A Framework for Synergy: Synthesizing the Relationship Between the International Criminal Court and Hybrid Tribunals

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The field of international criminal justice has evolved into a series of disconnected processes with little overlap or synchronicity. Nowhere is this more evident than in the recent debate on how best to provide accountability for ongoing crimes in Ukraine. Much discussion has revolved around independent prosecutions by entities like the International Criminal Court (ICC) and a potential new court—which may be stylized as a hybrid tribunal, combining international and Ukrainian elements—to prosecute Russian crimes. Yet, relatively little attention has been given to how these entities may work together, which is reflective of a much more serious problem. This disjointed approach to justice is contributing to an ever-widening accountability gap for international crimes.

In efforts to obtain a more comprehensive approach to international criminal justice, this Article identifies the need for more streamlined, jurisdiction-sharing relationships between the ICC and hybrid tribunals. It analyzes how such a relationship works in practice by evaluating the ongoing collaboration between the ICC and the Special Criminal Court for the Central African Republic—the first jurisdiction-sharing relationship between the ICC and a hybrid tribunal. To encourage future iterations of this type of streamlining, this Article then outlines a "framework for synergy," which identifies the conditions under which such a jurisdiction-sharing relationship is appropriate and the procedures that should govern the relationship. Finally, this Article applies the proposed framework to the potential jurisdiction-sharing relationship between the ICC and a Ukrainian hybrid tribunal designed to prosecute ongoing Russian crimes.

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I. INTRODUCTION

While there are numerous goals inherent in the field of international criminal justice,[2] one key aim is to "promise an end to the impunity that perpetrators of some of the world's worst crimes have long enjoyed."[3] With the creation of the International Criminal Court (ICC) in 2002, the international community sought to do just that, with the idea that no additional judicial mechanism beyond the ICC would be needed.[4] However, it became clear that due to the ICC's shortcomings—including its limited resources and jurisdictional restrictions—the Court would

2. Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 84–85 (2009); Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT'L L. 179, 190 (2018) (identifying nine "commonly-articulated" goals of international criminal tribunals).

3. Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, HUM. RTS. WATCH (Jan. 26, 2004, 7:00PM EST), https://www.hrw.org/news/2004/01/26/beyond-hague-challenges-international-justice#:~:text=During%20the%201990s%2C%20the%20international,as%20a%20weapon%20of%20war.

4. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 171–72 (2016); Rome Statute of the International Criminal Court, preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (explaining that the ICC was established in part "to put an end to impunity for the perpetrators of [atrocity] crimes and to contribute to the prevention of such crimes").

"only be able to handle a fraction of the situations demanding justice around the globe."[5]

Accordingly, the field of international criminal justice has developed into a "fragile" system composed of the ICC, domestic courts, ad hoc tribunals, and hybrid or mixed courts that combine domestic and international elements.[6] While we now have a "menu of architectural options for pursuing justice,"[7] these mechanisms primarily act unilaterally; the once-envisioned cohesive field of international criminal justice has been divided up into a collection of independent courts.[8]

Specifically, little cohesion remains between the operations of the ICC and what are known as hybrid tribunals. Hybrid tribunals continue to be created as joint initiatives between governments in post-conflict States and the greater regional or international community to prosecute atrocity crimes.[9] Until recently, hybrid tribunals and the ICC have operated independently, with the former historically utilized only to investigate and prosecute atrocity crimes that fall outside of the ICC's jurisdictional reach.[10] With little synchronicity, this division has contributed to a widening accountability gap for international crimes.[11]

Nowhere is this disconnect between the ICC and hybrid courts more evident than in the fragmented efforts to address atrocities committed during the ongoing War in Ukraine. Russia's invasion of Ukraine in early 2022 sparked significant debate regarding the most appropriate means and mechanisms for prosecuting

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5. Van Schaack, *supra* note 4, at 172.

6. Dicker & Keppler, *supra* note 3; *see also* Van Schaack, *supra* note 4, at 171–72 (providing a brief overview of the evolution of international legal mechanisms).

7. Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 539 (2013).

8. *See* Mark Kersten, *As the Pendulum Swings – the Revival of the Hybrid Tribunal*, *in* INTERNATIONAL PRACTICES OF CRIMINAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES 1 (Mikkel Jarle Christensen & Ron Levi, eds., 2017); Marlise Simons, *Veteran International Prosecutor Foresees War Crimes Trials for ISIS*, N.Y. TIMES (Dec. 26, 2015), https://www.nytimes.com/2015/12/27/world/europe/veteran-international-prosecutor-foresees-war-crimes-trials-for-isis.html (quoting former US Ambassador-at-Large for War Crimes Issue, Stephen Rapp, as saying "there isn't a global system of justice, just some cases in The Hague and a few other places").

9. Van Schaack, *supra* note 4, at 172.

10. *See* Erika de Wet, *The Relationship Between the International Criminal Court and* ad hoc *Criminal Tribunals: Competition or Symbiosis?* 83 DIE FRIEDENS-WARTE 33, 43 (2008) (recognizing that as of 2008, no hybrid tribunal's jurisdiction overlapped with the ICC); Patryk I. Labuda, *Institutional Design and Non-Complementarity: Regulating Relations Between Hybrid Tribunals and other Judicial and Non-Judicial Institutions*, *in* HYBRID JUSTICE: INNOVATION AND IMPACT IN THE PROSECUTION OF ATROCITY CRIMES 2 (Kirsten Ainley & Mark Kersten, eds., 2020) (noting that the Special Criminal Court in the Central African Republic became the first hybrid court to share jurisdiction with the ICC upon its creation in 2015).

11. *See, e.g.*, Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 434 (2018) (recognizing that "there is a huge gap between the actual accountability efforts undertaken, on the one hand, and the far larger number of individuals who are believed to be responsible for atrocity crimes, on the other").

these crimes. Shortly after the invasion, ICC Prosecutor Karim Khan concluded that the ICC's jurisdiction extended to the atrocities committed in Ukraine.[12] With the referral of the situation to the Office of the Prosecutor by no less than forty State Parties, Prosecutor Khan formally opened an investigation into alleged crimes against humanity, war crimes, and genocide committed in Ukraine.[13]

Yet, the opening of the ICC's investigation did not entirely resolve the debate regarding Russian accountability. Instead, scholars and the media quickly pointed out that arguably the most serious crime committed by Russia against Ukraine—the crime of aggression, or the unlawful invasion of one country by another[14]—fell outside the scope of ICC jurisdiction and thus could not be investigated or prosecuted in the ICC.[15] Accordingly, as the violence in Ukraine has progressed, calls have continued for the creation of a separate international tribunal to address Russia's crime of aggression.[16] These calls include proposals for the establishment of a hybrid tribunal—one that combines elements of international law, funding, and support with domestic laws and resources—or a court that incorporates elements of hybridity.[17] Yet, most proponents have called for the use

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12. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."*, INT'L CRIM. CT. (Feb. 28, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

13. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states; *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia: Contact Portal Launched for Provision of Information,* INT'L CRIM. CT. (Mar. 11, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and; Rome Statute *supra* note 4, at arts. 14, 15(3) (Because State parties to the Rome Statute referred the Situation in Ukraine to the ICC, Prosecutor Khan was relieved of his duty pursuant to the Rome Statute to seek authorization for the investigation from the Court's Pre-Trial Chamber).

14. *See* Rome Statute, *supra* note 4, at art. 8 *bis*.

15. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern."*, INT'L CRIM. CT. (Feb. 25, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following ("Given that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation."); *see also* Kristen E. Eichensehr, *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT'L L. 631, 636 (2022).

16. *See, e.g.*, Press Release: Ukraine: MEPs Want a Special International Tribunal for Crimes of Aggression, EUROPEAN PARLIAMENT (May 19, 2022), https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression; Isobel Koshiw, *Ukraine Calls for International Tribunal to Bring Putin to Justice More Quickly*, THE GUARDIAN (Jul. 21, 2022), https://www.theguardian.com/world/2022/jul/21/ukraine-calls-for-international-tribunal-to-bring-putin-to-justice-more-quickly.

17. *E.g.* Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar.16, 2022), https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/ (proposing a hybrid tribunal "established as part of

of a hybrid tribunal to *supplement* the ICC's investigation; namely, to investigate and prosecute the crime of aggression that falls outside the ICC's jurisdiction in the Situation in Ukraine.[18] In comparison, there has been relatively little discussion about utilizing a hybrid tribunal to *complement* the ICC's jurisdiction by coordinating prosecutions of alleged crimes that fall both within the ICC's jurisdiction and within the hybrid court's jurisdiction.[19] Moreover, there are currently no agreements governing how a special tribunal would work in conjunction with the ICC. This creates a potential situation in which actors of one mechanism could potentially undermine the other, or "trip over one another in their search for evidence and witnesses."[20]

The idea of a jurisdiction-sharing relationship between the ICC and hybrid courts is innovative and growing in prominence. To date, there has been only one hybrid court to share jurisdiction with the ICC–the Special Criminal Court for the Central African Republic[21]–and the details of that relationship remain largely elusive.[22] Yet, a more comprehensive approach to international criminal justice

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the Ukrainian judicial system with the support of the Council of Europe," which he has tentatively named the "Extraordinary Ukrainian Chamber for Aggression"); Statement: *The Elders call for a criminal tribunal to investigate alleged crime of aggression in Ukraine*, THE ELDERS (Mar. 5, 2022), https://theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine; Larry D. Johnson, *United Nations response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SECURITY (Mar. 1, 2022), https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/; GLOBAL ACCOUNTABILITY NETWORK, CONSIDERATIONS FOR THE SETTING UP OF THE SPECIAL TRIBUNAL FOR UKRAINE ON THE CRIME OF AGGRESSION 3-8 (2022), https://2022.uba.ua/wp-content/uploads/2022/09/the-special-tribunal-for-ukraine-on-the-crime-of-aggression.pdf.

18. GLOBAL ACCOUNTABILITY NETWORK, *supra* note 17, at 16–17 (recognizing that "it seems widely accepted that [a hybrid tribunal designed to prosecute ongoing atrocities in Ukraine] should only have jurisdiction over the crime of aggression to limit the tribunal's focus and eliminate redundancy with the ICC's efforts").

19. One notable exception to this is a 2022 blog post authored by former US Ambassador-at-Large for War Crimes Issues David Scheffer, which explores a potential relationship between the ICC and the proposed Ukrainian special tribunal. *See* David Scheffer, *Forging a Cooperative Relationship Between Int'l Crim. Court and a Special Tribunal for Russian Aggression Against Ukraine*, JUST SECURITY (Oct. 25, 2022), https://www.justsecurity.org/83757/forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine/?utm_source=rss&utm_medium=rss&utm_campaign=forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine.

20. Dan Bilefsky & Matthew Mpoke Bigg, *The Many Parties Involved Complicate War Crimes Investigations*, N.Y. TIMES (July 15, 2022), https://www.nytimes.com/2022/07/15/world/the-many-parties-involved-complicate-war-crimes-investigations.html?searchResultPosition=15.

21. *See, e.g.* Labuda, *Institutional Design & Non-Complementarity*, *supra* note 10, at 2 (noting that the SCC-ICC relationship is the ICC's first jurisdiction-sharing relationship); Mark Kersten, *Why Central African Republic's Hybrid Tribunal Could be a Game-Changer*, JUST. IN CONFLICT (May 14, 2015), https://justiceinconflict.org/2015/05/14/why-central-african-republics-hybrid-tribunal-could-be-a-game-changer/ (recognizing the SCC as the first entity to attempt to "complement an ICC intervention rather than present an alternative to the Court").

