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**Hybrid courts and their impact on the development of
substantive international criminal law**

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Declaration of authorship

I, Julian Rindler, hereby declare that the work presented in this research paper entitled **‘Hybrid courts and their impact on the development of substantive international criminal law’** is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly recognised.

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CHAPTER 1: INTRODUCTION

For most of the history of international criminal law, there were essentially two conceivable options to prosecute perpetrators of crimes under international law. These were, on the one hand, international criminal tribunals, such as the international military tribunals in Nuremberg (IMT) and Tokyo (IMTFE), the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and, more recently, the permanent International Criminal Court (ICC). On the other hand, prosecutions could take place before national courts.¹

However, since the end of the 1990s, so-called ‘hybrid’ courts (also called ‘mixed’ or ‘internationalised’ courts)², which combine international and national criminal justice in various ways, have increasingly been established to prosecute perpetrators of large-scale atrocities. The proliferation of such courts is an ongoing development, as evidenced by the recent establishment of the internationalised Extraordinary African Chambers (EAC) in Senegal in 2013. This moreover indicates that, despite the creation of a permanent international criminal court with the ICC, hybrid courts are likely to be established in the future.

Especially for this reason, this development deserves closer scrutiny and assessment, and has indeed been the subject of numerous publications in recent years. However, the substantial part of the scholarly debate thus far, has focused on practical issues. These include, in particular, the impact of hybrid courts on post-conflict societies,

¹ These two options can be referred to as ‘direct’ and ‘indirect’ enforcement of international criminal law, respectively. See, e.g., Bassiouni MC *International Criminal Law* 3 ed Vol II (2008) 3; Werle G *Principles of International Criminal Law* 2 ed (2009) para 220.

² See, e.g., Cassese A *International Criminal Law* 2 ed (2008) 332-3.

namely the perception of legitimacy, impartiality and ownership within the local population, as well as local capacity building.³

However, another significant issue in assessing this development is the impact of hybrid courts on international criminal law itself. The application of substantive international criminal law by hybrid courts may lead to two contrasting outcomes. One possibility is that hybrid courts affirm well-established rules of international criminal law, or further develop this area of law to a reasonable extent. This could result in hybrid courts having a consolidating and strengthening effect on international criminal law. However, another possibility is that hybrid courts deviate significantly from what can be considered established international criminal law. This could cause an adverse diversification of international criminal law, and thus its weakening.⁴ The same is true regarding the inclusion of substantive international criminal law in the legal bases of hybrid courts.

Yet, while individual decisions by hybrid courts have certainly been discussed by scholars and dealt with in decisions by other international or internationalised courts, this question as such has not been a focus of debate in recent years.⁵

³ See, e.g., Higonnet IR 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23 *Arizona Journal of International & Comparative Law* 347-435; Nouwen SMH "'Hybrid Courts" – The hybrid category of a new type of international crimes courts' (2006) 2 *Utrecht Law Review* 190-214; Wierda M, Nassar H & Maalouf L 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1065-81.

⁴ See, e.g., Buergenthal T 'Proliferation of International Tribunals: Is it Good or is it Bad?' (2001) 14 *Leiden Journal of International Law* 267-75; Pocar F 'The Proliferation of International Criminal Courts and Tribunals: A Necessity in the International Community' (2002) 2 *Journal of International Criminal Justice* 304-8; Raub L 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 14 *International Law and Politics* 1013-53; Benzing M & Bergsmo M 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court' in Romano CPR, Nollkaemper A & Kleffner JK (eds.) *Internationalized Criminal Courts and Tribunals* (2005) 410-11.

⁵ For notable exceptions, see Breitegger A 'Aktuelle Beiträge der internationalen Strafjustiz zur Entwicklung des humanitären Völkerrechts' (2010) *Zeitschrift für Internationale*

The aim of this study is to scrutinise, in particular, the legal bases of and decisions taken by various hybrid courts with regards to such consolidating or fragmenting effects on substantive international criminal law.

The first section (Chapter 2), it will examine what is to be understood by the notion of a hybrid court. This will be followed by an analysis of the hybrid courts that have been established thus far. Furthermore, the advantages and reasons for which hybrid courts have been established in recent decades will be discussed, especially regarding their potential advantages as a transitional justice instrument. Moreover, disadvantages of hybrid courts and their deficiencies in the past will be addressed.

Subsequently, the role of hybrid courts within the international legal system and their utility in the future will be discussed (Chapter 3). This will include, on the one hand, the scope of the jurisdiction of hybrid courts in relation to other national and international criminal courts, especially vis-à-vis the ICC. On the other hand, it will be addressed whether hybrid courts will – or should – be established in the future, given the creation of the permanent ICC as well as the shortcomings of hybrid courts in the past.

Against this background, the impact of hybrid courts on the further development of international criminal law will be assessed in the third section of the paper (Chapter 4). In this regard, the discussion will focus on a representative selection of hybrid courts, namely the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). It will be discussed how their legal bases as well as their jurisprudence relate

Strafrechtsdogmatik 712-25; Meisenberg S ‘Festigung, Fortentwicklung und Verbreitung: Der Beitrag des Sondergerichtshofs für Sierra Leone zum humanitären Völkerrecht’ (2004) *Humanitäres Völkerrecht – Informationsschriften* 175-80; Meisenberg S ‘Die Rechtsprechung des Sondergerichtshof für Sierra Leone und sein Beitrag zum humanitären Völkerrecht’ (2008) *Humanitäres Völkerrecht – Informationsschriften* 143-57.

to the previous state of international criminal law, and whether they constitute adverse diversifications or positive contributions to international criminal law.

In a concluding section (Chapter 5), the results of the study will be analysed and possible correlations between the structural elements of hybrid courts and their impact on international criminal law will be discussed. Finally, further questions regarding the use of hybrid courts in the future will be addressed.



CHAPTER 2: THE HYBRID CRIMINAL JUSTICE MODEL

2.1 The notion of hybrid courts

Hybrid courts are criminal courts that feature both international and national elements.⁶ They are often established by a post-conflict state in cooperation with the UN and seated in the state concerned, are typically composed of both international and national judges,⁷ and usually apply both international and national criminal law.⁸ Yet, no hybrid court is like another. As will be discussed below,⁹ considerable differences exist between hybrid courts, in particular regarding the type and extent of their respective ‘internationalisation’.

For the purposes of this paper, the term ‘hybrid courts’ is thus used broadly to describe criminal courts or chambers that feature international and national elements regarding their composition as well as their establishment or subject matter jurisdiction.¹⁰

2.2 Existing and former hybrid courts

In order to illustrate the variety of hybrid courts in more detail, existing and former hybrid courts will be analysed in the following, with particular attention to their respective international aspects, the circumstances leading to their establishment, and their structural particularities.

⁶ Ambos K *Internationales Strafrecht* 3 ed (2011) 131; Cassese A *International Criminal Law* 3 ed (2008) 332; Werle G (2009) para 76-7.

⁷ In this study, mixed composition is considered a constitutive element of hybrid courts, thus excluding similar institutions such as the Iraqi Special Tribunal. See, similarly, Cassese A *International Criminal Law* 3 ed (2008) 332; Nouwen SMH (2006) 205. For a different classification, see, e.g., Ambos K *Internationales Strafrecht* 3 ed (2011) 136.

⁸ See Ambos K *Internationales Strafrecht* 3 ed (2011) 131, 138-40; Werle G (2009) paras 76-8, 284-91.

⁹ See below 10-11.

¹⁰ See, similarly, Office of the United Nations High Commissioner for Human Rights *Rule-of-law-tools for post-conflict states – maximizing the legacy of hybrid courts* (2008) 1.

2.2.1 Regulation 64 Panels (Kosovo)

In the late 1990s, while the ICTY focused on prosecuting perpetrators most responsible for the atrocities committed during the Yugoslav wars, numerous lower ranking suspects were detained in prisons in Kosovo. However, the domestic judicial system lacked the capacity and independence to appropriately conduct trials. For these reasons, the UN Mission in Kosovo (UNMIK) issued a series of regulations that provided for the participation of international judges and prosecutors in domestic trials.¹¹ These so-called Regulation 64 Panels, named after UNMIK Regulation 2000/64, have been deployed in trials concerning serious crimes on a case-by-case basis. International members are appointed by the Special Representative for UNMIK. The involvement of international personnel is the only international aspect of these panels, though UNMIK Regulation 2000/64 provided for a majority of international judges within the panels.¹² The panels only apply domestic law, which however includes crimes under international law.¹³ Moreover, domestic law that conflicts with international law cannot be applied.¹⁴ The Regulation 64 Panels are funded through the UNMIK budget.¹⁵

2.2.2 Special Panels of the Dili District Court (East Timor)

In the aftermath of the armed conflict following the overthrow of the Suharto government in 1998, the situation in East Timor was similar to that in Kosovo. Here,

¹¹ UNMIK Regulation 2000/6 of 15 February 2000 as amended by UNMIK Regulation 2000/34 of 27 May 2000 and UNMIK Regulation 2001/2 of 12 January 2001; UNMIK Regulation 2000/64 of 15 December 2000. The regulations are available at <http://www.unmikonline.org/regulations> (accessed 25 October 2013). Due to the position of UNMIK as the interim legislative authority, the panels were essentially created domestically; see Nouwen SMH (2006) 200.

¹² See s 2(1)(c) UNMIK Regulation 64.

¹³ Werle G (2009) para 291, however noting that the applicable domestic law does not contain provisions on crimes against humanity and superior responsibility.

¹⁴ Dickinson LA 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 297.

¹⁵ See Raub L (2009) 1024, 1029.

too, the domestic judicial system was incapable of conducting trials of the numerous suspects in custody, mostly due to a substantial destruction of the infrastructure and lack of qualified personnel in East Timor.¹⁶ In 2000, the UN Transitional Administration for East Timor (UNTAET) established the Special Panels for Serious Crimes (SPSC), integrated into the District Court of Dili, to try cases related to the conflict.¹⁷ The SPSC were operational until 2005. They had exclusive jurisdiction over genocide, crimes against humanity and war crimes, as well as serious criminal offences under the law of East Timor committed between January and October 1999.¹⁸ Uniquely, the SPSC moreover claimed universal jurisdiction.¹⁹ International judges formed the majority in the SPSC's chambers.²⁰ Like the Regulation 64 Panels, the SPSC were funded through the UN mission budget.²¹

2.2.3 Special Court for Sierra Leone

In January 2002, following an appeal for international assistance by Sierra Leone, the UN and the government of Sierra Leone established the Special Court for Sierra Leone (SCSL) in order to account for atrocities committed during the Sierra Leonean civil war.²² The SCSL has jurisdiction over crimes against humanity, war crimes and certain crimes under Sierra Leonean law committed from 30 November 1996 until

¹⁶ Raub L (2009) 1036.

¹⁷ UNTAET Regulation 2000/15 of 6 June 2000, available at <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR> (accessed 25 October 2013). Similarly to the Regulation 64 Panels, the SPSC were established by UNTAET and thus domestically. See above 5 n 11; Nouwen SMH (2006) 200.

¹⁸ See s 2 UNTAET Regulation 2000/15.

¹⁹ See ss 2.1, 2.2, 4-7 UNTAET Regulation 2000/15. See also Nouwen SMH (2006) 207.

²⁰ See s 22.1 UNTAET Regulation 2000/15.

²¹ Raub L (2009) 1024, 1029.

²² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appended to the Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone Transmitted by the Secretary-General to the President of the Security Council of 8 March 2002, appending the Statute of the Special Court for Sierra Leone (SCSL Statute) UN Doc. S/2002/246, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176> (accessed 25 October 2013).

January 2002.²³ The SCSL is seated in Freetown, though the trial of Charles Taylor has been removed to The Hague for security reasons. Not being integrated into the Sierra Leonean justice system, the SCSL considers itself an autonomous international court.²⁴ Its composition is largely international, featuring only one Sierra Leonean judge in its Appeals Chamber and one in one of the two Trial Chambers.²⁵ The SCSL is funded by voluntary contributions of willing states.²⁶

2.2.4 Extraordinary Chambers in the Courts of Cambodia

From 1975 to 1979, approximately 20 to 25 per cent of Cambodian citizens lost their lives under the rule of Pol Pot's Khmer Rouge regime.²⁷ However, due to armed struggles that lasted until 1998, it was not until then that the establishment of a criminal tribunal to account for these crimes was conceivable. After initial negotiations to set up a tribunal between the UN and the Cambodian government failed, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were created domestically in 2001. However, an agreement was struck between the UN and Cambodia in 2003, in accordance with which the ECCC's legal basis was later amended.²⁸ The ECCC are integrated into the domestic court system and seated in Phnom Penh. Though national judges form the majorities in all chambers, at least one

²³ Arts 1-5 SCSL Statute.

