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Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm

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CHAPTER 3. THE RISE OF HYBRIDITY AND REGIONALISM AS NEW ACCOUNTABILITY MODELS

Introduction

In this chapter, I answer the question: what are the typologies of regional and hybrid institutions that have been emerging in ICL? I aim to establish the form, nature and strands of hybridity that have emerged as forums of prosecution in ICL. At the beginning of the chapter, I investigate why the practice of ICL has turned to alternative forums of prosecution. I outline the sequence of the development of forums for application of international criminal law. I argue that regionalism is just one of the necessary strands of alternative forums of prosecutions that have been developed. I specify the forms that regional assistance took in the respective tribunals discussed, in order to reinforce my claim. I present prosecution before national mechanisms and those before purely international tribunals properly so called, as the first and primary platforms for prosecution of international crimes. I then present the emergence of hybrid tribunals (hybridity) and the establishment of supranational regional tribunal as the two most recent forums. I explain the link between the two recent forums by showing that the turn to full regionalism is grounded in the development of the hybrid tribunals. I argue that as hybridity has different phases, so does regionalism in ICL. I present the first phase of regionalism in ICL as the internationalization of domestic courts through the efforts of a regional organization. This assistance driven approach sees a regional organization establishing a hybrid tribunal in the domestic system of a country within the region. Two examples are the Kosovo Specialist Chambers and the Specialist Prosecutor's Office (KSCSPO) in Europe and the Extraordinary African Chamber (EAC) in the Courts of Senegal that was established to prosecute Hissène Habré, the late former President of Chad. I discuss these two examples of regional-hybrid tribunals in chapter 4. The second phase of regionalism is the more independent model that aims to wean itself off international dependence at the regional level. A recent example is the proposal to establish an African Chamber for international crimes in the African Court on Human Rights and Justice. I discuss this independent model of regionalism in chapter 5. In the discussion on the waves of hybridity, I show the two models of hybrid tribunals and their features. The first are those whose establishment are attributable to the UN. I discussed some examples of this in chapter 3. The second model are those

established purely by regional initiatives. I show that these regional-hybrid tribunals belong in a unique class of hybrids that combine regional support with established hybrid practices. I argue that ICL's future is similar to its past – where hybrid tribunals are being created to handle specific situations. My two theses are that hybridity led to regionalism; regionalism has two strands – the assistance driven strand, and the fully independent strand. I advance the position that it is now impossible to overlook the potential of hybrid and regional tribunals in administering international criminal justice. I argue that utilizing these tribunals will help to accelerate the fulfillment of the overall goal of the Rome Statute and augurs well for international criminal justice. Structurally, chapter 3 has 2 sections. In section 1, I start the chapter with a general discussion on diverse accountability models in ICL. In that section, I discuss prosecution before national, international and hybrid mechanisms. Discussions on the new waves of hybridity and typology of hybrid tribunals featured in the second section. I concluded that section with an analysis on the two strands of regionalism and the two models of hybridity

1. Diverse justice enforcement models

International criminal law, and the justice it portends to dispense,¹ are at intriguing crossroads.² At these crossroads, some say it has developed and has reached 'a remarkable benchmark of maturity'.³ Yet, others say its advancement has been stifled by multiple challenges and midlife crisis.⁴ Call it what you may, the reality is that international criminal prosecution, with all its perceived flaws and weaknesses, is a present-day reality. Its practice has so far been somewhat impressive yet grossly imperfect. The optimism of those who think it has come of age is understandable. It has been over 70 years since the first attempts at prosecutions through

¹ On what justice means in ICL, and what ICL means for justice, see D. Robinson 'International Criminal Law as Justice' (2013) 11 *JICJ* 3 699-711.

² On this, see K. Ambos 'International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty Based Universal System' in C. Stahn & L. van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 161-177; M. Findlay 'The Challenges for Asian Jurisdictions in the Development of International Criminal Justice' (2010) 32 *Sydney Law Review* 2 205-219.

³ S. Vasiliev 'International criminal trials: A normative theory' (2014) University of Amsterdam Ph.D. Thesis, Volume I, at 4.

⁴ On the challenges capable of stifling the growth of the ICC, see C. Gegout 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34 *Third World Quarterly* 5, 800-818. See also J. J. Vilmer 'The African Union and the International Criminal Court: counteracting the crisis' (2016) 92 *International Affairs* 6, 1341.

international criminal tribunals: the Nuremberg and Tokyo Tribunals. It has been more than 20 years since the ad hoc tribunals and the ICC were established. These have been years of learning and unlearning; years of making many mistakes and getting some things right. There is no doubt that lessons have emerged from these years. One of the most enduring legacies from these years of experimenting with international criminal justice is that hybrid and regional hybrid tribunals have become veritable mechanisms for securing accountability for international crimes.⁵

There is no universal agreement on the appropriate forums for enforcing international criminal law. Jalloh identified three pillars upon which present enforcement of international criminal law rests: national courts, international courts and domestic courts of third states.⁶ On his part, Stahn identified four layers: ‘domestic’, ‘international’, ‘hybrid’ and ‘regional’,⁷ with the last two being the most recent additions to the fold. Taking the two scholars’ positions into account, I submit that there are currently five frameworks for the enforcement of international criminal law. These are national mechanisms which are not only the primary enforcement frameworks, but also enjoy primacy in relation to other frameworks; the second are prosecutions done in national courts of third states, through the application of universal jurisdiction; the third is international framework, while the fourth and the fifth, which are the most recent additions are hybrid and regional tribunals.

There are however scholars who argue that in the formal sense, there are only domestic and international courts. Accordingly, O’Keefe submits that what truly exists is ‘national implementation of international crimes’ and ‘a state’s international legal authority in relation to national laws.’⁸

Notwithstanding the contrary view above, the recent additions have brought with them significant challenges while expanding the institutional frameworks of international justice. I call this ‘the four-tiered justice paradigm’. While there exists a distinction between prosecutions in national courts of a state with jurisdiction over a crime, and those done in national courts of third states,

⁵ See generally A. Fichtelberg *Hybrid Tribunals: A Comparative Examination of Their Origins, Structure, Legitimacy and Effectiveness* (Springer Press 2015).

⁶ C. Jalloh ‘The Place of the African Court of Justice and Human and Peoples’ Rights in the Prosecution of Serious Crimes in Africa’ in C. Jalloh and Ors. *The African Court of Justice and Human and Peoples’ Rights in Context: Developments and Challenges* (Cambridge University Press 2019) 57.

⁷ C. Stahn *Fair and Effective Investigation and Prosecution of International Crimes Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2* (International Nuremberg Principles Academy Press 2018) 3-4.

⁸ R. O’Keefe, *International Criminal Law* (Oxford University Press 2014).

through the exercise of universal jurisdiction, I will adopt a four tier paradigm for the purpose of this study, thus considering both forms of prosecution in a domestic court as the same. I admit that it is quite fundamental whether a case is handled under universal jurisdiction or based on some other principles, particularly in terms of competition and/or coordination and cooperation between the two states concerned. The application of universal jurisdiction is one of the five principles upon which states' right to punish international crimes within their territory is founded. This chapter is concerned with the two recent additions and how one has led to the other. However, I will briefly discuss the previous forums for enforcing ICL.

1.1. ICL enforcement before national and international mechanisms

States have the primary responsibility of punishing international crimes in their territory. This is trite and undisputable in international law. The Rome Statute recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'⁹ This responsibility flows from a state's duty to maintain public order in their domain.¹⁰ It is also a manifestation of a state's exercise of sovereignty.¹¹ Chapter 1 of this work demonstrates how states have historically sought to protect that sovereignty. This ensured that they only agreed to the creation of tribunals to address specific situations. According to Stahn, one early example is states' agreement to establish the UN War Crimes Commission (UNWCC).¹² The Commission was created to facilitate domestic prosecutions of crimes committed in WWII.¹³

States' right to punish international crimes in their territories is founded on five principles. The principles of territoriality, active personality, passive personality, protective principle and lastly, universal jurisdiction. Territoriality principle implies that a state has jurisdiction to punish international crimes that take place in their territory. It sees law enforcement as part of keeping the peace in a territory.¹⁴ Active personality is based on the nationality of the perpetrator of the crimes.