22. *See* Julian Elderfield, *The Rise and Rise of the Special Criminal Court (Part I)*, OPINIOJURIS (Apr. 7, 2021), http://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-

is particularly important given the jurisdictional and resource limitations placed on the ICC, as well as its controversial record of achieving only five convictions on core crimes in the twenty years it has been operational.[23]

Given the current disjointed nature of international criminal justice, there exists a growing accountability gap whereby many perpetrators of past and ongoing atrocity crimes remain free with impunity.[24] Moreover, in circumstances where the ICC is exclusively exercising jurisdiction over atrocity crimes, it is largely incapable of fostering transitional justice among the victims and the post-conflict community where the crimes occurred.[25] By cultivating jurisdiction-sharing relationships between hybrid tribunals and the ICC, the international community can limit ever-expanding impunity by strategically utilizing limited resources to provide more widespread justice. Moreover, a more synergistic relationship between the ICC and hybrid tribunals can also ensure that victims receive more comprehensive justice both in terms of traditional criminal

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i/ [hereinafter *The Rise and Rise of the SCC Part I*] (recognizing the limited publicly available information about the Court); Julian Elderfield, *The Rise and Rise of the Special Criminal Court (Part II)*, OPINIOJURIS (Apr. 7, 2021), https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/ [hereinafter *The Rise and Rise of the SCC Part II*] (explaining that the details of the cooperation between the ICC and the Special Criminal Court for the Central African Republic are confidential).

23. Following its first trial, in 2012, the ICC convicted Thomas Lubanga Dylio, the leader of a rebel group in the Democratic Republic of the Congo, "of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities." *Lubanga Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/lubanga (last visited Sept. 29, 2022). Also, within the Situation in the Democratic Republic of the Congo, in 2014, the Court convicted Germain Katanga, a commander of a rebel group, of one count of the crime against humanity of murder as well as four counts of war crimes, and Bosco Ntganda of 18 counts of war crimes and crimes against humanity, and convicted Bosco Ntganda of 13 counts of war crimes and 5 counts of crimes against humanity. *Katanga Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/katanga (last visited Sept. 29, 2022); *Ntaganda Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/ntaganda (last visited Sept. 29, 2022). In 2016, the Trial Chamber convicted Ahmad Al Faqui Al Mahdi of committing the war crime of "intentionally directing attacks against religious and historic buildings" in Mali. *Al Mahdi Case,* INT'L CRIM. CT., https://www.icc-cpi.int/mali/al-mahdi (last visited Sept. 29, 2022). And, in 2021, the Trial Chamber convicted Dominic Ongwen of 61 counts of crimes against humanity and war crimes committed in northern Uganda in relation to his role as a commander of the Lord's Resistance Army. *Ongwen Case,* INT'L CRIM. CT., https://www.icc-cpi.int/uganda/ongwen (last visited Sept. 29, 2022).

While the Trial Chamber convicted Jean-Pierre Bemba Gombo, the leader of a rebel group in the Democratic Republic of the Congo, on charges of war crimes and crimes against humanity, including those related to sexual offenses, the ICC Appeals Chamber later acquitted Bemba of all charges. *Bemba Case*, INT'L CRIM. CT., https://www.icc-cpi.int/car/bemba (last visited Sept. 29, 2022). However, the ICC later brought charges and convicted Bemba Gombo and several other men of various offenses against the administration of justice related to false witness testimonies in the previous Bemba case. *Bemba et al. Case*, INT'L CRIM. CT., https://www.icc-cpi.int/car/Bemba-et-al (last visited Sept. 29, 2022).

24. Meron, *supra* note 11, at 433–35 (explaining this growing accountability gap and the reasons therefor).

25. *See* David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 6 (2007) (recognizing the issues purely international tribunals encounter with regard to involving local victims and communities in judicial proceedings).

accountability achieved through criminal trials and through transitional justice initiatives that hybrid tribunals can enact.

Yet, despite the growing need to streamline judicial mechanisms within the field of international criminal justice, there is minimal publicly available information on how jurisdiction-sharing relationships between the ICC and hybrid courts can and should practically work. Indeed, as scholar Patryk Labuda has recognized, there exists "little scholarship on institutional design . . . and jurisdictional design," and specifically on designing jurisdictional relationships between different international criminal justice systems.[26] Accordingly, this paper seeks to contribute to this field by first recognizing why streamlining within the field of international criminal law is both necessary and desirable, and then by providing a framework for how jurisdiction-sharing relationships between the ICC and hybrid tribunals should be designed and developed to achieve comprehensive justice for victims of atrocity crimes.

Part II of this Article introduces the ICC and hybrid tribunals and specifically identifies the jurisdictional reach of and limitations on each mechanism. Part III then analyzes the one instance in which the ICC has shared jurisdiction and cooperated with a hybrid court to date: the Special Criminal Court for the Central African Republic. Specifically, this part explores the background and history of the SCC as well as its structure and specific jurisdictional relationship with the ICC.

Part IV then advocates for additional jurisdiction-sharing relationships between the ICC and future hybrid tribunals by highlighting their necessity to achieve three goals: achieving more comprehensive criminal accountability for atrocity crimes; furthering transitional justice initiatives in post-conflict States; and improving efficiency and legitimacy for the courts themselves. Part V then identifies a framework pursuant to which future jurisdiction-sharing relationships between the ICC and hybrid tribunals may be realized.

II. OVERVIEW OF THE ICC & HYBRID TRIBUNALS

A. The International Criminal Court

At the time of its creation in 2002, the ICC became the world's first and only permanent international criminal court, designed to address the "most serious crimes of international concern."[27] Established and governed by the Rome Statute, the ICC currently has 123 States Parties.[28] And while the ICC has certainly achieved many accomplishments after twenty years of operation, it has

26. Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2.

27. *See* Rome Statute, *supra* note 4, at art. 1.

28. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/states-parties (last visited Sept. 21, 2022).

secured only five convictions for core crimes recognized under the Rome Statute.[29]

A primary reason for this failure to achieve more widespread accountability is the strict limitations placed on the ICC's jurisdictional reach. These limitations are intentional; the drafters of the Rome Statute envisioned that the ICC would function as a "court of last resort," to be utilized only when a nation's domestic criminal courts are unwilling or unable to prosecute crimes of international concern that fall within their jurisdiction.[30] Accordingly, the ICC's subject matter jurisdiction is limited to the core crimes of international law, namely genocide, crimes against humanity, war crimes, and the crime of aggression.[31] The Court's jurisdiction is also limited temporally—to crimes committed after July 1, 2002, the date on which the Rome Statute entered into force[32]—and territorially—to crimes committed on the territory of or by a national of a State Party, except when referred to the Court by the United Nations Security Council.[33]

Moreover, the ICC may not hear all cases over which it has jurisdiction; instead, a case must first be deemed admissible. To be admissible, a case must, by virtue of its scale, nature, and impact, be "of sufficient gravity to justify" ICC action.[34] Moreover, the case must satisfy what is referred to as the "complementarity" principle,[35] in that the crimes within the case have not and

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29. *See supra* note 22; *see also* Ford, *A Hierarchy of the Goals of International Criminal Courts, supra* note 2, at 182–87 (explaining that the successes of an international criminal tribunal should not be measured solely on the number of trials and convictions it secures (its "outputs") and should instead be reflected by its "outcomes," which Ford defines as "the impact of [the court's] work on the world").

30. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. Chron. (Dec. 2012), https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law.

31. Rome Statute, *supra* note 4, at art. 5.

32. For States that joined the Rome Statute after July 1, 2002, the Court generally will only have jurisdiction over crimes that were committed on those States' territories or by their nationals and that occurred after the Rome Statute entered into force for that State. *Id.* at arts. 11, ¶ 2, 12. With regard to the crime of aggression, the ICC only has jurisdiction over crimes committed one year after thirty States Parties' ratification or acceptance of amendments to the Rome Statute pertaining to the crime of aggression. *Id*. at art. 15 *bis*, ¶ 2.

33. *Id.* at art. 12. When the Security Council chooses to refer a matter to the ICC, the Court is relieved of its territorial jurisdictional limitations. Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 305 (2012).

34. Rome Statute, *supra* note 4, at art. 17 ¶ 1 (d); *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1449–56 (2008) (identifying factors that the Court should rely upon in determining whether a case meets the gravity requirement).

35. While the term "complementarity" itself is not included in the Rome Statute, scholars, practitioners, and the ICC itself recognize that this term embodies the principle of States Parties' jurisdictional primacy over the ICC. *See, e.g.*, Int'l Crim. Ct. [ICC], Assembly of States Parties Res. ICC-ASP/20/Res.5, *Strengthening the International Criminal Court and the Assembly of States Parties at* 16-17 (Dec. 9, 2021), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-Res5-AV-ENG.pdf.

will not be investigated by a State which has jurisdiction over it, due to the State's genuine unwillingness or inability to prosecute.[36]

Further, the Rome Statute delineates only three circumstances in which the Court may exercise its jurisdiction over admissible cases: (1) when a State Party refers the situation to the ICC Prosecutor; (2) when the United Nations Security Council refers the situation to the Prosecutor; or (3) when the Prosecutor initiates an investigation into a situation on his or her *propio motu* authority, which requires subsequent approval by the ICC Pre-Trial Chamber.[37]

These various limitations on the Court's power—especially the principle of complementarity—affirms the ICC's label as a "court of last resort," by prioritizing States' right to prosecute crimes within their jurisdiction and rendering the ICC's jurisdiction secondary to national jurisdictions.[38] Notably, this ensures that the ICC is "deferential and non-invasive to its member States, especially those with highly sophisticated and international justice conscious domestic judiciaries."[39]

Although these limitations on the ICC's reach were intended by the drafters of the Rome Statute, the ICC has also encountered other, less intentional obstacles in securing convictions for the world's most serious crimes. For instance, the ICC has regularly operated with stringent budgetary restrictions and limited resources.[40] Further, the ICC has also repeatedly had to defend itself from campaigns against powerful States—including the United States and Israel—who refuse to recognize the Court's authority to investigate and prosecute their nationals.[41]

In light of these jurisdictional and other limitations, it is much more understandable why the ICC has achieved only a handful of convictions in its twenty years of operations.[42] Yet, its operation alongside another type of judicial mechanism—hybrid tribunals—offers a number of options by which to expand its reach and successes.

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36. Rome Statute, *supra* note 4, at art. 17(1)(a)-(b).

37. *Id.* at arts. 13, 15.

38. Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or Weakness*, 12 WASH. U. GLOBAL STUD. L. REV. 451, 455 (2013).

39. Christopher "Kip" Hale & Maanaska K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 599 (2013).

40. *See* Nirej Sekhon, *Complementarity And Post-Coloniality*, 27 EMORY INT'L L. REV. 799, 808 (2013) (noting that "the ICC's limited budget makes it impossible for it to do much more than process a relatively limited set of cases").

41. *See generally*, Sara L. Ochs, *Propaganda Warfare on the International Criminal Court*, 42 MICH. J. INT'L L. 581 (2021) (explaining the United States' and Israel's use of "propaganda warfare" against the ICC).

42. *See also* Ford, *A Hierarchy of the Goals of International Criminal Courts, supra* note 2, at 182–86 (delineating the reasons for the relatively few trials heard and completed by international criminal courts).

