

Hybridization—A Spectrum of Creative Possibilities

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Introduction

After a sharp decline in interest, it appeared that the hybrid tribunal had become an ‘orphan’ of the international criminal justice project.² That was not to be. Recent years have seen a spate of hybrids established or proposed, from Syria and South Sudan, to the Central African Republic and Sri Lanka. Perhaps most prominently, a hybrid court was set up in Dakar, Senegal, to prosecute former Chadian President Hissène Habré in 2013, a development that has stood out as the vanguard of a new generation of hybrid tribunals.

The re-emergence of the hybrid has been addressed by numerous scholars.³ Yet despite its renewed popularity, it remains unclear what, precisely, it means to be a hybrid court and how the latest hybrids might contribute to furthering the project of international criminal justice. The answer to the first question is typically assumed to be simple: hybrid tribunals are ‘of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.’⁴ But hybrids are much more than just middle-ground institutions that marry national and international components. As this chapter demonstrates, they are institutions whose very hybridity creates productive space for creative solutions aimed at responding to some of the most endemic challenges facing international criminal justice.

What makes a hybrid tribunal hybrid?

We rely primarily on knowing a hybrid when we see it—when some ‘mix’ of the local and the global meet within a juridical forum. Prior and contemporary hybrids have featured

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² Padraig McAuliffe, ‘Hybrid Tribunals at Ten—How International Criminal Justice’s Golden Child became an Orphan’ (2011) 7 *Journal of International Law and International Relations* 1–65.

³ See Harry Hobbs, ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16(2) *Chicago Journal of International Law* 494; Beth Van Schaack, *The Building Blocks of Hybrid Justice*, Stanford Public Law Working Paper No 2705110 (22 March 2016); Mark Kersten, *As the Pendulum Swings—The Revival of the Hybrid Tribunal*, in Mikkel Jarie Christensen and Ron Levi (eds), *The Institutions of International and Transnational Crime* (Routledge 2017)

⁴ United Nations Office of the United Nations High Commission for Human Rights, *Rule-of-Law Tools for Post-Conflict States—Maximizing the Legacy of Hybrid Courts* (Geneva 2008) 1

varying combinations of international and domestic staff, operative law, structure, financing and rules of procedure.

But the threshold of where a court emerges as a hybrid tribunal rather than a domestic or an international court remains unclear. What are the defining elements that make a court hybrid? How much international law versus domestic law does a court need to use before it is hybrid? Is there a point at which the mix of international and national components tip the scales and make an institution hybrid or, alternatively, international or domestic?⁵

It is, of course, understood that there has to be *some* mix of international and domestic for a hybrid court to be a hybrid court. But it would be a mistake to think of hybrid courts as static, as though they can easily be categorized together as a generation of tribunals which can be replicated in different situations with contextual tweaks here and there. Neha Jain's 2008 observation still resonates: 'There is little clarity on exactly what elements must be present to classify a tribunal as hybrid', and scholars have eschewed 'a definition based on essential elements'.⁶ And as Muharremi adds: 'there is no uniform model of how a hybrid court should look like and how the ratio, or blend, between international and national elements should look like'.⁷ This lack of consensus as to what exactly a hybrid constitutes is precisely the advantage of this model of tribunal.

Rather than seeking a strict or categorical definition, it is more useful to view hybrids as 'joint ventures'⁸ between the international and national actors which reside on a multi-axis *spectrum* with fully internationalized and fully domestic at the extremes, as suggested by Sarah Williams as well as Harry Hobbs.⁹ Each axis, then, represents a component that may be hybridized to a greater or lesser extent: substantive law, location, staff, etc. Hybrids can be seen as having different levels of hybridity for each constitutive component.

It is their presence on this spectrum and their concomitant adaptability which permits hybrids to respond creatively to some of the seemingly endemic challenges facing international criminal justice. This chapter examines hybrid creativity through four specific examples, each allocated to a section of the chapter: (i) the outsourcing of outreach efforts at the Extraordinary African Chambers in order to communicate to affected and interested communities of Habré's trial on charges of war crimes and crimes against humanity; (ii) combating victors' justice at the Kosovo Specialist Chambers; (iii) sharing concurrent jurisdiction between the Central African Republic's Special Criminal Court and the International Criminal Court; and (iv) using the premises of previous hybrid courts to host new tribunals and therefore reduce the financial and security costs of international criminal justice.

The analysis that follows is optimistic in many ways. We outline what we believe to be beneficial innovations in the pursuit of international criminal justice. We recognize both

⁵ To complicate matters further, some of the institutions commonly categorized as hybrids do not wish to be described as such. The Kosovo Specialist Chambers and the Specialist Prosecutor's Office, for instance, describe themselves as 'internationalised' rather than hybrid as they are embedded in the domestic system. A distinction could be made between mixed and hybrid courts—mixed courts being domestic bodies with some level of international assistance, and hybrid courts being created through partnerships or agreements between international and domestic actors—but for simplicity in this chapter we refer to all of these courts as 'hybrid'.

⁶ Neha Jain, 'Conceptualising Internationalisation in Hybrid Criminal Court' (2008) 12 *Singapore Year Book of International Law* 81

⁷ Robert Muharremi, 'The Kosovo Specialist Chambers and Specialist Prosecutor's Office' (2016) 76 *Houston Journal of International Law* 988

⁸ Hobbs (2016) 492.

⁹ *ibid*; Sarah Williams, *Hybrid and Internationalised Criminal Tribunals* (Hart Publishing 2012) 249–50.

the problems inherent in evaluating the success of tribunals and the criticism that has been levelled against hybrids, however.¹⁰ The chapter does not seek to justify hybrid justice *tout court* but rather to highlight creative responses to challenges in the broader practice that have been developed by hybrids.

Outsourcing outreach: The extraordinary African chambers

It has become almost cliché to stress that justice must not only be done, but also needs to be *seen* to be done.¹¹ Yet public awareness of a tribunal's work and how accountability efforts are perceived remains critically important to the legitimacy of the international criminal justice project.

