Leiden Journal of International Law, 18 (2005), pp. 425–466
 Printed in the United Kingdom doi:10.1017/S0922156505002827

The Geometry of Transitional Justice: Choices of Institutional Design

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Abstract

Recent years have seen a proliferation of forms of transitional justice, ranging from pure truth and reconciliation formulas to various integrated approaches, combining international or internationalized trials with alternative forms of justice. Many of these phenomena have been examined in individual case studies. However, few attempts have been made to put the various pieces of the puzzle together and to analyze the merits and pitfalls of different institutional choices of transitional justice. This essay seeks to fill this shortcoming. It looks at different institutional designs of transitional justice from a comparative and impact-based perspective. It tries to identify some of the contextual parameters which may contribute to the success or failure of specific formulas of institutional design. Moreover, this contribution seeks to establish that international and domestic models of justice are not contradictory, but interdependent forces in the process of sustainable peacemaking, in areas such as criminal trials, victim's protection and reparation. It argues that transitional justice requires pluralist and complementary approaches, combining parallel mechanisms at the domestic and the international level, in order to succeed in practice, especially after the coming into operation of the International Criminal Court.

Key words

Transitional justice; truth commissions; ad hoc tribunals; hybrid courts; internationalized court chambers; International Criminal Court

1. INTRODUCTION**

The search for appropriate institutional designs to deal with mass atrocities is still very much 'a work in progress'.[1] Experience has shown that there is no one-size-fits-all formula, but a need for individual and country-specific solutions. Nevertheless, a specific scenario of transition is rarely so unique that it falls completely out of the scope of solutions offered in different contexts. The domestic dialogue about transitional justice may be informed by a pool of common principles and lessons

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** Abbreviations: CPA: Coalition Provisional Authority; ICC: International Criminal Court; EU: European Union; NATO: North Atlantic Treaty Organization; ICTR: International Criminal Tribunal for Rwanda; ICTY: International Criminal Tribunal for the Former Yugoslavia; OSCE: Organization for Security and Cooperation in Europe: SCSL: Special Court for Sierra Leone; UNMIK: United Nations Interim Administration Mission in Kosovo; UNTAET: United Nations Transitional Administration in East Timor.

1. See N. J. Kritz, 'Progress and Humility: The Ongoing Search for Post-Conflict Justice', in M. C. Bassiouni, *Post-Conflict Justice* (2002), 55, at 87.

learned from the practice at the international level. Three guidelines may be drawn from international practice and, in particular, the engagement of the United Nations in peace-building efforts.

First, it is increasingly recognized in international practice today that justice and peace are not contradictory, but complementary, forces. The essential point was made very clear by the UN Secretary-General in his recent Report on the rule of law and transitional justice in conflict and post-conflict societies: 'The question . . . can never be whether to pursue justice and accountability, but rather when and how.'[2] This imperative is particularly important in the aftermath of internal armed conflict, where perpetrators and victims continue to operate in one single polity.

Secondly, there is a need for comprehensive approaches. Justice, peace and security are interrelated. Post-conflict justice requires an integrated approach which balances a number of interdependent, but sometimes conflicting factors, such as the preservation of peace and security, individual criminal accountability for human rights violations, reconciliation through truth-seeking and reparation for victims and longer-term strategies for domestic institutional reform in the field of the rule of law and democratic governance.[3]

Thirdly, there is a growing recognition that amnesties and pardons concerning some categories of crime will not be respected by foreign states or international institutions[4] regardless of the specific context in which they have been committed. These crimes include, at least, genocide, crimes against humanity and grave breaches of the Four Geneva Conventions.[5] The emerging principle is clear. States may feel inclined to enact amnesties and pardons for genocide, crimes against humanity and war crimes under their own domestic law. But there is no guarantee that these clauses will be respected by international treaty bodies or foreign states which get custody over perpetrators of these crimes.[6]

These three structural principles are gaining increasing recognition at the international level. They may serve as a guide of reference for the design of future frameworks of transitional justice. The trends and experiences of international practice may be translated into four more concrete propositions.

First, there is no blueprint for transitional justice. The choice and design of each formula must be adjusted to the particular needs of each individual case, taking into account factors such as the nature of the underlying conflict, the commitment

2. See Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 3 August 2004, UN Doc S/2004/616, para. 21.
3. See also ibid., at para. 25.
4. In 1999, the Secretary-General appended a disclaimer to the blanket amnesty clause ('absolute and free pardon') contained in the *Lomé* Peace Agreement, stating that the amnesty 'shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'. See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, para. 23. In 2004, the UN Secretary-General even went a step further, by recommending a general non-recognition policy by the UN. See Report of the Secretary-General, *supra* note 2, para. 64.
5. See in favour of a full-fledged ban of the permissibility of amnesties for core crimes, M. T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', (2001) 23 *Human Rights Quarterly* 940, at 956.
6. See also A. Cassese, *International Criminal Law* (2003), at 315.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

of parties to the peace process, the need and degree of protection for particular groups (minorities, displaced persons, abducted children), the potential for public and victim consultation, and the condition of the country's legal and political system, in general (part 2).

Second, experiments in transitional justice over the last decade suggest that various degrees of the internationalization of judicial and non-judicial proceedings may help fill capacity gaps and legitimacy gaps in the restoration of justice in post-conflict settings (part 3).

Third, it is becoming evident that it is necessary to think about transitional justice as a multi-layered framework. There is, in particular, widespread recognition that criminal trials and truth commissions or alternative mechanisms of justice are not mutually exclusive, but may positively complement each other (part 4).

Finally, it is necessary to perceive the International Criminal Court (ICC) as an additional actor in the multi-faceted landscape of transitional justice which may play a constructive role in peace processes and post-conflict situations.[7] The ICC offers significant opportunities for a peace process, even in a stage of transition from conflict to peace. Moreover, the framework of the Statute is generally supportive of a multi-layered accountability structure, involving domestic and international(ized) forums of justice working side by side[8] (part 5).

The growing proliferation of domestic and international institutions in the field of international criminal justice is symptomatic of the move towards institutionalism in international law more generally.[9] It points towards the emergence of a multi-faceted system of post-conflict justice, which seeks to overcome the challenges of transition to peace through the functional interaction of a network of complementary and mutually intertwined entities acting at the domestic and international levels.[10] This 'multilateralist approach' to transitional justice may be of assistance to a society in transition, provided that both the timing of involvement and the distinct mandates of the different players are sufficiently well defined in advance and co-ordinated in practice.

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7. Recent events related to the first two situations of the Court (the Democratic Republic of Congo and Uganda) suggest that this is not yet fully the case. There is some uncertainty, as to whether the Court may be instrumental in bringing peace in a conflict environment and how it might interact with other actors in the process of transitional justice. See, in relation to Uganda, Refugee Law Project, *Position Paper on the announcement of formal investigations of the Lord's Resistance Army*, 28 July 2004, at www.refugeelawproject.org. See, in relation to the Democratic Republic of Congo, O. Kambala, *Entre négligence et complaisance : les risques de dérapage de la Cour pénale internationale en RDC*, Le Phare (Kinshasha), 28 October 2004, at http://fr.allafrica.com/stories/200410290050.html.
8. For a discussion, see M. Benzing and M. Bergsmo, 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in C. P. R. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals* (2004), 407.
9. See e.g., D. Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841–988; J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', (1998) 271 *Recueil des cours* 101; B. Kingsbury, 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?', (1999) 31 *N. Y. U. Journal of International Law and Politics* 679.
10. For an in-depth development of this argument from the perspective of 'liberal peace' theory, see generally W. W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', (2002) 14 *Michigan Journal of International Law* 1.

2. Models of institutional design – the case for diversity

Transitional justice requires a plurality of approaches. Different symptoms require distinct treatments. Similarly, different scenarios of transition need individual institutional designs. Solutions applied in one country will not necessarily work in a different country.

The choices depend on a variety of factors, including the nature of the conflict, the political environment in the country, the capacity of the domestic judiciary, the security situation and the involvement of international actors. The factors influence the design of both judicial and quasi- or non-judicial mechanisms of justice.

2.1. The case for diversity: 1 Contextual parameters of truth and reconciliation commissions

The close interdependence between the institutional choice and the political context of the situation is apparent in the context of the design of truth commissions. Truth commissions are traditionally temporary bodies, set up by an official authority to investigate a pattern of gross human rights violations committed over a period of time in the past, the record of which is identified in a public report and/or recommendations for justice and reconciliation.[11] But there was an increase in the number of different models in the 1980s and 1990s, with a variety of institutional designs emerging. Truth commissions have taken on very different forms and characteristics in terms of their mandate (selective v. comprehensive enquiry), powers (quasi-judicial functions v. fact-finding), composition (international v. domestic), and functions (public reporting and recommendation v. reintegration of perpetrators into society). These choices are determined by specific contextual factors, which influence the overall design.

2.1.1. International v. domestic approaches

International practice has developed a variety of forms of truth commission. In some cases, truth commissions have shown significant traces of internationalization. The Commission on the Truth in El Salvador was established on the basis of a UN-sponsored peace accord and composed of three international members.[12] The Historical Clarification Commission in Guatemala was created on the basis of a UN-brokered peace deal and was internationalized in the sense that one of its three members was appointed by the Secretary-General.[13] The Lomé Agreement provided for the creation of the Sierra Leonean Truth Commission – an institution composed of four domestic and three international members.[14] Finally, the Commission for

11. See generally P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001); P. B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', (1994) 16 *Human Rights Quarterly* 600.
12. See generally on the work of the Commission, T. Buergenthal, 'The United Nations Truth Commission for El Salvador', (1994) 27 *Vanderbilt Journal of Transnational Law* 497.
13. See generally P. Seils, 'The Limits of Truth Commissions in the Search of Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and their Effect in Achieving Post-Conflict Justice', in M. C. Bassiouni, *supra* note 1, at 785.
14. See Art. VI of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement), which provides for the establishment of a 'Commission for the

Truth and Reconciliation in East Timor was directly created by a Regulation of the United Nations Transitional Administration in East Timor.[15]

These international approaches contrast with classical domestic models, such as the National Commission on the Forced Disappearance of Persons in Argentina ('Sabato Commission'), the National Commission on Truth and Reconciliation in Chile ('Rettig Commission') or the Truth and Reconciliation Commission in South Africa ('Tutu Commission'), all named after their main promoters/organizers.

There is common agreement that both types of commission may make a positive difference for a process of transition by providing a historical account of facts, some degree of justice for individual victims and a general form of accountability. The question which model is best equipped to address the problems of a specific society in transition is directly linked to a number of socio-political factors related to the nature of the conflict and the condition of domestic society.

Experience shows that domestic approaches may produce beneficial results in situations in which there is a clear break between the old and the new regime and where both the new government and the local judiciary enjoy the trust of the population.[16] These conditions roughly characterized the transitions, in Argentina and South Africa, where governments linked to the commitment of atrocities were largely ousted from power and where the domestic judiciary continued to be regarded as independent and capable of enforcing a new accountability policy. Both factors help to explain the choice of a domestic forum in these cases.[17]

At the same time, international approaches ('commissions established by or under the auspices of the UN or other multilateral organizations') or internationalized approaches ('mixed national–international Commissions') appear to be better suited to address scenarios of transition in which ethnic conflicts or group-oriented oppression continue to divide a society, where there is no clear break in regime and where the justice system lacks capacity, legitimacy or independence. Purely domestic approaches are not practical in such circumstances. International assistance is crucial in cases in which domestic legal institutions are inoperative after conflict, such as in the case of East Timor. Moreover, a country may not be able to ensure independent and effective reconciliation, if substantial parts of the old regime remain in power and remain opposed to an origin-neutral investigation of human rights abuses, because they were involved in the commission or sponsoring of atrocities.

Consolidation of Peace'. The Commission was inaugurated on 5 July 2002. The mandate of the Commission is laid down in the Truth and Reconciliation Commission Act. See Part III of the Truth and Reconciliation Commission Act 2000, at http://www.sierra-leone.org/trcact2000.html.

15. See UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor of 13 July 2001. See generally C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', (2001) 95 AJIL 952.
16. See E. B. Ludwin, 'Trials and Truth Commissions in Argentina and El Salvador', in E. Stromseth (ed.), *Accountability for Atrocities: National and International Responses* (2003), 273, at 307 and 317.
17. The effect on impunity has been 'mixed' in both cases. For an assessment of the South African case, see B. N. Schiff, 'Do Truth Commissions Promote Accountability or Impunity?, The Case of the South African Truth and Reconciliation Commission', in Bassiouni, *supra* note 1, at 341–2. For the Argentinean case, see Ludwin, *supra* note 16, at 296–8.

Such circumstances characterized the situations in El Salvador and Guatemala, which both experienced a full-blown civil war, after which the governments linked to human rights violations continued to be part of power-sharing arrangements, while society itself remained polarized and divided.[18] Both commissions encountered obstacles in their work, and in the implementation of their findings. Nevertheless, the fact that the members of the commissions were distanced from the events of the conflict, and institutionally independent due to their appointment by neutral institutions, presented an asset in the sense that it relieved both institutions at least partly from the suspicion of political dependence or bias.

The experiences in the cases of El Salvador, Guatemala, Sierra Leone and East Timor indicate that internationalized solutions are most likely to be established in cases in which the UN or other international actors have been actively involved in the peace process. In particular, mixed institutions, composed of local and international members, appear to enjoy some attraction for future scenarios,[19] because they combine the virtues of impartiality and legitimacy with a sense of local ownership and domestic engagement.[20]

2.1.2. Selective v. general enquiry

The shaping of the mandate of a truth commission depends on a number of factors, including the scope of actors involved in the negotiation of the framework of the commission, the degree of political control held by armed opposition forces, the nature of the conflict and the focus of crimes. Several approaches have been used in practice.

