. Doc. SC/Res/2149 (2014), 10 April 2014.

[184] ICC, *Statement of the Prosecutor of the ICC, Fatou Bensouda, on the opening of a new preliminary examination in Central African Republic*, 7 February 2014.

[185] CAR SCC, *Memorandum of Intent between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic and the Government of the Central African Republic*, 7 August 2014; UN Doc. S/2014/562, United Nations Security Council, *Report of the Secretary-General on the situation in the Central African Republic*, 2014, para. 2; H. HOBBES, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol. 30, pp. 177–197, p. 178.

[186] Amnesty International, *The Long Wait for Justice: Accountability in the Central African Republic*, AFR 19/5425/2017, London, 2017, p. 11.

[187] SCC Law, article 70.

[188] "Central African Republic: War Crimes Court's First Trial. Offers Potential Justice Model for Other Countries", in *Human Rights Watch*, 12 April 2022, available at www.hrw.org [last accessed 18 April 2022].

Republic signed a memorandum of intent that committed the former to establish a special criminal court[189]. Consequently, the Central African Transitional Parliament adopted an organic law establishing the Special Criminal Court, which was promulgated by the CAR President in the transitional government, Ms Catherine Samba-Panza, on 3 June 2015 and validated by the national Constitutional Court[190].

The progress in setting up the SCC was slow, due to changes in the political will: dedicated support to the project was given by the 2014-2015 Transitional administration of the country under the guidance of Samba-Panza, head of a non-elected government, set in power by the international community. After the elections of 2015, the new president Touadéra did not show decided commitment for the establishment of the court.

Yet the SCC was established in 2017, on the basis of the organic law of 2015.

Thus, it is not an international agreement, directly or indirectly upholding the establishment of the SCC: even though the United Nations played a significant role in the ideation of the court, and the Memorandum of Understanding was so detailed that it could possibly be the basis for the institution of a tribunal[191], the piece of document providing the legal basis is undoubtably a national organic law.

The first factor of hybridisation chosen for the SCC, therefore, is purely domestic.

3. The structure: lesson learnt from the experience of the ECCC.

The SCC is structured with a *Chambre d'instruction* (Investigating Chamber), a *Chambre d'Accusation Spéciale* (Pre-Trial Indictment Chamber), a *Chambre d'Assises* (Trial Chamber), and a *Chambre d'Appel* (Appeals Chamber)[192]. The structure of the court, mirroring that of CAR national system, is inspired by the French inquisitorial model, in which the investigating judges and the prosecutor have relevant powers to investigate into crimes. Furthermore, the SCC presents a structure that is similar to that of the Extraordinary Chambers in the Courts of Cambodia[193].

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[189] *Memorandum of Intent between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic and the Government of the Central African Republic*, 7 August 2014.

[190] SCC Law, article 11.

[191] J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 135.

[192] SCC Law, article 7.

[193] *See* Chapter II for the description of the structure of the ECCC.

The *Chambre d'instruction*, corresponding to the *Cabinets d'instructions des Tribunaux de Grande Instance* of CAR judicial system, is the dismemberment of the Special Criminal Court in charge of the preliminary investigations, and is composed of three cabinets, each staffed with one national judge and one international judge[194]. The two jurists sitting at the bench work together and must issue the indictment or the dismissal order jointly; whereas they do not agree over the outcome of an investigation, they must submit their disagreement to the PTC[195].

The *Chambre d'Accusation Spéciale* corresponds to the *Chambres d'Accusation* of the Appeals Chamber of CAR and decides on the appeals against the decisions adopted by the *Chambre d'instruction*. It is composed of three judges, two international and one national (who also serves as the President)[196].

The *Chambre d'Assises* is charged with the cases submitted to it by the *Chambre d'instruction* for the trial stage, just like the *Cours Criminelles* of CAR; it is staffed with six national judges and three international judges who are assigned to three sections, each composed of two nationals and one international[197].

Last, two international foreign magistrates and one Central African Republic judge sit in the Appeals Chambers, charged with the appeals against the decisions of the trial chamber and the pre-trial chamber[198].

Thus, an overall number of twenty-seven judges serve with the Special Criminal Court: fourteen are CAR nationals, while the remaining are foreign experts. In addition, each judge of the SCC can be assisted by a legal counsel (*Conseiller Juridique*) nationally or internationally recruited with the approval MINUSCA[199].

National judges are appointed to the SCC by the national Council of Magistracy[200]; international magistrates, instead, are proposed by MINUSCA and eventually appointed by the President of the Superior Council of the Magistracy[201]. Such procedure of appointment recalls that of the judges of the ECCC and allow national authorities to exercise a greater control over the choice of the foreign experts.

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[194] SCC Law, article 11.
[195] SCC Law, article 42.
[196] SCC Law, article 12.
[197] SCC Law, article 13.
[198] SCC Law, article 14.
[199] SCC Law, article 7.
[200] SCC Law, articles 21-23.
[201] SCC Law, article 24.

The President of the SCC is elected among the national judges of the court; the President of the *Chambre d'instruction* and the *Chambre d'Assises* is elected by majority by all judges sitting in the respective chambers and must be a CAR citizen[202]. Last, the judge of the *Chambre d'Appel d'Assise* is the only national judge sitting at the bench[203]. The choice of assigning the guidance of each chamber and of the SCC itself exclusively to the national component is a strong signal of a desire of appropriation and nationalisation of the special court.

Other than the judicial articulations, a *greffe* (Registry), a special unit of defence lawyers and units for the protection of victims and witnesses complete the structural framework. The entirety of personnel in such organs is recruited within CAR, safe the possibility to recruit international barristers is restricted to the most sensitives case, whereas the security of domestic counsels may be under threat[204].

The public prosecutor is represented at the SCC by the *Parquet du Procureur Spécial* (Office of the Special Prosecutor), including one international prosecutor, seconded by a national prosecutor[205]. If the number of cases opened before the SCC requires it, the *Procureur Spécial* can require the nomination of complementary prosecutors, being either national or international, as long as a balance between the components is guaranteed[206].

A special unit of the national police is at exclusive disposal of the SCC, which can use it for investigations, evidence-collection[207]. In addition, upon reasoned request of the Special Prosecutor, MINUSCA may decide to make available to the Special Criminal Court as many police officers as the Chief of the Police Component of MINUSCA itself may deem necessary to assist the Special Prosecutor's Office and the judges of the investigating cabinets in their investigations[208].

During negotiations, the proportion between international and national personnel was a major point of discussion. The memorandum of understanding between the UN and CAR foresaw a majority of foreign judges, but the SCC Law, instead, stated as described above. The tension between the international and the national side during negotiations

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[202] SCC Law, article 6, article 11.
[203] SCC Law, article 14.
[204] SCC Law, article 7, articles 15-16, article 67.
[205] SCC Law, article 7, article 18. The prosecutors can be substituted by a number of national and international vice-prosecutors, maintaining a balance between the two components.
[206] SCC Law, article 10.
[207] SCC Law, article 8, articles 28-33.
[208] SCC Law, article 32.

reminded that for the establishment of the ECCC: perhaps with the desire to avoid the stalemate that affected the work of the Extraordinary Chambers in Cambodia, the balance between the national and the foreign component and the mechanisms of conflict resolution in case they do not agree over what to do is greatly detailed in the SCC Law itself.

While the majority of judges is a citizen of CAR, the balance of powers makes it clear that the last word over a case is left to the international side, that, in this way, can influence the entirety of a proceedings: while it is true indeed that judgements in the first instance are adopted by the trial chamber gathered in a composition made up of seven judges, four of which nationals, the Appeals Chamber, that has the power to review such judgements both on law and fact, is composed of two international judges and only one CAR magistrate[209].

Thus, in relation to the composition of the chambers and the structure of the Special Criminal Court, it is possible to recognise a mixed composition at some extent inspired by the experience of the Extraordinary Chambers in the Courts of Cambodia. The balance between national and international at the SCC vary depending on each chamber: while there is an exact equilibrium in the investigating chambers and in the office of the prosecutor, the pre-trial and appeals chambers encompass a majority of international judges, and the trial chamber a majority of national magistrates. Absent a rule requiring a super-majority for a chamber to assume a decision , just it is before the ECCC, it is well possible that a component alone rules over a matter, without the need of the approval of the counterpart. Yet, all chambers should seek unanimity and the responsibility for the decision-making is assigned to the two components equally and jointly.

The structure and composition of the Special Criminal Court of CAR set the jurisdiction in the middle of the ideal scale of hybridity, not only due to the cooperation of national and international experts, but also to the different proportion of them within each chambers, assigning the possibility to assume a decision autonomously either to the national side, either to the international side, depending on the single organ.

[209] SCC Law, article 47, article 14, articles 50-51.

4. Applicable law.

The Special Criminal Court can refer to material and procedural law established at international level, whereas the national legislation does not provide for it, or any time there is uncertainty concerning the interpretation or the application of a certain national law, or whenever there is an issue of compatibility between a national law with international law[210]. Such rule contained in the SCC Law underlines the primacy of CAR existing national legislation over international or appositely designed provisions. Thus, judges of the Special Court must first attempt to apply domestic law to the proceedings and, only secondarily, may seek guidance in international standards and laws.