²⁴ *Prosecutor v Taylor*, SCSL (Appeals Chamber), decision of 31 May 2004 para 42.

²⁵ The current composition of the SCSL is available at <http://www.sc-sl.org/ABOUT/CourtOrganization/Chambers/tabid/86/Default.aspx> (accessed 25 October 2013).

²⁶ Raub L (2009) 1036.

²⁷ Horsington H 'The Khmer Rouge Tribunal' (2004) 5 *Melbourne Journal of International Law* 462, 465; Raub L (2009) 1031.

²⁸ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, available at <http://www.eccc.gov.kh/en/document/legal/law-on-eccc> (accessed 25 October 2013); Agreement Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, annexed to UN Doc. A/RES/57/228B of 6 June 2003.

international judge must vote in favour of any decision.²⁹ The ECCC are funded by the Cambodian government and by voluntary donations.³⁰

2.2.5 War Crimes Chamber (Bosnia and Herzegovina)

Like the Regulation 64 Panels, the War Crimes Chamber (WCC) in Bosnia and Herzegovina operates alongside the ICTY. The reason for the establishment of the WCC, however, was mainly to facilitate the ICTY's completion strategy, which involved the transfer of proceedings from the ICTY to national courts.³¹ The WCC is integrated into the Criminal Division of the State Court of Bosnia and Herzegovina in Sarajevo as a specialised chamber. It applies domestic criminal law, which contains crimes under international law.³² The WCC has initially been composed of both national and international judges, though the latter have been incrementally reduced, and as of 2013 international judges have been replaced completely by national judges.³³ Given that mixed composition can be considered a constitutive element of hybrid courts, the WCC has arguably transitioned from a hybrid body to a purely domestic institution. It has been funded partially by the national Ministry of Justice's regular budget and partially by voluntary contributions from donor countries.³⁴

2.2.6 Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) was established to prosecute, in particular, persons responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri in February 2005. It was created by the UN Security Council and set up in

²⁹ Art 14(1) ECCC Law.

³⁰ Skilbek R 'Funding Justice: The Price of War Crimes Trials' (2008) 15/3 *Human Rights Brief* 7.

³¹ For details, see Werle G (2009) para 278.

³² See Werle G (2009) para 291.

³³ The current composition of the WCC is available at <http://www.sudbih.gov.ba/?opcija=bio&jezik=e> (accessed 25 October 2013).

³⁴ Skilbek R (2008) 8.

accordance with an agreement between the UN and the Lebanese government.³⁵ To date, it is the only hybrid court established by the UN Security Council based on Chapter VII of the UN Charter. The STL will only apply Lebanese criminal law,³⁶ though international judges form the majority in both its Trial Chamber and Appeals Chamber.³⁷ The STL is seated in The Hague and thus, untypically for hybrid courts, not in the commission state. Another unique feature of the STL is the existence of a pre-trial judge, whose task is to review indictments and prepare cases for trial.³⁸ Like the SCSL, the STL is funded by voluntary contributions of willing states.³⁹

2.2.7 Extraordinary African Chambers (Senegal)

The Extraordinary African Chambers (EAC) are the most recent example of a hybrid court. They were established in February 2013 in order to prosecute crimes committed under the rule of Hissène Habré in Chad from 1982 to 1990.⁴⁰ The EAC are integrated into the Senegalese court system and seated in Dakar. Though the crimes were committed in Chad, a link between their location and the atrocities exists due to the fact that Habré has fled to Senegal after being overthrown in 1990. After years of failed attempts to prosecute Habré in Senegal, Chad and Belgium, the International Court of Justice (ICJ) ordered Senegal to either prosecute or extradite him to Belgium

³⁵ See UN Security Council Resolution 1757 (2007) of 30 May 2007, UN Doc. S/RES/1757 (2007), appending the Statute of the Special Tribunal for Lebanon (STL Statute).

³⁶ Art 2 STL Statute. For details on the insofar ambiguous Art 3 STL Statute, see below 30.

³⁷ Art 8 STL Statute.

³⁸ See <http://www.stl-tsl.org/en/about-the-stl/unique-features/an-autonomous-pre-trial-judge> (accessed 25 October 2013).

³⁹ See <http://www.un.org/apps/news/infocus/lebanon/tribunal/timeline.shtml> (accessed 25 October 2013).

⁴⁰ Statut des Chambres africaines extraordinaires (EAC Statute), available at <http://www.hrw.org/node/113271> (accessed 25 October 2013). An unofficial English translation is available at <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (accessed 25 October 2013).

in July 2012,⁴¹ eventually resulting in the creation of the EAC. The EAC have jurisdiction over genocide, crimes against humanity, war crimes and torture committed in Chad from 1982 to 1990.⁴² Apart from the Trial Chamber and the Appeals Chamber, the EAC uniquely feature an Investigating Chamber and an Indicting Chamber.⁴³ The presidents of the Trial Chamber and the Appeals Chamber will be nationals of an African Union state other than Senegal, while the remaining judges will be exclusively Senegalese.⁴⁴ The EAC are funded through donations by willing countries and organisations, most notably Chad and the European Union.⁴⁵

2.3 Observations

It can be seen from the foregoing sections that hybrid courts are highly heterogeneous in particular with regard to the type and extent of their internationalisation. Hybrid courts may take the form of autonomous 'international' courts that are effectively 'nationalised' due to a few national elements,⁴⁶ though most are essentially integrated into the domestic court system. Moreover, the integration of a hybrid court may be centralised within a specific court, or decentralised throughout the court system.⁴⁷ Their ad hoc nature and involvement of both national and international judges or prosecutors are the most predominant features of hybrid courts. However, while international judges formed the majority in most hybrid courts and chambers, a few feature majorities of national judges. This is observable particularly in hybrid courts

⁴¹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits), ICJ, judgment of 22 July 2012 39.

⁴² Art 3 EAC Statute.

⁴³ Art 11 EAC Statute.

⁴⁴ Art 11 EAC Statute.

⁴⁵ See <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#15> (accessed 25 October 2013).

⁴⁶ See the SCSL and the STL.

⁴⁷ Such as the Regulation 64 Panels. See also Office of the United Nations High Commissioner for Human Rights (2008) 12-14.

set up long after the alleged crimes have been committed,⁴⁸ arguably related to the fact that a functional domestic justice system is more likely to be available. Considerable differences exist in other areas as well. While the legal bases of most hybrid courts provide for the application of both international and domestic criminal law, others merely apply domestic criminal law.⁴⁹ Several hybrid courts have been created unilaterally under an interim UN administration,⁵⁰ though the establishment of a hybrid court is typically based on the cooperation between an international organisation and a sovereign government. Usually, this includes the involvement of the UN. However, the establishment of the EAC indicates that the international aspect regarding the creation of a hybrid court may also be present by virtue of the involvement of a regional organisation, such as the African Union. Finally, while hybrid courts are usually seated in the state in which the crimes were committed, some are removed from the *locus delicti* for various reasons.⁵¹ Thus, it can be noted that there is no single hybrid court model, but rather as many as there are hybrid courts and situational particularities leading to their establishment.

Nonetheless, certain tendencies can be observed. Only the earliest hybrid courts have been set up unilaterally, whereas the establishment of a hybrid court by the state concerned in cooperation with an international organisation has become the norm. While their cost-effectiveness has arguably been a major motivation for the establishment of the first hybrid courts, a stronger emphasis on their potential positive effects as a transitional justice instrument is apparent nowadays.⁵² Moreover, it is observable that the centralised integration of hybrid courts into the domestic court

⁴⁸ See the ECCC and the EAC.

⁴⁹ See the Regulation 64 Panels, the WCC and the STL.

⁵⁰ See the SPSC and the Regulation 64 Panels.

⁵¹ See the EAC, the STL and the SCSL's trial of Charles Taylor.

⁵² See, e.g., Dickinson LA (2003) 299 (regarding the establishment of the SCSL); Raub L (2009) 1032 (regarding the establishment of the ECCC).

system is opted for in most scenarios. Accordingly, they are most commonly seated in the state of commission, and generally only located in another state for security reasons⁵³ or due to other unique circumstances.⁵⁴ Similarly, tendencies emerge regarding the applicable law. Normally, hybrid courts apply both international and national criminal law, whereas exclusively domestic law is applicable only where no corresponding international provision exists or where international criminal law has been domesticated.⁵⁵

2.4 Reasons for the establishment of hybrid courts

2.4.1 Flexibility in transitional settings

It is apparent from the foregoing that hybrid courts are most commonly set up in transitional states, following a period of time in which serious crimes have been committed on a large scale.⁵⁶ The national justice system in such post-conflict states is often unavailable or incapable of conducting trials adequately. Thus, some form of international help is frequently required in order to carry out prosecutions.⁵⁷ However, the needs of respective states vary greatly, and especially depend on the extent to which the national justice system is available. Moreover, criminal proceedings may be envisaged to take place alongside other transitional justice instruments, such as truth and reconciliation commissions, and a state may wish to create a certain relationship

⁵³ See the STL and the SCSL's trial of Charles Taylor.

⁵⁴ See, e.g., the developments leading to the creation of the EAC.

⁵⁵ See the STL, which is mainly concerned with an act of terrorism, and the application of domesticated international criminal law by the Regulation 64 Panels or the WCC.

⁵⁶ Werle G (2009) para 78.

⁵⁷ Ambach P 'Laufen hybride ad hoc-Gerichte dem Internationalen Strafgerichtshof den Rang ab? Eine Bestandsaufnahme' (2005) 2 *Humanitäres Völkerrecht – Informationsschriften* 108; Egonda-Ntende F 'Justice after Conflict: Challenges Facing "Hybrid" Courts: National Tribunals with International Participation' (2005) 1 *Humanitäres Völkerrecht – Informationsschriften/Journal of International Law of Peace and Armed Conflict* 24.

between such institutions.⁵⁸ For instance, this may include guidelines on cooperation regarding the exchange information on cases several institutions are concerned with. Similarly, hybrid courts may be implemented alongside an existing international criminal tribunal.⁵⁹ Here, too, providing for a specific cooperative relationship to such international criminal courts may be desirable. Moreover, since hybrid courts can be given jurisdiction over both crimes under international law and domestic crimes, they may cover a more extensive catalogue of crimes than purely international or purely national courts.⁶⁰

The hybrid court model enables a state to craft a court precisely matching its needs regarding these considerations, and thus provides for more flexibility to address and adapt to particularities of transitional settings than purely international courts.

2.4.2 Costs-effectiveness

The increasing establishment of hybrid courts is moreover related to the relatively high costs and low efficiency of the purely international ad hoc tribunals established in the 1990s. The ICTY and ICTR budgets have, at one point, accounted for 15 per cent of the UN budget,⁶¹ and their proceedings have taken significantly longer than initially anticipated.⁶² Amongst other reasons, this contributed to a ‘tribunal fatigue’⁶³ within the international community at the end of the 1990s. Hybrid courts, however, can be financed through various means and are considerably less expensive to set up and run, which has been an important motivation for their establishment.⁶⁴

⁵⁸ On this issue, see Ambos K *Internationales Strafrecht* 3 ed (2011) 139-40. For instance, there was a truth commission operating alongside the SCSL in Sierra Leone.

⁵⁹ See above 5-6 and 8, regarding the Regulation 64 Panels and the WCC.

⁶⁰ Ambach P (2005) 110.

⁶¹ Nouwen SMH (2006) 191; Ambach P (2005) 113.

⁶² Ambach P (2005) 113.

⁶³ Dickinson LA (2003) 308.

⁶⁴ See Egonda-Ntende F (2005) 25; Ingadottir T ‘The Financing of Internationalized Criminal Courts and Tribunals’ in Romano CPR, Nollkaemper A & Kleffner JK (2005) 271-89.

2.4.3 Capacity building and norm-penetration

Moreover, hybrid courts ideally strengthen the national criminal justice system. The inability of a domestic justice system to carry out prosecutions may be attributable to the destruction of the infrastructure. However, in many instances a more pressing issue is the lack of legal personnel with the necessary qualifications and experience. Through working alongside international judges, prosecutors or lawyers, national jurists are likely to gain valuable legal expertise and experience.⁶⁵ Trials taking place before international courts removed from the state concerned, on the other hand, cannot promote such local capacity building, which is particularly desirable in post-conflict states.⁶⁶

Similarly, the prosecution of crimes under international law with the help of the international community and international experts is instrumental in the promotion of the norms of international law on the national level. This not only includes norms of substantive international criminal law, but also fair trial standards.⁶⁷ Thus, the mixed composition of hybrid courts may at least indirectly foster the internalisation of international norms in the domestic sphere. While certainly intangible to a large degree, this ‘norm-penetration’ effect⁶⁸ is another potential advantage of hybrid courts over international or national criminal courts.