In some cases, it may be advisable to grant a truth commission a broad investigative mandate, covering many types of violation committed over a longer period of time. Such an approach is necessary in cases where several competing groups were involved in armed hostilities. Moreover, a broad mandate may enhance the independence and credibility of truth and reconciliation proceedings, because it enables a commission to look at abuses from all sides to the conflict and to independently assess the importance of specific historical events within the broader context of a long-term conflict. Such a model was, inter alia, adopted in the case of South Africa, where the underlying conflict entailed a broad range of violations, including killings, torture, threats, racist attacks, demolition and gross discrimination.[21]

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18. See Report of the Commission for Historical Clarification, *Memory of Silence* (1999), Conclusion and Recommendations. See also R. Mattarollo,'Truth Commissions', in Bassiouni, *supra* note 1, 295, at 309.
19. For a suggested application to the Colombian case, see Ludwin, *supra* note 16, at 314–15 ('A hybrid approach to accountability that draws on international assistance would enable Colombia to begin a process of accountability and reconciliation while modifying the structure of the country. In addition, international, 'objective' assistance would lend legitimacy to the transition and to whatever means Colombia uses to hold people accountable for the human rights violations committed during its war').
20. It is quite telling that no fully international truth commission has been established since the experience in El Salvador. See also N. J. Kritz, 'Dealing with Legacy of Past Abuses: An Overview of the Options and Their Relationship to the Promotion of Peace', in M. Bleeker and J. Sisson (eds.), *Dealing with the Past* (2004), 15, at 24.
21. Broader mandates have been given to the truth commissions in El Salvador and Guatemala. The truth commission in El Salvador was charged with 'investigating serious acts of violence which took place from 1980 onwards and whose impact on society urgently demands that the public should know the truth'. The Historical Clarification Commission in Guatemala was authorized to identify 'acts of violence that have caused the Guatemalan population to suffer, connected to the armed conflict'.

In other cases, the mandate of truth commissions has been expressly limited to the investigation of specific types of abuse. One example is the Chilean Truth Commission, which conducted an in-depth investigation of disappearances after arrest, extrajudicial executions and torture resulting in death committed by state agents or persons in the service of the state, without looking into other violations.[22] Another example is Argentina's National Commission on the Forced Disappearance of Persons, which dealt with disappearances committed by security forces from 1976 to 1983.[23]

A limited mandate may be adequate in cases in which the violations committed in the conflict concern a well-defined and specific group of victims. But it reaches its limits in situations where a vast array of atrocities has been committed by both sides of the conflict. Moreover, selectivity becomes ambiguous where the mandate leaves out substantial segments of atrocities. This has occurred in Chile, where the limitation of the mandate to violations resulting in death excluded the investigation of numerous instances of torture and arbitrary detention.[24]

The terms of the mandate are also significantly shaped by factual parameters such as resources and time. Investigations may be focused on the most serious violations and perpetrators. This was done in El Salvador, where the commission addressed only a total of 32 cases in detail. Such an in-depth investigation of a limited number of cases may make sense in circumstances where it is generally difficult to obtain a record of people's identity (rural societies),[25] or where the fact-finding time period of the commission itself is limited.[26]

2.1.3. Quasi-judicial enquiry v. fact-finding

Both the security situation in the country and the status quo of domestic institutions have direct implication for the modus operandi of a truth commission. Truth commissions may be vested either with a collectivity-oriented mandate aimed at the uncovering of historical truth,[27] or with a more 'juridical' mandate[28] which places

22. Other country examples which applied targeted proceedings are the truth commissions in Bolivia and Uruguay.
23. Note, however, that Argentina later took additional steps to combat immunity. In its report of 10 December 2004, the Committee against Torture welcomed 'with satisfaction the efforts made by the state party to combat impunity in respect of crimes against humanity committed under the military dictatorship, and in particular: (a) The promulgation of Act No. 25.779 in September 2003, declaring the "Due Obedience" and 'Clean Slate' Acts absolutely null and void; (b) The initiation of a significant number of cases in which such violations are being investigated; (c) The repeal in 2003 of executive decree No. 1581/01, which required the automatic rejection of requests for extradition in cases involving serious and flagrant violations of human rights under the military dictatorship'. See Conclusions and Recommendations of the Committee against Torture, Argentina, UN Doc. CAT/C/CR/33/1 (2004), 10 December 2004.
24. See also the criticism by Mattarollo, *supra* note 18, at 313.
25. Ibid., at 305.
26. The fact finding period of the Truth Commission in El Salvador was limited to three months. See Seils, *supra* note 13, at 780.
27. A classical example is the Commission for the Elucidation of the Past in Guatemala. The Commission could not name perpetrators of violations, nor was it entitled to make binding recommendations for justice reform and reconciliation.
28. See generally, in favour of investigative commissions for purposes of efficiency, Principle 13 B of the Guiding Principles for Combating Impunity for International Crimes, in Bassiouni, *supra* note 1, at 255, 270 ('To be effective, an investigative commission requires, at minimum, the powers: (1) to gather, by appropriate means, including by subpoena power, and consistent with international standards of due process, any information

greater emphasis on the individualization of specific perpetrators and/or the link to criminal adjudication. The question whether one or the other option is feasible in a scenario of transition depends on the situational context.

2.1.3.1. Security. The general security environment may shape the nature of the proceedings before the commission. Quasi-judicial mechanisms require a partly stabilized environment. The identification of individual perpetrations through quasi-judicial proceedings makes it necessary to ensure a high degree of transparency and openness in the proceedings. Hearings may have to be held in public. Moreover, the perpetrator must be given an opportunity to respond to the allegations or to call and question witnesses, in particular in cases in which the procedure before the commission reveals the names of perpetrators.[29] These requirements of fairness and publicity can only be guaranteed in an environment which allows free movement of persons and which poses low risks to the safety of witnesses and security of the commission itself.[30]

This has led to fairly different approaches in practice. The South African Truth Commission was able to apply quasi-judicial procedures with public hearings and testimony from over 2,000 witnesses because the political environment in the country allowed people to speak without direct fear of public retribution.

In other cases, the security situation forced truth commissions to rely on non-public proceedings. The Truth Commission in El Salvador, for example, had to operate largely confidentially, due to security concerns. The Argentinean Commission on the Forced Disappearances dealt with the problem of fear of persecution by receiving testimony from victims living outside Argentina. Similar safeguards may have to be introduced in situations where victims testifying before a commission are exposed to the threat of retribution by former combatants. Some protection may, in such cases, be guaranteed by protective measures, such as the holding of hearings *in camera*, the use of pre-recorded testimonies in proceedings or the introduction of pseudonyms to protect the identity of persons.[31]

2.1.3.2. Institutional capacity. The procedural features of a truth commission are also linked to operational capacities of the domestic judiciary more generally. Truth commissions investigate incidents that may constitute criminal offences. The question as to whether testimony received by the commission is merely used for an enquiry into the facts and the establishment of a historical record, or as a possible

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or evidence it considers relevant to its mandate; (2) to interview any individuals, groups, or members of organizations or institutions who may possess information relevant to its inquiry; (3) to hear testimony of victims, witnesses, and other relevant parties; and (4) to employ measures for the protection of victims and witnesses').

29. See Principle 13 E of the Guiding Principles for Combating Impunity for International Crimes, in Bassiouni, *supra* note 1, at 271 ('Where appropriate, any individual who, in the opinion of the investigative commission, is likely to be adversely affected by the evidence given before the commission should receive an opportunity to be heard in person, by a written submission, or through a representative, and to confront or rebut evidence offered against the individual').
30. See also J. S. Abrams and P. Hayner, 'Documenting, Acknowledging and Publicizing the Truth', in Bassiouni, *supra* note 1, at 288.
31. For a survey of protective measures in judicial proceedings, see Rules 87 and 88 of the Rules of Procedure and Evidence of the ICC.

basis for future prosecutions, depends on a variety of factors, such as the general will of a society to engage in the pursuit of accountability, the types of crime examined by a commission and its interplay with other institutions.

One of the lessons learned from past practice is that a prosecution-based vision of truth commission proceedings can only operate in practical terms if the country concerned enjoys a judicial structure which is able to carry out proceedings.

This point was made very clear by the experience of the Truth Commission in El Salvador. The evidence gathered by the Commission, together with the names derived from testimonies,[32] could have provided a starting point for prosecutions. But the Commission was reluctant to recommend prosecutions. It acknowledged the merits of punishment in general, but denied its feasibility in the light of the situation in El Salvador. The Commission noted in its report:

> El Salvador has no system of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably. This is part of the country's current reality . . . .[33]

The decision of the Commission not to encourage prosecutions was thus, in part, influenced by the lack of domestic judicial capacity.

A similar lesson may be drawn from the South African example.[34] The South African model is famous for its novel approach in the definition of the relationship between truth commissions and criminal institutions. The Commission opened new horizons for alternative forms of accountability by gaining the power to grant individuals amnesty for politically motivated offences upon full disclosure of the crimes.[35] But it tends to be overlooked that this new formula cannot work in every environment. The model of conditional amnesties granted upon completion of a truth and reconciliation procedure can only work effectively if there is a domestic system which may be used to prosecute perpetrators who do not apply for amnesties or who do not qualify for amnesties.[36]

Statistics show that only 10% of the 7,000 persons who applied for amnesties in South Africa were relieved from criminal sanction. A considerable number of applications for amnesties failed, either because applicants did not make full disclosure,

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32. The Report of the Commission contained the names of victims in Tome II of its Annexes.
33. The Commission also highlighted the general conflict between truth and justice in its Report. It noted: '[A] judicial debate in the current context, far from satisfying a legitimate desire for justice, could revive old frustrations, thereby impeding the achievement of that cardinal objective, reconciliation. That being the current situation, it is clear for now, the only judicial system which the Commission could trust to administer justice in a full and timely manner would be one which had been restructured in the light of the peace agreements.' See Report of the Commission on the Truth for El Salvador, *From Madness to Hope: the 12-year war in El Salvador*, sub V. (Recommendations), F (Penalties), at http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html.
34. See generally J. Dugard,'Reconciliation and Justice: The South African Experience', (1998) 8 *Transnational Law and Contemporary Problems* 277; P. van Zyl, 'Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa', in Bassiouni, *supra* note 1, at 745.
35. According to s. 21 of the Promotion of National Unity and Reconciliation Act of 1995, amnesty was allowed for acts with a political objective, but only upon a 'full disclosure of all the relevant facts' relating to their acts. The amnesty was validated by the South African Constitutional Court in *Azanian Peoples Organization v. President of Republic of South Africa*, 1996 (8) BCLR 1015 (CC), 1996 SACLR LEXIS 20. For a survey of the practice, see T. Puurunen, 'The Committee on Amnesty of the South African Truth and Reconciliation Commission – A New Model for Conflict Resolution?', (1998) 9 *Finnish Yearbook of International Law* 297.
36. See also Abrams and Hayner, *supra* note 30, at 287.

or because their acts did not qualify as political crimes.[37] The TRC stressed in its Final Report that these cases should be prosecuted. It noted:

> Where an amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals . . . . In order to avoid a culture of impunity and to entrench the rule of law, the granting of a general amnesty should be resisted.[38]

This statement illustrates that a replication of the South African model supposes the prospect of a functioning domestic judiciary.

2.1.4. Enquiry v. reintegration

Finally, it is important to note that the character of a conflict shapes the overall rationale of a truth commission. In some cases, the main challenge of transitional justice is to transform a culture of impunity into a culture of accountability. This may be achieved through traditional forms of truth commission which are centred on the public identification of abuses and the initiation of institutional policies to foster accountability.[39] This type of commission is particularly valuable in circumstances where there has been a recent change in government and where the context of the violations or the circle of perpetrators remains disputed in a society.

An additional challenge arises, however, where atrocities have a religious, racial or ethnic component, where different layers of a society have been involved in an armed conflict, and where this conflict has triggered displacements and distanced perpetrators from their own local community. In these cases, more is needed than the establishment of a culture of accountability and deterrence, such as in the context of the transitions in Argentina, Chile and El Salvador. Truth commissions may have to take on an additional role in reintegrating individuals into their local environment, in order to prevent underlying social grievances from being passed on from one generation to another.[40] Such a reintegrative function was assigned to *gacaca* panels in the context of Rwanda.[41] But it has also found its way into the design of truth commissions.

Both the case of Sierra Leone and the example of the East Timorese Truth Commission indicate that truth commissions may potentially take an active role in peace-building through the involvement of community-based structures.

The Sierra Leone Truth and Reconciliation Act of 2000 merges quasi-judicial truth commission proceedings with traces of traditional justice. Section 7(2) of the Act provides that the Truth and Reconciliation Commission of Sierra Leone 'may seek assistance from traditional and religious leaders to facilitate its public sessions and

37. See van Zyl, *supra* note 34, at 753.
38. See Truth and Reconciliation Commission of South Africa Report (1998), Vol. 2, at 309.
39. The truth commissions in Argentina and Chile provided a report and recommendations. See generally on the Chilean example, M. Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment', (1994) 16 *Human Rights Quarterly* 656.
40. See also Kritz, *supra* note 20, at 24.
41. For a survey, see Kritz, *supra* note 1, at 77–9.

in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation'.[42]

This approach has been developed by the Truth Commission in East Timor. The reconciliation mechanism was expressly designed to encourage perpetrators to return to their original communities and to assume responsibility for criminal acts that might otherwise go unpunished. The perpetrator must specify the community in which he or she wishes to undertake an individual process of reconciliation and reintegration.[43] The procedure is subsequently conducted by a panel composed of the regional commissioner and community representatives, which may grant immunity for low-level crimes on the condition of the performance of a visible act of remorse serving the interests of the people affected by the original offence, such as community service, reparation, a public apology, and/or other acts of contrition.[44] The strong focus on the participation of representatives of the local communities and the performance of a community-based act of reconciliation is designed to soothe emotions at the local level and ensure the quick reintegration of deponents in their previous environment.

Such approaches may, in particular, be useful in order to reintegrate perpetrators into their own domestic society who are at the same time victims of the conflict, such as abducted child soldiers. But they may also have considerable downsides. Mechanisms of restorative justice may replicate existing structural inequities and power relations at the expense of victims. For example, a woman victimized in conflict may have to seek justice within traditional patriarchal structures that often reflect gender bias. Moreover, traditional forms of justice may fall short of granting alleged perpetrators rights, which are generally perceived as minimum guarantees of procedural fairness.[45]

2.2. The case for diversity: 2 Contextual parameters of the internationalization of judicial institutions

The argument that international practice offers a plurality of approaches in order to respond to different challenges of transition is also reflected in the context of judicial frameworks for post-conflict justice.

2.2.1. Institutional diversity

International practice has witnessed a strong move towards the crystallization of a multi-layered accountability structure for serious crimes over the last decade. This process is founded upon the recognition in international treaty law and practice that some crimes (genocide, crimes against humanity and war crimes) are so grave that they concern not only domestic societies but the international community

42. The Truth and Reconciliation Act does not envisage a formalized procedure of community-based reintegration. But the Truth Commission facilitated symbolic gestures of reconciliation in its practice. On several occasions, perpetrators asked their local communities for forgiveness in front of traditional leaders. See generally E. M. Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court', (2004) 104 *Columbia Law Review* 730, at 763.
43. See s. 23.1 of UNTAET Regulation No. 10/2001.
44. See s. 27.7 of UNTAET Regulation No. 10/2001.
45. See text *infra* at 4.2.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

as a whole.[46] Both the growing international consensus on the impermissibility of impunity for these categories of crime and the lessons learned about the inherent limitations of purely domestic and purely international justice have led to a proliferation of new forums of enforcement,[47] including various models of international(ized) justice in post-conflict situations.[48] At least four different models of institutional design may be distinguished: international tribunals, hybrid tribunals, internationalized domestic courts, and internationally assisted courts.