B. Hybrid Tribunals

The definition of a "hybrid" court or tribunal remains amorphous, likely due to the broad spectrum of forms such entities embody.[43] This Article utilizes the terms "hybrid tribunal" and "hybrid court" interchangeably to broadly refer to international criminal justice mechanisms that blend elements of international and domestic law, such as through the composition of their judiciary, the scope of substantive and procedural law applied, and their funding and resources.[44]

The hybrid model of justice was designed to limit the impunity gap for international crimes by providing justice for internationally recognized crimes when domestic judicial structures lack the capacity to do so.[45] Such a model is particularly necessary in post-conflict communities, where extensive violence may have decimated or heavily damaged local justice institutions.[46] The concept of hybrid courts came to fruition at the end of the twentieth century as an alternative to the two purely international ad hoc courts: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[47] The hybrid model was intended to cure these courts' shortcomings—namely their high costs, lengthy proceedings, and lack of domestic involvement and legitimacy.[48] By combining local and international elements, such as by locating the court within the post-conflict affected State, creating mixed judicial benches of local and international judges, and applying both domestic and international laws, the original hybrid courts intended to

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43. *See, e.g.* Kirsten Ainley & Mark Kersten, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS, 6 (2019) ("There is no consensus on what makes a hybrid tribunal 'hybrid.'"); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT'L L. 482, 490 (2016) (admitting there is "'no comprehensive definition' of a hybrid tribunal").

44. *See* UN Office of the High Commissioner for Human Rights. Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, 2008, 1 available at https://www.ohchr.org/Documents/Publications/HybridCourts.pdf (defining hybrid courts as "courts of mixed composition and jurisdiction, encompassing both national and international aspects"); de Wet, *supra* note 10, at 36.

45. Stephen Rapp, *Foreword* to KIRSTEN AINLEY & MARK KERSTEN, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS, v–vi (2019), http://eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf.; Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality in* INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 5 (Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner, eds. 2004).

46. *See* Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 354, n.16 (2006) ("While it is critical for international jurists not to denigrate local courts overall, it is undeniable that following mass atrocity local judiciaries are often devastated.").

47. Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 967, 969 (2016), https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

48. *Id.* at 969.

"marry the best of two worlds—the expertise of the international community with the legitimacy of local actors."[49]

With this idealized image, the hybrid model also recognized its potential to achieve goals that had previously been overlooked by other international courts. Namely, scholars recognized that the hybrid model had the potential to enact not only traditional justice by imposing individual criminal accountability on perpetrators, but that it could also obtain more comprehensive justice and rehabilitation for affected States.[50] These transitional justice capabilities include fostering capacity building for local judges and legal practitioners through on-the-ground training alongside their international counterparts, allowing victims to become directly involved in the judicial process, and spurring on-the-ground outreach to ensure the community is engaged and enjoys a sense of ownership over the tribunal's work.[51]

In practice, all of the hybrid courts created to date have been markedly different in nearly all aspects; indeed, there is no one "model" hybrid tribunal.[52] Because of this, and because there is no single set of laws governing the creation of hybrid courts, creators have immense flexibility in drafting each hybrid mechanism's governing statute, which dictates the mechanism's jurisdiction, applicable law, structure, and geographic seat, among other important structural and operational aspects.[53]

Generally, hybrid tribunals are created through two general methods: (1) pursuant to a U.N. Security Council Resolution[54] or (2) by agreement between

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49. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L. J. 516, 616 (2004).

50. *See* Koh, *supra* note 7, at 531 (recognizing that hybrid courts could seek to achieve "international justice, transitional justice, and institution-building").

51. *See* Sara L. Ochs, *A Renewed Call for Hybrid Tribunals*, 52 N.Y.U. J. INT'L L. & POL. 351, 395–403 (2020) (discussing the various transitional justice benefits associated with hybrid tribunals); Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103, 112 (2010) (recognizing hybrid tribunals as a component of the "third wave of transitional justice").

52. Elena Naughton, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals* INT'L CTR. TRANSITIONAL JUSTICE 5 (2018), https://www.ictj.org/publication/committing-justice-serious-human-rights-violations-lessons-hybrid-tribunals; Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, N.Y.U. J. INT'L L. & POL. 1013, 1023 (2009) (recognizing that "no two hybrid tribunals are identical").

53. Morse H. Tan, *Finding a Forum for North Korea*, 65 SMU L. REV. 765, 806 (2012); *see* Raub, *supra* note 52, at 1017.

54. It should be noted that while certain hybrid tribunals, like the Special Tribunal for Lebanon, were created directly by U.N. Security Council Resolution, others, including the Special Panels for Serious Crimes in East Timor and the "Regulation 64" Panels in the Courts of Kosovo, were created under the authority of a U.N. transitional authority, which in turn, was established through Security Council Resolution. *See* Suhong Yang, *Can Hybrid Courts Overcome Legitimacy Challenges?: Analyzing the Extraordinary African Chambers in Senegal*, 11 GEORGE MASON INT'L L.J. 45, 52 (2020); Van Schaack, *supra* note 4, at 185.

the post-conflict nation and a regional or international body.[55] A hybrid court's means of establishment often directly affects the level of internationalization it enjoys. For instance, international elements are much more prominent in hybrid tribunals created through UN Security Council resolutions, such as the Special Tribunal for Lebanon, rather than in those created through bilateral agreements.[56] A hybrid court's internationalization is further determined by the type of law it applies, the composition of its judiciary, its location (whether it is located in the affected State or elsewhere), and its funding sources—all of which are specific to each court and codified in its governing statute.[57] These many differences among hybrid courts have led to the creation of a hybridized spectrum.[58] On one end of this spectrum lie "internationalized domestic' courts," which are placed within a State's domestic judicial system and are primarily reliant upon domestic resources, and on the other end lie international courts with domestic elements, which are primarily international in nature, with relatively minimal domestic connections.[59]

A number of hybrid courts were established between 1999 and 2001, including the Serious Crimes Panels of the District Court of Dili in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the "Regulation 64" Panels in the Courts of Kosovo.[60] These courts did not obtain ubiquitous success; instead, they faced challenges such as political interference and lack of resources. They also earned criticism for being too costly and too slow, and for achieving too few convictions.[61] Even so, several of these courts are highly regarded for combating impunity and enacting transitional justice initiatives in the affected States.[62]

In the wake of the ICC's establishment, many predicted that hybrid tribunals would be rendered redundant, as atrocity crime prosecutions would be conducted

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55. Examples of hybrid courts created by agreements between an affected State and the United Nations include the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, whereas the Extraordinary African Chambers in Senegal was created pursuant to a bilateral agreement between a State and a regional organization—the African Union. Yang, *supra* note 54, at 66; Van Schaack, *supra* note 4, at 195–96.

56. Muharremi, *supra* note 47, at 988–91.

57. *See* de Wet, *supra* note 10, at 41–42 (explaining that while all hybrid tribunals "are subject to some degree of international influence, the extent to which this is the case depends on the circumstances of each tribunal").

58. Muharremi, *supra* note 47, at 989.

59. *See id*.; *see also* Elizabeth Nielsen, *Hybrid International Criminal Tribunals: Political Interference and Judicial Independence*, 15 UCLA J. INT'L L. & FOREIGN AFF. 289, 325 (2010) (recognizing the two ends of the hybrid spectrum as a "domestic system with limited international features" and "a mainly international tribunal with a few national elements").

60. Higonnet, *supra* note 46, at 353.

61. *See generally*, Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L L. & INT'L REL. 1 (2011) (explaining how the hybrid model fell short of its idealized expectations).

62. *See generally*, Ochs, *A Renewed Call for Hybrid Tribunals*, *supra* note 51.

either before the ICC or by courts at the domestic level.[63] Yet, this assumption soon proved to be laced with naivety, in large part because of the ICC's strict jurisdictional parameters and stringent resources that constrained its ability to investigate and prosecute atrocity crimes.[64] The ICC's limited number of successful convictions led Stephen Rapp, former international prosecutor and US Ambassador-at-Large for War Crimes Issues, to astutely recognize:

> The choices cannot be only a single court in The Hague that is necessarily expensive, distant and easy for local leaders to demoni[z]e, and national systems that are often challenged to overcome legacies of dysfunction that led to impunity before the mass violence and then were further disabled by it.[65]

Indeed, hybrid courts did not end with the creation of the ICC. The hybrid model temporarily fell out of favor with the international community in light of the above referenced criticisms in the late 1990s and early 2000s, leading to a universal decision not to create any hybrid tribunals between 2007 and 2014.[66] Yet, the past decade has marked a return to the hybrid model.[67] Since the ICC's establishment in 2002, hybrid courts have been established to prosecute atrocity crimes committed in the Central African Republic, Kosovo, and Chad,[68] and have recently been proposed to address crimes committed in South Sudan, the Democratic Republic of the Congo, Syria, Sri Lanka, and Myanmar, as well as the bombing of Malaysian Air MH 17 over Ukraine.[69]

Until recently, however, hybrid tribunals were exclusively used to address crimes or situations that fell outside the scope of the ICC's jurisdiction, namely in terms of temporality and territoriality.[70] For instance, notable hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone were created to adjudicate crimes committed prior to 2002 when the Rome Statute entered into force.[71] Consequently, the crimes falling within these hybrid courts' mandates were beyond the ICC's temporal

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63. Rapp, *supra* note 45, at iv.

64. *Id*.

65. *Id*.

66. Hobbs, *supra* note 43, at 485 (referring to this time as a "period of dormancy" for hybrid courts).

67. Ainley & Kersten, *supra* note 43, at 3.

68. *Id.* at 1.

69. *Id.*; Van Schaack, *supra* note 4, at 170.

70. *See* de Wet, *supra* note 10, at 43 (recognizing that as of her article's publication in 2008, no ad hoc tribunal—whether hybrid or fully international—overlapped jurisdictionally with the ICC).

71. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 1, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (explaining that the ECCC was created to adjudicate crimes committed during the reign of the Khmer Rouge between April 17, 1975, and January 6, 1979); Statute of the Special Court for Sierra Leone, art. 1(1), available at http://www.rscsl.org/Documents/scsl-statute.pdf (explaining that the SCSL's jurisdiction extended to crimes committed as early as November 30, 1996).

jurisdiction.[72] For other hybrid courts, such as the Special Tribunal for Lebanon and the Kosovo Specialist Chambers, the crimes within their mandates fall outside the ICC's territorial jurisdiction, as neither Kosovo nor Lebanon are States Parties to the Rome Statute.[73]

Yet, this segregation of ICC and hybrid court jurisdiction is no longer absolute. As hybrid tribunals continue to be established for recent crimes committed on the territories of States Parties to the Rome Statute, there is much more opportunity for overlap. In fact, this jurisdictional overlap occurred for the first time in 2015 with the creation of the Special Criminal Court in the Central African Republic.[74]

III. STREAMLINING IN ACTION: THE SPECIAL CRIMINAL COURT IN THE CENTRAL AFRICAN REPUBLIC

To date, one hybrid court has actively shared jurisdiction with the ICC: The Special Criminal Court (SCC) in the Central African Republic (CAR).[75] The CAR's history has been marked by violence, and the country has enjoyed relatively few years of peace since it gained independence from France in 1960.[76] Despite its extensive conflicts, until relatively recently, there was a general lack of accountability or justice in the CAR for any parties' crimes, which has, in turn, fueled further violence.[77]

In 2002, rebel forces attempted to overthrow the CAR Government.[78] In response, the Government secured support from Libyan forces and the Movement

72. *See* Rome Statute, *supra* note 4, at art. 11.

73. de Wet, *supra* note 10, at 43 (noting that Lebanon is not a party to the ICC); Dafina Buçaj, *Acceptance of International Criminal Justice through Fragmented Domestication: The Case of Kosovo,* INT'L NUREMBERG PRINCIPLES ACADEMY, 6 (2016), https://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Kosovo.pdf (noting that "Kosovo is not a signatory member of the Rome Statute"); *see also The States Parties to the Rome Statute*, *supra* note 28.

74. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 2. For further discussion of the jurisdiction sharing between the ICC and the Special Criminal Court, *see infra* Part III.