⁹ Para. 6 of the Preamble of the Rome Statute.

¹⁰ A. Sagalyn 'Preservation of Law and Order: A Fundamental Function of Government' (1965) 40 *Notre Dame Law Review* 549-551.

¹¹ A. Chehtman 'The Extraterritorial Scope of the Right to Punish' (2010) 29 *Law and Philosophy* 127-157 at 130.

¹² On the UNWCC, see C. Stahn 'Complementarity and Cooperative Justice ahead of their Time? The United Nations War Crimes Commission, Fact-Finding and Evidence' (2014) 25 *Criminal Law Forum* 223-260.

¹³ C. Stahn *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 161.

¹⁴ See R. M. Perkins 'The Territorial Principle in Criminal Law' (1971) 22 *Hastings Law Journal* 5, 1115.

It flows from the ‘Roman Theory of Criminal Law.’¹⁵ Passive personality relates to jurisdiction that is rooted in the victim’s nationality. This is the ‘Injured Forum Theory’.¹⁶ The protective principle allows a state to claim jurisdiction over a crime if the conducts affect the interest of the state – even if the defendant is outside of the state’s territory.¹⁷ In universal jurisdiction, a state’s power to prosecute is grounded in the idea that the crime being prosecuted harms humanity and a state is acting on behalf of the international community. Jurisdiction here is exercised by a state even if it would lack jurisdiction based on the other four principles.¹⁸ Accountability for international crimes within the domestic systems – own or third states’ - has seen developments that warrant states adopting special laws and establishing special institutions within existing legal systems for the purposes of investigating and prosecuting international crimes.¹⁹

There are perceived advantages in international crimes prosecution through national mechanisms. However, the heightened risk of impartiality deficit and intimidation of the judicial system by powerful perpetrators may drown out those advantages.²⁰ International crimes are often committed by powerful perpetrators. After the Nuremberg and Tokyo Tribunals, key trials for international crimes had taken place in domestic courts. Prominent examples include ‘the *Eichmann and Demjanjuk* cases in Israel, the *Menten* case in the Netherlands, the *Barbie and Touvier* cases in France and the *Finta, Mugesera and Munyaneza* cases in Canada.’²¹ Some of these cases have contributed to the jurisprudence of more recent ICL institutions.²²

Aside from the domestic systems, another commonly used forum for prosecuting international crimes, especially since the horrors of WWI and WWII have been international institutions created

¹⁵ See W.D Aston ‘Problems of Roman Criminal Law’ (1913) 2 *Journal of the Society of Comparative Legislation*, 213-231.

¹⁶ See R. M. Perkins ‘The Territorial Principle in Criminal Law’ (1971) 22 *Hastings Law Journal* 5, 1116.

¹⁷ M. Garrod ‘The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality’ (2012) 12 *International Criminal Law Review* 12, 763–826.

¹⁸ On Universal Jurisdiction, see X. Philippe ‘The principles of universal jurisdiction and complementarity: how do the two principles intermesh?’ (2006) 88 *International Review of the Red Cross* 862, 375-398.

¹⁹ See J. Charney ‘International Criminal Law and the Role of Domestic Courts’ (2001) 95 *The American Journal of International Law* 121-125.

²⁰ J. Stigen *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Brill Nijhoff 2008) 22.

²¹ Sean D. Murphy, ‘New Mechanisms for Punishing Atrocities in Non-International Armed Conflicts’ (2015) 16 *Melbourne Journal of International Law* 299, 305.

²² See for example W. Schabas ‘The Contribution of the Eichmann Trial to International Law’ (2013) 26 *Leiden Journal of International Law* 2, 667-699.

for that purpose. This is partly due to the understanding that international cooperation is often necessary in order to address impunity for atrocities. This was reiterated in paragraph 4 of the Preamble to the Rome Statute. The international nature of their enabling instruments is what confers international authority on them.²³ Stahn identifies two theories that justify international criminal jurisdiction. The first is the view that international tribunals only exercise international jurisdiction as a result of authorities that have been delegated to them by states. The second theory casts international tribunals as projects to protect humanity from crimes.²⁴ International criminal jurisdictions have been exercised through temporal and permanent platforms. The temporal platforms are those institutions that have been created, since at least the end of WWII to punish perpetrators of crimes in respect of specific conflicts. Examples include the Nuremberg and Tokyo Tribunals. They are the predecessors of the hybrid tribunals that are discussed in this chapter. The second type of platform is the more permanent institution like the International Criminal Court.

The emergence of hybrid and regional tribunals has added to the ‘four-tiered justice paradigm’ or ‘the multi-layered accountability architecture of international justice.’²⁵ International criminal law has developed to an extent that the central issues are no longer about whether persons who commit international crimes should be prosecuted, but more about the appropriate forum and the proper prosecutorial strategies to adopt in prosecuting them. This is what Frédéric Mégret calls ‘the normalization of international criminal justice.’²⁶ This normalization also accounts for the proliferation of international criminal adjudicatory bodies.²⁷ Now that there are more concerns relating to the finer points about forums and strategies, a discussion on the place of these alternative forums is necessary.

²³ C. Stahn *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 191.

²⁴ *Ibid.*

²⁵ C. Stahn *Fair and Effective Investigation and Prosecution of International Crimes Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2* (International Nuremberg Principles Academy 2018) 3.

²⁶ F. Megret ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (2005) 38 *Cornell International Law Journal* 3, 725.

²⁷ See generally Tan, Alvin Poh Heng ‘Advancing international criminal justice in southeast Asia through the regionalisation of international criminal law’ (2014) PhD Thesis, University of Nottingham.

1.2. The new wave of hybridity

ICL has witnessed a new wave of hybridity²⁸ as ‘hybrid criminal tribunals have returned as a viable option in international criminal justice.’²⁹ Since the 1990s, some of the more common forums for prosecuting international crimes have been tribunals and courts created and/or supported by the UN, regional bodies and/or states.³⁰ It has been suggested that these tribunals became necessary as stop-gap measures during the period between the adoption of the Rome Statute in 1998 and its coming into force in 2002.³¹ Some have described them as ‘the most effective’ mechanism for prosecution,³² while others have called them ‘the pre-eminent symbol of global justice.’³³ Beyond agreement about the reality of their emergence, scholars are divided on key questions around their usefulness and continuous relevance in ICL, with one scholar even suggesting that their popularity has declined dramatically.³⁴

There is no agreement among academics on the definition of a hybrid tribunal,³⁵ but they tend to blend ‘the international and the local as a judicial accountability sharing measure between states and the UN’.³⁶ They are composed of independent judges, working on the basis of predetermined

²⁸ On the new wave of hybridity in international criminal law, see P.K. Mendez ‘The new wave of hybrid tribunals: A sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?’ (2009) 20 *Criminal Law Forum* 95; see also C. Stahn ‘Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity’, 23 September 2016 *EJIL: Talk Blog of the European Journal of International Law*, [available at <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/> - accessed 6 February 2024]; E. M. Bruch ‘Hybrid Courts: Examining hybridity through a post-colonial lens’ (2010) 28 *Boston University International Law Journal* 1; S. Nouwen, ‘Hybrid Courts’: The hybrid category of a new type of international crimes courts’ (2010) 2 *Utrecht Law Review* 213.

