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# What Defines an International Criminal Court?: A Critical Assessment of 'the Involvement of the International Community' as a Deciding Factor

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**Abstract**

Since the post-Second World War tribunals, only a few scholars have attempted to draw a definitional distinction between international and national criminal courts. Remarkable exceptions include Robert Woetzel, who in 1962 categorized criminal courts according to 'the involvement of the international community', and Sarah Williams, who 50 years later relied on the same factor in her definitions of 'hybrid' and 'internationalized' criminal tribunals.

Through examples of rulings by the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, this article will demonstrate that 'the involvement of the international community' is at best an unhelpful criterion when it comes to resolving questions, e.g. regarding the immunity of state officials and the relevance of domestic law, that require a determination of the legal system in which the court operates.

Instead, it is argued that only criminal tribunals deriving their authority from international law should be labelled 'international', while the term 'national criminal court' should apply to tribunals set up under national law. This terminology would underline that issues concerning jurisdiction and applicable law must be settled according to each court's constituent document and other relevant sources of law, depending on the legal system to which this document belongs.

**Key words**

Extraordinary Chambers in the Courts of Cambodia; internationalized criminal courts; relationship between international and national law; Special Court for Sierra Leone; 'the international community'

## 1. Introduction

Given their proliferation over the past 20 years and the great academic interest in the field of international criminal law, it would be reasonable to presume an 'international criminal court' to be a well-defined concept. However, no generally recognized distinction between an 'international criminal court', an 'internationalized criminal court', and a 'domestic criminal court' appears to exist.[1] In fact, it is

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1 In his 2011 book on the NMTs, Kevin Jon Heller wrote: 'To determine the legal character of the NMTs, we must first identify what distinguishes an international tribunal from a domestic court. Perhaps surprisingly,

common for textbooks and handbooks on international criminal law to completely avoid a discussion of the criteria for categorizing a judicial body as 'an international criminal court'.[2] Without particular explanation this label is generally attached to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), whereas judicial bodies such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the International Judges and Prosecutors Programme in Kosovo, the War Crimes Chamber for Bosnia-Herzegovina, and the Iraqi High Tribunal are placed in the category of 'internationalized or hybrid courts'.[3]

Rather than accounting for the distinct elements that characterize a tribunal as either 'international', 'internationalized', or 'domestic', textbook authors tend to focus their attention on the pros and cons of prosecuting offenders before the various kinds of tribunals[4] and/or on the specific traits of each of the existing 'internationalized criminal courts'.[5] The distinction between 'international' and 'domestic' courts is implied at best.[6]

This article will show that the current terminological confusion is not just a formal matter. In particular, material legal questions arising before a number of so-called internationalized or hybrid courts can only be answered by drawing a clear-cut distinction between courts that operate under international law and courts that operate under domestic law.

What follows in sections 2 and 3 is a brief discussion of the scholarly debate of the definition of an 'international criminal court' exemplified by Robert Woetzel's *The Nuremberg Trials in International Law* from 1962[7] and the recent *Hybrid and Internationalised Criminal Tribunals* published by Sarah Williams in 2012.[8] Although 50 years apart, these two works are among the few to try to come up with a definition of international and internationalized tribunals respectively – and they both emphasize 'the involvement of the international community' as a crucial element.

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that issue has been largely ignored by scholars. The primary exception is Robert Woetzel . . . '. See K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), 110.

2 See, e.g., W. A. Schabas and N. Bernaz (eds.), *Routledge Handbook on International Criminal Law* (2011), A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), A. Cassese, *International Criminal Law* (2008), I. Bantekas and S. Nash, *International Criminal Law* (2007), M. Cherif Bassiouni (ed.), *International Criminal Law* (1986), Vol. 1–3.

3 S. Williams, *Hybrid and Internationalised Criminal Tribunals – Selected Jurisdictional Issues* (2012), 58–133. See also C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004).

4 See, e.g., A. Cassese, 'The Rationale for International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion*, *supra* note 2, at 123–30, and F. Jessberger, 'International v. National Prosecution of International Crimes' in ibid., at 208–15.

5 See, e.g., Bantekas and Nash, *supra* note 2, at 577–84, and Donlon, 'Hybrid Tribunals', in Schabas and Bernaz (eds.), *supra* note 2, at 85–105.

6 As a noteworthy exception, Alexander Zahar and Göran Sluiter state in a footnote concerning internationalized criminal courts that '. . . the source of the court's authority . . . is in our view decisive as to the institution's position as part of the international or the national legal order'. A. Zahar and G. Sluiter, *International Criminal Law – A Critical Introduction* (2008), 12. See also W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012), 19. Schabas argues that '[t]he test should be whether the tribunal can be dissolved by the law of a single country'.

7 R. K. Woetzel, *The Nuremberg Trials in International Law* (1962).

8 S. Williams, *Hybrid and Internationalised Criminal Tribunals – Selected Jurisdictional Issues* (2012).

Section 4 examines the nature of the International Military Tribunal (IMT) and the Nuremberg Military Tribunals (NMTs) based on the statements of the tribunals themselves as well as the academic debate they gave rise to. The IMT and the NMTs are interesting for present purposes not only because they were the first tribunals of their kind, but also because the assessment of the nature of subsequent tribunals takes their practice as a point of departure.

Sections 5 and 6 will illustrate through examples from the practice of the SCSL and the ECCC that 'the involvement of the international community' is a questionable criterion when it comes to determining whether a criminal court is international or national in kind. The SCSL and the ECCC have been chosen for examination over other hybrid or internationalized tribunals, because these two particular courts have recently been confronted with legal questions regarding the immunity of state officials and the relevance of domestic law in the proceedings of criminal courts that can only be answered by identifying the legal system under which they operate.

Section 7 concludes the article by arguing that a definitional distinction between international and national criminal courts should revolve around the nature of each court's founding document and thus correspond to the overall distinction between the international legal system and the national legal system(s).