Procedure-wise, unless specific dispositions contained in the SCC Law itself and in the legislation adopted for its application rule differently, the norms applicable before the Special Criminal Court are those provided for by the Code of Criminal Procedure of CAR: the court did not adopt an apposite set of rules of procedure and evidence[211]. Nevertheless, the SCC Law do contain some provisions concerning procedural issues[212]. An example is that of immunities and amnesties: since CAR national legislation greatly departed from international standards in such regard, the organic law states the irrelevance of immunities and pardons, by simply incorporating the relevant provisions in such regard included formulated by the ICC Statute[213].

In addition, the penalties applicable by the Special Criminal Court, in principle, are those provided for by the Penal Code of the Central African Republic; nevertheless, in accordance with Article 6 of the International Covenant on Civil and Political Rights of 1966, Article 77 of the Rome Statute, the Cotonou Declaration of 4 July 2014 and the United Nations General Assembly Resolution "Moratorium on the Application of the Death Penalty" the maximum sentence that the court can order is life imprisonment, while the national penal code foresees the death penalty for those responsible of international crimes[214]. Such a rule was indeed necessary for the establishment of a court assisted by the international community since the death penalty is excluded by international standards of justice[215].

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[210] SCC Law, article 3.
[211] SCC Law, article 5, article 43, article 47, article 49.
[212] SCC Law, articles 47-51.
[213] ICC, *Rome Statute*, articles 25-28.
[214] SCC Law, article 59; UN Doc. A/Res/69/186 (2014), *Moratorium on the Application of the Death Penalty*, 4 July 2014.
[215] M. BOHLANDER, "Can the Iraqi Tribunal Sentence Saddam Hussein to Death?", in *Journal of International Criminal Justice*, 2005, vol. 3, issue 2.

Furthermore, lacking a specific bilateral agreement of judiciary cooperation with a state, procedural law concerning international criminal cooperation apply for the investigations, the trial, and the execution of a sentence[216].

Similarly, material-wise, as it will be discussed below, the only law applicable is the national criminal code, which incorporated genocide, crimes against humanity, and war crimes.

Thus, with few exclusions, the SCC applies laws already existing in the CAR criminal code and national code of criminal procedure. In relation to such factor of hybridisation, hence, the Special Criminal Court is a strongly nation-oriented jurisdiction, which adheres to the domestic model with a few minor exceptions.

5. Personal, temporal, territorial, and material jurisdiction.

CAR SCC has jurisdiction over war crimes, crimes against humanity, and genocide committed since 1 January 2003.

The temporal jurisdiction is broad and open-ended, including offences committed from 1 January 2003 onwards.

Such competence extends to the entire national territory, but it also covers those acts of co-perpetration and complicity committed on the territory of other states with which the CAR undertook agreements of judiciary cooperation[217]. The choice to limit the jurisdiction to those countries with which CAR undersigned a multi-lateral agreement appears pragmatic and aimed to avoid wasting resources on arrest warrants that are not to be executed. Thus, potentially, the SCC may prosecute individuals who fomented the violence in the country from abroad: this appears as a realistic and pragmatic response to the circumstance that neighbouring countries have been supporting the combats in CAR[218].

Only individuals fall within the jurisdiction of the court, with the consequence that armed groups as such cannot be held responsible for their misconducts. Yet, the law applies equally to all, without distinction based on official status and the level in the

[216] SCC Law, article 4.
[217] SCC Law, article 4.
[218] G. MUSILA, *The Special Criminal Court and Other Options for Accountability in the Central African Republic: Legal and Policy Recommendations*, Nuremberg, 2016, p. 19.

hierarchy[219]: this means that, in principle, the SCC law may prosecute both the "small" and the "big fishes". In fact, instead, as it will also be discussed while assessing the relationship between the Special Court, the national system, and the International Criminal Court, such possibility appears unlikely, not only due to the considerable number of potential suspected, but also to the repartition of duties among such jurisdictions.

An entire section of the SCC law is dedicated to the criminal liability of military chiefs and hierarchical superiors, clarifying that a military chief or a person actually acting as such is criminally responsible for crimes falling within the competence of the Special Criminal Court committed by forces under his command or authority and effective control, where did not exercise appropriate control over these forces if he or she knew, or should have known, that those forces were committing or were about to commit these crimes and he/she did not take all the measures necessary and reasonable in his/her power to prevent or suppress the execution, or to refer it to the competent authorities for investigation and prosecution[220]. Generally, any superior is criminally responsible for crimes within the competence of the Special Criminal Court committed by subordinates under his authority and effective control, where he has not exercised the appropriate control over these subordinates in cases where the superior knew that these subordinates were committing or were about to commit these crimes or deliberately neglected to take into account information that clearly indicated so; these crimes were related to activities within his responsibility and effective control; the superior did not take all necessary and reasonable measures in his/her power to prevent or suppress its execution or to refer it to the competent authorities for investigation and prosecution[221].

The jurisdiction *ratione personae* is not restricted or limited under any aspect: nor the rank in a hierarchical order, nor the age of the suspects (making it potentially possible for children to appear before the court). The absence of an age limitation may be justified by an implicit strategy of bringing to trial before the Special Criminal Court only mid-level officials, leaving low-ranked soldiers to the ordinary national courts.

The SCC has the subject-matter jurisdiction over grave violations of international humanitarian law, as defined by the Central African criminal code and according with the

[219] SCC Law, article 56.
[220] SCC Law, article 57.
[221] SCC Law, article 58.

international obligations assumed by CAR at the international level[222]. International crimes listed in the SCC Law are genocide, crimes against humanity and war crimes. None of those concepts is defined by the law, that explicitly refers to the definitions provided by the Central African Penal Code and international law, leaving some room to the SCC for creative jurisprudence on the matter.

The description of each category of crimes elaborated in the domestic criminal code does not set the Special Criminal Court, and CAR judicial system in general, in line with widespread international understanding of such crimes and their definition. Genocide, for example, under the Penal Code of CAR, can exclusively be committed «en execution d'un plan concerté», and the list of protected groups includes «un groupe determine à partire de tout critère abritraire»[223]. This means that, in principle, such protection may extend to political, cultural, and social groups[224]. The requirement of the existence of an organised plan, instead, raises the evidentiary threshold for genocide, especially in a situation, such as the conflict in CAR, where violence where perpetrated by non-state actors[225]. On the contrary, the definition of crimes against humanity does not require the criminal acts to be committed in the context of a state or organisational policy[226]. Last, the definition of war crimes, distributed on four articles of the penal code, does not list the acts constituting such misconducts[227].

The definition of international crimes elaborated by the Central African Penal Code sensibly differ by those of the Rome Statute and international standards in general, since the ICC Statute, which was domesticated in CAR in 2009, was not incorporated *verbatim*[228].

Hence, the subject-matter jurisdiction is not limited to international crimes: it is a mixed material jurisdiction[229].

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[222] SCC Law, article 3.

[223] CAR, Central African Penal Code, 2010, article 152.

[224] G. MUSILA, *The Special Criminal Court and Other Options for Accountability in the Central African Republic: Legal and Policy Recommendations*, Nuremberg, 2016, p. 16.

[225] P. LABUDA, "The Special Criminal Court in the Central African Republic:", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 187-188.

[226] CAR, Central African Penal Code, 2010, article 153.

[227] CAR Central African Penal Code, 2010, articles 154-157.

[228] CAR, Central African Penal Code, 2010, articles 152-161.

[229] J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 141-142.

6. Relation with the domestic system and the International Criminal Court.

The SCC is formally created «au sein de l'organisation judiciaire centrafricaine»[230]. While such phrasing recalls that of the Kosovo Specialist Chambers, the relationship between the Special Court and the Central African national system is quite different from that of the KSC with Kosovo.

The words "*au sein*" underline the significant bound between the SCC and CAR, which actually unfolds under several aspects.

First, in case of concurrent jurisdiction with another national criminal court, the SCC enjoys primacy[231]. Second, the SCC has its own police force unit, attached to it, but coming from the national forces[232]. Third, during the period in which all the Chambers were being established, the special police unit pronounced their oath before the ordinary pre-trial chamber in Bangui, and the prosecutor could order the trial of a suspected person before the ordinary criminal jurisdictions of CAR, that would apply the dispositions of the SCC Law to conduct the case, and would be transferred before the special chamber competent as soon as it would begin functioning[233]. Such circumstances highlight the continuity between the national ordinary system of justice and the Special Criminal Court: the two judiciary structures are not parallel, like it was the case of the KSC, nor separate, but the latter forms a special branch of the first.

The relationship with the national judiciary system, thus is quite significant: from a constitutional standpoint, the SCC is part of the national judiciary order. Such tight bound makes the Special Criminal Court particularly close to the pure national model of criminal jurisdiction, entrenched in a complex judicial system.

In addition, the Special Criminal Court was established when the International Criminal Court had already opened two sets of investigations in CAR, thus it is indeed urgent to assess the relationship between these two jurisdictions.

