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# Pragmatism as Principle

## The Comeback of Hybrid Courts

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## Summary

At the turn of the century, it was in vogue to establish “hybrid courts” – composed of both international and national elements – to ensure the prosecution of war crimes and other serious violations in post-conflict societies. These courts were specifically praised for being local and thus more legitimate than their international counterparts, the ad hoc criminal tribunals for the former Yugoslavia and Rwanda. The first generation of hybrid courts dealt with crimes in Sierra Leone, Cambodia, Timor-Leste (East Timor), Kosovo, Bosnia and Herzegovina, and Lebanon. However, the courts were plagued by interference from local elites, chronic underfunding, the international actors’ lack of ownership, and inadequate long-term capacity building. Their shine quickly dimmed.

This is why it is surprising that since 2013, new hybrid institutions have begun to be established. This report examines new tendencies in “hybrid prosecution” and the lessons learned from the problems of their first generation. What role does the United Nations (UN) play in developing and implementing the new institutions? What significance could hybrid courts have for the future?

The report argues that the current surge in the number of hybrid institutions (in Senegal, the Central African Republic, and Kosovo) is linked to disenchantment with purely international prosecution by the International Criminal Court (ICC) and hybrid courts. Although the UN was once very involved, it now either keeps a low profile (partly for political reasons) or supports the establishment of hybrid institutions that are not based on agreements with international entities. There are also examples of pragmatism with regard to hybrid institutions, such as Guatemala’s dissociation of criminal investigation from prosecution.

Only a few lessons have been learned since the first hybrid tribunals were established in the 2000s. Mainly, the defense side has been strengthened. However, with regard to long-term financing, extended terms, increased transparency, and better public relations, there have been hardly any improvements. Nevertheless, it appears that the new hybrid institutions can fill gaps in the network of international prosecution, particularly when the ICC reaches the limits of its territorial, temporary and specific mandates or is paralyzed by political conflicts. Hybrid tribunals still have to balance the interests of the UN and target countries, while massive conflicts of interest continue to exist between the desire for the rule of law to prevail and national elites, who don’t want to accept any hybrid institutions that could be “too successful.” This means establishing and designing hybrid courts always involves compromises between national elites and international actors.

I particularly recommend that Western donor states, the main financiers of such hybrid institutions, adopt a pragmatic approach and provide strong support: They should study existing institutions to avoid repeating mistakes in recruiting international and national staff and designing transition strategies and capacity building. Furthermore, the expectations placed in hybrid tribunals should be lowered – especially those of the civil society in target countries. Hybrid courts are best at handling a small number of cases but beyond that, show few positive impacts on the rule of law in war-torn and post-conflict societies. Last but not least, donors must provide reliable long-term financing to ensure the future of new hybrid tribunals.

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## 1. Introduction<sup>1</sup>

How should the most serious crimes of past and present violent conflicts be prosecuted? The atrocities being committed in Syria, Yemen, and South Sudan keep this question very pertinent. There is little enthusiasm for establishing any hybrid tribunals or chambers – “hybrid courts” – in response. However, in the debate about international criminal prosecution hybrid tribunals are experiencing a comeback.

“Hybrid courts” have both international and national features (OHCHR 2018: 1), such as international and national judges and prosecutors who apply both international and national law. In the early 2000s, hybrid courts for prosecuting war crimes or specific other violations were in vogue. Compared with the international ad hoc tribunals established in the 1990s to prosecute crimes committed during the Balkan Wars and in Rwanda, the hybrid courts of the next decade were regarded as “local” – thus more legitimate (Dickinson 2003a). Those tribunals included the Special Court for Sierra Leone, the Extraordinary Chambers in Cambodia, the Serious Crimes Panel in Timor-Leste, the Regulation 64 Panels in Kosovo, the Bosnia War Crimes Chamber, and the Special Tribunal for Lebanon.

However, with only some of the numerous functional and normative expectations of these hybrid courts met, many observers have declared them a thing of the past. In addition, the new International Criminal Court (ICC) was seen as reducing the need for hybrid courts (McAuliffe 2011). In fact, between 2007 and 2013, no new hybrid tribunals were created. Talk about them did not end, however, and three new hybrid courts have recently been established to address crimes committed in the Central African Republic (CAR), Chad, and Kosovo.

In light of this development, I examine the format and evolution of hybrid courts: What are the new trends? Have the early problems been seriously addressed? What are the particular challenges for the UN with regard to establishing these courts and pursuing hybrid criminal prosecution? Finally, what role could hybrid courts play in the context of a functioning ICC? This report considers the catch-22 between internationalization and the local (nation-state or domestic) integration of international criminal prosecution: At the turn of the century, the goal was greater local integration. In the 2010s, there seems to be disenchantment at the UN regarding internationalization and local integration. The UN has had to limit its role as protagonist with respect to hybrid courts, and now participates in a diversified network of international, regional, and domestic institutions involved in criminal investigation and prosecution.

I start by looking at the evolution of international criminal prosecution before describing how hybrid courts emerged in the 2000s to replace the “internationalized” ad hoc tribunals like those for the former Yugoslavia and Rwanda. I compare the circumstances of the

1 I warmly thank Caroline Fehl, Max Lesch and Eva Ottendörfer for their many helpful comments regarding the report. Anna Fehl provided valuable support for the preliminary research

formation and mandates of the first generation of hybrid courts, and discuss the high operational and normative expectations of these innovative institutions. The report's second section explores the general disenchantment regarding both internationalization and local integration in the 2010s that has led the UN to take a more pragmatic and cautious approach. On one hand, hybrid tribunals (in Senegal, the CAR, and Kosovo) were regionally or nationally (not internationally) integrated, while on the other, innovative approaches such as separating criminal investigation from prosecution were used (in Guatemala). I argue that few lessons have been learned from the problems of the first generation of hybrid tribunals. In the last chapter I present recommendations for further developing hybrid institutions in a network of international, regional, and national criminal prosecution in conflict- and post-conflict states – pragmatically, and with increased support.

## 2. The Evolution of International Criminal Justice

The notion of international criminal justice – the prosecution of war crimes, genocide, and crimes against humanity – began in the 19<sup>th</sup> century (Bogdandy/Venzke 2014: 97; Schabas 2017: Ch. 1). However, it wasn't until after the Second World War that the first cases were prosecuted in the ad hoc tribunals of Nuremberg and Tokyo (the International Military Tribunal for the Far East). Those trials are often described as the first generation of international criminal prosecution.