²⁹ H. Hobbs ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16 *Chicago journal of International Law* 2, 485.

³⁰ See ‘International and Hybrid Criminal Tribunals’ [available at: <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> - accessed 15 June 2023].

³¹ M. Holvoet and P. de Hert ‘International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals’ (2012) 17 *Tilburg Law Review* 235.

³² C. E. Carroll ‘Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State’ (2013) 90 *Seton Hall University Law School Student Scholarship* 1.

³³ D. Orentlicher, ‘Striking a Balance: Mixed Law tribunals and Conflicts of Jurisdiction’ in L. Mark & S. Philippe (eds) *Justice for Crimes Against Humanity* (Hart Publishing 2003) 212.

³⁴ P. McAuliffe ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan’ (2011) 7 *Journal of International Law and International Relations* 1, 1.

³⁵ C. Hicks ‘*The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice* (ZED books 2018) 67.

³⁶ E. Higonnet ‘Restructuring Hybrid Courts: Local Employment and National Criminal Justice Reforms’ (2006) 23 *Arizona Journal of International and Comparative Law* 347.

rules of procedure and rendering binding decisions.³⁷ Moreover, their other common features are that they combine national and international components in their personnel and applicable laws; they are ‘ad hoc institutions; created to address particular situations; for a limited amount of time and are the results of singular political and historical circumstances.’³⁸

There have been two primary models of temporary criminal tribunals: the ‘international’ and the ‘internationalized or hybrid’ tribunals. The international tribunals refer to those institutions that enjoy an independent status while the internationalized refer to those incorporated into a state’s judiciary. Examples of the former are the UN *ad hoc* tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). They applied international law *stricto sensu*. They however suffered from certain inherent disadvantages and fundamental drawbacks. Their operation was arguably costly.³⁹ They dispensed justice slowly, and could only handle a relatively limited caseload,⁴⁰ although, some scholars argued that looking at the numbers, the two tribunals did well.⁴¹ The ICTR’s administration was alleged to have been corrupt.⁴² Both ICTY and ICTR were sited far away from the scenes of crimes, thus making them somewhat detached from the actual victims and local realities.⁴³ These distances make the trials less accessible and meaningful for victims.⁴⁴ In addition, evidence-gathering in faraway crime scenes proved difficult.⁴⁵ There were challenges with enforcement and non-cooperation from states.⁴⁶ The tribunals faced increasing political and financial constraints.⁴⁷

³⁷ The Graduate Institute Geneva ‘International tribunals: Hybrid Courts’ [available at <http://libguides.graduateinstitute.ch/icl/hybrid> - accessed 5 February 2024]

³⁸ *Ibid.*

³⁹ P.K Mendez ‘The new wave of hybrid tribunals: A sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?’ (2009) 20 *Criminal Law Forum* 53, 61.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² P.M. Wald ‘Accountability for War Crimes: What Role for National, International and Hybrid Tribunals?’ (2004) *American Society of International Law: Proceeding of Annual Meeting* 192.

⁴³ P. Clark ‘*Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018) 45.

⁴⁴ *Ibid.*

⁴⁵ R. Dicker and E. Keppler ‘Beyond the Hague: The Challenges of International Justice’ at <https://www.hrw.org/legacy/wr2k4/download/10.pdf>.

⁴⁶ G.K. McDonald ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 JICJ 558-571. See also L. Ljuboja ‘Justice in an uncooperative world: ICTY and ICTR foreshadow ICC ineffectiveness’ (2010) 32 *Houston Journal of International Law* 780.

⁴⁷ R. Dicker and E. Keppler Dicker R and Keppler E, ‘Beyond the Hague: The Challenges of International Justice’ [available at <https://www.hrw.org/legacy/wr2k4/download/10.pdf> - accessed 12 January 2024].

As a result of non-cooperation from states, the ICTR experienced a delay in apprehending its suspects. This is also probably because of overly ambitious prosecution strategies. In the ICTY, running costs were rising with indictments being overloaded with too many counts.⁴⁸

1.3. The rise of new hybrid tribunals

Given the shortcomings of the *ad hoc* tribunals, different hybrid tribunals began to emerge during the late 1990s and early 2000s. Their emergence was partly because of the criticisms against the ICTY and the ICTR.⁴⁹ These hybrids offered non-permanent solutions to specific situations.⁵⁰ Commenting on the factors responsible for their emergence, Kersten stated that

[T]heir development owed much to a peculiar convergence of three factors: 1) wavering international commitment to the sprawling, costly, and lengthy *ad hoc* tribunals; 2) the absence of a permanent supranational criminal court; and 3) a growing appreciation that states should have primary responsibility to investigate and prosecute international crimes combined with a keen awareness that post-conflict states may not be able to try cases in accordance with international standards.⁵¹

Given these factors, it became obvious that hybrids were needed to address some of the shortcomings of the *ad hoc* tribunals. But what sort of hybrids were expected and how are they defined? Like many terms in ICL, the term ‘hybridity’ does not lend itself to an ease of definition. For this reason, a description of its features seems to be more appropriate. In that regard, there are three ways in which tribunals display their hybridity. The first is through their origin, in which case, they were created through domestic and international processes. The second is through their application of both domestic and international law while the third is their composition, in that they

⁴⁸ M. Sterio & M. Scharf (eds) *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (Cambridge University Press 2019) 1-10.

⁴⁹ Suzanne Katzenstein ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2003) 16 *Harvard Human Rights Journal* 245.

⁵⁰ S. Williams ‘Hybrid Tribunals: A Time for Reflection’ (2016) 10 *International Journal of Transitional Justice* 539.

⁵¹ M. Kersten ‘International Criminal Justice Redux: A New Wave of Hybrid Courts’ *Justice in Conflict*, 13 March 2018 [available at <https://justiceinconflict.org/2018/03/13/international-criminal-justice-redux-a-new-wave-of-hybrid-courts/> - accessed 6 February 2024].

combine domestic and ‘international’ members.⁵² These descriptions explain hybridity better than an attempt at an all-encompassing definition.

On the other hand, there are those who argue that there are still no clear features through which hybrids can be recognized. According to Muharremi, ‘the concept of hybrid courts is unclear and there are no clear criteria which would provide guidance for establishing if a judicial body is a hybrid court or not. The idea of hybrid courts is conceptually misleading because it creates the perception that hybrid courts are a separate institutional category different from international and domestic criminal courts.’⁵³ While there may remain some confusion on the actual features that a hybrid court must possess, there is no doubt that some features have become well-known as displaying a court’s hybridity. Such features include that the tribunal performs a criminal judicial function; that the tribunal is temporary or transitional; that it has mixed composition;⁵⁴ and that it has a measure of international funding.⁵⁵ Existing examples however show that some hybrids, like the KSC, have a fully international bench, while some like the SCSL and ECCC often ignore domestic laws.

1.4. Typology of the new hybrid tribunals

There have been some academic writings on the typology of the new hybrid tribunals.⁵⁶ For example, Stahn identified two broad types of hybrids. The first are the ‘hybrid courts’ properly so called. They have pure international legal basis and are generally independent and detached from the domestic jurisdiction. Examples are the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL). The SCSL and the STL were not incorporated into their respective states’ judiciary. While the STL applied domestic law alongside international law, the SCSL only applied international law. This implies that they shared attributes of both international and national

⁵² E. M. Bruch ‘Hybrid Courts: Examining hybridity through a post-colonial lens’ (2010) 28 *Boston University International Law Journal* 1, 6.

⁵³ R. Muharremi ‘The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers’ (2018) 18 *International Criminal Law Review* 4.

⁵⁴ R. Muharremi ‘The Kosovo Specialist Chambers and Specialist Prosecutor’s Office’ (2016) *ASIL Online Post*, [available at <https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office> - accessed 6 February 2024].