In contrast to the primacy over national courts given to the SCC, whereas the ICC Prosecutor investigates on the country, the SCC must give the precedence to the international tribunal[234]. Such domestic law may generate problems as the ICC's statute

[230] SCC Law, article 1.
[231] SCC Law, article 3.
[232] SCC Law, article 8.
[233] SCC Law, article 72.
[234] SCC Law, article 37.

foresees primacy of the national over the ICC[235] since, at some extent, it seems to reverse the principle of complementarity as provided by the article 17 of the Rome Statute: national courts have the primacy over the ICC for prosecuting international crimes, thus, the Special Criminal Court, being established "*au sein*" of the CAR judicial system, should follow such rule, descending from an international agreement signed by 123 states of the world. Yet, it does not, since the national organic law instituting it rules differently for the case of concurrent jurisdiction. This provision removes the Special Court from the list of ordinary national courts, in this respect, assigning it, instead, a detached and different position, compared to all other domestic courts, with regard to the relationship with the ICC. Authors suggested that the repartition of the competence between the ICC, the SCC, and the ordinary national criminal courts, as designed by the organic law in the terms illustrated, may implicitly assign to the ICC the duty to prosecute the major leaders, to the SCC the mid-level officials, and all the others low-ranked culprits to the ordinary criminal tribunals[236]. While this cannot be inferred from any documents regulating the work of the court, it is instead possible to acknowledge that such provisions regulating the relationship of the Special Criminal Court with the ICC design a new concept of complementarity, which may perhaps reflect more realistically the expectations on the work of the ICC itself: to stay in the middle of an ideal "galaxy" of international criminal justice, to be its heart and centre, not the last resort court.

Beyond those speculations, though, the set of rules regulating the relationship of the SCC with the national judiciary system and the ICC, although they make the court's position clearly pushing towards the internal court model, they move away a few steps, thus hybridising such model, in providing for a particular relationship of the Special Court with the ICC.

7. Funding, seat, and official language.

The International Community bear the budget of the Special Criminal Court, notably through voluntary contributions, including the participation of MINUSCA or any other operation mandated by the Security Council or the United Nations System, in

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[235] P. LABUDA, "The Special Criminal Court in the Central African Republic", in *American Society of International Law*, vol. 22, issue 2.

[236] J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 150.

consultation with then national government, within the limits of the financial resources available[237]. Thus, the future and the work of the SCC strongly depends on the international community's will to provide continued financial support [238]. The European Union refused to support the jurisdiction, since it already provides generous contribution to the budget of the International Criminal Court, already operating in CAR.

CAR does not participate in financing the whole work of the Special Court: the national budget only covers the expenses for the compounds hosting the SCC[239]. In sum, it is a hybrid system of financing, in which international voluntary contributions have utter importance. In such regard, the SCC resembles more like an international court, rather than a domestic one.

The SCC has its only seat in Bangui, CAR's capital city; yet it can be moved to any other place of the national territory in case exceptional circumstances or necessities of work may require it[240]. The choice of setting the court exclusively within the territory of the state concerned suggests a strong connection to the national system and the will to maintain a link with it, but is not free from practical implications: should the SCC move abroad, the special unit of national police should be moved accordingly, the costs for the national government for financing the compounds would raise, the participation of victims and witnesses would become more difficult, and the chance to easily transfer cases from the ordinary courts to the SCC would expire.

Nothing, instead, is provided for in the organic law regarding the official language of the Special Criminal Court, but the fact that the law itself, in its official edition, is only available in French, together with the fact that the court's websites has only a French version, allows to suggest that such is the working idiom of the Special Criminal Court, just like it is the language of writing and formal situations in the country. Such factor of hybridisation was adopted by the SCC in a way that makes it further in line with the practice of the national judiciary system.

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[237] SCC Law, article 54.

[238] E. BUSSEY, "Progress and Challenges in Establishing the Special Criminal Court in the Central African Republic", in *Amnesty International*, 2 October 2017, available at www.amnesty.org [last accessed 15 December 2021].

[239] SCC Law, article 52.

[240] SCC Law, article 2.

8. Conclusion: CAR, a terrain for evaluating the complementarity of the ICC.

SCC was established shortly following the opening of the second investigation of the ICC in CAR. This makes it the first specialised court to share its jurisdiction with an ongoing case before the ICC and working in complementarity with it.

Even though the organic law establishing the SCC assigned primacy to the ICC over the SCC, cooperation between the two court, on the other side, may also be mutually beneficial[241]. According to some authors, the presence of the SCC remains a ban to the ICC Article 17 admissibility challenge, since it still represents the willingness and ability of CAR to investigate and prosecute, throughout genuine proceedings[242].

The subject-matter jurisdiction of the SCC is not limited to the same crimes falling within the jurisdiction of the ICC and, concerning international crimes, the definition provided by the Rome Statute and the national penal code is quite different, leaving further room for the coexistence of the two jurisdictions. Article 37 of the SCC Law, giving primacy to the ICC over the SCC in case of concurrent jurisdiction, seems incompatible with international law and the Rome Statute itself[243].

Only the practice will actually tell how such regime of complementarity may unfold.

Before that, to the purpose of this study, its is urgent to assess whether the Special Criminal Court can be regarded as a hybrid court or not.

Some authors label the SCC of CAR as a simple national court with participation of international actors[244]. Nevertheless, the SCC, even though it encompasses a very nation-oriented series of factors of hybridisation, which make it particularly close to the model of a purely domestic court, still appears to be a hybrid court due to two main aspects. First, the presence of a series of factors of hybridisation taking distances from a purely national models: the circumstance that a part of the judicial personnel is foreign and their contribution to the decision-making process is truly relevant; a relationship with the ICC that is different from that of the (other) national courts; a budget fuelled by international contributors.

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[241] M. KERSTEN, A. , "Hybridization – A spectrum of creative possibilities", in *The President on Trial*, 2020, p. 275-277.

[242] P. LABUDA, "The Special Criminal Court in the Central African Republic: failure or vindication of complementarity?", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 183.

[243] P. LABUDA, "The Special Criminal Court in the Central African Republic: failure or vindication of complementarity?", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 192-194.

[244] G. MUSILA, *The Special Criminal Court and Other Options for Accountability in the Central African Republic: Legal and Policy Recommendations*, Nuremberg, 2016, p. 15.

Second, the clear intent to work of reconciliation and transitional justice. The institution of the Special Criminal Court cannot be regarded as isolated from a broader plan to restore security and peace in CAR, fostered by the UN[245]. Negotiations for designing the court commenced under the aegis of MINUSCA, that had received by the Security Council the mandate to maintain basic law and order and fight impunity in the country, and eventually undersigned the memorandum of understanding with the government of CAR[246]. MINUSCA is also charged with the task of organising capacity-building programs in the country and to assist judicial reforms to comply with international standards[247]. The SCC, in addition, is recognised to carry the promised of bringing effective justice to victims and this is the reason for which it was designed and set up: the SCC offers victims the chance to be witnesses and civil parties into the proceedings concerning the crimes affecting them, and in such capacity can claim reparations; it deals with relatively recent and ongoing atrocities against such victims, who still feel the urgence to fight for justice[248].

Furthermore, the implicit project (contrasting the concept of complementarity) that the ICC, in The Hague, should prosecute the "biggest fishes" whose proceedings may cause disorders and instability, while the SCC shall conduct the trials of secondary prosecutors, may represent an interesting and valuable strategy to promote accountability and foster the fight against impunity without triggering further violence[249].

Last, the coexistence of the SCC and the ICC on the territory of CAR may also represent an opportunity to gather forces in order to better direct outreach strategies and activities: while the ICC may have greater financial resources to implement activities

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[245] CAR, MINUSCA, UNDP, *Document de Projet République Centrafricaine*, 1 January 2020; J. MICHELIN, "The Special Criminal Court in the Central African Republic: Progress and Challenges for the Hybrid Tribunal", in *McGill Human Rights Internships Working Paper Series*, 2020, vol. 8, issue 1, p. 27 ff.

[246] UN Doc. SC/Res/2149(2014), *On establishment of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) until 30 Apr. 2015*, 14 April 2014.

[247] UN Doc. SC/Res/2217(2015), 28 April 2015.

[248] J. PEREZ-LEON-ACEVEDO, "Victims at the Central African Republic's Special Criminal Court", in *Nordic Journal of Human Rights*, 2021, vol. 39, issue 1, p. 2-3; J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 133.

[249] J. AKANDJI-KOMBE, C. MAIA, "La Cour Pénale Spécial Centrafricaine : les défis de la mise en place d'une justice pénale internationalisée en République Centrafricaine", in *Revue Belge de Droit International*, 2017, issue 1, p. 150 ; J. PEREZ-LEON-ACEVEDO, "Victims at the Central African Republic's Special Criminal Court", in *Nordic Journal of Human Rights*, 2021, vol. 39, issue 1, p. 2-3.

towards the communities, the SCC may offer a better sensitivity of what victims and communities expect and understand[250].

Thus, it is safe to acknowledge that the Special Criminal Court for the Central African Republic embodies the definition of "hybrid court" developed through the practice of the "first generation" of mixed tribunals and represents the second internationalised criminal tribunal of the "second generation" of hybrids.