75. *See, e.g.* Labuda, *Institutional Design & Non-Complementarity, supra* note 10, at 2 (noting that the SCC-ICC relationship is the first jurisdiction-sharing relationship); Kersten, *supra* note 21 (recognizing the SCC as the first entity to attempt to "complement an ICC intervention rather than present an alternative to the Court").

76. Godfrey M. Musila, *The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations*, INT'L NUREMBERG PRINCIPLES ACADEMY 5 (2016), https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf.

77. *Central African Republic: First Trial at the Special Criminal Court*, HUM. RTS. WATCH (Apr. 12, 2022), https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court#whatisthe.

78. *Central African Republic I*, INT'L CRIM. CT. PROJECT (Feb. 2, 2021), https://www.aba-icc.org/situations/central-african-republic/.

for the Liberation of the Congo to fight against the rebels, which resulted in the murder, torture, and rape of civilians and widespread destruction of civilian villages.[79] In December 2004, the CAR—which had previously ratified the Rome Statute and become a State Party to the ICC—referred the situation to the ICC's Office of the Prosecutor, thereby prompting the Prosecutor to open a preliminary investigation into crimes committed on CAR territory since July 1, 2002.[80] Given the CAR's State Party status and the fact that the crimes all occurred on CAR territory, the Prosecutor determined that the ICC held jurisdiction over the situation and formally opened an investigation into these crimes in 2007.[81]

Ultimately, the Prosecutor's investigation produced only one primary case against Jean-Pierre Bemba Gombo, the president and commander-in-chief of the Movement for the Liberation of the Congo.[82] Following a lengthy trial, ICC Trial Chamber III convicted Mr. Bemba of two counts of crimes against humanity for murder and rape and three counts of war crimes for murder, rape, and pillaging,[83] and subsequently sentenced him to 18 years imprisonment.[84] However, in a huge blow to the Court, the ICC Appeal Chamber ultimately reversed this judgment and sentence upon finding that the Trial Chamber erroneously convicted Mr. Bemba for acts outside of the confirmed charges against him and erred in concluding that Mr. Bemba failed to take all necessary and reasonable measures to prevent and punish crimes committed by his subordinates.[85]

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79. *Id.*

80. *Prosecutor Receives Referral Concerning Central African Republic,* INT'L CRIM. CT. (Jan. 7, 2005), https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic.

81. *Prosecutor Opens Investigation in the Central African Republic* INT'L CRIM. CT. (May 22, 2007), https://www.icc-cpi.int/news/prosecutor-opens-investigation-central-african-republic.

82. *Central African Republic*, INT'L CRIM. CT., https://www.icc-cpi.int/car (last visited Sept. 20, 2022); *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo*, INT'L CRIM. CT., https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf (last updated March 2019). The Office of the Prosecutor also initiated a second case against Bemba and four other defendants for various alleged offenses against the administration of justice and related to providing false witness testimony before the ICC. *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, INT'L CRIM. CT., https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Bemba-et-alEng.pdf (last updated Sept. 2018).

83. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, ¶ 752 (Mar. 21. 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

84. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 97 (June 21, 2016) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04476.PDF.

85. *See generally*, Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF; *ICC Appeals Chamber Acquits Mr Bemba from Charges of War Crimes and Crimes Against Humanity*, INT'L CRIM. CT. (June 8, 2018), https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity. Following the appeal judgment and the closure of the second trial focused

In 2012, within the CAR, a coalition of primarily Muslim groups known as the Seleka launched an offensive against the CAR government.[86] Shortly thereafter, coalitions of Christian fighters, known as the anti-balaka, responded by engaging in revenge attacks against Seleka fighters.[87] In subsequent years, the conflict has "mutated into one between the largely Christian farmers and Muslim herders and nomads in the countryside and villages."[88] This long-running conflict has resulted in the deaths of thousands and the displacement of more than 740,000 refugees,[89] and has left almost 75% of the CAR population in poverty.[90]

This violence prompted the CAR's transitional government to make a second referral to the ICC's Office of the Prosecutor in May 2014.[91] The ICC Prosecutor once again opened an investigation into the crimes committed in the CAR, this time focusing on crimes committed since 2012.[92] The ICC Prosecutor has made much more progress in this situation than in the first CAR situation; to date, two trials against three defendants (Alfred Yekatom, Patrice-Edouard Ngaïssona, and Mahamat Said Abdel Kani) are currently underway on charges of war crimes and crimes against humanity.[93]

The ICC is not the only entity that has sought to achieve justice for crimes committed in the CAR since 2012. First, domestic courts within the CAR have handled several cases against individuals involved in the 2012 violence.[94] Second, and more relevant to this article, the CAR—in cooperation with the international community—has created a hybrid tribunal to specifically address these crimes.

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on offenses against the administration of justice, the CAR I Situation has remained essentially "dormant." *Central African Republic: First Trial at the Special Criminal Court*, *supra* note 77.

86. *Instability in the Central African Republic*, CTR. FOR PREVENTATIVE ACTION, https://www.cfr.org/global-conflict-tracker/conflict/violence-central-african-republic (last visited Aug. 10, 2023).

87. *Id*.

88. Musila, *supra* note 76, at 6.

89. *Operational Portal: Regional Response – Central African Crisis*, U.N.H.C.R., https://data.unhcr.org/fr/situations/car (last visited Sept. 30, 2023) (noting that as of September 30, 2023, there are 747,792 refugees and asylum seekers from the CAR, and on top of that, 488,866 people are internally displaced).

90. *Instability in the Central African Republic*, *supra* note 86.

91. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on *Opening a Second Investigation in the Central African Republic*, INT'L CRIM. CT. (Sept. 24, 2014), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-opening-second-investigation.

92. *Id*.

93. *See Central African Republic II*, INT'L CRIM. CT., https://www.icc-cpi.int/carII (last visited Sept. 20, 2022).

94. *See* Robert Kosho Ndiyun, *The Justice Versus Amnesty Approach to Resolving the Protracted Conflict in the Central African Republic*, 7 LIBERAL ARTS & SOC. SCIS. INT'L J. 58, 70 (2023), https://www.ideapublishers.org/index.php/lassij/article/view/888/381.

A. Creation & Structure

In April 2014, UN Security Council Resolution 2149 officially established the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), a peacekeeping mission designed to restore peace and stability to the CAR and to bring perpetrators within the country to justice.[95] Shortly thereafter, MINUSCA and the CAR's transitional government signed a Memorandum of Understanding,[96] agreeing to establish a special jurisdiction under CAR domestic legislation to bring these perpetrators to justice.[97] Then, in April 2015, the Central African Transitional Parliament adopted the Statute establishing the Special Criminal Court (SCC Statute) into domestic law.[98]

The SCC Statute grants the Court jurisdiction to investigate, prosecute, and try "grave violations of human rights and of international humanitarian law perpetrated since January 1, 2003," that are recognized under the CAR domestic criminal code and the nation's international obligations.[99] Because the CAR is a State Party to the Rome Statute, which it has adopted into its domestic law, the SCC's jurisdiction extends to crimes of genocide, crimes against humanity, and war crimes.[100] The SCC Statute further dictates that the Court be seated in Bangui, the capital of the CAR,[101] and operate pursuant to a five-year mandate which may be renewed once, meaning the SCC may only be operational for a maximum of ten years.[102] While the judicial chambers of the SCC include international judges to "safeguard the objective conduct of proceedings," these judges are in the minority, with the majority of judges hailing from the CAR.[103] Moreover, whereas the SCC's Special Prosecutor must be international,[104] the

95. *See generally*, S. C. Res. 2149 (Apr. 10, 2014), https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2149%20(2014)&Lang=E; *see also* Konstantinos D. Magliveras, *The Special Criminal Court of the Central African Republic*, 32 INT'L ENFORCEMENT L. REP. 69, 70 (2016).

96. Memorandum de Entente [Memorandum of Understanding] (Aug. 7, 2014), available in French only at https://www.fidh.org/IMG/pdf/mou_minusca_-_rca_concernant_la_cps.pdf.

97. Magliveras, *supra* note 95, at 70.

98. *Id.* Shortly thereafter, the CAR Constitutional Court upheld the legality of the law incorporating the SCC Statute. Patryk I. Labuda, *The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?* 15 J. INT'L CRIM. JUST. 175, 177 (2017).

99. Magliveras, *supra* note 95, at 70.

100. *Id.*

101. Loi Organique No. 15.003 Portant Creation, Organisation et Fonctionnement de la Cour Penale Speciale, art. 2 (June 3, 2015), https://www.fidh.org/IMG/pdf/loi_organique_portant_cre_ation_organisation_et_fonctionnement_de_la_cps.pdf [hereinafter SCC Statute].

102. SCC Statute, *supra* note 101, at art. 70; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

103. Magliveras, *supra* note 95, at 71.

104. SCC Statute, *supra* note 101, at art. 18; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

President of the Court must be a national from the CAR.[105] The SCC is funded by the international community; specifically, from voluntary donations from States.[106]

B. Relationship with the ICC & Operations to Date

The general framework of the SCC and ICC's jurisdiction-sharing relationship is outlined in the SCC Statute. Article 37 provides as follows:

> When, in application of the Rome Treaty of the International Criminal Court or special agreements binding the Central African State to this international jurisdiction, it is established that the Prosecutor of the International Criminal Court has seized a case which is concurrently under the jurisdiction of the International Criminal Court and the Special Criminal Court, the second relinquishes jurisdiction in favor of the first.[107]

As some scholars have recognized, this method of jurisdiction-sharing essentially turns the ICC's complementarity principle "on its head," giving the ICC jurisdictional primacy over cases that fall within the jurisdiction of both the ICC and the SCC, while relegating the SCC—which is in many aspects a domestic court—to secondary jurisdiction.[108]

This upside-down approach to complementarity has created concern regarding the legality of the SCC's jurisdictional provisions. As Patryk Labuda has recognized, Article 37 opens up the SCC Statute—along with pending ICC cases against defendants from the CAR—to jurisdictional challenges.[109] Indeed, counsel for at least one defendant facing charges before the ICC, Alfred Yekatom, has already challenged the ICC's jurisdiction on the grounds that under the Rome Statute's complementarity principle, the SCC must be given the opportunity to adjudicate his case.[110] While the Trial Chamber rejected this challenge,[111] which the Appeals Chamber affirmed,[112] the reasoning behind these decisions does not

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105. SCC Statute, *supra* note 101, at art. 6; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

106. Magliveras, *supra* note 95, at 71; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

107. SCC Statute, *supra* note 101, at art. 37 (translation taken from Situation in the Central African Republic II, ICC-01/14-01/18, Yekatom Defence's Admissibility Challenge—Complementarity, 3 (Mar. 17, 2020), https://www.icc-cpi.int/court-record/icc-01/14-01/18-456 [hereinafter Yekatom Defence's Admissibility Challenge]); *see also* Magliveras, *supra* note 95, at 71 (describing article 37 as meaning that "when the ICC Prosecutor investigates a case for which the ICC and the SCC have concurrent jurisdiction, the latter shall decline jurisdiction in favor of the former").

108. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 12.

109. *Id.*

110. *See generally*, Yekatom Defence's Admissibility Challenge, *supra* note 107.

111. *See generally*,Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona, ICC-01/14-01/18, Decision on the Yekatom Defence's Admissibility Challenge, (Apr. 28, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01715.PDF.

112. *See generally*, Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona, Case No. ICC-01/14-01/18 OA, Judgment on Mr. Yekatom's appeal against Trial Chamber V's Decision on the

specifically address the seemingly contradictory provisions set forth in Rome Statute Article 17 (governing complementarity and admissibility) and SCC Law Article 37. Therefore, both the SCC and the ICC apparently remain vulnerable to future jurisdictional challenges on similar grounds.