2.2.1.1. Fully international justice. Judicial frameworks for transitional justice may, first of all, be fully international.[49] The prime examples of this tradition are, of course, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), which were established by the UN Security Council at the beginning of the 1990s. Later, the phenomenon of fully internationalized judicial frameworks re-emerged in a different form within the context of UN transitional administration. In 1999 the UN Security Council charged the UN Interim Administration Mission in Kosovo (UNMIK) with administering powers over Kosovo,[50] which were interpreted by the latter so as to encompass exclusive authority over the judiciary in Kosovo.[51] UNMIK used its powers to appoint international judges and prosecutors in the territory who acted as the only functioning judicial institutions in the immediate aftermath of hostilities due to a capacity gap in the local judiciary.[52]

2.2.1.2. Hybrid courts. At the same time, the international community started to explore alternative solutions to ad hoc tribunals, which had become subject to increased criticism at the end of the 1990s partly due to their perceived distance from domestic communities, and due to their high costs.[53] Rather than creating Chapter VII-based tribunals, the UN supported the establishment of internationalized forums of justice, including mixed national–international courts operating as independent criminal institutions outside the traditional realm of domestic jurisdiction ('hybrid courts').[54]

46. See the Preamble of the Statute of the ICC.
47. See, generally, Romano, Nollkaemper and Kleffner, *supra* note 8; D. A. Mundis, 'New Mechanisms for the Enforcement of International Humanitarian Law', (2001) 95 AJIL 934, at 936.
48. For a tentative characterization of different models, see L. Condorelli and T. Boutrouche, 'Internationalized Criminal Courts and Tribunals: Are They Necessary?', in Romano, Nollkaemper and Kleffner, *supra* note 8, 428–30.
49. The regime of the ICC is addressed separately *infra*, in section 5.
50. See paras. 10–11 of Security Council Resolution 1244 (1999) of 10 June 1999.
51. See s. 1 of UNMIK Regulation No. 1/1999 of 25 July 1999.
52. For a survey, see H. Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', (2001) 95 AJIL 46.
53. For a recent criticism of the model of ad hoc tribunals, see R. Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 *Journal of International Criminal Justice* 541–5. For a more balanced assessment, see C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY', (2004) 2 *Journal of International Criminal Justice* 572.
54. Hybrid courts and internationalized domestic institutions are often conflated in legal doctrine. See e.g. L. A. Dickinson, 'The Relationship Between Hybrid Courts and International Courts: The case of Kosovo', (2003) 37 *New England Law Review* 1060. There are, however, a number of fundamental differences. First, hybrid courts, such as the Special Court for Sierra Leone, are not part of the domestic legal system. They operate formally outside the domestic judiciary. Secondly, they enjoy institutional independence which is reflected in the recognition of separate legal personality.

2.2.1.2.1. The Special Court for Sierra Leone. The clearest example of a hybrid court is the Special Court for Sierra Leone (SCSL), which was established on the basis of a UN-brokered agreement to try those who 'bear the greatest responsibility for the commission of crimes against humanity, war crimes and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone since November 30, 1996'.[55]

The design of the SCSL differs considerably from the structure of the ad hoc tribunals. The Court is not a subsidiary organ of the Security Council, but an independent treaty-based institution, composed of domestic and international judges, which was simply endorsed by the Security Council. The Court applies international and domestic law. At the same time, the Special Court enjoys autonomy vis-à-vis the domestic system. The Court is not subject to immunities applicable under domestic law.[56] International judges may outvote domestic judges. Moreover, the Court has concurrent jurisdiction with and primacy over the domestic courts of Sierra Leone.[57] This last feature is important, because it empowers the Court to require a national court to defer to its jurisdiction and to transfer suspects, witnesses or evidence where necessary.

2.2.1.2.2. The Kosovo War and Ethnic Crimes Court proposal. A similar model was proposed in the context of Kosovo. UNMIK envisaged the creation of a 'Kosovo War and Ethnic Crimes Court' to try crimes committed in the Kosovo conflict.[58] Like the SCSL, this court was conceived as a mixed and independent body, composed of domestic and international judges operating outside the local court system.[59] The project was, however, abandoned for a number of political reasons, including protests by the Kosovo Albanian community, which judged the domestic judiciary fit and competent to try these crimes fairly, and concerns about the feasibility of the creation of an additional jurisdictional body operating at the borderline of the domestic judiciary and the ICTY.[60]

2.2.1.3. Internationalized domestic courts. Instead, a third model garnered increasing support at the international level, first in Kosovo and then in East Timor and Cambodia, and mostly likely next in Bosnia and Herzegovina: the integration of mixed domestic–international courts into the structure of the domestic legal system. These mixed court chambers differ from hybrid courts due to the fact that they lack a separate international legal identity of their own, distinct from the legal personality

55. See Art. 1 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and Art. 1 of the Statute of the Special Court. For a survey, see generally A. D. Haines, 'Accountability in Sierra Leone: The Role of the Special Court', in Stromseth, *supra* note 16, at 173; J. L. Poole, 'Post-Conflict Justice in Sierra Leone', in Bassiouni, *supra* note 1, at 563.
56. See Art. 10 of the Statute of the Special Court for Sierra Leone.
57. See Art. 8 of the Statute of the Special Court for Sierra Leone.
58. See J. Cerone and C. Balwin, 'Explaining and Evaluating the UNMIK Court System', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 41, 48.
59. The Court would have enjoyed jurisdiction over crimes under international law and serious offences under domestic law. Ibid., at 49.
60. For a survey of the reasons, see Cerone and Balwin, *supra* note 58. For a discussion of UNMIK's 'Regulation 64 panels', which were created as an alternative, see text *infra* at 2.2.1.3.1.

of the domestic state.[61] They are internationalized domestic institutions, which have jurisdiction over special categories of crime. They apply both domestic and international law. Moreover, domestic judges may, under some circumstances, overrule international judges.

2.2.1.3.1. Kosovo – Appointment of judges to domestic courts. This solution was adopted in Kosovo, in order to address the tension between local ownership and the need for neutralization of the domestic judiciary. UNMIK created a two-track system. It provided for the general appointment of international judges to the regular courts within the applicable law under UNMIK Regulation 2000/6.[62] In addition, UNMIK created special internationalized panels ('Regulation 64 panels') in order to ensure that some of the most sensitive war crimes trials may be adjudicated in a neutral and independent environment and in accordance with international fair trial guarantees, under the scrutiny of a majority of international judges.[63] Regulation 64 panels have reviewed most of the war crimes trials against Kosovo Serbs since then, and have overturned a number of doubtful convictions by domestic courts.[64]

2.2.1.3.2. East Timor – Special Panels for Serious Crimes. A similar methodology was adopted by the United Nations Transitional Administration in East Timor. The International Commission of Inquiry on East Timor had recommended the establishment of an international criminal tribunal to try the atrocities committed in East Timor.[65] The Secretary-General, however, took a different view, arguing that priority be given to the domestic courts.[66] On 6 June 2000, UNTAET adopted

61. Art. 11 of the Agreement Between the United Nations and the Government of Sierra Leone grants the Court partial international legal personality ('Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court'). The organs of the Court are independent and not part of the judiciary of Sierra Leone. See Arts. 4, 8 and 12 of the Agreement Between the United Nations and the Government of Sierra Leone. The Court relied on its special legal nature as an international institution in its jurisprudence. See Special Court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004. Neither the UNTAET panels, nor the Extraordinary Chambers in the Courts of Cambodia, enjoy such an identifiable legal identity of their own, due to the fact that they are formally part of the domestic system. See e.g. Art. 2 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 of 6 June 2003 ('The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "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" . . . as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia').
62. UNMIK Regulation No. 2000/6 allowed the appointment of international judges and prosecutors to courts in the district of Mitrovica. UNMIK Regulation No. 2000/34 extended this regime to other courts, including the Supreme Court.
63. The role of international judges and prosecutors was regulated by UNMIK Regulation No. 2000/64, which provides as follows: 'At any stage in the criminal proceedings, the Department of Judicial Affairs, on the basis of [a petition from the competent prosecutor, the accused or the defence counsel] or on its own motion, may submit a recommendation to the Special Representative of the Secretary-General for the assignment of international judges/prosecutors and/or a change of venue if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice'.
64. For full details, see Cerone and Baldwin, *supra* note 58, at 51–2. See also J. C. Cady and N. Booth, 'Internationalized Courts in Kosovo: An UNMIK Perspective', in Romano, Nollkaemper and Kleffner, *supra* note 8, 59, at 64–5.
65. See Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59 (2000), at 153.
66. See Letter of 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, accompanying

Regulation 2000/15, creating the panels of judges with exclusive jurisdiction as partly internationalized institutions, acting within the local justice system under the authority of the District Court of Dili, East Timor's capital.[67]

The panels are composed of two international judges and one East Timorese judge.[68] They try international crimes, namely genocide, crimes against humanity, war crimes and torture,[69] as well as murder and sexual offences, as defined by the applicable Indonesian law, which have been committed in the immediate context of the vote on East Timorese independence, namely in the period between 1 January 1999 and 25 October 1999.[70]

2.2.1.3.3. Cambodia – Extraordinary Court Chambers for the prosecution of serious crimes. The third experiment in this tradition is the creation of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea.[71]

This mechanism was set up after more than two decades of impunity of Khmer Rouge leaders, mostly in response to the weaknesses of the Cambodian judicial system, and after numerous grants of amnesty to medium- and low-level perpetrators.[72] The original plan proposed by international experts here again was to create an ad hoc tribunal similar to the ICTY and the ICTR to 'try those persons most responsible for the most serious violations of international human rights' committed between 17April 1975 and 6 January 1979.[73] But the Cambodian government insisted on a domestic solution, taking the form of a joint international–domestic mechanism, in order to localize justice.[74]

In October 2004, the Cambodian National Assembly ratified the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period

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UN Doc. A/54/726, S/2000/59 (2000). See generally, on the prosecution of serious human rights violations by domestic courts, R. Wolfrum, 'The decentralized prosecution of international offences through national courts', in Y. Dinstein and M. Tabory (eds.), *War crimes in international law* (1996), 233 et seq.

67. See generally UNTAET Regulation No. 15/2000 of 6 June 2000 (*On the Establishment of Panels With Exclusive Jurisdiction over Serious Criminal Offences*). See also S. de Bertodano, 'East Timor: Trials and Tribulations', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 87.
68. See s. 22.1 of UNTAET Regulation 2000/15.
69. See ss. 4–7 of UNTAET Regulation 2000/15.
70. See s. 10.2 of UNTEAT Regulation 2000/11 and s. 2.3 of UNTEAT Regulation 2000/15: 'With regard to the serious criminal offences listed under s. 10.1 d) [murder] to e) [sexual offences] of UNTAET Regulation 2000/11 . . . the panels established within the District Court of Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January, 1999 and 25 October 1999.'
71. See 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 of 6 June 2003. For a discussion, see R. S. Taylor, 'Better Later Than Never: Cambodia's Joint Tribunal', in Stromseth, *supra* note 16, at 237.
72. See generally C. Etchetson, 'The Politics of Genocide Justice in Cambodia', in Romano, Nollkaemper and Kleffner, *supra* note 8, 181.
73. See the Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/125. See generally S. R. Ratner, 'United Nations Group of Experts for Cambodia', (1999) 93 AJIL 948.
74. See *Aide-mémoire on the Report of the United Nations Group of Experts for Cambodia* of 18 February 1999, issued by the Government of Cambodia, 12 March 1999 ('the culprit is a Cambodian national, the victims are Cambodians, the place of the commission of crimes is also in Cambodia; therefore the trial by a Cambodian Court is fully in conformity with the [norms of] legal process').

of Democratic Kampuchea,[75] which provides for the establishment of internationalized trial and Supreme Court chambers to try 'those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia' that were committed during the Khmer Rouge era from 1975 to 1979.[76] The Chambers are composed of a majority of Cambodian judges, who act in concert with international judges who are appointed by the Supreme Court of the Magistracy upon nomination by the Secretary-General.[77]

The Cambodian framework differs significantly in a number of respects from the Sierra Leonean model. Domestic law plays a greater role in the Cambodian context.[78] The four Cambodian judges may block convictions supported by all three international judges.[79] Last, but not least, the Extraordinary Chambers lack the type of separate legal identity which characterizes the Special Court for Sierra Leone as an international jurisdiction.

2.2.1.3.4. Special War Crimes Chamber in the State Court of Bosnia and Herzegovina. The proposal for a special War Crimes Chamber in the State Court of Bosnia and Herzegovina is the most recent project of internationalization of domestic courts. In June 2003, the Office of the High Representative in Bosnia and Herzegovina and ICTY representatives proposed the creation of a special chamber to try serious violations of international humanitarian law in the State Court of Bosnia and Herzegovina.[80] The chamber is supposed to form part of the domestic judiciary, namely the newly established State Court of Bosnia and Herzegovina. It shall be composed of international and domestic judges, who exercise jurisdiction over cases involving the commission of genocide, crimes against humanity and war crimes, including cases deferred to it by the ICTY as well as a limited number of cases initiated before local

75. 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 entered into force on 29 April 2005.
76. See Art. 1 of the Agreement of 6 June 2003.
77. See Art. 3 of the Agreement of 6 June 2003.
78. See Art. 3 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, Law NS/RKM/0801/12, adopted on 11 July 2001. The crimes under Cambodian law include homicide, torture and religious persecution.
79. See Arts. 17, 36 and 37 of the Law on the Establishment of Extraordinary Chambers. The UN wanted to avoid this situation. It had a strong preference for a majority of international judges acting under a simple majority regime. See Report of the Secretary-General of 31 March 2003, UN Doc. A/57/769, at 11 ('in view of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would have much preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges'. For a discussion, see E. E. Meijer, 'The Extraordinary Chambers in Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 218–19.
80. The Steering Board of the Peace Implementation Council endorsed the proposal in June 2003. The proposal was presented to the Security Council. See Security Council Briefed on Establishment of War Crimes Chamber Within State Court of Bosnia and Herzegovina, Press Release, SC/7888 of 8 October 2003. See generally, Amnesty International, *Bosnia-Herzegovina: Shelving Justice – War Crimes Prosecution in Paralysis* (Nov. 2003), AI Index: EUR 63/018/2003.

courts.[81] The purpose of the special chamber is a very specific one. It was essentially designed in order to respond to calls for local justice and to allow the ICTY to transfer cases concerning mid-level perpetrators to domestic courts as part of the tribunal's completion strategy.[82]

2.2.1.4. An internationally assisted court – the Iraqi Special Tribunal. Yet another approach was adopted in the case of Iraq. Both the influence of the US–British Coalition Provisional Authority (CPA) on the design of post-conflict justice in Iraq and concomitant pressure for local ownership in the post-Saddam era[83] led to the creation of an internationally assisted special tribunal. The status of this tribunal is unique. It derives its authority formally from a delegation of occupation authority by the Coalition Provisional Authority to the Iraqi Governing Council.[84] Domestic judges are formally in charge of the trials. But non-Iraqi nationals may act 'as observers to the Trial Chambers and to the Appeals Chambers', including the possibility of monitoring the 'protection by the Tribunal of general due process of law standards'.[85]

2.2.2. Factors guiding the choice

The repeated use of similar formulas of institutional design in different domestic contexts over the last decade suggests that the concept of the temporary internationalization of criminal justice is not a country-specific solution, but a model of transitional justice which lends itself to application in a variety of contexts. The choice of the specific design appears to be determined by a number of general parameters which shape the form of the framework in the individual context.