2.4.4 Locational advantage

The fact that hybrid courts are most commonly established in the state concerned is moreover a practical advantage. Unlike international courts that are normally far

⁶⁵ Dickinson LA (2003) 307; Cassese A ‘The Role of Internationalized Courts in the Fight Against Criminality’ in Romano CPR, Nollkaemper A & Kleffner JK (2005) 6.

⁶⁶ Dickinson LA (2003) 303-4; Raub L (2009) 1020.

⁶⁷ Raub L (2009) 1031. See also Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 6.

⁶⁸ Dickinson LA (2003) 304; Nouwen SMH (2006) 191.

removed from the commission state (such as the ICTY, the ICTR or the ICC), hybrid courts have more direct access to witnesses and other evidence.⁶⁹ Accordingly, there are fewer logistical obstacles involved, which in turn results in lower costs and speedier proceedings.⁷⁰

2.4.5 Perception of legitimacy, ownership and impartiality

Hybrid courts are moreover advantageous as regards the perception of their proceedings within the state in which the crimes have occurred. At first, due to national elements regarding their creation, location or personnel, hybrid courts are less likely to be perceived as an imposed interference from outside.⁷¹ In particular, a court co-established by the state concerned eliminates reservations regarding the court's jurisdiction and state sovereignty.⁷² Moreover, the applicability of national law and the involvement of national personnel can ensure that domestic legal culture and corresponding expertise are represented. At the same time, the involvement of the international community counteracts perceptions of bias and lack of impartiality that may be associated with trials carried out by judges and prosecutors who had worked under a prior repressive regime.⁷³ Thus, the combination of national and international elements can be instrumental in ensuring that the proceedings are perceived as impartial and legitimate.⁷⁴

Furthermore, criminal trials can constitute opportunities for a society to come to terms with atrocities committed in its past. The society's interest in conducting trials

⁶⁹ Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 4.

⁷⁰ Ambach P *Eine Rahmenkonvention für die Errichtung hybrider internationaler Strafgerichte als Mittel zur Garantie moderner Völkerrechtsstandards im Rahmen zukünftiger Ad-hoc-Strafgerichtsbarkeit für Völkerrechtsverbrechen* (2011) 107.

⁷¹ Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 409; Werle G (2009) para 78.

⁷² Mégret F 'In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 *Cornell International Law Journal* 6.

⁷³ Dickinson LA (2003) 301.

⁷⁴ Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 6.

through its own criminal justice system, the involvement of national personnel, and the local exposure of the perpetrators can be described as ‘ownership’ of such criminal proceedings.⁷⁵ As opposed to purely international courts, whose activities often lack any link to the state in which the crimes have been committed, hybrid courts are able to convey such local ownership of the proceedings similarly to national courts.

Regarding these aspects, hybrid courts have the potential to further national reconciliation and a society’s attempts to come to terms with atrocities committed in its past. Thus, they may play a significant role as a transitional justice instrument, and are potentially better suited to do so than purely international or purely national criminal courts.

2.5 Deficiencies

The advantages of hybrid courts, however, are only one side of the coin, and in fact some of the aforementioned aspects could also be considered disadvantages. In particular, the lower costs of such courts have been described to be a potential weakness.⁷⁶ Scarce financial resources could lead to serious operational problems, ranging from the unavailability of access to the internet, or to international legal resources in general, to the lack of effective translation services necessary for court members to communicate with one another.⁷⁷ Such deficiencies may also affect a hybrid court’s jurisprudence, especially a lack of access to pertinent international legal sources. Moreover, courts could be under-staffed and their personnel under-

⁷⁵ See, e.g., Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 6; Mégret F (2005) 25-6; Nouwen SMH (2006) 191; Dickinson LA (2003) 299; Raub L (2009) 1030.

⁷⁶ Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 10.

⁷⁷ See, e.g., Egonda-Ntende F (2005) 25; Raub L (2009) 1030.

qualified due to insufficient funding.⁷⁸ Eventually, the lack of financial resources could therefore cause hybrid court case law to be of an inferior legal quality.⁷⁹

Similarly, the location in the commission state has been regarded as problematic. Where atrocities have been committed or condoned by state agents who are still influential in the state concerned, hybrid courts could face pressure and attempts of interference by such local actors.⁸⁰ Moreover, the local perception of ownership, legitimacy and impartiality of the proceedings before a hybrid court cannot be taken for granted. Unclear division of responsibility between national and international actors may hamper such perceptions,⁸¹ and international fair trial standards do not permeate proceedings simply due to the involvement of the international community.⁸²

Some hybrid courts, such as the SPSC and the Regulation 64 Panels,⁸³ have indeed fallen short in some of these respects in the past. Such instances show that, while the reasons for which hybrid courts are established are certainly valid, the aims pursued with their establishment do not materialise automatically. Rather, the implementation of their advantages in the transitional justice context is a challenge for hybrid courts and their creators on its own.

Another shortcoming of past hybrid courts is the lack of adequate efforts regarding their legacy in the transitional state. Given the fact that hybrid courts are typically targeted interventions with limited temporal jurisdiction, efforts towards a long-

⁷⁸ See, e.g., Raub L (2009) 1030.

⁷⁹ Ambos K *Internationales Strafrecht* 3 ed (2011) 138.

⁸⁰ Cassese A in Romano CPR, Nolkaemper A & Kleffner JK (2005) 4.

⁸¹ Office of the United Nations High Commissioner for Human Rights (2008) 10.

⁸² See Raub L (2009) 1030.

⁸³ For details, see Egonda-Ntende F (2005) 26-9; Raub L (2009) 1030-1. See also Ambos K *Internationales Strafrecht* 3 ed (2011) 138.

lasting positive effect on the transitional society are desirable.⁸⁴ In this regard, the lack of planning, outreach, and completion strategies including the transfer of unresolved cases has hampered the legacy of hybrid courts.⁸⁵ Moreover, the creation of hybrid courts in the past has frequently been accompanied by insufficient assessment of local capacity,⁸⁶ which may result in an inadequate degree of internationalisation, and strategies as to the realisation of the potential advantages of hybrid courts as a transitional justice instrument have not been formulated.⁸⁷ Since the establishment of a hybrid court constitutes a unique opportunity for the transitional state and the international community, more efforts should indeed be made to maximise their abovementioned potential advantages, in order for hybrid courts to leave behind more than just ‘convictions and acquittals’.⁸⁸



⁸⁴ Office of the United Nations Commissioner for Human Rights (2008) 5-6.

⁸⁵ Office of the United Nations Commissioner for Human Rights (2008) 8.

⁸⁶ Office of the United Nations Commissioner for Human Rights (2008) 9.

⁸⁷ Office of the United Nations Commissioner for Human Rights (2008) 7-9.

⁸⁸ Office of the United Nations Commissioner for Human Rights (2008) 1.

CHAPTER 3: THE ROLE OF HYBRID COURTS WITHIN THE INTERNATIONAL LEGAL ORDER

Apart from their characteristics and the transitional role of hybrid courts in the domestic sphere, it is moreover necessary to address their role on the international level. The position of hybrid courts within the international legal system deserves particular scrutiny because it has implications as to their possible effects on international criminal law: While a negligible position on the international level would diminish the impact of hybrid courts from the outset, a strong position suggests the possibility of more considerable effects on international criminal law. A significant issue in this regard is the scope of the jurisdiction of hybrid courts vis-à-vis international and national courts, and especially the position of hybrid courts in relation to the ICC. Furthermore, the future utility of hybrid courts may be questioned in general. Given the very establishment of the ICC and the operational problems former hybrid courts have encountered, it could be questionable whether the establishment of hybrid courts is likely to be – or should be – continued in the future.

3.1 The ambit of hybrid court jurisdiction

3.1.1 Vis-à-vis international criminal courts

The question of the scope of the jurisdiction of hybrid courts vis-à-vis international criminal courts may arise in relation to UN ad hoc tribunals, namely the ICTY and the ICTR, and in relation to the ICC.

Where a hybrid court is established to operate alongside a UN ad hoc tribunal, the latter has primary jurisdiction. Having been established by the UN Security Council under Chapter VII of the UN Charter, all UN member states are obliged to cooperate with the ICTY and the ICTR. This follows from the ad hoc tribunals' nature as subsidiary organs of the UN Security Council under Article 29 of the UN Charter.

Moreover, their primacy pertains to both national and hybrid courts regardless of the state in which they have been established.⁸⁹ Thus, for instance, the Regulation 64 Panels and the WCC, both of which operate alongside the ICTY, are subject to the ICTY's primacy.

The jurisdiction of the ICC, on the other hand, is based on the complementarity principle, which is implemented as an admissibility test in Article 17 of the ICC Statute.⁹⁰ According to this provision, a case is inadmissible before the ICC in principle when national authorities are investigating or prosecuting a case, have prosecuted, or have investigated but decided not to prosecute. However, the provision also states that the inadmissibility is dependent on the ability or willingness of the state to pursue any such action, which is to be determined by the ICC.

Since Article 17 of the ICC Statute presumes prosecutions to take place before national courts,⁹¹ the question with regard to hybrid courts is whether they should be considered 'national' in this context. The provision does not expressly address the issue, despite the Regulation 64 Panels and the SPSC being operational at the time of the Rome Conference. This may suggest that the drafters did not intend the ICC's jurisdiction to be subsidiary under such circumstances.⁹²

⁸⁹ See Arts 25, 29, 39, 41, 103 Charter of the United Nations of 24 October 1945 (UN Charter) 1 UNTS XVI.

⁹⁰ Rome Statute of the International Criminal Court (hereafter Rome Statute or ICC Statute) (1998) 37 ILM 1002.

⁹¹ From its wording – 'by a State' (Art 17(1)(a), (b) ICC Statute), 'national decision' (Art 17(2)(a) ICC Statute), 'national judicial system' (Art 17(3) ICC Statute) – the provision seems to apply only to purely national courts, see Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 411.

⁹² Ambach P (2005) 115.

However, from a teleological perspective, it is convincing to treat hybrid courts as national courts for the purposes of Article 17 of the ICC Statute.⁹³ The complementarity principle is aimed at ensuring that perpetrators are held accountable as well as at protecting state sovereignty.⁹⁴ In these aspects, hybrid courts do not differ from national courts, as they are typically co-established by the sovereign government of the state concerned and equally aim at counteracting impunity. Given the purpose of the provision, it should also be irrelevant whether a hybrid court has been created unilaterally or bilaterally, or whether its composition features a majority of international or national judges.⁹⁵ By the same token, this should moreover apply to ‘nationalised international courts’, such as the SCSL or the STL.⁹⁶ However, in such instances, the rather unambiguous wording of Article 17 of the ICC Statute may necessitate its analogous application.⁹⁷

However, even in instances where a case is admissible under Article 17 of the ICC Statute, hybrid courts may nonetheless operate alongside the ICC in a supplementing role. As evidenced by the Regulation 64 Panels and the WCC, hybrid courts are well suited to work alongside and ease the caseload of purely international tribunals that operate simultaneously. Similarly to the UN ad hoc tribunals, the ICC only has the capacity to try a limited number of persons who are presumed to be most responsible for large-scale atrocities. Accordingly, lower ranking perpetrators may be prosecuted before hybrid courts, especially where the domestic justice system is incapable of carrying out such prosecutions on its own. Moreover, notwithstanding a functional

⁹³ Ambos K *Internationales Strafrecht* 3 ed (2011) 138 n 300; Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 412; Raub L (2009) 1048-9.

⁹⁴ Ambach P (2005) 115; Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 412.

⁹⁵ Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 412.

⁹⁶ See also Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 412.

⁹⁷ Ambach P (2005) 115.

domestic justice system, such supplementary prosecutions may be carried out by hybrid courts more appropriately than by national courts, given their aforementioned advantages in the transitional context.⁹⁸

3.1.2 Vis-à-vis national criminal courts

In cases of complete integration into the national court system, the jurisdiction of a hybrid court is determined according to the relevant domestic laws, while their legal bases may ascribe a special competence regarding the relevant crimes and time frame.⁹⁹ The legal bases of hybrid courts that are not integrated into the domestic court system typically provide for concurrent jurisdiction, with the hybrid courts having primacy over national courts within the scope of their jurisdiction.¹⁰⁰ However, the jurisdiction of hybrid courts vis-à-vis criminal courts in third states is less clear. Typically, hybrid courts are not established by the UN Security Council under Chapter VII of the UN Charter – the STL being the only exception as of today. Thus, as opposed to the ICTY and ICTR, they do not automatically have primacy over courts in third states.¹⁰¹ This pertains even with respect to courts that can be considered primarily ‘international’ in nature, such as the SCSL.¹⁰² But for the possibility of UN Security Council resolutions,¹⁰³ which could force other states to cooperate with a hybrid court regardless of the nature of its establishment, hybrid courts cannot seize jurisdiction over cases pending before courts in third states.