⁵⁵ On other features of hybrid courts, see S. Williams ‘The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?’ (2013) 11 *JICJ* 1139-1160.

⁵⁶ For example, see S.M.H Nouwen ‘Hybrid Courts’: The hybrid category of a new type of international crimes courts (2006) 2 *Utrecht Law Review* 190.

tribunals. They are probably better referred to as ‘internationalized’ since there are doubts as to whether they are in a separate family of courts. The second types are ‘the mixed domestic–international courts that form part of the domestic system, but with adjustments in relation to the composition of staff or the applicable law.’⁵⁷ These are the ones commonly referred to as the ‘internationalized’ or ‘mixed-criminal’ tribunals. Examples include the Special Panels for Serious Crimes in East Timor (SPSC), The Kosovo Specialist Chambers and Prosecutor’s Office (KSCSPO), the Regulation 64 UNMIK Panels in Kosovo, the EULEX judicial panel,⁵⁸ the War Crimes Chamber in the State Court of Bosnia and Herzegovina (WCCSCBH), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁵⁹

What has emerged from these classifications is that the courts that are referred to as ‘hybrid tribunals’ are diverse.⁶⁰ There have been at least ten of such ‘hybrid tribunals’, including the SCCCAR and the Hissène Habré court. There are those who have contested that the Iraqi High Tribunal and the International Crimes Tribunal-1 Bangladesh⁶¹ would not qualify as ‘hybrid tribunals’.⁶² The major argument is because they lacked international judges in their composition. The presence of international judges had been argued as the ‘most defining feature’ of such tribunals.⁶³ In the next sub-section, I discuss five examples of hybrid tribunals. They are the SCSL, STL, ECCC, SPSL and SCCCAR. The first two are international hybrid tribunals properly called, while the other three are mixed criminal tribunals.

⁵⁷ C. Stahn, ‘Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity’, 23 September 2016 *EJIL: Talk Blog of the European Journal of International Law*, [available at <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/>] - accessed 6 February 2024]; see also C. Stahn *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 198.

⁵⁸ O. Dursun-Özkanca ‘The European Union Rule of Law Mission in Kosovo: An Analysis from the Local Perspective’ (2018) 17 *Ethnopolitics* 1, 71-94.

⁵⁹ Stahn (2016) ‘Tribunals are Dead (n.57).

⁶⁰ H. Hobbs ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16 *Chicago Journal of International Law* 2, 489.

⁶¹ See R. Mustakimur ‘Has the International Crimes Tribunal Bangladesh (ICT-BD) assisted to Reconcile Society?’ (2023) 19 *AUDJ* 2, 115-149, for thoughts on this tribunal.

⁶² See S. M.H. Nouwen, ‘Hybrid Courts’: The hybrid category of a new type of international crimes courts’ (2010) 2 *Utrecht Law Review* 213.

⁶³ S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (HART Publishing 2012).

1.4.1. The Special Court for Sierra Leone (SCSL)

Between 1991 and 2002, there was a civil war in Sierra Leone. In an effort to bring about peace and reconciliation, the government of Sierra Leone requested the United Nations to establish a special court to try those suspected of having perpetrated atrocities during the war. In response, the Security Council, on 14 August 2000, adopted Resolution 1315 which requested the Secretary-General of the UN to negotiate the establishment of a special court with the government of Sierra Leone. The Resolution specifically ‘recommends that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.’⁶⁴ The establishment of the court was a product of direct request and engagement of the government with the UN.

In essence, this court was a treaty-based entity that was jointly established by the government of Sierra Leone and the United Nations, as opposed to the ICTY and ICTR which had been established by Security Council’s resolutions under Chapter VII of the UN Charter. The import of this is that while the ICTY and ICTR consisted of international judges, the SCSL benches and the OTP were a mix of international and domestic personnel.⁶⁵ Another difference is in its mode of establishment. While the SCSL had primacy over domestic courts in Sierra Leone and could order surrender of accused persons, it lacked similar powers of the ICTY/ICTR to compel cooperation from a third state. The SCSL did not have primacy over judicial mechanisms of any state outside Sierra Leone.⁶⁶ Lastly, while the subject-matter jurisdiction of the ICTY/ICTR related to customary international law, the SCSL had jurisdiction over these, alongside some other crimes under Sierra Leonean laws.⁶⁷

⁶⁴ UN Doc: S/RES/1315 (2000) Resolution 1315 (2000) Adopted by the Security Council at its 4186th meeting, on 14 August 2000.

⁶⁵ M. Scharf, 'Special Court for Sierra Leone' (2000) 6 *Int'l Peacekeeping* 156.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

While the African Union and its predecessor, the OAU, did not establish the SCSL, the regional body expressed political support and offered diplomatic assistance to the tribunal. It also facilitated regional cooperation for the court.⁶⁸ These are the specific

1.4.2. Special Tribunal for Lebanon (STL)

2005 was the decisive year for the establishment of a Special Tribunal for Lebanon. Many violent crises had taken place in Beirut, but none was as significant as the 14 February bombing of the motorcade of the then Prime Minister – Rafiq Hariri. His death, as well as the deaths of other 22 people in the bomb blast were the triggers that led to the establishment of the STL. Its establishment was preceded by the establishment of the United Nations International Independent Investigation Commission (UNIIC), through a UNSC Resolution 1595.⁶⁹ The Commission started its work on 16 June 2005. As Harwood had noted, the UNIIC is unique among international commissions of inquiry because, unlike others, it was established to make inquiries into domestic crimes and ‘it is the only commission to have direct institutional links with an internationalized criminal tribunal.’⁷⁰

In December 2005, the Lebanese Prime Minister sent a letter to the Secretary-General of the UN, requesting the latter ‘to establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Hariri.’⁷¹ Two days later, the UNSC responded by adopting Resolution 1644 which essentially extended the mandate of the UNIIC, in accordance with the 5 December 2005 letter from the Prime Minister.⁷² After a series of political events in Lebanon, the UNSC invoked its powers under article IV of the UN Charter to pass Resolution 1757,⁷³ thus causing the agreement earlier signed

⁶⁸ N. Novogrodsky ‘Speaking to Africa – The Early Success of the Special Court for Sierra Leone’ (2006) 5 *Santa Clara Journal of International Law* 1, 194-216.

⁶⁹ S/RES/1595 (2005) Resolution 1595 (2005) Adopted by the Security Council at its 5160th meeting, on 7 April 2005.

⁷⁰ C. Harwood ‘The UN International Independent Investigation Commission in Lebanon’ in J. Meierhenrich (ed.) *The Law and Practice of International Commissions of Inquiry* (Oxford University Press 2018).

⁷¹ S/2005/783, Letter dated 13 December 2005 from the *Chargé d’affaires a.i.* of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General.

⁷² UN Doc: S/2005/762 ‘Letter dated 5 December 2005 from the *Chargé d’affaires* of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General’.

⁷³ S/RES/1757 (2007), Resolution 1757 Adopted by the Security Council at its 5685th meeting, on 30 May 2007.

between the government and the UN to come into force. The STL was thus established. The model of establishment of the STL is closely tied to the work of a commission of enquiry. But it shares similar feature with the SCSL in that its establishment was at the instance of the invitation by the Lebanese authorities to the UN.

There are divergent views on the place of the STL in ICL. For some, it was a triumph against impunity, while others argued that it was ‘partial at best and illegal at worst.’⁷⁴ It has also been called ‘an oddity’.⁷⁵ It was unique on many fronts: it was the first time a treaty-based tribunal came into existence through a UN Security Council resolution adopted under Chapter VII of the UN Charter. It was also an international tribunal that solely existed to prosecute, and depended on, ‘domestic substantive crimes’.⁷⁶ At the time of its establishment, an international tribunal was used to resolve a domestic problem, albeit a problem with an international dimension. It was established to punish the perpetrators of the killing of Hariri. Other attacks may also be tried by the tribunal if certain criteria are fulfilled. This is different from other internationalized tribunals which were set up to address ‘mass atrocities.’