Only in the 1990s, in the framework of the UN, was an effort to develop a standardized procedural approach in this area observed. In many transformation processes of the 1980s in Argentina and Chile, perpetrators were granted amnesty, and in South Africa in the 1990s. During that decade, support<sup>2</sup> grew internationally to create binding legal norms for criminal accountability. This then became an important part of UN activities, particularly in post-conflict countries. Criminal prosecution was enshrined in the UN's goals. The UN regards that the most essential task of criminal prosecution is fighting impunity and punishing the most serious crimes committed during a violent conflict. However, criminal prosecution is also generally expected to improve security and serve as a deterrent (McAuliffe 2011: 19–20).<sup>3</sup>

In scientific literature, the tasks of international criminal prosecution are described more broadly (see Bogdandy/Venzke 2014: 16–29), with jurisprudence in international courts often contributing to international humanitarian law, for example, in rulings by international courts that sexual violence is a crime against humanity (Bogdandy/Venzke 2014: 100; Kuhli/Günther 2012). Especially in the field of criminal prosecution, courts could present a

2 This was the fruit of broad transnational campaigns calling for bottom-up rather than top-down approaches, in which most of the focus was placed on dictatorships and conflicts in Latin America (see Sikkink 2013).

3 This was in the general context of a more unified approach to the rule of law, such as the United Nations Security Council 2004. For critical discussions, see Rajagopal 2008: 50–51; Carothers 2003; Sriram 2008.

specific interpretation and “facts” about a civil war as a means of promoting reconciliation and acknowledgment of the past (Bogdandy/Venzke 2014: 103; Joyce 2004). A survey by Bogdandy/Venzke (2014: 16–29) shows that international courts might also have stabilized conflicting parties’ normative expectations.

Internationalization dominated criminal prosecution in the 1990s – along with negotiations to create a permanent international criminal court and temporary tribunals, the “second generation” of international criminal prosecution. The international community viewed ad hoc courts as the only way for ethnically polarized post-war countries to prosecute the most serious crimes committed during conflicts and civil wars – by using international law. The tribunals were considered “external” because they were staffed by judges from other countries who applied international humanitarian law. The two such “external” temporary tribunals established in the 1990s were the International Criminal Tribunal for the former Yugoslavia (ICTY, 1994–2017) and the International Criminal Tribunal for Rwanda (ICTR, 1995–2014) (summarized in Bassiouni 2016; Bassiouni/Manikas 1996; Kerr 2004; Schabas 2006; Shraga/Zacklin 1994, 1996). Both tribunals were mandated to punish crimes against humanity, genocide, and severe violations of the Geneva Conventions.<sup>4</sup> They were established through UN Security Council (UNSC) resolutions – in the case of the ICTY, against the will of local actors.

Despite partly successful prosecutions of the most serious perpetrators (Slobodan Milošević, the head of the Serbian government, who died before being sentenced, the Bosnian Serb Radovan Karadžić, and most recently, the Croat Ratko Mladić, to name but a few), the two tribunals had similar problems. These included the difficulty of simply apprehending the accused and funding the tribunals, as well as perceptions in the countries and territories for which the judicial processes were being conducted that the courts lacked legitimacy. The courts were depicted as rendering victors’ justice, with the prosecution unfairly persecuting specific ethnic groups (Barria/Roper 2005; Baylis 2017; Cassese 1998; Cruvellier 2010; Meron 2005; Nagy 2008; Novak 2015: 12–13; Peskin 2006; Schabas 2006). The recent debates in Serbia and Croatia about Ratko Mladić’s sentence, as well as Bosnian Croat General Slobodan Praljak’s spectacular courtroom suicide, illustrate that until the ICTY was formally closed, it was considered illegitimate and unfair, and that international criminal prosecution does not automatically lead to reconciliation or dealing with the past critically (Praljak 2017; Verseck 2017).

While these temporary tribunals were being established, negotiations were being conducted for a permanent tribunal, the International Criminal Court (ICC), which was created pursuant to the 1998 Rome Statute. The ICC, which institutionalized an international standard for individual criminal accountability, is mandated to prosecute the gravest breaches of international criminal law (crimes against humanity, genocide, and war

4 International Criminal Tribunal for the former Yugoslavia: <http://www.icty.org/>;  
International Criminal Tribunal for Rwanda: <http://unictr.unmict.org>.

crimes) when national institutions are not capable or willing to do that.<sup>5</sup> The ICC only began to function after 2002 (Fehl 2014).

A standard for international criminal prosecution was established in the second half of the 20<sup>th</sup> century but only institutionalized in its last decade. UN-supported international institutions are supposed to ensure that the most serious crimes committed during violent conflicts are criminally prosecuted under international humanitarian law.

### 3. Hybrid Courts in the 2000s: Searching for More “Local” Instruments

At first, hybrid courts were seen as a way of locally integrating international criminal prosecution. The UN, which wanted to overcome the difficulties with a strongly internationalized approach, assumed a central role in their creation and development.

The limits of these internationalized approaches have been intensively discussed since the 2000s: Externally run courts are often locally perceived as “artificial” bodies that impose victors’ justice (Costi 2005; Dickinson 2003b; Holvoet/Hert 2012; Raub 2009). Given the rather small number of convicted criminals, some observers consider that the costly trials took far too much time.<sup>6</sup> In 2002, the ICC was just beginning its work and had not established its own profile. Strong internationalization was seen as having failed and ways to criminally prosecute that were tailored to local contexts were sought.<sup>7</sup>

At the UN and in specialist literature, “hybrid tribunals” or “chambers” for criminally investigating and prosecuting specific crimes were regarded as advancements.<sup>8</sup> Strong expectations were expressed about their standards and operations: Not only would these new bodies be more successful at criminal prosecution than international and national courts – which, in post-conflict situations, had woefully inadequate capacity and mostly favored the victors<sup>9</sup> – but they would also be better received by the population. The advantages of fairness and objectivity imputed to international courts were conflated with local advantages (increased legitimacy and visibility). The new hybrid courts would build capacity in the domestic justice system, conduct shorter trials, and show that fair, independent trials are possible – thereby ensuring the greater propagation and acceptance of standards of the rule of law in post-conflict countries. These goals were expected to be

5 For more about the ICC’s creation, see Deitelhoff 2006; Fehl 2004.

6 In 2004, the UN Secretary-General allotted more than 2000 staff members and an annual budget of USD 250 million for the two temporary tribunals (United Nations 2004: 42).

7 The UN generally attempts to find instruments for peace building and promoting the rule of law that are tailored to the context. See Ottendörfer 2016; Zimmermann 2017b.

8 For example, the UN General Assembly 2008: 92–93.

9 Rwanda is a prime example of the failures of national trials.



attainable with less money since national staff of such bodies cost less and pay for international staff is often lower than for their counterparts' salaries at international tribunals based in The Hague. It is also easier to create hybrid courts or chambers, which usually do not need a UNSC Chapter VII resolution (Burke-White 2002: 23–24, 63; Dickinson 2003b; Novak 2015: 15). Finally, it was believed that such hybrid courts would ensure that the original focus on “serious violations” of international humanitarian law (war crimes, genocide, and crimes against humanity) would be extended to other crimes that could be prosecuted under domestic law.