2.2.2.1. Domestic capacity. The first parameter is the criterion of domestic capacity. Experience shows that internationalized solutions are particularly important in two situations: where domestic authorities are unable to try perpetrators, and where domestic institutions are not sufficiently legitimate and independent to conduct trials and prosecutions.

The involvement of international actors in the administration of justice is crucial in the first scenario. Deficits in the domestic system may exist on several levels. The case for internationalization is particularly compelling in cases where a polity

81. The proposed War Crimes Chamber is supposed to have jurisdiction over three types of case: cases deferred to it by the ICTY under Rule 11 *bis* of the Rules of the Procedure and Evidence, cases deferred by the ICTY Prosecutor (for which indictments have not yet been issued) and cases pending before cantonal and district courts, which should be tried at the State Court level given their sensitivity. See Joint Conclusions of the Working Group of the ICTY and the OHR regarding domestic prosecution of war crimes in Bosnia and Herzegovina, 21 February 2003.

82. For a criticism, see Amnesty International, *supra* note 80, at 2 ('[T]he current proposal appears to be based on short-term planning aiming to effect the cheapest possible withdrawal of the international community and the acceleration of the exit strategy of the Tribunal . . . [T]he War Crimes Chamber may only have the resources and time available to prosecute a small number of the thousands of suspects, selected on the basis of vague and contradictory criteria').

83. Note that the Security Council stressed the importance of local ownership in para. 4 of the Preamble of SC Resolution 1483 (2003) of 22 May 2003.

84. See s. 1 of CPA Order No. 48 of 9 December 2003 ('The Governing Council is hereby authorized to establish an Iraqi Special Tribunal to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA . . . ').

85. See Art. 6(4) of the Statute of the Iraqi Special Tribunal.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

never had a fully independent and functioning justice system or where the physical infrastructure of the judiciary was destroyed by a conflict. A temporary externalization or internationalization of the judiciary may in these cases be the only option to restore justice swiftly.[86]

However, a capacity gap may also arise from gaps in the applicable law. A domestic legal system may be ill-equipped to take on the burden of post-conflict trials due to a lack of implementation of international crimes into domestic law. This problem has arisen in Sierra Leone, East Timor and Cambodia. In these cases, the creation of internationalized forums for serious crimes filled not only physical gaps, but partly also shortcomings and uncertainties about the applicable law.[87] In Sierra Leone, for instance, domestic courts were prevented from prosecuting international human rights violations due to the amnesty clause under Article 9 of the Lomé Agreement. The drafting of the Statute of the Special Court opened the door for prosecution and clarified many of the crimes which were less clearly circumscribed under domestic or customary law. In the cases of East Timor and Cambodia, the constitutive instruments of the internationalized court chambers closed normative gaps by defining the applicable law and the crimes subject to adjudication.

Finally, the examples of Cambodia and Sierra Leone show that international solutions merit particular attention where the domestic court system does not meet basic standards of independence and impartiality. Purely domestic justice is problematic under these circumstances because the verdicts delivered by local courts will not be perceived as legitimate within the post-conflict polity itself. One of the main reasons for the establishment of the Extraordinary Chambers was the dubious reputation of the Cambodian judiciary which is widely perceived as lacking impartiality and independence. A group of experts concluded in 1999 that Cambodia's court system falls short of international standards of criminal justice. The group noted that the domestic system is 'functionally deficient in most important areas', lacking 'a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for due process'.[88] Similar motives underlie the creation of the SCSL. Domestic courts in Sierra Leone were not sufficiently prepared to take on the challenge of war crimes trials, due to a lack of resources and infrastructure. Sources indicate that by June 2002, only 5 out of 14 magistrate courts were operational.[89] Even ex-combatants from both the rebel Revolutionary United Front (RUF) and Local Civil Defense Forces remained divided over the impartiality of domestic courts.[90] The establishment of the SCSL thus helped address a legitimacy gap.

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86. See also Condorelli and Boutrouche, *supra* note 48, at 431.
87. For a full discussion, see L. A. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 AJIL 295, at 307–8.
88. See Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/125. The UN General Assembly highlighted this point later in its Resolution 57/225, in which the Assembly noted 'with concern the continued problems related to the rule of law and the functioning of the judiciary [in Cambodia] resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary'. See UN GA Res. 57/225 of 26 February 2003.
89. See *Fourteenth Report of the Secretary-General on the UN Mission in Sierra Leone*, UN Doc. S/2002/679 of 19 June 2002, at 24.
90. See *Thirteenth Report of the Secretary-General on the UN Mission in Sierra Leone*, UN Doc. S/2002/267 of 14 March 2002, at 17.

2.2.2.2. Stage of transition. The second factor which influences the institutional choice of post-conflict justice is the stage of transition. International experience suggests that full internationalization of domestic judicial systems may be required in the immediate aftermath of conflicts in order to fill a rule-of-law vacuum, such as in the early phase of the UNMIK presence in Kosovo, where no domestic institutions existed.[91] An international judicial presence is essential from the very start of a peace-building mission, in order to carry out detentions and to provide for law and order. At this stage, importing international judges and prosecutors from outside may be a 'lesser evil' than a state of lawlessness in the immediate conflict phase. Moreover, the creation of an interim international judicial structure may be the necessary institutional corollary of the idea of an immediately applicable code of criminal procedure embraced by the Report of the Panel on UN Peace Operations.[92]

But it is also clear from the lessons learned in UN peace operations that fully international forms of justice do not provide long-term solutions within peace-building frameworks. Internationalized justice must ultimately serve to empower domestic capacity. This point was expressly made by the UN Secretary-General in the report on the rule of law and transitional justice in conflict and post-conflict societies,[93] which stressed that 'peace operations must better assist national stakeholders to develop their own reform vision, their own agenda, their own approaches to transitional justice and their own national plans and projects'.[94] International mechanisms of transitional justice are therefore only partial solutions. They only help 'build domestic justice capacities', but they cannot be 'substitutes for national structures'.[95]

2.2.2.3. Type of conflict. The choice of the model of transitional justice is necessarily shaped by the nature of the conflict. Hybrid and mixed national–international solutions tend to be particularly useful strategies in a context of ethnic violence and systematic oppression. Domestic institutions are vulnerable in these situations. They encounter legitimacy problems, because they have often been instrumentalized by one group or party to the conflict for the purpose of oppression of the other side.

This lesson may, in particular, be learned from the cases of Kosovo and East Timor. Both Kosovo Albanians and East Timorese have been systematically oppressed and excluded from local public institutions by their respective territorial ruler before the assumption of authority by the UN. The lack of experience and expertise of domestic actors made it necessary to internationalize the judiciary in the aftermath

91. See H. Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions on Kosovo and East Timor', (2001) 95 AJIL 46, at 62–3.
92. See Panel on UN Peace Operations, Report to the UN Secretary-General, 21 August 2000, UN Doc. A/55/305 – S/2000/809, at 55.
93. See *supra* note 2, para. 17 ('The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations. In doing so, we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards').
94. Ibid., para. 17.
95. Ibid., Summary.

of the conflict. But there was, at the same time, a strong need to integrate domestic players in the framework, in order to restore their confidence in judicial institutions. Otherwise, international authority would have been perceived as a prolonged form of authoritarian rule, carried out under the auspices of the international community. The creation of mixed national–international institutions was in this context the most rational solution to find a balance between the conflicting prerogatives of local ownership and need for internationalization.

Very similar considerations may explain the choice of an internationally assisted court in Iraq.[96] Following the general parameters set by the Security Council,[97] and due to pressure by local groups, the design was shaped by the desire to ensure a degree of international monitoring, without depriving the Iraqi people themselves of ownership over the proceedings.

2.2.2.4. Need for enforcement powers. Another factor which significantly impacts the design of mechanisms of transitional justice is the location of and access to suspects. One of the hard-learned lessons of international practice is that enforcement powers and strong co-operation regimes may be necessary prerequisites of mechanisms of transitional justice, where a conflict has inter-state implications.[98]

Except in the cases of the ad hoc tribunals, the co-operation regime of international(ized) mechanisms of justice (UNTAET Panels,[99] Special Court for Sierra Leone,[100] Cambodian Extraordinary Chambers[101]) is based on the premise that evidence, including witnesses and documents may be obtained in the territory where the crimes were committed or where the court performs its functions. This narrow focus creates problems in cases where the main perpetrators are located in third states beyond the reach of internationalized courts,[102] in particular in the light of growing slcepticism towards the possibility of trials *in absentia*.[103]

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96. For a discussion of the dichotomy between the choice of an international and a domestic solution in Iraq, see M. P. Scharf, 'Is it international enough? – A Critique of the Iraqi Special Tribunal in the Light of the Goals of International Justice', (2004) 2 *Journal of International Criminal Justice* 855.
97. The Security Council reaffirmed on several occasions the need to preserve local ownership in Iraq.
98. For a general discussion, see G. Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 379.
99. UNTAET panels could not rely on Chapter VII powers to seek co-operation from third states. Para. 7 of SC Resolution 1272 (1999) merely stressed the importance of co-operation between Indonesia, Portugal and UNTAET for purposes of the implementation of the resolution. Co-operation was regulated by a Memorandum of Understanding between UNTAET and Indonesia, which is based on the principle of reciprocity. See Memorandum of Understanding between the Republic of Indonesia and UNTAET Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Jakarta (5 April 2000).
100. Art. 17 of the Agreement between the UN and Sierra Leone regulates only the relationship between the Court and Sierra Leone. There is no express duty of third states to co-operate with the Court. But the Security Council called 'on all States, in particular the Government of Liberia to cooperate fully with the Court'. See the Preamble of SC Resolution 1478 (2003).
101. The Extraordinary Chambers cannot oblige other states than Cambodia to co-operate on the basis of the UN agreement. One might, however, raise the question whether the Extraordinary Chambers could force the Cambodian government to request assistance from third states on the basis of its own legal assistance agreements with other states. See Sluiter, *supra* note 98, at 403–4.
102. Ibid., at 405–6.
103. This possibility is expressly excluded by the legal framework governing the UNMIK courts in Kosovo and the Serious Crimes Panels in East Timor. See UNMIK Regulation No. 2001/1 (*On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law*) and s. 5 of UNTAET Regulation No. 2000/30 (*On the Transitional Rules of Criminal Procedure*).

Its design as a Chapter VII-based ad hoc tribunal with the power to make binding requests for co-operation was crucial to the functioning of the ICTY.[104] It allowed the tribunal to put pressure on domestic authorities in Bosnia and Herzegovina and Serbia and Montenegro to surrender suspects to The Hague, even against their will. The compliance pool was significantly enhanced by the fact that third states and international organizations conditioned aid and linked membership of organizations such as EU and NATO to enforcement of the legally binding orders of the Tribunal.[105]

The problems caused by a lack of enforcement powers became apparent in the case of East Timor. The Special Panels for Serious Crimes were set up by a Regulation of UNTAET as part of the domestic legal system of East Timor, without enforcement powers vis-à-vis Indonesia. Indonesia refused voluntary co-operation and withheld assistance to the Serious Crimes Panels. This meant that most Indonesian high-level perpetrators, including top-level army, police and militia commanders remained beyond the reach of the Panels. The Panels completed cases involving 88 accused in the five years of their existence. However, indictments against 281 individuals remain outstanding, because these perpetrators are outside East Timor and cannot be arrested.[106]

The lesson which may be drawn from the case of East Timor is that mixed national–international mechanisms of justice may foster accountability in an environment where the underlying conflict is largely internal in nature. But they are much less effective in situations in which the prime suspects are located in a different jurisdiction over which mixed courts have no effective control.[107]

Similar concerns apply to hybrid courts. They rely, in principle, on voluntary assistance and co-operation by states, which are not party to the agreement establishing the court.[108] This burden may complicate the accessibility of documents, the arrest or detention of persons located in third states and the transfer of indictees to the court. The experience of the Special Court for Sierra Leone suggests that the special international legal nature of hybrid courts may be instrumental in denying recognition to domestic amnesties,[109] and may facilitate the issuance of warrants of arrest against foreign-state officials.[110] Nevertheless, obtaining custody over

104. See Art. 29 of the ICTY Statute, which obliges states to co-operate with the tribunal. The duty to co-operate derives from Art. 24 of the UN Charter.
105. See generally J. R. W. D. Jones and S. Powles, *International Criminal Practice* (2003), at 836–7.
106. See S. de Bertodano, 'Current Developments in Internationalized Courts: East Timor – Justice Denied', (2004) 2 *Journal of International Criminal Justice* 910, at 911.
107. See N. Koumijian, *Accomplishments and limitations of one hybrid tribunal: Experience at East Timor*, Guest Lecture Series of the Office of the Prosecutor of the ICC, 14 October 2004.
108. Art. 17 of the Agreement Between the United Nations and the Government of Sierra Leone limits the obligation to comply with requests for assistance to the government of Sierra Leone. The same approach is reflected in Art. 25 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.
109. See Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. M. Kallon*, Decision of 13 March 2004, paras. 71–2.
110. The Special Court for Sierra Leone used this argument in order to establish that the immunity of heads of state under customary law does not apply vis-à-vis the Special Court in the light of the exception made by the International Court of Justice in para. 58 of the *Yerodia* case, according to which 'an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international courts'. See Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Charles G. Taylor*, Decision of 31 May 2004,

perpetrators located in third states remains a practical problem,[111] because the bilateral treaty arrangements creating hybrid courts do not create duties of co-operation for third parties.[112]

In both situations, the active involvement of the Security Council in the situation (e.g. through calls and requests for co-operation)[113] or requests for co-operation issued by the territorial state under its own legal assistance agreements may be the only options to enhance co-operation by third states.[114]

2.2.2.5. The need to supersede existing domestic amnesty structures. The choice of institutional design may also be affected by the content of domestic law, in particular the existence of domestic amnesty clauses. The creation of a separate internationalized jurisdiction in the form of a hybrid court may, in some cases, be the only option to exempt certain categories of perpetrator from the realm of impunity, without repudiating the underlying amnesty clause under domestic law. This rationale guided the design of the SCSL.[115] The decision to remove the jurisdiction of the Court from the domestic legal system was visibly shaped by the intention to exempt the Court from the scope of application of the amnesty under the Lomé Accord,[116] which was considered by many as an essential condition for peace, at least domestically.[117] The same reason may also explain why the UN pushed for the establishment of the Extraordinary Chambers in Cambodia on the basis of an international agreement, rather than by a national law, as originally envisaged.[118]

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paras. 42, 53. The Court came 'to the conclusion that the Special Court is an international criminal court' due to the fact that it is not part of the judiciary of Sierra Leone and not a national court. The result is convincing in the light of the rationale of state immunity. Classically, state immunity derives from the concept of sovereign equality of states, and it is designed to protect high state officials from undue political interference by third states. Such a fear is unfounded in relation to impartial international tribunals which are independent from any national jurisdiction and protected against interference by the host state in judicial proceedings through immunities.