## 2. Robert Woetzel's 1962 definition of an 'international criminal tribunal'

In *The Nuremberg Trials in International Law* of 1962, Woetzel set out to examine whether the IMT could truly be categorized as 'an international criminal court'. He went through four main theories pertaining to the definition of an international court, which may be summed up as follows:[9]

1. 'a court is international if it applies international law';
2. 'an international court is a tribunal based on powers of occupation under international law';
3. 'a tribunal is international if it derives its authority from a treaty or decision of an international council';
4. 'a court instituted by one or a group of nations is international if it has the approval of the international community'.

Woetzel rejected the first argument for the straightforward reason that national courts also apply international law, whereas he considered the second argument to be unconvincing 'since occupation tribunals are widely considered to be limited in their power by the rules of belligerent occupation . . . '.[10] Against the background of international criminal law developments during the past decades, few twenty-first

9 See further Woetzel, *supra* note 7, at 41 et seq.
10 Ibid., at 42.

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century legal scholars would be likely to endorse either of the first two arguments.[11] What is more interesting from a contemporary viewpoint is why Woetzel discarded the third argument in favour of the fourth.

Pertaining to the third argument, Woetzel stated that '[i]t would be indisputably international only in so far as the contracting members are affected by it, within their respective spheres of jurisdiction'.[12] He apparently found the label 'international' to imply that the relevant tribunal has jurisdiction over nationals, including state representatives, of third states. Woetzel did not provide any further support for his conclusion '... that a treaty between several states by itself would not be an uncontested basis for an international court'.[13] He only pointed to the rather circular argument that the IMT would not have had jurisdiction over German nationals without the approval of the international community.[14] One might speculate that Woetzel preferred to conclude that the IMT was an international tribunal, but had doubts as to the jurisdiction of the Allied Powers over German nationals.[15] Emphasizing 'the approval of the international community' in his definition of an international criminal tribunal allowed him to circumvent the latter issue.

In Woetzel's definition, 'the approval of the international community' should ideally take the form of an act of 'a world organization like the United Nations'. However, if such an organization is inexistent or somehow unable to act, he found it '... reasonable to conclude that a nation or combination of states that represent the "quasi-totality of civilised nations" could institute war crimes proceedings similar to those at Nuremberg on its own initiative'.[16]

While Woetzel did not explicitly explain his rejection of the third theory emphasizing the source of the court's authority, his subsequent analysis of the position of the individual in international law reveals why he – in spite of its inherent ambiguity – favoured the fourth theory revolving around 'the approval of the international community'.

According to Woetzel, the direct application of international law to individuals is in conflict with the idea that international law and national law are separate legal systems.[17] Thus, in opposition to '... dualist writers who deny that international

11 See, however, Ronen, 'Blind in their Own Cause: The Military Courts in the West Bank', paper presented at the Fifth Research Forum of European Society of International Law held in May 2013, available at <www.esil2013.nl>. Yaël Ronen claims that the Military Courts in the West Bank are a part of the international legal order because '... they ... draw their authority from the laws of occupation'. Ronen thereby seems to overlook the fundamental difference between setting up a criminal tribunal under international law and setting up a criminal tribunal under domestic law in compliance with international law.

12 Ibid., at 43.

13 Ibid., at 43.

14 Ibid., at 48–49. Notably, Bantekas and Nash imply without further discussion – and without explicit reference to Woetzel – that the recognition of the international community is necessary for a criminal court to be labeled 'international'. In their opinion, however, the IMT did not meet this requirement, since '... although no State objected to its establishment, the Allied powers received only 22 statements of support'. See Bantekas and Nash, *supra* note 2, at 505–6.

15 See further section 4, *infra*.

16 Woetzel, *supra* note 7, at 52–53.

17 See ibid., at 100: '... it was to be expected that some authors would criticise the Judgment of the Nuremberg Tribunal on the ground that international law applied only to states, while national law applied to individuals. According to their point of view, national law and international law are two spheres which cannot overlap but which exist parallel to each other, even when they are identical in contents'.

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law applies directly to individuals as well as to states …',[18] Woetzel claimed as follows:

> 'Since … international courts can apply international law, this would leave no doubt that before international tribunals at least, international law may be applied directly to individuals, regardless of the provisions of national law.'[19]

He thereby conflated the two fundamental questions of (i) the possible entities that international law may govern and (ii) the effect of an international norm in domestic law. In the common view, 'dualism' implies that international law and national law are separate legal systems, and that the rules of any national legal system decide the impact of international law in national law and vice versa.[20] But 'dualism' says nothing about the potential content of the material international norm. Whereas the concept of international legal personality is a contentious topic in international law, the direct applicability of international norms in domestic legal systems – regardless of whether they are addressed to individuals – is a matter of domestic law. Woetzel concluded that '… the IMT, an international court, was completely justified in applying international law to the individual defendants'.[21] However, from the point of view of international law, the same could be said about any domestic court. It is a different question altogether whether – under domestic law – a domestic court may impose international legal obligations directly on individuals. In any event, this issue, which may find different answers in different domestic legal systems, cannot be decisive for the definition of an 'international criminal court' under international law.

Had Woetzel been less sceptical about the direct applicability of international law to individuals, he might have looked more favourably upon the third theory which as explained further below is endorsed in the present article in a slightly modified version.

As will become apparent in section 4, it is far from certain whether Woetzel's fourth theory on the definition of an 'international criminal court' was in fact in line with the judgments of the post-Second World War tribunals.[22] But, before embarking on the study of relevant case law, the following section 3 will briefly discuss Williams' recent work on *Hybrid and Internationalised Tribunals*, which, like Woetzel, relies heavily on 'the involvement of the international community' as a criterion for assessing the legal nature of criminal courts.

18 Ibid., at 104.
19 Ibid., at 105.
20 See, e.g., Gaja, 'Dualism – a Review' in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (2007), at 52–53, and Nijman and Nollkaemper, 'Beyond the Divide' in ibid., at 341.
21 Ibid., at 108.
22 On the other hand, it is clear from the academic debate on the nature of these tribunals that he was not the only scholar to view the developments in international criminal law through the lens of the orthodox presumption against the international legal personality of individuals.