⁹⁸ Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 416; Dickinson LA (2003) 1066; Njikam O, Pirmurat S & Stegmiller I ‘Der Sondergerichtshof für Sierra Leone, der Oberste Irakische Strafgerichtshof und das Sondertribunal für Libanon – ein Vergleich’ (2008) *Zeitschrift für Internationale Strafrechtsdogmatik* 432; Raub L (2009) 1053.

⁹⁹ See, e.g., Art 2 ECCC Law; s 2.3 UNTAET Regulation 2000/15.

¹⁰⁰ See Art 8 SCSL Statute; Art 4 STL Statute.

¹⁰¹ Ambach P (2005) 113.

¹⁰² Ambach P (2005) 113.

¹⁰³ In this regard, see UN Security Council Resolution 1638 (2005) of 11 November 2005, UN Doc. S/RES/1638 (2005) regarding the obligation of Liberia to extradite Charles Taylor.

However, notwithstanding the possibility of prosecutions in third states under the principle of universal jurisdiction, this scenario is arguably of little practical significance.

3.2 The future utility of hybrid courts

3.2.1 Co-existence with the ICC

Given that the first hybrid courts were established before the Rome Statute entered into force, it was not clear whether this criminal justice model would outlive the creation of the ICC. Moreover, the creation of further hybrid courts could be counterproductive in relation to efforts regarding the establishment of the ICC as the primary – and ideally universal – international criminal justice institution. However, several considerations suggest that the ICC does not make the creation of hybrid courts obsolete or undesirable.

The ICC's lack of universality makes the establishment of hybrid courts an option for states that have not ratified the Rome Statute,¹⁰⁴ especially where a UN Security Council referral in accordance with Article 13(b) of the ICC Statute is unlikely.¹⁰⁵

With regard to the ICC's limited temporal jurisdiction, the same is true where the crimes have been committed prior to the entry into force of the Rome Statute. For example, this has been the case regarding the crimes the ECCC and EAC are concerned with.

Furthermore, hybrid courts may be created even where the ICC has both temporal and territorial jurisdiction. It has already been argued that hybrid courts should be considered 'national' courts for the purposes of the complementarity principle.

¹⁰⁴ Ambach P (2005) 117; Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 408-9.

¹⁰⁵ An example is the Darfur situation, where a UNSC referral was initially uncertain, see Ambach P (2005) 117; Raub L (2009) 1050-1.

Bearing in mind the advantages of hybrid courts discussed above,¹⁰⁶ even in ICC member states, the establishment of a hybrid court may indeed be more desirable than prosecutions before the ICC or national courts. For instance, with regard to a situation before the ICC, the establishment of a hybrid court has at least been contemplated in Kenya.¹⁰⁷ As set out above, hybrid courts may moreover operate alongside and supplement the activities of the ICC.¹⁰⁸

For these reasons, hybrid courts do not necessarily counteract the ICC's establishment as the primary international criminal justice institution, but rather constitute a flexible interim solution.¹⁰⁹ Thus the creation of the ICC does not implicate a departure from the use of hybrid courts in the future.

3.2.2 Consequences of past deficiencies

The future utility of hybrid courts may also be called into question due to the previously discussed deficiencies of former hybrid courts.¹¹⁰ This pertains in particular to the lack of smooth administration and financial resources, which has been shown to possibly cause serious operational problems. Indeed, such issues have sparked the perception of hybrid courts as administering 'justice on the cheap'¹¹¹ and rendering decisions of inferior legal quality.¹¹² It certainly needs to be ensured that future hybrid courts will not encounter considerable issues regarding these aspects. However, these shortcomings are of an operational nature, and thus relatively easily rectifiable through adequate funding and administration of future hybrid courts. Therefore, these considerations do not affect the general viability of the hybrid

¹⁰⁶ See above 12-16.

¹⁰⁷ See, e.g., Raub L (2009) 1050-1.

¹⁰⁸ See above 21.

¹⁰⁹ See Njikam O, Pirmurat S & Stegmiller I (2008) 432.

¹¹⁰ See above 16-18; Cassese A *International Criminal Law* 2 ed (2008) 334-5; Raub L (2009) 1044-6.

¹¹¹ Egonda-Ntende F (2005) 25.

¹¹² Ambos K *Internationales Strafrecht* 3 ed (2011) 138.

criminal justice model in the future,¹¹³ and are thus also unlikely to cause a decrease in the future establishment of hybrid courts.

3.3 Conclusions

Neither the creation of the ICC nor deficiencies of former hybrid courts indicate a departure from the hybrid court model in the future. Moreover, the ambit of the jurisdiction of hybrid courts is considerable. Unless a given case is prosecuted before a UN ad hoc tribunal or a court in a third state, hybrid courts, as a principle, have jurisdiction over the crimes and the territory set forth in their legal bases. For these reasons, hybrid courts are likely to play a significant role regarding the future development of international criminal law.



¹¹³ See Ambach P (2005) 112.

CHAPTER 4: THE IMPACT OF HYBRID COURTS ON THE DEVELOPMENT OF SUBSTANTIVE INTERNATIONAL CRIMINAL LAW

4.1 Diversification vs. consolidation

As mentioned in the beginning, a significant question regarding the application of substantive international criminal law by hybrid courts is whether it causes a consolidation or fragmentation of international criminal law.¹¹⁴ There is a legitimate interest in the uniform application of international criminal law, especially from the viewpoint of legal certainty.¹¹⁵ However, it must be borne in mind that holding perpetrators of mass atrocities accountable is the primary aim of international criminal law.¹¹⁶ Since counteracting impunity should be prioritised over a uniform international jurisprudence, it cannot be said that any deviation from established international criminal law by hybrid courts has a ‘negative impact’ per se.

However, the following discussion of the legal bases and jurisprudence of hybrid courts will be confined to their coherence with substantive international criminal law hitherto, and thus largely set aside considerations regarding the value of its uniform application as well as aspects relating to domestic criminal law and criminal procedure.

4.2 The SCSL, ECCC and STL as a representative selection

The discussion will moreover focus on the SCSL, the ECCC and the STL, though reference will be made to other hybrid courts where appropriate. These three courts can be considered representative in two ways.

¹¹⁴ See, e.g., Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 410-11; Buergenthal T (2001) 267-275; Pocar F (2002) 304-308; Raub L (2009) 1048.

¹¹⁵ Meisenberg S (2004) 176; Pocar F (2004) 307.

¹¹⁶ Cassese A in Romano CPR, Nollkaemper A & Kleffner JK (2005) 3; Pocar F (2004) 307; Raub L (2009) 1048.

First, they cover a wide range of various degrees and types of internationalisation. While the SCSL and STL are autonomous institutions, the ECCC are completely integrated into the domestic criminal justice system. The SCSL and ECCC apply both national and international criminal law, whereas the STL will only apply domestic criminal law. While international judges form the majority in the SCSL and STL, national judges form the majority within the ECCC. Furthermore, they have been established in different ways. The STL has been created by the UN Security Council, the SCSL is based on an agreement between the UN and Sierra Leone, and the ECCC have initially been created by domestic legislation, which has later been amended in accordance with an agreement between the UN and Cambodia.

Secondly, as will be discussed in more detail below,¹¹⁷ the jurisprudence of these courts can be considered representative of the various possible positions of hybrid court case law in relation to previously established international criminal law: The SCSL has been the first court to interpret and apply the elements of several existing crimes, while the ECCC have partially deviated from settled ICTY and ICTR jurisprudence, and the STL has attempted to establish an entirely new crime under international law.

4.3 Legal bases

Before addressing the jurisprudence of these tribunals, however, it is indicated to scrutinise, in the following, their legal bases regarding their conformity with previously established international criminal law. Moreover, the legal bases of other hybrid courts will be briefly addressed for reasons of comparison regarding the respective inclusion of substantive international criminal law.

¹¹⁷ See below 33-50.

4.3.1 SCSL Statute

The SCSL Statute follows the ICTY and ICTR Statutes in numerous aspects. Concerning individual criminal responsibility, the SCSL Statute reproduces the ICTY and ICTR Statutes, the only addition being that domestic provisions on individual criminal responsibility shall apply with respect to the application of Sierra Leonean criminal law.¹¹⁸ As far as crimes under international law are concerned, the SCSL Statute contains provisions on crimes against humanity and war crimes.

The definition of crimes against humanity is primarily based on the ICTR Statute.¹¹⁹ Thus, as opposed to the relevant provision in the ICTY Statute, the formulation in the SCSL Statute is in conformity with customary international law to the effect that crimes against humanity need not be committed during an armed conflict.¹²⁰ By the same token, the SCSL Statute's omission of the ICTR Statute's requirement that crimes against humanity needed to be committed with discriminatory intent reflects customary international law.¹²¹ Moreover, the SCSL Statute adopts several individual acts that may constitute crimes against humanity from the ICC Statute, namely 'sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'.¹²² The SCSL Statute does not expressly include the so-called 'policy element', which is included in the ICC Statute. However, it is also required under the ICTY and ICTR jurisprudence.¹²³

¹¹⁸ See Art 6 SCSL Statute, Art 7 ICTY Statute, Art 6 ICTR Statute.

¹¹⁹ See Art 2 SCSL Statute, Art 3 ICTR Statute.

¹²⁰ This 'nexus requirement' had been long abandoned under customary international law, see, e.g., Swart B 'Internationalized Courts and Substantive Criminal Law' in Romano CPR, Nollkaemper A & Kleffner JK (2005) 299; Werle G (2009) paras 783-4, 787.

¹²¹ The only crime against humanity which requires such an intent is persecution, see, e.g., *Prosecutor v Tadić*, ICTY (Appeals Chamber), judgment of 15 July 1999, paras 273-305;

¹²² See Art 2(g) SCSL Statute and Art 7(1)(g) ICC Statute.

¹²³ See Art 7(2)(a) ICC Statute; Meisenberg S (2004) 176 with further references.

The SCSL Statute contains two provisions on war crimes. Concerning violations of the Common Article 3 of the Geneva Conventions and its Additional Protocol II (AP II),¹²⁴ the SCSL Statute again almost precisely follows the ICTR Statute.¹²⁵ Moreover, three ‘other serious violations of international humanitarian law’ have been borrowed from the ICC Statute.¹²⁶ Most significantly – considering the conflict at hand –, this includes the recruitment and use of child soldiers. The SCSL Statute does not expressly contain provisions on war crimes committed in an international armed conflict, since the drafters considered the Sierra Leonean civil war to be a non-international armed conflict.¹²⁷ Moreover, genocide was not included in the SCSL Statute, since the UN Security Council did not see a need to do so.¹²⁸

A unique provision is Article 7 of the SCSL Statute, which provides for jurisdiction over juveniles. While child soldiers committed atrocious crimes during the civil war in Sierra Leone, the SCSL Statute places a strong emphasis on rehabilitative measures. Moreover, the SCSL’s prosecutor made it clear that juveniles would not be prosecuted before the SCSL.¹²⁹

Notably, the SCSL also addresses the relation to the ICTY and ICTR. Article 20(3) of the SCSL Statute states that, as far as international criminal law is concerned, SCSL judges shall be guided by pertinent case law of the Appeals Chamber of the ICTY and

¹²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (hereafter Additional Protocol II or AP II) 1125 UNTS 609.

¹²⁵ See Art 3 SCSL Statute and Art 4 ICTR Statute.

¹²⁶ See Art 4 SCSL Statute and Art 8(2)(e)(i), (iii), (vii) ICC Statute. It is not clear why other crimes defined in Art 8(2)(e) ICC Statute have not been included, see Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 301.

¹²⁷ *Prosecutor v Fofana & Kondewa*, SCSL (Appeals Chamber), decision of 25 May 2004 para 25.

¹²⁸ Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 299, referring to UN Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315 (2007).

¹²⁹ SCSL Public Affairs Office ‘Special Court Prosecutor Says He Will Not Prosecute Children’ Press Release of 2 November 2002, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2BaVhw%3D&tabid=196> (accessed 25 October 2013).

ICTR. This provision is especially noteworthy because, *prima facie*, it seems to counteract the possibility of an adverse diversification of international criminal law.

4.3.2 ECCC Law

Like the SCSL Statute, the ECCC Law draws from the ICTY and ICTR Statutes regarding the respective provisions on individual criminal responsibility.¹³⁰ Moreover, it reproduces the ICTR Statute's definition of crimes against humanity.¹³¹ Thus, like the SCSL Statute and in conformity with customary international law, it does not require the nexus to an armed conflict. However, in contrast to the SCSL Statute, the ECCC Law in addition adopts the requirement of discriminatory intent from the ICTR Statute. In this regard, the definition is thus more restrictive than customary international law, under which discriminatory intent is required only for the crime of persecution.¹³² Moreover, the ECCC Law is more restrictive with regard to the crime of genocide, reproducing the 1948 Genocide Convention, but omitting the crimes of complicity and incitement to commit genocide.¹³³ As concerns war crimes, the ECCC Law includes grave breaches of the 1949 Geneva Conventions.¹³⁴ The relevant provision resembles those of the ICC and ICTY Statutes.¹³⁵ The ECCC Law does not contain any express provisions on war crimes committed in internal armed conflict, although conduct amounting to such crimes must have been widespread during the relevant time.¹³⁶ This is due to the fact that Cambodia had not ratified the Additional

¹³⁰ See Art 29 ECCC Law, Art 7 ICTY Statute, Art 6 ICTR Statute.