111. It is symptomatic that by December 2004 all of the accused tried by the Special Court for Sierra Leone were captured on the territory of Sierra Leone. Moreover, by December 2004, the Special Court for Sierra Leone had not yet managed to get custody over at least two major suspects, namely former Liberian President Charles Taylor and former AFRC leader Johnny Paul Koroma. See http://www.sc-sl.org/cases-other.html.
112. See Art. 34 of the Vienna Convention on the Law of Treaties.
113. This has occurred on several occasions in the case of Sierra Leone. The Security Council urged 'all states to cooperate fully with the Court' in Resolution 1470 (2003). See also the Preamble of SC Resolution 1478 (2003).
114. See Sluiter, *supra* note 98, at 403–4.
115. See W. A. Schabas, 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 161.
116. Art. 9 of the Lomé Agreement granted combatants from various sides full amnesty and pardon in respect of crimes committed between March 1991 and the signing of the Lomé Agreement.
117. This understanding is still reflected in the Final Report of the Truth Commission for Sierra Leone. See Truth and Reconciliation Commission, Final Report, Part. 1, Findings, para. 553 ('The Commission finds that the amnesty clause in the Lomé Agreement was well intentioned and meant to secure peace. The Commission finds that in repudiating the amnesty clause in the Lomé Agreement, both the United Nations and the Government of Sierra Leone have sent an unfortunate message to combatants in future wars that they cannot trust peace agreements that contain amnesty clauses').
118. The Royal Government is empowered to request amnesties and pardons under domestic law of Cambodia. The fact that the UN regulated the status of the Chambers in an international agreement limited this power in a double effect. It removed the government's discretion in relation to crimes tried before the Chambers through the inclusion of a clause on amnesties (see Art. 11, para. 1 of the Agreement Between the United Nations and the Royal Government of Cambodia), and it empowered the Chambers to determine the scope of a pardon granted in the past. See Art. 11, para. 2 of the Agreement Between the United Nations and the Royal Government of Cambodia. This power was not provided for under Art. 40 of the domestic law on the

2.2.2.6. Scope of involvement of international actors in the peace process. Last, but not least, there is obviously a close correlation between previous international involvement in the crisis and the design of the framework of post-conflict justice. Internationalized solutions have been sought in cases in which the UN has taken on an active role in the peace process. This is obvious in the cases of the former Yugoslavia and Rwanda, where the Security Council has taken on an active role during and after the conflict. But the same conclusion may be drawn from other cases.

The design of the post-conflict mechanisms in Kosovo and East Timor was primarily shaped by the engagement of the respective UN transitional administrations in the post-conflict phase.[119] Both administrations have created the frameworks for adjudication by way of UN regulations. The creation of a Special Court Chamber in the State Court of Bosnia and Herzegovina is largely the result of the long-term engagement of the High Representative in the post-conflict phase and the completion strategy of the ICTY. Finally, the creation of the SCSL and the Extraordinary Court Chambers in Cambodia is also largely a result of the continued involvement of the UN in the peace process. UN-led peace negotiations have led to the conclusion of international agreements, which then set out the design of the respective post-conflict mechanisms.

It is therefore fair to say that international(ized) solutions have so far only been adopted in quite specific circumstances, namely either in the context of Chapter VII-based responses to mass atrocities (ICTY, ICTR), or in the case of the exercise of territorial authority by UN administrations (Kosovo, East Timor) or, alternatively, in the context of multidimensional peacekeeping or longer-term post-conflict engagement endorsed by the Security Council (Sierra Leone, Cambodia, Iraq[120]).

Nevertheless, this does not mean that this model cannot be applied in other circumstances. International(ized) approaches may provide solutions in a whole range of situations in which a domestic judicial system cannot render justice independently or impartially, due to civil strife, ethnic or religious tensions or general security risks. In particular, the option of a temporary internationalization of domestic judicial structures merits attention in this regard.

This possibility has been envisaged in legal doctrine as a potential model to try serious crimes in various contexts, such as Colombia,[121] Afghanistan[122] or

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Extraordinary Chambers, which provides: 'The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Arts. 3, 4, 5, 6, 7 and 8 of this law.'

119. See also Condorelli and Boutrouche, *supra* note 48, at 430–432.

120. Note that the Security Council bestowed the CPA with a quasi-mandate to administer Iraq. See paras. 4 and 8 of SC Res. 1483 (2003) of 22 May 2003.

121. See A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in Romano, Nollkaemper and Kleffner, *supra* note 8, at 10 ('[J]udges fear to take proceedings against terrorists or people suspected of appalling crimes because of security problems – they fear for their own lives. They would be happy, I think if trials against people accused of atrocities or serious crimes could be heard by some sort of international or internationalized courts. There is therefore an area where such courts might play a role'). See also A. Pellet, 'Internationalized Courts: Better Than Nothing', in Romano, Nollkaemper and Kleffner, *supra* note 8, 437, at 442.

122. See Cassese, *supra* note 121, at 10 ('Crimes which have been committed in Afghanistan . . . could be tried by local judges, of course, on condition that such courts are strengthened by an international component').

Palestine.[123] Moreover, the concept of internationalization might be considered as a possible mechanism to deal with other categories of crime than war crimes and crimes against humanity, such as drug-related crimes or special terrorist offences. Domestic judges operate under strong domestic pressure and severe threats when trying such offences. It may therefore be feasible to appoint international judges to the relevant chambers, in order to foster impartiality and independence. Alternatively, it may be considered whether such categories of crime could be tried by a separate mixed national–international jurisdiction, located outside the country or, at least, outside the immediate conflict zone.[124] The merit of this model is that it builds on domestic capacity, in order to offer an additional and specialized forum for the adjudication of certain crimes, rather than 'exteriorizing' justice. This approach is geared towards the preservation of domestic ownership, and it may thus present benefits over the option of extraditing suspects to a different national jurisdiction.

Some first steps in this general direction have recently been taken in Guatemala, where the UN and the government of Guatemala established an internationalized investigative/prosecutorial unit operating under the national law of Guatemala (the 'Commission for Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala' (CICIAS)),[125] in order to investigate the structure and activities of illegal groups and clandestine security organizations in an 'effective', 'timely and exhaustive manner'.[126] The implementation of this model still encounters difficulties in practice, caused, inter alia, by a ruling by the Guatemalan Constitutional Court which held that a number of the powers of the CICIAS are unconstitutional.[127] Nevertheless, the model as such might deserve further consideration in other contexts.

3. Benefits and pitfalls of internationalization

The practice of international, hybrid and mixed national–international institutions shows that international(ized) solutions may play a crucial role in closing capacity gaps and legitimacy gaps in domestic judicial institutions. The question is therefore

123. Ibid., at 11 ('[I]t would perhaps be appropriate for the National Authority for Palestine to set up courts and tribunals in the occupied territories with an international component, to bring to trial those people who have been arrested and accused of terrorist acts against Israeli territory or Israeli nationals').

124. See specifically, in relation to Colombia, Pellet, *supra* note 121, at 442 ('Colombian drug traffickers also commit other serious violations of international law in parallel with their traffic and it is clear that national judges rightly fear for their lives when they judge these criminals. It would therefore be appropriate to create an international tribunal having competence to deal with drug trafficking and related crimes. However, it could be valuable to appoint one or two judges from the relevant country to the Bench . . . ').

125. See Agreement Between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala of 7 January 2004. The Commission shall be composed of a UN-appointed Commissioner and international and domestic staff. See Art. 5 of the Agreement. It is designed '. . . to assist the State of Guatemala . . . to investigate the structure and activities of illegal groups and clandestine security organizations and their association with the State and organized criminal activities, as well as prosecute those persons responsible for the formation and operation of these entities'. See Art. 1 of the Agreement.

126. See paras. 3 and 4 of the Preamble of the Agreement, which emphasize that the Commission was created for two reasons: to strengthen domestic capacity and to accelerate investigations.

127. In August 2004, the Guatemalan Constitutional Court pronounced an opinion on the unconstitutionality of the framework agreement signed between the United Nations and the Guatemalan Government to establish the CICIAS. See Amnesty International Press Release, Guatemala: President Berger's political will to end impunity on the line, 7 August 2004, at http://web.amnesty.org/library/Index/ENGAMR340152004?open&of=ENG-2M2.

not whether internationalization makes sense, but rather in which format such efforts should be pursued.

3.1. The experience of the ad hoc tribunals

The main achievement of the work of the ad hoc tribunals in terms of institutional design is that they have opened the door for the creation of new international models of criminal justice, both through their international trial practice and their substantive development of international criminal law.[128] The ad hoc tribunals have made it clear that international tribunals have advantages over domestic trials in the adjudication of serious criminal offences. They are usually less subject to concerns of bias or reproaches of carrying out 'victors' justice' than local forums in a post-conflict environment; they assemble the necessary expertise and means to conduct fair and impartial trials; they signal a broader international commitment to the process of peace-building; and they contribute to a sharing of the costs of post-conflict justice.[129]

But ad hoc tribunals do not present conclusive answers to dilemmas of post-conflict justice. The experience of the ICTY and ICTR has shown that international tribunals are only able to try a very small fraction of the perpetrators. Moreover, they are often too detached from local communities to respond effectively to the needs and expectations of victims' group and local societies.[130] These limitations have encouraged the search for alternative and additional frameworks of justice, such as the transfer of cases involving mid-level perpetrators to domestic courts.[131] Finally, the high costs of the tribunals and the entry into force of the Statute of the ICC have reduced the likelihood that the model of ad hoc tribunals will be extensively applied in the near future.

Nevertheless, the option of the establishment of ad hoc tribunals cannot be completely discarded from the choices of institutional design in post-conflict situations. They may remain the most effective choice in cases in which an international criminal institution needs a robust co-operation regime to get hold of perpetrators who are beyond the reach of a national jurisdiction, in particular in situations in which the ICC does not enjoy jurisdiction.[132]

3.2. Hybrid courts

The establishment of a hybrid court in the form of an independent legal entity with domestic and international judges presents an attractive option to pursue targeted prosecutions in the aftermath of a civil conflict. Hybrid courts offer at least partial responses to challenges of legitimacy and capacity in a post-conflict environment.[133]

Their main advantage over international mechanisms such as the current two ad hoc tribunals or the ICC is that they are better equipped to address directly the

128. See Report of the Secretary-General, *supra* note 2, para. 41.
129. See also Kritz, *supra* note 1, at 58.
130. See Report of the Secretary-General, *supra* note 2, para. 47.
131. The ICTY is taking steps to transfer cases to the special War Crimes Chamber of the State Court of Bosnia and Herzegovina as part of its completion strategy. See International Center for Transitional Justice, *Bosnia and Herzegovina: Selected Developments in Transitional Justice* (2004), at 4.
132. Alternatively, the Security Council may refer a situation to the Court under Art. 13 b. of the Rome Statute, as done in the case of Darfur. See Security Council Resolution 1593 (2005) of 31 March 2005.
133. See generally Dickinson, *supra* note 87, at 306.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

needs of local people and the society which suffered from the atrocities. Both the appointment of domestic judges to the proceedings and the possible on-site location of hybrid courts may foster closer identification by domestic actors with the process of transitional justice.

The fact that hybrid courts operate outside the realm of the domestic court system allows them to preserve their independence from the government or former political leaders. Moreover, the creation of a hybrid tribunal may have a positive impact on the application and development of substantive norms of criminal law in post-conflict societies.

In many cases of post-conflict justice, the adjudication of serious crimes poses legal challenges. Core crimes such as genocide, crimes against humanity or war crimes are recognized on the international level, but they may not have been codified or defined under domestic law. Similarly, domestic judges and prosecutors may have little experience in the adjudication of international crimes. The establishment of a hybrid tribunal alleviates these problems. It provides an incentive to tailor the law and structure of the court to the specific needs of the post-conflict situation, and to update domestic provisions in the light of the international standards through the definition of the law applicable to proceedings before the court.[134] This process increases the chances that these provisions will be internalized in the domestic legal system of the post-conflict society. The fact that foreign judges sit alongside their domestic counterparts offers additional advantages, because it allows the sharing of experience and knowledge in both directions.

Hybrid courts are, in sum, viable additions to purely domestic and purely international forums of adjudication.[135] But they cannot replace domestic or international trials. Their capacity is mostly limited to the trial of a handful of perpetrators.[136] Moreover, experience shows that not all states are likely to agree to the option of hybrid courts. The establishment of a hybrid court may require a partial transfer of jurisdiction to a separate legal entity. Such a concession may not be obtained in all cases.

3.3. Mixed national–international court chambers

Mixed national–international court chambers form part of the structure of the domestic legal system. Their close link to a domestic jurisdiction enables them, in particular, to deal with conflicts which are internal in nature.

The internationalization of domestic courts may present a number of advantages over the creation of a hybrid court or an international tribunal. An internationalization of the existing court system may in some cases be more practical than the creation of a new autonomous entity, because it may help avoid potential jurisdictional

134. See Haines, *supra* note 55, at 234.
135. They may validly complement purely international and purely domestic tribunals in processes of post-conflict justice. See also Dickinson, *supra* note 87, at 310.
136. It is anticipated that the Special Court for Sierra Leone would try between 20 and 30 perpetrators. See Mundis, *supra* note 47, at 936. It is expected that the Extraordinary Chambers in Cambodia will try between six and ten perpetrators.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

conflicts among different legal institutions.[137] Further, there is an issue of capacity. The appointment of additional international judges and prosecutors to domestic courts to try serious crimes may, in sum, allow a greater number of trials than the creation of an ad hoc court of extraordinary jurisdiction. Finally, the internationalization of domestic courts may have a greater impact on capacity-building, because international knowledge and expertise is directly incorporated into domestic procedure and jurisprudence.

