

RESEARCH PAPER

'Hybrid courts'

The hybrid category of a new type of international crimes courts

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1. Introduction: 'hybrid courts' welcomed as a new type of courts holding great promise

The latest type of international crimes courts, *inter alia* dubbed 'hybrid courts', has been welcomed with great expectations. The hybrid model that is characterized by a mix of national and international components is said to 'hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other.'¹ The hybrid courts are thought to avoid the drawbacks of purely domestic trials and proceedings by purely international courts, such as the International Criminal Tribunals for the former Yugoslavia (ICTY), Rwanda (ICTR) and the International Criminal Court (ICC). The model of hybrid courts 'endeavors to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions.'²

Hybrid courts are thus assumed to combine the best of two worlds, the purely domestic and the purely international prosecution of international crimes, and to transcend the shortcomings of

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1 L. Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo', 2003 *New England Law Review*, pp. 1059-1072, p. 1060.

2 S. Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', 2003 *Harvard Human Rights Journal*, pp. 245-278, p.245. See for authors advocating the promise of hybrid courts L. Dickinson, 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals', 2002 *Denver Journal of International Law and Policy*, pp. 23-42, 'The Promise of Hybrid Courts', 2003 *American Journal of International Law*, pp. 295-310, 'The Relationship between Hybrid Courts and International Courts: the Case of Kosovo', *supra* note 1, 'Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?', 2004 *American Society of International Law Proceedings*, pp.181-182, E. Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform', 2005 *Yale Law School Student Scholarship Series*, Paper 6, <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1005&context=yale/student> (last accessed 10 February 2006) and R. Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan', 2006 *Columbia Law Review*, pp. 182-212. On different grounds hybrid courts are welcomed by F. Mégret, 'Symposium: Milosevic & Hussein on Trial: Panel 1: Global or Local Justice: Who Should Try or Ousted Leaders?: In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', 2005 *Cornell International Law Journal*, pp. 725-751. Authors with substantial field experience are less certain about the promise of hybrid courts. See, *inter alia*, S. de Bertodano, 'Current Developments in Internationalized Courts', 2003 *Journal of International Criminal Justice*, pp. 226-244 and S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', 2001 *Criminal Law Forum*, pp.185-246, 'Prosecuting Atrocities at the District Court of Dili', 2001 *Melbourne Journal of International Law*, pp. 414-458, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor', 2001 *Melbourne University Law Review*, pp. 122-180 and 'New Approaches to International Justice in Cambodia and East Timor', 2002 *International Review of the Red Cross*, March, pp. 93-119.

each world taken separately. According to Dickinson, one of the most fervent proponents of this model, hybrid courts do this in the areas of legitimacy, capacity and norm penetration.³

In a post-conflict situation domestic trials often lack legitimacy because the judicial institutions are not impartial and independent or are not perceived as such. Trials by purely international courts such as the ICTY, ICTR and ICC however are also considered to lack legitimacy because those who have been most directly affected by the crimes lack 'ownership' of the trials. The prosecution takes place in far away court rooms, in which the key actors are lawyers not familiar with the conflict and culture in which the crimes have been committed. Consequently, many of the potentially positive effects that trials can have on the society concerned do not reach the affected society.

As regards capacity, post-conflict societies frequently face ravaged legal landscapes. Both the physical infrastructure and human resources have been severely damaged by the conflict, or have always been weak to begin with. International courts, quite conversely, have been strongholds of capacity. With highly experienced international judges and a budget of over \$100,000,000 a year each,⁴ the ICTY and ICTR have more wherewithal than most states' entire justice systems. However, the balance between the expenses, which at one point amounted to 15% of the UN budget, and the few dozens of judgments that have been passed so far, have also tempered the international community's enthusiasm for such courts. This is expounded by the fact that the trials have hardly addressed one of the underlying causes of the threat to peace and security that spurred the courts' establishment in the first place, namely lawlessness flowing from weak domestic justice systems. The international courts are criticized for only building international case-law, not vital domestic capacity. Today, however, the UN's '(...) main role is not to build international substitutes for national structures, but to help domestic justice capacities.'⁵ This capacity-building rationale is said to be a driving force behind the development of hybrid courts.⁶ Finally, regarding the penetration of international norms in domestic societies, international courts are the Maecenas of international law. They have elucidated, developed and enforced it, but they face the difficulty of not being tailored to domestic circumstances. Consequently, a problem of tailoring arises if the justice done at the international level is not perceived as justice according to local standards. However, although domestic courts usually fit in better with the domestic culture, according to some, 'in cases of international crimes, national courts are not the appropriate fora to judge the perpetrators.'⁷ In their view domestic trials are commonly unable to investigate and prosecute complex international crimes and, as a consequence of the emphasis on ordinary rather than international crimes, do not serve international justice. Besides, domestic courts often face difficulties in meeting the international human rights standards of fair trial. Hybrid courts, when presented as the best of two worlds, are thus expected to offer legitimacy by providing ownership without affecting independence and impartiality; to prosecute more perpetrators in less time and at lower costs while also building domestic capacity; to do domestic justice while upholding international law and complying with international fair trial standards, and thus also doing international justice.

3 Dickinson, 'The Promise of Hybrid Courts', *supra* note 2, p. 296.

4 <http://www.un.org/icty/glance/> and <http://www.icttr.org> (last accessed 10 February 2006).

5 UN Doc. S/2004/616, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', p. 1.

6 See e.g. J. Kleffner *et al.*, 'The Relationship between Internationalized Courts and National Courts', in: C. Romano *et al.* (eds.), *Internationalized Criminal Courts and Tribunals*, 2004, pp. 359-378, p. 378.

7 A. Pellet, 'Internationalized Courts: Better than Nothing ...', in: Romano *et al.* (eds.), *supra* note 6, pp. 437-444, p. 439.

These great expectations raise the question what courts are these miracle courts and, particularly, what defines them.

As regards the first question, consensus roughly appears to exist, despite the terminological warfare concerning what to call the new species. Regardless of whether they call them ‘hybrid (criminal) courts⁸/tribunals’,⁹ ‘mixed courts¹⁰/tribunals’,¹¹ ‘internationalized (criminal) courts¹²/tribunals’,¹³ ‘mixed domestic-international tribunals’,¹⁴ ‘hybrid domestic-international courts’,¹⁵ ‘semi-internationalized criminal courts¹⁶/tribunals’,¹⁷ ‘internationalized domestic courts¹⁸/internationalized domestic tribunals’¹⁹ or ‘mixed international/national institutions’,²⁰ most authors on the subject²¹ mention as examples of this new species the Serious Crimes Panels in the District Court of Dili in East Timor,²² the Regulation 64 Panels in the courts of Kosovo,²³ the Special Court for Sierra Leone²⁴ and the Extraordinary Chambers in the courts of Cambodia.²⁵ Some also refer to the War Crimes Chamber in the Court of Bosnia and Herzegovina.²⁶ These are the courts that are discussed in this article. The Iraqi Special Tribunal²⁷ and the Ethiopian Special Prosecutor’s Office,²⁸ which some also hesitantly group under the heading of ‘hybrid courts’, are only analyzed in this article in the sections that substantiate their exclusion from the category of hybrid courts.

The second question, as to what defines this new species of courts, has so far received hardly any attention.²⁹ The characteristics of the species of hybrid courts are generally deduced from the elements which the current hybrid courts have in common. However, upon closer examination

8 Dickinson, *supra* note 2, Pellet, *supra* note 7, Higonnet, *supra* note 2 and D. Orentlicher, ‘The Future of Universal Jurisdiction in the New Architecture of Transitional Justice’, in: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes*, 2003, pp. 214-239, using the term as an overarching name for more specific different types of hybrid courts.

9 UN Doc. S/2004/616, *supra* note 5, Dickinson, *supra* note 1, C. Romano *et al.*, ‘Tribunaux Pénaux Internationalisés: Etat des Lieux d’une Justice Hybride’, 2003 *Revue Générale de Droit International Public*, pp. 109-124 and Mégret, *supra* note 2.

10 A. Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight against International Criminality’, in: Romano *et al.* (eds.), *supra* note 6, pp. 3-13 and Orentlicher, *supra* note 8.

11 C. Sriram, ‘Globalising Justice: From Universal Jurisdiction to Mixed Tribunals’, 2004 *Netherlands Quarterly of Human Rights*, pp. 7-32, UN Doc. S/2004/616, *supra* note 5 and Pellet, *supra* note 7.

12 Romano *et al.* (eds.), *supra* note 6, title, Cassese, *supra* note 10, Kleffner *et al.*, *supra* note 6 and Pellet, *supra* note 7.

13 L. Condorelli *et al.*, ‘Internationalized Criminal Courts and Tribunals: Are They Necessary?’, in: Romano *et al.* (eds.), *supra* note 6, pp. 427-436.

14 Dickinson, ‘Transitional Justice in Afghanistan: The Promise of Mixed Tribunals’, *supra* note 2.

15 Dickinson, ‘The Promise of Hybrid Courts’, *supra* note 2.

16 W. Burke-White, ‘Regionalization of International Criminal Law Enforcement: A Preliminary Exploration’, 2003 *Texas International Law Journal*, pp. 729-761, p. 730.

17 W. Burke-White, ‘A Community of Courts: Towards a System of International Criminal Law Enforcement’, 2002 *Michigan Journal of International Law*, pp. 1-101, p. 3.

18 *Ibid.*, p. 23.

19 Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, p. 231.

20 C. Stahn, ‘Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor’, 2001 *American Journal of International Law*, pp. 952-966, p. 960.

21 The various contributions in Romano *et al.* (eds.), *supra* note 6, discuss these four courts and so do Dickinson, ‘The Promise of Hybrid Courts’, *supra* note 2, Romano *et al.*, *supra* note 9 and Burke-White, *supra* notes 16 and 17. Sriram, *supra* note 11, Stahn, *supra* note 20 and Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, also mention these same courts with the exception of Kosovo (Linton does mention Kosovo, but not explicitly as part of the category of hybrid courts). Mégret, *supra* note 2, only mentions the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers.

22 Although since its independence as from 19 May 2002 the official name is Timor Leste, this article continues to use the name East Timor, as this was what the territory was called when the panels were established.

23 Most (Romano *et al.*, *supra* note 9 are an exception) do not acknowledge that UNMIK Regulation 6/2000 as amended by Regulation 34/2000 also provides for a form of hybrid courts that have only been supplemented by the Regulation 64 panels, not replaced by them. See *infra* section 2.1.

24 Hereinafter ‘Special Court’.

25 Hereinafter ‘Extraordinary Chambers’.

26 Burke-White, ‘Regionalization’, *supra* note 16, p. 757, D. Schraga, ‘The Second Generation UN-based Tribunals: A Diversity of Mixed Jurisdictions’, in: Romano *et al.* (eds.), *supra* note 6, pp. 15-38, p. 16. Hereinafter ‘War Crimes Chamber’.