Despite this strict jurisdictional distribution, the SCC and ICC work collaboratively in other aspects of their operations. The SCC-ICC relationship is further delineated in the SCC's Rules of Procedure and Evidence, which requires the SCC's Special Prosecutor "in the interests of efficiency and judicial economy [to] consult, as much as possible, [with] the Prosecutor of the International Criminal Court regarding the implementation of his investigation and prosecution strategy."[113] While details of any specific cooperation agreements developed between the SCC and ICC are confidential,[114] it is anticipated that the ICC will pursue the prosecution of senior leadership involved in the crimes, whereas the SCC will focus more broadly on "lower-level" perpetrators, to encompass a "wider set of cases."[115] Additionally, it is publicly known that the SCC Special Prosecutor and the ICC Prosecutor have implemented a "robust, working-level cooperation and information exchange," under which the SCC Special Prosecutor may consult with the ICC Prosecutor prior to opening a preliminary investigation.[116] As Julian Elderfield, former Legal Advisor to the SCC, recognizes, this cooperation "serves the interests of both preserving judicial economy and furthering the investigation and prosecution of cases at both institutions."[117]

The cooperation between the two entities can be seen through SCC judges' visits to the ICC as part of "training and capacity-building efforts,"[118] along with ICC officials, including ICC Deputy Prosecutor Mame Mandiaye Niang, visiting the SCC.[119] Moreover, ICC Prosecutor Karim Khan has voiced his support for the cooperative relationship between the ICC and the SCC, saying:

> Justice is best delivered closest to those impacted by crimes. We should support all efforts that aim to engage with and empower communities, that allow them to participate more directly in the process of justice. The SCC is an excellent example

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Yekatom Defence's Admissibility Challenge, (Oct. 9, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01261.PDF.

113. Elderfield, *supra* note 22 (quoting Art. 41, Rules of Procedure and Evidence (SCC 2018)).

114. *Id.*

115. *Central African Republic: War Crimes Court's First Trial*, HUM. RTS. WATCH (Apr. 12, 2022), https://www.hrw.org/news/2022/04/12/central-african-republic-war-crimes-courts-first-trial.

116. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

117. *Id.*

118. *Id.*

119. *Central African Republic: First Trial at the Special Criminal Court*, *supra* note 77; *ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at opening of First Frial in Bangui*, INT'L CRIM. CT. (May 11, 2022), https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic [hereinafter ICC Prosecutor Underlines Commitment].

> of how this partnership between the international community, national authorities and local actors can result in tangible steps towards this goal.[120]

The operational challenges that the SCC has faced to date are well acknowledged. As with most international courts, the SCC has been forced to address issues stemming from a lack of resources.[121] The SCC's budget, which is funded primarily by voluntary contributions from international countries, with "limited support" from the CAR government, is particularly small, even relative to other under-funded hybrid tribunals.[122] In addition, the SCC has faced serious impediments to progress caused by the COVID-19 pandemic and continues to struggle with hiring and retaining international judicial staff.[123] Moreover, the CAR faced another violent conflict following its election in 2021,[124] which exacerbated security issues for the SCC and deterred witnesses and potential witnesses from cooperating.[125]

Despite these challenges, and taking into consideration that the SCC is in its early days of operations, it has already achieved significant accomplishments. The SCC opened its first trial in April 2022 against three defendants—Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat—all of whom are members of an armed rebel group known as 3R.[126] Collectively, they are accused of killing forty-six civilians and are charged with war crimes and crimes against humanity.[127] Additionally, as of August 2021, twenty-one suspects were in pretrial detention, with eleven cases under preliminary analysis, and twelve cases referred by the prosecutor to the investigating judges.[128]

Julian Elderfield has also examined the many successes the SCC has already achieved in terms of transitional justice within the CAR.[129] He notes that the SCC provides the CAR with a functioning legal body, which has largely been missing throughout its numerous generations of violence.[130] In addition, the SCC has

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120. *Id.*

121. Elderfield, *The Rise and Rise of the SCC Part I*, *supra* note 22.

122. Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22 (recognizing that the SCC's annual budget is the equivalent of only 30% of the annual budgets for the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia, and only 20% of the annual budget for the Special Tribunal for Lebanon).

123. *Id.*

124. For an explanation of CAR's post-election violence, see Elizabeth Murray & Rachel Sullivan, *Central African Republic's Disputed Elections Exacerbate Rising Tensions*, U.S. INST. OF PEACE (Jan. 7, 2021), https://www.usip.org/publications/2021/01/central-african-republics-disputed-elections-exacerbate-rising-tensions.

125. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

126. *Central African Republic: War Crimes Court's First Trial*, *supra* note 115.

127. Dr. Ewelina U. Ochab, *Central African Republic's Special Criminal Court to Hear its First Trial*, FORBES (Apr. 19, 2022), https://www.forbes.com/sites/ewelinaochab/2022/04/19/central-african-republics-special-criminal-court-hears-its-first-trial/?sh=556bcc393e3f.

128. *Id.*

129. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

130. *Id.*

contributed to improving the capability of the CAR's judicial system, both in terms of strengthening judicial and government infrastructure and in providing CAR national staff with knowledge of and experience with international norms.[131] Moreover, Elderfield explains that the SCC has led an initiative to collect and publish in one anthology all of CAR's criminal law-related judgments rendered since 2003, which he recognizes as "an important step towards understanding and clarifying Central African criminal legal principles and their application in local courts, both for SCC judges who must apply them … and for future law students and legal professionals in CAR."[132] These benefits are not entirely one-sided; through its relationship with the SCC, the ICC has also enjoyed an opportunity to expand visibility in the CAR regarding its ongoing trials and to educate local CAR residents about its judicial efforts.[133] All in all, the creation and operation of the SCC to date provides hope for generating more comprehensive justice for CAR violence as well as implementing greater transitional justice for victims within the CAR.

IV. THE NEED TO STREAMLINE

As mentioned above, the SCC is innovative as the first hybrid tribunal to share jurisdiction with the ICC.[134] Previously, the ICC operated alone, with hybrid tribunals adjudicating different sets of crimes independently from the ICC.[135] Unfortunately, this level of disconnect has not been without consequences. The increasingly disjointed nature of international criminal justice has been a barrier to holding perpetrators accountable for atrocity crimes and implementing transitional justice measures for communities recovering from conflict. In order to achieve more comprehensive justice, both with regard to the breadth of accountability and the types of justice offered to post-conflict communities, more streamlining and synergism between the ICC and hybrid courts is needed. The potential benefits of implementing effective jurisdiction-sharing relationships between hybrid courts and the ICC include greater criminal accountability for perpetrators, more comprehensive justice for victims, and greater legitimacy and efficiency for the courts themselves.

131. *Id.* (also recognizing that the international funds entering the CAR in relation to the SCC have resulted in various infrastructure improvements, including to the national morgue and central police station, as well as a prison and law library in Bangui).

132. *Id.*

133. *See* Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

134. *See* Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2, 10 (recognizing that in 2015, the SCC formed the first concurrent jurisdiction relationship between a hybrid court and the ICC).

135. *See* Part B, *infra*.

A. Greater Accountability

First, as discussed previously, the ICC is extremely limited in its ability to obtain comprehensive justice—both in investigating and prosecuting various atrocities throughout the world and ensuring complete justice for a single set of atrocity crimes. For instance, as the US Ambassador-at-Large for Global Criminal Justice Beth Van Schaack has recognized, "it is now clear that the ICC cannot handle all the atrocity situations ravaging our planet," especially with regard to atrocity situations occurring on territories of nations who have not joined the Rome Statute.[136] Moreover, in the atrocity situations that the ICC Prosecutor *is* able to investigate, the ICC lacks the resources to prosecute "more than a handful of senior figures involved in any conflict."[137]

This is easily demonstrated in the ICC's experiences with regard to the situation in the Democratic Republic of the Congo. Following the DRC's referral of the situation in 2004—which encompassed war crimes and crimes against humanity committed in the DRC since July 2002—the ICC Prosecutor opened an investigation into this situation.[138] Despite the widespread nature of the atrocities being committed in the DRC, which had resulted in at least 5.4 million deaths as of 2008,[139] the ICC has convicted only three defendants and issued arrest warrants for a total of seven individuals.[140]

Furthermore, the ICC is not the only judicial mechanism that is constrained in its goals of prosecuting perpetrators of mass atrocities. For instance, the Extraordinary Chambers for the Courts in Cambodia (ECCC), the hybrid tribunal created jointly by the United Nations and the Royal Government of Cambodia, was designed to investigate and prosecute the atrocities committed by the Khmer Rouge regime in the 1970s, which resulted in approximately two million deaths.[141] The ECCC formally concluded its operations in September 2022, after sixteen years of operations and the convictions of only three defendants.[142] Both the ICC and the ECCC show that judicial mechanisms acting independently can

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136. Van Schaack, *supra* note 4, at 169; Kersten, *supra* note 8, at 17 (recognizing that "the majority of the world's population resides beyond the [ICC]'s territorial jurisdiction").

137. Higonnet, *supra* note 46, at 349.

138. *Democratic Republic of the Congo*, INT'L CRIM. CT., https://www.icc-cpi.int/drc (last visited Sept. 29, 2022).

139. Joe Bavier, *Congo war-driven crisis kills 45,000 a Month: Study*, REUTERS (Jan. 22, 2008), https://www.reuters.com/article/us-congo-democratic-death-idUSL2280201220080122; *Democratic Republic of Congo*, INT'L RESCUE COMMITTEE, https://www.rescue.org/country/democratic-republic-congo (last visited Sept. 29, 2022).

140. *Democratic Republic of the Congo*, INT'L CRIM. CT., https://www.icc-cpi.int/drc (last visited Sept. 29, 2022).

141. Marija Đorđeska, *The ECCC Begins Winding Down: In Cambodia, a Hybrid Tribunal's Hybrid Legacy*, JUST SECURITY (Oct. 3, 2022), https://www.justsecurity.org/83316/eccc-winding-down-in-cambodia-hybrid-tribunals-hybrid-legacy.

142. *Id*.

often only skim the surface of providing justice for an extended period of atrocity crimes.

Thus, by combining forces when circumstances allow, hybrid courts and the ICC could utilize their resources to attain greater accountability for atrocities. The ICC, in part because of its international visibility and its refusal to recognize sovereign immunity, is well-suited to prosecute high-profile defendants, including heads of State and military leaders.[143] By tasking hybrid courts with prosecuting similar crimes committed by culpable perpetrators who do not enjoy the same "high-profile" notoriety, the ICC and the hybrid court could collectively obtain "more complete and just accountability," by ensuring that a broader range of culpable perpetrators are prosecuted.[144]

Taking this approach would also greatly improve courts' efficiency. Patryk Labuda has recognized that streamlining relations between hybrid tribunals and the ICC could "minimize a duplication of tasks" and "maximize cross-fertilization."[145] At a basic level, instead of having two independent mechanisms in two different geographical areas acquiring the same evidence through investigation and interviews, information acquired could be shared, thereby freeing up resources to engage in other investigations or to focus on prosecuting additional defendants within the same investigation. As Labuda further notes, this approach also avoids subjecting witnesses to several rounds of interviews, thereby minimizing the risk of inconsistent testimony and the re-traumatization of witnesses.[146]

B. More Comprehensive Justice

Moreover, a cohesive working relationship between the ICC and hybrid tribunals could also significantly enhance the breadth of justice rendered to victims and post-conflict communities. As mentioned above, the ICC is often unable to connect with its victims directly and, instead, is regularly viewed at the local stage as providing justice from the outside.[147]

As an international court permanently located in the Hague, far removed from where many of the crimes within its jurisdictional mandate were committed, the ICC is severely limited in its ability to provide tailored justice to victims.[148]

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143. Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine, Part III: How Many to Prosecute, Immunities, Amnesty and More*, JUST SECURITY (Sept. 26, 2022), https://www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/ (recognizing that the distinct advantages of an international or hybrid tribunal—over a purely domestic tribunal—is that immunity does not attach at the international level).