How affected and interested communities *view* justice is determined by the effectiveness of a tribunal's outreach efforts. In general, war crimes tribunals have had a mixed record in conducting outreach efforts. Some, like the SCSL, are generally regarded as having conducted 'impressive' outreach programming, although the focus of these efforts was very prosecution-heavy.¹² The ECCC is widely praised for the number of Cambodians that were able to visit the tribunal's premises and thus take in some of the proceedings.¹³ Efforts to disseminate its work have, according to recent research, had a significant impact on the understanding of crimes committed by the Khmer Rouge among young Cambodians.¹⁴ Others, like the ICTY, have been criticized for their 'poor outreach activities' which produced citizens who 'did not know of or accept the facts established through the ICTY's work' and left them not believing 'that justice has been served through its judgements'.¹⁵ Generally, outreach efforts have improved with time, as the intimate, correlative relationship between communicating justice and realizing it has become clearer.

Outreach, however, is more than just communicating the work of a tribunal. It can take on many forms: radio and television programming; educational activities in schools; public debates and competitions; efforts to bring citizens to watch proceedings; town hall or village

¹⁰ Kirsten Ainley, 'Evaluating the Evaluators' (2017) 11(3) *International Journal of Transnational Justice* 421–42; Kirsten Ainley, Rebekka Friedman, and Chris Mahony (eds), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (Palgrave Macmillan 2015).

¹¹ See Rachel Kerr, *Procedure: 'Justice Must Not Only be Done, but Must be Seen to be Done'*, in <<https://www.hrw.org/reports/2004/sierraleone0904/>>

¹² Kerr writes that the SCSL's outreach was 'far more extensive and ambitious than anything that has previously been undertaken'. See Rachel Kerr and Jessica Lincoln, *The Special Court for Sierra Leone Outreach, Legacy and Impact (Final Report)* (Kings College London 2008). A Human Rights Watch Report similarly states that 'Outreach at the Special Court consists of an impressive and diverse set of initiatives that represent a marked improvement over outreach efforts by the ad hoc tribunals'. See Human Rights Watch, *Bringing Justice: The Special Court For Sierra Leone—Accomplishments, Shortcomings, and Needed Support*, Vol. 16, No. 8(A).

¹³ For an interesting discussion of Cambodian citizens attending proceedings at the ECCC, see Thierry Cruvellier, *The Master of Confessions—The Making of a Khmer Rouge Torturer* (Harper Collins 2011) 10–13. As he writes in relation to the prosecution of Duch: 'Duch's trial will give thirty-thousand Cambodians the chance to spend at least a day inside the court, unique in their country. No other international trial has had an audience as vast and wide-ranging as this one.' *ibid* p 13. See also See, for instance, Tom Fawthrop, 'Cambodia's Khmer Rouge Tribunal: Mission Accomplished?', *The Diplomat* (17 July 2017) at <https://thediplomat.com/2017/07/cambodias-khmer-rouge-tribunal-mission-accomplished/>

¹⁴ Caitlin McCaffrie, Somaly Kum, Daniel Mattes, and Lina Tay, 'So We Can Know What Happened': *The Educational Potential of the ECCC*, Report for the WSD HANDA Center for Human Rights and International Justice at Stanford University and the East-West Center (January 2018)

¹⁵ Olivera Banjeglav, 'The Micro Legacy of the ICTY in Croatia—A Case Study of Vukovar' in Martina Fischer and Olivera Simić (eds), *Transitional Justice and Reconciliation—Lessons from the Balkans* (Routledge 2016) 94

meetings and rallies to consult communities, etc. Importantly, effective outreach is not about telling the prosecution's story—but the narrative of the tribunal. This ensures that other actors, including defence lawyers and members from the Registry, Presidency, and other organs, are involved and that their work is (better) understood. Effective outreach also means reaching those in opposition to the tribunal's work, combating misconceptions, confronting falsehoods, and 'shrinking the space of denial'.¹⁶

Apart from being tailored to the realities of the political violence to which a tribunal is responding, identifying the appropriate target audiences for outreach efforts depends, in significant part, on the location of a hybrid tribunal. Some tribunals, like the SCSL or ECCC, had this task, more or less, easily defined: their outreach efforts were focused on communities in Sierra Leone and Cambodia, respectively (as well as on interested international audiences and, to a lesser extent, members of the diaspora). Tribunals that are located outside of the locus of violence have an altogether more complex challenge in that they have distinct—often unrelated—communities to target with outreach programming. For example, if the proposed Hybrid Court for South Sudan is established, it will likely be located in Arusha, Tanzania. In addition to affected and interested populations in South Sudan, at least some effort will have to be made to communicate and explain the work of the HCSS to Tanzanians as well as internationally.

The situation that faced the Extraordinary African Chambers (EAC) was altogether more complex. The EAC heard a single case: that of Hissène Habré. It was set up in Dakar, Senegal in 2013 in order to prosecute the former President of neighbouring Chad. Habré's victims were Chadian but the former leader had fled to Senegal in 1990. Eventually the demands of victims for justice—and in no small degree, political realities—caught up with Habré.¹⁷ The challenge for the EAC was to design outreach programming that would reach three constituencies: (i) victims, survivors, and interested communities in Chad, an endeavour made only more difficult due to the fact that 'the conditions for a full and open discussion of transitional justice issues do not exist';¹⁸ (ii) citizens in Senegal where the proceedings were taking place and where Habré had spent the preceding twenty-plus years; and (iii) a sceptical international community. According to trial observers, ten percent of the court's budget was allocated to outreach efforts.¹⁹

In order to address the particular outreach-related challenges it faced, the EAC decided to outsource outreach activities to a consortium of three organizations. Franck Petit, the head of the so-called Outreach Consortium that was contracted to do the EAC's outreach has reflected on this unique arrangement:

The main innovation of the Extraordinary African Chambers was to fully externalise the outreach. This meant delegating outreach work to the many organisations that have credibility on the ground, in Chad, in Senegal and on the international level. There were

¹⁶ Diane F Orentlicher, *Shrinking the Space for Denial—The Impact of the ICTY in Serbia*, Open Society Justice Initiative (May 2008) <https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia_20080501.pdf>

¹⁷ See an excellent overview of the dynamics that led to Habré's prosecution in Dakar, see, Celeste Hicks, *The Trial of Hissène Habré—How the People of Chad Brought a Tyrant to Justice* (Zed Books 2018) esp Chapters 2 and 3

¹⁸ Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) 13(2) *Journal of International Criminal Justice* 209–17, 215

¹⁹ Celeste Hicks, *The Trial of Hissène Habré and What it Could Mean for Justice in Africa*, *Justice in Conflict* (27 March 2018), at <https://justiceinconflict.org/2018/03/27/the-trial-of-hissene-habre-and-what-it-could-mean-for-justice-in-africa>

three organisations working together as a unit known as the Outreach Consortium. RCN Justice & Démocratie based in Belgium took care of things at the international level while Magi Communication, based in Ndjamena, handled Chad, while the Dakar-based Primum Africa Consulting was responsible for outreach in Senegal.

The consortium of these three organisations was implementing the program with the tribunal organisation in Chad, the Senegalese organisation in Senegal and the international NGO at an international level was also doing the backstopping of projects and everything dealing with financial reports. This guaranteed that the program really went well. So the combination of the three organisations was very effective and I don't think it would be possible for one of the three organisations alone to execute the whole project singlehandedly and have the same results as we did.²⁰

In addition to the consortium members contracted to conduct the outreach programming of the court, civil society organizations worked to facilitate the travel of Chadian journalists to cover proceedings in Dakar and Senegalese journalist to travel to Chad.²¹ Observers have generally concluded that the outreach efforts of the Consortium were a success.²²

The lessons from the EAC, and to some extent the ECCC and SCSL, are that the success of outreach is a fundamental determinant of the perception of success of the tribunal as a whole, and that successful outreach relies on smart targeting as well as a significant investment of resources. The diverse nature of the constituencies that the EAC needed to reach and the resource constraints faced by the tribunal created fertile ground to identify a creative solution to outreach efforts. Rather than have one outreach entity, the EAC had three working in conjunction and cooperation with each other. Instead of complicating matters, the shared expertise of the Consortium members made outreach efforts more credible with affected populations, expeditious, and efficient.²³ The Outreach Consortium in turn ensured that the EAC could both better reach its targeted audiences as well as avoid expending resources to replicate expertise which already existed outside of the court. Whether this innovation sets a precedent to be followed by courts facing similar constraints remains to be seen but it is undoubtedly one that could only have been generated by the conditions faced—and met—by a hybrid tribunal.

Combating victors' justice in Kosovo

Since its inception, international criminal justice has been plagued by allegations that it represents the law of the victors imposed upon the vanquished. The Nuremberg and Tokyo International Military Tribunals have been repeatedly criticized for their production of

²⁰ See comments by Franck Petit in Brian Obara, *Outreach in the Hissène Habré was an Exercise in Winning Hearts and Minds* (Justice Hub, 1 October 2017), at <https://justicehub.org/article/outreach-hissene-habre-trial-was-exercise-winning-hearts-and-minds>. See also Chapter 23 in this volume.

²¹ Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (3 May 2016), at <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>

²² See Hicks (2018) p 138.

²³ See comments by Petit in Hicks (2018) 136.

victors' justice,²⁴ including by Judges on their benches,²⁵ although others have defended their record and offered important nuance to the debate.²⁶ Still, fifty years after the creation of the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for Rwanda (ICTR) faced the same critique—and not devoid of merit. When it closed its doors in 2015, all of the ninety-three individuals for whom the ICTR had issued arrest warrants were Hutu génocidaires. Despite widespread allegations of atrocities, not a single individual from the Rwandan Patriotic Front was indicted by the Court.²⁷ The International Criminal Court (ICC) has likewise been criticized for its one-sided prosecutions.²⁸

While not always couched in terms of 'victors' justice', allegations that international criminal law is so intimately tethered to power that only the weak are selected for prosecution continue to plague the field. Hybrid tribunals, however, have generally received less criticism relating to allegations of victors' justice and many have fared better in prosecuting the various sides of the conflicts to which they are a judicial response. But no tribunal—hybrid or otherwise—has been established to so directly challenge the notion of victors' justice as the Kosovo Specialist Chambers (KSC).

Legally, the KSC is not a hybrid court, but 'part of the judicial system of Kosovo ... attached to each level of the Kosovo court system'.²⁹ At the same time, the KSC and SPO not only are informed by international law, they are located in The Hague, are staffed entirely by internationals, and are funded by the European Union.³⁰ As Aidan Hehir writes: 'the choice of location and personnel was justified as necessary to ensure the court's impartiality and guard against intimidation'.³¹ Other 'special' features of the KSC have been elaborated elsewhere and generally point to it fitting neatly within accepted conceptualizations hybrid courts.³² Thus, even though its staff may be at pains to say it is not a hybrid court, for excellent reasons to do with domestic politics, ownership and legitimacy, the KSC shares both the features and the rationale of a hybrid tribunal. We describe the KSC as a hybrid—even if it does not describe itself as such—because it has the key features of one.

²⁴ The concept of victors' justice is generally attributed to Victor Minnear's *Victors Justice—The Tokyo War Crimes Trial* (Princeton University Press 1971).

²⁵ Judge Radhabinod Pal, who sat on the International Military Tribunal for the Far East, famously condemned the Tokyo Tribunal for pursuing victors' justice in post-war Japan. Pal found all defendants facing trial at the Tokyo Tribunal 'not guilty'. See Latha Varadarajan, 'The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal' (2015) 21(4) *European Journal of International Relations* 793–815.