¹³¹ See Art 5 ECCC Law, Art 3 ICTR Statute.

¹³² See above 27 n 120; Werle G (2009) para 821.

¹³³ See Art 4 ECCC Law, Arts II, III Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereafter Genocide Convention) 78 UNTS 277; Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 298.

¹³⁴ Art 6 ECCC Law. The singular formulation ('the Geneva Convention') is presumably a typing error, see Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 301.

¹³⁵ See Art 6 ECCC Law, Art 8(2)(a) ICC Statute, Art 4 ICTY Statute.

¹³⁶ See Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 301.

Protocols I and II to the Geneva Conventions until 1980, and the relevant rules were not considered part of customary international law at the relevant time.¹³⁷

4.3.3 STL Statute

The STL Statute generally provides for the application of Lebanese criminal law.¹³⁸ However, though this undoubtedly pertains to the applicable crimes, the statute is nevertheless unclear with regard to the modes individual criminal liability. While declaring applicable the entire body of Lebanese criminal law in Article 2, the STL Statute entails a separate provision on individual criminal responsibility in its Article 3, which incorporates elements of modes of liability found in the legal bases of the IMT, the IMTFE, and the UN ad hoc tribunals.¹³⁹ Yet, the provision also reflects the relevant Lebanese law.¹⁴⁰ In interpreting the relationship between Article 2 and Article 3 of the STL Statute, the STL's Appeals Chamber found that, in principle, Lebanese law should be applied. Rather, Article 3 was held to be applicable only where the application of the relevant domestic provisions would be in conflict with international law.¹⁴¹ Since the remainder of the applicable law before the STL is domestic, a presentation thereof is dispensed with.

4.3.4 International criminal law in the legal bases of other hybrid courts

Regarding the inclusion of substantive international criminal law, the legal bases of other hybrid courts should be briefly addressed for reasons of comparison. While the Regulation 64 Panels and the WCC are essentially domestic courts applying domestic law, the legal bases of the SPSC and EAC are especially suitable in this respect.

¹³⁷ Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 301.

¹³⁸ Art 2 STL Statute.

¹³⁹ See *Interlocutory Decision on the Applicable Law*, STL (Appeals Chamber), decision of 16 February 2011 para 206 and footnotes.

¹⁴⁰ STL (Appeals Chamber), decision of 16 February 2011 para 206.

¹⁴¹ STL (Appeals Chamber), decision of 16 February 2011 para 211.

The SPSC's legal basis is UNTAET Regulation 2000/15. It is closely modelled after the ICC Statute regarding genocide,¹⁴² crimes against humanity,¹⁴³ war crimes¹⁴⁴ and, notably, individual criminal responsibility.¹⁴⁵

Likewise, the EAC Statute borrows heavily from the ICC Statute, though in a more selective way. While genocide is defined in conformity with the ICC Statute and the Genocide Convention,¹⁴⁶ the EAC Statute omits several of the ICC Statute's crimes against humanity and adds others.¹⁴⁷ Regarding war crimes, the EAC Statute contains grave breaches of the Geneva Conventions. Here, the respective provisions of the ICC Statute are adopted almost verbatim.¹⁴⁸ It moreover includes violations of the Geneva Conventions' Common Article 3, again adopting the relevant provision of the ICC Statute, though with numerous omissions.¹⁴⁹ Regarding individual criminal responsibility, however, the EAC Statute draws from the ICTY and ICTR Statutes.¹⁵⁰

4.3.5 Observations

The SCSL's and ECCC's legal bases feature a noteworthy degree of eclecticism when it comes to the definitions of crimes under international law.¹⁵¹ Borrowing from the statutes of various previous tribunals and partially adjusting them, taking into account customary international law, the crimes set forth in the SCSL Statute and the ECCC Law differ from any previously existing definitions. While some of these do not correspond entirely with customary international law, deviations are relatively slight,

¹⁴² See s 4 UNTAET Regulation 2000/15, Art 6 ICC Statute, Art II Genocide Convention.

¹⁴³ See s 5 UNTAET Regulation 2000/15 and Art 7 ICC Statute.

¹⁴⁴ See s 6 UNTAET Regulation 2000/15 and Art 8 ICC Statute.

¹⁴⁵ See s 14 UNTAET Regulation 2000/15 and Art 25 ICC Statute.

¹⁴⁶ See Art 5 EAC Statute; Art 6 ICC Statute; Art II Genocide Convention.

¹⁴⁷ See Art 6 EAC Statute and Art 7 ICC Statute. Art 6 EAC Statute does not adopt Art 7(1)(e) and (h), while adding the crime of 'massive and systematic practice of summary executions'.

¹⁴⁸ See Art 7(1) EAC Statute and Art 8(2)(a) ICC Statute

¹⁴⁹ See Art 7(2) EAC Statute and Art 8(2)(c), (e) ICC Statute.

¹⁵⁰ See Art 10 EAC Statute, Art 7 ICTY Statute, Art 6 ICTR Statute.

¹⁵¹ Swart B in Romano CPR, Nollkaemper A & Kleffner JK (2005) 315.

tend to be restrictive, and are mostly due to the particularities of the conflicts at hand. Thus, the legal bases of the SCSL and ECCC rather exhibit the flexibility of hybrid courts in adapting to a particular situation than adversely diversifying international criminal law. It is noticeable that the legal bases of the SCSL and ECCC do not draw as heavily from the ICC Statute as the legal bases of other hybrid courts. This is unfortunate to the extent that the ICC Statute represents the predominant source of international criminal law today, and by primarily borrowing from the ICTY and ICTR Statutes, one could say that the drafters of the SCSL Statute and the ECCC Law missed a chance to contribute to the harmonisation of substantive international criminal law. The issue becomes especially clear regarding the provisions on individual criminal responsibility for crimes under international law. While the SCSL Statute and the ECCC Law reproduce the ICTY and ICTR Statutes, recourse could have been made to the more detailed ICC Statute, which for the first time included comprehensive provisions on individual criminal responsibility.¹⁵² As will be discussed below, this has arguably had negative implications regarding the case law of these courts on individual criminal responsibility.¹⁵³

The STL Statute confines the applicable law to Lebanese criminal law, allowing for few conclusions to be drawn as to its relation to the previous state of international criminal law. However, it may be observed that its provision on modes of liability under international criminal law bears elements found in the statutes of other international criminal courts.¹⁵⁴

¹⁵² Werle G (2009) para 446.

¹⁵³ See also below 41-2; Schomburg W 'Jurisprudence on JCE – revisiting a never ending story' 3 June 2010 *Cambodia Trial Monitor* available at http://www.cambodia-tribunal.org/sites/default/files/resources/ctm_blog_6_1_2010.pdf (accessed 25 October 2013).

¹⁵⁴ STL (Appeals Chamber), decision of 16 February 2011 para 206 and footnotes.

4.4 Jurisprudence

The following discussion of the SCSL, ECCC and STL jurisprudence will focus on a number of selected issues of substantive international criminal law. While the legal issues themselves are highly diverse, they are illustrative of the possible ways in which the legal position taken in the jurisprudence of a hybrid court may relate to previously established international criminal law. Accordingly, these issues will be discussed specifically regarding this aspect, whereas a comprehensive presentation of their respective legal details will be largely dispensed with.

With regard to each hybrid court, it will first be outlined how a given legal issue was approached within the relevant jurisprudence. Moreover, it will be discussed how the respective decisions were received by other international or internationalised courts, as well as scholars. Subsequently, conclusions will be drawn regarding the impact of the jurisprudence on the development of substantive international criminal law, and whether or not the respective findings constitute a consolidation or fragmentation thereof.

4.4.1 Special Court for Sierra Leone

The SCSL's jurisprudence has been concerned with crimes against humanity and war crimes committed in the Sierra Leonean civil war from 1996 to 2002. In particular, the SCSL was the first court to adjudicate on the war crimes of recruiting and using child soldiers and attacks on peacekeeping missions.

4.4.1.1 Recruitment and use of child soldiers

From its inception, the SCSL was expected to make significant contributions to jurisprudence regarding the war crime of recruiting or using child soldiers.¹⁵⁵ The crime is included in Article 4(c) of the SCSL Statute, which adopts verbatim

¹⁵⁵ Meisenberg S (2004), 180; Meisenberg S (2008) 147.

Article 8(2)(e)(vii) of the ICC Statute. Prior to the ICC Statute, several international treaties obliged the respective states parties to take all feasible measures to ensure that children under 15 were neither recruited into the armed forces nor took part in hostilities.¹⁵⁶

However, in its first decision on the recruitment and use of child soldiers, the SCSL had to establish that the application of the relevant provision did not constitute a violation of the *nullum crimen sine lege* principle, as it was argued by one defendant that this war crime had not existed before the adoption of the Rome Statute.¹⁵⁷ The SCSL found that the recruitment and use of child soldiers had in fact been a crime under customary international law at the relevant time.¹⁵⁸ After having established a prohibition of the conduct in question under international humanitarian law, the SCSL applied the criteria developed by the ICTY in its *Tadić* jurisdictional decision as to the requirements under which violations of such a rule also entailed individual criminal responsibility under international law.¹⁵⁹ Apart from the affirmation of these criteria, the establishment of the criminality of the recruitment and use of child soldiers under customary international law before 1996 was a significant contribution to international humanitarian law in itself.¹⁶⁰

¹⁵⁶ See Art 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereafter Additional Protocol I or AP I) 1125 UNTS 3; Art 4(3)(c) AP II; Art 38(2), (3) Convention on the Rights of the Child of 20 November 1989 (1989) 28 ILM 1456.

¹⁵⁷ *Prosecutor v Norman*, SCSL (Appeals Chamber), decision of 31 May 2004.

¹⁵⁸ *Prosecutor v Norman*, SCSL (Appeals Chamber), decision of 31 May 2004 para 53.

However, see separate opinion Robertson paras 45-7.

¹⁵⁹ *Prosecutor v Norman*, SCSL (Appeals Chamber), decision of 31 May 2004 paras 25-7; *Prosecutor v Tadić*, ICTY (Appeals Chamber), decision of 2 October 1995 para 94.

¹⁶⁰ Meisenberg S (2004) 178.

In setting out the actus reus of the crime, the SCSL took recourse to the elements of crimes for Article 8(2)(e)(vii) of the ICC Statute.¹⁶¹ However, these included no interpretative guidance on the individual elements of the crime, i.e. ‘conscripting’, ‘enlisting’ or ‘using’ child soldiers ‘to participate actively in hostilities’. The SCSL stated that the alternatives of ‘conscripting’ and ‘enlisting’ referred to compulsory and voluntary ‘recruiting’ of a child, respectively.¹⁶² Thus, the SCSL supported the notion that the two separate terms had been used to clarify that recruitment need not be achieved by forcible means, and that the consent of a child was not a defence to the crime.¹⁶³ Moreover, the SCSL found that ‘conscripting’ was not restricted to formal compulsory service in the armed forces of a state, but included coercive recruitment of children by any armed group in order to use them to participate actively in hostilities.¹⁶⁴

Regarding the use of children ‘to participate actively in hostilities’, the SCSL had to answer the question whether ‘active’ participation was identical to ‘direct’

¹⁶¹ See *Prosecutor v Brima, Kamara & Kanu*, SCSL (Trial Chamber II), judgment of 20 June 2007 para 731; *Prosecutor v Fofana & Kondewa*, SCSL (Trial Chamber I), judgment of 2 August 2007 paras 195-6. The elements of crimes for Art 8(2)(e)(vii) ICC Statute read: ‘(1) The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities. (2) Such person or persons were under the age of 15 years. (3) The Perpetrator knew or should have known that such person or persons were under the age of 15 years. (4) The conduct took place in the context of and was associated with an armed conflict not of an international character. (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.’ – SCSL (Trial Chamber II), judgment of 20 June 2007 para 731 mistakenly cites the elements of crimes for Art 8(2)(b)(xxvi) ICC Statute, which deal with the crime in the context of an international armed conflict, see Meisenberg S (2008) 147.

¹⁶² *Prosecutor v Fofana & Kondewa*, SCSL (Appeals Chamber), judgment of 28 May 2008 para 139; SCSL (Trial Chamber II), judgment of 20 June 2007 para 733.