27 Higonnet, *supra* note 2, p. 5. Later renamed ‘Iraqi High Court’ or ‘Supreme Iraqi Criminal Tribunal’.

28 Orentlicher, *supra* note 8, pp. 223-224.

29 Exceptions are Condorelli *et al.*, *supra* note 13 and Romano *et al.*, *supra* note 9, p. 111.

many of the common elements, such as the mixture of domestic and international staff and laws, are not as common as they appear. Moreover, as a result of the fact that these elements are deduced from the current examples of hybrid courts, two fundamental issues remain unaddressed.³⁰ First, are the common elements so important that they override the huge differences between these courts and do they justify the categorization of courts as one internally heterogeneous genus³¹ where these courts in various ways are all 'sui generis'?³² Second, which of these common characteristics of the current hybrid courts are defining elements of hybrid courts and which characteristics are just shared, but not necessarily defining? The search for defining elements becomes all the more pertinent with new courts emerging that partly share characteristics but are themselves again slightly different. It is likely that more types of hybrid courts will emerge, in other words: '[t]he structure of the handful of existing hybrid tribunals does not by any means set in stone the limits for all conceivable forms of hybrids.'³³

Defining hybrid courts is not an aim in itself. Indeed, hybrid courts' 'precise definition is still evolving' and 'it remains to be seen if the term "hybrid" will become a catch-all for any institution between an international tribunal and national court, or if it will crystallize at a point along that spectrum.'³⁴ However, with such an enormous range of different courts falling into that category, it is highly questionable whether it is valid to conclude that 'it is the *model* of hybrid tribunals which is presented as a promising model.'³⁵ Can a promise be ascribed to a category that has only very marginal common defining characteristics, whereas the promise may also depend on coincidentally common characteristics or on features that only some of the courts belonging to this species have?

Therefore, rather than assessing the purported promise of 'hybrid courts',³⁶ the aim of this article is to explore an essential preliminary issue, which is often neglected in the literature advocating 'the promise of hybrid courts'.³⁷ This study analyzes to what extent the courts that are currently referred to as hybrid courts actually form one category, which features they have in common and in which respects they are fundamentally different. This groundwork is indispensable, as only after itemizing the features it becomes possible to construct a court that indeed combines the best features of both domestic and international trials. Omitting this initial step leads to expectations that are doomed to result in disappointment since qualities are ascribed to a category of which the only common defining feature standing alone is unlikely to fulfil all the promises asserted. In the following, first the aspects in which the current examples of hybrid courts differ fundamentally are presented (2). These are their historic backgrounds (2.1); the manner of their establishment (2.2); and the legal orders to which they belong and their legal personalities (2.3). Then the elements that most authors consider defining of hybrid courts are discussed: hybridity, meaning a mixture of national and international elements (3), more specifically hybrid staff (3.1) and hybrid applicable law (3.2). Subsequently, various elements will be addressed that some consider characteristic, but which cannot be deemed defining of the category of 'hybrid courts' (4). The

30 The deductive definition is illustrated by language such as 'dans tous les cas' (Romano *et al.*, *supra* note 9) 'in all four cases' (Kleffner *et al.*, *supra* note 6) 'in all cases' (Higonnet, *supra* note 2).

31 See, for those acknowledging the heterogeneity of hybrid courts: Romano *et al.*, *supra* note 9, Condorelli *et al.*, *supra* note 13, Pellet, *supra* note 7, Orentlicher, *supra* note 8, Schraga, *supra* note 26 and UN Doc. S/2004/616, *supra* note 5.

32 See, with respect to the Special Court, UN Doc. S/2000/915, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 9.

33 Higonnet, *supra* note 2, p. 4.

34 *Ibid.*, p. 6.

35 *Ibid.*, p. 3, emphasis added.

36 See for this subsequent study, S. Nouwen, 'Addressing National and International Concerns through Transitional Justice: The "Hybrid" Promise of "Hybrid Courts"', Centre of International Studies Cambridge MPhil International Relations thesis, 2005 and A. Nollkaemper and S. Nouwen, 'Gemengde Tribunaalen en Hooggespannen Verwachtingen', 2006 *Justitiële Verkenningen*, no. 4, pp. 37-55.

37 Dickinson, 'The Promise of Hybrid Courts', *supra* note 2.

analysis of these differences and defining and non-defining features leads to the conclusion that it is hard to ascribe promise to hybrid courts in general and that they can only be assessed fairly if specific attention is given to their diverging characteristics (5).

2. Fundamental differences among hybrid courts

2.1. Different historical backgrounds

Although the Extraordinary Chambers still have to try the first accused, the idea of a court with national and international elements was first considered for Cambodia.³⁸ In 1999 a Group of Experts, established by the UN Secretary-General on the request of the General Assembly,³⁹ came up with ideas for a UN-established tribunal with Cambodian jurists serving as judges or a Cambodian tribunal under UN administration. However, the Group itself advised against these options.⁴⁰ It doubted whether it was possible to find qualified and (evidently) independent Cambodian staff. The key concern about a Cambodian court was that ‘the negotiation of an agreement and the preparation of legislation for and its adoption by the Cambodian National Assembly could drag on. (...) The Cambodian government might insist on provisions that might undermine the independence of the court.’⁴¹ The Experts proved to be talented soothsayers. In June 1997 the then Cambodian Co-Prime Ministers requested ‘the assistance of the United Nations and the international community in bringing to justice those responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979’ since ‘Cambodia does not have the resources or expertise to conduct this very important procedure’.⁴² Only eight years later, in 2005, the hybrid court became operational. Whereas the requesting letter had hinted at an international tribunal like the ICTY and the ICTR and the report of the Group of Experts had also recommended an international tribunal, the subsequent years of acrimonious negotiations between the – changed – Cambodian government and the UN were characterized by the Cambodian government insisting on a strong Cambodian hallmark on the court and the UN trying to guarantee international standards by demanding more international influence. Fearing that zealous prosecutions might jeopardize the embryonic peace and reconciliation, Cambodia demanded sufficient control over the process. The UN however doubted the Cambodian judiciary’s independence and was concerned about amnesties passed and violations of the rights of the accused. Without an agreement with the UN having been signed, the Cambodian law on the Extraordinary Chambers in the Courts of Cambodia⁴³ was promulgated in August

38 See for the process in Cambodia, *inter alia*, C. Etcheson, ‘The Politics of Genocide Justice in Cambodia’, in: Romano *et al.* (eds.), *supra* note 6, pp. 181-205, S. Heder *et al.*, ‘Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge’, War Crimes Office of the Washington College of Law, American University and the Coalition for International Justice, June 2001, <http://www.wcl.american.edu/warcrimes/khmerrouge.pdf> (last accessed 10 February 2006), H. Jarvis, ‘Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide’, 2002 *Critical Asian Studies*, pp. 607-610, B. Kiernan, ‘Cambodia and the United Nations – Legal Documents’, 2002 *Critical Asian Studies*, pp. 611-621, Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, S. Meisenberg, ‘The Cambodian Extraordinary Chambers’, 2004 *BOFAXE*, No. 287E, <http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x287E.pdf> (last accessed 10 February 2006), B. Tittmore, ‘Securing Accountability for Gross Violations of Human Rights and the Implications of Non-Intervention: The Lessons of Cambodia’, 2001 *ILSA Journal of International & Comparative Law*, p. 447, S. Williams, ‘The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?’, 2004 *International & Comparative Law Quarterly*, pp. 227-245.

39 UN Doc. GA/RES/52/135 (1997).

40 See UN Docs. A/53/850 and S/1999/231, ‘Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135 Annexed to Identical Letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council’.

41 *Ibid.*, para. 190.

42 Letter of 21 June 1997 as partly reproduced in *ibid.*, para. 5.

43 Cambodian law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, available at <http://www.cambodia.gov.kh/krt/english/index.htm> (last accessed 10 February 2006), hereinafter ‘Extraordinary Chambers Law’.

2001. It founded mixed panels and jurisdiction over both national and international crimes committed by 'senior leaders of Democratic Kampuchea' and 'those most responsible for the crimes' between 17 April 1975 and 6 January 1979.⁴⁴ However, both the panels and the procedural law would be predominantly Cambodian. In February 2002 the UN withdrew from the negotiations because 'as currently envisaged, the Cambodian court would not guarantee independence, impartiality and objectivity, which is required by the United Nations for it to cooperate with such a court.'⁴⁵ Nevertheless, pushed by the General Assembly,⁴⁶ negotiations were resumed and an Agreement, providing for more international guarantees, was signed in June 2003.⁴⁷ The law ratifying the agreement and the law amending the Extraordinary Chambers Law in accordance with the Agreement were passed in October 2004.⁴⁸ Late 2005 staff was appointed,⁴⁹ but funding was still problematic as the Cambodian government went back on its commitment to pay its share.⁵⁰ In July 2006 the first judges were appointed, but the first trials are not expected before 2007.⁵¹

Sierra Leone also requested the United Nations to assist in prosecuting those responsible for the atrocities that had taken place during its decade-long war.⁵² However, in comparison with the Cambodian Extraordinary Chambers, this agreement was reached relatively quickly. The Sierra Leonean request came while the situation in Sierra Leone was still a Security Council agenda item, the peace agreement was fresh and fragile, and the UN was heavily involved, *inter alia*, with troops on the ground. Two months after the request the Security Council adopted a resolution. 'Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region', the Council, without invoking Chapter VII of the UN Charter, requested the Secretary-General 'to negotiate an agreement with the Government of Sierra Leone to create an independent special court.'⁵³ The resolution contained detailed recommendations for the features of such a 'special court'. The subsequent deliberations were primarily between the Council and the Secretary-General. The Secretary-General expressed his strong preference for

44 *Ibid.*, Art. 1.

45 S. Mydans, 'U.N. Ends Cambodia Talks on Trials for Khmer Rouge', *New York Times*, 9 February 2002, p. 4.

46 UN Doc. GA/RES/57/228 (2002).

47 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, available at <http://www.cambodia.gov.kh/krt/english/index.htm> (last accessed 10 February 2006).

48 Law on the Ratification of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea and Law on Amendments to the Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 5 October 2004, available at <http://www.cambodia.gov.kh/krt/english/index.htm> (last accessed 10 February 2006).

49 'UN Moves Ahead With Cambodian Trials Court for Khmer Rouge Leaders', UN News Service, New York, 23 November 2005, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=16664&Cr=cambodia&Cr1=&Kw1=UN&Kw2=Cambodia&Kw3=Khmer> (last accessed 10 February 2006).

50 Y. Chang, 'Lack of Funds Must Not Block Path of Justice', *The Bangkok Post*, 16 December 2005.

51 E. Madra, 'U.N., Cambodia Look to Khmer Rouge Trial in 2007', *The Boston Globe*, 9 February 2006, http://www.boston.com/news/world/asia/articles/2006/02/09/un_cambodia_look_to_khmer_rouge_trial_in_2007 (last accessed 10 February 2006).

52 See UN Doc. S/2000/786, annex, 'Letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General'.

53 UN Doc. S/RES/1315 (2000). See for the Special Court, *inter alia*, S. Beresford *et al.*, 'The Special Court for Sierra Leone: An Initial Comment', 2001 *Leiden Journal of International Law*, pp. 635-651, J. Cerone 'The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice', 2002 *ILSA Journal of International and Comparative Law*, p. 379, R. Cryer, 'A "Special Court" for Sierra Leone?', 2001 *International and Comparative Law Quarterly*, pp. 435-446, N. Fritz, *et al.*, 'Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone', 2001 *Fordham International Law Journal*, pp. 391-430, Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *supra* note 2, C. Schocken, 'The Special Court for Sierra Leone: Overview and Recommendations', 2002 *Berkeley Journal of International Law*, pp. 436-461, M. Sieff, 'Prosecuting War Crimes in Sierra Leone. War criminals: Watch Out', *The World Today*, pp. 18-20, February 2001, A. Tejan-Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives', 2001 *African Human Rights Law Journal*, pp. 107-126, N. Udombana, 'Globalization of Justice and the Special Court for Sierra Leone's War Crimes', 2003 *Emory International Law Review*, pp. 55-132, J. Webster, 'Sierra Leone - Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security', 2001 *Indiana International and Comparative Law Review*, pp. 731-777.

assessed contributions; the Council insisted on voluntary contributions.⁵⁴ The Secretary-General preferred a personal jurisdiction over ‘persons most responsible’; the Council insisted on limiting the prosecutions to those bearing ‘the greatest responsibility.’⁵⁵ The Council got its way, but the compromise was that the Agreement would not be signed until sufficient funds had been secured,⁵⁶ which was not until January 2002. Sierra Leone ratified the Agreement in March that year⁵⁷ and since then 13 persons have been indicted, 10 of which are in custody of the court, with former Liberian President Charles Taylor as the most famous among them. The trials in the RUF, AFRC and CDF cases are at an advanced stage.⁵⁸

In East Timor and Kosovo the UN was even more heavily involved. With no functioning state authority in Kosovo after Serbia had withdrawn following NATO’s intervention in March 1999, the Security Council, acting under Chapter VII, authorized the Secretary-General to establish⁵⁹ an interim administration for Kosovo (UNMIK). Likewise, it established a transitional administration for East Timor after Indonesia’s withdrawal after the violence following the consultation on East Timor’s future status in August 1999 (UNTAET).⁶⁰ The Special Representative of the Secretary-General was responsible for the entire governance of the territory until East Timor became independent and in the case of Kosovo, until its status had been settled. Whereas in Cambodia and Sierra Leone the UN had been requested to assist in the prosecution of international crimes specifically, in East Timor and Kosovo the UN administration was responsible for *all* aspects of governance, including the administration of justice. Faced with a legal vacuum, the Special Representatives adopted regulations to administer the territories, including on the applicable law and the organization of courts and prosecution systems.⁶¹

54 See UN Doc. S/2000/915, *supra* note 32, paras. 68-71, UN Doc. S/2000/1234, ‘Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General’, UN Doc. S/2001/40, ‘Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council’, UN Doc. S/2001/95, ‘Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General.’