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## 3. Sarah Williams' 2012 definition of an 'internationalized criminal court'

Based on a survey of existing courts and tribunals commonly referred to as 'internationalized' or 'hybrid', Williams concludes that there is no comprehensive definition of this kind of judicial body.[23] She does, however, identify six 'defining features' of 'internationalized' or 'hybrid' criminal courts, including, for example, the involvement of a party other than the affected state and a mix of international and national elements in their material jurisdiction. Among institutions satisfying those six criteria, Williams notes that there is still a wide range of diversity. She finds:

> Having now conducted this study, it is possible to categorise the various international and national mechanisms for international criminal justice on a sliding scale by looking at the extent and degree of international involvement.[24]

Essentially, Williams' sliding scale measures the involvement of the UN. Thus, the 'true' international criminal tribunals are set up by the Security Council acting under Chapter VII of the UN Charter, e.g. the ICTY and the ICTR. Although not a UN subsidiary, the ICC also fulfils the criteria for being categorized as 'truly international' in light of the growing number of member states to the Rome Statute and the possibility of Security Council referrals. Contrary to common terminology, Williams draws a distinction between 'hybrid' and 'internationalized' criminal courts. In the category of 'hybrid courts' she places the tribunals such as SCSL and the STL because they operate directly on the basis of international law (e.g. an agreement between the UN and the affected state), and because of the 'considerable international involvement in [their] design, establishment and operation'. The category of 'internationalized' tribunals, on the other hand, comprises 'essentially domestic institutions but with significant participation from other states or from international organisations including the United Nations'. The ECCC is an example of an internationalized tribunal.[25] In a fourth category, Williams places tribunals receiving (usually ad hoc) assistance from other states or international organizations, whereas the fifth and final category includes courts set up under domestic law without international assistance.[26]

Williams should perhaps be commended for trying to put flesh on the bone of inherently elusive 'involvement of the international community' criterion.[27] Nonetheless, it seems reasonable to ask whether it would have be wiser to abandon this criterion altogether. As Williams herself notes, the sliding scale does not help to resolve the legal issues faced by criminal tribunals: 'While such a classification can be a useful first step, of greater importance is a proper analysis of the legal and

23 Williams, *supra* note 3, at 249.
24 Ibid., at 249–50.
25 Ibid., at 250.
26 Ibid., at 251.
27 See also S. Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', (2005) 18 LJIL 645, at 657.

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jurisdictional basis and the constituent instruments of the particular tribunal.'[28] A number of rulings from 'hybrid' and 'internationalized' courts palpably illustrate this point pertaining to immunities and the principle of legality (see section 5 on the SCSL and section 6 on the ECCC). First, however, section 4 will examine the practice of the IMT and the NMTs.

## 4. The IMT and the NMTs

The purpose of the following section is primarily to assess whether the judgments of the IMT and the NMTs endorse a definition of an international criminal court emphasizing 'the involvement of the international community' (as argued by Woetzel and Williams, see sections 2 and 3); or whether these judgments may rather be read as supporting a definition based on the nature of the court's source of authority. In addition, section 4 aims at uncovering whether post-Second World War scholarly reactions to the early international criminal case law can help to explain the present-day terminological bewilderment.

### 4.1. The IMT

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('the London Agreement'), which set up the IMT, and the annexed Charter of the International Military Tribunal ('IMT Charter') were adopted by the United States, the United Kingdom, France, and the Soviet Union on 8 August 1945.[29]

Before discussing the nature of the IMT, it is necessary to briefly outline the underlying presumption as to the legal status of Germany in the aftermath of the Second World War. A number of scholars, led by Hans Kelsen, have argued that a *debellatio* of Germany had taken place: Germany had ceased to exist as a state and the German territory and population had been placed under the joint sovereignty of the occupying powers.[30] Critics of Kelsen's 'condominium rationale' find the assumption that Germany was no longer a state in itself to lead unavoidably to the conclusion that it had been annexed by the Allies.[31] However, as Kelsen points out, '[t]he establishment of territorial sovereignty does not depend on the new sovereign's intention to hold the territory for good'.[32] Kelsen's analysis would appear to find support in the Berlin Declaration of 5 June 1945,[33] which reads inter alia:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic,

28 Williams, *supra* note 3, at 252.

29 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279. Reprinted in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1949), at 420–8.

30 H. Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', (1945) 39 AJIL 518, at 523. See also, for example, Q. Wright, 'The Law of the Nuremberg Trial', (1947) 47 AJIL 38, at 50–1.

31 See, e.g., K. V. Laun, 'The Legal Status of Germany', (1951) 35 AJIL 267, at 268. See also H. Lauterpacht (ed.), *Oppenheim's International Law* (1946), Vol. I, at 519–20, and R. Y. Jennings, 'Government in Commission', (1946) 23 BYIL 112, at 133–40.

32 Kelsen, *supra* note 30, at 521.

33 Available at <http://avalon.law.yale.edu/wwii/ger01.asp>.

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> hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany. . . .[34]

The indictment of 24 Nazi leaders and six organizations was lodged on 10 October 1945, and a year later, on 1 October 1946, the IMT delivered its judgment and sentences. The Tribunal made the following statement on the competence of the state parties to the London Agreement:

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world . . . The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law.[35]

This paragraph has given rise to extensive debate and a number of scholars have interpreted it to imply that the IMT was a domestic tribunal. Georg Schwarzenberger, for example, contended that the IMT was to be classified as 'a joint municipal tribunal':

> . . . the Nuremberg Tribunal is international more in form than in substance. It is more akin to a joint tribunal under municipal law than to an international tribunal in the normal sense of the word.[36]

Presupposing in accordance with Kelsen that the four victorious states (temporarily) held legislative authority over Germany, it is perfectly arguable that a tribunal to try the major German war criminals could have been set up by them under municipal law. But it remains a matter of interpretation of the documents in question whether that was what the Allies actually did.