The UN itself also had high expectations for both ad hoc tribunals and hybrid courts:

“In the past decade, the United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.” (United Nations 2004: Art. 38)

The UN goals expanded from successful criminal prosecutions to reconciliation, general support for the domestic rule of law, and promoting the peace process.

However, these great expectations were not linked to the specific circumstances in which the bodies were developed (see also Nouwen 2006: 193–198). Usually they had to compromise in order to carry out any kind of (limited) criminal prosecution in difficult political conditions. In cases of ethnic polarization that were normally accompanied by the destruction of the existing legal system and a dicey security situation, hybrid courts were supposed to create a rapid way forward (McAuliffe 2011: 2, 23). Dickinson (2003a: 296) put it pointedly: They are the “product of on the ground innovation rather than grand institutional design.” Individual hybrid courts and chambers were created in very different types of institutional structures and situations. Most of these bodies focused on criminally prosecuting gross human rights violations committed during recent wars and armed conflicts. The Special Tribunal for Lebanon, however, focused on crimes of terrorism.

The various contexts, mandates, and basic institutional parameters of this first generation of hybrid courts (legal foundations and status, applicable law, staffing, and financing) are outlined below (Table 1). The hybrid courts and chambers created with UN involvement include those for Sierra Leone, Cambodia, Timor-Leste, Kosovo, Bosnia and Herzegovina, and Lebanon.<sup>10</sup> The problems and challenges faced by these institutions are presented in detail.

<sup>10</sup> Bodies such as the Iraqi Special Tribunal, which was supposed to prosecute the Baath Party's most severe violations of international law and have international judges, are not counted among the first generation of hybrid courts. The Iraqi court was created during the American occupation of Iraq (Newton 2010). Another special case was the 2011 trial on the Lockerbie bombing, for which a temporary Scottish Court was set up in the Netherlands (Grant 2013).

*The Special Court for Sierra Leone (2002–2013)*

Today, the Special Court for Sierra Leone is regarded as one of the more successful hybrid courts. It was created at the request of the Government of Sierra Leone, which did not want to domestically prosecute crimes committed during its civil war. The country's precarious security situation put it on the agenda of the UN Security Council (UNSC), whose Resolution 1315 of 2000 requested the UN Secretary-General to negotiate with Sierra Leone's government about a tribunal. The agreement establishing the court was signed in 2002.

The Special Court was mandated to prosecute those persons who bear the "greatest responsibility" for the crimes. The court applied both national and international law with regard to "serious violations of international humanitarian law and crimes committed under Sierra Leonean law" (United Nations/Government of Sierra Leone 2002: Preamble). First located in Sierra Leone, the tribunal was later moved to The Hague because of security risks regarding the trial of Charles Taylor, the former president of Liberia and main protagonist in Sierra Leone's civil war.<sup>11</sup> The Special Court was financed by voluntary contributions from UN Member States. Most key court staff members (judges and chief prosecutors) were international (United Nations/Government of Sierra Leone 2002: Art. 2). However, the government of Sierra Leone also filled positions designated for "locals" with foreigners. Altogether, 13 individuals (not counting those charged with contempt of court) were indicted, including Charles Taylor, who was condemned in 2012 (Jalloh 2011, 2013, 2014; Kerr/Lincoln 2008; Nkansah 2014; Oosterveld 2008; Wharton 2011).

*The Extraordinary Chambers in the Courts of Cambodia (2005–)*

The Extraordinary Chambers in the Courts of Cambodia (or Khmer Rouge Tribunal, ECCC) were created through Cambodian Government negotiations with the UN about prosecuting crimes committed by senior leaders of the Khmer Rouge in the 1970s (Cayley 2012; Ciorciari/Heindel 2014; Meisenberg/Stegmiller 2016). However, the situation in Cambodia was different from that in Sierra Leone. Negotiations on UN help for Cambodia to organize trials had begun in 1997: An international team of experts recommended an entirely international tribunal because they feared Cambodian Government interference (Nouwen 2006: 194). However, neither national nor international partners were interested in creating another temporary international tribunal. The Cambodian Government wanted the trials to be held at home, and experience with ad hoc tribunals had tempered international enthusiasm for long and costly international proceedings. The UN and the Royal Government of Cambodia only reached an agreement in 2003, after the UN General Assembly pushed the Secretary-General to resume (the broken-off) negotiations. The compromise created hybrid judicial chambers in Cambodia (including Pre-Trial, Trial, and Supreme Court (Appeals) Chambers), with an "exit clause" that allowed the UN to pull out

11 The tribunal had priority over national amnesties that could have protected Charles Taylor (Statute of the Special Court, Art. 10).

if the Cambodian Government blatantly interfered (United Nations/Government of Cambodia 2003b: Art. 28).

The court began work in 2005 under a mandate to try “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia” (United Nations/Government of Cambodia 2003b: Preamble) between 1975 and 1979. In contrast to the Special Court for Sierra Leone, most of the judges are Cambodian. Decisions, however, must be approved by at least one international judge. There are also an international and a Cambodian prosecutor (Art. 6.1). This arrangement led to the development of a highly complex concertation and mediation procedure. The court is funded by Cambodia and voluntary contributions from various countries (United Nations/Government of Cambodia 2003a). Thus far, four cases have been heard. Two remain. Eight people have been indicted, and three of them sentenced to life imprisonment (Cayley 2012; Sperfeldt 2013).<sup>12</sup>

#### *The Serious Crimes Panel in District Court of Dili in East Timor (2000-2006)*

There is a crucial difference between the way the tribunals in Sierra Leone and Cambodia came into being and the way the two hybrid courts and chambers I discuss next were created. Both of these were established by UN Transitional Administrations through UNSC resolutions, in the case of Timor-Leste, by the United Nations Transitional Administration in East Timor (UNTAET) Regulation 2000/15. In this case, too, the hybrid institution was a stopgap. The international community was not interested in establishing an international tribunal to prosecute human rights violations committed around the referendum on Timor-Leste’s independence, and accepted that Indonesia, which had invaded Timor-Leste (East Timor) in 1975 and was the main perpetrator of atrocities in the former Portuguese colony, wished to try Indonesian citizens in its own courts. Such domestic prosecutions could hardly be expected to seek accountability.

With such a possibility looming and wanting to quickly start court cases, UNTAET decided to create a hybrid institution for Timor-Leste, namely, a special chamber in the district court of Timor-Leste’s capital Dili and an appeals chamber. The main justifications for establishing the chambers were the lack of local expertise and the fact that the Government of Timor-Leste had imprisoned the alleged perpetrators for far too long. There were hardly any experienced local judges or prosecutors because until recently these key positions had been staffed entirely by Indonesian citizens (Nouwen 2006: 197; Ottendörfer 2016: Ch. 5.5).