144. *Id.*; *see also* Higonnet, *supra* note 46, at 349 (recognizing that the ICC's success "can be bolstered by establishing complementary hybrids").

145. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 3.

146. *See id.*

147. *See* Cohen, *supra* note 25, at 6; Higonnet, *supra* note 46, at 349.

148. *See* Cohen, *supra* note 25, at 6.

Aside from limited outreach programs, the ICC cannot help rebuild domestic legal systems in affected States following a conflict, train local judges and lawyers, or even provide means by which victims can actively participate in its judicial proceedings.[149] As a result, "wholly international courts," like the ICC, "have proven disconnected with local realities and [have] even be[en] considered imperialistic," by the States for whom the ICC seeks to obtain justice.[150] This imposition of justice from "the outside" deprives victims from participating in or enjoying a sense of ownership over ICC proceedings, which directly hampers the ICC's legitimacy.[151] Without this ownership, a court like the ICC is limited to achieving criminal accountability, and is effectively prevented from "promoting reconciliation, developing a culture of accountability, and creating respect for judicial institutions in a post-conflict society."[152]

As previously mentioned, one of the driving forces behind creating the hybrid model was to foster local ownership over—and legitimacy in—court proceedings, and to return criminal justice—at least in part—to the victims and the affected State.[153] Given the incorporation of local judges, lawyers, and staff in a hybrid court's operations, as well as—in many cases—the court's physical location within the affected State, the hybrid model carries significant benefits when it comes to transitional justice.[154] Specifically, unlike the ICC, hybrid tribunals have the potential to strengthen and rebuild local judicial systems, both through the physical rebuilding of infrastructure as well as capacity building of local lawyers, judges, and court staff.[155] Hybrid tribunals can also foster the rule of law within the affected State and deter future violence, and, moreover, they can help establish reconciliation and stability by providing the affected State with ownership over the justice process.[156]

It thus logically follows that in circumstances in which international crimes are exclusively investigated and prosecuted by the ICC, the affected State is often

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149. *Id.* at 5 ("Locating a tribunal outside of the country virtually ensures that, though public in principle, it will not be accessible to those who should in the first instance be able to attend.").

150. Higonnet, *supra* note 46, at 349.

151. Ainley & Kersten, *supra* note 43, at 2; Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?* 21 AM. U. INT'L L. REV. 525, 526 (2006) (defining one form of ownership as the "popular acceptance of a particular tribunal or its work, especially within the jurisdiction to which it relates," and further recognizing that the degree of victims' ownership "serves as an important measure of the tribunal's credibility and the extent to which it is perceived to have done justice").

152. Cohen, *supra* note 25, at 6.

153. Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 81 (2008); Cohen, *supra* note 25, at 6; de Wet, *supra* note 10, at 33.

154. *See generally* Higonnet, *supra* note 46 (discussing the elements of "effective justice" that can be achieved through the hybrid model).

155. *See generally* i*d.*

156. Higonnet, *supra* note 46, at 358–72; Ochs, *A Renewed Call for Hybrid Tribunals*, *supra* note 51, at 395–401.

left wanting some transitional justice initiatives. Indeed, as Etelle Higonnet has recognized, "the ICC was not designed to accomplish all the goals that can be achieved through hybrids and provides only a partial solution to impunity."[157] By combining the ICC's potential to obtain criminal accountability with the type of outreach and capacity building that can only be provided by hybrid tribunals located within affected States, victims can seek both traditional and transitional justice.

In conclusion, as ICC Deputy Prosecutor Mame Mandiaye Niang has said concerning the collaborative relationship between the ICC and the SCC in the Central African Republic, "it is this synergy and these combined actions that make the fight against impunity for crimes under international law effective and that make justice relevant to the most affected communities."[158]

C. Benefits to Courts Themselves

It is not only the victims who benefit from more collaborative relationships between the ICC and hybrid courts; there are immense benefits to the courts as well. First, such a streamlined relationship can conserve valuable resources for both mechanisms. As scholar Patrick Labuda has insightfully remarked, "at a basic level, effective coordination and conflict resolution mechanisms can prevent wasteful practices, free up money, and channel resources to areas which receive less attention."[159] In a field routinely plagued by budgetary and resource constraints, an efficient approach to investigation and prosecution that would avoid the duplication of time, funds, and personal resources would be a welcomed relief.[160]

Moreover, both the ICC and hybrid tribunals struggle with legitimacy—or how the people and States which the courts are designed to serve perceive their operations.[161] Legitimacy for both the ICC and any hybrid court is essential, and

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157. Higonnet, *supra* note 46, at 348–49.

158. *ICC Prosecutor Underlines Commitment*, *supra* note 119.

159. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 3.

160. *See* de Wet, *supra* note 10, at 50 (recognizing that a division of labor between the ICC and hybrid courts would "contribute to ensuring that the different institutions remain functional despite financial constraints"); *see also* Yuval Shany, *The Role of National Courts in Advancing the Goals of International Criminal Tribunals*, 103 AM. SOC'Y INT'L L. PROC. 210, 212 (2009) (recognizing the "mismatch" between international criminal courts' goals and capabilities due to limited resources); Janet H. Anderson, *The ICC in Times of Budget Crunch*, JUSTICEINFO.NET (Dec. 13, 2021), https://www.justiceinfo.net/en/85475-icc-times-budget-crunch.html (discussing the ICC Prosecutor's request for a budget increase in light of complaints that the Office of the Prosecutor has "spread itself too thin" by opening investigations and preliminary examinations in 11 and 16 States, respectively).

161. This Article utilizes the term "legitimacy" to refer to "perceived legitimacy," or as Stuart Ford defines it, "how audiences subjectively perceive the legitimacy of international criminal courts." Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 406, n.1 (2012). *See* Ochs, *Propaganda Warfare on the International Criminal Court*, *supra* note 41, at 582 (discussing the critical impact recent "propaganda wars" have had on the ICC's perceived

indeed, Professor Stuart Ford recognizes a large body of literature that deems perceived legitimacy to be a "prerequisite to the success of all transitional justice mechanisms, including international criminal courts."[162]

By combining forces, both the ICC and hybrid courts can foster greater legitimacy. One of the most strident criticisms against the ICC and hybrid tribunals pertains to the limited number of convictions they have obtained. As previously discussed, combining forces could expand the courts' ability to obtain greater convictions and broader accountability, thereby directly contributing to greater legitimacy of both mechanisms.

Streamlined relations between the ICC and hybrid tribunals—especially one located in an affected State—can significantly improve how the ICC is perceived by local communities. The ICC's legitimacy is hampered among local populations due to its imposition of justice from the outside, and the difficulty it experiences in engaging in outreach in affected States.[163] For example, despite the ICC's "concerted effort to expand its visibility" in the CAR, it struggles in State cooperation and public outreach, given its lack of "significant permanent field presence in a country that still functions most efficiently on the basis of face-to-face encounters."[164] By coordinating with the SCC, which is located in Bangui and is thus much better suited to engage in face-to-face outreach, the ICC can now ensure that the local community within the CAR will be well informed not just of the SCC's operations, but also of its partner's—the ICC.

Alternatively, while hybrid courts may have greater perceived legitimacy in the affected State as opposed to the outsider ICC, they may also receive skepticism from the local community, especially in countries with judicial systems that are historically corrupt or subject to political influence.[165] By collaborating with the ICC, hybrid courts will benefit from international oversight beyond the courts' embedded international actors. Operating in close conjunction with an international organization like the ICC could lend a hybrid court credibility and legitimacy that may otherwise be absent in the eyes of the local population.[166]

While there have been concerns that hybrid tribunals may undermine the authority and reach of the ICC, and conversely, that the ICC may render hybrid

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legitimacy); Hobbs, *supra* note 43, at 485 (concluding that as of 2016, the field of international criminal justice was "suffering something of a crisis of legitimacy").

162. Ford, *A Social Psychology Model, supra* note 161, at 407 (citing Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 12–13 (2010)).

163. *See* Jane E. Stromseth, *The International Criminal Court and Justice On the Ground*, 43 ARIZ. ST. L.J. 427, 435 (2011); *see* Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

164. Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

165. Stromseth, *supra* note 163, at 435.

166. *See* Higonnet, *supra* note 46, at 349 (explaining the "credibility of international law and the legitimacy of international institutions, which can lend hybrid courts a degree of authority as a fair mechanism for holding perpetrators accountable").

tribunals redundant, these concerns have so far proved unfounded.[167] Indeed, to view these two mechanisms in a competitive relationship specifically "ignore[s] the possibility of cooperation" and undermines the ability of these mechanisms to "curb impunity for international core crimes."[168] Instead, the focus should be on developing the courts' symbiotic relationship and enhancing its synergy.[169] As Ambassador Van Schaack has put it, "rather than threatening to undermine the ICC, [hybrid tribunals] have the potential to contribute to a more integrated, differentiated and impactful international justice system that will mount a stronger challenge to impunity by reaching more victims and perpetrators."[170]

Unsurprisingly, this article is not the first to advocate for such streamlining of international justice, given the evident benefits associated with a more cohesive international criminal justice system.[171] Indeed, scholars have proposed different methods utilizing pre-existing international criminal law mechanisms to achieve a more comprehensive and seamless approach to justice. These include proposals for a permanent "hybrid chamber" within the ICC jointly composed of international judges and ad hoc domestic judges from the territory where the crimes subject to the proceedings occurred;[172] a permanent hybrid tribunal;[173] embedding international legal experts into existing domestic judicial frameworks to work side-by-side with domestic judges and prosecutors;[174] and even a "roaming ICC," which envisions a decentralized international criminal system that would create temporary courts of law at the domestic, regional, and international levels.[175]

While many of these proposals are significant—and should be considered in due course—none is more pressing than the need for a streamlined relationship between the ICC and hybrid tribunals. There have been proposals for—and in some cases, international efforts taken to create—additional hybrid tribunals to address crimes committed in States currently subject to ICC investigation,

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167. Ainley & Kersten, *supra* note 43, at 3; de Wet, *supra* note 10, at 50 (explaining that allegations that hybrid courts undermine ICC jurisdiction "ignore the possibility of cooperation between these institutions in an attempt to curb impunity for international core crimes").

168. de Wet, *supra* note 10, at 50.

169. *See generally*, de Wet, *supra* note 10 (recognizing the opportunity for international and hybrid courts to enjoy synergies by which they can contribute to domestic legal capacity in addition to achieving criminal accountability).

170. Van Schaack, *supra* note 4, at 171.

171. *See generally, e.g.*, de Wet, *supra* note 10.

172. David Donat-Cattin & Philippa Greer, *Making the Case for a Hybrid Chamber at the ICC*, HARV. INT'L L. J. BLOG, https://harvardilj.org/2021/05/making-the-case-for-a-hybrid-chamber-at-the-icc/ (last visited Aug. 10, 2022).

173. *See* Kersten, *supra* note 8, at 24–26.

174. *See* Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

175. *See* Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429, 431–32, 487 (2007).

including Kenya, Sudan, and the Democratic Republic of the Congo.[176] This is positive news, given that these mechanisms could achieve more comprehensive accountability and broader justice for victims; however, these results are largely dependent on a clear framework that ensures a smooth and cohesive relationship between these new hybrid courts and the ICC's ongoing operations.