The London Agreement has all the traits of a treaty as regards the format, wording, and signatures, declarations by the parties before and after the signing, and registration with the UN Secretary General.[37] It therefore seems clear that the signatory states did not perceive of the London Agreement, including the IMT Charter, as municipal legislation exercised on the basis of delegated authority from Germany in the Berlin Declaration. More likely, they meant for it to have the form of a treaty.

In order to regard the London Agreement and the IMT Charter as municipal law, one would arguably have to presume that issues involving individuals as a matter of doctrine are governed by domestic rather than international law. Correspondingly, Schwarzenberger's categorization of the IMT as a 'joint tribunal under municipal

34 The Berlin Declaration in fact largely follows H. Kelsen, 'The International Legal Status of Germany to be Established Immediately Upon the Termination of the War', (1944) 38 AJIL 689.

35 IMT, *Judgment*, 1 October 1946, reprinted in 41 AJIL (1947) 172.

36 G. Schwarzenberger, 'The Judgment of Nuremberg', (1947) 11 *Tulane Law Review* 329, at 338. See further ibid., at 333–5, and G. Schwarzenberger, 'The Problem of an International Criminal Law', (1950) 3 *Current Legal Problems* 263, at 290–1. See also Wright, *supra* note 30, at 48–51, and Bantekas and Nash, *supra* note 2, at 505–6.

37 The fact that it was subsequently ratified by other states eliminates all doubt that the London Agreement is a treaty.

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law' is seemingly based on the idea that criminal responsibility of individuals inherently follows from domestic law:

> Little importance need … be attached to the circumstance that the joint sovereigns exercised their jurisdiction as the fountain of law and justice in Germany by an international treaty; for this mode of co-ordinating their sovereign wills is not so much determined by the object of their joint deliberations as by the character of the joint sovereigns as four distinct subjects of international law.[38]

The deciding factor for the categorization of the law governing the IMT in Schwarzenberger's argument is not the fact that the tribunal was set up by a treaty, which he does not dispute.[39] Instead, he seems to reason that since the object of said treaty is to exercise criminal jurisdiction over individuals, the IMT must be characterized as municipal law:

> In substance … the Tribunal is a municipal tribunal of extraordinary jurisdiction which the four Contracting Powers share in common.[40]

Such a statement about the possible 'substance' of international law would seem to build on a presumption against the subjectivity of individuals in international law,[41] which has arguably been unsustainable as a reflection of practice throughout the history of the discipline and is undoubtedly mistaken in the twenty-first century.[42]

Interestingly, Kelsen appears to have read the IMT judgment as though the Tribunal was in accord with Schwarzenberger's line of thought, when it stated that '[t]he making of the Charter was the exercise of the sovereign legislative power …' (see the quote above). He understandably finds this analysis to be 'problematical'. But instead of pursuing the matter in detail, Kelsen emphasized the insignificance of the issue from a practical viewpoint:

> … in relation to the German delinquents the difference between a legislative act of the four occupant powers in their capacity as legitimate successors of the German Government, and a treaty concluded by them and adhered to by other States belonging to the United Nations, is rather formal than substantial.[43]

Though this observation was not without merit at the time, Kelsen might have taken the issue more seriously if he had known the material consequences of this formal question for twenty-first century trials regarding international crimes (see sections 5 and 6 below). In any event, it remains open to question whether Kelsen's reading of the IMT's judgment as coherent with Schwarzenberger's reasoning is correct. Kelsen seems to presume that 'sovereign legislative power' is – in the eyes of the IMT – necessarily exercised through domestic law. In opposition, it may be inferred that the IMT was not addressing the competence of the signatory states to issue domestic

38 Schwarzenberger, *supra* note 36, at 334.
39 See further Heller, *supra* note 1, at 123–4.
40 Schwarzenberger, *supra* note 36, at 335.
41 Schwarzenberger, 'The Fundamental Principles of International Law', (1955-I) 87 *RdC* 191, at 354–5.
42 See further A. Kjeldgaard-Pedersen, 'The Influence of the Concept of International Legal Personality in the Drafting of the Statute of the Permanent Court of International Justice', (2014) 16 *Journal of the History of International Law*, at 9–25. See also R. Portmann, *Legal Personality in International Law* (2010), at 283.
43 See K. J. Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', (1947) 1 *International Law Quarterly* 153, at 169–70

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legislation as such, but instead their overall jurisdiction to govern – in the form of a treaty or through domestic law – individuals who were not their own nationals or residents. Following the 'condominium rationale', the Allied Powers could simply choose between exercising their jurisdiction over Germany in a treaty or through domestic law, and it seems that they opted for the treaty solution in the case of the IMT.[44]

Assuming that there are no limitations (except of course for *jus cogens* norms) on the subject matter that may be governed by international law, the choice between issuing domestic law and entering into a treaty is open to all states governing individuals within their jurisdiction – given that at least one other state is interested in adopting a treaty on the relevant subject. What is unusual about the post-Second World War circumstances is that the Allied Powers had joint legislative jurisdiction over Germany. Outside the situation of *debellatio*, it is less obvious whether – and, if so, under what circumstances – the legislative jurisdiction of states includes the competence to impose treaty obligations on other individuals than their respective nationals and residents or persons who are present on their respective territories.[45]

It is submitted that in the special situation of post-Second World War, when Germany was neither a state in itself nor annexed by other states, the Allied Powers had the choice between conferring obligations on German war criminals through domestic legislation or a treaty. Substantial elements of the London Agreement, including the IMT Charter, indicate that it is indeed a treaty. Pursuant to the definitional distinction between criminal courts proposed here, the IMT was for that reason alone an international criminal court. In contrast, it appears that the NMTs were set up according to domestic law:

### 4.2. The NMTs

In order to 'give effect to the terms' of the Moscow Declaration and the London Agreement, the Control Council issued Law No. 10,[46] whereby the US, UK, France, and the Soviet Union were each authorized to establish in their respective 'Zones of Occupation' tribunals for the prosecution of other war criminals than the 24 Nazi leaders who were brought before the IMT. The law was signed by the four zone commanders[47] on 20 December 1945, and the Moscow Declaration and the London

44 Following this line of thought, the phrase 'they have done together what any one of them might have done singly' does not, as inferred by, for example, Cassese, *International Criminal Law*, *supra* note 2, at 322, support the idea that the IMT (and the IMTFE) were – as Cassese puts it – 'judicial bodies acting as organs common to the appointing states'. It may just as well be read as a reinforcement of the Allied Powers' legislative jurisdiction over Germany at the time.