This technique has shown some success in international practice. The recent creation of the Extraordinary Court Chambers to try Khmer Rouge leaders has closed a legitimacy gap of the domestic courts in Cambodia. The practice in Kosovo and East Timor has also produced some positive effects. The integration of international judges and prosecutors in the Kosovo legal system has reduced bias against Serb defendants in war crimes trials involving genocide.[138] Similar experiences have occurred in East Timor. The jurisprudence of the international panels restricted the less rigorous standards applied by domestic prosecutors in the charging practice of serious crimes. Moreover, the panels completed a comparatively large number of cases in relation to the statistics of the ICTR and the ICTY.[139]

But the internationalization of domestic courts has also produced some problems. The direct link between UNMIK and international judges raised problems of judicial independence. International judges formally enjoyed the status of UNMIK civil employees. This created an appearance of undue executive influence, because UNMIK held ultimate control over the extension of contracts. UNMIK's practice was criticized by the OSCE.[140]

Even greater difficulties arose in East Timor. An East Timorese Court of Appeal ruled on 15 July 2003 that UNTAET Regulation No. 2000/15, which defined the serious criminal offences applicable in criminal proceedings in East Timor, violates the principle of non-retroactivity enshrined in Section 31 of the Constitution of East Timor.[141] This judgment blurred the entire structure of law applicable in East Timor, and the previous jurisprudence of UNTAET panels.[142] Its consequences have not yet been fully addressed.

These experiences show that the fully fledged integration of international judges into the mechanics of the domestic legal system is a double-edged sword: it fosters the internalization of international expert knowledge, but it may create problems where purely domestic institutions retain an unchecked final decision-making authority.

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137. This is one of the lessons learned by UNMIK, which encountered such conflicts in civil litigation. See Cady and Booth, *supra* note 64, at 77.
138. Before the introduction of mixed national–international panels, a number of Serbs were convicted for genocide, despite the strict requirements of genocidal intent under international law. These judgments were later reviewed by panels with international judges and overruled. See Dickinson, *supra* note 87, at 305.
139. See Koumijian, *supra* note 107, at 4.
140. Non-extension may, in particular, be a means of holding judges accountable for specific conduct undertaken within the term of their offices, which is manifestly incompatible with the independence of the judiciary. See OSCE Report, *Review of the Criminal Justice System*, September 2001–February 2002, at 25; *Review of the Criminal Justice System*, March 2002-April 2003, at 28.
141. See Court of Appeal, *Prosecutor v. Armando Dos Santos*, Case No. 16/2001, 15 July 2003, at http://www.jsmp.minihub.org.
142. For an in-depth analysis, see *supra* note 106 at 916–922.

4. Complementarity of criminal trials and alternative mechanisms of justice

One single approach alone does often not suffice to solve the problems of transitional justice. International practice has shown that the restoration of justice in post-conflict societies requires 'integrated and complementary approaches', encompassing a variety of fora, including trials, truth commissions, return mechanisms for displaced persons and reparation programmes.[143] It has, in particular, become clear that judicial forums and truth commissions are not alternative formulas but complementary models.[144]

The example of South Africa has shown that even modern and relatively successful truth and reconciliation mechanisms are only partial solutions to transitional justice.[145] At the same time, criminal trials are an incomplete response to mass atrocities. It is a bare fact that a large number of perpetrators cannot be tried in post-conflict societies, either internationally or domestically.[146] Nor are criminal trials well suited to establish the truth in a multiplicity of cases, or to initiate policies of legal reform through mere adjudication.

These insights have encouraged the naissance of pluralist and integrated solutions combining judicial and non-judicial frameworks of justice.

4.1. Bosnia and Herzegovina

The need for multi-layered approaches to transitional justice emerged quite early in Bosnia and Herzegovina. Soon after the start of the work of the ICTY, it became apparent that the tribunal would only have limited facilities to contribute to the local reconciliation process. Calls for domestic reconciliation led to proposals for the creation of a national truth and reconciliation commission along the lines of the South African model, with the possibility for perpetrators to apply for an amnesty in exchange for a full confession of crimes, with an exception for crimes falling within the jurisdiction of the ICTY.[147]

The first reaction by the ICTY was divided. Tribunal officials argued that the creation of the proposed truth commission should be delayed until the conclusion of trials in The Hague, because its work would conflict with the mandate of the ICTY.

143. See Report of the Secretary-General, *supra* note 2, paras. 23–6.
144. See also Principle 12 of the Guiding Principles for Combating Impunity for International Crimes, in Bassiouni, *supra* note 1, at 269 ('Investigative commissions should be employed as precursors or adjuncts to criminal prosecutions, not as substitutes for them').
145. The South African Truth Commission played a comparatively successful role in the peace process by offering individuals amnesty in exchange for truth-telling, and by supporting the process of institutional reform in South Africa. But it could only make a partial contribution. Only a relatively small number of perpetrators successfully applied for amnesties. This left many cases open for potential prosecution. Few of these cases have been effectively prosecuted in the end. The reluctance of the South African government to follow up the truth-telling process with effective prosecutions shed a cloud of doubt about post-conflict justice, because some of those who ignored the amnesty procedure did not have to pay a price for their incomplete action or inaction. See van Zyl, *supra* note 34, at 754–5, 760 ('The government's failure to prosecute highlights the limits of any truth commission's contribution to achieving justice').
146. See Report of the Secretary-General, *supra* note 2, at para. 46.
147. The proposal was backed by former members of the Yugoslav war crimes commissions and President Alija Izetbegovic. See Kritz, *supra* note 1, at 64.

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It was argued that the truth commission would create conflicts of competencies with the ICTY and risks of multiple and conflicting testimony by individuals before the two bodies.[148] This position was, however, later revised by the Tribunal. Claude Jorda, former President of the ICTY, recognized in an open address in Sarajevo in May 2001 that a truth commission and the International Tribunal could perform 'complementary and distinct roles'.[149] President Jorda noted that a truth commission could positively supplement the 'peace-making' activity of the ICTY, by allowing 'lower ranking executioners' to participate voluntarily in the work of the truth commission by admitting their crime, without being granted amnesties.[150]

These reflections have encouraged proposals for the establishment of a truth-telling body,[151] which have not yet materialized in practice, but at least reflect an important conceptual shift in thinking about transitional justice.[152]

4.2. Rwanda

An unconventional model of transitional justice was adopted in Rwanda.[153] Domestic initiatives to complement the work of the ICTR and to deal with the mass of perpetrators held in Rwandan prisons have resulted in the creation of a three-tiered system, which combines international and local forms of justice.

Those persons allegedly most responsible for the Rwandan genocide are tried before the ICTR. Remaining leaders, including those who designed and led the genocide and persons who committed acts of sexual torture or violence (Category I perpetrators), are tried by conventional courts.[154] Finally, the great majority of cases are

148. Ibid., at 62.
149. See ICTY Press Release, *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, 17 May 2001, at http://www.un.org/icty/pressreal/p591-e.htm.
150. President Jorda stressed that confessions should not lead to an amnesty, but could encourage recommendations to local prosecutors and courts, which might then be considered as 'mitigating circumstances for sentencing' in domestic trials.
151. A draft law was prepared which re-designed the model of the truth commission in Bosnia and Herzegovina. See Center for Transitional justice, *Bosnia and Herzegovina: Selected Developments in Transitional Justice* (October 2004), at 8. But the commission has not yet been established in practice, due to obstacles at the domestic level, such as the lack of a national debate on the feasibility of a truth commission and uncertainties about the design.
152. President Jorda noted: 'The scope of the International Tribunal's "peace-making" is . . . *limited*. It cannot try all the perpetrators of serious violations of humanitarian law committed during a conflict which lasted more than five years. As you can easily understand, doing so would be physically impossible and, more importantly, require far too much time. In the long term, this would risk undermining the reliability of the testimony and do damage to the credibility of the International Tribunal. Ideally, the Tribunal's priority should be to try the highest ranking military and political leaders, that is, those who through the great responsibilities which were theirs and the seriousness of the crimes ascribed to them by the Prosecutor truly endangered international public order. Nor can the International Tribunal hear the tens of thousands of victims. Only those considered useful towards the establishment of the truth are invited to testify and even they cannot claim compensation for the harm they suffered. It is not the mission of the International Tribunal to analyse all of the historical, political, sociological and economic causes which converged to give rise to the war. Instead, it must review what happened only from the specific angle of the criminal responsibility of the perpetrators. Finally, the International Tribunal alone cannot accomplish all the work of memory required for the reconstruction of a national identity.'
153. See generally, W. A. Schabas, 'The Rwanda Case: Sometimes It's Impossible', in Bassiouni, *supra* note 1, at 499.
154. In early 1996, the Rwandan government created special domestic courts to hear cases of genocide and crimes against humanity. This was done in part as a reaction to the limited judicial capacity of the ICTR. See Rwanda Organic Law No. 8/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since October 1990, available

dealt with by less formal community panels (*gacaca* 'judgment on the grass' panels) under which perpetrators, conspirators or accomplices of homicide (Category II perpetrators) or serious bodily harm (Category III perpetrators), as well as persons who committed property crimes (Category IV perpetrators) may be tried by community-elected judges and receive reduced penalties, including community service upon confession and guilty plea.[155]

This multi-dimensional model of international, domestic and local adjudication was conditioned by the incredibly large number of alleged *génocidaires* in Rwanda. About 115,000 detainees accused of genocide and crimes against humanity were held in Rwandan prisons. The government estimated that it would take at least 200 years to complete the trial of genocide-related detainees if the country relied on its conventional court system.[156] The creation of *gacaca* trials, involving 260,000 local community judges, represented an effort to address this dilemma by transferring the large burden of trials to the village level, in order to promote return and reconciliation. This system was explicitly chosen over a widespread amnesty system, because Rwanda did not want to deviate from the principle of accountability after the genocide.[157]

This solution is anything but satisfactory in the context of ensuring a fair trial. Allowing lay members of a local community to impose formal criminal sanctions on persons suspected of having committed medium-level or even severe crimes raises serious concerns relating to the right to be tried by a competent, independent, and impartial tribunal by means of procedures established by law. Moreover, the fact that suspects have no right of appeal against the possible categorization of crimes, which has serious implications for the punishment, is difficult to reconcile with fair trial standards. But the *gacaca* programme provides, at least, an opportunity to allow perpetrators to return to their home communities, and to release them from

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at http://www.preventgenocide.org/law/domestic/rwanda.htm. Art. 2 of the law distinguished four categories of crime. Category I crimes are defined as crimes committed by 'person[s] whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or a crime against humanity', persons who 'acted in positions of authority at the national, prefectoral, communal, sector or cell level or in a political party who fostered such crimes,' 'notorious murderers,' and 'persons who committed acts of sexual torture.' Category II crimes include 'persons whose criminal acts or whose acts of criminal participation place them among the perpetrators, conspirators or accomplices of international homicide or of serious assault against the person causing death.' Category III refers to 'persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.' Category IV crimes include 'persons who committed offences against property.'

155. See Rwanda Organic Law on Gacaca, Organic Law No. 40/2000 (2001). Generally, see E. Daly, 'Between Punitive and Restructive Justice: The Gacaca Courts in Rwanda', (2002) 34 *N.Y.U. Journal of International Law and Policy* 355.

156. See Official Website of the Rwandan Government, Genocide, at http://www.rwanda1.com/gov.

157. The Chairman of the Legal and Constitutional Commission noted: '[T]he Rwandan people did not accept amnesty. Throughout the history of Rwanda, the government of the day has granted amnesty, and throughout history, the government has been involved in the massacres and then granted amnesty . . . Amnesty encouraged impunity. For these reasons, [the people] wanted to try something else in Rwanda'. See T. Rutaremara, Chairman, Legal and Constitutional Commission of Rwanda, Comments at the Conference on Constitutional Development, Kibuye, Rwanda (22 August, 2001). A similar point was made by the Rwandan chief prosecutor, who stated: 'We are asked why we didn't take the South African approach of amnesty . . . you can only do what is politically possible in your own society . . . In the aftermath of genocide there was an overwhelming feeling that there must be accountability, people must be punished so it will not happen again'. See V. Brittain, 'Time for Truth as Rwanda Strives for Reconciliation', *Guardian*, 6 April 2001, 14.

detention in the overcrowded Rwandan prisons,[158] where some suspects have been held for up to eight years, sometimes without specific charges.[159]

The sharing of responsibility between the ICTR, domestic courts and *gacaca* panels appears to have worked comparatively well, given the enormous number of perpetrators in the Rwandan conflict.[160] Nevertheless, the design suffers from several frictions which have caused tensions between international and domestic actors. There is, first of all, a disparity in sentencing. The most responsible accused who are tried before the ICTR face life imprisonment as the maximal penalty. Persons who are tried before domestic courts and who are allegedly 'less responsible' are on the contrary subject to the death penalty under domestic law.[161] In addition, there are double standards in the treatment of detainees. Those tried in the ICTR have access to medical care and anti-retroviral drugs, while perpetrators tried under national law and victims of sexual crimes often lack access to adequate medical facilities.

4.3. Sierra Leone

The Lomé Agreement provided for a dualist approach to post-conflict justice in Sierra Leone, encompassing both a prosecution and a truth and reconciliation component. The Special Court for Sierra Leone operated side by side with an internationalized Truth and Reconciliation Commission[162] which was established to investigate the causes, nature and extent of human rights violations committed from the 'beginning of the Conflict in 1991 to the Lomé Peace Agreement.'

The Court and the Truth Commission pursued distinct functions. The Commission was primarily conceived as a forum for truth-telling and 'constructive interchange between victims and perpetrators',[163] designed to report on the root causes and the context in which violations occurred, including the 'question of, whether those violations and abuses were the result of deliberate planning, policy or authorization by any government, group or individual'.[164] Persons appearing before the Commission could not gain immunity before the Court by virtue of their testimony in truth-telling proceedings. The determination of individual criminal responsibility was left to the Court.