²⁶ See, eg, Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4(5) *Journal of Human Rights* 213–31; Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21(4) *European Journal of International Law* 1085–1102; Yuki Tanaka, Timothy LH McCormack, and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Brill 2011);

²⁷ United Nations Office of the United Nations High Commission for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (August 2010).

²⁸ See Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions' (2014) 18(4)–(5) *International Journal of Human Rights* 444–61; see also Mark Kersten, *Justice in Conflict—The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press 2016) 162–84.

²⁹ That these are the first two sentences one reads on the institution's website is illustrative of just how important and politically sensitive the matter of *not* being a hybrid court is in Kosovo.

³⁰ As Sarah Williams points out, the KSC is the first hybrid court to exclusively employ international staff. See Sarah Williams, 'The Specialist Chambers of Kosovo: The Limits of Internationalization?' (2016) 14(1) *Journal of International Criminal Justice* 25–51.

³¹ Aidan Hehir, 'Step Towards Justice or Potential Timebomb?' (2018) *Balkan Investigative Reporting Network* 4.

³² Carsten Stahn, *Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity*, (EJIL: Talk! 23 September 2016), at <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/>

The KSC and SPO were established in 2015 in order to investigate and prosecute the alleged atrocities committed by members of the Kosovo Liberation Army (KLA), or against Kosovo nationals, between 1 January 1998 and 31 December 2000, during and after the Kosovo War.³³ Of particular interest to the KSC are alleged crimes committed by KLA forces against ethnic Serbs and those KLA figures who escaped prosecution at other courts (including the International Criminal Tribunal for the Former Yugoslavia). Many of these are widely seen as war heroes in Kosovo and have, in the meantime, ascended to positions of political power.³⁴ The challenge of bringing Kosovo's victors to justice was alluded to in a statement by the Dutch government when the creation of the KSC was announced:

Possible suspects may be seen by sections of Kosovan society as freedom fighters, and witnesses may feel threatened in Kosovo. This is why the option of trying cases outside Kosovo was explored.³⁵

The Chambers are a direct response to the Council of Europe's 2010 report, named after its author, Dick Marty, and which concluded that members of the KLA were responsible for international crimes as well as transnational organized crimes such as the harvesting and trafficking of human organs.³⁶ In Marty's crosshairs were the very KLA leaders who are revered by many and have emerged as political leaders since Kosovo's war with Serbia. That includes current President Hashim Thaçi, whom Marty described as a criminal 'boss' and Ramush Haradinaj, the current Prime Minister. Both have been periodically hostile to the court, with Thaçi describing allegations against KLA combatants as 'groundless' and allegedly threatening to release the names of ethnic Albanians who cooperate in Marty's investigation.³⁷ Thaçi has also insisted that the KSC was imposed upon Kosovo by the European Union, an allegation corroborated by some scholars.³⁸ According to Thaçi, Kosovo had to decide between a court established by the European Union or a court consecrated by the United Nations Security Council where permanent member Russia is an ally of Serbia.³⁹ In late 2017 and early 2018, Thaçi and Haradinaj's supporters in parliament pushed forward a vote to abolish the KSC by revoking the law that created it. Following domestic pressure and strongly-worded diplomatic statements by Western leaders, the effort was rebuked.⁴⁰ Thaçi retorted that while the KSC 'cannot be revoked and will not be revoked,' the 'establishment of this court is a historic injustice; no other place went through this'.⁴¹

³³ Republic of Kosovo, Law No.05/L-053, On Specialist Chambers and Specialist Prosecutor's Office (3 August 2015), available at: <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>

³⁴ Muhareemi writes that 'the Specialist Chambers were construed as an extension of the ICTY dedicated to prosecuting and indicting former Kosovo Albanian KLA members only.' See Muharremi (2016) 975.

³⁵ Government of The Netherlands, *Kosovo court to be established in The Hague* (15 January 2016), at <https://www.government.nl/latest/news/2016/01/15/kosovo-court-to-be-established-in-the-hague>

³⁶ See Council of Europe, Committee on Legal Affairs and Human Rights, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, (12 December 2010)

³⁷ See Chuck Sudetic, *The Bullies who run Kosovo*, Politico, (21 July 2015), at <https://www.politico.eu/article/kosovo-hashim-thaci-un-special-court-tribunal-organ-trafficking-kla-serbia-milosevic-serbia-ramush/>

³⁸ See Muharremi (2016) 968.

³⁹ Die Morina and Taulant Osmani, *Kosovo President: Special War Court Can't Be Stopped*, Balkan Transitional Justice (1 February 2018), at <http://www.balkaninsight.com/en/article/special-court-cannot-be-revoked-kosovo-president-says-02-01-2018>

⁴⁰ The American Ambassador to Kosovo Greg Delawie issued a harshly worded statement that read: 'This effort, if it succeeds, will have profoundly negative implications for Kosovo's future as part of Europe. It will be considered by the United States as a stab in the back. Kosovo will be choosing isolation instead of cooperation and I have to say we would hate to turn the clock back for Kosovo on progress when it has come so far.' Ambassador Delawie's Statement to the Media about Undoing the Special Court Law, see <https://xk.usembassy.gov/ambassador-delawies-statement-media-undoing-special-court-law/>

⁴¹ *ibid.*

Indeed, no country has had a tribunal created with the express purpose of holding the victors of its wars to account for war crimes and crimes against humanity. The Kosovo Specialist Chambers are unique in this regard. It remains to be seen whether the KSC can achieve justice for the KLA's alleged crimes. Many are sceptical. One report found that, due to a combination of the positions of power held by alleged perpetrators, a lack of witnesses willing to testify or still alive, and corruption in the country, few Kosovars have faith that the KSC will be able to fulfil its mandate.⁴² Some, like Aidan Hehir, also argue that the alleged responsibility of Western states, NATO, and the United Nations Mission in Kosovo is unlikely to be investigated by the KSC and SPO, undermining their legitimacy and perception in Kosovo.⁴³

Whether or not the KSC and SPO successfully prosecute the former senior leadership of the KLA is currently unclear. Given the political and legal sensitivities touched upon above, it will be a tall order. But that does not take away from the fact that a hybrid court was, for the first time in the history of international criminal justice, set up with the express purpose of prosecuting the domestic victors of a conflict.