¹⁶³ SCSL (Trial Chamber I), judgment of 2 August 2007 para 192; SCSL (Trial Chamber II), judgment of 20 June 2007 para 735. See also SCSL (Appeals Chamber), judgment of 28 May 2008, separate opinion Winter para 11 n 1207; Breitegger A (2010) 721; Meisenberg S (2008) 148; Werle G (2009) para 1140. However, the distinction between ‘conscripting’ and ‘enlisting’ arguably remains relevant for sentencing, see Graf R ‘The International Criminal Court and Child Soldiers, An Appraisal of the *Lubanga* Judgment’ (2012) 10 *Journal of International Criminal Justice* 956-7.

¹⁶⁴ SCSL (Trial Chamber II), judgment of 20 June 2007 para 734.

participation, a term used in numerous international humanitarian law instruments.¹⁶⁵ The terminological issue was relevant due to the fact that ‘direct participation’ relates to the fundamental principle of distinction between combatants and civilians and entails the loss of the protected civilian status.¹⁶⁶ In the context of international humanitarian law, ‘direct participation’ was thus interpreted narrowly in order to afford wide protection to civilians.¹⁶⁷ However, in the context of international criminal law, an extensive interpretation of ‘active’ participation was desirable with regard to the protective scope of the war crime of using child soldiers.¹⁶⁸

Referring to a footnote in the Preparatory Committee’s ICC Draft Statute of 1998,¹⁶⁹ the SCSL concluded that ‘active participation’ in this context included ‘direct participation in combat’ as well as ‘active participation in activities linked to combat’.¹⁷⁰ Thus, the SCSL took an extensive approach, understanding ‘active’ participation more broadly than ‘direct’ participation in the context of international humanitarian law.¹⁷¹ Moreover, the SCSL stated that active participation of children in hostilities encompassed putting their lives at risk,¹⁷² and explained that this was not limited to direct participation in combat, but could also be the case with respect to logistical and other supportive activities.¹⁷³

¹⁶⁵ Art 51(3) AP I, Art 13(3) AP II, Art 4(1) AP II.

¹⁶⁶ Art 51(3) AP I; Art 13(3) AP II, Art 4(1) AP II; Art 43(2) AP I; Art 67(e) AP I. See also Graf R (2012) 961.

¹⁶⁷ Graf R (2012) 961.

¹⁶⁸ Breitegger A (2010) 722; Meisenberg S (2008) 149.

¹⁶⁹ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1 of 14 April 1998, 21 n 12.

¹⁷⁰ SCSL (Trial Chamber II), judgment of 20 June 2007 para 736; *Prosecutor v Sesay, Kallon & Gbao*, SCSL (Trial Chamber I), judgment of 25 February 2009 para 188.

¹⁷¹ SCSL (Trial Chamber I), judgment of 25 February 2009 para 1723. See also Breitegger A (2010) 722; Graf R (2012) 964; Meisenberg S (2008) 149.

¹⁷² SCSL (Trial Chamber II), judgment of 20 June 2007 para 736.

¹⁷³ SCSL (Trial Chamber II), judgment of 20 June 2007 para 737.

In its *Lubanga* judgment,¹⁷⁴ the ICC was concerned with many of the issues that were dealt with before the SCSL regarding the recruitment and use of child soldiers. Having considered that the relevant provisions in the SCSL and ICC Statutes were identical, the ICC expressly identified the potential utility of the SCSL jurisprudence in interpreting the relevant provisions of the Rome Statute.¹⁷⁵ Subsequently, the ICC drew upon the findings of the SCSL, inter alia, regarding the conception of compulsion as the distinguishing element between conscription and enlistment¹⁷⁶ and the role of consent.¹⁷⁷ Moreover, likewise referring to the aforementioned report of the Preparatory Commission as well as the pertinent SCSL case law, the ICC also took an extensive approach as to the notion of ‘active’ participation in hostilities. Notably, the ICC made out the decisive element of active participation (be it ‘direct’ or ‘indirect’) to be the exposure of the child to danger as a potential target.¹⁷⁸ This may arguably be considered only terminologically different from the constitutive element according to the SCSL jurisprudence, namely that the activity encompasses putting the life of the child at risk.¹⁷⁹

The jurisprudence of the SCSL was certainly not essential to many of the ICC’s findings. The genesis of the ICC Statute, its elements of crimes as well as established customary international law may well have led the ICC to the same conclusions in the absence of the SCSL jurisprudence. Yet the ICC’s intensive scrutiny of the SCSL case law and the concurrent findings are striking.

¹⁷⁴ *Prosecutor v Lubanga*, ICC (Trial Chamber I), judgment of 14 March 2012.

¹⁷⁵ ICC (Trial Chamber I), judgment of 14 March 2012 para 603.

¹⁷⁶ ICC (Trial Chamber I), judgment of 14 March 2012 para 607-8.

¹⁷⁷ ICC (Trial Chamber I), judgment of 14 March 2012 para 616.

¹⁷⁸ ICC (Trial Chamber I), judgment of 14 March 2012 para 628.

¹⁷⁹ See above 36.

Moreover, the fact that the SCSL for its part based many of its findings on the ICC Statute and the pertinent elements of crimes is a consolidating contribution in itself. The resulting coherences between the two courts' jurisprudence regarding child soldiers can thus be considered exemplary for a positive 'cross-fertilisation'¹⁸⁰ between hybrid courts and the ICC.

4.4.1.2 Attacks on peacekeeping missions

The war crime of attacks on peacekeeping missions is included in Article 4(b) of the SCSL Statute, which corresponds verbatim to Article 8(2)(b)(iii) and (e)(iii) of the ICC Statute. As with the recruitment and use of child soldiers, the SCSL found that the offence existed as a crime under customary international law at the relevant time.¹⁸¹ The actus reus as determined by the SCSL again essentially corresponds to the elements of crimes for the respective provision under the ICC Statute,¹⁸² though the SCSL did not expressly refer to the latter.

As to the notion of a 'peacekeeping mission', the court made out three constitutive elements, namely the consent of the parties, impartiality, and non-use of force except in self-defence and defence of the mandate.¹⁸³ As concerns the latter element, the SCSL noted that peacekeeping missions needed to be distinguished from measures

¹⁸⁰ Benzing M & Bergsmo M in Romano CPR, Nollkaemper A & Kleffner JK (2005) 413. See also Dickinson LA (2003) 304 regarding such cross-fertilisation effects across national and international levels through hybrid courts in general.

¹⁸¹ See SCSL (Trial Chamber I), judgment of 25 February 2009 para 213.

¹⁸² See SCSL (Trial Chamber I), judgment of 25 February 2009 para 219, namely: '(i) The Accused directed an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; (ii) The Accused intended such personnel, installations, material, units or vehicles to be the object of the attack; (iii) Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict; and (iv) The Accused knew or had reason to know that the personnel, installations, material, units or vehicles were protected.' See also elements of crimes for Art 8(2)(b)(iii), (e)(iii) ICC Statute.

¹⁸³ SCSL (Trial Chamber I), judgment of 25 February 2009 para 225.

under Chapter VII of the UN Charter.¹⁸⁴ The SCSL considered the crime a particularisation of the general prohibition of attacks against civilians and civilian objects in international humanitarian law.¹⁸⁵ Thus, the respective personnel or objects needed to be entitled to protection given to civilians and civilian objects under international humanitarian law.¹⁸⁶ This necessitated a differentiation between self-defence and direct participation in hostilities.¹⁸⁷ In this regard, the SCSL implied that the formal legal basis, such as a UN mandate under Chapter VI of the UN Charter as opposed to a Chapter VII mandate, was not decisive.¹⁸⁸ Rather, it stated that the entirety of circumstances should be taken into account, including the practices actually adopted by the peacekeeping mission during the conflict.¹⁸⁹

The ICC was concerned with attacks on peacekeeping missions in its decision on the confirmation of charges in the *Abu Garda* case.¹⁹⁰ Here, too, the ICC followed the SCSL in all relevant aspects. This included, in particular, the three constitutive elements of a peacekeeping mission,¹⁹¹ the necessity to distinguish these from Chapter VII measures,¹⁹² as well as the factual (as opposed to formal) criteria developed by the SCSL regarding self-defence vis-à-vis direct participation in hostilities.¹⁹³

¹⁸⁴ SCSL (Trial Chamber I), judgment of 25 February 2009 para 230.

¹⁸⁵ SCSL (Trial Chamber I), judgment of 25 February 2009 para 215.

¹⁸⁶ SCSL (Trial Chamber I), judgment of 25 February 2009 para 233-4.

¹⁸⁷ See also above 35-6; Breitegger A (2010) 718.

¹⁸⁸ Breitegger A (2010) 719.

¹⁸⁹ SCSL (Trial Chamber I), judgment of 25 February 2009 para 234.

¹⁹⁰ *Prosecutor v Abu Garda*, ICC (Pre-Trial Chamber I), decision of 8 February 2010.

¹⁹¹ ICC (Pre-Trial Chamber I), decision of 8 February 2010 para 71.

¹⁹² ICC (Pre-Trial Chamber I), decision of 8 February 2010 para 71.

¹⁹³ ICC (Pre-Trial Chamber I), decision of 8 February 2010 para 80, expressly referring to SCSL (Trial Chamber I), judgment of 25 February 2009 para 234.

4.4.1.3 Internationalisation of an internal armed conflict

The existence of an armed conflict in Sierra Leone from 1991 to 2002 had been established by the SCSL early on.¹⁹⁴ However, following a defence motion in the RUF case, the SCSL had to adjudicate on the question of the Sierra Leonean civil war's classification as an international or non-international armed conflict. It was argued by the defence that the SCSL had jurisdiction only over war crimes committed in non-international armed conflict, whereas the Sierra Leonean conflict was international due to the involvement of ECOMOG and UNAMSIL troops.

The SCSL relied on the UN ad hoc tribunals' jurisprudence in ascertaining that the distinction between international and non-international armed conflict had been overcome regarding the war crimes entailed in the SCSL Statute, while conceding that the drafters of the SCSL Statute indeed had a non-international armed conflict in mind.¹⁹⁵ Moreover, it applied the ICTY's *Tadić* criteria with respect to the internationalisation of an internal conflict due to the 'overall control' over one of the belligerent parties by another state.¹⁹⁶ The SCSL eventually held that the conflict at hand was non-international, since the alleged influence of Charles Taylor's Liberia did not amount to overall control over the RUF, and that the involvement of UNAMSIL and ECOMOG troops could not be classified as armed violence between two states.¹⁹⁷

¹⁹⁴ SCSL (Trial Chamber I), judgment of 2 August 2007 para 696; SCSL (Trial Chamber II), judgment of 20 June 2007 para 258.

¹⁹⁵ SCSL (Appeals Chamber), decision of 25 May 2004 paras 19, 25.

¹⁹⁶ See SCSL (Trial Chamber II), judgment of 20 June 2007 para 251; ICTY (Appeals Chamber), decision of 2 October 1995 paras 131, 137. The SCSL thereby adopted the ICTY's position regarding the so-called 'Nicaragua-Tadić controversy', see Breitegger A (2010) 716-17 with further references.

¹⁹⁷ SCSL (Trial Chamber II), judgment of 20 June 2007 para 251; SCSL (Trial Chamber I), judgment of 25 February 2009 paras 973, 976. This finding was considered another significant contribution concerning the internationalisation of armed conflicts, see Breitegger A (2010) 716 for details.

4.4.1.4 Participation in a ‘joint criminal enterprise’

The SCSL also followed the ICTY and ICTR case law regarding the modes of liability and in particular applied the ‘joint criminal enterprise’ (JCE) doctrine.¹⁹⁸ This concept had been developed by the ICTY as a form of primary criminal liability and entails a ‘basic’ (JCE I), a ‘systemic’ (JCE II) and an ‘extended’ form (JCE III).¹⁹⁹ The mens rea requirements of the three forms differ, and especially those of JCE III are controversial.²⁰⁰ Moreover, the entire concept of JCE is unlikely to be applied by the ICC, which has stated on several occasions that the comprehensive provisions on individual criminal responsibility in the ICC Statute do not provide for the application of the JCE doctrine.²⁰¹ For these reasons, the future of this model of individual criminal responsibility is rather uncertain. Thus, it is doubtful whether its application by the SCSL constitutes a positive contribution, even though it reaffirmed the case law of the UN ad hoc tribunals.

Notably, however, several SCSL judges had reservations in particular with respect to the application of the JCE III variant.²⁰² Moreover, it must be borne in mind not only that the SCSL Statute follows the ICTY and ICTR Statutes regarding individual criminal responsibility, but also that it specifically provides that the court should be

¹⁹⁸ See, e.g., *Prosecutor v Brima, Kamara & Kanu*, SCSL (Appeals Chamber), judgment of 22 February 2008 para 72; SCSL (Trial Chamber II), judgment of 20 June 2007 para 61; SCSL (Trial Chamber I), judgment of 2 August 2007 para 206; SCSL (Trial Chamber I), judgment of 25 February 2009 para 251.