55 *Ibid.* letters and report, para. 29.

56 UN Doc. S/2001/40, *supra* note 54.

57 Special Court Agreement, 2002, (Ratification) Act, 2002, available at <http://www.sc-sl.org/Documents/SCSL-ratificationamendmentact.pdf> (last visited 10 February 2006).

58 The indictments against Foday Sankoh and Sam Bockarie were withdrawn on 8 December 2003 due to the deaths of the two accused. The whereabouts of the third initially indicted but not imprisoned person, Johnny Paul Koroma, are unknown. See <http://www.sc-sl.org> (last accessed 14 September 2006).

59 UN Doc. S/RES/1244 (1999), para. 10.

60 UN Doc. S/RES/1272 (1999), para. 1.

61 The Kosovo Court system is based partly on UNMIK/REG/1999/24, which incorporated the Laws on the Courts of the Federal Republic of Yugoslavia, and partly on the Constitutional Framework for Provisional Self-Government in Kosovo (promulgated in UNMIK/REG/2001/9), section 9.4.4. See for East Timor UNTAET/REG/2000/11 (on the organization of courts in East Timor), amended by UNTAET/REG/2001/25 and UNTAET/REG/2000/16 (on the organization of the public prosecution service in East Timor), amended by UNTAET/REG/2001/26. See for the mixed panels in Kosovo, *inter alia*, de Bertodano, *supra* note 2, W. Betts, *et al.*, ‘Post-conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law’, 2001 *Michigan Journal of International Law*, pp. 371-389, S. Chesterman, ‘Justice under International Administration: Kosovo, East Timor and Afghanistan’, 2001 *Finnish Yearbook of International Law*, pp. 143-164, J. Cerone *et al.*, ‘Explaining and Evaluating the UNMIK Court System’, in: Romano *et al.* (eds.), *supra* note 6, pp. 41-57, Dickinson, ‘The Relationship between Hybrid Courts and International Courts: The Case of Kosovo’, *supra* note 1, M. Justman Kaman, ‘To Live and Work in Kosovo, Justice in the Aftermath of War’, 2004 *Criminal Justice*, p. 5, H. Strohmeier, ‘Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor’, 2001 *American Journal of International Law*, pp. 46-63. See for the Serious Crimes Project in East Timor, *inter alia*, J. Beauvais, ‘Benevolent Despotism: A Critique of UN State-building in East Timor’, 2001 *New York University Journal of International Law and Politics*, pp. 1101-1178, S. de Bertodano, ‘East Timor: Trials and Tribulations’, in: Romano *et al.* (eds.), *supra* note 6, pp. 79-97, de Bertodano, *supra* note 2, N. Bhuta, ‘Great Expectations- East Timor and the Vicissitudes of Externalised Justice’, 2001 *Finnish Yearbook of International Law*, pp. 165-189, Chesterman, ‘Justice under International Administration: Kosovo, East Timor and Afghanistan’, *supra* in this note, D. Cohen, ‘Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future’, 2002, *Analysis from the East-West Center*, No. 61, <http://www.eastwestcenter.org/stored/misc/CohenEastTimorTribunal.pdf> (last accessed 10 February 2006), Katzenstein, *supra* note 2, S. Linton *et al.*, ‘The Evolving Jurisprudence and Practice of East Timor’s Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders’, 2001 *Yearbook of International Humanitarian Law*, pp. 1-48, Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, ‘Prosecuting Atrocities at the District Court of Dili’, *supra* note 2, ‘Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor’, *supra* note 2, ‘New Approaches to International Justice in Cambodia and East Timor’, *supra* note 2 and Strohmeier, ‘Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor’, *supra* in this note.

In East Timor a criminal justice system had to be built from scratch. The physical infrastructure had been destroyed. No East Timorese lawyers with experience as judges, prosecutors or defence counsel were available. These jobs had always been filled by Indonesians.⁶² An International Commission of Inquiry, established by the Secretary-General on the request of the Commission on Human Rights, had recommended an 'international human rights tribunal (...) to try and sentence those accused by the independent investigating body of serious violations of fundamental human rights and humanitarian law which took place in East Timor since January 1999'.⁶³ Nevertheless, Indonesia was given the go-ahead to conduct its own trials. Absent international willingness to establish an international court, the Transitional Administrator in East Timor established a special department for 'serious crimes' within the Office of the General Prosecutor (Serious Crimes Unit), under the leadership of an (in practice international) Deputy Prosecutor for Serious Crimes.⁶⁴ Mixed panels within the District Court of Dili and within the Appeals Court were granted exclusive jurisdiction over crimes under both international and national law (Special Panels for Serious Crimes), without any limitations on the temporal jurisdiction.⁶⁵ After East Timor's independence in 2002 the Serious Crimes Project continued, but it ended in May 2005 with the departure of UNTAET's successor UNMISSET, although 339 of the 440 defendants had not appeared before the Special Panels.⁶⁶ Also considering the 'sham trials' conducted in Indonesia,⁶⁷ a Commission of Experts recommended in June 2005 that the Security Council reconsider the establishment of an international tribunal if Indonesia did not start serious prosecutions after all.⁶⁸ In early 2006, after three and a half years of research and writing, the independent Commission for Reception, Truth and Reconciliation also recommended in its 2500-page report entitled 'Chega!' – 'Enough' – the establishment of an international tribunal to investigate the violence in East Timor should other measures 'be deemed to have failed to deliver a sufficient measure of justice and Indonesia persists in the obstruction of justice'.⁶⁹ As one of those other measures it recommended a renewal of the mandate of the Serious Crimes Unit and Special Panels. East Timor's government however has emphasized the need to grant amnesty where appropriate, to turn the page and to continue with the bilateral Commission for Truth and Friendship it established with Indonesia.⁷⁰

In Kosovo no specific provision has been made for the prosecution of serious crimes. An important difference compared to the cases of Sierra Leone, Cambodia and East Timor is that an international tribunal with jurisdiction over the territory already existed: the ICTY. Its Prosecutor however indicated that she only intended to prosecute the most serious crimes committed in Kosovo.⁷¹ A special Kosovo War and Ethnic Crimes Court was considered but never implemented. Impunity for international crimes was not the only problem. Serbian lawyers were

62 See UN Doc. S/2000/53, 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor', para. 44.

63 See UN Docs. A/54/726 and S/2000/59, 'Report of the International Commission of Inquiry on East Timor, Annexed to Identical Letters Dated 31 January 2000 from the Secretary-General to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights.'

64 UNTAET/REG/2000/15.

65 UNTAET/REG/2000/11 and UNTAET/REG/2000/15.

66 See however Judicial System Monitoring Programme, 'Continued Trial of Serious Crimes Suspects', 2005 *Justice Update*, 16, available at <http://www.jsmp.minihub.org/justiceupdate.htm> (last accessed 24 September 2006).

67 Human Rights Watch, 'Justice Denied for East Timor', *Backgrounders*, 20 December 2002, <http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm> (last accessed 10 February 2006), International Center for Transitional Justice, 'Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta', *Occasional Paper Series*, August 2003, http://www.ictj.org/downloads/IntendedtoFail_designed.pdf (last accessed 10 February 2006).

68 UN Doc. S/2005/458, 'Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council'.

69 'Chega!, Final Report of the Commission for Reception, Truth and Reconciliation in East Timor', Part 11, Recommendations, p. 26, available at <http://ictj.org/cavr.report.asp> (last accessed 10 February 2006).

70 See J. Kingston, 'The Search for Truth Divides East Timor', *International Herald Tribune*, 21 December 2005.

71 ICTY Press Release, PR/P.I.S./437-E, 29 September 1999, available through <http://www.un.org/icty/latest/index.htm>.

unwilling to work in the justice system and the Albanian lawyers, who had previously been excluded from it, were inexperienced and appeared partial. Therefore, UNMIK adopted regulations providing the possibility of adding international judges and prosecutors to courts, first only in Mitrovica,⁷² later in all District Courts of Kosovo.⁷³ Because of persistent independence problems, Regulation 2000/64 was adopted. It provided that on the request of the prosecutor, defence counsel or accused, the UN Special Representative can designate an international prosecutor, an international investigating judge and/or a panel of three judges with at least two internationals, known as ‘Regulation 64 panels’.⁷⁴ The option of mixed panels and an international prosecutor was thus not limited to specific serious crimes or to criminal cases even. The Bosnian War Crimes Chamber started on 9 March 2005 as an offspring of the ICTY’s completion strategy.⁷⁵ The Security Council had decided that the ICTY should finish its proceedings in the trial chambers in 2008 and all activities in 2010 and had recommended to transfer unfinished cases to competent national jurisdictions.⁷⁶ As prior war crimes prosecutions in Bosnia and Herzegovina had been problematic, a War Crimes Chamber within the Court of Bosnia and Herzegovina and a Special Department within the Prosecutor’s Office were created. In addition to a limited number of cases referred to it by the ICTY, the War Crimes Chamber can also try locally initiated cases. For the first years both the Chamber and the prosecution department will partly consist of international staff that will gradually phase out. This hybrid characteristic will thus disappear, albeit that unlike the other tribunals, this Chamber is intended to be permanent. ‘[W]hat The Hague began, Bosnia and Herzegovina will finish’⁷⁷ and for the first time in history cases are referred from an international tribunal to a domestic court.⁷⁸ Also crimes not previously investigated by the ICTY can be prosecuted in these courts. An agreement between Bosnia and Herzegovina and the High Representative – having the final authority in Bosnia and Herzegovina on behalf of the Peace Implementation Council established in the Dayton Agreements – established an independent registry to assist the Chamber and propose candidates to the High Representative for the positions of judges and prosecutors.⁷⁹ A comparison of these establishment histories reveals that all five tribunals were established in totally different circumstances, which has had a fundamental impact on their specific features and consequently on their potential. Already for this reason it is therefore hardly possible to speak of ‘the’ promise of hybrid courts. One of the asserted promises of hybrid courts is for example that they provide more ownership to the population most affected by the crimes than the purely international courts like the ICTY and ICTR. The widely diverging establishment histories show, however, that the national involvement in the establishment of the hybrid courts has varied

72 UNMIK/REG/2000/6 grants the UN Special Representative the authority to appoint and remove from office international judges and prosecutors to the courts in Mitrovica. UNMIK/REG/2000/6 has subsequently also been amended by UNMIK/REG/2001/2 (on the specific powers of the international prosecutor).