The investigation was supposed to be about the crisis and eruption of violence following the 1999 referendum about independence for Timor-Leste. The chamber was supposed to

<sup>12</sup> For more details, see: <https://www.ijmonitor.org/khmer-rouge-trials-timeline/> and <https://www.eccc.gov.kh/en/about-eccc> (28 December 2017).

deal with “serious criminal offences” (UNTAET 2000a: Art. 1.1): genocide, war crimes, crimes against humanity, sexual assault, and torture (Art. 1.3). The court was allowed to bring charges against individuals not residing in Timor-Leste for crimes that had been committed in the country (Art. 2.1). It was to apply both national law (which was very rudimentary at the time) and international law (Art. 3.2). The chambers were staffed by two international judges and one East Timorese (Art. 22). A similarly international-national prosecuting office was to conduct criminal investigations (Burke-White 2002: 65; UNTAET 2000b).

The Serious Crimes Panel in Timor-Leste focused on the most serious human rights violations committed during an earlier conflict. It was not created by an agreement but rather by the UN Transitional Administration, which also financed it. Although a domestic entity, it applied both international and national law, mostly under international judges.

The new East Timor government was not very interested in the new chamber; nor did it think it was important to efficiently prosecute human rights violators. The Government was also concerned that the proceedings would seriously affect relations with its powerful neighbor, Indonesia (Bertodano 2004: 914; Reiger/Wierda 2006: 32). The UN, too, displayed very limited commitment (Ottendörfer 2016: 161, 168–173). In the end, the special panels brought charges against 87 people, of whom 83 have been convicted. (Cohen 2009: 118). However, Indonesia’s refusal to cooperate with the government of Timor-Leste and the special panels by extraditing suspects makes it impossible to prosecute many charges (Reiger/Wierda 2006: 21). The financing for the special panels and staff and technical resources, such as translating, was also extremely uncertain (Cohen 2006: 26).

#### *The Regulation 64 Panels in the Courts of Kosovo (2000–)*

The Regulation 64 Panels in Kosovo also represent a stopgap by the United Nations Mission in Kosovo (UNMIK), with a hybrid institution created by the UN Transitional Administration (Resolution 2000/64 and earlier resolutions, such as 2000/32). In many ways, however, the Regulation 64 Panels have shifted the framework of hybrid courts. The text of the regulation states that the goal is not to just deal with serious crimes during the conflict but also to prevent bias: For that reason all courts should be staffed by international judges and prosecutors. However that has mostly been the case for trying the gravest crimes. UNMIK was concerned that Albanian judges and prosecutors would treat Serbian defendants unfairly and acquit Albanian defendants despite incriminating evidence (Cady/Booth 2004; McAuliffe 2011: 24) and the regulation’s preamble reflects that:

“Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo [...]” (Regulation 2000/64, Preamble)

The regulation states that if the UN administration considers it necessary, the proceedings can be “internationalized” by assigning an international prosecutor or judge or staffing a panel with at least two international judges; the applicable law is not international but rather national. Although hundreds of trials have been held under Regulation 64, the hybrid courts

were not intended to replace local courts but rather to support the implementation of national law (Carolan 2008; Muharremi 2014).

Since 2008, the European Union has expanded on the Regulation 64 Panels created by UNMIK to further support judicial and prosecutorial instruments in the framework of the European Rule of Law Mission in Kosovo (EULEX). The most recent developments are the creation of “Specialist Chambers” to prosecute international and cross-border crimes committed during the armed conflict (see below as well as Cross 2016; Holvoet 2017; Selimi 2016; Welski 2014).

#### *The Bosnian War Crimes Chamber (2005–)*

In 2003, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the UN Office of the High Representative (OHR) agreed to create a hybrid chamber in Bosnian courts that was supposed to be completely domesticated within a few years. The Bosnian War Crimes Chamber (BWCC) was created through an agreement between the UN Transitional Administration and the ICTY to take over the latter’s cases after that tribunal completed its work, and also initiate its own prosecutions, especially of lesser figures for whom the ICTY had no capacity (Nouwen 2006: 207).<sup>13</sup> Convictions are based on Bosnian national law regarding war crimes, crimes against humanity, and genocide (Ivanisevic 2008: 7). UN Member States and Bosnia and Herzegovina finance the BWCC through voluntary contributions.

Four categories of cases are being tried before the BWCC: cases referred by the ICTY, defendants who did not fall under ICTY jurisdiction or had not yet been investigated there, cases prosecuted by local courts that are viewed as belonging to the BWCC’s mandate, and cases within the BWCC’s mandate investigated after March 2003 (Ivanisevic 2008: 8).<sup>14</sup>

The BWCC is surely considered a rather successful hybrid body (Abdulhak 2009; Garbett 2010: 561–562, 2012: 72–73) because of its very narrow and specific remit, as well as its strategy for phasing out international judges (OHCHR 2008: 10).

#### *The Special Tribunal for Lebanon (2009–)*

The Special Tribunal for Lebanon (STL) is tasked to criminally prosecute those responsible for the assassination of former Lebanese Prime Minister Rafik Hariri in 2005. The Lebanese Government requested the UNSC to have the UN Secretary-General negotiate an agreement – which the Lebanese Parliament then refused to ratify because the court would

13 The “Bosnian War Crimes Chamber” was not the only mixed court in the country. For an overview, see Winkelmann 2006.

14 From September 2005 to June 2008, in the 48 cases were tried before the BWCC, 27 of the 84 defendants were convicted. Five were acquitted. See Ivanisevic 2008: 10. Unfortunately, figures concerning recent developments in the court are not available.

not be authorized to demand the death penalty. Finally, a special type of hybrid tribunal was created through UNSC Resolution 1757 (based on Chapter VII).

The STL is not based in Lebanon, but rather in The Hague, although it does not apply international law but rather Lebanese criminal law, particularly the provisions of the legal code concerning terrorism (United Nations 2007: 12). The tribunal's specific focus on terrorism, rather than grave human rights violations, makes it somewhat different from other hybrid courts. Furthermore, offenders can be tried *in absentia* under certain conditions (Novak 2015: 16). The STL is 51% financed by voluntary contributions of UN Member States, and 49% by the Lebanese Government.