¹⁹⁹ For details, see ICTY (Appeals Chamber), judgment of 15 July 1999 paras 227-8.

²⁰⁰ See also below 43.

²⁰¹ See *Prosecutor v Katanga & Ngudjolo Chui*, ICC (Pre-Trial Chamber), decision of 30 September 2008 para 508; *Prosecutor v Lubanga*, ICC (Pre-Trial Chamber), decision of 29 January 2007 para 326.

²⁰² SCSL (Trial Chamber I), judgment of 2 August 2007, separate opinion Thompson; *Prosecutor v Sesay, Kallon & Gbao*, SCSL (Appeals Chamber), judgment of 26 October 2009 separate opinion Fisher para 18.

guided by pertinent ICTY and ICTR jurisprudence.²⁰³ Thus, the SCSL's application of the JCE doctrine is ultimately not surprising.²⁰⁴

4.4.1.5 Conclusions

The SCSL's contributions to the development of substantive international criminal law have been considerable. In particular, its decisions concerning the recruitment and use of child soldiers and attacks on peacekeeping missions have rightly been welcomed.²⁰⁵ Moreover, the reciprocal use of sources and decisions between the SCSL and the ICC regarding the interpretation of these crimes is noteworthy. Indeed, this shows the possibility of a positive relationship between hybrid courts and the ICC regarding the further development of international criminal law.

In other areas, the SCSL affirmed established case law of the UN ad hoc tribunals and thus did not cause a fragmentation of substantive international criminal law. While this arguably had a consolidating and thus strengthening effect as far as the internationalisation of an armed conflict is concerned, the same is not necessarily true regarding the application of the JCE doctrine. However, it is doubtful whether the SCSL could have been expected to depart from the relevant ICTY and ICTR case law in this regard.

4.4.2 Extraordinary Chambers in the Courts of Cambodia

However, the JCE doctrine was dealt with rather differently before the ECCC. While the SCSL, not unlike other hybrid courts,²⁰⁶ applied the JCE doctrine without much hesitation, the ECCC were the first criminal tribunal other than the ICTY and the

²⁰³ Arts 14, 20 SCSL Statute.

²⁰⁴ See also Schomburg W (2010) 24.

²⁰⁵ Breitegger A (2012) 725 ('groundbreaking'); Meisenberg S (2008) 143.

²⁰⁶ See also *Prosecutor v Perreira*, SPSC, judgment of 27 April 2005 para 206.

ICTR to engage in detailed deliberations on the genesis of this mode of liability, especially regarding JCE III.²⁰⁷

4.4.2.1 Participation in a ‘joint criminal enterprise’

According to the ad hoc tribunals’ jurisprudence concerning JCE III, a person may be criminally liable for acts committed by other members of a joint criminal enterprise that exceed the framework of the common plan, as long as such acts have been foreseeable.²⁰⁸ The application of JCE III by the ad hoc tribunals drew considerable criticism especially for two reasons in particular. First, its basis in customary international law was questioned.²⁰⁹ Secondly, it was stated that it violated the principle of individual guilt, since the perpetrator need not necessarily fulfil the mens rea of the crime in question.²¹⁰

Following an appeal to a decision by the ECCC’s Office of the Co-Investigating Judge in which all forms of JCE had been found to be applicable in principle, the ECCC’s Pre-Trial Chamber had to determine whether individual criminal liability as provided for by the JCE doctrine had existed in international law before 1974.²¹¹ In this regard it scrutinised, in particular, the derivation of JCE from customary

²⁰⁷ Berster LC ‘Entscheidungsanmerkung – ECCC (Pre-Trial Chamber), Beschl. v. 20.5.2010’ (2010) *Zeitschrift für Internationale Strafrechtsdogmatik* 538.

²⁰⁸ ICTY (Appeals Chamber), judgment of 15 July 1999 paras 204, 228.

²⁰⁹ See, e.g., Ambos K ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 *Journal of International Criminal Justice* 173; Bogdan A ‘Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia’ (2006) 6 *International Criminal Law Review* 109. – For the ICTY’s derivation of JCE from customary international law, see ICTY (Appeals Chamber), judgment of 15 July 1999 paras 194-219.

²¹⁰ See, e.g., Ambos K *Der Allgemeine Teil des Völkerstrafrechts* 2 ed (2004) 557; Olásolo H ‘Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeals Judgment’ (2007) 7 *International Criminal Law Review* 157-8. See also *Prosecutor v Martić*, ICTY (Appeals Chamber), judgment of 8 October 2008, separate opinion Schomburg para 7.

²¹¹ *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, ECCC (Pre-Trial Chamber), decision of 20 May 2010.

international law in the relevant ICTY jurisprudence.²¹² Remarkably, the ECCC's Pre-Trial Chamber found that JCE III did not have a sufficiently firm basis in customary international law at the relevant time.²¹³ While the ICTY had derived the JCE doctrine especially from several post-World War II decisions by national courts in Europe,²¹⁴ the ECCC found that no conviction in any of these cases was expressly or impliedly based on the JCE III elements.²¹⁵ The ECCC did not elaborate on the aforementioned criticism regarding an alleged violation of the principle of individual guilt in the context of JCE III. However, after discussing the relevant authorities,²¹⁶ it stated that the JCE I and JCE II variants had been firmly established under customary international law at the relevant time.²¹⁷ The ECCC's Trial Chamber subsequently concurred with these considerations.²¹⁸

4.4.2.2 Conclusions

While the ICC is highly unlikely to apply the JCE doctrine,²¹⁹ the ECCC's findings regarding JCE may influence how other international or internationalised courts deal with this mode of liability.²²⁰ Though not entirely in line with ICTY and ICTR case law, the ECCC's conclusions largely correspond to the arguably predominant scholarly opinion, as well as that of several judges of international and

²¹² ECCC (Pre-Trial Chamber), decision of 20 May 2010 paras 75-86.

²¹³ ECCC (Pre-Trial Chamber), decision of 20 May 2010 paras 77, 83.

²¹⁴ ICTY (Appeals Chamber), judgment of 15 July 1999 paras 194-219.

²¹⁵ ECCC (Pre-Trial Chamber), decision of 20 May 2010 paras 77, 83.

²¹⁶ ECCC (Pre-Trial Chamber), decision of 20 May 2010 paras 59-69.

²¹⁷ ECCC (Pre-Trial Chamber), decision of 20 May 2010 para 72.

²¹⁸ *Decision on the Applicability of Joint Criminal Enterprise*, ECCC (Trial Chamber), decision of 12 September 2011 paras 32-4. For the STL's deliberations on JCE and the ECCC's assessment thereof in this decision, see below 48-50.

²¹⁹ See above 41; ICC (Pre-Trial Chamber), decision of 30 September 2008 para 508; ICC (Pre-Trial Chamber), decision of 29 January 2007 para 326.

²²⁰ Berster LC (2010) 538.

internationalised courts.²²¹ Accordingly, the decision was in fact rightly welcomed and lauded especially for its thorough analysis of the relevant case law.²²² To the contrary, with regard to the other forms of JCE, it was even suggested that the ECCC missed a chance of terminological clarification by not adhering to the term ‘commission’ and abandoning the ‘joint criminal enterprise’ label altogether.²²³ Yet, the decision was praised for allowing for the necessary harmonisation of modes of liability in international criminal law, though a further approximation to the ICC Statute’s language in interpreting ‘joint commission’ was considered desirable.²²⁴ Ultimately, thus, despite its prima facie fragmenting effect due to the deviation from the settled case law of the ICTY and ICTR, the ECCC’s deliberations arguably had a positive effect on the development of international criminal law.

4.4.3 Special Tribunal for Lebanon

As previously mentioned, in principle, the STL will only apply domestic criminal law. However, its relevance for this study arises from the fact that the STL’s Appeals Chamber, in an interlocutory decision,²²⁵ took recourse to and discussed international criminal law.

4.4.3.1 Terrorism as a crime under international law

The STL was established primarily to prosecute the perpetrators of a terrorist act, namely the assassination of Rafiq Hariri. Since Article 2 of the STL Statutes provides for the application of domestic criminal law, the key provision before the STL in this

²²¹ See above 43 nn 207-8; ICTY (Appeals Chamber), judgment of 8 October 2008, separate opinion Schomburg; SCSL (Trial Chamber I), judgment of 2 August 2007, separate opinion Thompson; SCSL (Appeals Chamber), judgment of 26 October 2009, separate opinion Fisher.

²²² Karnavas MG ‘Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision Against the Application of JCE III and Two Divergent Commentaries on the Same’ (2010) 21 *Criminal Law Forum* 448; Schomburg W (2010) 28.

²²³ Schomburg W (2010) 27-8.

²²⁴ Schomburg W (2010) 28.

²²⁵ STL (Appeals Chamber), decision of 16 February 2011.

regard is Section 314 of the Lebanese Criminal Code, which criminalises terrorism. However, in answering several questions posed by the STL's pre-trial judge,²²⁶ the STL's Appeals Chamber addressed the question of whether international criminal law should be taken into account in interpreting the relevant provisions of the Lebanese Criminal Code, and how this would affect their interpretation.

The STL first noted that internationally established criminal tribunals could only apply domestic law that is not in conflict with international law.²²⁷ In this regard, international law may operate as a corrective to avoid 'unreasonable' or 'manifestly unjust' results.²²⁸ However, despite not finding the domestic provision to be unreasonable or unjust, the STL found that international law should be taken into account as an interpretative aid nonetheless.²²⁹ In the STL's view, this was justified because of the international dimension of the allegations falling under the STL's jurisdiction, which the UN Security Council classified as 'threats to international peace and security'.²³⁰

Subsequently, the STL undertook a comprehensive discussion of international treaties, national laws, decisions by national courts, and UN resolutions relating to terrorism and its status under customary international law. In particular, the STL came

²²⁶ The decision was issued pursuant to Rule 68(G) of the STL's Rules of Procedure and Evidence. The judge-made rule was introduced one week before the decision at hand and enabled the pre-trial judge to pose preliminary questions to the Appeals Chamber. It may have been created ultra vires given the functions of the Appeals Chamber set forth in Art 26(2) STL Statute and thus the separation of responsibility between the Trial Chamber and Appeals Chamber, see Gillett M & Schuster M 'Fast-track Justice, The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 *Journal of International Criminal Justice* 992-3.

²²⁷ STL (Appeals Chamber), decision of 16 February 2011 para 39. See also Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 *Leiden Journal of International Law* (hereafter 'Judicial Creativity at the Special Tribunal for Lebanon') 657 with further references.

²²⁸ Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 657.

²²⁹ STL (Appeals Chamber), decision of 16 February 2011 paras 81-2, 123-4.

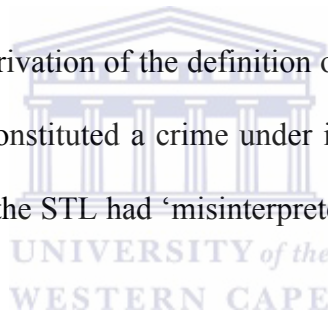
²³⁰ STL (Appeals Chamber), decision of 16 February 2011 para 124.

to the conclusion that there was a crime of transnational terrorism under customary international law, the elements of which it deduced from the analysed sources.²³¹

These findings were criticised with remarkable vehemence.²³² Apart from the dubious procedural circumstances surrounding the decision,²³³ commentators pointed out several methodological deficiencies. According to some authors, the STL failed to properly recognise and address the distinction between a proscription under international law on the one hand, and individual criminal responsibility under international law on the other.²³⁴ Moreover, the STL's very recourse to international law was questioned,²³⁵ given that the Lebanese terrorism provision as interpreted in the Lebanese courts was sufficiently clear and neither unreasonable nor unjust.²³⁶

In particular, however, the derivation of the definition of terrorism and the conclusion that transnational terrorism constituted a crime under international law was rejected.

In fact, it was suggested that the STL had 'misinterpreted, exaggerated or erroneously



²³¹ STL (Appeals Chamber), decision of 16 February 2011 paras 85-6, 88-100, 102. The STL finds the elements of the crime to be '(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element' (para 85). For a critical discussion of the derivation from customary international law see Saul B 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 681-99.

²³² See, e.g., Kirsch S & Oehmichen A 'Die Erfindung von "Terrorismus" als Völkerrechtsverbrechen durch den Sondergerichtshof für den Libanon' (2011) *Zeitschrift für Internationale Strafrechtsdogmatik* 805-7 ('scandalous', 'disastrous', '[must be] decidedly rejected'); Saul B (2011) 670 ('fatally incorrect'), 699 ('poor reasons and loose methodology', 'badly misjudged [the available sources]').