73 UNMIK/REG/2000/34 expands the authority of UNMIK/REG/2000/6 to appoint and remove from office international judges and prosecutors beyond the District Court of Mitrovica to all five district courts in Kosovo.

74 UNMIK/REG/2000/64, sections 1 and 2, prolonged by UNMIK/REG/2001/34, UNMIK/REG/2002/20 and UNMIK/REG/2003/36.

75 See for the War Crimes Chamber Balkan Investigative Reporting Network, *In Pursuit of Justice: Guide to the War Crimes Chamber of the Court of BiH*, available at <http://www.birn.eu.com> (last accessed 14 September 2006) and Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Vol. 18, No. 1 (D), February 2006, available at <http://hrw.org/reports/2006/ij0206/> (last accessed 14 September 2006).

76 UN Docs. S/RES/1503 (2003) and S/RES/1534 (2004).

77 High Representative Paddy Ashdown, quoted in S. Gottlieb, “‘A Huge Step Forward’ – Sarajevo’s War Crimes Court”, *Radio Netherlands*, 10 March 2003, available at <http://www.radionetherlands.nl/currentaffairs/region/easterneurope/bos050310> (last accessed 10 February 2006).

78 The first case was *Prosecutor v. Radovan Stankovich*, UN Doc. IT-96-23/2-PT, 17 May 2005.

79 Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia and Herzegovina.

extensively. As the temporary sovereign the UN had a monopoly on the design of the transitional justice model in Kosovo and East Timor. In Kosovo no specific decisions were made on how to deal with international crimes committed in the past. Conversely, in East Timor the Transitional Administrator set up a fully-fledged transitional justice scheme by establishing a Reception Truth and Reconciliation Commission⁸⁰ and by promulgating Regulations on the Serious Crimes Project, which on paper should be able to deal with twenty-five years of Indonesian occupation and beyond. However, unlike East Timor and Kosovo, Sierra Leone and Cambodia had requested the UN to assist in trials. In those territories, however, the UN did not have sovereign powers. It faced existing States as negotiation partners, with specific ideas on the design of the process, thus limiting the UN's discretionary freedom. The Extraordinary Chambers and the Special Court are clearly products of negotiations between the UN and the State concerned and reflect the powers of the respective negotiating powers. Sierra Leone figured highly on the Security Council's agenda; the Cambodia trials were only backed by the less powerful General Assembly.⁸¹ Unlike the Assembly, the Council could impose the establishment of a court. The lengthy and assiduous negotiation process between Cambodia and the UN reflects this difference in the balance of power between the Secretary-General and the Cambodian and Sierra Leonean governments respectively. Not featuring on the agenda of the Security Council, Cambodia had much more leverage than Sierra Leone. Consequently, the Extraordinary Chambers are more in accordance with the demands of the requesting government than the Special Court.⁸²

Another example of a promise that has been ascribed to hybrid courts in general, but in fact depends to a large extent on the – very different – establishment histories, especially the balance of power between the UN and the government concerned, is that these courts would be more impartial and independent than domestic courts. For example, the Cambodian government has been more successful in the negotiations to control the target of the trials by limiting the mandate of the court, than has the Sierra Leonean Government. Whereas President Kabbah had requested a court 'to try (...) those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes (...)',⁸³ the Special Court's Statute now provides for general personal jurisdiction over those bearing the greatest responsibility, not limited to the RUF.⁸⁴ In fact, of the thirteen indictees only five are RUF members. However, the Extraordinary Chambers Law does refer to one specific group: 'senior leaders of Democratic Kampuchea and those who were most responsible (...)'.⁸⁵ Theoretically, others than the Khmer Rouge could be 'most responsible', but it is expected that only former Khmer Rouge members will be prosecuted.⁸⁶

As the establishment histories, which diverge so extensively among the current examples of hybrid courts, have a substantial impact on their promise in various respects, *inter alia* in the areas of legitimacy (providing ownership without affecting impartiality and independence), it is difficult to embrace any general statements on 'the' promise of hybrid courts in these respects.

80 UNTAET/REG/2001/10.

81 See, *inter alia*, UN Docs. GA/RES/52/135 (1997), GA/RES/57/228 (2002), GA/RES/57/228B (2003).

82 Besides, ownership is not guaranteed by government involvement alone; the consultation of the population as a whole is even more important. Apart from in Sierra Leone, nearly no consultation has taken place.

83 UN Doc. S/2000/786.

84 Special Court Statute, available at <http://www.sc-sl.org/scsl-statute.html> (last accessed 10 February 2006), Art. 1(1).

85 Amended Extraordinary Chambers Law, *supra* note 48, Art. 1.

86 See UN Docs. A/53/850-S/1999/231, para.10 and Heder *et al.*, *supra* note 38.

2.2. *Different legal bases*

Due to their diverging establishment histories the hybrid courts are, like the purely international tribunals, not of a single mould.⁸⁷ Their founding instruments and thereby their legal bases vary substantially, which has important consequences for the questions of which legal order the courts belong to and their legal personality (see next section) and the issue of their powers vis-à-vis other States (see section 4.4).

In the establishment of the Extraordinary Chambers in Cambodia a variety of legal documents was involved: General Assembly and Commission for Human Rights resolutions calling for the establishment, a General Assembly resolution approving the draft Agreement,⁸⁸ an international agreement with the UN and domestic laws. However, the actual establishment stems from a domestic Act, which is thus the legal foundation of the Chambers.⁸⁹ The Act was promulgated two years before the conclusion of the Agreement with the United Nations and the Agreement specifically mentions in its title that the prosecutions take place under Cambodian law.⁹⁰ The purpose of the Agreement is not to establish a legal basis for the trials, but to ‘regulate the cooperation’ between the UN and Cambodia, with the Agreement as the ‘legal basis ... for such cooperation.’⁹¹ The international Agreement was then ratified into domestic law and the already promulgated Law on the Extraordinary Chambers was amended in accordance with the Agreement.⁹²

Also in the establishment of the Special Court for Sierra Leone both international and domestic legislation played a part, but compared with Cambodia, their roles were just the reverse. After a (non-Chapter VII) Security Council resolution requesting the Secretary-General to conclude an Agreement with the government of Sierra Leone,⁹³ it was the Agreement that actually established the Special Court.⁹⁴ The Statute is an integral part of that international agreement.⁹⁵ As in Cambodia, the Agreement has been incorporated in domestic legislation: the Special Court Agreement Ratification Act⁹⁶ is Parliament’s ratification and implementation Bill of the – non-self-executing – Agreement between the Government and the UN.⁹⁷

The courts in East Timor and Kosovo were not the result of negotiations and agreements with the country concerned: unlike in Cambodia and Sierra Leone there was no legitimate government to negotiate with. The UN itself acted as *de facto* government and promulgated regulations on the establishment of the panels. The authority to do so derived from Chapter VII Security Council resolutions. Indirectly, therefore, international instruments served as the legal basis for these court systems. Nevertheless, these international instruments did not directly establish the courts, but granted the UN administration the authority to promulgate *domestic* laws. The regulations establishing these courts should be considered as domestic instruments.

The Bosnian War Crimes Chambers and the War Crimes Department in the Office of the Prosecutor are also based on domestic laws, albeit that the international community’s High Representative would have had the power to adopt the law in case the national parliament would

87 See also Orentlicher, *supra* note 8.

88 UN Doc. GA/RES/57/228B (2003).

89 See *supra* note 43.

90 See *supra* note 47.

91 Agreement, *supra* note 47, Art. 1.

92 See *supra* note 48.

93 UN Doc. S/RES/1315 (2000).

94 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, Art. 1(1).

95 *Ibid.*, Art. 1(2).

96 Special Court Agreement, 2002, (Ratification) Act, 2002, available at www.specialcourt.org/documents/SpecialCourt.html (last accessed 10 February 2006).

97 See also Udombana, *supra* note 53, p. 85.

not do so. The independent Registry, on the other hand, is based on an agreement between the High Representative and Bosnia and Herzegovina.⁹⁸

It may therefore be concluded that a common legal basis is not a ground for grouping hybrid courts into one category. In fact, although combinations of national and international legislation were often involved in the establishment of the hybrid courts, their actual establishment occurred under either an international agreement or a domestic law. The Special Court for Sierra Leone resembles the ICC in that respect, as it is based upon an international agreement, albeit not among a group of States, but between one State and an international organization. The other hybrid courts mentioned are more like domestic courts, as they are rooted in domestic legislation, albeit that international instruments have spurred on the adoption of domestic legislation or have complemented it. Calling hybrid courts 'hybrid' because of their hybrid roots – domestic and international instruments playing different parts – only confuses the picture: their manner of establishment is what distinguishes these courts from one another, not what unites them.

Moreover, the discussed models of the current hybrid courts are by no means exhaustive. One could imagine the Security Council adopting a resolution under Chapter VII establishing a hybrid court. The only difference with the ICTY and ICTR would then be that the hybrid court, unlike the ICTY and ICTR, has both national and international staff, and, if that is considered a defining element of hybrid courts (see section 3.2) jurisdiction over both international and domestic crimes.⁹⁹ In practice, imposing a hybrid court on a State against its will probably causes difficulties, for instance in finding suitable and willing national judges.

Therefore, if one wishes to acknowledge the importance of 'the variety of institutional models'¹⁰⁰ rather than categorizing them all as hybrid courts it may be better to distinguish them according to their different legal foundation.¹⁰¹ In Bosnia and Herzegovina a 'mixed tribunal (structured as a "court within a court")'¹⁰² has been created. The same term could be used for the Extraordinary Chambers, also accurately called a 'court, established under Cambodian law but operating with substantial international participation'¹⁰³ or 'a national court with international characteristics.'¹⁰⁴ In Kosovo and East Timor there are 'UN-administered mixed panels.' The Special Court for Sierra Leone, however, is a 'treaty-based sui generis court of mixed jurisdiction and composition.'¹⁰⁵

Of course, it is not always necessary for the colloquial name to exactly indicate the legal nature of the court. However, the fundamentally different legal foundations of these courts do call into question whether one can validly speak of 'the' promise of hybrid courts, as the legal basis has a substantial impact on some of the areas in which hybrid courts are said to hold a promise. For example, it has a bearing on domestic ownership and on the impartiality and independence of the court. It is usually possible for the government concerned to unilaterally annul or amend a

98 See *supra* note 78.

99 Whether the Security Council would be allowed to grant this court jurisdiction over domestic crimes depends on the rationale for the Council's authority to establish international courts. If the rationale is that these courts exercise universal jurisdiction that all national (and foreign) courts are allowed to exercise over international crimes, it is difficult to maintain that the Council is allowed to grant jurisdiction over domestic crimes. However, the argument that the Security Council is allowed to do so as a Chapter-VII-enforcement measure when having determined that there is 'a threat against the peace and security', is more convincing. On that basis the UNTAET and UNMIK administrations also have the authority to re-establish a court system prosecuting domestic crimes.

100 S/2004/616, *supra* note 5, p. 13.

101 As is done in S/2004/616, *supra* note 5, Orentlicher, *supra* note 8, pp. 219-225.

102 S/2004/616, *supra* note 5, p. 13.

103 Orentlicher, *supra* note 8, p. 219.

104 Speech by Deputy Prime Minister Sok An on the Ratification of the Khmer Rouge Law Amendments, 5 October 2004, available at www.dccam.org/Tribunal/Analysis/Sok_An_Speech.htm (last accessed 10 February 2006).