The current main proceedings (Prosecutor v. Ayyash, Merhi, Oneissi and Sabra) are against those – Hezbollah members – who are alleged to be responsible for the attack that killed former Prime Minister Hariri in 2005. Although arrest warrants were issued in 2011 and the trial began in 2014, none of the suspects has been arrested, mainly because the Lebanese authorities and government are not cooperating (Enders 2017): The trial is truly being held with the accused *in absentia* (Special Tribunal for Lebanon 2017: 8; Shamsi 2015: 61). There are also proceedings against two media enterprises and their managers. In the first instance, they were fined for publishing information about confidential witnesses. One conviction was later reversed (Special Tribunal for Lebanon 2017: 12–13).

### 3.1 Problems of the first hybrid courts

It appears that the institutional design of the first hybrid courts was largely determined by historical and political circumstances. Although they sought to maximize the advantages of international and national bodies, they had no model. Instead, each hybrid tribunal had a certain scope for its design, which is surely one of the main advantages of this format.

The tribunals were based on joint agreements with national governments (Sierra Leone and Cambodia), UN Transitional Administration regulations (Kosovo, Timor-Leste, and Bosnia and Herzegovina), and in one special case, a UNSC Chapter VII Resolution (Lebanon) (Table 1). Some courts or chambers were part of the domestic legal system (Bosnia, Kosovo, Timor-Leste, and Cambodia); Sierra Leone's special court and the Lebanese Special Tribunal have had independent international legal personalities. The crucial difference is the type of law applied: in Sierra Leone, Cambodia, and Timor-Leste it is international and national; in the Kosovo panels, the Lebanese Special Tribunal, and in the Bosnian War Crimes Chamber, it is only national. In practice, staffing did not entirely follow the rules, with Sierra Leone giving local positions to foreigners. The bench staff in Sierra Leone were mostly international judges, whereas in Cambodia, they were mostly national. Most hybrid courts were financed through international contributions (as well as national contributions, where appropriate). Exceptions were the hybrid courts and chambers established by UN Transitional Administrations.



Table 1: Hybrid courts/chambers compared

	Sierra Leone	Cambodia	Timor-Leste	Kosovo	Bosnia	Lebanon
<b>Legal foundations</b>	UN-government agreement	UN-government agreement	UN Transitional Administration regulation	UN Transitional Administration regulation	UN-ICTY agreement, domestic law	UN Security Council resolution
<b>Legal status</b>	International entity	National entity	National entity	National entity	National entity	International entity
<b>Applicable law</b>	International-national	International-national	International-national	National	National	National
<b>Focus</b>	The most serious human rights violations committed in the past	The most serious human rights violations committed in the past	The most serious human rights violations committed in the past	General criminal investigation (focused on the most serious human rights violations committed in the past)	The most serious human rights violations committed in the past	Terrorism
<b>Official staffing</b>	Mostly international judges	Mostly national judges <sup>15</sup>	Mostly international judges	Flexible	Changes over time	Mostly international judges
<b>Funding</b>	Voluntary contributions	International (voluntary contributions) and national funds	UN Transitional Administration	UN Transitional Administration	International (voluntary contributions) and national funds	International (voluntary contributions) and national funds

15 Decisions require a supermajority.

There was no coordinated institutional development of hybrid courts – partly because very different UN departments were responsible for negotiating and designing the various institutions.

With respect to the high expectations regarding their operations and standards, the practical work of the various tribunals and chambers was quite disappointing. Only a superficial summary of these institutions can be provided here.<sup>16</sup> Locally, the mechanisms were seen as having very little legitimacy and most court proceedings were controversial, for example in Lebanon, Timor-Leste, and Cambodia. Local government interference – especially in Cambodia and Timor-Leste – created procedural problems. In some cases, like Sierra Leone and Timor-Leste, changes of elites or other local political changes seriously hampered cooperation and long-term support. At the same time, trials were not always fair. Appointed by the national side, the defense was marginalized in the face of generally competent judges and prosecutors. Such asymmetry enhanced local perceptions that the courts returned “victors’ justice.” (This was only corrected in later hybrid courts like the Special Tribunal for Lebanon.) It was also often difficult to recruit suitable international staff because the financial conditions and future prospects were rarely enticing (OHCHR 25–26).<sup>17</sup>

Beyond that, there were not enough funds for infrastructure and equipment – whether translation services or access to law libraries – while the voluntary donor contributions, both national and international, were often scanty. Even the tribunals created by UN transitional administrations were often underfunded and there was little ownership by the UN, for example, in Timor-Leste (Ottendörfer 2016: 171). Largely inadequate court outreach made locals consider them illegitimate (although Sierra Leone and Cambodia might be different). Long-term capacity building, which includes educating local judges, prosecutors, and counsels for the defense, was either hardly possible or rarely conducted systematically – except in Kosovo, Sierra Leone, and Timor-Leste (OHCHR 2008: 7). Sustained, intensive contact between international and national personnel was often lacking (and discouraged by large salary disparities, OHCHR 2008: 27). In the worst case, local staff members of hybrid bodies were marginalized.<sup>18</sup>

Despite all these shortcomings, observers certify that the trials were relatively fair, with at least some successes with respect to the hybrid courts’ main task: combating impunity in isolated (paradigmatic) cases (McAuliffe 2011: 52, 57). However, the courts had negligible long-term impacts on national systems of criminal prosecution and the rule of law (Kerr/Mobekk 2007: 95).

16 See McAuliffe 2011, Kerr/Mobekk 2007: Ch. 4, and OHCHR 2008 for more detailed comparisons.

18 Sierra Leone’s recruiting system was more flexible than others.

18 With regard to Timor-Leste, see McAuliffe 2011: 32, 37, 42–43; Ottendörfer 2016: Ch. 5.5; Burke-White 2002: 66–70.



#### **4. Current Developments: Hybrid Courts are Making a Comeback – Albeit with Differences**

In many respects, the large number of hybrid tribunals was considered unique to the early 2000s. At the end of the decade, observers saw few signs of a need for more hybrid tribunals (Kersten 2017).

Within the UN, there now seems to be less enthusiasm for such tribunals, partly because there have been no other UN missions with strong mandates like those in Timor-Leste, Kosovo, and Bosnia and Herzegovina. In addition, the ICC has become operational.

Some negotiations have been held on establishing new hybrid institutions but with no success. In many cases, talks dragged on over many years, and ended abruptly because of political changes in the target countries. In the 2000s, negotiations in Burundi, Liberia, and Kenya came to nothing.<sup>19</sup> Talks about a hybrid tribunal for South Sudan look promising but are not successful yet because of the government's refusal.<sup>20</sup> In the Democratic Republic of the Congo, where a hybrid tribunal was first considered in 2011, there seems to be no further development.<sup>21</sup> There has been no response to calls for hybrid tribunals for Syria and Sri Lanka (Kersten 2017).

Nevertheless, hybrid institutions are making a comeback – albeit under different circumstances: The UN is increasingly ceding its role of international partner to others, and seems to be a less attractive partner. Now there are also more different views about how to deal with the ICC's temporal, territorial and subject-matter restrictions.