Shared jurisdiction: The Special Criminal Court in the Central African Republic

Hybrid courts need to be sensitive to the matter of concurrent jurisdiction—whether the tribunal shares jurisdiction over crimes with other judicial institutions. For most hybrid tribunals, this is particularly relevant for their relationship with domestic bodies which may also have jurisdiction over the international or transnational crimes that the hybrid is investigating and prosecuting. An assessment of the domestic criminal code of the state, and therefore any legislation which can be invoked or needs amendment in order to prosecute international crimes, will influence the precise blend of national and international law that the hybrid applies, as well as the appropriate mix of national and international staff that should populate the tribunal. However, there may also be times when a hybrid tribunal is established and has concurrent jurisdiction with an *international* court.

Hybrids should not only be seen as an appropriate judicial response to situations where there is an accountability 'blind spot' and therefore *no* tribunal present. It would be deleterious to present conflict-affected communities with a trade-off whereby a choice would have to be made between exclusively domestic, international, or hybrid justice. On the contrary, hybrid tribunals may be most successful in situations where there is concurrent jurisdiction with both internationalized courts *and* domestic institutions. In a prescient 2003 essay, Laura A Dickinson observed the following:

... the ICC will not be equipped to try more than a handful of cases arising from any given post-conflict situation. Yet local courts may not be able to try such cases either ... [I]t is precisely in these circumstances that huge numbers of cases cannot be adequately resolved by local courts—and the number of the cases that cannot be resolved adequately will likely

⁴² Hehir (2018) 13–14.

⁴³ Aidan Hehir, *A New War Crimes Court is born, but who is Responsible in Kosovo?*, Justice in Conflict (10 August 2015), at <https://justiceinconflict.org/2015/08/10/a-new-war-crimes-court-is-born-but-who-is-responsible-in-kosovo/>

far outnumber the ones that might come before the ICC. Under these circumstances, hybrid courts can play a useful role in shoring up the capacity and legitimacy of criminal proceedings to try those accused of committing mass atrocities ... These courts hold considerable promise, even in a world after the ICC.⁴⁴

There is an increasing understanding and acknowledgement that the ICC cannot—and should not—be seen as the only or even the ideal response to mass atrocities. The re-emergence of hybrid tribunals is indicative of this reality. As Beth van Schaak writes:

[T]here is an enduring need for the international community to create, enable, and support additional accountability mechanisms to respond to the commission of international crimes ... Rather than threatening to undermine the ICC, many proposals [to create hybrid courts], if pursued, have the potential to contribute to a more integrated, differentiated, and impactful international justice system that will mount a stronger challenge to impunity by reaching more victims and perpetrators.⁴⁵

Such an integrated approach can be seen most clearly in the Central African Republic (CAR), where the hybrid Special Criminal Court (SCC) and the ICC share concurrent jurisdiction over war crimes, crimes against humanity, and genocide committed since 1 January 2003.⁴⁶

The SCC was created via domestic legislation in response to ongoing political violence in CAR, particularly the atrocities perpetrated by Séléka and anti-Balaka forces between 2012–2014 in which thousands of civilians were killed.⁴⁷ It is to be financed by voluntary contributions, primarily from Western donors and supported by the UN mission in the country, MINUSCA, ‘in the areas of investigations, arrests, detention, criminal and forensic analysis, evidence collection and storage, recruitment and selection of personnel, court management, prosecution strategy and case development and the establishment of a legal aid system, as appropriate, as well as, to provide security for magistrates, including at the premises and proceedings of the SCC, and take measures for the protection of victims and witnesses, in line with the CAR’s international human rights obligations, including with respect to fair trials, and due process.’⁴⁸

⁴⁴ Laura A Dickinson, ‘The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo’ (2003) 37(4) *New England Law Review* 1072

⁴⁵ Van Schaak (2016) 101–03.

⁴⁶ For a discussion of the SCC’s concurrent jurisdiction with the ICC as well as the ordinary Central African court system, see Patryk I Labuda, ‘The Special Criminal Court in the Central African Republic—Failure or Vindication of Complementarity?’ (2017) 15 *Journal of International Criminal Justice* 191–95

⁴⁷ The United Nations’ mandated International Commission of Inquiry on the Central African Republic observed that: ‘The Commission considers that in the context of the CAR conflict, it is not in a position to establish with any degree of accuracy the number of people who were killed in the conflict, during the two years covered by the mandate. The difficulties of collecting accurate data in this regard are due to various reasons, including the practice of Muslim communities to bury their dead almost immediately and the difficulty of getting access to mass graves, especially in the countryside and forests, in the midst of continuing conflicts. The various estimates so far available during this period range from 3,000 to 6,000 people killed, but the Commission considers that such estimates fail to capture the full magnitude of the killings that occurred.’ See <https://reliefweb.int/sites/reliefweb.int/files/resources/N1471229.pdf>

⁴⁸ See United Nations Security Council Resolution 2448, S/RES/2448 (2018), (13 December 2018), available at: https://minusca.unmissions.org/sites/default/files/_resolution_2448_2018.pdf

The SCC's establishment came soon after the ICC opened its second of two investigations in CAR, into the anti-Balaka—Séléka violence. The ICC thus has two active investigations in CAR, although it is notable that it has only prosecuted one individual for atrocities committed in CAR, Jean-Pierre Bemba, a national of the Democratic Republic of Congo, who was initially convicted and later controversially acquitted on appeal.⁴⁹ Moreover, as Patryk Labuda explains, the 2015 domestic legislation establishing the SCC gives primacy to the ICC over the SCC which, he argues, may constitute a violation of the ICC's rules on complementarity.⁵⁰ Labuda also notes that the SCC may be seen as 'a failure of the ICC's decade-long intervention in the country and epitomizes the shortcomings of the international community's efforts to fight impunity in Africa.'⁵¹