²³³ It was suggested that the rule was introduced with the single purpose to render the decision at hand and its findings on terrorism, see Kirsch S & Oehmichen A (2011) 803, 806.

²³⁴ Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 665; Kirsch S & Oehmichen A (2011) 805.

²³⁵ Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 656 ('essentially *obiter*'); Gillett M & Schuster M (2011) 1006; Kirsch S & Oehmichen A (2011) 802-3, 805.

²³⁶ Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 664; Gillett M & Schuster M (2011) 998-9, 1006; Kirsch S & Oehmichen A (2011) 805.

applied' every source it relied upon.²³⁷ Rather, the respective sources were at best considered efforts to reach an international consensus on the definition of terrorism, while precisely verifying that these had so far been fruitless.²³⁸ Moreover, the STL's definition was not considered a helpful contribution to this discourse either – at least as far as a definition of terrorism as a criminal offence was concerned – because its *actus reus* lacked precision.²³⁹ Furthermore, the STL was criticised for not showing proper judicial restraint, accused of exceeding the bounds of the judicial function and assuming a quasi-legislative role.²⁴⁰

4.4.3.2 Participation in a 'joint criminal enterprise'

Regarding the applicable modes of criminal liability, the pre-trial judge moreover asked the Appeals Chamber whether reference should be made to domestic law, international law, or both.²⁴¹ This question arose due to the aforementioned ambiguity caused by the inclusion of Article 3 of the STL Statute.²⁴² While the Appeals Chamber found that, in principle, the modes of liability under Lebanese criminal law should be applied,²⁴³ it embarked on an extensive discussion of international criminal law concerning individual criminal responsibility. In this context the STL reaffirmed the JCE doctrine, and especially defended its extended form (JCE III) and its basis in customary international law.²⁴⁴ The STL took notice of the previously discussed ECCC decision in which the foundation of JCE III in customary international law was

²³⁷ Saul B (2011) 679.

²³⁸ See Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 675; Kirsch S & Oehmichen A (2011) 803-5.

²³⁹ Ambos K 'Judicial Creativity at the Special Tribunal for Lebanon' (2011) 675; Kirsch S & Oehmichen A (2011) 805.

²⁴⁰ Gillett M & Schuster M (2011) 993, 999; Kirsch S & Oehmichen A (2011) 806; Saul B (2011) 678.

²⁴¹ STL (Appeals Chamber), decision of 16 February 2011 para 204.

²⁴² See above 30.

²⁴³ STL (Appeals Chamber), decision of 16 February 2011 para 211.

²⁴⁴ STL (Appeals Chamber), decision of 16 February 2011 para 239.

negated. However, in a footnote, it dismissed the ECCC decision by referring to the divergent scope of temporal jurisdiction of the two courts, stating that the STL had to consider jurisprudence from the 1990s, which was irrelevant to the ECCC with regard to its temporal jurisdiction.²⁴⁵

This line of argument was criticised due to the fact that the ICTY, in its *Tadić* decision, had relied on post-World War II jurisprudence as the alleged foundation of JCE in customary international law.²⁴⁶ Moreover, notwithstanding the relevant ICTY and ICTR case law, the same is true with regard to additional authorities the STL cited in the decision at hand.²⁴⁷ Since the alleged basis of JCE in customary international law was thus equally relevant to the ECCC's temporal jurisdiction, the STL's reasoning was considered to be rather specious.²⁴⁸

Notably, in a subsequent decision, the ECCC's Trial Chamber upheld the assessment of the Pre-Trial Chamber that JCE III was not part of customary international law at the relevant time, and found that the additional authorities relied upon by the STL did not support a different conclusion.²⁴⁹

4.4.3.3 Conclusions

The STL's decision is problematic especially regarding its conclusion that transnational terrorism is a crime under customary international law. In particular, it is unfortunate as it is likely to be cited as authority for the proposition that such a crime exists.²⁵⁰ Given that the predominant opinion hitherto denied that terrorism was a

²⁴⁵ STL (Appeals Chamber), decision of 16 February 2011 para 239 n 360.

²⁴⁶ See above 44 n 212.

²⁴⁷ STL (Appeals Chamber), decision of 16 February 2011 para 237 n 355.

²⁴⁸ Gillett M & Schuster M (2011) 1016.

²⁴⁹ ECCC (Trial Chamber), decision of 12 September 2011 paras 32-4.

²⁵⁰ Saul B (2011) 699.

crime under international law,²⁵¹ this finding can be considered an instance of a considerable deviation from the previous state of international criminal law. As opposed to an incremental and cautious further development of international criminal law (such as the SCSL jurisprudence regarding the interpretation of previously existing war crimes), it formulates an entirely new crime in a methodologically highly questionable way.²⁵² Accordingly, the impact of this decision is rather more adverse than a mere deviation from the settled case law of international criminal courts. Moreover, apart from substantive legal issues, the STL's findings may have negative effects on public confidence in international criminal justice institutions and the professionalism of their judges.²⁵³

The affirmation of the JCE doctrine, on the other hand, confirmed the settled case law of the ICTY and the ICTR. However, as already discussed regarding the relevant SCSL and ECCC jurisprudence,²⁵⁴ it is doubtful whether the affirmation of the JCE doctrine has had a positive impact on international criminal law. Yet, the STL's decision is noteworthy in this regard considering its relation to the ECCC decisions on JCE III. While the STL dismissed the ECCC's Pre-Trial Chamber decision, the ECCC's Trial Chamber subsequently upheld the proposition that JCE III was not part of customary international law in 1974.²⁵⁵ Irrespective of whether it is more desirable to confirm or renounce the JCE doctrine and especially JCE III, the interplay of these decisions is certainly an example of a fragmentation of substantive international criminal law caused by hybrid courts.

²⁵¹ See, e.g., Saul B (2011) 678. However, it was considered that terrorist acts could amount to crimes against humanity or war crimes, see Werle G (2009) para 85 with further references.

²⁵² Gillett M & Schuster M (2011) 993, 999; Kirsch S & Oehmichen A (2011) 806; Saul B (2011) 678.

²⁵³ Kirsch S & Oehmichen A (2011) 806-7; Saul B (2011) 699.

²⁵⁴ See above 41-5.

²⁵⁵ ECCC (Trial Chamber), decision of 12 September 2011 paras 32-4.

CHAPTER 5: CONCLUDING REMARKS

It has been shown in the beginning that hybrid courts offer numerous advantages over purely international or purely national criminal courts. This is especially true regarding their impact on a transitional society coming to terms with large-scale atrocities committed in its past. While international tribunals run the risk of being perceived as interference from outside, the national justice system might lack the independence and impartiality to adequately carry out prosecutions. However, the combination of international and national elements may promote the perception of criminal trials as being legitimate and impartial. Moreover, while national involvement is essential to a perception of ownership and local capacity building, the domestic criminal justice system of a post-conflict state is often unprepared to carry out prosecutions without international help. For these reasons, the establishment of hybrid courts is a viable option for a transitional state to prosecute perpetrators of serious crimes. It has moreover been discussed that neither the deficiencies of former hybrid courts nor the creation of the ICC necessarily render the establishment of future hybrid courts undesirable or obsolete. It is thus to be expected that more hybrid courts will be established in the future. Moreover, considering their position within the international legal system, hybrid courts could play a significant role as regards the development of international criminal law in the near future.

Whether the proliferation of hybrid courts is a positive or a negative development depends to a considerable extent on whether they have a strengthening or weakening impact on substantive international criminal law. Regarding this question, the study had contradictory findings.

The legal bases of hybrid courts ultimately cannot be said to cause an adverse diversification of international criminal law, despite many of them exhibiting a certain

degree of eclecticism when it comes to the inclusion of international criminal law. Deviations from established international criminal law have been shown to be relatively slight and restrictive. Thus, they rather illustrate the flexibility of hybrid courts in adapting to the particularities of a given conflict.

However, the jurisprudence discussed in this study arguably had both positive and negative effects on the development of substantive international criminal law. In particular, the STL's heavily criticised terrorism decision can be considered exemplary of the potential negative impact of hybrid courts on international criminal law. On the other hand, the interpretation of certain war crimes by the SCSL is certainly a positive contribution, which has influenced the case law of the ICC and has been well received by commentators. The same can be said of its affirmation of ICTY and ICTR case law relating to the law of armed conflict. However, the effect of the application of the 'joint criminal enterprise' doctrine, despite its prima facie consolidating effect, is debatable. Indeed, it is rather the – diversifying – ECCC jurisprudence that should be welcomed in this respect. This moreover shows that deviation from previous international case law by hybrid courts cannot per se be equated to a negative impact on international criminal law.

In the context of the scope of this study, it is furthermore indicated to consider two further questions relating to the future use of hybrid courts.

The first is whether these findings allow for any conclusions regarding the preferability of certain hybrid court models over others. As previously mentioned,²⁵⁶ certain tendencies regarding the structural features of hybrid courts are observable. These include their establishment by a state in co-operation with an international

²⁵⁶ See above 11-12.

organisation, their centralised integration into the domestic court system, location in the commission state, and mixed composition. However, with regard to the future use of hybrid courts, the question arises whether these characteristics relate in any way to the possible consolidating or diversifying effects of a given hybrid court's jurisprudence. A particularly interesting issue in this regard is the possible coherence between, on the one hand, the legal position taken within a hybrid court's jurisprudence in relation to the previous state of international criminal law, and, on the other hand, the degree of its internationalisation.

The findings of this study do not entail a clear answer to this question. The SCSL, whose case law has largely had a positive effect on international criminal law, does feature numerous international and only few national elements. However, this coherence does not pertain with regard to the STL and the ECCC. The STL has numerous elements that make it akin to a purely international court: It was created by the UN Security Council, features renowned international judges,²⁵⁷ and is geographically removed from the state in which the crimes have been committed. However, its decision on the crime of terrorism has been widely rejected and has arguably had a negative impact on international criminal law. The ECCC, on the other hand, are entirely integrated into the domestic court system, have initially been created domestically and feature a majority of national judges. Yet their deliberations on JCE have widely been lauded and should be considered a positive contribution to the development of substantive international criminal law. Remarkably, thus, it must be concluded – within the scope of this study – that a higher degree of internationalisation does not necessarily entail positive implications of the jurisprudence of a given hybrid court. Rather, the positive or negative effects seem to

²⁵⁷ The first president of the STL was Antonio Cassese, a former judge of the ICTY.

depend on the extent to which the legal basis of a hybrid court adequately reflects existing international criminal law, as well as on methodological accuracy and proper consciousness of the judicial function on the part of its judges.

The second issue regarding the future use of hybrid courts is how to counteract the diversification of international criminal law by hybrid courts. The different approaches to the 'joint criminal enterprise' doctrine in the jurisprudence discussed in this paper show that hybrid courts can indeed have a fragmenting effect on international criminal law. Irrespective of whether this should be welcomed or rejected regarding the specific legal issue at hand, one cannot deny that a uniform application of substantive international criminal law is desirable with regard to the future. One possibility to achieve such uniformity across international courts and a plurality of hybrid courts is to provide for a common appellate body. An option could be the cooperation of future hybrid courts with the ICC in this regard.²⁵⁸ However, this could in turn be problematic, as hybrid courts may be established precisely in order to avoid the involvement of a purely international court.

A preferable step could be the development of a model statute for internationalised courts.²⁵⁹ Certainly, this should not curtail the flexibility offered by the numerous models of hybrid courts regarding their composition, the degree of their integration into the domestic system, and the applicable law. However, concerning the inclusion of substantive international criminal law, it seems sensible to provide for a standardised codification of general principles and crimes under international law.

²⁵⁸ See Meisenberg S *Rezension: Philipp Ambach: Eine Rahmenkonvention für die Errichtung hybrider internationaler Strafgerichte als Mittel zur Garantie moderner Völkerrechtsstandards im Rahmen zukünftiger Ad-hoc-Strafgerichtsbarkeit für Völkerrechtsverbrechen* (22 September 2011) available at <http://www.friedenswarte.de/de/rezensionen/168-rezmeisenberg20110922.html> (accessed 25 October 2013).

²⁵⁹ For the proposal of such a framework, see Ambach P (2011).

This should moreover be based on the ICC Statute,²⁶⁰ as this would allow for further harmonisation and reciprocal utility of hybrid court and ICC jurisprudence. In this way, the existence of a model statute could significantly counteract the diversification of international criminal law by hybrid courts and promote their positive effects on its further development.



²⁶⁰ See also, e.g., Njikam O, Pirmurat S & Stegmiller I (2008) 432.

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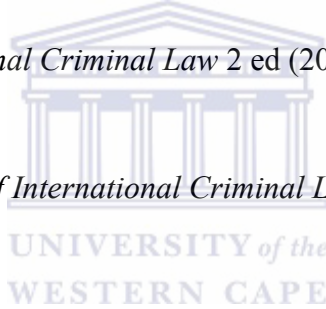
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