1.4.3. The Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Khmer Rouge regime ruled in Cambodia between 1975 to 1979.⁷⁷ In that period, the regime committed a catalog of international crimes. The ECCC was established in 2003, exclusively under the domestic law at that point, to try the most senior leaders in the regime. It was established pursuant to an agreement between the UNGA and the Cambodian government that succeeded the Khmer Rouge.⁷⁸ It was the second hybrid tribunal to be established in Southeast Asia after the Special Panels for Serious Crimes (SPSC) in Dili, East Timor. The ECCC is a hybrid court which was embedded into the domestic system of the Cambodian courts. The UN wanted an international court to guarantee ‘independence, impartiality and objectivity’ but the Cambodian government

⁷⁴ See M.A Bouhabib ‘Power and Perception: The Special Tribunal for Lebanon’ (2010) 3 *Berkeley J. of Middle Eastern & Islamic Law* 1, 174.

⁷⁵ M. Milanovic ‘The Oddity that is the Hariri Tribunal’ [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906 – accessed 12 March 2023].

⁷⁶ See N. N Jurdi ‘The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon’ (2007) 5 *JICJ* 5 1125-1138.

⁷⁷ See generally J. D. Ciorciari & A. Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, (2014) 35 *Michigan Journal of International Law* 369.

⁷⁸ 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.

pushed to retain ownership. The compromise was therefore an internationalized court in Cambodia's legal system.⁷⁹ The ECCC explained that its hybridity was chosen to ensure full national involvement and an adherence to international standards.⁸⁰ Article 3 of the Agreement provided for mixed bench composition consisting of Cambodian and international judges, with the latter being in minority. In terms of procedure, Vasiliev argues that adherence to the inquisitorial model distinguishes the ECCC from other international and hybrid tribunals.⁸¹ The ECCC was equally dogged with criticisms that include corruption and political interference,⁸² high costs and slow proceedings as well as insufficient outreach to the population.⁸³ There appeared to have been a 'power battle' between the international and national judges in the ECCC.⁸⁴ While the risk of political considerations and interferences are present in international tribunals, they are heightened in hybrids, regional or domestic criminal tribunals.⁸⁵ This is one potent argument against regional tribunals who may be subservient to few powerful states within a regional bloc.

1.4.4. Special Panels for Serious Crimes (SPSC) in East Timor

For decades, the people of East Timor had agitated for independence from Indonesia which had unlawfully occupied East Timor since December 1975. Supporters of independence suffered many acts of systematic violence and crimes from Timorese militia groups sponsored and supported by the Indonesian Army. On 30 August 1999, under the supervision of the UN, a referendum conducted by the United Nations Mission to East Timor (UNAMET), voted overwhelmingly for independence, as against the option of remaining an autonomous entity within Indonesia. Shortly after the referendum in August 1999, through resolution 1272, the Security Council, acting under

⁷⁹ C. Stahn *A critical Introduction to International Criminal Law* (Cambridge University Press 2019) 203.

⁸⁰ Extraordinary Chambers in the Courts of Cambodia, 'Why was this model chosen for the ECCC?' [available at <https://www.eccc.gov.kh/en/faq/why-was-model-chosen-eccc> - accessed 7 February 2024].

⁸¹ S. Vasiliev 'Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in International Criminal Law?' in S.M. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press 2016) 389.

⁸² T. Hamilton and M. Ramsden 'The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia' (2014) *International Criminal Law Review* 115-147.

⁸³ C. Sperfeldt 'From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 *JICJ* pg. 1113.

⁸⁴ See M. J. Christensen & A. Kjeldgaard-Pedersen 'Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Courts of Cambodia' (2018) 18 *International Criminal Law Review* 127.

⁸⁵ E. Nielsen 'Hybrid International Criminal Tribunals: Political Interference and Judicial Independence' (2010) 15 *UCLA J Int'l L Foreign Affair* 289.

Chapter VII of the Charter, established the UN Transitional Administrations for East Timor (UNTAET)⁸⁶ on 25 October 1999, to administer the territory during the transition period, and more importantly, to build capacity for self-governance for the new government.⁸⁷ The UN also set up an International Commission of Enquiry whose report was made public on 30 January 2000. The report recommended the establishment of a UN international tribunal.⁸⁸ In response, Indonesia promptly rejected the report of the Commission of Enquiry. Instead, it committed itself to investigate the violence and to prosecute those who are found culpable. Its argument was that the crimes were committed at a time when East Timor was a territory of Indonesia and as such, Indonesia could exercise jurisdiction over investigation and prosecution of the violations.

Faced with Indonesia's stiff opposition, the UN settled for a system that allowed the judicial systems in both Indonesia and East Timor to conduct investigation and trials into the alleged crimes and human rights violations. In Indonesia, the government established the National Commission of Inquiry on Human Rights Violations in East Timor (KPP-HAM)⁸⁹ and the Ad Hoc Human Rights Court.⁹⁰ On the other hand, there was a total lack of a functional judicial system in East Timor. The UNTAET had to build a judicial system for the country 'virtually from scratch'.⁹¹ The UNTAET adopted some regulations, including Regulation 2000/11 which established a number of district courts.⁹² Thus, the Special Panels for Serious Crimes in East Timor (SPSC) were created by the UNTAET, for the purposes of prosecuting perpetrators of grave international and national

⁸⁶ In various contexts, the UN had proposed and used transitional administrations to restore peace in troubled or conflict areas. It has been previously used in Kosovo, East Timor and Cambodia. On this, see S. Chesterman *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford Scholarship Online 2004). See also M. Giffard-Lindsay *Post-conflict peacebuilding: Lessons from transitional administrations in Cambodia and East Timor* (Lambert Academic Publishing 2012).

⁸⁷ Paragraph 2(e) of Resolution 1272.

⁸⁸ D. Cohen 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' (2002) 61 *Analysis from the East-West Center 1*.

⁸⁹ Human Rights Watch, 'Justice Denied for East Timor: Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action' (2002) [available at <https://www.hrw.org/legacy/background/asia/timor/etimor1202bg.htm> - accessed 6 February 2024].

⁹⁰ See D. Cohen 'Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta' (2003) *International Center for Transitional Justice Occasional Paper Series 12*.

⁹¹ D. Cohen 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' (2002) 61 *Analysis from the East-West Center 1*.

⁹² Regulation No. 2000/11 on the Organization of Courts in East Timor.

crimes. Similar to the SCSL and STL, the mandate of the panels extended beyond international law, to breaches of East Timorese national laws.⁹³

The Special Panels and a Special Crimes Unit (SCU) were the two “distinct institutions that made up what has now been called ‘the Serious Crimes Process’ in Timor Leste.”⁹⁴ The third organ was the Public Defender’s office which functioned independently of the Special Panels.⁹⁵

The normative framework for the Serious Crimes Process consisted of different regulations.⁹⁶ Some of the most referenced ones in literature are Regulation 2000/11 on the Organization of Courts in East Timor and Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. Aside from minor exceptions, this regulation mirrored the Rome Statute. Other regulations included Regulation 2000/16 on the Organisation of the Public Prosecution Service in East Timor; Regulation 2000/30 on Transitional Rules of Criminal Procedure and Regulation 2001/25 on the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor.