At the same time, UN bodies are simply choosing smaller-scale solutions when international criminal prosecution is not possible domestically. A current example is the International Commission against Impunity in Guatemala (CICIG) that started to operate in 2007 and is not focused on previous conflicts. This is an example of how internationally supported criminal investigations and prosecutions are being removed from the context of transitional justice – of dealing with crimes committed during past wars and armed conflicts. The UN is seeking appropriate solutions in an even more diverse group of actors, which further blurs the distinction between national and international criminal prosecution.

19 Regarding Burundi see: United Nations 2005; for Liberia see: Human Rights Watch 2009b; 2009c; for Kenya see: Human Rights Watch 2009a.

20 See also: United Nations 2016 and Mogeni 2017.

21 See also Human Rights Watch 2011, 2014.

#### 4.1 New features of hybrid courts: working without direct UN participation

For a number of years, no new hybrid courts were established. Since 2013, however, three new hybrid tribunals have been inaugurated in Senegal, the Central African Republic, and Kosovo – with different protagonists. Partly for pragmatic reasons, the UN is remaining on the sidelines.

##### *The Extraordinary African Chambers (2013–)*

The Extraordinary African Chambers are based on a 2012 agreement between the Senegalese Government and the African Union (Government of Senegal/African Union 2012). The court, which is part of the Senegalese legal system, started to prosecute international crimes (crimes against humanity, genocide, and torture) committed in Chad under the regime of Hissène Habré (1982–1990). Modeled on the first hybrid courts, the chambers bring charges of grave crimes committed in a specific period by specific actors. What is special in this case is that the court is not in Chad, but rather in Senegal, where Habré had been living undisturbed since the 1990s.

The establishment of the chambers is linked to the conflict between the African Union (AU) and the ICC or its “Western” supporters<sup>22</sup>: The AU contends that too much focus has been placed on African cases and that the ICC breaches the immunity of African heads of state. (For a detailed discussion of this conflict, see Arcudi 2016; Tull/Weber 2016.) First Belgium wanted to apply universal jurisdiction to Habré’s case and the AU agreed. But attitudes changed and only in 2012 did the new Senegalese President Mackie Sall accept that Habré could be tried – although the exact context has not been decided.<sup>23</sup> By that time, the dispute between the AU and the ICC and its Western supporters had intensified and the AU preferred an “African solution” – a hybrid court with a regional partner. The chambers were again largely funded by voluntary contributions: individual European countries, the EU, the USA, and the AU (Scheen: 2015). In 2016, Hissène Habré was sentenced to life imprisonment for crimes against humanity, sexual slavery, ordering illegal killings and torture, among other violations. This was the first case in which a former African head of government was tried and sentenced in another African country.

##### *The Kosovo Specialist Chambers*

The four Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSV) are another example of how hybrid tribunals are developing. After the UN Transitional Administration

22 According to its rules, the ICC could not have directly prosecuted Habré because the crimes had been committed before it was created.

23 The Extraordinary African Chambers were established after huge discussions about how to try Habré that lasted many years. The International Court of Justice (ICJ) decided that Senegal had not fulfilled its obligations with regard to the UN Convention on Torture, Eckelmans 2016: 809–810; Scheen 2015.

in Kosovo transferred authority to Kosovo institutions, the EU assumed a supporting role regarding the rule of law (mainly through the EU Rule of Law Mission in Kosovo, EULEX Kosovo, which deploys EU police and civilian resources to the country). The Kosovo Specialist Chambers were created through negotiations with EU bodies. Based on an “Exchange of Letters” between the EU and Kosovo authorities, their legal basis is national law, and they apply both international and national law. In 2015, the Kosovo Parliament adopted the enabling act.

Before the chambers were created, the Council of Europe had published critical reports and the findings of a Special Investigative Task Force on crimes committed by the Kosovo Liberation Army (KLA) during the fight for independence. The chambers (based in Kosovo and The Hague) are supposed to prosecute crimes against humanity, war crimes, and crimes committed against Kosovo law (especially “grave trans-boundary crimes”, specifically organ trafficking) between 1998 and 2000. It is the first court to focus on the “winners of the war.” Established in 2016, after the rules of procedure were overhauled the court became operational in 2017. What is particular to this court is that while the legal basis is Kosovo law, it is entirely staffed by internationals (international judges and EU employees in the administration). Funding comes from the EU (Eckelmans 2016: 810–811). The court’s focus on KLA crimes is particularly contested in Kosovo, and heavily criticized by the current government.<sup>24</sup>

#### *The Special Criminal Court in the Central African Republic*

Another interesting institutional development is the Special Criminal Court (SCC) in the Central African Republic (CAR) (*Cour Pénale Spéciale pour la Centrafrique*). Close negotiations with the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (known as MINUSCA, the French acronym) led to the creation of a chamber in Bangui that is integrated into the Central African justice system – for an initial five years. The court was created by legislation passed by the Transitional Government of the Central African Republic in 2015, organic law 15/003). Mostly staffed by national, with some international, judges, the SCC has jurisdiction to prosecute crimes against humanity, genocide, and war crimes, as well as torture, committed since 2003. National law applies, but not the death penalty (Kersten 2017). Funding comes from voluntary and MINUSCA contributions. The UN was heavily involved in designing the court, and MINUSCA in appointing the international judges. However, the SCC is a “national jurisdiction” that operates within the CAR justice system; it is not based on any agreement with the UN.<sup>25</sup> The tribunal is not yet operational.

<sup>24</sup> See Tanjug 2017 and Morina 2017.

<sup>25</sup> However, a memorandum of understanding was adopted (cf. 19 February 2015 press release, Fédération internationale des ligues des droits de l’Homme).

An important, possibly trend-setting, aspect of this case is that the hybrid chambers in CAR were created although the ICC was already investigating two cases in the country (Eckelmans 2016: 811–812). In many respects, the SCC is a reaction to the ICC’s lack of progress in such cases in recent years (Labuda 2018). The UN also supports the SCC because the ICC only prosecutes senior officials. NGO observers hope that the tribunal will create a model for how the ICC and other institutions can complement each other in criminal investigations.<sup>26</sup>

#### **4.2 Investigative work dissociated from tribunals: The International Commission against Impunity in Guatemala (CICIG)**

Although hybrid courts appear to have become less popular in the 2010s than earlier in the decade, new institutional experiments are being conducted: A prime example is the International Commission against Impunity in Guatemala (CICIG), which dissociates criminal investigation from criminal prosecution and also introduces other innovations. Created in 2006, the CICIG first began to receive international attention in the 2010s.