V. The Hybrid Court for South Sudan.

Alongside the jurisdictions that we have just analysed and that have already begun (or even concluded) to operate, an additional situation of interest to this study concerns the state of South Sudan where, since 2015, it has repeatedly echoed the hypothesis of establishing a hybrid court. Although, as will be explained below, this institution has not yet taken place, it is nevertheless possible to conduct an initial analysis of this (hypothetical) court, which is not entirely speculative, thanks to two international agreements which have defined in detail certain choices as to the hybridisation factors which would characterise that institution.

The project for a hybrid court for South Sudan is contained within two international agreements between South Sudan itself and the African Union, which have a wider purpose to set a durable peace in the state.

South Sudan, the most recent sovereign state of the world, became independent only in 2011. The conflict in South Sudan exploded in December 2013. The conflict stems from the political conflict between President Salva Kiir Mayardit, of Dinka ethnicity, and his Vice President Riek Machar, of Nuer ethnicity, supported by their respective factions, and then spread, setting the country's two main ethnic groups against each other, and overwhelming the other minorities.[251]

The *casus belli*, after months of increasing tensions, occurred on 15 December 2013, with an armed confrontation between Nuer soldiers and other Dinka government

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[250] P. VICK, P. PHAM, "Outreach Evaluation: The International Criminal Court in the Central African Republic", in *International Journal of Transitional Justice*, 2010, vol. 4, issue 3, p. 421-442; ICC, ICC-PIDS-FS-09-001/14_Eng, *Interacting with Communities*.

[251] D. ISSER, S. LUBKEMANN, S. N'TOWN, "Looking for justice: recommendations for the establishment of the Hybrid Court for South Sudan", Amnesty International, FIDH, AFR 65/4742/2016, 2016, p. 6; *South Sudan's New War. Abuses by Government and Opposition Forces*, in *Human Rights Watch*, 7 August 2014, available at www.hrw.org [last accessed 18 April 2022]; Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2016 – South Sudan*, 12 July 2016.

soldiers in the country's capital, Juba. The clash followed by a few hours the massacre of Nuer men in Juba by the security forces of the Dinka government, in response to which thousands of armed Nuer people had taken to the streets, mainly to avenge such violence. During the following months, continuous fighting spread to other towns and regions of the Greater Upper Nile, in the northeast of the country. Machar's forces quickly organized themselves, taking the name of the Sudan People's Liberation Movement - In Opposition ("SPLM-OP").

Over the next eight years, about four million South Sudanese citizens have been forced to flee their homes, taking refuge in neighbouring countries or in regions less affected by the clashes and nearly 400,000 people have been killed.[252] But the figures are constantly changing: in 2020 alone, in fact, there were a number of about 100,000 civilians forced to move due to violence on the territory of South Sudan.[253]

Repeated and very violent attacks on the civilian population – on the basis of ethnicity or alleged affiliations – marked the first months of the war. In fact, both the government forces and those of the opposition made themselves responsible for what, *prima facie*, have been classified as war crimes and crimes against humanity: mass killings, arbitrary arrests and detention, torture, destruction and looting of private property and humanitarian infrastructures, including several hospitals.[254] Both sides launched attacks against civilian shelters, places of worship, schools and humanitarian bases, including those of the United Nations, regardless and in full violation of the rules of international humanitarian law, domestic law (in particular certain provisions of the transitional constitution of South Sudan, which guarantee the right to life and prohibit torture, arbitrary arrest and unjust detention) and the protection of human rights also applicable in situations of conflict.[255]

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[252] D. ISSER, S. LUBKEMANN, S. N'TOWN, "Looking for justice: recommendations for the establishment of the Hybrid Court for South Sudan", Amnesty International, FIDH, AFR 65/4742/2016, 2016, p. 6.

[253] *Q&A: Justice for War Crimes in South Sudan*, in *Human Rights Watch*, 24 August 2020, available at www.hrw.org [last accessed 18 April 2022].

[254] African Union Commission, *Final Report of the African Union Commission of Inquiry on South Sudan (AUCISS)*, 2014, paras. 657 ff.

[255] South Sudan ratified the 1949 Geneva Conventions and the 1977 Additional Protocols on 25 January 2013. In particular, art. 3 common to the four conventions imposes minimum standards for the adequate treatment of non-combatants. In addition, the II Additional Protocol of 1977, on the protection of victims in internal armed conflicts, also applies. *South Sudan: Stop Delays on Hybrid Court. Four years into Conflict, Rampant Abuse*, in *Human Rights Watch*, 14 December 2017, available at www.hrw.org [last accessed 18 April 2022]; Sud Sudan, *The Transitional Constitution of the Republic of South Sudan*, 2011.

As a result, an emergency has quickly arisen due to the scarcity of available food resources, which reduced more than a million people to hunger, a problem that has not yet been contained.[256] Indeed, the report of the UN Commission on Human Rights in South Sudan – a body set up by the Human Rights Council in March 2016 to investigate the facts and gather evidence of possible violations – highlighted how the destruction of food resources and the reduction of civilians to hunger can be a deliberate way of conducting the conflict, by all the actors of the violence.[257]

In addition, the UN Commission denounced and documented the repeated recruitment of child soldiers, as well as the widespread use of sexual violence, with the use of rape, genital mutilation and forced marriages.[258]

After two years of violence and ongoing negotiations under the leadership of the Intergovernmental Authority on Development ("IGAD"), representatives of the government, opposition parties and other armed groups involved in the conflict, committed to a first peace agreement in 2015, quickly frustrated by the military initiatives of new rebel political groups, which have repeatedly continued to rekindle the clashes.[259]

In 2018, through the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan ("Revitalised Agreement"), the parties renewed their will to form a transitional government of national unity, based in Juba, charged with implementing the further content of the Agreement, which aims at peace, reconciliation

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[256] S. DULAI, *Famine Roils War-Torn South Sudan*, in *Newsweek*, 4 February 2017, available at www.newsweek.com [last accessed 11 February 2011]; J. PEDNEAULT, *Starving under the bullets in South Sudan*, in *Human Rights Watch*, 11 April 2017, available at www.hrw.org [last accessed 18 April 2022]; *Emergency (IPC Phase 4) outcomes are widespread at the July/August peak of the lean season*, in *Fews*, July 2020, available at www.fews.net [last accessed 18 April 2022].

[257] UN Doc. A/HRC/43/56, General Assembly, *Report of the Commission on Human Rights in South Sudan*, 31 January 2020; T. DANNENBAUM, *Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence*, in *Vanderbilt Journal of Transnational Law*, 2021; T. DANNENBAUM, *Siege Starvation: A War Crime of Societal Torture*, in *Chicago Journal of International Law*, 2022, p. 372.

[258] UN Doc. A/HRC/43/56, General Assembly, *Report of the Commission on Human Rights in South Sudan*, 31 January 2020.

[259] Intergovernmental Authority on Development, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, 17 August 2015. IGAD is an international organization with the aim of facilitating and affirming food security, environmental protection, prevention, management and resolution of conflicts, and the management of humanitarian affairs and the development of infrastructure in the Horn of Africa region. The agreement was signed by President Kiir, Machar as Commander-in-Chief of the SPLA-IO and by representatives of the *SPLM-Former Detainees*, *South Sudanese Opposition Alliance*, *Umbrella of Political Parties*, *the Alliance of Political Parties*, the *USAF*, il *United Democratic Salvation Front*, the *United Democratic Party*, the *African National Congress*. Following the signing, as guarantors, of the heads of state and government of the IGAD states (Ethiopia, Uganda, Somalia, Kenya), the ad-hoc Committee of the African Union for South Sudan, China, the TROIKA, the EU, and the United Nations.

and stability in the country.[260] The signature of this Agreement put a stop to the fighting between the factions that endorsed it, despite sporadic clashes still do occur in the west and south of the country, between the groups that, instead, did not.[261] Although, therefore, the extent of the conflict has diminished over time, some non-governmental organisations have recently reported an increase in localized clashes, during 2020, which saw the involvement of political and military officers also from the groups signatory to the Agreement.

In February 2020, finally, the South Sudanese authorities started the process planned to form the aforementioned transitional government of unity, which was then, effectively, installed in June of the same year and which, since then, has begun to lead South Sudan.[262]

1. Legal basis.

The first proposition of establishing a hybrid court in South Sudan came from the United Nations Mission in the country. In its report of 8 May 2014, the UN Mission in the Republic of South Sudan, suggested that instituting a hybrid court may assist in pursuing accountability of perpetrators in the country[263]. Yet, initially the proposal did not encounter the favour of the local government: according to UN experts, South Sudanese leaders even repeatedly impeded the establishment of such a jurisdiction[264].

The youngest state in the world appears to scholars, in fact, lacking a deep-rooted legal culture: indeed, since the independence of 2011, the country has been incessantly

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[260] Intergovernmental Authority on Development, *Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan*, 12 September 2018 (hereinafter "Revitalised Agreement").

[261] "South Sudan: New Spate of Ethnic Killings", in *Human Rights Watch*, 14 April 2017, available at www.hrw.org [last accessed 18 April 2022]; map of the geographical distribution of minorities in the territory of South Sudan available at www.refworld.org [last accessed 18 April 2022].