45 The issue falls beyond the scope of the present article. See, e.g., V. Lowe and C. Staker, 'Jurisdiction' in M. D. Evans (ed.), *International Law* (2010), at 318–20. See also M. Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', (2011) 9 *Journal of International Criminal Justice* 25.

46 Reprinted in Heller, *supra* note 1, at 473–6.

47 See J. B. Bing, 'Control Council Law No. 10' in Cassese (ed.), *The Oxford Companion*, *supra* note 2, at 281.

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Agreement were 'made integral parts of it' (see Article I).[48] Since the American trials are the most well recorded, they will serve as reference in the following.[49]

In the American zone, 12 trials involving 185 defendants were brought before what is collectively referred to as the NMTs.[50] The NMTs were set up by the Military Government's Ordinance No. 7 – Organization and Power of Certain Military Tribunals of 18 October 1946.[51]

The legal character of the NMTs has been heavily debated: Were they international tribunals, domestic courts of each of the Allied Powers, domestic courts of Germany, or something else altogether?[52] Apparently, some of the NMTs considered themselves to be international tribunals set up under international law. In the *Ministries* case, for example, Tribunal IV claimed:

> This is not a tribunal of the United States of America, but is an International Military Tribunal, established and exercising jurisdiction pursuant to authority given for such establishment and jurisdiction by Control Council Law No. 10.[53]

Similarly, Tribunal III held in the *Justice* case:

> The tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C. C. Law 10 and are thus based upon international authority and retain international characteristics.[54]

Following Woetzel's definition (see section 2), Heller has recently argued that the NMTs cannot be considered international, because Law No. 10 – as opposed to the London Agreement – did not enjoy the consent and approval of the international community.[55] However, the practice of the NMTs themselves would appear to confirm that the turning point is rather whether Law No. 10 belongs to international or national law. The quotes above indicate that Tribunals III and IV perceived of Law No. 10 as international in kind. Arguably, that is where the tribunals got it wrong, since a number of factors point towards national law: Law No. 10 is issued by the supreme legislative authority in Germany at the time, which happened to be

48 However, it was explicitly noted that '[a]dherence to the provisions of the London Agreement … by any of the United Nations … shall not entitle such Nations to participate or interfere in the operation of this Law…'.

49 Recently they have been scrutinized in Heller, *supra* note 1. See also W. A. Zeck, 'Nuremberg: Proceedings Subsequent to Goering Et Al', (1947–48) 26 *North Carolina Law Review* 350, and M. Lippman, 'The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany', (1992–93) 3 *Indiana International & Comparative Law Review* 1.

50 In total 1,814 individuals were convicted in the American occupation zone. The Soviet trials are largely unrecorded, but it is estimated that more than 10,000 individuals were convicted. 2,107 persons were convicted in the French zone. See M. Cherif Bassiouni, *Crimes Against Humanity – Historical Evolution and Contemporary Application* (2011), 158. The British trials, which lead to the conviction of 1,085 individuals, see ibid, were completed according to Royal Warrant – Regulations for the Trial of War Criminals issued by the British War Office on 18 June 1945, reprinted in T. Taylor, *Final Report to the Secretary of the Army on the Nurenberg War Crimes Trials under Control Council Law No. 10* (1949), at 254–7. See further A. P. V. Rogers, 'War Crimes Trials under the Royal Warrant: British Practice 1945–1949', (1990) 39 ICLQ 780, at 786–95.

51 Reprinted in Heller, *supra* note 1, at 477–82.

52 Ibid. at 109 et seq.

53 See *United States of America v. Ernst von Weizsaecker et al. ('Ministries')*, Order of 29 December 1947, XV TWC 324, at 325.

54 *United States of America v. Josef Altstoetter et al ('Justice')*, Judgment, 4 December 1947, III TWC 954, at 958.

55 Heller, *supra* note 1, at 112.

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a body consisting of representatives of four states:[56] The document is entitled *Law* No. 10, it is unambiguously issued by the Control Council and signed by the four zone commanders in their capacity as such rather than on behalf of their respective governments. There are no indications before or after its enactment that the four states intended for the Law to have the form of a treaty.[57] Thus, Law No. 10 must be categorized as national law and as a consequence the NMTs are to be regarded as national in kind.

Concluding section 4, it is submitted that neither the practice of the NMTs nor the judgment of the IMT support the notion that the 'approval of the international community' is a deciding factor in the assessment of the legal nature of a criminal court.

The NMTs were established under Law No. 10, which was issued by the supreme legislative authority in Germany at the time with little indication that it was to be regarded as anything other than domestic law. Although some of the NMTs claimed to be international in kind, they did not base this argument on 'the involvement of the international community', but rather on a (mis)conception of Law No. 10 as an international instrument.

For its part, the IMT does not seem to have shared the quandaries of scholars like Woetzel and Schwarzenberger as to the international legal personality of individuals and the Allied Powers' jurisdiction over German nationals, which have continually influenced the academic debate. Instead, the IMT appears to have relied on the fact that the Allied Powers in the particular situation of *debellatio* were competent to confer obligations on German individuals, and that they had chosen to do so in the form of a treaty. Against this background, the judgment of the IMT can hardly be said to support Woetzel's dismissal of the third theory, see section 2 above, that 'a tribunal is international if it derives its authority from a treaty or decision of an international council'.