105 See UN Doc. S/2000/915, *supra* note 32, para. 9. The name given in Beresford *et al.*, *supra* note 53, p. 636 of '[a] national court with a large involvement' does not reflect the international legal basis of the court. '[A] Sierra Leonean international court' (a diplomat quoted by M. Sieff, *supra* note 53, p. 19) does not say whether the legal foundation is actually national or international.

domestic law, but not an international instrument. It is even more questionable whether it is possible to speak of ‘the’ promise of hybrid courts in comparison with the category of ‘international courts’, the latter referring to the ICC, the ICTY and the ICTR. Similar to these three courts, the Special Court has been established by an international act and is, in that respect, an ‘international court.’¹⁰⁶

2.3. Different legal orders and legal personalities

Some regard being part of the domestic legal order as a characteristic of hybrid courts.¹⁰⁷ Considering their founding instruments, the Cambodian Extraordinary Chambers,¹⁰⁸ the panels in East Timor and Kosovo and the Bosnian War Crimes Chamber are indeed all part of the domestic system and their legal status is that of a domestic court. The ICTY explicitly reiterated this for the Bosnian War Crimes Chamber in *Stankovich*: ‘The State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a “national court.” Bosnia and Herzegovina has chosen to include in the composition of the State Court judges who are not nationals of Bosnia and Herzegovina. That is a matter determined by the legislative authorities of Bosnia and Herzegovina. The inclusion of some non-nationals among the judges of the State Court does that [*sic!* meant is: ‘not’] make that court any less a “national court” of Bosnia and Herzegovina.’¹⁰⁹

However, the abovementioned theoretical possibility of a Security-Council-established hybrid court and the extant Special Court for Sierra Leone belie this assumption of hybrid courts necessarily being part of the domestic legal order. The Special Court is legally separate from the judicial system of Sierra Leone.¹¹⁰ The fact that the Agreement has been ratified by a domestic law does not alter this. The Ratification Act provides that: ‘[t]he Special Court shall not form part of the Judiciary of Sierra Leone.’¹¹¹ Offences are not prosecuted before the Special Court in the name of the Republic of Sierra Leone.¹¹² The Special Court’s Appeals Chamber explained that the Special Court’s ‘description as hybrid should not be understood as denoting that it is part of

106 Therefore this article refers to the ICTY, ICTR and ICC as ‘purely international courts.’

107 See, *inter alia*, Burke-White, ‘Community’, *supra* note 17, p. 23. Kleffner *et al.*, *supra* note 6, p. 359, state: ‘Each of the four internationalized courts that are discussed in this book is *embedded into, or grafted onto*, the national legal order of one particular state (...). It is this connection that makes the courts “internationalized” rather than “international.”’ However, the fact that Sierra Leone has ratified the Special Court Agreement does not make that Special Court ‘embedded into, or grafted onto, the national legal order’ of Sierra Leone. More nuanced is Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, p. 185: ‘grafted onto the judicial structure of a nation..., or created as a treaty based organ, separate from that structure.’ Later however, p. 186, she also states: ‘There is much that is positive in the concept that international and local judges can sit together as panels adjudicating international crimes, *as part of the judicial system* of the nation which has suffered the atrocities’ (emphasis added).

108 However, see Schraga, *supra* note 26, pp. 36-37: ‘The Extraordinary Chambers were established by law, and although technically within the existing court system of Cambodia, they are, in fact, a self-contained court with a separate organizational structure of judges, prosecutors, and court managers, *whose operation is conditioned in its entirety on the implementation of the Agreement* between the United Nations and the government’ (emphasis added). See also UN Doc. S/2004/616, *supra* note 5, p. 13: ‘a mixed tribunal for Cambodia, proposed under a national law specially *promulgated in accordance with a treaty*.’ This statement obscures the fact that although the Extraordinary Chambers Law has been slightly amended in accordance with the treaty, the Law had already been promulgated before agreement was reached between the UN and Cambodia.

109 *Prosecutor v. Radovan Stankovich*, *supra* note 78, para. 26.

110 Different: Burke-White, ‘Regionalization’, *supra* note 16, p. 730: ‘semi-internationalized criminal courts, *effectively grafted onto domestic judiciaries*, such as the Special Panels in East Timor or the Special Court for Sierra Leone’ (emphasis added) and p. 753: ‘In both East Timor and Sierra Leone, the courts are *effectively grafted onto the domestic judiciary*, applying international criminal law within the overall structure of the domestic courts.’ This of course depends on the interpretation of ‘grafted onto’, but most authors use this term as opposed to ‘autonomous’.

111 Ratification Act, *supra* note 57, section 11 (2).

112 *Ibid.*, section 13.

two or more legal systems.’¹¹³ Part of neither the UN nor Sierra Leone, it is the only current hybrid court that is formally completely separate from a domestic justice system.

Having rights and duties that neither the UN nor Sierra Leone have and with the capability to operate on the international plane, for instance through concluding agreements with States,¹¹⁴ the Special Court is also the only hybrid court fulfilling the conditions of international legal personality.¹¹⁵ The Extraordinary Chambers and War Crimes Chambers are part of domestic courts and do not have independent powers on the international plane. For the panels in East Timor and Kosovo the situation seems more complicated as they have been established by regulations stemming from a UN Security Council Resolution. However, as has been stated above, the UN Secretary-General’s Special Representatives in East Timor and Kosovo were authorized to issue regulations with domestic, not international effect, and the panels established only have rights and duties at the domestic, not the international level.

Like the establishment history and the founding legal instrument, the domestic order also has a bearing on some of the alleged promises of hybrid courts. Again with respect to the assumed promise as regards ownership and independence and impartiality, courts that are part of the domestic justice system are more likely to be subject to domestic influence than are courts that are totally outside the domestic system. As this is not a common characteristic among hybrid courts, this is yet another factor which cannot serve to assert the promise of ‘hybrid courts’ as a model.

3. The predominant commonality: hybridity, the mixture of the national and the international

Having first discussed the most fundamental differences between them, the arguments for nevertheless grouping these courts into the one category of ‘hybrid courts’ will now be examined. In the panoply of names used for this new type of courts, as enumerated in the introduction, one common element can be discerned: a mixture of national and international elements.¹¹⁶ Some literature leaves it at that and rushes on to describe the category as a whole without asking or answering the question in what respect that mixture occurs. Others specify it, but the deductive approach is obfuscating: it is not clear whether merely the mixture in the current hybrid courts is described or whether this particular mixture is considered as defining hybrid courts.¹¹⁷ Where authors go beyond the statement that hybrid courts ‘are being fashioned out of national and international elements’,¹¹⁸ or ‘a half-way house, a hybrid containing elements of domestic prosecutions and an international process’,¹¹⁹ most refer either to the fact that the institutional

113 Special Court for Sierra Leone, Decision on Challenge to Jurisdiction: Lomé Accord b, *Kallon and Kamara* (SCSL-2004-15/16-AR72(E)), Appeals Chamber, 13 March 2004, para. 85. In his Separate Opinion in Special Court for Sierra Leone, Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, *Kondewa* (SCSL-2004-14-AR72(E)), Appeals Chamber, 25 May 2004, para. 15, Judge Robertson, then President of the Appeals Chamber, however went to the other extreme by saying: ‘(...) the Special Court (...) is not accurately described in the Secretary-General’s report as a court of “mixed jurisdiction and composition:” (...) it is in reality an international court onto which a few national elements have been grafted.’ However, stating that it is a court of ‘mixed jurisdiction and composition’ does not elucidate the nature of the court, *i.e.* whether it is national or international.

114 Special Court Statute, *supra* note 84, Art. 11(d).

115 *Reparations for Injuries suffered in the service of the United Nations*, [1949] *ICJ Reports*, 174. The Special Court itself confirmed that it has international legal personality in Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, *Prosecutor against Charles Gankay Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004, para. 41 (b).

116 The description of hybrid courts by Romano *et al.*, *supra* note 9 and Condorelli *et al.*, *supra* note 13, encompasses many more aspects than the hybridity in staff and applicable laws. Some of the other elements will be discussed *infra*, section 4.

117 For instance, UN Doc. S/2004/616, *supra* note 5, does not go into the question of what actually defines hybrid courts, not even the mixture of judges. Nor is it clear whether the report considers hybrid and mixed courts as one category.

118 Orentlicher, *supra* note 8, p. 238.

119 Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, *supra* note 2, p. 185.

apparatus (judges, prosecutors, registry and staff) is mixed,¹²⁰ or that the applicable laws are mixed,¹²¹ or both.¹²² Most leave open whether both elements have to be fulfilled in order to be considered a hybrid court, or whether one suffices.¹²³

Indeed, the current hybrid courts all display this ‘amalgam of local and international elements’¹²⁴ with respect to staff and laws. However, as will be elaborated below, the degree to which they do so varies a great deal. Furthermore, the element of a combination of national and international law is better conceptualized in terms of the nature of the crimes than in terms of the nature of the applicable law.

3.1. Staff

Whilst domestic courts usually only employ nationals¹²⁵ and international courts employ nationals of States other than where the atrocities took place, the hybrid courts in East Timor, Kosovo, Sierra Leone, Cambodia and Bosnia and Herzegovina indeed employ a mixture of national and international staff. The term ‘staff’ as used here includes judges, prosecutors, registrars and support staff. However, the way in which these courts do so differs widely.

On the one end of the spectrum is Sierra Leone where the Statute of the Special Court provides that the majority of the judges in the Trial and Appeals Chambers are appointed by the UN Secretary-General and the remainder by the Sierra Leonean government.¹²⁶ As those appointed by the Sierra Leonean government need not be Sierra Leoneans, and theoretically could all be internationals as well, the court can be – and in fact is – predominantly composed of internationals.¹²⁷ Also the Registrar and the Prosecutor are appointed by the Secretary-General.¹²⁸

The only high official whom the Statute requires to be Sierra Leonean is the Deputy Prosecutor, but in fact even for this position the Sierra Leonean government has appointed foreigners.¹²⁹ Assisting staff is Sierra Leonean and international.

On the other end of the spectrum are Cambodia’s Extraordinary Chambers where Cambodian judges are in the majority. The international judges are nominated by the UN Secretary-General but must be appointed by Cambodia’s Supreme Council of the Magistracy.¹³⁰ A ‘super-majority’ rule has been developed so that always at least one international judge has to vote in favour for a decision to pass.¹³¹ A Cambodian and an international serve as equal co-prosecutors¹³² and as co-investigating judges.¹³³ A special Pre-Trial Chamber is established to settle differences

120 *Ibid.* and D. Tolbert, ‘The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings’, 2002 *Fletcher Forum of World Affairs*, pp. 7-18, p. 16.

121 SCSL-2004-15/16-AR72(E), *supra* note 113, para. 85, ‘[The Special Court] is described as “hybrid” or “mixed jurisdiction” because of the nature of the laws it is empowered to apply.’

122 Dickinson, ‘The Promise of Hybrid Courts’, ‘Transitional Justice in Afghanistan: The Promise of Mixed Tribunals’, ‘Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?’, *supra* note 2, Schraga, *supra* note 26, Stahn, *supra* note 20, Higonnet, *supra* note 2, Cerone *et al.*, *supra* note 61, Romano *et al.*, *supra* note 9, Condorelli *et al.*, *supra* note 13, G-J. Knoops, ‘International and Internationalized Criminal Courts: The New Face of International Peace and Security?’, 2004 *International Criminal Law Review*, pp. 527-547.

123 For instance Sriram, *supra* note 11, Condorelli *et al.*, *supra* note 13.

124 Orentlicher, *supra* note 8, p. 224.

125 Exceptions are some Commonwealth States, where judges from other Commonwealth countries sit on the bench.

126 Special Court Statute, *supra* note 84, Art. 12.

127 Of course, theoretically the Secretary-General could also appoint Sierra Leoneans but it is questionable whether that is in accordance with the object and purpose of the Agreement.