V. A FRAMEWORK FOR SYNERGY

Given the clear benefits associated with establishing jurisdiction-sharing relationships between the ICC and hybrid tribunals, it is evident that these relationships should be pursued in the future. Yet, it is much less clear how exactly these jurisdiction-sharing relationships should be structured. Accordingly, the need to develop a framework that governs these future relationships is essential.

Unlike with other permanent courts, hybrid courts are ad hoc, temporary, and highly flexible, enabling them to tailor to specific situations.[177] This flexibility is highly beneficial in the context of creating hybrid tribunals that intend to share jurisdiction with the ICC, as it provides the possibility of molding the tribunal's structure, governing rules, and jurisdictional grounds in consideration of its relationship to the ICC. Accordingly, the circumstances and features of each ICC-hybrid tribunal relationship will likely differ significantly.

However, considering that the jurisdictional sharing relationship may be here to stay, it is essential to have at least a very basic framework for how these two entities may cooperate to achieve the most comprehensive justice possible. While the ICC-SCC relationship provides an excellent starting point for such a framework, the high level of secrecy, both between the courts and with the public, make it very difficult for this particular relationship to be used as a model for future ICC-hybrid tribunal cooperation.

Accordingly, this Article seeks to provide a highly simplified, foundational framework for the primary features that should exist in any ICC-hybrid tribunal jurisdiction-sharing relationship. Specifically, it sets forth: (1) the requisite circumstances needed for an ICC-hybrid tribunal relationship; (2) a jurisdictional framework, with specific examples for how these two mechanisms may share jurisdiction while also avoiding the jurisdictional challenges that have plagued the ICC-SCC relationship; (3) suggestions for how a hybrid tribunal may be designed to most effectively cooperate with the ICC's existing features and structure; and (4) a discussion on the need for consistent procedural rules and guidelines between the ICC and the envisioned hybrid tribunal. Additionally, this section seeks to show how each tenant may work in practice should a future jurisdiction-sharing relationship come to fruition between the ICC and a proposed hybrid tribunal for Ukraine. This Article will hereon refer to this proposed hybrid tribunal as the "Special Ukrainian Tribunal."

176. Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2.

177. Yang, *supra* note 54, at 54.

A. Requisite Circumstances

First and foremost, in determining whether a jurisdiction-sharing relationship between the ICC and a hybrid court is appropriate to adjudicate a specific situation, there must be requisite circumstances in place to warrant the creation of a hybrid tribunal. It is easy to get caught up in tribunal fever, with the idea that the creation of more and more courts will proportionately reduce impunity. However, Patryk Labuda cautions, "the very real existence of an accountability gap should not be confused with the notion that 'more institutions' necessarily translates into 'more justice.'"[178] And indeed, this paper is not advocating for the creation of more tribunals simply for tribunals' sake. The creation of a hybrid tribunal is not necessary for every situation before the ICC. Instead, hybrid tribunals should only be used to complement the ICC's work when broader justice is necessary and when the creation of a hybrid tribunal in an affected State is feasible.

The circumstances of each post-conflict State are often radically different.[179] As Jane Stromseth has recognized, "whether holding domestic or hybrid atrocity trials within the affected [State] is realistic at all or whether, instead, only international proceedings outside the [State] offer prospects for fair justice will also differ significantly across [States] recovering from atrocities."[180] Not every one of these affected States is suitable for the creation of a hybrid tribunal. The late Judge Antonio Cassese identified the following requirements that any affected State must have for a hybrid tribunal to be successful: (1) the national judicial system must be at least partially viable; and (2) there must be a need to "assuage the nationalistic demands of the local population" for the administration of justice, or in other words, "the national government must *want* to be involved."[181] Moreover, as recommended in the Dakar Guidelines on the Establishment of Hybrid Courts, a comprehensive "needs assessment" should be conducted to determine "whether or not a hybrid court is an appropriate mechanism to institute in response to mass crimes."[182] Such an assessment should intimately examine the post-conflict State's "political, social, legal and economic contexts."[183]

Unfortunately, these requirements make hybrid tribunals improper in many post-conflict States. Lessons can be drawn from the Extraordinary Chambers in the Courts of Cambodia, which faced countless barriers and endless challenges

178. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 2–3.

179. Stromseth, *supra* note 163, at 432.

180. *Id.*

181. Cassese, *supra* note 45, at 5; Raub, *supra* note 52, at 1042.

182. Ainley & Kersten, *supra* note 43, at 9.

183. *Id.*

pertaining to political interference and judicial deadlock, which was in part due to a lack of political support within Cambodia.[184]

But the circumstances necessary for an ICC-hybrid tribunal jurisdiction-sharing relationship extend well beyond those warranted for the creation of a hybrid court. In the event that the former circumstances are satisfied, and the creation of a hybrid tribunal is appropriate for addressing conflict crimes, a jurisdiction-sharing relationship between that hybrid tribunal and the ICC should only be utilized when: (1) the affected State has a positive and supportive relationship with the ICC; and (2) the ICC Prosecutor supports such a jurisdiction-sharing relationship.

Regarding the first requirement, the affected State must have a stable relationship with the ICC. Not only must the State be a State Party to the Rome Statute—or have otherwise accepted the ICC's jurisdiction—it must also have a history of supporting the ICC by upholding its duties under the Rome Statute, such as turning over evidence and witnesses as required.[185] Or put differently, the affected State must not have a track record of impeding the Prosecutor's investigations or prosecutions.

Moreover, the relationship must not be one-way; without the ICC Prosecutor's support for a jurisdictional-sharing relationship, it is highly unlikely that said relationship will be successful. As noted in the next section, the Prosecutor and his office must establish a specific agreement with the hybrid tribunal that delineates the shared jurisdiction at the outset of the relationship and prescribes the precise details of the relationship; without prosecutorial support, the creation of this agreement will be highly unlikely. Moreover, a lack of prosecutorial support poses significant obstacles to cooperation between the ICC and the hybrid tribunal, especially when it comes to the sharing of evidence. As such, both an affected State's support for the ICC and the ICC's support for the hybrid tribunal with which it seeks to share jurisdiction are vital for such a relationship to work.

I will turn now to applying these requirements to the Situation in Ukraine. As has been deftly discussed at length by Kevin Jon Heller, the circumstances in Ukraine are favorable for the creation of a hybrid tribunal.[186] Specifically, applying the requirements identified by Judge Cassese reveals: (1) Ukraine's national judicial system remains viable, as it continues to conduct domestic

184. *See generally*, Shannon Maree Torrens, *Allegations of Political Interference, Bias and Corruption at the ECCC*, *in* The EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, eds. Simon M. Meisenberg & Ignaz Stegmiller (Springer 2016) (discussing the issues that arose in part from a lack of support of the ECCC by the Cambodian Government).

185. A State party's obligations to cooperate with the ICC are set forth in Part 9 of the Rome Statute. Rome Statute, *supra* note 4, at Part 9.

186. Heller, *supra* note 17; *see also* Janet H. Anderson, *Everything You Need to Know or Argue About a Special Tribunal on Russia's Crime of Aggression*, JUSTICEINFO.NET (Dec. 13, 2022), https://www.justiceinfo.net/en/110201-everything-you-need-to-know-argue-special-tribunal-russia-crime-of-aggression.html (setting forth the author's interview with Kevin Jon Heller).

trials—including those for Russian war crimes—as the conflict within its borders rages;[187] and (2) Ukrainians have specifically expressed a desire for the creation of an internationally supported tribunal to prosecute Russian crimes.[188] Moreover, while a full "needs assessment" as envisioned by the Dakar Guidelines is beyond the scope of this paper, it is possible—if not likely, given the contexts currently present in Ukraine—that such an assessment would find the hybrid tribunal to be an appropriate mechanism for investigating and prosecuting at least some of Russia's crimes.

However, the additional requirements I note above make the prospects of a jurisdiction-sharing relationship between the ICC and the Special Ukrainian Tribunal much more complicated. Although Ukraine is not a formal State Party to the Rome Statute, it has accepted ICC jurisdiction for Russian crimes extending back to 2014.[189] Moreover, there is no public evidence to suggest that Ukraine has attempted to thwart the ICC's ongoing investigation; therefore, the first requirement—that the affected State be supportive of the ICC—is met. However, ICC Prosecutor Karim Khan has expressed his doubts as to the creation of a new tribunal for Ukraine.[190] Specifically, when questioned by reporters about his views on the proposed tribunal in 2022, Prosecutor Khan famously said, "We should avoid fragmentation, and instead focus on consolidation,"[191] a statement that would ironically appear to justify a jurisdiction-sharing relationship with the proposed tribunal. While the specific reasons behind Prosecutor Khan's unwillingness to support the tribunal have not been made public, given his hesitancy at this juncture, it does not appear that the second requirement for a jurisdiction-sharing relationship between the ICC and the Special Ukrainian Tribunal is met.

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187. See Elena Sanchez Nicolas, *Ukraine files cases against 45 suspected war criminals*, EU OBSERVER (Oct. 13, 2022), https://euobserver.com/ukraine/156281.

188. *See, e.g.*, Jennifer Hansler, *Ukrainians push for US to support special tribunal to prosecute Russian leadership for crime of aggression*, CNN POLITICS (Dec. 14, 2022), https://edition.cnn.com/2022/12/14/politics/ukraine-special-tribunal-russia-crime-of-aggression/index.html.

189. Ukraine has lodged two declarations with the ICC formally accepting the Court's jurisdiction over Russian crimes committed on Ukrainian territory. The first, lodged with the court in 2014, granted the ICC jurisdiction starting from November 21, 2013, to February 22, 2014, and the second, filed in 2015, extended this jurisdiction for an "indefinite duration." Ukrainian Declaration to the ICC (Apr. 9, 2014), https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf; Ukrainian Declaration to the ICC (Sept. 8, 2015), https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

190. Molly Quell, *ICC Prosecutor Opposes EU Plan for Special Ukraine Tribunal*, AP (Dec. 5, 2022), https://apnews.com/article/russia-ukraine-war-crimes-netherlands-the-hague-ursula-von-der-leyen-9e83e1107064ef6e9c375576b998373a (recognizing Prosecutor Khan's pushback to the creation of a Special Tribunal for Ukraine).

191. *Id.*

B. Jurisdictional Delineation

Should the circumstances in an affected State prove viable for the creation of a hybrid tribunal, as well as a jurisdiction-sharing relationship with the ICC, the international community must then turn to the issue of how such overlapping jurisdiction is divided. As discussed previously with regard to the SCC, how jurisdiction is shared can be problematic should a hybrid tribunal grant the ICC jurisdictional primacy, as such could turn the concept of complementarity "on its head," and open up both the hybrid tribunal's governing statute and ICC proceedings to jurisdictional challenges.[192]

However, the general view of complementarity has largely shifted in recent years. While "traditional complementarity" espoused the idea that the ICC could coerce States into conducting domestic trials under threat of ICC intervention, the concept of "positive complementarity" envisions a more "cooperative relationship" between State legal systems and the ICC.[193] Under a positive complementarity approach, the ICC would work with national jurisdictions to prosecute by actively communicating with the affected State's judiciaries, conducting legal and judicial training in-State, and monitoring State prosecutorial processes.[194] And indeed, scholars have noted that ICC Prosecutor Karim Khan has been open to this practice of positive complementarity, expressing a willingness to enter into "a more positive cooperative relationship with those States that are fundamentally willing and able to conduct national criminal prosecutions and work with his office to this end."[195]

A jurisdiction-sharing relationship between the ICC and a hybrid tribunal—which would likely qualify as a domestic court for complementarity purposes—would be consistent with this shift towards positive complementarity. Moreover, the Rome Statute and its interpreting jurisprudence do not prevent the ICC from sharing jurisdiction with a domestic or hybrid court, especially if the hybrid court consents to such a jurisdiction-sharing relationship. Specifically, complementarity becomes less of an issue when a hybrid court agrees to surrender some—but not all—of its primacy to the ICC. In this situation, the hybrid court could agree that the ICC has primary jurisdiction over either certain defendants or certain crimes. Such a relationship should not violate the complementarity principle because it would not exclusively give the ICC primary jurisdiction over all crimes (as was done with the SCC[196]); it would instead affirmatively delineate

192. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 7.