Notably, there is a difference between Woetzel's third argument and the terminology proposed in the present article in that the latter does not imply a distinction between various kinds of sources of international law. The turning point is simply whether a court's authority is based on international law or domestic law.

The International Military Tribunal for the Far East (IMTFE) provides an illustrative example: Given that the IMTFE was established according to a proclamation[58] issued by the American General Douglas MacArthur, who acted as Supreme Commander for the Allied Powers in Japan, it is no surprise that the nature of its legal basis has been disputed. Arguments have been made in favour of regarding the IMTFE as both an internationalized court[59] and a domestic US court. [60] However, key factors support the notion that the IMTFE was established under international law and should, accordingly, be categorized as an international criminal court:

56 For a discussion on the competence of the Control Council, see ibid., at 113–18.
57 See also Taylor, *supra* note 50, at 9: 'Law No. 10 may be a statute of Germany ...'.
58 Reprinted in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal* (2008), 7.
59 Zahar and Sluiter, *supra* note 6, at 5–6.
60 This proposition was dismissed by the US Supreme Court's decision of 20 December 1948 in *Hirota v. MacArthur*, 338 US 197 (Sup.Ct.1949).

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The Potsdam Declaration[61] adopted by the US, the UK, and China on 26 July 1945 laid down the terms for Japanese surrender.[62] Principle 10 of the Declaration states that '… stern justice shall be meted out to all war criminals …'. At a meeting in Moscow in December 1945, the foreign ministers of the US, the UK, and the Soviet Union agreed, with the concurrence of China, to delegate the power to implement the Potsdam Declaration to the Supreme Commander for the Allied Powers in Japan.[63] The competence to issue the constituent document of the IMTFE – and thereby implement Principle 10 of the Potsdam Declaration and Japan's acceptance of it – was thus delegated to MacArthur by an international agreement between the Allied Powers (see item II(B)(5) of the report from the Moscow meeting of 27 December 1945). As opposed to the example of the NMTs (see section 4.2.), there is no indication that either the Allied Powers or MacArthur purported to be exercising domestic legislative authority by reference to the surrender of Japan. Consequently, the argument that the IMTFE was set up under domestic law has little merit.[64]

In spite of the lack of support in the practice of the post-Second World War tribunals, 'the involvement of the international community' continues to be attributed significance not only in scholarly writings (see section 3), but also in practice. The legal problems with this approach have become clearly apparent in a number of recent rulings by the SCSL and the ECCC to be discussed in the following.

## 5. Special court for sierra leone

On 14 August 2000 the UN Security Council issued Resolution 1315 requesting the Secretary General to inter alia '… negotiate with the government of Sierra Leone to create an independent special court …'. The UN and the government of Sierra Leone entered into an Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone[65] on 15 January 2002. Article 1 of the Agreement reads:

> There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[66]

On 7 March 2003, while he was still head of state of Liberia, the SCSL indicted Charles Taylor. Taylor's defence claimed that he enjoyed immunity *ratione personae* because exceptions to this rule can only '… derive from other rules of international law

61 Reprinted in Boister and Cryer, *supra* note 58, at 1.
62 Japan accepted the terms on 2 September 1945. The Japanese *Instrument of Surrender* is reprinted in ibid., at 3.
63 The report of the Moscow meeting, which is dated 27 December 1945, is available at <http://avalon.law.yale.edu/20th_century/decade19.asp>. See item II(B)(5).
64 For a detailed analysis of the nature of the IMTFE, see N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), 20–31 and 40–43.
65 Hereinafter 'the Agreement'. Available at <www.sc-sl.org>.
66 Ibid.

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such as Security Council resolutions under Chapter VII of the … UN Charter …'.[67] The prosecutor on the other hand submitted:

> Customary international law permits international criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law … The lack of Chapter VII powers does not affect the Special Court's jurisdiction over Heads of State. The International Criminal Court ("ICC"), which does not have Chapter VII powers, explicitly denies immunity to Heads of State for international crimes.[68]

The Appeals Chamber dealt with the issue in two steps. It first considered whether the SCSL is 'an international criminal tribunal'. In particular, the Appeals Chamber assessed the implications of the fact that the SCSL – as opposed to the ICTY and ICTR – had not been set up by the Security Council acting under Chapter VII. In the Appeals Chamber's opinion, the crux of the matter was not whether Chapter VII powers had been invoked, but rather whether the Agreement reflected the will of the international community. The Appeals Chamber stated:

> It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court in such circumstances is truly international.[69]

It then went on to assess the applicability of the customary rules on immunity. Relying in particular on para. 61 of the ICJ's judgment in the *Arrest Warrant* case (cited and discussed below), the Appeals Chamber found that heads of state (and other high-ranking state officials) do not enjoy immunity *ratione personae* before international criminal courts. It concluded inter alia:

> … the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[70]

Arguably, this reasoning misrepresents what the ICJ actually said in the *Arrest Warrant* case. In the last section of the (in)famous para. 61 of its judgment, the Court stated that:

> … an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security

67 SCSL, Appeals Chamber, Decision on Immunity from Jurisdiction, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, 31 May 2004, para. 6. Hereinafter '31 May 2004 Decision on Immunity'.

68 Ibid., para. 9.

69 Ibid., para. 38. The construction of the Agreement between the UN and Sierra Leone as an agreement between all members of the UN and Sierra Leone has (rightfully) been widely criticized. See, e.g., M. Frulli, 'The Question of Charles Taylor's Immunity', (2004) 2 *Journal of International Criminal Justice* 1118, at 1124, and Nouwen, *supra* note 27, at 651. This question is, however, not of particular interest for present purposes and will not be explored further.

70 31 May 2004 Decision on Immunity, para. 51.