[262] The Transitional Government of National Unity was installed in February 2020 and ministers were appointed in March 2020. The work of such a government authority, therefore, had to first of all addressing the global Covid-19 pandemic emergency that spread during that time. Therefore, the government could not give priority to the implementation of the peace agreement, but the need for managing the health emergency has been a good testing ground. The transitional government, on that occasion, gave a demonstration of political unity in the country, a novelty for South Sudan. A. A. AWOLICH, "Covid-19 and the Political Transition in South Sudan", in *Sudd Institute Policy Brief*, 2021, p. 3 ss.

[263] United Nations Mission in the Republic of South Sudan, *Conflict in South Sudan: A Human Rights Report*, paras 312-313.

[264] "South Sudan: UN rights commission welcomes 'first steps' towards transitional justice institutions", in *UN News*, 1 February 2021, available at www.new.un.org [last accessed 18 April 2022]; N. TUT PUR, "A Glimmer of Hope for South Sudan's Victims", in *Human Rights Watch*, 31 January 2021, available at www.hrw.org [last accessed 18 April 2022]; *South Sudan: Stop Delays on Hybrid* Court, cit.; E. KEPPLER, "South Sudan's Cynical Bid to Block War Crimes Court", in *Human Rights Watch*, 30 April 2019, available at www.hrw.org [last accessed 18 April 2022].

the scene of armed rebellions and conflicts on an ethnic basis, but a jurisdiction to try those responsible has never been activated. Moreover, the South Sudanese judiciary is not yet sufficiently independent from political influence to be able to prosecute crimes of this magnitude on its own. Therefore, purely domestic initiatives gave always been considered a difficult option to implement.

Only following the signature of the first peace agreement, in 2014, the government of South Sudan slowly progressed in strengthening its cooperation with the African Union to the purpose of establishing a tribunal for international crimes[265]. Consequently, in 2017, after prolonged consultations, South Sudan and the African Union elaborated a draft of a statute of a future specialised court, and a memorandum of understanding about its functioning. In August 2016, both documents were transmitted to the national Council of Ministers, which approved them in December. Since then, though, no further steps were taken, nor information made available, about the effective institution of the tribunal.

The "Revitalised Agreement" of 2018 brought the project back, reproposing the commitment assumed in 2015 by the parties, which profiled in a rather detailed manner the features of the hybrid court to establish. Yet, this did not automatically cause the timely and effective implementation of the disposition thereby contained. On the contrary: in 2019, the government of South Sudan took a position openly against the creation of the court. In the same year, however, the African Union Commission moved in the direction of establishing such jurisdiction, appointing a group of experts to analyse and identify the essential elements for the proper functioning of a court in the country concerned.

In 2020, the South Sudan Civil Society Forum, a coalition counting over 200 non-governmental organisations, intimated the African Union to call on the South Sudanese government to find a definitive solution for activating the hybrid court, whose key features would be those as identified in the 2018 Agreement[266].

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[265] IGAD, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, 15 August 2015. Indeed, as early as December 2013, the African Union took steps to promote the investigation of international crimes committed in South Sudan by setting up a dedicated Commission.

[266] *Letter to the AU Peace and Security Council Regarding the Session on South Sudan*, 15 July 2020, signed by South Sudan Civil Society Forum, Transitional Justice Working Group, Crown the Woman, Dialogue Research Initiative, Foundation for Democracy and Accountability Governance, Organisation for Responsive Governance, South Sudan Women With Disability Network, South Sudan Youth for Peace Development Organisation, Action des Chrétiens pour l'Abolition de la Torture, Africa Center for International Law and Accountability African Centre for Justice and Peace Studies Africa Legal Aid, Africans Rising, Amnesty International, Association Communautaire pour la Promotion et Protection des Droits de l'Homme, Candel for Hope Foundation, Center for Accountability and Rule of Law – Sierra Leone Civil Society Human Rights Advocacy Platform, Global Trauma Project Human Rights Concern,

The legal basis of the Tribunal should be constituted by a memorandum of understanding between South Sudan and the African Union Commission. In fact, on the one hand, the peace agreement requires the transitional government of South Sudan to adopt the legislation, evidently domestic (and currently pending before the parliamentary assembly of the country)[267] necessary for the establishment of the court, that clearly defines its mandate, the jurisdiction, the sources of financing, the organs and the options for the participation of the public[268]. On the other hand, however, the agreement also states that «The Court will be established by the Commission of the African Union»[269]. In any case, it is specified that the provisions of the Hybrid Court must be in conformity with the content of the agreement. The task of the African Union Commission shall be to provide broad guidelines on the location of the tribunal, infrastructure, funding, enforcement mechanisms, applicable case law, the number and composition of judges, the privileges and immunities accorded to staff and any other relevant matters.[270]

2. Structure and composition of the organs.

The composition of the HCSS will be mixed, ad it is meant to gather the most competent judges, investigators, and prosecutors of African States other than South Sudan, alongside South Sudanese jurists, also selected for their «high moral character, impartiality, and integrity, and […] expertise in criminal law and international law» to sit in the court's chambers[271]. In particular, the agreement specifies that, in the various chambers, the majority of judges should come from African States other than South Sudan. The fact that "only" the majority of the judges of all the chambers should have nationality of an African state other than South Sudan leaves room, in the drafting of the defined statute of the court, to a double possibility: on the one hand, a clear propensity for the internationalization of the court, appointing, in the minority of panels, non-South-Sudanese jurists, but not even African nationalities; or, on the contrary, to lean, as seems

Human Rights Watch Institute for Security Studies Independent Human Rights Investigators, Journalists for Justice Kenya Human Rights Commission Mother of Hope, Parliamentarians for Global Action Partners in Justice International Rights for Peace Southern African Centre for the Constructive Resolution of Disputes (Zambia), Southern Africa Litigation Centre Transitional Justice Working Group (Liberia), Women's International Peace Centre.

[267] UN Doc. A/HRC/46/CRP.2, Human Rights Council, *Detailed findings of the Commission on Human Rights in South Sudan*, 18 February 2021, p. 16.

[268] IGAD, *Revitalised Agreement*, paras 5.1.1-5.1.2.

[269] IGAD, *Revitalised Agreement*, paras 5.3.1.1.

[270] IGAD, *Revitalised Agreement*, paras 5.3.1.2.

[271] IGAD, *Revitalised Agreement*, par. 5.3.3.

to have increasingly asserted in the practice of mixed courts, to install, in the remaining seats, jurists of the Republic of South Sudan[272]. This second perspective could ensure a series of positive effects that we identified in chapter II: first, it could strengthen a sense of "belonging" and "connection" of the hybrid court with local communities, reducing the risk of it being perceived as an external organ, an "intruder"; second, South Sudanese experts could help to better understand the local culture and the context in which the conflict has unfolded for so long[273].

The organs of the prosecutor's office and the defence will be composed of non-South Sudanese African citizens who can, however, in any case, be assisted by South Sudanese or foreign personnel (of any origin) as may be necessary in order to conduct effectively and efficiently their functions[274]. In addition, the suspects are entitled with the right to appoint a lawyer of their choice to accompany or replace the one appointed by the court: the degree of internationalization of the defence team is, therefore, left to the discretion of the person subjected to proceedings[275]. Instead, the registrar, necessarily, will be a citizen of an African state other than South Sudan[276].

The choice of appointing to the most relevant roles African, but not south Sudanese, experts is not devoid of implications. The greater detachment from the domestic national system, strongly undermined by the years of conflict, allows to ensure a better respect of the international standards of fair trials, to guarantee a higher degree of independence and impartiality with respect to the interests at stake in the state, thus making the work of the court itself more credible and helping to strengthen genuine capacity building processes in favour of the local judicial system[277]. In short, the reasons for this option are clearly linked to the urgent need to guarantee security and independence[278].

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[272] H. HOBBS, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, p. 177 ff.

[273] P. LABUDA, "The International Criminal Court and Perceptions of Sovereignty, Colonialism, and Pan-African Solidarity", in *African Yearbook of International Law*, 2014, pp. 289 ff.; C. JALLOH, "Regionalizing International Criminal Law?", in *International Criminal Law Review*, 2009, pp. 445 ff.

[274] IGAD, *Revitalised Agreement*, paras 5.3.3.3. and 5.3.3.6.

[275] IGAD, *Revitalised Agreement*, para. 5.3.3.3.

[276] IGAD, *Revitalised Agreement*, para. 5.3.3.4.

[277] W. BETTS, S. CARLSON, G. GISVOLD, "The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law", in *Michigan Journal of International Law*, 2001, p. 119; L. DICKINSON, "Transitional Justice and International Courts: The Case of Kosovo", in *New England law Review*, 2002, p. 1065 ff.; L. DICKINSON, "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals", in *Denver Journal of International Law and Policy*, 2002, p. 37-39; H. HOBBS, "Hybrid Tribunals and the Composition of the Court: In search of Sociological Legitimacy", in *Chicago Journal of International Law*, 2016, p. 485 ff.

[278] J. AKECH, "Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation", *in International Journal of Transitional Justice*, 2021, p. 587.

The agreement, however, indicates a further proportion to be observed in the selection of court operators: the representation of the female gender must constitute at least 35% of the staff, at any level[279]. This precise and determined figure is unique in the experience of the international criminal courts established to date. All staff will, in any case, be appointed and selected by the President of the African Union Commission[280].