Still, the SCC is notable for being the first-ever hybrid court to exist concurrently with active ICC investigations (as well as possible activity among domestic courts). Rather than competing over cases or dealing a 'death blow to the ICC's legitimacy',⁵² staff at the SCC and ICC have gone to significant lengths to ensure that their mandates complement each other. Letters that could form the basis of a formal Memorandum of Understanding between the institutions have been exchanged.⁵³ In March 2018, senior staff from the ICC, including the chief Prosecutor, held training sessions with magistrates from CAR, including senior prosecutors from the SCC.⁵⁴ The ICC has also offered to train SCC judges and investigators and, as some civil society organizations have pointed out, it may be wise for the two institutions to cooperate on other ventures, including outreach efforts, as well.⁵⁵

The level of violence and atrocity perpetrated in CAR is far beyond what either the SCC or the ICC could effectively respond to alone. Indeed, it is likely beyond what both can do, even taken together with the domestic judiciary.⁵⁶ It remains to be seen what direction either tribunal takes; at the time of writing, neither have issued warrants of arrest pertaining to crimes committed by Séléka and anti-Balaka forces. But by striking a cordial and co-operative relationship with the ICC and by using the Court's expertise and knowledge to develop and improve its own, the SCC remains unique among tribunals. It has demonstrated that a hybrid court and the ICC can function in a complementary fashion whilst operating in the same jurisdiction and investigating the same crimes. It is, of course, far too early to cast judgement upon this novel experiment in international criminal justice, but it at least holds the potential of an effective division of labour between hybrids and the ICC that patches the all-too-apparent gaps in the system of international justice. Moreover, forging

⁴⁹ For instance: Jennifer Trahan, *Bemba Acquittal Rests on Erroneous Application of Appellate Review Standard*, *Opinio Juris* at <http://opiniojuris.org/2018/06/25/bemba-acquittal-rests-on-erroneous-application-of-appellate-review-standard/>

⁵⁰ Patryk Labuda, *The Special Criminal Court in the Central African Republic*, American Society of International Law, <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>

⁵¹ Labuda (2017) at p 204.

⁵² This was suggested as a possibility had the SCC competed for cases with the ICC. See L Luigi Prosperi, 'Is a Hybrid Court for the CAR a Good Idea?' (*Justice Hub*, 15 May 2015), at <https://justicehub.org/article/hybrid-court-car-good-idea>

⁵³ See Human Rights Watch, 'Looking for Justice' The Special Criminal Court, a New Opportunity for Victims in the Central African Republic (2018) at https://www.hrw.org/sites/default/files/report_pdf/car0518_web.pdf 30

⁵⁴ See International Criminal Court, *ICC holds training for Magistrates in Central African Republic* (22 March 2018) at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1373>

⁵⁵ See Human Rights Watch (2018) 29.

⁵⁶ See AFP, *Criminal justice a Rare Commodity in Central African Republic* (18 October 2017), at <https://www.timeslive.co.za/news/africa/2017-10-18-criminal-justice-a-rare-commodity-in-central-african-republic/>

such cooperative arrangements between tribunals may make a useful contribution which resonates beyond the relationship between hybrids and the ICC.

Scholars and observers have become increasingly interested in the African Union's Malabo Protocol and the possibility that the jurisdiction of the African Court on Human and Peoples' Rights would be expanded to include the core international crimes embodied in the Rome Statute.⁵⁷ Despite certain problematic caveats in particular around sitting head of state immunity,⁵⁸ such an institution would be a welcome development as a means to investigate and prosecute international and transnational crimes in the region—not in competition with the ICC, but in a complementary fashion.⁵⁹ Indeed, the Protocol already envisions being complementary to other regional and national judicial bodies. This could—and should—be extended to its relationship with international tribunals such as the ICC. As Margaret M deGuzman maintains:

[A]s regional and sub-regional criminal courts such as the [African Court] emerge, they should not be viewed as forming a jurisdictional hierarchy, with national courts at the top and the ICC at the bottom, but rather as providing a menu of adjudicative options... In this way, national, regional, and international criminal courts can enter into a truly complementary relationship.⁶⁰

The complementary and cooperative experience of the SCC-ICC relationship looks set to make a precedent for how such courts can operate and cooperate together.

Cutting costs, pooling premises

Tribunals generally do not enjoy funding sufficient to meet the demands and expectations of justice and accountability. Funding has been a particularly difficult challenge for hybrid courts. While it is generally accepted that assessed contributions are the preferred means of resourcing a tribunal, many have been funded voluntarily.⁶¹ Voluntary funding poses severe

⁵⁷ See, eg, Amnesty International, *Malabo Protocol—Legal and Institutional Implications of the Merged and Expanded African Court* (2016); Gerhard Werle and Moritz Vormbaum (eds), *The African Criminal Court A Commentary on the Malabo Protocol* (Asser Press 2017); Charles Jalloh, Kamari Clarke, and Vincent Nmeihelle (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press: Forthcoming 2019).

⁵⁸ An amendment to the Malabo Protocol provides for immunity for heads of state and senior government officials.