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> Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[71]

Along with the Appeals Chamber, a number of scholars, including professors Diane Orentlicher[72] and Philippe Sands,[73] who were appointed by the Chamber as *amici curiae*, have interpreted this section to imply that the label 'international criminal court' always carries with it specific legal ramifications, in particular exceptions to the rules on immunities under customary international law.[74] In other words, these authors find that once it has been established that a criminal tribunal is 'international', exceptions to the customary rules on immunities by definition apply.

It is debatable, however, whether this line of reasoning in fact corresponds to the ICJ's statement in the *Arrest Warrant* case. By including the words 'certain' and 'where they have jurisdiction' in para. 61 and subsequently naming examples of tribunals, which according to their founding documents override the customary rules on immunities under particular circumstances, the ICJ did not necessarily imply that exceptions to the rules on immunities apply to all judicial bodies which may be categorized as an 'international criminal courts'. Had that been the ICJ's intention, the Court would presumably have clarified the criteria for acquiring such a label. More likely, para. 61 simply underlines that the importance of the customary rules on immunities is to be decided in accordance with the relevant sources of law pertaining to each individual court. The particular court's founding document is of course a central source of law, but the principles of interpretation to be employed and the relevance of additional sources depend on whether this document is a treaty or a piece of domestic legislation.

The courts mentioned in para. 61 were merely examples of courts founded by sources of international law before which the rules on immunities do not apply for various reasons, *in casu* the bindingness of the statutes of the ICTY and ICTR adopted under Chapter VII of the UN Charter and the bindingness of the ICC Statute on its member states. In other words, the ICJ did not rule out the possibility of an 'international court' before which the rules on immunity would apply.[75]

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71 *Arrest Warrant of 11 April 2000 (Belgium v. Democratic Republic of Congo)*, Judgement of 14 February 2002, [2002] ICJ Rep. 3, at 61, para.61.

72 Orentlicher, 'Submission of the Amicus Curiae on Head of State Immunity', SCSL Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case SCSL-2003-01-I, 23 October 2003, at 13–14. Available at <www.sc-sl.org>.

73 P. Sands, 'Submission of the Amicus Curiae on Head of State Immunity', SCSL Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case SCSL-2003-01-I, 23 October 2003, para. 56. Available at <www.sc-sl.org>.

74 See also W. Schabas, 'The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?' (2008) 21 LJIL 513, at 514.

75 There is little indication in para. 61 that the ICJ found Art. 27(2) of the ICC Statute to apply vis-à-vis third states. The ICC Statute cannot override the rules on immunity under customary international law unless it is binding on the state in question – either because that state has ratified the Statute, or because the relevant situation has been referred to the Court by the UN Security Council in accordance with Art. 13(b). See further D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 AJIL 407, at 416 et seq.

It lies beyond the purpose of this article to determine whether or not the Appeals Chamber erred in denying Charles Taylor immunity *ratione personae*. The aim here is merely to challenge the Appeals Chamber's rationale that the SCSL is an international criminal court, because it is established by 'the will of the international community', and that – for that sole reason – the customary rules on immunity do not apply. Instead, it is submitted that, while the SCSL is established by an international agreement, and, thus, international criminal court according to the definition proposed here, it requires further analysis of relevant legal sources to assess the relevance of the customary rules on immunities.[76]

The applicability of the doctrine of Joint Criminal Enterprise (JCE) before the ECCC provides another interesting case study of a criminal court's reliance on 'the involvement of the international community'.

## 6. Extraordinary chambers in the court of cambodia

The ECCC was set up by the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea passed by the Cambodian National Assembly in 2001.[77] Thus, in contrast to the SCSL, the ECCC is not set up under an international agreement, but under domestic Cambodian law. 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, which was signed on 6 June 2003, details how the UN assists and participates in the ECCC.[78]

In Case 002 involving the most senior officials of the Khmer Rouge regime, the question foreseeably arose whether imposing JCE liability on the accused would constitute a violation of the principle of legality (*nullum crimen sine lege*). Of particular interest for present purposes is the argument raised by the defence team of one of the accused, Ieng Sary, that the ECCC should apply the test of legality following from domestic Cambodian Law (as opposed to Article 15 of the ICCPR), because it is a domestic court of Cambodia.[79]

Unfortunately, neither of the rulings on the applicability of JCE liability in Case 002 issued by the Office of the Co-Investigating Judges (OCIJ),[80] the Pre-Trial

76 See, e.g., Deen-Racsmány, 'Prosecutor v. Taylor: The Status of the Special Court of Sierra Leone and Its Implications for Immunity', (2005) 18 LJIL 299, at 313–20.

77 The law as amended on 27 October 2004 is available at <www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended>.

78 Available at <www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecution>.

79 ECCC, IENG Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, Case No. 002/19-09-2007-ECCC-OCIJ, filed to the OCIJ on 24 November 2008, para. 63. See further ECCC, Ieng Sary's appeal against the closing order, Case No. 002/19-09-2007-ECCC/OCIJ(PTC 75), filed to the PTC on 25 October 2010, paras. 103–14.

80 ECCC, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ, 8 December 2009. Hereinafter '8 December 2009 Order'.

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Chamber (PTC),[81] or the Trial Chamber (TC)[82] considered the legal nature of the ECCC in any great detail.