Section 7 of Regulation 2000/11 had provided that the district courts shall have territorial jurisdictions in other cities apart from Dili. Section 10 however confers the district courts in Dili with exclusive jurisdiction for serious crimes namely: genocide, war crimes, crimes against humanity, torture, murder and sexual offences. The same position was reiterated by section 2.3 of Regulation 2000/15, while restricting the District of Dili Panel’s jurisdiction to offences committed between 1 January and 25 October 1999. The panels were localized, as they were established and operated in the location where the crimes took place. Unlike other hybrids considered in this chapter, the UN created judicial systems in Dili, where there was none previously existing.⁹⁷

The SPSC shared judicial accountability and financial responsibility jointly between the state and the UN. It hoped to maximise the benefit of international support and resources with local

⁹³ UNTAET Regulation 2000/15.

⁹⁴ Y. Beigbeder ‘Special Panels for Serious Crimes in East Timor-Now Timor-Leste’ *International Criminal Tribunals: Justice and Politics* (Palgrave Macmillan 2011).

⁹⁵ C. Reiger and M. Wierda ‘The Serious Crimes Process in Timor-Leste: In Retrospect’ (2006) *ICTJ Prosecutions Case Studies Series*, 10.

⁹⁶ See <http://mj.gov.tl/jornal/lawsTL/UNTAET-Law/Regulations%20English/regenglish.htm> for a comprehensive catalogue of all regulations relating to the UN Administration in East Timor.

⁹⁷ S. Katzenstein ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2004) 16 *Harvard Human Rights Journal* 252.

prosecution. That hope appeared to have been dashed as the tribunal was failed by those who were meant to provide it with the necessary support and did not do so. Some suggested that instead of incorporating the best of both judicial systems, it only reflected their worst.⁹⁸ The panels sat from 2000 to 2006 and faced similar challenges as many of the other tribunals: lack of funding; lack of ownership by local community and thus affecting sociological legitimacy; non-cooperation from Indonesia which ensured the prosecution of largely low-level defendants. The panels indicted a total of 391 people, but 339 could not be tried as they were outside of jurisdiction in Indonesia and other places. The high number of persons indicted sometimes makes justice practitioners equate mere prosecutions with justice delivered, thus leading to a false sense of accomplishment.⁹⁹

1.4.5. The Special Criminal Court in the Central African Republic (SCCCAR)

In August 2014, the UN and the government of the Central African Republic (CAR) entered into an agreement which required the latter to establish a ‘Special Criminal Court.’ Through the actions of the country’s parliament, in 2015, the Special Criminal Court for the CAR (SCCCAR) was established. This was more than ten years after the ICC had opened an investigation into crimes committed in the CAR between 2002 and 2003. This investigation was succeeded by another September 2014 ICC investigation, making a total of two active investigations by the ICC in the CAR. This was the first time that the ICC would have two active situations in the same country. The SCCCAR has jurisdiction to try war crimes and crimes against humanity that were committed on the territory of CAR since 2003, matching the same timeline as the first ICC investigation. Its establishment is grounded in the Organic Law, which is essentially a national law adopted by the CAR parliament, authenticated by the country’s constitutional court and eventually promulgated by the President of the country.¹⁰⁰ As with all hybrid tribunals, its personnel is a mix of national

⁹⁸ S. Katzenstein ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2004) 16 *Harvard Human Rights Journal* 252.

⁹⁹ S. Linton ‘Rising from the ashes: The creation of a viable criminal justice system in East Timor’ (2001) 25 *Melbourne University Law Review* 122, 178.

¹⁰⁰ See generally P. Labuda ‘The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?’ (2017) 15 *Journal of International Criminal Justice*, 175-206.

and international staff, whose appointment is to be ratified by the CAR authorities.¹⁰¹ The tribunal had its first trial in April 2022 and handed down its first judgement in October of the same year.¹⁰²

In many ways, the SCCCAR as a hybrid tribunal represents an innovation that had hitherto not been seen in ICL. As noted by previous authors, it is the first tribunal to be established in an ICC situation country.¹⁰³ This underscores one of the macro-claims of this dissertation: the understanding that ICC's involvement in any conflict situation should not automatically foreclose the involvement of other mechanisms, so long as the relationship can be arranged to avoid possible conflicts. In another criticised innovation, the tribunal enjoys primacy over national courts, while being subordinate to the jurisdiction of the ICC. This has been described as a 'three-tiered institutional hierarchy'.¹⁰⁴ It is one of the few mechanisms that have complementarity with the ICC and national mechanisms specified in its instrument and framework. Additionally, victims at the SCCCAR can be witnesses and/or civil parties, entitled to reparations.¹⁰⁵ This is more promising for reparative justice, in comparison to previous internationalised tribunals like ICTR and SCSL where victims were only witnesses. At the ICC, victims could only be parties (rather than mere participants) at the reparation stage alone, while the SCCCAR provides an opportunity for victims to be parties throughout all stages of the proceedings.¹⁰⁶

While views about the tribunal's place in ICL vary, its existence has raised pertinent questions about complementarity.¹⁰⁷ Whereas the Organic Law gives primacy to the ICC over the SCCCAR, as per article 37, the provision appears to have reversed the settled understanding of complementarity in the Rome Statute.

¹⁰¹ Article 60-61 of the Organic Law.

¹⁰² Amnesty International 'Amnesty International, 'Central African Republic: First-ever SCC trials ensures alleged war criminals face justice', 19 April 2022.

¹⁰³ P. Labuda (n. 100) 175.

¹⁰⁴ *Ibid.*

¹⁰⁵ JP Perez Acevedo 'Victims at the Central Africa's Republic Special Criminal Court' (2020) 39 *Nordic Journal of Human Rights* 1, 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ P. Labuda (n. 100) 175.

1.5. Hybrid's legal basis, legitimacy and justification

In terms of the background to their establishment, STL, ECCC and SCSL, with relatively active governments, requested the UN to help in prosecuting the perpetrators of atrocities in their respective countries. That was slightly different from the situation in East Timor and the CAR, where, though the UN was involved, the internationally backed transitional authorities were the active governments in place. In Sierra Leone, the UN Security Council took a decision while the issue was still on the agenda of the Security Council and there were UN troops on ground.¹⁰⁸ While the UN Security Council did not invoke Chapter VII of the Charter in Sierra Leone, in order to request the Secretary-General to enter an agreement with the government to establish a special court, it did so in the case of East Timor.¹⁰⁹ Chapter VII was invoked to establish interim administration for East Timor. In Sierra Leone and Lebanon, the UN was requested to assist in prosecuting perpetrators of crimes, while in East Timor, the UN or at least, the interim administration was responsible for all facets of governance, including the administration of criminal justice. For the CAR, the origin of the tribunal is traceable to the activities of the UNSC authorized multi-dimensional peacekeeping mission and the internationally backed transitional government.

The founding documents of these hybrids varied from one to another. In the case of Sierra Leone, it was the bilateral treaty or agreement between the country and the UN that established the SCSL. The Statute of the SCSL was only annexed to the agreement. The bilateral treaty was also incorporated as a domestic legislation through the Special Court Agreement Ratification Act. The legal basis of the SCSL was thus a combination of domestic and international instruments that interacted jointly. This was true also for SCSL and the ECCC. For East Timor, there was no government to negotiate with, hence, the UN established an interim administration which promulgated regulations to establish and operationalise the tribunal. The UN Security Council derived that authority to so act from Chapter VII resolutions that were passed to establish the

¹⁰⁸ Sarah M.H. Nouwen, 'Hybrid courts': The Hybrid Category of a New Type of International Crimes Courts', (2006) 2 *Utrecht L. Rev.* 195.

¹⁰⁹ *Ibid.*

interim administration.¹¹⁰ In the CAR, the Organic Law establishing the tribunal was a result of the combined efforts of the country's parliament, judiciary and the executive.