Although simple in theory, the interplay between the Court and the Truth Commission posed some problems in practice.[165] No legal instrument set out clear parameters for co-operation between these two organs in crucial areas such as the

158. When genocide trials begin in Rwanda's semi-traditional *Gacaca* courts, there will be about 10,000 trial courts operating in Rwanda simultaneously.
159. See Kritz, *supra* note 1, at 78.
160. See J. Strain and E. Keyes, 'Accountability in the Aftermath of Rwanda's Genocide', in Stromseth, *supra* note 16, at 126.
161. Ibid., at 127.
162. Like the Special Court itself, the Truth Commission is a mixed body composed of four domestic commissioners and three international members appointed by the UN High Commissioner for Human Rights. See Truth and Reconciliation Commission Act 2000, Part II.
163. See Truth and Reconciliation Commission Act 2000, Part III.
164. See ibid., Part III, sub. 6 (2).
165. See A. Tejan-Cole, 'The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission', (2003) 6 *Yale Human Rights and Development Law Journal* 139; E. M. Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court', (2003) 104 *Columbia Law Review* 730.

collection and use of evidence and the use of witnesses and their protection. This deficit created tensions, because the Commission was vested with quasi-judicial powers to conduct its investigations, including the power to hold public hearings and to issue summons to appear and subpoenas.

Strategies of co-ordination emerged only gradually through practice. David Crane, the Chief Prosecutor of the Special Court, announced quite early that he would not use information revealed in Truth Commission proceedings for his indictments. But a great deal of confusion continued to exist, which led the Truth Commission to conclude that 'many Sierra Leoneans who might have wished to participate in the truth telling process stayed away for fear that their information may be turned over to the Court'.[166]

Moreover, the Special Court itself had to clarify in its jurisprudence if and under what circumstances detainees in the Court could be summoned for public hearings before the Commission.[167] The Commission disagreed with the restrictive approach taken by the Court[168] and noted in its Final Report that 'the United Nations and the Government of Sierra Leone should have enshrined the right of detainees and prisoners in custody of the Special Court to participate in the truth and reconciliation process'.[169]

The Commission ended its report with a rather disenchanting note on inter-institutional co-operation. It noted: 'Sierra Leone, with its two institutions of transitional justice in operation at the same time . . . had the opportunity to offer the world a unique framework in moving from conflict to peace. Sadly, this opportunity was not seized. The two bodies had little contact and when they intersected at the operational level, the relationship was a troubled one.'[170]

4.4. East Timor

The UN established a novel, integrated model of transitional justice in East Timor. The design is innovative in that it reconciles the principle of individual criminal responsibility for serious crimes with the need to grant selective immunities for the restoration of a war-torn society. The prosecution of core international crimes which are of concern to the international community as a whole, such as genocide, crimes against humanity, and war crimes, remained within the exclusive jurisdiction of the mixed national–international judicial bodies.[171] But the UNTAET model offered perpetrators an opportunity to seek immunity from prosecution for low-level crimes by undertaking an act of reconciliation determined by the Truth Commission.

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166. See Truth And Reconciliation Commission Report, Vol. 2, ch. 2 – Findings, para. 568.
167. See Special Court for Sierra Leone, *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission of Sierra Leone. See generally Evenson, *supra* note 165, at 758.
168. The Commission noted that it was 'effectively blocked by the Special Court from holding any public hearings or confidential interviews with the detainees'. See Truth And Reconciliation Commission Report, Vol. 2, ch. 2 – Findings, para. 573.
169. See ibid., Vol. 2. ch. 2 – Findings, para. 565.
170. The Truth and Reconciliation Commission added: 'The Commission finds that the United Nations and the Government of Sierra Leone, who were responsible for the Special Court initiative and the authors of its founding instruments, might have given more consideration to the laying down of guidelines for the simultaneous operation of the two organizations.' See Truth And Reconciliation Commission Report, Vol. 2. ch. 2 – Findings, paras. 563–4.
171. See s. 1.3 of UNTAET Regulation No. 15/2000 of 6 June 2000.

The lines of authority between the panels and the Truth Commission were more clearly defined than in the case of Sierra Leone. Several procedural rules prevented serious crimes from being dealt with in the reconciliation process. Section 24 of UNTAET Regulation 2001/10 required that a copy of all statements received by the CRTR Statements Committee be transmitted to the Office of the General Prosecutor at the beginning of the Truth Commission proceedings. This communication allowed the Prosecutor of the Serious Crimes Unit to examine whether the crimes examined by the Commission came within the jurisdiction of the panels.[172] Furthermore, a second control was undertaken by the Community Reconciliation Panel in the course of Truth Commission proceedings. The Panel was obliged to refer the evidence to the Office of the General Prosecutor, where a hearing revealed whether 'credible evidence' of the commission of a serious offence existed.[173] This strict mechanism of information-sharing enabled the Truth Commission and criminal panels to operate closely side by side, while maintaining their distinct functions.

The combined justice and reconciliation formula embodied in UNTAET Regulations 2000/15 and 2001/10 presents overall a promising mechanism for the restoration of peace and justice in a postwar society. The immunity-for-truth-telling formula of the East Timorese model cannot be criticized for failing to comply with internationally recognized standards of criminal accountability, as has been the case in the context of the South African model. The institution of a division of labour between the Truth Commission and international panels eased the burden on the judiciary, by relieving the courts of numerous low-level criminal trials. Moreover, the reconciliation mechanism encouraged perpetrators to return to their original communities and to assume responsibility for criminal acts that might otherwise go unpunished.

4.5. Democratic Republic of Congo

Future designs may very well incorporate scenarios in which two international(ized) courts adjudicate serious crimes in a complementary fashion, while acting in concert with a truth commission.

This point is illustrated by the peace efforts in the Democratic Republic of Congo (DRC). Current events point towards the possible adoption of a three-tiered approach, involving the ICC, a hybrid tribunal, and a truth commission. The DRC has made a referral to the ICC which triggers the jurisdiction of the Court.[174] President Joseph Kabila has ratified an Act bringing the country's truth and reconciliation commission into being.[175] Moreover, local leaders have considered proposals for the creation of a hybrid tribunal, in order to fill capacity gaps left by domestic courts.

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172. See s. 23.3 of UNTAET Regulation No. 10/2001 of 13 July 2001.
173. See s. 27.6 of UNTAET Regulation No. 10/2001 of 13 July 2001.
174. See ICC Press Release, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, The Hague, 19 April 2004, at http://www.icc-cpi.int/press/pressreleases/19.html. See generally, William W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', (2005) 18 LJIL 557.
175. See Africa News Update, DRC: The long road to reconciliation, 23 September 2004, at http://www.afrika.no/Detailed/6088.html.

4.6. Trends in international practice

The different experiments of transitional justice described here reveal a number of general tendencies, which might deserve further attention in different national contexts.

First, state practice is moving towards a holistic conception of post-conflict justice: Neither criminal trials, nor alternative forms of justice deliver conclusive answers to the challenges of post-conflict justice.[176] They must operate hand in hand, as parallel mechanisms for the restoration of post-conflict justice.[177]

Secondly, the complementary relationship between truth commissions and international(ized) courts may be organized in, at least, two different ways. Truth commissions and courts may be conceived as fully independent organs, each performing distinct functions – following the proposals made in the context of Bosnia and Herzegovina or the practice in Sierra Leone; or they may be part of an amnesty-for-truth-telling model, which is based on a division of labour in a proper sense (East Timor, South Africa).

Existing international practice indicates that both models require clear organizational rules in order to function properly and to avoid conflicts of competences. Two conditions may be helpful in this regard: the jurisdictional boundaries between each of the two institutions must be clear, and there must be channels of dialogue and co-operation between the different institutions, in order to make the procedural relationship between the separate entities and/or a possible distinction between serious and less serious crimes operational in practice.

Finally, it is increasingly accepted that core crimes like genocide, crimes against humanity and serious war crimes are generally outside the realm of immunity in post-conflict scenarios.[178] This rule is supported by the practice of the cases in Rwanda, Bosnia and Herzegovina, Sierra Leone and East Timor. It is also reflected in the official policy of the UN Secretariat, including the recent report on the rule of law and transitional justice in conflict and post-conflict societies, which recommends that peace agreements and Security Council resolutions and mandates should '[r]eject any endorsement of amnesty for genocide, war crimes and crimes against humanity, including those relating to ethnic, gender and sexually based

176. This point was made clear by the Inter-American Commission on Human Rights (IACHR) in 1999 in the context of El Salvador's obligations under the American Convention on Human Rights. The Commission noted: 'The value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.' See Inter-American Commission on Human Rights, *Ellacuria Case*, Report No. 136/1999 (El Salvador), paras. 229–30.

177. This functional parallelism makes sense not only from a strict accountability perspective, but also from the angle of efficiency. A combined justice and reconciliation model may produce the best results in practice. The threat of prosecution may encourage perpetrators to lay down their arms and to engage in a peace process, based on the option of conditional immunity based on truth-telling and individual confession. The application of alternative forms of justice, on the other hand, may relieve the conventional justice system from burdens which it cannot shoulder in practice due to the mass of crimes committed in the conflict.

178. In the *Ellacuria* case, the IACHR stated that: 'the institution of a Truth Commission [cannot] be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim.'

international crimes' and 'ensure that no such amnesty granted is a bar to prosecution before any United Nations-created or assisted court'.[179]

The conflict between accountability and national reconciliation may instead be solved by a differentiation among perpetrators in the process of enforcement. Prosecution may target only the most serious perpetrators.[180] Alternative forms of justice, such as truth-telling and individualized amnesty procedures, can potentially be applied to lower-level perpetrators.

5. The impact of the ICC

How does the entry into force of the ICC Statute affect this institutional framework?

The coming into operation of the Court adds another layer to the geometry of transitional justice. The Court offers an additional international choice which complements the existing models of other forums of justice.

The Court has, in particular, three features, which define its relationship with other institutions in a situation of transition. First, the ICC is a forum to try the most serious crimes.[181] Its judicial activity will therefore, most likely, remain focused on the prosecution of a select number of high-level perpetrators. Secondly, the jurisdiction of the Court is, in principle, limited to crimes committed after the entry into force of the Rome Statute.[182] This means that the ICC will, at least at the present time, not be able to deal with the implications of mass atrocities and national tragedies which occurred before 1 July 2002. These crimes may be prosecuted by other international(ized) judicial bodies, without conflicting with the jurisdiction of the Court. Last, but not least, the Court is complementary to domestic jurisdiction.[183] This principle enables states to deploy a variety of different forums of justice in a peace process, in addition to the Court.

The fact that a state becomes a party to the Statute has implications for a society in transition. It influences some of the modalities of transitional justice. State parties to the Statute must ensure that their choices are in accordance with the Statute. They should carefully consider the advantages that ICC proceedings may have over other forums. Moreover, ICC membership forces domestic society to be more vigilant in the design of multi-level judicial forums. Post-conflict justice will work most efficiently

179. See Report of the Secretary-General, *supra* note 2, para. 64.

180. The jurisdiction of international criminal institutions is frequently limited to the most serious violations or crimes (see Art. 1 of the Rome Statute, Art. 1 of the ICTR Statute and Arts. 1 and 7(1) of the ICTY Statute). This reference may be regarded as an acknowledgment that prosecution should focus on leaders. This principle was ultimately accepted by the ICTY. See Security Council Resolution 1329 of 30 November 2000 in which the Council takes note 'of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors'. The focus on leadership figures was expressly stipulated in Art. 1 of the Statute of the Special Court for Sierra Leone which extends the competence of the Court to 'persons who bear the greatest responsibility for serious violations'. See also J. R .W. D. Jones and S. Powles, *International Criminal Practice* (2003), at 134–5; D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', (2003) 14 EJIL 481.

181. See the Preamble and Art. 1 of the Rome Statute.

182. See Art. 11(1) of the Rome Statute.

183. See Art. 17 of the Rome Statute.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

if international(ized) courts work in accordance with the complementarity regime of the ICC, or fill gaps left by ICC jurisdiction.

5.1. Sometimes – there is no choice

The decision to join the ICC system marks a special commitment to accountability.[184] By ratifying the Statute, a state acknowledges that crimes within the jurisdiction of the Court shall, in principle, either be investigated or prosecuted by a domestic jurisdiction[185] or by the Court itself.[186]

This commitment has several consequences for a society in transition. It implies that the Statute sets the general parameters for the accountability architecture in that domestic society in relation to the crimes over which the Court has jurisdiction.[187] Furthermore, ratification of the Statute grants the ICC an independent right of assessment (*droit de regard*) over the situation and the choices of transitional justice adopted in the domestic context. The Court is, in particular, entitled to initiate investigations on its own motion[188] and determine, on its own motion, whether it has jurisdiction over crimes committed, and whether proceedings before the Court are admissible.[189]

Moreover, the ratification of the Statute has an effect on domestic amnesties.[190] An amnesty granted under domestic law will not necessarily bar proceedings before the

184. See para. 4 of the Preamble of the Statute: 'affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. This commitment cannot be simply revoked by a state for reasons of political opportunity. This is, inter alia, reflected in Art. 127, para. 2 of the Statute, which states that even a withdrawal of the Statute 'shall not affect any co-operation with the Court in connection with criminal investigations and prosecutions in relation to which the withdrawing state had a duty to co-operate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the day on which the withdrawal became effective'.

185. See para. 6 of the preamble of the Statute: 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. See also Art. 17(1)(a) of the Statute ('The case is being investigated or prosecuted by a State').

186. See Art. 17(1)–(3) of the Statute.

187. These prerequisites apply in an objective fashion, irrespective of the current political preferences of a specific regime or leadership in the country in question. This objectivity is guaranteed by the fact that states may only refer a whole situation to the Court, but not specific crimes or acts committed by a specific group of people. See Art. 14 of the Rome Statute.

188. See Art. 15 of the Rome Statute. Note that the Prosecutor has contacted the government of Colombia in 2005, in order to obtain information on details of crimes committed in Colombia. See BBC News, *ICC probes Colombia in war crimes*, 1 April 2005.

189. See Art. 19, first and second sentence. This implies that a state party to the Statute cannot unilaterally limit or curtail the competences attributed to the Court.

190. The most practical solution for a polity in transition to ensure consistency with the Statute might be the adoption of a safeguard clause which makes it clear that nothing in the domestic legislation shall prejudice the prosecutorial authority of the Prosecutor of the ICC or the jurisdiction of the Court, as defined in the Rome Statute. Such a solution might still permit domestic authorities to introduce certain alternative forms of justice for perpetrators, which cannot be prosecuted by the Court, while allowing states to honour their legal obligations under the Statute. Note, however, the statement made by the government of Colombia upon ratifying the Statute: 'None of the provisions of the Rome Statute about the exercise of jurisdiction by the International Criminal Court impedes the concession of amnesties or pardons for political crimes by the Colombian State, providing that these benefits are awarded in conformity with the Constitution and the principles and norms accepted by Colombia.' See the interpretative declaration made by Colombia upon ratification of the Statute, 2 August 2002, at http://www.iccnow.org/espanol/colombia/colombia_doc.htm.