⁵⁹ When asked whether the expansion of the African Court's jurisdiction would be a 'slap in the face', ICC chief Prosecutor Fatou Bensouda responded that 'In fact, ICC is a court of last resort. We will be encouraged by national jurisdictions taking up their responsibility to investigate and prosecute these crimes'. See Caroline Schmitt, *13 years, 1 billion dollars, 2 Convictions: Is the International Criminal Court worth it?* (*Deutsche Welle*, 27 January 2016) at <https://www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069>

⁶⁰ See Margaret M deGuzman, 'Complementarity at the African Court', in Charles Jalloh, Kamari Clarke, and Vincent Nmeihelle (eds), *The African Court of Justice and Human and Peoples' Rights* (Cambridge University Press 2017); Temple University Legal Studies Research Paper No 2018-01, p 1 Available at SSRN: <https://ssrn.com/abstract=3078119>,

⁶¹ For example, in a report on the SCC, Erica Bussey has written that due to it being '[f]unded solely by voluntary contributions, it is difficult to see how the SCC will avoid ongoing financial crises similar to those that destabilised and undermined the work of the Special Court for Sierra Leone and to this day affect the work of the Extraordinary Chambers in the Courts of Cambodia.' See Erica Bussey, *Progress and Challenges in Establishing the Special Criminal Court in the Central African Republic*

challenges for tribunals. It exposes tribunals to potential intrusions on their independence by donors who can hold resources hostage for particular judicial outcomes. Voluntary contributions can also sap the energy of senior staff who are forced to devote time and energy to fundraising rather than pursuing the core investigatory, prosecutorial, or juridical functions of the Court. Some estimate that senior staff at the SCSL, for example, spent as much as a third of their time on fundraising and related activities.⁶²

A tribunal's premises must meet certain standards of functionality, security, and technology. As a result, the creation of a tribunal can be a costly endeavour, particularly in relation to the financial situation of the communities in or for which they are established. For example, the estimated cost of building the premises of the SCSL was \$6 million at a time when the GDP per capita of the Sierra Leonean population was under \$328.⁶³ Post-conflict states should not be expected to carry the burden of building modern courts when the very edifices of other public institutions are suffering. Nor should they be solely responsible for maintaining the upkeep of such tribunals during the lifespan of the court or, as importantly, once the tribunal's mandate is completed. However, a sense of dependency is created if external donors must maintain such facilities for years after the tribunal's work is completed, leaving an uneasy choice between a decreased sense of local ownership if internationals maintain facilities, and the possibility of the bricks-and-mortar of tribunals being allowed to fall into disrepair and disuse if the burden falls on a less-developed host state.

At the same time, it is not always feasible for hybrid tribunals to be located within the state in which the alleged atrocities occurred due to security reasons and fears of political destabilization and interference. This may be true for all proceedings before the tribunal, as is the case with the KSC, or may only be partial. The latter scenario was evident when former Liberian President Charles Taylor was prosecuted not on the premises of the SCSL in Freetown but in The Hague, in courtrooms seconded by the ICC and the Special Tribunal for Lebanon to the SCSL.

Previous iterations of international and hybrid tribunals have bequeathed a physical legacy that could help to alleviate the set-up costs and security challenges faced by a new generation of hybrid courts. By pooling tribunals, the unique flexibility of hybrids could help policy- and lawmakers alleviate the cost and insecurity burdens present when setting up tribunals. Consider the examples of South Sudan and Liberia.

The proposed hybrid court for South Sudan

Given the current political context and ongoing instability, it is implausible that the proposed Hybrid Court for South Sudan (HCSS) could be located in the capital of Juba. Indeed, given security concerns and the resources that it would require of an impoverished and

(*Amnesty International*, 2 October 2017), at <https://www.amnesty.org/en/latest/campaigns/2017/10/progress-and-challenges-in-establishing-the-special-criminal-court-in-the-central-african-republic/>

⁶² Conversation with former senior staff member of SCSL.

⁶³ See Special Court for Sierra Leone Press and Public Affairs Office, Press Release (11 October 2002), available at <http://www.rscsl.org/Documents/Press/2002/pressrelease-101103.pdf>; World Bank, World Integrated Trade Solution, *Sierra Leone GDP per capita constant 2010 US\$ 2000–2006* (accessed 20 July 2018), at <https://wits.worldbank.org/CountryProfile/en/Country/SLE/StartYear/2000/EndYear/2006/Indicator/NY-GDP-PCAP-KD>

severely conflict-affected state (even with international donor help), such a proposition would be unfair. One can imagine, for example, that rebel attacks on tribunal staff would result in severe criticism of the state. This has inspired some consideration of alternative premises for the HCSS outside of Juba. One possibility is Arusha, Tanzania.

Arusha is a stable and secure city, which some refer to as ‘The Hague of Africa’ due to its numerous international bodies and courts, including the ICTR. Notably, despite closing down and being replaced by the residual institution the Mechanism for International Criminal Tribunals (MICT), a new and modern headquarters was built for the ICTR just outside of Arusha. Due to the continued existence of some fugitives indicted by the tribunal, these premises may still be used to prosecute Rwandan génocidaires. However, they could also be used as something analogous to a permanent hybrid court, housing proceedings for tribunals established to investigate and prosecute atrocities but which remain too unstable to host tribunals and secure tribunal staff.⁶⁴ Indeed, some senior MICT staff have suggested that this should indeed be the case and that they would welcome the use of the building’s courtroom for such purposes.⁶⁵ Some diplomats have also intimated their preference that proceedings at the HCSS take place in Arusha instead of Juba.⁶⁶

While the premises of the MICT could host proceedings from states in the region, like South Sudan, unless there are no other possibilities, it should not act as a host for prosecutions of perpetrators happening in disparate regions of the continent or world. There are other options.

A potential war crimes court in Liberia

Since the election of George Weah as President of Liberia in December 2017, there has been a strong push from international and domestic civil society to establish a Liberian war crimes tribunal. In all likelihood, such a court would take the form of a hybrid tribunal. In its final report, issued in 2009, the Liberian Truth and Reconciliation Commission recommended that an ‘internationalized domestic criminal court’ be established with a mandate to investigate and prosecute core international crimes in addition to certain economic and domestic crimes. Since Weah’s ascension to power, pressure on the government to set up a tribunal has grown.⁶⁷

As of this writing, it remains unclear whether the government is interested in such a tribunal. Ministers have said it is not a ‘priority’ for the government.⁶⁸ Weah’s selection of Jewel Howard Taylor, the former wife of Liberian President Charles Taylor, as Vice President

⁶⁴ For a discussion on this proposal, see Kersten (2018) 270–72.