3. Applicable law and jurisdiction.

As regards the applicable law, instead, the 2018 Peace Agreement remains silent, merely suggesting that, from the point of view of substantive law, both international law and a selection of rules of the South Sudanese Penal Code will apply, configuring, thus, a mixed combination that allows you to face in a complete way all the events of the conflict.

The court's jurisdiction, on the contrary, is delineated rather precisely by the Agreement. The HCSS' mandate, in fact, is that of investigate and prosecute those persons responsible for the violation of international law and the applicable south Sudanese law.[281]

The jurisdiction *ratione personae*, thus, should only extend to individuals. No one shall be relieved of his or her criminal responsibility for the fact that he or she has acted in an official capacity as a government official, an elected official or in accordance with an order of a hierarchical superior[282]. Moreover, no immunity, amnesty or pardon will count in court. This will certainly be one of the first issues that the court will face, having to deal with the blank amnesty that, in 2015, the government offered to the generality of the fighters[283]. However, there seems to be no indication of a minimum age to appear before the court as a defendant.

The jurisdiction *ratione materiae* of the court is mixed: limited to genocide, war crimes, crimes against humanity, as well as other serious violations of international law, it also includes the violation of relevant national laws including, explicitly mentioned, the

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[279] IGAD, *Revitalised Agreement*, par. 5.1.1.
[280] IGAD, *Revitalised Agreement*, par. 5.3.3.6.
[281] IGAD, *Revitalised Agreement*, par. 5.3.1.1.
[282] IGAD, *Revitalised Agreement*, par. 5.3.5.5.
[283] Office of the United Nations High Commission for Human Rights, UN Doc. A/HRC/31/CRP.6, *Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation, and capacity in South Sudan: detailed findings*, 10 March 2016, para. 366.

gender-based crimes and sexual violence[284]. With regard to the latter, it will be essential for the Statute of the Court to define in detail the profiles relevant to the jurisdiction of the Court, in so far as they are outlined, by the Penal Code of South Sudan, by a definition that does not accord, instead, with the description of them offered by the norms of international law (For example, sexual violence committed by the husband against his wife does not constitute conduct criminalised by the South Sudanese Penal Code.)[285].

The jurisdiction *ratione temporis* restricts the jurisdiction of the court to the only violations committed from 15 December 2013 to the end of the transitional period which, again in the agreement, is identified in 36 months from the completion of the redistribution of powers following the installation of a government no longer transitory but democratically elected and, hopefully, able to offer the proper functioning of all state apparatus - not least, the judicial[286].

Finally, no indication has been given by the 2018 agreement on the territorial delimitation of the jurisdiction of the court. Presumably, it will be limited to the national territory, scene of clashes since the independence of 2011.

4. The relationship with the national system and international jurisdictions.

A further interesting profile is the relationship between the perspective hybrid court and the South Sudanese national judicial system. The court will be an «independent judicial body»[287].

The court, therefore, will carry out its own operations independently from the national legal system; to such purpose it will, presumably, be entitled with its own judicial subjectivity like, in the past, it was the case of the Special Court for Sierra Leone[288]. In order to ensure the maximum degree of autonomy of the judicial body, in particular from the interests of the local executive, the hybrid court should also be external to the structures of the national judicial system and should also have primary jurisdiction over any South Sudanese domestic court, in cases where issues of concurrent jurisdiction

[284] IGAD, *Revitalised Agreement*, par. 5.3.2.1.

[285] International Human Rights Program, University of Toronto, *Gender-Based Violence in Southern Sudan*, 2008.

[286] IGAD, *Revitalised Agreement*, para. 5.3.1.1, para. 5.3.5.4.

[287] IGAD, *Revitalised Agreement*, para. 5.1.1.2, para. 5.3.1.1. («Independent hybrid judicial body»), para. 5.3.2.2.

[288] SCSL, *SCSL Agreement*, article 11.

arise[289]. It appears, therefore, that, like other mixed courts, such as the Extraordinary Chambers in the Courts of Cambodia, there will be no possibility of direct interaction between the HCSS and the national courts[290]. Obviously, the need to introduce a body specifically charged with dealing with international crimes, but to the greatest extent detached from the domestic system is dictated by the poor state of the internal judicial system of South Sudan, where the principle of separation of powers is constantly threatened, as well as the impartiality and independence of judges[291]. However, it does not appear from the text of the agreement that the South Sudan Tribunal will enjoy such a high degree of autonomy and independence that it will even have its own forces to execute arrest warrants or sentences. However, it does not appear from the text of the agreement that the tribunal will enjoy such a high degree of autonomy and independence as to have its own forces to execute arrest warrants or sentences. The South Sudanese government, committing itself to cooperate with the court, would seem, in fact, to provide the necessary resources so that the decisions of the HCSS do not remain unexecuted[292].

No relationship, at the moment, is foreseeable with the ICC. On the other hand, the reticence of South Sudan could not even integrate that situation of unwillingness or inability necessary for the intervention of the International Criminal Court, in place (or alongside, as in the case of the Special Court for the Central African Republic) of the establishment of the hybrid court. To date, South Sudan is not a member state of the International Criminal Court. Therefore, a declaration by the government of South Sudan of voluntary acceptance of the jurisdiction of the Court would be necessary (scenario, in a perspective of general reluctance to activate justice initiatives in its own territory, implausible) or, alternatively, referral by the UN Security Council to the Court.

5. The seat, the funding, the official languages.

The 2018 Agreement does not take position over the location where the court should operate. It is a duty of the African Union Commission to provide broad guidelines on the location of the tribunal, infrastructure, financial resources[293]. The establishment of a hybrid court, especially if located in the territory of the State, will have the advantages of

[289] IGAD, *Revitalised Agreement*, para. 5.3.2.2.
[290] ECCC, *Co-Prosecutors v. Duch*, Case 001, Decision on the appeals against the order of provisional detention of Kaing Guek Eav alias Duch, 3 December 2007, para. 19.
[291] South Sudan, *Judiciary Act 2008*, sections 20-32.
[292] IGAD, *Revitalised Agreement*, para. 5.1.4.
[293] IGAD, *Revitalised Agreement*, par. 5.1.4.

great accessibility by the civilian population and will have significant effects on the development of the South Sudanese judicial system, increasing its quality. Amnesty International stressed the importance of choosing the seat of the court, saying that it should be as close as possible to where the crimes were committed: therefore, in South Sudan or, however, in the neighbouring states[294].

While Juba remains the best possible choice in terms of transitional justice and visibility to the affected communities, safety concerns may dictate the choice to locate the court abroad. Kersten and Ainley and other scholars proposed to set the HCSS in Arusha, in Tanzania, reutilising the IRMCT's compounds to save some funds for the establishment of the court. Nevertheless, this may conduct to the court being less visible to the general public, threatening its ability to impact over the population[295].

Relying primarily over South Sudan's resources may conduct the court to a shortage of funding.

6. Non-prosecutorial programs of the HCSS.

Finally, some final considerations should be made regarding the functional perspective of the South Sudan Tribunal, assessing the existence of a shared intention to promote not only the proper conduct of trials related to international crimes committed in a given territory, but also to stimulate peace, reconciliation, and capacity building within the internal system[296]. Also in this regard, the expected court for South Sudan seems to fully adhere to the phenomenon of internationalized jurisdictions. In fact, the agreement itself assigns to the Hybrid Court the task of promoting the objective of facilitating truth, reconciliation, and reparation initiatives in South Sudan, seeking, where necessary, the assistance of the African Union, of the United Nations and the African Commission on Human and People's Rights[297]. In fact, «The HCSS shall strive to leave a permanent legacy in the State of South Sudan upon completion of its mandate.»[298]

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[294] D. ISSER, S. LUBKEMANN, S. N'TOWN, *Looking for Justice: recommendations for the establishment of the Hybrid Court for South Sudan*, Amnesty International, FIDH, AFR 65/4742/2016, 2016.

[295] M. KERSTEN, A. , "Hybridization – A spectrum of creative possibilities", in *The President on Trial*, 2020, p. 279.

[296] E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009.

[297] IGAD, *Revitalised Agreement*, par. 5.1.3-5.1.4.

[298] IGAD, *Revitalised Agreement*, par. 5.3.5.6.

The 2018 agreement, which includes the hybrid court project just described, in its entirety sets as a general objective to put an end to the hostilities on the territory of South Sudan, implementing a series of measures to ensure peace and reconciliation in the country. It intends, therefore, to indicate the way to definitively encourage a lasting peace, based primarily on the fight against impunity for the commission of international crimes, on the reconstruction of the truth about past violations and structural causes of political violence, as well as the promotion of human dignity.

After a detailed explanation of the articulation and powers of the transitional government, the document declared a permanent ceasefire, accompanied by a series of commitments concerning the release of prisoners of war, the cessation of violent acts, South Sudan's adherence to international standards for the protection of human rights and the protection of civilians[299].