Independent hybrid institutions that conduct criminal investigations are not completely new: A UN Independent Investigative Commission (UNIIC, 2005–2009) was established by UNSC Resolution 1595 to conduct relevant investigations and support Lebanese institutions conducting investigations. The UNIIC staff was mixed (international and national), applied Lebanese law, and presented its findings to the Office of the Prosecutor for the Special Tribunal. The CICIG is different: It coordinates investigative work to be used in national courts and is not permitted to assume any independent prosecutorial functions.<sup>27</sup>

Like some hybrid tribunals, the CICIG was established after long negotiations with the Guatemalan Government, and is a “second-best solution” (Zimmermann 2017b: Ch. 6, 2017a).<sup>28</sup> Nevertheless, observers describe it as “[o]ne of the most innovative programs in the UN’s toolbox” (Schlesinger 2015). Growing out of an initiative of Guatemalan civil society, intensive consultations with UN experts developed a “hybrid” design for a commission focused on criminal investigation and prosecution. Then the Guatemalan Government and Constitutional Court stopped independent prosecution by the CICIG. After many years of negotiations, a commission was created to conduct independent

<sup>26</sup> See also Human Rights Watch 2017b.

<sup>27</sup> The accountability mechanism for Syria (the “International, Impartial and Independent Mechanism”) operates in a similar fashion although no courts are currently prosecuting crimes. It is, however, an international institution, not a “hybrid.” Some observers describe it as a “quasi-prosecutorial” model like the CICIG, Wenaweser/Cockayne 2017: 214.

<sup>28</sup> See the detailed description in the Open Society Justice Initiative 2016.

criminal investigations that can only support prosecutorial functions as a “joint complainant” (CICIG Agreement, Art. 3b). Indictments must be brought in national courts.

The CICIG represents an attempt to support the investigation and prosecution of criminals in post-conflict Guatemala. CICIG also seeks to develop practical training in the rule of law in a country plagued by very serious security problems – like most of Central America – where organized crime has infiltrated the frail political institutions (Carrera 2017: 4–6; Human Rights Watch 2017a: 2–4; International Crisis Group 2016: 1–2; Open Society Justice Initiative 2016: 4–6; 11–12). CICIG innovations include a focus on investigating crime in Guatemala and a broad mandate that is less concerned with the most severe human rights violations of the past than with the current challenges posed by organized crime and corruption in politics (see CICIG Agreement 2006).<sup>29</sup> The CICIG is also explicitly mandated to support legal reform that will enable criminal investigations and prosecutions (e.g. regarding organized crime, high-security prisons, witness protection, eavesdropping techniques, etc.).

The CICIG is staffed by internationals and locals under a commissioner appointed by the UN. It is based on a cooperation agreement between the Guatemalan Government and the UN that was ratified by the Guatemalan Parliament. It is not an official UN mandate.<sup>30</sup> Like hybrid tribunals, it is funded by voluntary contributions from UN Member States, particularly the USA and European countries.

It quickly became obvious that a hybrid investigative commission applying national law would become politically contentious in Guatemala. The CICIG was targeted by campaigns by elite groups who feared having their own ranks investigated. The commission’s tasks were much more ambitious than those of many hybrid courts: Instead of using a short list of crimes to prosecute a limited number of actors, its goal was generally fighting impunity in Guatemala, a country plagued by drug smuggling, organized crime, and corruption. Unfortunately, intermittent investigations cannot bring about any fundamental improvements in a country’s legal system: A decade of work by the CICIG shows that.

However, in many respects the commission’s work was far more successful than expected: The CICIG did not shy away from investigating ruling politicians and its work led to the prosecutions of three former presidents, and one acting president. Many different crimes were prosecuted including corruption, illegal campaign contributions, drug smuggling, and systematic unlawful killings by actors in the justice system. However, the corruption in Guatemalan courts means that these far-reaching criminal investigations have led to relatively few successful convictions.

The CICIG’s domestically integrated criminal investigations have not been adapted elsewhere. Nevertheless, its recent investigative successes have stimulated debate in Central

29 For more information on its focus, see CICIG 2015: 13–14; International Crisis Group 2016: 6

30 It does, however, have the support of the UN General Assembly.

America. First and foremost, the USA regards the institutional form of the CICIG as a good way to fight corruption.<sup>31</sup> Yet the commission's very successes may explain why it has not been imitated elsewhere: A country's government has to agree to such an institution and national elites fear it could affect their power structures. The CICIG seems to have been too successful in Guatemala to spread (Open Society Justice Initiative 2016: 109–110).

The government in Honduras is the only one to have been successfully pressured at home and by foreign actors to react to scandalous corruption. However, instead of opting for an independent hybrid model like the CICIG, the Honduran government chose a weaker external commission headed by the Organization of American States (OAS). Unlike the CICIG, the Mission to Support the Fight against Corruption and Impunity in Honduras (*Misión de Apoyo contra la Corrupción y la Impunidad en Honduras*, MACCIH)<sup>32</sup> is not authorized to make independent investigations: It can only submit proposals and support capacity building to fight corruption.<sup>33</sup> Nonetheless, civil society actors repeatedly invoke the CICIG model and experience, for example, when discussing Mexico<sup>34</sup> and Panama (Telemetro 2016). Although the CICIG deserves to be better known<sup>35</sup> it is already often evoked outside of Central America.

### 4.3 New developments, limited learning

To what extent are new courts taking the problems of the first generation of hybrid courts into consideration? What are their new orientations?

There has been a certain amount of learning and development, and UN bodies are trying to integrate lessons learned from the first generation of hybrid courts (e.g. OHCHR 2008). Defense offices, which were seriously neglected in the first hybrid courts (Cambodia and Timor-Leste), are being beefed up. The Special Tribunal for Lebanon had already introduced extra support, as did the new institutions of the 2010s.<sup>36</sup> The rules of procedure in earlier courts and chambers are also being adapted for the new hybrid courts.<sup>37</sup> The

31 See Renteria 2015; Tabory 2015.

32 See OAS 2016.

33 For details, see also Hilse 2017. Yet even MACCIH does not spare senior politicians: It is currently investigating corruption charges against former President Porfirio Lobo Sosa. See Albaladejo 2017.

34 Plataforma contra la Impunidad y la Corrupción 2017.

35 In Sri Lanka, too, civil society actors regard the CICIG as a possible model for their own institution (Dibbert 2017).

36 In the case of the Central African Republic, exact arrangements for the defense are still being discussed and specified in the rules of procedure (Labuda 2018). Another problem for the Extraordinary African Chambers in Senegal was that the defense had little time to prepare (International Justice Resource Center 2016).

37 E.g. regarding the Kosovo Specialist Chambers, Heinze 2017.



degree of improvement in strategies for recruiting international and national staff and for external communication will probably only be obvious some years from now.