One of the most hotly contested issues on hybrid tribunals and indeed, many systems of international and domestic governance,¹¹¹ is their legitimacy.¹¹² They are said to be suffering from 'a crisis of legitimacy.'¹¹³ Without legitimacy, a tribunal's ability to discharge its core functions are called into question. The validity of a tribunal's judgements and decisions, and the subsequent acceptability of the decision by parties to a case, the witnesses or the society are significantly eroded if the tribunal lacks legitimacy.¹¹⁴ In the next chapter, I discuss the Extraordinary African Chambers that tried former Chadian President Hissène Habré and the impact that the challenge to its legitimacy had on the trials. Suffice it to say that one of the justifications for hybrid tribunals, as earlier noted, is that they advance the need to make justice more visible to the affected people, thus improving the chances of acceptability by the local communities. This is a result of the proximity of the justice-dispensing institutions to the affected communities. Generally, other factors that have improved hybrid tribunal's legitimacy included: the presence of local judges;¹¹⁵ availability of victim participation;¹¹⁶ the presence of international judges, in addition to local judges, as this may infuse some balance into the judicial process; proximity to the scenes of crimes; application of domestic legal system alongside international order, among others.

¹¹⁰ On Chapter VII actions of the UN SC, see N. Krisch 'Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Introduction to Chapter VII: The General Framework' in B. Simma & Ors (eds) *The Charter of the United Nations: A Commentary*, Volume II (Oxford University Press 2012).

¹¹¹ Bodansky argued that 'the legitimacy of domestic government has been a central focus of political theory since at least the time of Hobbes and Locke.' In the same vein, he wondered why legitimacy of international governance systems has been undertheorized until recently. See D. M. Bodansky 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law*, 596.

¹¹² For discussions on legitimacy of hybrid tribunals, see S. Williams 'Hybrid and Internationalized Criminal Tribunals: Jurisdictional Issues' (2009) PhD Thesis at Durham University. See also M. Wierda & ors 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1065. See also H. Hobbs 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16 *Chicago journal of International Law* 2.

¹¹³ See D. Luban 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *JICJ* 505 at 509.

¹¹⁴ See generally Yvonne McDermott *Fairness in International Criminal Trials* (OUP 2016).

¹¹⁵ H. Hobbs 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16 *Chicago journal of International Law* 2.

¹¹⁶ H. Hobbs, 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' (2014) 49 *Texas International Law Journal* 9-12.

Many justifications have been adduced for hybrids' existence. Mendez classified the justifications into legal, ethical and consequentialist categories.¹¹⁷ One legal justification could be the idea that 'hybrid courts may be alternatives to the ICC where national courts are unwilling or unable to render justice.'¹¹⁸ The ethical justification centers around making victims and affected communities the focus of international criminal justice and accountability measures. Prioritizing the victims' interests appears to be a better ethical approach towards holding perpetrators accountable.¹¹⁹ The consequentialist justification puts into context 'the impact of [such] tribunals on the victims and affected communities in the short and long terms.'¹²⁰ The short term and long-term consequences of prosecutions before hybrid tribunals could be rebuilding the affected community's legal system and consequently, overall nation-building. This practical approach envisages interaction between foreign and local professionals which may lead to transfer of skills and knowledge about ICL and international law generally.¹²¹

Other motivations for establishing hybrid tribunals are that they offer the benefits of both domestic and international prosecutions;¹²² they are developed as pragmatic solution to the international community's failure to bridge the impunity gap;¹²³ they help to resolve the tension between maintaining state sovereignty and ending impunity for atrocity crimes;¹²⁴ they collapse the artificial distinction between domestic and international crimes prosecution;¹²⁵ they remedy the ICC's limited jurisdictional reach and resources;¹²⁶ they advance the ambition to make justice more visible to populations affected;¹²⁷ and they fulfill the ultimate goal of increasing capacity within the national judicial system.¹²⁸ Moreover, hybrids have been established and useful in circumstances where the international tribunal with jurisdiction would have been overwhelmed

¹¹⁷ Mendez (n. 39) 71.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at 73.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Williams (n. 63) 5.

¹²³ *Ibid.*

¹²⁴ Williams (n. 63) 58.

¹²⁵ F. Megret 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 *Cornell International Law Journal* 3, 747.

¹²⁶ Williams (n. 63) 58.

¹²⁷ Stahn (n. 57).

¹²⁸ For this and many other benefits of hybrid tribunals, see T. Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre' (2008) 39 *Columbia Human Rights Law Review* 471.

with caseloads. A fitting example is the Kosovo hybrid courts. As explained by Professor Dickinson, ‘the U.N. established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region. The ICTY prosecutor made it clear that the ICTY would be reserved for only the highest profile cases from Kosovo, leaving many suspects without a forum for trial.’¹²⁹

Whether hybrid tribunals have lived up to their expectations is an ongoing debate. Authors like McAuliffe have argued that they have failed to live up to their lofty goals.¹³⁰ Schabas submits that their enormous productivity has contributed in no small measure to ICL through building ‘an impressive body of case law.’¹³¹ Ciorciari and Heindel argue that ‘hybrid courts have downsides [which include being] susceptible to confusion and inefficiency as they merge multiple legal systems and personnel with disparate backgrounds, training, and approaches to justice.’¹³² Holvoet and de Hert opine that while an analysis on whether hybrids have achieved their aims may be premature, ‘these institutions have not entirely lived up to their promises.’¹³³ They have had some successes but clearly, there is a lot of room for improvement. For instance, while trying to avoid costly trials like those at the *ad hoc* tribunals, many tribunals have had their jurisdictions so narrowed down that in the end, much money was spent to achieve too little. There were criticisms that the EAC gulped a lot of money, yet, only Hissène Habré was tried and convicted by it.¹³⁴ Again, experiences have shown that many tribunals struggle to secure cooperation and needed assistance from states, thus limiting their effectiveness. In spite of UN backing, the ICTY also

¹²⁹ L. A. Dickinson ‘The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo’ (2003) *New England Law Review* at 1071.

¹³⁰ P. McAuliffe ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan’ (2011) 7 *Journal of International Law and International Relations* 1, 1-65.

¹³¹ W. Schabas ‘International Criminal Courts’ in Cesare P. R. Romano, K. J. Alter, and Y. Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press 2013).

¹³² J. D. Ciorciari and A. Heindel ‘Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal’ (2013) *Michigan Journal of International Law*, 369-442.

¹³³ M. Holvoet and P. de Hert ‘International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals’ (2012) 17 *Tilburg Law Review* 233.

¹³⁴ L. E. Carter, M. S. Ellis, C. Jalloh *The International Criminal Court in an Effective Global Justice System* (Edward Elgar Publishing 2016) 39-40.

struggled to get cooperation from states.¹³⁵ The situation is graver for other tribunals who do not have such resources and backing from the UN.

Tribunals are ‘no longer viewed as an alternative to the ICC, but as a possible complement.’¹³⁶ In future practice, they may even be considered useful in situations where the ICC is not likely to be able to exercise jurisdiction.¹³⁷ In that regard, there are at least three circumstances in which the ICC may have no jurisdiction over a crime: where it lacks jurisdiction *ratione temporis*;¹³⁸ where the ICC lacks jurisdiction *ratione loci*;¹³⁹ and where it lacks jurisdiction *ratione materiae*.¹⁴⁰

In conclusion, there have been different models of hybridity which suggests that there are now wide varieties of international criminal law adjudicatory models. Secondly, that a lot of ‘trial and error’ had gone into establishing these tribunals which suggests that different approaches were evolved to address the specific circumstances that surrounded the establishment of different tribunals. That there is no-one-size-fits-all approach has allowed for ‘individualized attention and specificity.’¹⁴¹ Thirdly, in spite of the trial and error, a number of common features have been observed: they were all established as a result of agreement between the UN and the states affected

¹³⁵ UN ‘War Crimes Denial, Failure to Cooperate with National Authorities Hampering Progress of Former Yugoslavia Tribunal, Security Council Told’ [available at <https://www.un.org/press/en/2017/sc12858.doc.htm> - accessed 23 May 2023].