It is Chapter V which specifically invokes the establishment of a hybrid court for these purposes and stresses the need to use instruments of reconciliation and transitional justice. It, titled «Transitional Justice, Accountability, Reconciliation and Healing» opens by stating that the transitional government of South Sudan is committed to supporting the adoption of the necessary legislation for the establishment of three institutional mechanisms of transitional justice: a Commission for Truth, Reconciliation and Healing, ("CTRH"), an independent judicial system, which takes the name of Hybrid Court for South Sudan and, finally, a Compensation and Reparation Authority ("CRA")[300]. The system generated by the three institutions would pursue the objective of facilitating the emergence of truth, the activation of reconciliation processes and the provision of compensation and reparations to victims. It will be the domestic legislation which is expected to be enacted, to specify and distinguish in detail the mandate and jurisdiction of the three bodies. The Hybrid Court, therefore, would be only one of the instruments at the service of the process of transition to peace in South Sudan [301].

Each of the three bodies would, of course, be entrusted with separate functions, with the common intention of assessing in a reconciliative key past violations of international law and human rights. The need to integrate the functions of the three institutions is also dictated by the desirability of avoiding contradictions between them - for example, the

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[299] IGAD, *Revitalised Agreement*, chapters I-IV.

[300] J. OKUK, "Revitalizing the Government for Peacebuilding in South Sudan", in *African Conflict & Peacebuilding Review*, 2021, vol. 11, n. 2, p. 64 ff.

[301] O. OWISO, "The proposed hybrid court for South Sudan. Moving South Sudan and the African Union to action against impunity", *in African Journal of Conflict Resolution*, 2018, p. 87 ss.

irrelevance of immunity before the court must be combined with the choice of the truth commission not to guarantee them[302]. Although, however, the three institutions can jointly best fulfil the task of establishing peace and restoring dignity and justice to the victims, the commitment to prosecute by judicial means those responsible for international crimes does not remain a political choice within the country but, instead, fully responds to the commitments taken by South Sudan before the international community, through the ratification of treaties.

Whether it is because of the slowdowns suffered by the transitional government and linked to the pandemic emergency from 2020, or, as others claim, lack of political will, however, the widest part of the provisions contained in the 2018 agreement remains to date unworked and outside the work programs of the government itself[303]. The transitional government, in fact, is already lagging behind the deadlines imposed by the agreement, which provided that the necessary national legislation for the establishment of the court should be adopted within three months of the installation of the government itself[304].

7. Critical remarks.

The name chosen for this court, in itself, is interesting in that, for the first time, the adjective "hybrid" is explicitly included in the official title of the court[305]. From a purely theoretical point of view, the choice of this diction is particularly significant because, for a long time, doctrine has questioned the possibility of recognizing the existence of a unique category of courts qualified as "hybrid/mixed/internationalized", leading to substantially different results.

The circumstance on which the court was intentionally baptized with the adjective "hybrid", to a certain extent, seems to validate, in practice, the existence of that category and seems to indicate that, inherent in that qualification, there are a number of specific

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[302] J. G. AKECH, "Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation", in *International Journal of Transitional Justice*, 2020, vol. 14, p. 585 ff.

[303] . A. AWOLICH, "Covid-19 and the Political Transition in South Sudan", in *Sudd Institute Policy Brief*, 2021, p. 7-8.

[304] IGAD, *Revitalised Agreement*, annexure D: Revitalised ARCSS Implementation Matrix 2018.

[305] The courts that, to date, have been pointed out as mixed, rather emphasized the relationship with the domestic judicial system: *Special* Court for Sierra Leone, *Extraordinary* Chambers in the courts of Cambodia, *Special* Panels for Serious Crimes in East Timor, *Special* Criminal Court in CAR, Kosovo *Specialist* Chambers (and some scholars also include the *Extraordinary* African Chambers of Senegal and the *Special* Tribunal for Lebanon).

characteristics, typical to the phenomenon, necessary and substantially implicit. The long-standing question on the possibility of bringing - or not - a court back to the phenomenon of mixed criminal courts seems here, in the first instance, superfluous[306]: does it make sense, in principle, to question whether the "Hybrid Court for South Sudan" is a hybrid court? The choice to title the court in this way, perhaps, may be a symptom of the affirmation of a unitary model of mixed court, to which the adjective "hybrid" should, immediately refer.

In any case, it appears that, should it eventually assume the features as designed in the Agreement, the HCSS will surely adhere to the definition of "hybrid court" as elaborated in chapter II. Indeed, this is not only due to the structure characterised by a variety of factors of hybridisation all falling within the spectrum identified for each of them, but also (and overall) because of the non-judicial purposes that are expressly assigned to – and expected from – the work of the mixed jurisdiction itself.

VI. Other calls for the establishment of hybrid courts.

With the KSC and the SCC fully operational, and the HCSS being established, the new generation of internationalised criminal tribunal is taking shape. Though, the momentum of this second wave of hybridity has not expired yet, and the institution of a mixed jurisdiction has been invocated for a series of other situations.

A mixed jurisdiction for Liberia was advocated to address the violations of international humanitarian law and human rights law (torture, rape, and extra-judicial killings) committed in the country during the courts of a 14-year-long conflict[307]. Kersten and Ainley insist that the court should reutilise the compoungs of the the Special Court for Sierra Leone[308].

Another example is that of the Democratic Republic of the Congo (DRC), where the call to establish a 'Specialized Mixed Cambers' in the DRC came from a coalition of

[306] E. CIMIOTTA, "The first steps of the Extraordinary African Chambers: A new mixed tribunal?", in *Journal of International Criminal Justice*, 2015; S. SELIMI, "The Specialist Court for Kosovo: continuity or departure from the hybrid model?", in *Academicus International Scientific Journal*, 2016.

[307] C. JALLOH, A. MARONG, "Ending Impunity: The Case for War Crimes Trials in Liberia", in *African Journal of Legal Studies*, 2005, vol. 2, p. 53 ff.; P. HAYNER, *Negotiating peace in Liberia: Preserving the possibility for Justice*, Geneva, 2007.

[308] M. KERSTEN, K. AINLEY, "Hybridization – A spectrum of creative possibilities", in *The President on Trial*, 2020, p. 280.

civil society exponents[309]. Civil society has repeatedly invoked the establishment of a hybrid court in DRC to contrast continued gross violations of human rights by armed groups and state officials[310]. The ICC opened a case on the country, but an internationalised criminal tribunal might offer a suitable solution for such cases not included in the jurisdiction of the ICC, following the example of the Special Criminal Court in the Central African Republic[311].

In addition, Sri Lanka has been the subject of the proposition of another mixed tribunal: on 16 September 2015, the United Nations High Commissioner for Human Rights, in its report, recommended the institution of a hybrid special court to face violations of human rights and international humanitarian law in Sri Lanka[312].

The institution of a hybrid court for Syria, to investigate and prosecute those crimes committed in the context of the heinous war dating back to 2011 was repeatedly proposed, but never effectively projected, because there are too many parties to the conflict and the violence is still ongoing[313]. In the meanwhile, the establishment of the International Impartial Investigative Mechanism for Syria allows the collection and preservation of evidence, which might be essential for the conduct of proceedings in the future.

Last, the recent events in Ukraine, following the attack by Russia in February 2022, raised the international community's cry for the establishment of a hybrid tribunal for bringing justice to the Ukrainian communities[314].

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[309] "Democratic Republic of Congo: No More Delays for Justice – Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session", in *Human Rights Watch*, 1 April 2014, available at ww.hrw.org [last accessed 16 December 2021].

[310] "Democratic Republic of Congo: No More Delays for Justice – Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session", in *Human Rights Watch*, 1 April 2014, available at ww.hrw.org [last accessed 16 December 2021]; UN Doc. S/2014/698, United Nations Security Council, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo,* 2014, para. 72; H. HOBBES, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals", in *Leiden Journal of International Law*, 2017, vol. 30, pp. 177–197, p. 178.

[311] R. KEENEN, "When All Ese Fails, Look to The Courts: Using Hybrid Tribunals to Build Judicial Capacity and End Environmental Destruction in Post-Conflict Countries", in *William & Mary Environmental Law and Policy review*, 2019, vol. 43, n. 3, p. 970 ff.

[312] UN Doc. A/HRC/30/CRP.2, Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka*, 16 September 2015; R. DE ALWIS, N. ANKETELL, *A Hybrid Court: Ideas for Sri Lanka*, Colombo, 2015; N. DE VOLTA, "A win for democracy in Sri Lanka", in *Journal of Democracy*, 2016, vol. 7, no. 1; M. VANHULLEBUSH, N. PUSHPARAJAH, "The Politics of Prosecution of International Crimes in Sri Lanka", in *Journal of International Criminal Justice*, 2016, vol. 14, p. 1235-1260; P. JAYAPRAKASH, "Not the Time to Take Feet off the Pedal: Sri Lanka's Transitional Justice Process", in J. ANDHARIA, *Disaster Sudies*, Singapore, 2020.

[313] N. KABAWATM, F. TRAVERSI, "Justice for Syrian Victims Beyond Trials", 2018.

[314] K. HELLER, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression", in *OpinioJuris*, 16 March 2022, available at www.opinionjuris.org [last accessed 18 April 2022].

None of these tribunals has been established, nor a detailed project was elaborated for their institution. However, it is still worth notice those proposals, which can be regarded as a symptom of an even growing interest in the hybrid persecution of international crimes, and which further highlight that the second generation of mixed criminal courts could soon be populated by new jurisdictions.