128 Special Court Statute, *supra* note 84, Arts. 16 and 15(3) respectively.

129 *Ibid.*, Art. 15(4). The first Deputy Prosecutor was Desmond de Silva, a Brit. His successor, Dr Christopher Staker, is Australian (and later became Acting Prosecutor).

130 Amended Extraordinary Chambers Law, *supra* note 48, Arts. 9-11.

131 *Ibid.*, Art. 14. It is not clear what will happen if this super-majority is not obtained apart from that no decision will have been made.

132 *Ibid.*, Art. 16.

133 *Ibid.*, Art. 23.

between the national and international co-investigating judges and co-prosecutors respectively.¹³⁴ The Office of Administration is headed by a Cambodian; an international deputy is responsible for the international matters.¹³⁵

Along this 'staff spectrum' ranging from predominantly international to predominantly national the Kosovo panels are on the Cambodian side. In Kosovo two types of hybrid panels are possible. Initially, international judges and prosecutors were added to courts in Kosovo and they could choose to sit on the bench or take over the prosecution.¹³⁶ However, as they constituted a minority on the panels, the international judges were often outvoted.¹³⁷ According to the subsequent Regulation 64 the UN Special Representative can designate an international prosecutor, an international investigating judge and/or a panel of three judges with at least two internationals, on the request of the prosecutor, defence counsel or accused.¹³⁸ In comparison with the other hybrid courts, the Kosovo court system is unique in that it is not institutionalized. 'Rather, the international judges permeate the court system, sitting in panels throughout Kosovo on a case-by-case basis.'¹³⁹

Whilst in Kosovo hybridity in panels and prosecution is optional, in East Timor the UN transitional administration's regulations institutionalized them for specific 'serious crimes', judged by Special Panels of two international judges and one East Timorese judge.¹⁴⁰ The Deputy General Prosecutor for Serious Crimes had exclusive prosecutorial authority over these crimes and was an international,¹⁴¹ assisted by nationals.¹⁴² In practice, however, assistance was chiefly provided by internationals.¹⁴³

The Bosnian War Crimes Chamber is innovative in that it explicitly provides for a 'phasing-out' scheme for the internationals. Starting with an international majority, it is envisaged that within five years it will have purely national panels.¹⁴⁴

As in Kosovo, the 2003 Statute of the Iraqi Special Tribunal created a *possibility* for international judges to be appointed by the Governing Council, without *requiring* international judges.¹⁴⁵ However, when the 2003 Statute was replaced by the 2005 Law of the Supreme Iraqi Criminal Tribunal, this possibility was narrowed down substantially. International judges may only be appointed 'in the event one of the parties is a state.' Where the 2003 Statute still required the appointment of non-Iraqis to advise and monitor the prosecutor and to advise the Investigative

134 *Ibid.*, Arts. 23 and 20.

135 *Ibid.*, Art. 30.

136 UNMIK/REG/2000/6, *supra* note 72 and UNMIK/REG/2000/34, *supra* note 73.

137 Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 'Kosovo Review of the Criminal Justice System 1999-2005, Reforms and Residual Concerns', March 2006, http://www.osce.org/documents/mik/2006/03/18579_en.pdf (last accessed 15 September 2006), p. 41.

138 UNMIK/REG/2000/64, *supra* note 74.

139 Cerone *et al.*, *supra* note 61, p. 42.

140 UNTAET/REG/2000/15, section 22, in accordance with UNTAET/REG/2000/11 (later amended by UNTAET/REG/2001/25), sections 9 and 10.3.

141 UNTAET/REG/2000/16 (later amended by UNTAET/REG/2001/26), section 14.4 and P. Rapoza, 'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned', *International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned* (Dili, Timor Leste, 28 April 2005), <http://www.etan.org/et2005/may/08/28judge.htm> (last accessed 10 February 2006).

142 *Ibid.*, section 14.6. Since independence it is still possible to have internationals appointed to the judiciary of East Timor on the basis of Law no. 2002, Statutes of Judicial Magistrates, Promulgated on 9 September 2002, section 111 and section 163 of the Constitution.

143 Linton, 'New Approaches to International Justice in Cambodia and East Timor', *supra* note 2, p. 107.

144 War Crimes Chamber Project, 'Project Implementation Plan Registry Progress Report', October 2004, <http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf> (last accessed 10 February 2006), p. 43.

145 The Statute of the Iraqi Special Tribunal, Issued 10 December 2003, http://www.cpa-iraq.org/human_rights/Statute.htm (last visited 10 February 2006), Art. 4(d).

Judges, the 2005 Law makes this a mere discretionary possibility.¹⁴⁶ Also in Ethiopia, international involvement was limited to providing advice and support to the Special Prosecutor's Office.¹⁴⁷

In conclusion, with respect to the hybridity of the staff, it is true for all four of the most frequently mentioned examples of hybrid courts, *i.e.* the courts in East Timor, Kosovo, Sierra Leone and Cambodia, that they employ a mixture of international and national judges, prosecutors and sometimes registry and assisting staff. This is also true for the more recent Bosnian War Crimes Chamber. The predominance varies from very international (Sierra Leone) to very national (Cambodia). Kosovo is exceptional in that international involvement has been provided for, but that this has not been institutionalized. Whilst the domination of national or international elements need not be defining for hybridity, the role of the internationals involved probably is. Merely having international assisting staff is a very limited basis for a court to be categorized as hybrid. The Nuremberg Tribunal also employed about 50% locals as assisting staff,¹⁴⁸ but is not likely to be considered a hybrid court. As international involvement in the Ethiopian and Iraqi prosecutions has been limited to providing advice, these tribunals are not discussed in this article as hybrid courts. It is acknowledged however that in the case of the Iraqi trials the advisory role has in fact been substantial, in particular in the initial establishment of the Tribunal.¹⁴⁹ Moreover, if foreign judges are indeed appointed as is allowed under the Statute, it will move further into the direction of being a hybrid court, although in that case the question arises whether the staff's involvement should not be termed foreign rather than international, as will be elaborated below (4.2).

3.2. Laws

‘L’application par ces tribunaux d’un droit ayant ses origines à la fois dans le droit international pénal et dans le droit interne tant procédural que substantiel représente indéniablement le cœur de ce nouveau modèle de juridictions.’¹⁵⁰ Indeed, most of the literature mentions the fact that ‘the applicable law consist[s] of a blend of the international and the domestic’¹⁵¹ as another characteristic of hybrid courts. The hybrid panels in East Timor, Kosovo, Sierra Leone and Cambodia, and also the newer one in Bosnia and Herzegovina, do have in common that they all have to deal with a mixture of national and international law. However, even more so than is the case with the hybridity in staff, the hybridity in applicable law varies greatly from one hybrid court to the other.

The documents establishing the hybrid courts in Sierra Leone, Cambodia and East Timor mandate the panels to apply directly both substantive international criminal law and substantive domestic law. In all three cases direct reference is made to crimes under international law and under domestic law. Thus, the Extraordinary Chambers Law grants the Chambers the authority to prosecute three specific crimes under the 1956 Penal Code of Cambodia (homicide, torture and religious persecution) as well as the international crimes of genocide, crimes against humanity, grave breaches of the 1949 Geneva Convention, the destruction of cultural property and crimes

146 Compare *ibid.*, Arts. 4(d), 6(b),7(n) and 8(j) with Law of the Supreme Iraqi Criminal Tribunal, *Official Gazette of the Republic of Iraq*, 18 October 2005, <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (last accessed 17 October 2006), Arts. 3(5), 7(2), 8(9) and 9(7).

147 N. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, 1996 *Law & Contemporary Problems*, pp. 127-152, p. 133.

148 *Ibid.*

149 M. Sissons, ‘Symposium: The Trial of Saddam Hussein. And Now from the Green Zone... Reflections on the Iraq’s Tribunal’s Dujail Trial’, 2006 *Ethics & International Affairs*, pp. 1-16, p.3.

150 Romano *et al.*, *supra* note 9, p. 118.

151 Dickinson, ‘The Relationship between Hybrid Courts and International Courts: The Case of Kosovo’, *supra* note 1, p. 1059.

against internationally protected persons.¹⁵² Likewise, the Statute of the Special Court incorporates both international crimes (crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of humanitarian law) and crimes under Sierra Leonean law (offences relating to the abuse of girls and offences relating to the wanton destruction of property).¹⁵³ The Serious Crimes Panels in East Timor have the widest substantive jurisdiction of all hybrid courts. They have jurisdiction over murder and sexual offences under the applicable Penal Code of East Timor and over international crimes that include virtually all those covered by the ICC Statute and the international crime of torture.¹⁵⁴ Moreover, it is the only hybrid court, and the only international crimes court in general, that claims universal jurisdiction.¹⁵⁵ The fact that the constitutive documents of the Special Crimes Panels and the Cambodian Extraordinary Chambers must be considered domestic law (see 2.2) does not make the international crimes to which they refer crimes under domestic legislation. The laws mandating the prosecutions are domestic; the laws criminalizing the behaviour to which these laws refer are national and international.¹⁵⁶

By contrast, the hybrid panels in Kosovo and the War Crimes Chamber in Bosnia have jurisdiction over crimes under domestic law only, albeit that the applicable domestic law also incorporates international crimes. In the Kosovo courts international criminal law is applied indirectly, 'through the vehicle of pre-existing domestic legislation.'¹⁵⁷ In Bosnia and Herzegovina, legislation has been amended to include international crimes. In Kosovo the panels' jurisdiction theoretically extends from annulling contracts to prosecuting genocide, but the FRY Criminal Code, which is applicable to crimes committed during the armed conflict, does not include crimes against humanity or the in international law important concept of command responsibility. In Bosnia and Herzegovina two mixed Chambers have been established, one for organized crime, economic crime and corruption and one for war crimes.

In respect of substantive law, therefore, some hybrid courts apply both domestic and international law directly (Cambodia, Sierra Leone, East Timor), while other hybrid courts (in Kosovo and Bosnia and Herzegovina) apply only domestic law. However, also in the latter case international law can be influential, for example, in Kosovo where the domestic Yugoslav law on war crimes refers to international law.¹⁵⁸ Furthermore, international law can fulfil other roles besides criminalizing conduct. In Kosovo, for instance, it has been determined that the applicable law only applies to the extent that it does not conflict with UNMIK regulations and a list of international human rights standards.¹⁵⁹ The UNTAET Regulation establishing the Special Panels includes a comparable arrangement on the compatibility of domestic law with international human rights standards. The domestic applicable law consists of the 'laws applied'¹⁶⁰ in East Timor prior to 25 October 1999, insofar as this has not been replaced by UNTAET regulations

152 Amended Extraordinary Chambers Law, *supra* note 48, Arts. 3-8.

153 Special Court Statute, *supra* note 84, Arts. 2-5.

154 UNTAET/REG/2000/15, sections 4-9. The massive import of the ICC crimes and torture raises serious problems with respect to the *nullum crimen sine lege* provision, considering the fact that the panels have unlimited temporal jurisdiction, practically probably beginning in 1975 when Indonesia took control.

155 UNTAET/REG/2000/15, section 2.

156 Therefore Dickinson's statement in 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo', *supra* note 1, p. 1059, that in hybrid courts 'the judges apply domestic law that has been reformed to include international standards' is not always accurate. They often apply international law directly.

157 Cerone *et al.*, *supra* note 61, p. 44. On 6 April 2004 UNMIK/REG/2003/25 containing crimes such as those under the ICC Statute entered into force. However, this Provisional Criminal Code will not be applied retroactively.

158 FRY Criminal Code, section 142, in Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 'Kosovo's War Crimes Trials: A Review', 15 September 2002, http://www.osce.org/documents/mik/2002/09/857_en.pdf (last accessed 10 February 2006).