Strategies for securing funding over the long term have not yet been found, which means that hybrid courts continue to be under-financed. Longer mandates are also not being used (e.g. the CICIIG was for only two years, which could be extended, and the CAR Special Criminal Court for five). It appears to be difficult to make such changes because voluntary donors are reluctant to commit themselves long-term.

We also observe that second-generation hybrid courts are adapting to a network of international criminal prosecution in which the ICC has become the center of gravity. However, the ICC has limited scope to implement the “defragmenting” role it has been assigned (Kersten 2017). Hybrid courts can still play meaningful roles in cases in which the ICC’s temporary jurisdiction does not apply (such as prosecuting Habré and in the Kosovo Specialist Chambers). Hybrid courts are also being discussed for states like South Sudan and Syria that do not belong to the ICC and are unlikely to join it – although this is much less likely to happen. It might also be possible to introduce a division of labor regarding the focus. The ICC’s capacity and mandate restrict it to the “gravest crimes”; current hybrid institutions (such as Lebanon and Guatemala) are partly breaching this focus, or trying to ensure that crimes are more broadly prosecuted and not just by the people who are mainly responsible (as in the CAR).

The actors’ roles have also changed and there is greater pragmatism regarding both internationalized and hybrid formats; the UN is reluctant and regional organizations are often more attractive partners. While this is partly due to political reasons, such as the conflict between the AU and the ICC, it is also linked to the UN’s limited capacity to negotiate the institutions, staff and build them up, and sustain them for a long time. This is evident by the various ways that these hybrid institutions were created in the UN, with negotiations held in very different parts of the organization: in the regional departments of the Department of Political Affairs, local UN missions, and elsewhere – when the hybrid court was not initiated by a UNSC resolution (as in Sierra Leone). It is no surprise that other UN departments or sub-organizations did not always support these institutions. The UN Legal Department was very concerned about how the UN might be responsible for the new types of institutions, and UN sub-organizations worried about how their in-country work might be crowded out and have to take a back seat to the highly visible courts or commissions.<sup>38</sup> This may explain UN reluctance to accord UN status to nationally initiated institutions (those not created by the UNSC), or to become an official partner.

Generally, there is no longer any dilemma about internationalization versus local integration. While the glory of both international tribunals (the ICC and ad hoc courts) has been tarnished, the hybrid “alternatives” are not much more successful. A healthy dose of pragmatism regarding the goals of such institutions might even help the UN and donor

38 Staff member, UN Department of Political Affairs. Telephone interview, 11 November 2011.

states. Apparently, their great successes in criminal prosecution make them unappealing for national actors to imitate. The string of CICIG successes has discouraged Guatemala's neighbors from establishing similar bodies, and the governments in South Sudan and in Kenya refuse to approve hybrid tribunals. This will surely affect the establishment of future institutions.

## 5. Pragmatism with Greater Support

New hybrid courts and institutions are currently being established in conflict and post-conflict states. In the early 2000s, academics and politicians viewed them as successful "regionally adapted" alternatives to international tribunals. Today, however, greater pragmatism prevails with regard to such hybrid criminal prosecution. People thought it could become an essential part of peace building – that it would positively impact conflict transformation, reconciliation, security, and spread standards regarding the rule of law. After all "*All good things go together.*" Target countries' hefty criticism of the (more local) hybrid courts was unexpected.<sup>39</sup> The first generation of hybrid courts also had to contend with interference from local governments, inadequate funding, little long-term capacity building, and difficulties creating fairness in court.

In the 2010s, there was a more differentiated approach and a drop in international-local binarity: The ICC worked internationally, albeit with a mandate limiting it territorially, temporarily, and in terms of focus. Its work is accompanied by regional and national institutions that are mainly created through pressure from national–international alliances of civil society actors. The UN is less present as a partner in such hybrid institutions than in the 2000s, and regional organizations are stepping in. Hybrid institutions are also breaking new ground by no longer focusing exclusively on prosecuting the most serious human rights violations.

Western countries, which shoulder the main financial burden of most of these institutions, should be more pragmatic about the goals of hybrid courts and institutions – but give them more support.

The top priority remains learning from the experiences of the 2000s, particularly with regard to recruiting international and national staff, communicating with government elites and civil society groups, as well as ensuring sound capacity building and strategies for transfers to national institutions.

39 A good example of this critique is the UN General Assembly debate in 2013 criticizing the temporary international tribunals for the former Yugoslavia and Rwanda: Gladstone 2013; United Nations 2013; Dicker 4 April 2013, updated 9 June 2013.



It is also important to avoid excessively praising these institutions. Scholars and the UN often reported them as having major impacts – from teaching the rule of law to broadly building capacity and social reconciliation. But although criminal investigation and prosecution may have had isolated successes in exposing and convicting serious crimes of the past and present and thus stimulated some development in the rule of law (OHCHR 2008: 6), other impacts have been very limited. In this regard, the expectations of civil society groups and supporters in “beneficiary countries” should be subdued rather than encouraged. Given the current pessimistic discussions about the ICC, there is a risk that hybrid courts will be praised too highly. That should not happen.

Western donor countries should provide strong backing so that at least these pragmatic goals can be reached. Long-term commitment and reliable funding are crucial: Their current lack creates great problems. Aside from the hybrid institutions created by UN transitional administrations mandated by the UNSC, almost all rely on UN Member States’ voluntary contributions. Already at the turn of this century, the UN Secretary-General observed that unreliable funding – whether due to global economic crises or changes in national preferences – created regular financial difficulties for the organizations (UNSC 2004: 43). The institutions require long-term financial security to work well.

The same holds for designing the mandates: Organizations like the CICIG were created for two years, tribunals for three to five, but just setting up the institutions takes up half the time. For the growing number of institutions that are not mandated by the UN it is difficult to recruit international staff, while extending mandates creates other uncertainties (especially when approval by a national government is required). Expectations by internationals and members of civil society that rapid “successes” are necessary in order to justify funding should be curbed. At the same time, for the work to be successful, local actors have to be convinced to accept long-term mandates.

Not least, these institutions’ successful outcomes do not seem to make them models to imitate. Mandates that are restricted with regard to the group to be prosecuted (such as the Khmer Rouge in Cambodia) may not have much difficulty getting approval from national governments and elites who do not belong to these groups. However, it is harder for organizations like the CICIG that have broad mandates to investigate organized crime and corruption. Investigative successes reduce the likelihood that such bodies will be copied because they might endanger elite groups. A more pragmatic approach means acknowledging that successful work by hybrid institutions requires some support from national elites: The expectations and interests of both local and international actors must be balanced. They can hardly be reconciled.

The next years will show the way forward for international criminal prosecution. The cooperation of different institutions must be methodically planned – and not left to chance. This could also help reduce the current conflicts regarding the ICC.

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