Court.[191] In particular, blanket and unconditional amnesties will hardly ever lead to the inadmissibility of proceedings. An amnesty law, which impedes prosecution or which does not provide for an investigation[192] cannot be invoked as a bar to ICC proceedings, because it does not even meet the basic requirements for inadmissibility under Article 17(1)(a) or (b).[193]

5.2. The ICC – an opportunity for objective and inclusive judicial proceedings

The second factor which a state should have in mind when making its choices of institutional design is that the ICC offers a uniquely balanced and inclusive framework for judicial proceedings.

ICC trials will, out of necessity, remain limited in quantity. But they can make an important contribution to the process of peace-making. The Court is, first, particularly well placed and equipped to ensure objectivity, because it is forced to look independently and impartially at all sides of the conflict.[194] Furthermore, trials by the Court may not only foster accountability, but help establish an objective historical record of the crimes, which is an important precondition to reconstruction and reconciliation. By clearly identifying the individuals responsible for crimes, the Court can, in particular, help whole communities to avoid a collective stigma.

Moreover, ICC trials may be in the special interest of victims of crimes. Proceedings before the Court offer an unprecedented form of inclusiveness. The Statute and Rules of Procedure and Evidence specifically address the need for protection of victims and witnesses, particularly victims of gender violence and violence against children.[195] Unlike the tribunals which have preceded it,[196] the ICC gives those directly affected by crimes a voice in claiming their rights, attending the proceedings and affecting

191. The Appeals Chamber of the Special Court for Sierra Leone adopted this principle expressly in its decision in the case of *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, Case No. SCSL-2004-15-PT, Case No. SCSL-2004-16-PT, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Decision of 13 March 2004. The Chamber noted that: '[e]ven if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.' See para. 84 of the decision.

192. This approach is fully in line with case law of the Inter-American Commission on Human Rights which stated that governmental recognition of responsibility and even investigations carried out by truth commissions are not a substitute for a state's obligation under the American Convention on Human Rights to investigate, prosecute and sanction those responsible for serious violations of Human Rights. See Inter-American Commission on Human Rights, *Garay Hermosilla et al.*, Case No. 10.843, 1996 Annual Report IACHR (1997), para. 57; *Ellacuria* case, Report No. 136/99, paras. 119–230.

193. This follows from the wording and structure of Art. 17. Art. 17 must be interpreted narrowly, since it is drafted in negative fashion. It regulates exceptions to the principle of admissibility ('the Court shall determine that a case is inadmissible where'), and exceptions to the exception ('unwillingness and inability to investigate or prosecute'). This structure implies that a case is generally admissible before the Court, unless the conditions of a ground of inadmissibility are fulfilled. The basic principle underlying Art. 17 is that amnesties must, at least, be accompanied by some forums of enquiry into the crimes, in order to be able to bar proceedings by the Court. The only escape clause for a perpetrator is the *de minimiis* clause in Art. 17(1)(d), which allows deference by the Court where 'the case is not of sufficient gravity to justify further action by the Court.'

194. See *supra* note 187.

195. See Art. 68 (1) of the Rome Statute and Rule 86 of the Rules of Procedure and Evidence.

196. For a survey of the practice of the ICTY, see C. Jorda and J. de Hemptienne, 'Status and Role of the Victim', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (2002) Vol. II, 1387, at 1389.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

their outcome.[197] In order to facilitate this participation, victims will have the right to legal representation and to assistance from the Victims and Witnesses Unit within the Court's Registry.[198] This mechanism ensures that those who suffered most will have the chance to take part in the process of doing justice. The possibility of victims' participation it is complemented by a reparation regime,[199] which provides for the possibility of restitution, compensation and rehabilitation.

The Court is by no means comparable to a truth commission. But its inclusiveness and focus on the victims' rights distinguishes it visibly from other forums of criminal adjudication.

5.3. The ICC – part of a community of forums of justice

Finally, the framework of the ICC is flexible enough to support pluralist and complementary approaches to transitional justice, encompassing parallel mechanisms at the domestic and the international level.

The Court is, by its very nature, complementary in design. Complementarity means that the ICC will, in principle, only act when domestic jurisdictions are unwilling or unable to bring perpetrators to justice.[200] This principle is fundamental for the design of future frameworks of post-conflict justice. It ensures that a state will maintain the option to establish a multi-layered design of justice, in which the ICC and other judicial and non-judicial entities may positively complement each other, either in a vertical or in a horizontal fashion. But some attention must be devoted to the co-ordination of parallel choices, and their relation to the ICC.

5.3.1. ICC and alternative forms of justice

Truth commissions may be established parallel to the ICC. But they are not necessarily a substitute for ICC proceedings. The question of to what extent proceedings before truth commissions may bar accountability before the ICC is essentially a question of statutory interpretation and institutional design.

Article 17(1)(a) appears to allow some flexibility for temporary deference to quasi-judicial truth and reconciliation proceedings in the case of parallel and ongoing investigations in a domestic forum.[201] Moreover, Article 53(1)(c) and (2)(c) enable the Prosecutor to defer investigations or prosecutions in the 'interests of justice'. These safeguards allow the Court to adjust its investigation and prosecution strategies and the timing of proceedings to the dynamics of a peace process.

But there is no guarantee that proceedings before truth commissions will permanently relieve a perpetrator from criminal accountability before the ICC. This question is open to judicial interpretation. The answer appears to depend on the design of the truth commission. It might be argued that some types of quasi-judicial

197. See Art. 68(3) of the Rome Statute and Rules 89–91 of the Rules of Procedure and Evidence.
198. See Art. 68(3) of the Rome Statute and Rule 90 of the Rules of Procedure and Evidence.
199. See Art. 75 of the Rome Statute and Rules 94–9 of the Rules of Procedure and Evidence.
200. See Art. 17(2) of the Rome Statute.
201. Art. 17(1)(a) merely requires investigations by a state which has jurisdiction over it, in order to bar ICC proceedings. This requirement may be met by quasi-judicial proceedings, which examine the crimes committed in a public procedure.

procedures may bar Court proceedings under Article 17(2)[202] if these proceedings retain the possibility of criminal prosecution as an option of last resort, e.g. because the perpetrator does not comply with certain procedural conditions (e.g. full disclosure) or because the crime is too serious to be dealt with in quasi-judicial proceedings. Such forms of proceedings might be said to be in accordance with the 'intent to bring the person to justice'.

Nevertheless, this (flexible) interpretation is by no means certain. Taking a narrow line of interpretation, the Court might interpret the notion of 'justice' as referring to criminal justice only.[203] This would effectively rule out the possibility that quasi-judicial truth commissions following the South African model bar the admissibility of proceedings before the Court.[204]

It is therefore important for societies in transition to construe and present truth commissions as an addition, rather than as an alternative, to mechanisms of international criminal responsibility.

5.3.2. The ICC and internationalized domestic courts

The interplay between internationalized domestic courts and the ICC causes fewer problems in practice. The judicial practice of these mixed national-international courts may be viewed as an exercise of domestic jurisdiction by the state, on whose behalf these institutions act. These courts come therefore within the scope of application of the classical complementarity regime under Article 17, paragraphs (1) and (2),[205] which establishes a vertical relationship of co-operation with the Court.

Mixed national–international courts which form part of a domestic jurisdiction, such as the Extraordinary Court Chambers in Cambodia or the proposed Special War Crimes Chamber of the State Court of Bosnia and Herzegovina, come easily within the classical framework of admissibility under Article 17 of the Statute. These types of courts are merely internationalized in terms of their composition and their applicable law, while forming part of the domestic jurisdiction. Their investigations and prosecutions can be qualified as proceedings by a state under Article 17,[206] because their action is attributable to the domestic legal system in question.

The same principle must apply in relation to mixed national–international courts, which were not formally established by a state but created by an external actor,

202. See also Robinson, *supra* note 180, at 500.

203. Such a narrow understanding of the scope of application of the provision contrasts, however, with the use of the notion of 'proceedings' at the beginning of the sentence, which appears to incorporate a broader range of proceedings than pure criminal trials.

204. See J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Cassese, Gaeta and Jones, *supra* note 196, Vol. I at 702.

205. Originally, complementarity was essentially conceived as a state-centred concept, regulating the division of competences between the Court and states. The admissibility test and the concepts of inability and unwillingness used in Art. 17 are visibly defined in relation to the state as the classical holders of domestic jurisdiction. This is reflected in the wording of Arts. 17(1)(a) ('the case is being investigated or prosecuted by a State'), 17(1)(b) ('The case has been investigated by a State'), 17(2)(a) ('the national decision was made for the purpose of shielding'), and 17(3) ('due to a total or substantial collapse or unavailability of its national judicial system, the State is unable'). But the complementarity principle may also be applied in relation to international(ized) courts, which will most likely increase in importance in the years to come.

206. Concurring, Benzing and Bergsmo, *supra* note 8, at 412.

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such as the UN-based serious crimes panels in East Timor or the 'Regulation 64' panels in Kosovo. A strictly textual interpretation of the vocabulary used in Article 17 (investigation or prosecution 'by a state', 'national decision', 'national judicial system') might suggest that these entities fall outside the scope of application of the traditional complementarity scheme. However, the nature and function of these internationalized courts is identical to that of their state-created counterparts. These institutions act formally on behalf of a domestic jurisdiction. They must therefore be equated to 'national' or 'state' institutions within the meaning of Article 17 from a functional point of view.[207]

The fact that both types of court may be assimilated in domestic jurisdictions has important practical implications. It means that they operate in an organized relationship with the Court, which is based on deference and judicial supervision. Internationalized courts may, in principle, carry out proceedings without fear of parallel Court action. But they remain subject to the scrutiny of the Court. The Court exercises a general supervisory role, which comes into play when the investigations or prosecutions conducted by these internationalized institutions show an unwillingness or inability under Article 17(2) (e.g. shielding of persons, unjustified delays in the proceedings or lack of independence and impartiality).

5.3.3. The ICC and hybrid and international courts

The interaction between the Court and other international or hybrid courts within a common framework of transitional justice poses more challenges. International tribunals and hybrid courts, which function outside a domestic jurisdiction, are detached from the state and independent in their action. They exist in a horizontal relationship with the Court. The Statute does not offer conclusive solutions to address a potential conflict of jurisdiction between such entities and the Court. The establishment of a co-operative and effective division of labour with the ICC requires therefore some additional thinking.

The fact that such courts may be created by way of an international agreement with the consent of a state does not suffice to subject them to the rules of complementarity which govern the relations between the ICC and domestic jurisdictions. The *telos* of Article 17, which is partly to respect domestic sovereignty, does not apply in the same fashion to international tribunals and hybrid courts which do not form part of a national judiciary. Moreover, the vertical system of supervision under Article 17(2) cannot be easily transposed to other independent international institutions, which enjoy a separate legal personality of their own.[208]

These types of institution are therefore, in principle, independent of the ICC in structural terms. Investigations or prosecutions may be carried out simultaneously and bar ICC proceedings only in accordance with the principle of *ne bis in idem* under Articles 17(1)(c) and 20(3), namely when a 'person has already been tried for conduct which is the subject of the [ICC] complaint'. The scope of ICC supervision is limited

207. Concurring, Benzing and Bergsmo, *supra* note 8, at 412 ('the mere involvement of the state in the operation, rather than its setting-up, may be sufficient for deeming it a national court for the purpose of article 17').
208. This argument is overlooked by Benzing and Bergsmo, *supra* note 8, at 412–13.

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to the criteria listed in Article 20(3) which will rarely apply to these types of court in practice.[209]

This horizontal relationship may cause some inconveniences in practice. The proliferation of international tribunals and independent hybrid courts may create overlaps of jurisdiction and give rise to the duplication of work in situations which come within the competence of the ICC. This type of multilayered justice will therefore require some attention in the future.

A division of responsibilities may be introduced in several ways. The jurisdiction of new international institutions may be confined to crimes which fall outside the temporal jurisdiction of the ICC, such as crimes committed before the entry into force of the Rome Statute on 1 July 2002,[210] or to crimes committed by a state before its ratification of the Statute (unless that state has made a declaration under Article 12(3)).[211] These precautions would avoid any overlap between the ICC and other courts.

Alternatively, the jurisdiction of other international or hybrid courts may be limited *ex ante* to lower-level perpetrators who are not likely to be prosecuted by the ICC. This solution is more problematic in practice. It restricts prosecutorial strategy, and it may be difficult to determine who qualifies as a low- or mid-level perpetrator.

Lastly, one might think of a division of responsibility along the lines of different crimes (e.g. prosecution of core crimes by the ICC, prosecution of other crimes such as terrorist acts or drug-related crimes by a hybrid court). However, such an approach will most likely raise problems in light of the principle of *ne bis in idem*.

6. Conclusions

A survey of the mechanisms and institutions developed in the area of transitional justice sends a note of cautious optimism. The search for appropriate institutional designs for post-conflict scenarios is still ongoing. But events over the last decade point towards the crystallization of new parameters and conceptual choices for transitional justice.

It is becoming apparent that international criminal justice and domestic justice are no longer opposed, but mutually interdependent and overlapping systems.[212] International practice has shown that both systems may constructively complement each other in scenarios of transition. This interplay may produce positive results on the basis of two conditions: systemic inclusiveness and institutional cooperation. Domestic structures must be flexible enough to allow for a temporary internationalization or externalization of local structures in situations of transition,

209. The ICC is entitled to examine whether 'the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'.

210. See Art. 11(1) of the Statute.

211. See Art. 11(2) of the Statute.

212. For an ICC-related analysis, see M. Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems', in Cassese, Gaeta and Jones, *supra* note 196, Vol. II (2002), 1915.

https://doi.org/10.1017/S0922156505002827 Published online by Cambridge University Press

where national frameworks encounter legitimacy or capacity gaps. International frameworks, on the other hand, must be sensitive to the needs of domestic actors and local ownership, in order to enable societies in transition to develop their own solutions to the consequences of past atrocities.

Further, societies in countries in transition may nowadays draw on a variety of institutional models and practices which have been adopted in other situations. These precedents may provide guidance and suggest choices which lend themselves to transposition in different national contexts. This diversity of choice is coupled with the framework of the ICC system, which is in itself flexible enough to allow for multi-layered judicial structures and certain alternative forms of justice.

This multi-faceted framework of mechanisms and institutions still offers no single blueprint for transitional justice. But it makes it very hard for any society to claim that its challenges are so unique that they fall outside the potential ambit of institutional problem-solving in the twenty-first century.