VII. Conclusions.

Hybridity has been coming back on vogue since 2015, thanks to a plurality of proposals to set up internationalised criminal courts to deal with situations of repeated and widespread violence, with particular reference to the territories of Chad, the Central African Republic, Kosovo, South Sudan, Sri Lanka, the Democratic Republic of the Congo, Syria, Liberia, and Ukraine.

Only some of them have been followed by the effective establishment of a specialised jurisdiction for international crimes (Chad, CAR, and Kosovo) or, at least, a detailed elaboration of a project that "simply" needs to be implemented (such is the case of South Sudan).

Nevertheless, drawing from the definition of hybrid court reached in the course of this study, and comparing those four tribunals with it, it rather appears that the Extraordinary African Chambers addressing the violence committed under Hissène Habré in Chad are not a mixed tribunal, but they rather inaugurate a new kind of "transnational court", based on the emerging principle of universal criminal jurisdiction for *crimina juris gentium.*

Thus, we can conclude that, at the time this study was developed, only the Kosovo Specialist Chambers, the Special Criminal Court in the Central African Republic, and the *costituenda* Hybrid Court for South Sudan embody the second generation of internationalised criminal tribunals.

CONCLUSIONS

CURRENT DEVELOPMENTS OF HYBRIDITY IN THE CONTEXT OF A SECOND GENERATION OF COURTS

The choice to prosecute those responsible for international crimes through solutions that involved both the internal order of a given state and the entire international community, was born in the late 1990s and early 2000s, due to a combination of a number of contingent reasons.

First, the development of international criminal justice from the aftermath of the Second World War to that date, characterised by the affirmation of a shared need to redress the 'shocked conscience of humanity' harmed by the atrocities committed during that conflict and the consequent birth of a culture of accountability for international crimes. In the context of such development, the experience of the military tribunals and the *ad hoc* jurisdictions for Rwanda and the Former Yugoslavia represented initial experiments to implement international criminal justice, shedding light on the limits that purely international courts present.

Second, the situations of total upheaval of the rule of law, in the aftermath of serious experiences of conflict and widespread violence, in the territories of Sierra Leone, Cambodia, Timor-Leste and Kosovo, led the respective governments (autonomous or internationally assisted under a transition programme) to address a request for help to the international community, identified in the United Nations Organization, to conduct fair trials against those responsible for international crimes committed in such situations.

Third, the enthusiasm around the establishment of the permanent International Criminal Court was counterbalanced by the fact that the ICC did not have jurisdiction over the situations of Kosovo, Timor-Leste, Cambodia, and Sierra Leone, thus, it was not an option for fighting impunity in those countries.

Such set of reasons led to the in invention of alternative and innovative solutions for the prosecution of international crimes, upon the request of the states concerned and with the assistance of the United Nations, at different extent. Consequently, in short order, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Regulation 64 Panels, and the Special Panels for Serious Crimes in Dili began their investigative and judicial activities.

Those four jurisdictions, although had been rapidly gathered under the label of "hybrid courts", actually differed enormously from one another, in terms of structure, functioning, jurisdiction, applicable law, relationship with the relative national judiciary system, legal foundation, and means of funding. Thus, scholars have begun to question the actual possibility of considering these four experiences of international justice as a single reality, with the consequent recognition of the existence of a unitary category that can be defined as "hybrid criminal justice".

Drawing from the theory proposed by Sarah Williams that hybridity should be regarded as a multi-axial spectrum within which every single tribunal can find its own position between a purely national and a purely international model of court, the study introduced the original concept of "factor of hybridisation", namely every single element characterising a jurisdiction and assisting in positioning every tribunal in the correct point of the spectrum.

Through this analysis it has been possible to become aware of the fact that diversity and uniqueness are an intrinsic feature of the hybrid criminal justice phenomenon and that, therefore, it is not possible to rely on a definition that takes into account only the characteristic structural parameters of this type of jurisdictions. Therefore, embracing the thesis first elaborated by professor Cimiotta, this study has outlined a definition of hybrid criminal justice that is defined as a phenomenon dealing not only with prosecutorial activities taking place in a forum uniquely structured by a different combination of "factors of hybridisation", but also with those extra-judicial effects that such jurisdictions provoke on the territory over which they operate: transitional justice, capacity-building, and peacebuilding. Such is the concept of mixed tribunal which was the basis for the critical study of the most recent developments in the phenomenon, starting with the new proposals to set up new international criminal courts from 2014 to today.

The reasons underpinning the re-proposal of hybrid criminal justice for the prosecution of mass crimes in the last eight years take root on several levels: first of all, in the continuing need to promote peace, justice and the fight against impunity, linked to a climate of widespread violence, in which war and violations of human rights and international humanitarian law are still widely spread; second, in the fact that the first two decades of work of the International Criminal Court have brought to light some flaws and difficulties in the operation of the latter, which earned it the appellation, already invented for the ICTY, of "giant without limbs". Such flaws are connected to a perceived lengthiness in the investigations and proceedings before the ICC; to the choice of the first

prosecutor to mainly address situations in the African continent, giving rise to harsh critiques of the court having an "African bias" and disrupting the relationship of the court with the African Union and the African states in general; finally, to the dubious effectiveness of the principle of complementarity, which seems to be perceived as an advantage only in cases where it is difficult for the ICC to obtain cooperation from states affected by mass crimes.

This combination of reasons has led to the search for alternative solutions to bring justice to communities affected by international crimes. In this respect, hybrid criminal justice offers undeniable advantages, both social and legal-wise. First, by intervening in a single country, the whole process is addressed to the connected factual and legal context, allowing the possibility to focus accurately on the situation and prosecute a larger number of suspects, bearing different degrees of responsibility, and guaranteeing a higher degree of flexibility of the prosecutorial activity, best adhering to the circumstances of the case and to the needs of the domestic system and the international community. Second, the ability, thanks to the closeness to the domestic system, to enhance capacity building for the benefit of the state's judicial system, to trigger ownership and to enjoy a greater cultural compatibility, and to participate in the transitional justice process of a country.

Having acknowledged the reasons that upheld the return of hybrid criminal justice, the study, by comparing all those new jurisdictions that have been pointed out as "new hybrid" with the definition of hybrid criminal justice as developed previously, identified the components of the second generation of internationalised criminal tribunals: the Special Criminal Court for the Central African Republic, the Kosovo Specialist Chambers, and the Hybrid Court for South Sudan (yet to be established).

After observing these three jurisdictions individually, we can now, at the end of the research work, draw some conclusions on the recent developments of the hybrid criminal justice phenomenon, in the context of a second generation that is far from being exhausted, as demonstrated by the repeated calls for the establishment of further internationalised criminal courts for the situations in the DRC, Sri Lanka, Liberia, Syria, and Ukraine.

A first consideration has to do with the design process and establishment of the new second generation hybrid courts. While one of the characteristics common to all four first generation hybrid courts had been that of having arisen by primary initiative of the state concerned (whether run by an autonomous and independent government, or under a transitional administration offered by the United Nations), which had addressed requests

for assistance to the international community for the establishment of such specialised courts, this is no longer a peculiar feature of contemporary hybrid criminal justice. In fact, for the second generation of hybrid courts, the idea of establishing a mixed criminal court for a particular country seems rather to arise either within a given international or regional organisation or, otherwise, as part of an interlocution between the state concerned and the international community.

Second, international law subjects involved in the development of hybrid court projects and their subsequent implementation are no longer exclusively linked to the UN, which, to date, is directly committed only to the management of the SCC in CAR. On the other hand, other regional organisations such as the European Union, the Council of Europe (involved in the management of the Kosovo Specialist Chambers) and the African Union (protagonist and supporter of the implementation of the project of the Hybrid Court for South Sudan) seem to affirm themselves as the international component of the new hybrid justice. This phenomenon could, in fact, been recognised as part of a general regionalisation of international criminal law.

A third trend is that, despite the fact that the decision to set up an international criminal court is increasingly being taken at international level, as we have just seen, the country concerned is more involved in ensuring the legitimacy and the legal basis for such a court, through procedures for adapting its internal legal system to the commitment to establish such courts expressed in international sources of law.

Fourth is a consideration regarding the structural features of the new generation of internationalised criminal tribunals. Their structure is parallel or detached from that of the courts, thus promoting the experiences of the Special Court for Sierra Leone and the ECCC and, instead, rejecting the model experimented with the Regulations 64/2000 panels and the special panels for Timor-Leste.

Last, as the SCC's experience in CAR shows, second-generation hybrid courts may or may not be interfaced with the possibility of competing with the International Criminal Court. This perspective, if drawn up in a constructive manner and bearing in mind the ultimate objective of ensuring as far as possible the promotion of peace, the protection of human rights, justice, the rule of law and the need to redress victims of international crimes, could promote the possibility of establishing a multi-level network of relations, involving both domestic courts, hybrid tribunals and the International Criminal Court. Such an integrated system of international criminal justice will also enable the principle of complementarity of the International Criminal Court to be better developed, and more

generally, of the role of this permanent criminal jurisdiction in an international community that is constantly evolving.

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