⁶⁵ Conversation with ICTR / MICT Staff, 2017.

⁶⁶ Conversation with senior African Union staff involved in establishment of the HCSS, 2018.

⁶⁷ See, eg, Front Page Africa, *Liberia Fails To Disclose Plans for War Crimes Before UN Human Rights Committee* (11 July 2018), at <https://frontpageafricaonline.com/liberia-war-crimes-trial/liberia-fails-to-disclose-plans-for-war-crimes-before-un-human-rights-committee/>; The Center for Justice & Accountability, *Liberia* (accessed 20 July 2018), at <https://cja.org/where-we-work/liberia/> <https://www.civitas-maxima.org/en/campaigns/liberian-quest-for-justice-campaign/>; Human Rights Watch, *Liberia: 76 Groups Seek Justice for War Crimes* (5 July 2018), at <https://www.hrw.org/news/2018/07/05/liberia-76-groups-seek-justice-war-crimes>.

⁶⁸ See Lennart Dedoo, *Liberian Govt. Not Interested in War Crimes Court For Now* (Front Page Africa, 11 May 2018), at <https://frontpageafricaonline.com/politics/liberian-govt-not-interested-in-war-crimes-court-for-now-deputy-information-minister/>

is reportedly 'seen by many Liberians as a snub to the victims'.⁶⁹ Further complicating matters, many individuals allegedly involved in the political violence of Liberia's civil wars are in positions of power and public office.⁷⁰ Removing them from office and/or power could be destabilizing to a country that held its first peaceful transition of power since 1944 in 2017.

One means to reduce tensions and the potentially destabilizing effects of prosecutions would be to outsource some of the proceedings to the premises of the SCSL. This would also reduce the start-up costs associated with creating a war crimes tribunal, which would likely be attractive to both the Liberian government as well as international donors. There is, as the saying goes, no need to reinvent the wheel. The SCSL premises would have to be updated, which is a resource-intensive proposition. But this would cost significantly less than the construction of a new tribunal in Monrovia that met international standards.

Of course, hosting proceedings in Freetown would create distance between the locus of the crimes that were committed in Liberia (Monrovia and Freetown are 525 km apart), but with the saved costs, more resources could be allocated to effective outreach programming in both Sierra Leone and Liberia. As a Sierra Leonean scholar astutely observes: 'The conflicts in Sierra Leone and Liberia are intertwined and it is easier to bring Liberians to Freetown to witness the trials live. Future trials (from Liberia or elsewhere) will also remind Sierra Leoneans of the legacy of the [SCSL] that impunity for grave crimes is no longer acceptable.'⁷¹ With time and the continued consolidation of peace and security, prosecutions could be transferred to domestic courts in Liberia, similar to the practice of case transfer from the ICTY and the Bosnian War Crimes Chamber to relevant courts in the former Yugoslavia.⁷²

Whatever features a Liberian war crimes tribunal ultimately has and whether or not the HCSS eventually hears cases in Arusha, hybrid courts have the unique and endogenous flexibility in their institutional design to utilize the strategic advantages of their predecessors. It would be a remarkable legacy if the facilities of previous tribunals could become residences of a new generation of hybrids.

Concluding reflections—Problem-solving justice

In her 2003 essay on hybrid tribunals, Laura Dickinson made the following observation:

[hybrid] courts have developed in an ad hoc way, the result of on-the-ground-innovation rather than institutional design ... they hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other.⁷³

⁶⁹ See Cristina Krippahl, *Liberians Still Seek Justice for War Crimes* (Deutsche Welle, 10 July 2018), at <https://www.dw.com/en/liberians-still-seek-justice-for-war-crimes/a-44599243>

⁷⁰ See Rodney D Sieh, *Liberia: Quiet Pursuit of War Criminals Signals Hope Against Impunity* (Front Page Africa, 22 October 2017), at <http://frontpageafricaonline.com/liberia-war-crimes-trial/liberia-quiet-pursuit-of-war-criminals-signals-hope-against-impunity/>

⁷¹ From a discussion with Mohamed Sesay (31 July 2018).

⁷² See Ivanišević Bogdan, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Center for Transitional Justice (2008).

⁷³ Dickinson (2003) 1059–60.

It is this ad hoc and flexible nature that animates hybrids. One tribunal need not be the same as the last. Each represents an opportunity to rectify any missteps of the last and improve on the record of its predecessors. This chapter has demonstrated how hybrids can be forums of creative thinking to address the shortcomings of international criminal justice: the EAC's innovative outreach programming which reached its multiple constituencies; the KSC's unprecedented mandate to investigate and prosecute the victors of the war in Kosovo; the SCC's sharing of concurrent jurisdiction and a cooperative relationship with the ICC; and the possibility of future hybrids, including the proposed HCSS and a war crimes court for Liberia, being housed in the premises of their predecessors. Some of these novel efforts may not be exclusive to hybrid courts. But there is something about the very hybridity of these institutions that can inspire innovative solutions which can, in turn, address the pitfalls of prior tribunals.

The analysis offered in this chapter is not an attempt to paint an overly rosy picture of hybrid courts or international criminal justice. With the rise of populism and a growing animosity towards international criminal law among powerful and weak states, tribunals and their proponents face, as perhaps they always have, an uphill battle. While recent years have seen the re-emergence of the hybrid tribunal as a popular mechanism of international criminal justice, with the EAC arguably a prime example, their predecessors—the SCSL, ECCC, STL, etc—had a mixed and contentious record. The latest generation of hybrids will have their own flaws, weaknesses, critics, and mixed records. Their ability to successfully confront the particular challenges they face remains to be seen. But hybrids offer something that other tribunals do not: an opportunity to continuously reimagine and problem-solve international criminal justice.