159 UNMIK/REG/1999/24, section 1.3.

160 The term 'applicable law' might suggest the retroactive legitimation of the Indonesian occupation, Strohmeyer, *supra* note 61, p. 58.

or subsequent legislation. The applicable domestic law also has to be compatible with international human rights standards.¹⁶¹ Unlike the UNMIK Regulations, the Regulation establishing the Special Panels for Serious Crimes explicitly provides that the panels should, where appropriate, apply international law.¹⁶²

Whereas the Rules of Procedure and Evidence of the Special Court for Sierra Leone are predominantly based on those of the ICTR with the possibility of amendments inspired by the Sierra Leone Criminal Procedure Act,¹⁶³ the Rules of Procedure of the Extraordinary Chambers are primarily inspired by Cambodian procedural law, although amendments have been made to the Extraordinary Chambers Law in order to improve the guarantee of international standards.¹⁶⁴ In practice the differences in the hybrid applicability of laws are greater still. For example, even though the Special Court also has jurisdiction over crimes under domestic law, the Prosecutor has only charged international crimes. The procedural law applied in Sierra Leone is also chiefly international. Whilst on paper the Special Court is thus hybrid in respect of the laws it applies, in practice, where this element of hybridity is concerned, it is purely international. However, in Kosovo and, especially initially, in East Timor, most convictions were convictions of ordinary crimes. This difference may be partly explained from the different historical backgrounds. While in Sierra Leone the prosecution could focus on only those ‘bearing the greatest responsibility’, in Kosovo and East Timor prosecutors started out with overcrowded detention centres necessitating ‘quick justice’ and leaving no time for charges of complicated international crimes. This brief overview of applicable laws shows that although both national and international law can indeed apply in all these hybrid courts, actual mixed applicability ranges from both bodies of substantive law being directly applicable to international law playing only a marginal, indirect role. At one end of the spectrum is the Special Court where certain domestic crimes could be prosecuted in theory, but have not been in practice and where procedurally speaking virtually only international law is applied. At the other end of the spectrum is the Bosnian War Crimes Chamber where both procedurally and substantially only domestic law is directly applicable, with the role of international law having been reduced to serving as the source of the crimes incorporated in domestic law. Therefore, rather than arguing that a defining characteristic of hybrid courts is that they apply both international law and domestic law, as most of the literature does, it is probably more apt to say that they have jurisdiction over both international crimes (whether first incorporated into domestic law or directly) and crimes under domestic law.

However, even with this specification, if hybridity in laws, or better, crimes, is, as is alleged, at ‘the heart of the new model’ and is not merely a coincidental commonality of the current hybrid courts, one would expect that in the assessment of the promise of hybrid courts particular attention is paid to the promise of this particular hybridity. For example, one could imagine that the inclusion of domestic crimes under the scope of jurisdiction would support ownership and improve the connection with the domestic legal culture as in this way jurisdiction is tailored to the particular conflict. However, the promise of hybridity in applicable laws is not commonly elaborated upon. The reason for this is probably that hybrid courts are so different in this respect that not only the promise, but even the relevance of defining hybrid courts by the hybridity in the laws which they apply is debatable. Rather than turning it into a defining element, it should more likely be considered to be only a ‘coincidental’ common characteristic of the current hybrid

161 UNTAET/REG/1999/1, section 3. See for the applicable procedural law in particular UNTAET/REG/2000/30 (amended by UNTAET/REG/2001/25).

162 UNTAET/REG/2000/15, section 3.

163 Special Court Statute, *supra* note 84, Art. 14.

164 Amended Extraordinary Chambers Law, *supra* note 48, Art. 33.

courts.¹⁶⁵ The criterion of applicable law is quite random given the challenge facing hybrid courts to solve obstacles commonly encountered by both domestic and international courts. These obstacles arise because of the difficulties inherent in the prosecution of international crimes. From the perspective of removing these obstacles, it is largely irrelevant whether the prosecution of such international crimes takes place directly on the basis of international law or indirectly on the basis of national law incorporating international law.¹⁶⁶

4. Common elements not captured by 'hybridity'

Some common features of the current examples of hybrid courts are not covered by the concept 'hybridity', as they do not involve a mixture of the national and international. The literature nevertheless sometimes considers these common features as defining characteristics of hybrid courts. However, upon closer examination of five of those features – the seat of the court, UN involvement, an ad hoc nature, no compulsory cooperation with third States and no assessed contributions – it emerges that these features are not necessarily defining and could be coincidentally common to the current hybrid courts. They are features with important effects on the functioning of courts, and can be modified to enhance the effectiveness of courts, either hybrid or not.

4.1. Seat of the court

Unlike the ICTY, the ICTR, and – hopefully for the Netherlands – the ICC, all current hybrid courts are located in the State where the atrocities took place. The promise attributed to this factor is that it enhances domestic ownership by providing an 'opportunity to connect and interact with the civilian population in explaining the purpose of the Court and identifying their expectations of it'.¹⁶⁷ However, although much of the literature considers the domestic seat of hybrid courts as a defining characteristic,¹⁶⁸ locality is a feature of the current hybrid courts, but not inherent in their design. For instance, the Agreement establishing the Special Court makes relocation outside Sierra Leone possible 'if circumstances so require.'¹⁶⁹ The Court considered this to be the case for the trial of Charles Taylor and for this case moved to The Hague.¹⁷⁰ This does not, however, affect the nature of the court as a hybrid court. The other way around, the physical and psychological distance that has become characteristic of the ICTY and ICTR is not inherent in purely international courts either. International courts *could* reside in the country where the crimes took place, as was considered for the ICTR, if the security situation allows it. Locality could be considered as a characteristic of the current hybrid courts that is not necessarily a defining feature. Therefore, it cannot be said that because of their seat hybrid courts per se provide more domestic ownership of trials or, alternatively, that because of their seat international tribunals per se lack such domestic ownership.

165 Likewise, although not explicit, Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *supra* note 2, and UN Doc. S/2004/616, *supra* note 5. See for the view that it is defining *supra* note 121.

166 One obstacle that may be avoided by prosecuting international crimes on the basis of domestic law that has incorporated them rather than on the basis of international law directly is that of the requirement of legality, in case direct application of international law is not permitted by the constitution.

167 'First annual report of the President of the Special Court for Sierra Leone for the period 2 December 2002 – 1 December 2003', available at <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf> (last accessed 10 February 2006), p. 31.

168 See, *inter alia*, Sriram, *supra* note 11, whose entire article is based on the distinction between 'externalized justice' taking place abroad and 'mixed tribunals' at the locus of the crimes. See also Pellet, *supra* note 7, p. 438 and 'Transitional Justice and the Rule of Law in Post Conflict Societies: The Role of International Actors', Report on Wilton Park Conference WPS05/1 (Monday 24-Wednesday 26 January 2005), <http://www.wiltonpark.org.uk/documents/conferences/WPS05-1/pdfs/WPS05-1.pdf> (last accessed 10 February 2006).

169 Agreement, *supra* note 94, Art. 10.

170 President Special Court for Sierra Leone, Order Changing Venue of Proceedings, 19 June 2006, and S/RES/1688 (2006).

4.2. UN involvement

Some view UN involvement as a defining feature of hybrid courts. ‘(...) [I]n substance what characterizes these four instances [East Timor, Kosovo, Sierra Leone and Cambodia] is the fact that they are linked to the United Nations (...).’¹⁷¹ Indeed, in these four cases ‘(...) l’Organisation des Nations Unis a joué un rôle déterminant quant à leur création soit sous la forme d’un accord négocié avec le gouvernement concerné ou par l’adoption de règlement l’autorité administrative des Nations Unis compétente.’¹⁷²

However, in this respect hybrid courts are no different from the purely international ICTY/ICTR and ICC: in the creation of these courts, although very differently for the ICC, the UN also played a key role. If one considers the ICTY and ICTR as the first-generation courts of this type, the hybrid courts could indeed be called the ‘second-generation UN-based Tribunals.’¹⁷³ However, whilst the UN may have played ‘un rôle clef’¹⁷⁴ in the establishment of these four courts, this key role has varied substantially from hybrid to hybrid. It has ranged from acting as a transitional/interim administrator establishing the courts in East Timor and Kosovo, to providing assistance in Cambodia, to co-establishing in Sierra Leone. Furthermore, whereas the Secretariat was involved in all four cases, the participation of other UN organs differed: the General Assembly supported the Extraordinary Chambers, while the Security Council pushed for the Special Court and created the (indirect) legal basis for the panels in Kosovo and East Timor. And if it is indeed a defining characteristic that the ‘[t]ribunaux résultent soit d’un acte normatif de l’ONU soit d’un accord passé entre l’Etat concerné et l’Organisation’,¹⁷⁵ the Bosnian War Crimes Chamber does not belong in this category, despite its mixed panel and jurisdiction over both national and international crimes. Although perhaps originating in the completion of a subsidiary UN organ (the ICTY), the War Crimes Chamber does not stem from a normative act of or agreement signed by the UN.

Hybridity implies a mixture of the national and the international, but the question arises whether international involvement must necessarily be that of the UN or could also consist of the involvement of a different organization or another State. Unless in the hypothetical case that a country requests another country or organization to take over governance, only the UN can grant the authority to establish panels through regulations as was done in Kosovo and East Timor. However, the Special Court could also have been established by an Agreement between Sierra Leone and for instance the African Union. Less hypothetically, at the nadir in the negotiations between the UN and Cambodia on the cooperation for the Extraordinary Chambers, there was thought of South African and Indian judges sitting on the bench, without any UN involvement. A comparable issue arises with the Iraqi Tribunal if it is decided to use the option to appoint non-Iraqi judges.¹⁷⁶ Is the Tribunal then considered a hybrid court also if only American judges are appointed (foreign involvement), or if judges from various nationalities are appointed (multi-

171 Condorelli *et al.*, *supra* note 13, p. 429. See also, bearing out the view that UN involvement is a defining feature of hybrid courts, Schraga, *supra* note 26, p. 36, Katzenstein, *supra* note 2, p. 245, ‘the hybrid model is a system that shares judicial accountability jointly between the state in which it functions and the United Nations.’

172 Romano *et al.*, *supra* note 9, p. 111.

173 Schraga, *supra* note 26, p. 15.

174 Romano *et al.*, *supra* note 9, p. 112.

175 *Ibid.*

176 See *supra* notes 145 and 146 and accompanying text.

national involvement),¹⁷⁷ or if an international organization assists in the appointment (international involvement) or is it only a hybrid court if the UN is involved?

According to some, UN involvement is crucial, because UN aims are pursued: reconstructing States and combating impunity.¹⁷⁸ However, it is not self-evident that the UN holds the monopoly over these objectives. Apart from in enforcement situations, States or other international organizations can also assist in rebuilding justice systems. Likewise, as illustrated by the fact that the ICC may on the basis of the complementarity principle have to give right of way to States exercising universal jurisdiction,¹⁷⁹ the struggle against impunity is also an aim to which States other than the State directly affected can make a contribution. Therefore, mixed panels of national and foreign judges, without UN involvement or even international or multi-national involvement, could also pursue these aims. UN involvement is thus not necessarily a defining feature of hybrid courts.