In support of its application of JCE liability under customary international law, the OCIJ relied exclusively on the fact that the ECCC 'holds indicia of an international court applying international law':

> Considering the international aspects of the ECCC, and considering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, the Co-Investigating Judges find that there is a basis under international law for applying JCE. . . . [83]

The OCIJ did not elaborate on what it meant by 'indicia of an international court', but simply referred to a ruling regarding Case 001 in which the PTC concluded that the ECCC is a 'special internationalized tribunal'. In that ruling the PTC had stated:

> In reaching its conclusion, the Pre-Trial Chamber also refers to the decision of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Taylor*, where it considered the indicia of an international court included the facts that the court is established by treaty, that it was "an expression of the will of the international community", that it is considered "part of the machinery of international justice" and that its jurisdiction involves trying the most serious international crimes.[84]

In its 20 May 2010 decision, the PTC overruled the OCIJ on this point by noting that it is 'immaterial whether the ECCC is a domestic or an international court because this does not impact on a finding that JCE is applicable, due to the clear terms of Articles 1 and 2 of the Establishment Law'.[85] According to the PTC, it follows from Article 2 that the ECCC has jurisdiction to apply forms of liability recognized under customary international law during the Khmer Rouge regime.[86] The PTC then stated:

> For the same reason, even if the OCIJ finding on an autonomous legal regime was in error, it would be superfluous and would not invalidate the finding on the applicability of the JCE before the ECCC.[87]

Although perhaps not in unequivocal terms, the PTC thereby seems to confirm that the ECCC belongs to the national legal system of Cambodia. However, in a subsequent ruling, the PTC has stated:

> The extraordinary and specific nature of the ECCC as an internationalised court established by mutual agreement between the United Nations and the Cambodian authorities directs the Pre-Trial Chamber to examine the standard for the principle of legality

81 ECCC, Public Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), 20 May 2010. Hereinafter '20 May 2010 Decision'.
82 ECCC, Decision on the Applicability of Joint Criminal Enterprise, Case No. 002/19–09–2007-ECCC/TC, 12 September 2011. Hereinafter '12 September 2011 Decision'.
83 8 December 2009 Order, para. 21.
84 ECCC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, para. 20.
85 20 May 2010 Decision, para. 47.
86 Ibid., para. 48.
87 Ibid.

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to be applied before it by looking explicitly at its establishing instruments, the ECCC Law and Agreement.[88]

From the point of view of international law the result is unproblematic since the standard set by Article 15 of the ICCPR does not depend on the nature of the criminal tribunal.[89] But the question remains whether it would have been relevant – from the perspective of domestic law – to consider in more detail if retroactive incorporation of JCE as a form of liability under customary international law was in compliance with Cambodian constitutional law.[90] This is of course strictly an issue of domestic Cambodian law, which will not be explored further in the present context. The point to be made here is only that a lack of a clear distinction between international and domestic criminal courts is not just a formal matter. In particular, the terminological confusion pertaining to so-called hybrid or internationalized tribunals raises material legal questions that call for answers.

## 7. Conclusion

Even though it is inherently elusive and finds little support in early international criminal case law, including the judgment of the IMT, Woetzel's definition revolving around 'the approval of the international community' is still relied on in current scholarship. Of course, the lack of academic writings on the matter since 1962 can scarcely be taken as evidence of universal consensus. It is more likely that scholars have simply devoted their efforts to other – seemingly less formal – aspects of international criminal law. Nevertheless, this article has aimed to show why we need a clear-cut distinction between 'international' and 'domestic' courts, and why it should turn exclusively on the legal character of the document from which the court draws its authority rather than 'the involvement of the international community'.

As the discussion of Charles Taylor case before the SCSL illustrates, the 'involvement of the international community' cannot in itself have the effect of granting criminal jurisdiction over – or lifting the possible immunity of – potential defendants. That is unless 'involvement of the international community' is strictly defined as the Security Council acting under Chapter VII of the UN Charter or a new customary rule modifying the existing norms on jurisdiction and immunity. But that was evidently not implied.

88 ECCC, Public Decision on Ieng Sary's Appeal Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), 11 April 2011, para. 222. Hereinafter '11 April 2011 Decision'.

89 See, e.g., Spiga, 'Non-retroactivity of Criminal Law', (2011) 9 *Journal of International Criminal Justice*, at 5–23, and M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005), 360.

90 A parallel objection can be made to the ECCC's findings on the application of the *ne bis in idem* principle: 'The Pre-Trial Chamber finds that no international *ne bis in idem* protection exists under the ICCPR. Taking into account its finding below that the ECCC is an internationalised court functioning separately from the Cambodian court structure, the Pre-Trial Chamber finds that the "internal *ne bis in idem* principle" as enshrined in Article 14(7) of the ICCPR does not apply to the proceedings before the ECCC. In these circumstances, the Pre-Trial Chamber will seek guidance in the procedural rules established at the international level to determine if Ieng Sary's previous conviction by a national Cambodian court shall prevent the ECCC from exercising jurisdiction against him for the offences charged in the Closing Order.' 11 April 2011 Decision, para. 131. See also Williams, *supra* note 3, at 385–7.

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Likewise, rulings from the ECCC show that the question of the legal nature of a tribunal is of material importance pertaining to inter alia the principle of legality. While applying the test following from Article 15 of the ICCPR to all kinds of criminal tribunals is unproblematic from the perspective of international law, a different (domestic) test might be of importance to tribunals deriving their authority from domestic law.

Sarah Williams has recently advocated that we place criminal courts on a sliding scale according to the involvement of the international community. She acknowledges, however, that this exercise does not help to resolve the legal issues that such courts face. In accordance with the above analysis of the practice of the SCSL and the ECCC, Williams concludes that questions concerning the applicability of the rules on immunities and the principle of legality require 'a proper analysis of the legal and jurisdictional basis and the constituent instruments of the particular tribunal'.[91] Against this background, it seems reasonable to inquire about the added value of categorizing criminal courts according to the degree of involvement of the international community. If anything, the above-mentioned examples indicate that this criterion in fact confuses the analysis that Williams calls for.

Instead, it is submitted that the distinction between national and international criminal courts should revolve solely around the nature of the founding document: A court set up under international law is international, whereas a court set up under domestic law is domestic. The labels 'internationalized', 'hybrid', or 'mixed' courts have no independent meaning and should be abandoned. This definitional distinction between 'international' and 'domestic' criminal courts would not only emphasize the decisiveness of each court's founding document relating to e.g. jurisdiction and applicable law. It would also be a consistent reflection of the overall relationship between the international legal system and national legal system(s) by underlining that the norms of the one legal system ultimately decide the effect given to the norms of the other.

91 Williams, *supra* note 3, at 252.

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