¹³⁶ S. William (n. 63) 61; Mendez (n. 39) 71.

¹³⁷ S. William (n. 63) 61.

¹³⁸ The ICC lacks jurisdiction *ratione temporis* over crimes that were committed before the coming into force of the Rome Statute. Article 11(1) of the Rome Statute provides that ‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.’ Hybrid tribunals could be useful in situations where the crimes to be prosecuted occurred before the Rome Statute entered into force, since the ICC would not have jurisdiction in that circumstance. The Extraordinary Chambers in the courts of Senegal, which were employed to prosecute crimes that took place between 1982 and 1990, offers a good example.

¹³⁹ Article 13(b) of the Rome Statute provides that the ICC may exercise its territorial jurisdiction if ‘[A] situation in which... crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’ This provision operates to grant the ICC territorial jurisdiction throughout the world, since the Security Council can potentially refer any situation to the court. However, this possibility is often hampered by political interests. For instance, members of the Security Council have used veto powers to defeat a draft resolution seeking to refer the situation in Syria to the ICC. Thus, where the ICC has no jurisdiction *ratione loci*, perhaps as a result of political considerations or other factors, a hybrid tribunal may become an attractive alternative.

¹⁴⁰ The ICC lacks jurisdiction *ratione materiae* in situations where the conducts to be prosecuted fall outside of the crimes that are codified in the Rome Statute. In that circumstance, a hybrid tribunal could be an alternative for the prosecution of such crimes. A good example is the Malabo protocol which codifies several transnational crimes for which the ICC lacks jurisdiction. For general thoughts on the different dimensions of the ICC’s jurisdictions, see F. Eboibi ‘Jurisdiction of the International Criminal Court: Analysis, Loopholes and Challenges’ (2012) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 28-46.

¹⁴¹ C. Carroll ‘Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State’ (2013) *Law School Student Scholarship* 90 at 18.

or by a UN transitional authority, mostly in post-conflict situations; they all comprise international and local personnel as judges and staff; their subject matter jurisdiction consisted of international and national crimes. They were all developed in instances where the domestic judicial mechanisms were grossly inadequate or totally non-existent. In this regard, judicial infrastructures were either destroyed during the conflict as in East Timor and Kosovo or local judges and lawyers were scarce or incompetent where available.

1.6. Strands of regionalism and models of hybridity

The typology of hybrid tribunals has shown that there are different models of hybridity. I conceive hybridity itself as a strand of regionalism. The first model of hybridity I considered are the STL, SCSL, SPSC, SCCAR and the ECCC which were established as a result of the actions of various UN organs, specifically the UNSC for the first four, and the UNGA, in the case of the latter tribunal. In the next chapter, I will discuss and analyse the KSCSPO and the EAC whose establishment is linked to the actions and support of regional organizations. This first mode of classification considers the organization that established the tribunal as a basis for comparison. In that regard, we see two classes of tribunals. First are those whose establishment were midwived through the joint efforts of states and a UN organ. The second class of tribunals are those whose establishment proceeded from the joint effort of a regional organization and a state within the region. This second class has provided a foundation for the current attempts to set up full-blown ICL regional courts. I view the involvement of regional organization in ICL through setting up of hybrid tribunals in their regions as some of the building blocks that have contributed to the attempt to set up regional supranational tribunals. This assistance-driven strand of regionalism is one that seeks to strengthen and support the domestic jurisdiction in order to deal with a specific crisis situation. It is the model that ‘internationalizes’ the domestic systems. One way through which the support for the domestic system happens is the embedment of the tribunal into the domestic system. The ECCC is the example of a hybrid that is embedded into the domestic judicial system. A similarity in the five examples discussed earlier is that the tribunals were established to address crimes that arose out of a conflict which had taken place. They were all established as a result of agreements between the UN or a regional organization and the states affected, mostly in post-conflict situations.

In the next chapter, I will discuss regional hybridity, using the KSCSPO and the EAC in the courts of Senegal as examples of the first strand of regionalism that I present. This can be distinguished from the second strand that attempts to construct a supranational regional institution to deal with future crimes in a specific region. As has been seen in the African continent, this kind is not established to deal with a singular past crisis. Instead, it is created to address crimes that may occur, usually after its establishment. As opposed to the first strand which does not seek to replace the domestic system, but rather strengthens it, this strand constructs a regional tribunal as a replacement for domestic systems, especially in a situation where the domestic system is unable to deal with a specific crime. Like the ICC, this will require the cooperation of states in order to discharge its responsibilities. Their activities will have effect on inter-state relations as their subject matters are individuals of several states within the region. Their power and influence extend beyond the state where they are sited. Their actions are not attributable to one state. In this regard, they are only comparable to the ICC, ICTY and ICTR, and not any of the mixed criminal tribunals. Member states are compelled as a matter of obligation to cooperate with such regional tribunals.

While the African continent is the first to establish such supranational entity, it is not unlikely that other regions may attempt the same. The EU and the CoE's efforts at establishing the KSCSPO may suggest that the European continent is open to the idea of taking more regional initiatives at international crimes prosecution. Also, it is my contention that Africa did not suddenly arrive at a place where it sought to establish a regional criminal court. One of the preceding developments in ICL is the AU's establishment of the EAC that tried late Hissène Habré. This progression from establishing a single tribunal to try a former leader, to an attempt to establish a fully functional regional tribunal is consistent with AU's approach to international law. It will appear that the establishment of a regional tribunal is a natural progression from the previous ICL efforts in the region. Also, it is to be recalled that regional systems' adoption of human rights regional instruments was motivated by the need to fill the gaps in international human rights instruments.¹⁴² Consistent with that pattern is the idea that a regional criminal court is a necessity that flows from the gap that current ICC system evinces. Such gaps include ICC's lack of jurisdiction to try transnational crimes that are of importance to the respective regions. In the introduction to this

¹⁴² M. Sirleaf 'Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Waste in Africa' (2018) 35 *Wisconsin Journal of International Law* 348.

work, I have previously considered other past and current regional practices and initiatives that suggest that more regions are interacting with ICL through different approaches.

Conclusion

The future of international criminal justice appears to be in its past. By this, I mean that in the early days, international criminal tribunals were initially created to address specific problems. Recall my reference to the UN War Crimes Commission (UNWCC) that was created to facilitate domestic prosecutions of crimes committed in WWII. Before and after the establishment of the ICC, regional and hybrid tribunals are being created to address specific problems and situations. The turn to regionalism is grounded in the development of these hybrid tribunals. Hybrid tribunals have evolved in different models: some through the cooperation between the UN and affected states and others through the cooperation between regional organizations and the affected states. Their development has now led to the possibility of the existence of a full-fledged regional criminal tribunal. The analysis has shown that regionalism is just one of the necessary strands of alternative forums for prosecutions that have been developed. Regional hybridity or the assistance-driven model and the establishment of full regional criminal courts are the two strands of regionalism. They share similar goals, part of which is to develop tailor made responses to atrocities, outside the traditional realm of domestic jurisdiction. The development of hybrid tribunals has served as roadmap that led ICL towards full-fledged regionalism. Development in different regions also suggest that there is a progressive move towards the second strand of regionalism: the establishment of regional courts to deal with transnational and international crimes. Other regions might be encouraged by the steps taken by the African Union in the adoption of the Malabo Protocol. As states continue to face common transnational crimes in their region, their joint responses may continue to deepen regional interaction with international criminal justice. The chapter sets out to investigate the typologies of regional and hybrid institutions that have been emerging in ICL. While there is perhaps no linear trajectory towards a regional approach, I have now established that the development and practice of hybrid tribunals were necessary building blocks for regionalism in ICL.