4.3. *Ad hoc nature*

Some consider 'ad hoc-ism' another characteristic of hybrid courts. They 'have been created on an ad hoc basis to respond to special situations.'¹⁸⁰ So far this has been true and it distinguishes these courts from the permanent ICC. However, this feature also characterizes the non-hybrid ICTY and ICTR. It immediately illustrates the inappropriateness of language distinguishing the hybrid courts from the ICTY and ICTR by referring to the former as hybrid courts and to the latter as 'ad hoc courts.'¹⁸¹ One way to distinguish them is to refer to the ICTY and ICTR as (direct) Chapter VII courts. As it is theoretically possible that the Security Council establishes a hybrid court, this would then be a hybrid Chapter VII court. Leaving aside the terminological battle, a more fundamental question is what 'ad hoc' means. Whilst all these courts have indeed 'been created on an ad hoc basis to respond to special situations',¹⁸² it does not necessarily imply that '[t]hey have a temporary nature'¹⁸³ and are 'bound to disappear' once they 'accomplish a certain objective.'¹⁸⁴ The validity of this statement depends on who 'they' are. Certainly, in Sierra Leone and Cambodia the Court and Chambers were established as a temporary project, like the ICTY and ICTR. However, it is intended that the courts in Bosnia and Kosovo will continue to exercise jurisdiction over both national and international crimes. What will disappear however, and in that sense is indeed ad hoc in the meaning of temporary, is the hybridity in staff.

177 See e.g. Higonnet, *supra* note 2, p. 5: 'The Iraq Special Tribunal might come to be described as a hybrid although its future remains uncertain, and the international side of the IST has thus far been restricted primarily to American rather than multi-national involvement.' However, a subsequent statement on p. 6 seems to indicate that mere foreign involvement suffices: 'A hybrid court (...) could be established with several states acting in concert and without any UN involvement at all. According to this definition, the Iraq Special Tribunal would be a hybrid in spite of the absence of non-American advisors to the IST.'

178 Condorelli *et al.*, *supra* note 13, p. 429.

179 See Rome Statute of the International Criminal Court, Art. 17, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last accessed 10 February 2006).

180 Condorelli *et al.*, *supra* note 13, p. 429.

181 This is done in much of the literature. Whilst Condorelli *et al.*, *supra* note 13, p. 429, explicitly mention ad hoc-ism as a characteristic element of the hybrid courts, they nevertheless distinguish hybrid courts (in their terminology: 'internationalized courts') from the ICTY and ICTR by categorizing the latter as 'ad hoc tribunals'. This distinction is also made by, *inter alia*, Burke-White, 'Community', *supra* note 17, p. 13 and p. 97, Higonnet, *supra* note 2, *passim*. The ICC has adopted this misnomer, referring to 'the caselaw of the ad hoc and hybrid tribunals', in Pre-trial chamber II, ICC-02/04-01/05 (available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-58_English.pdf, last accessed 10 February 2006).

182 Condorelli *et al.*, *supra* note 13, p. 429.

183 *Ibid.*, p. 429.

184 *Ibid.*, p. 429.

4.4. *No compulsory co-operation from third States*

One of the key advantages of the Chapter VII courts, the ICTY and ICTR, in comparison with national courts, is that the Security Council can oblige third States to co-operate with these tribunals. The current hybrid courts, as part of a domestic system or established by an international agreement not binding on third States, do not benefit from such compulsory cooperation. Although indirectly based on a Chapter VII resolution, the panels in Kosovo and East Timor do not have that power either;¹⁸⁵ the resolutions granting administering powers to UNMIK and UNTAET bind third States to the extent that they have to recognize the power of the transitional administrators to administer those territories. However, the decisions of the Secretary-General's Special Representative are no more binding upon third States than the decisions of a regular sovereign of a third State would be. Some regard the fact that hybrid courts lack a Chapter VII obligation for third States to cooperate with the court as a flaw inherent in the model of hybrid courts.¹⁸⁶ However, the fact that the operations of the hybrid courts in East Timor, Sierra Leone and Kosovo have to a larger or lesser extent been hampered by this feature does not mean that it is a defining characteristic of hybrid courts as such.¹⁸⁷ Compulsory cooperation by third States is not necessarily an exclusive feature of international courts established by the Security Council. If the Council determines that the lack of cooperation by third States and the consequent impunity of indictees 'constitutes a threat to peace and security' – in accordance with the rationale of the preambular paragraph in the ICC Statute providing that international crimes constitute a threat to the peace –, it can oblige States to cooperate with any court, hybrid courts included, even purely domestic courts.¹⁸⁸ A Chapter VII resolution could oblige States to co-operate with the tribunal in general terms, as was considered¹⁸⁹ and requested¹⁹⁰ for the Special Court, or in a specific case.

4.5. *No assessed contributions*

'One of the most important departures of the internationalized criminal tribunals from typical full international tribunals is the way they are funded.'¹⁹¹ The ICTY, ICTR and ICC are funded by assessed contributions: in accordance with a predefined scale of assessment the costs of the Chapter VII courts are borne by the UN member States and those of the ICC by States that are parties to the ICC Statute. The current hybrid courts are *not* funded in this way. However, this is where the commonality ends. The Kosovo and East Timorese justice projects are partly funded from the respective UN Administration's budgets and partly by the national budget of those territories. The Extraordinary Chambers are partly funded by Cambodia, but primarily by international donors. The Special Court is entirely funded by voluntary international contributions. As has proven to be the case for the seat of the court, ad hoc-ism (depending on the interpretation of the term), UN involvement and the lack of compulsory cooperation of third States, the absence of assessed contributions is not a given aspect of hybrid courts. It may be a

185 Different: Romano *et al.*, *supra* note 9, p. 113: 'Sous l'angle juridique, la différence majeure réside dans le fait que pour le Kosovo ou le Timor oriental, tous les Etats membres de l'ONU dont la Yougoslavie et l'Indonésie, sont, au regard de la Charte, censés coopérer avec les Tribunaux pénaux internationalisés dans la mesure où leur autorité découlent de résolutions du Conseil de Sécurité.'

186 Pellet, *supra* note 7, p. 440, Cassese, *supra* note 10, pp. 9-10, Romano *et al.*, *supra* note 9, p. 121.

187 Different: Knoop, *supra* note 122, p. 540.

188 Cf. the Security Council demanding that Libya transfer those implicated in the Lockerbie case, UN Docs. S/RES/748 (1992) and S/RES/731 (1992) and the obligations on UN Member States to co-operate with the International Independent Investigation Commission established pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005) and 1686 (2006).

189 UN Doc. S/2000/915, *supra* note 32, para. 10.

190 Press Release Special Court for Sierra Leone, 'No country found to take Sankoh for medical treatment', 11 June 2003, <http://www.sc-sl.org/Press/pressrelease-061103.html> (last accessed 10 February 2006).

191 T. Ingadottir, 'The Financing of Internationalized Criminal Courts and Tribunals', in: Romano *et al.* (eds.), *supra* note 6, pp. 271-289, p. 271.

common characteristic of the current hybrid courts, but in the theoretical example of a hybrid court established by the Security Council, assessed contributions are also conceivable.¹⁹²

In conclusion, at least the following observations should thus be made with respect to these five examples of features that are allegedly common to the current hybrid courts. First, it emerges upon closer examination that many of the features only appear shared on the surface, but actually differ substantially. Second, many of the commonalities are only negative characteristics, such as for instance the absence of assessed contributions, in the sense that they reveal what all do not have, rather than what all do have. Finally and most importantly, the features identified may be common to the current hybrid courts, but they are not necessarily defining components of hybrid courts. For all these reasons, it is thus unjustified on the basis of these features allegedly shared by hybrid courts to ascribe a certain promise or drawback to hybrid courts as a category as a whole. Without changing the nature of the court some of these features could be amended so that those characteristics that actually enhance the potential of courts to face certain challenges are preserved, while features that cause weaknesses in the court's system can be improved, such as the lack of compulsory cooperation and the absence of assessed contributions.

5. Conclusion

'Judicial romanticism'¹⁹³ about what courts can achieve, poses the risk of unfair evaluation. More fundamentally, it inevitably leads to disillusionment that might undermine rather than boost faith in the rule of law which is already weak in societies with a past of gross violations of human rights.

Considered in that light, the aim of this article has been to mitigate false expectations of hybrid courts stemming from the great promise ascribed to this new type of courts. Hybrid courts have been presented as combining the best and avoiding the worst of international and domestic justice, particularly as regards legitimacy, capacity and norm penetration.¹⁹⁴ This article has not provided an assessment of the asserted promise itself, but has questioned the oft neglected assumption of the homogeneity of the category of hybrid courts. The analysis has shown that, first, in fundamental respects such as establishment histories, legal constitutions and legal orders, the current hybrid courts are essentially different. Second, the only defining common feature of the current hybrid courts is that they have panels of both domestic and international judges. Third, hybrid courts also share features such as a seat in the country where the crimes were committed, an ad hoc nature, UN involvement, a lack of compulsory cooperation from third States and a lack of assessed contributions. However, in these respects they either do not differ from purely international courts like the ICTY, ICTR and ICC or they do, but are upon closer examination also among themselves so different in these respects, that these features cannot be considered common. Furthermore, even if these characteristics are in fact shared, they are not necessarily defining: it is also possible to develop courts that are still hybrid courts while changing those features.

Literature ascribing great promise to 'the model of hybrid courts' is thus based on a risky assumption. Ascribing promise to a model is only valid if the promise follows from the defining features of the model. Upon closer examination the model of hybrid courts appears to have panels composed of both domestic and international judges as the only defining commonality. It is

192 Recommended by the Secretary-General in UN Doc. S/2004/616, *supra* note 5, para. 43.

193 P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent future Atrocities?', 2001 *American Journal of International Law*, pp. 7-31, p. 31.

194 See note 3 and accompanying text, *supra*.

highly questionable whether all of the promise ascribed to the model can be based on this one feature.

If correctly implemented, mixed panels can indeed contain a promise in the areas of legitimacy, capacity and norm penetration. However, hybridity of panels alone can never suffice to achieve those aims. Other factors, some of which the hybrid courts thus far established happen to have in common, but most of which vary between them, are at least as important. Ownership for instance depends on more than the participation of domestic judges or other staff in the trials; local participation in the decision making preceding the establishment of the court and local affinity with the outcome of the trials are also vital. The thus far common, but not defining, feature of hybrid courts' local seat contributes to ownership of the trials, but factors on which hybrid courts vary extensively, like establishment histories and outreach, are as crucial. Likewise, (the appearance of) impartiality and independence may be supported by international participation in the decision making process leading up to the establishment of the court and in the judicial process, but also heavily depends on the extent to which hybrid courts are embedded in the domestic legal order and the character of that legal order, which differs from one hybrid court to the next. Hybrid panels offer potential for the transfer of skills. Nonetheless, the availability of sufficient resources and specific development programmes targeted at enhancing the domestic justice system are as decisive. Similarly, while the model of mixed panels is promising for norm penetration, other factors such as the legal order of which hybrid courts are part, the available resources and the mandate, are also influential for the fulfilment of the promise. Again, great differences exist between hybrid courts in these respects.

A similar argument could be made for the pitfalls often ascribed to hybrid courts, such as a lack of Chapter VII powers and of assessed contributions. These elements may be shared by the current hybrid courts, but they are not inherent in the model of hybrid courts, just as it is not intrinsic to the model of purely international courts to reside outside the country where the atrocities took place.

To cap it all, the promise which the literature has ascribed to hybrid courts is unlikely to depend only on the greatest common denominator of the current hybrid courts, namely mixed panels. In fact, also the non-defining common features and the characteristics in which they differ among themselves are crucial for the extent to which hybrid courts can fulfil the expectation of combining the best and avoiding the worst of purely domestic and purely international trials. For a correct analysis of the promise offered by hybrid courts and for the design of future courts it is thus essential to consider the impact of various factors other than mixed panels. As there is no one-size-fits-all ideal model, the design must depend on the different circumstances under which the courts have to operate, the different challenges they face and the different aims pursued. Only then courts established in a specific context to prosecute international crimes, be they international or hybrid, have any chance of fulfilling (part of) the great expectations set for them.