193. Katherine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17(2) HUM. RTS. BRIEF 21, 22 (2010), https://www.corteidh.or.cr/tablas/r24177.pdf.

194. *Id.*

195. Kai Ambos, *The return of 'positive complementarity'*, EJIL: TALK! (Nov. 3, 2021), https://www.ejiltalk.org/the-return-of-positive-complementarity/.

196. SCC Statute, *supra* note 101, at art. 37.

the types of individuals or crimes the hybrid tribunal would deem itself "unwilling" to investigate.

The actual distribution of the jurisdictional primacy between a hybrid tribunal and the ICC would be dependent upon the specific circumstances surrounding the nature of the crimes that fall within the shared jurisdiction and capacity of the hybrid tribunal. Certain scholars have proposed that the ICC should focus on prosecuting the highest-ranking and highest-profile defendants due to its wide potential media reach and its focus on the gravest crimes.[197] Hybrid tribunals could then concentrate on prosecuting the "lower ranking officials and the less severe crimes" that fall within that shared jurisdiction.[198]

While this distribution may be suitable in many hybrid-ICC jurisdiction-sharing relationships, it will not always be ideal, or even possible. For example, in a potential jurisdiction-sharing relationship between the ICC and a Special Ukrainian Tribunal, assigning the ICC to high-profile defendants while relegating lower-level defendants to the jurisdiction of the Special Ukrainian Tribunal would not be feasible. As discussed previously, one of—if not the exclusive—crime within the Special Ukrainian's Tribunal's jurisdiction would be the crime of aggression, for which only persons who are in a position to effectively "exercise control over or to direct the political or military action of" the aggressor State may be convicted.[199] Thus, should the Special Ukrainian Tribunal exercise jurisdiction over the crime of aggression, it must thus retain jurisdiction over Vladimir Putin and any other high-ranking Russian leaders who exercised control over Russia's invasion of Ukraine. Accordingly, should the Special Ukrainian Tribunal and the ICC consent to shared jurisdiction, the proposed division of jurisdictional primacy would need to be flipped from the model proposed above, with the Special Ukrainian Tribunal retaining jurisdiction over more high-profile defendants and the ICC pursuing cases against lower-ranking officials. It is, however, unclear whether the ICC would agree to such a proposed division of jurisdiction, and such a concept could be the reason for Prosecutor Khan's pushback against the creation of the Special Ukrainian Tribunal.[200] Again, these complications make clear that the specific jurisdictional division in any ICC-hybrid tribunal relationship must be determined on a case-by-case basis.

Regardless of the actual division reached by the ICC and the hybrid tribunal, the jurisdictional distribution should be clarified from the outset. As Patryk Labuda concluded, failing to identify clear means of distribution at the start of the ICC-hybrid relationship will have "pernicious effects further down the line," and may lead to future conflicts over jurisdictional primacy that will waste both time

197. *See* de Wet, *supra* note 10, at 49.

198. *Id*. at 49.

199. *Elements of Crimes*, ICC, art. 8 *bis*, element (2), https://www.icccpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

200. *See* Quell, *supra* note 190.

and precious resources for both entities.[201] Instead, Labuda recognizes that "an institutional framework that establishes prospective criteria for competing jurisdictional claims and a clear division of institutional responsibilities will help to prevent confusion, a duplication of tasks and unnecessary conflicts."[202] Such an agreement should be codified in the form of a "Master Agreement" that regulates the relationship between the ICC and the hybrid tribunal, and which may be modeled—to some extent—after the Relationship Agreement between the ICC and the UN.[203] This Master Agreement would specifically lay out the jurisdictional agreement between the two mechanisms and also govern any potential investigatory or prosecutorial dilemmas that may arise within the relationship, including but not limited to: arrest warrant procedures, confidential records sharing, and detention and custody concerns.

Moreover, the jurisdictional division agreed upon by the two courts should be transparent to foster the legitimacy of both entities. This requires making the Master Agreement and any amendments publicly available to the extent possible in light of security concerns. If the public is made readily aware of what types of investigations each entity is tasked with, it will be much better equipped to measure progress. Likewise, should such a jurisdictional division be successful, its codification could provide clear precedent for future jurisdiction-sharing relationships.

C. Open Cooperation

In structuring a hybrid court to share jurisdiction with the ICC, significant attention must be given to the court's institutional design, with special consideration as to how the two entities will collaborate and share resources to most effectively synergize their relationship.

It largely goes without saying that the ICC's Office of the Prosecutor and the prosecutorial arm of the hybrid court should work cohesively, not only to ensure that the jurisdiction-sharing agreement is followed, but to plan investigations and prosecutions so as to avoid replicating work.[204] Accordingly, an open stream of communication between the two prosecutorial offices is critical. To the extent possible, the international prosecutors involved in the hybrid tribunal should have experience working with the ICC's Office of the Prosecutor and be able to provide knowledge of the intricacies of the ICC's prosecutorial investigations with the

201. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 25.

202. *Id.* at 26.

203. *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, https://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf. *See* Scheffer, *supra* note 19 (arguing that the ICC-UN Relationship Agreement should apply to a relationship between the Special Ukraine Tribunal and the ICC).

204. *See* Scheffer, *supra* note 19 ("The last thing proponents of justice want is two strong-willed prosecutors bickering over procedures of cooperation. But that is quite easily avoided.").

hybrid tribunal's local prosecutors. This will also further the potential for the hybrid tribunal to foster capacity building of local prosecutors.

This level of cooperation should also extend to various other offices within both courts, namely the registry and any offices specifically dedicated to outreach. Beginning with the registry, which is generally responsible for providing "judicial support services and [the] overall administration of the tribunal,"[205] it would be convenient for the ICC and the hybrid tribunal's registries to work cohesively, specifically when it comes to issues of funding and communications. First, funding is an essential aspect of any international tribunal. The delineation of funds between the ICC and the hybrid tribunal involved in the jurisdiction-sharing scheme should be agreed upon at the outset and formally codified within the Master Agreement governing the relationship. In the event issues arise in how funds are to be budgeted among the two mechanisms, it is vital that members of the ICC's registry as well as the hybrid tribunal's registry have a clear method of resolution for how to avoid critical budgetary issues.[206]

Additionally, it is important that both registries—or the offices dedicated specifically to communications, should the hybrid tribunal choose to assign communication tasks to a separate office—collaborate to effectively convey information about the ICC and the tribunal's work to the general public. Both entities must provide regular public updates, as communication with the public is essential to fostering an international criminal mechanism's legitimacy.[207] Given the ICC's widespread reach, it certainly has an advantage in reaching the broader public. Yet, the hybrid tribunal's communications team has the advantage of being located within the affected State, and is capable of providing on-the-ground updates, especially in communities that lack reliable access to international media.[208] Sharing press releases and other news pertaining to prosecutorial and judicial developments will ensure that the public is apprised of the mechanisms' work, which will help positively influence public opinion and thereby foster the legitimacy of both entities.

This approach to institutional design—by coordinating work between the ICC's offices and those of its hybrid counterpart—is especially feasible in a

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205. Ainley & Kersten, *supra* note 43, at 32.

206. The potential harm caused by improper budgeting is not merely theoretical; budgeting issues threatened to close the Special Tribunal of Lebanon in 2021. See Severe Financial Crisis Threatens the STL's Ability to Fulfil its Mandate, Special Tribunal Lebanon (June 2, 2021), https://www.stl-tsl.org/en/media/press-releases/severe-financial-crisis-threatens-the-stls-ability-to-fulfil-its-mandate (explaining that the Special Tribunal faced an "unprecedented financial crisis" which threatened its ability to operate beyond July 2021, despite several pending cases).

207. Ochs, *Propaganda Warfare on the International Criminal Court*, *supra* note 41, at 626–28.

208. *See* Cohen, *supra* note 25, at 36 (recognizing that hybrid tribunals' "location in the country where the crimes occurred" provides an advantage over purely international courts when it comes to community outreach); John D. Ciorciari & Anne Heindel, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 236 (2014) (noting that the Cambodian hybrid tribunal's in-country location provided it with significant advantages when it came to outreach).

potential relationship between the ICC and the potential Special Ukrainian Tribunal. As noted by former Ambassador-at-Large for War Crimes David Scheffer, establishing a "cooperative relationship agreement" between the ICC and the Special Ukrainian Tribunal is "the most critical issue."[209] Having an open stream of communication between the two prosecutorial offices, as well as the registry and any dedicated outreach or communication teams, could effectively obtain the synergy envisioned by an ICC-hybrid tribunal jurisdiction-sharing relationship.

D. Applicable Procedure

Finally, cohesive procedural and evidentiary rules are essential for creating legitimate jurisdiction-sharing relationships between the ICC and hybrid tribunals. Rules of procedure and evidence governing hybrid tribunals are generally created by the tribunal's judges.[210] In jurisdiction-sharing relationships with the ICC, hybrid tribunal judges should take steps to ensure that the tribunal's rules align with the ICC's Rules of Procedure and Evidence so that proceedings are as procedurally consistent as possible. Such consistency will not only guarantee clearer international criminal jurisprudence, but will also preempt potential challenges to legitimacy, as both courts' judicial opinions regarding the admissibility of evidence or sentencing decisions will be in alignment.

In addition to creating compatible rules of procedure and evidence, the ICC and its companion hybrid tribunal should strive for uniformity in evidence gathering procedures through a relevant Master Agreement. Such an agreement is not particularly unusual. In fact, the ICC and the European Union Agency for Criminal Justice Cooperation (Eurojust) recently jointly established a set of guidelines for nongovernmental organizations collecting evidence of atrocities in Ukraine. These guidelines ensure that evidence collected by NGOs and other civil society organizations will comply with the collection and preservation requirements necessary for admissibility in court.[211] Similar guidelines should also pertain to any hybrid tribunal with which the ICC decides to pursue a jurisdiction-sharing relationship.

Moreover, these cohesive rules should extend beyond evidence-gathering procedures to the regulations governing the conduct of the actors involved in both mechanisms. The ICC has already implemented codes of conduct that govern its

209. Scheffer, *supra* note 19.

210. *See* Trahan, *supra* note 143.

211. Mike Corder, *Intl Court, EU Agency Publish Evidence-collecting Guidelines,* (Sept. 21, 2022), https://apnews.com/article/russia-ukraine-european-union-international-criminal-court-government-and-politics-8f11ae4601f12db2bfacd01806de17c3.

judges,[212] as well as members of its Office of the Prosecutor,[213] and its defense counsel.[214] While these codes are not always utilized in hybrid courts, the Dakar Guidelines strongly recommends their adoption to "maintain high professional standards and demonstrate internal accountability."[215] Accordingly, in a jurisdiction-sharing relationship, to ensure that judges, prosecutors, and defense counsel across both mechanisms are held to the same standards and in efforts to further legitimize them, the hybrid tribunal should employ codes of prosecutorial and judicial conduct that mirror those adopted by the ICC.

These suggestions would be fairly straightforward to implement should a jurisdiction-sharing relationship between the ICC and the proposed Special Ukrainian Tribunal progress. While the two mechanisms may seek to investigate and prosecute different crimes—if the Special Ukrainian Tribunal indeed limits its jurisdiction to the crime of aggression, as scholars have suggested[216]—there will be considerable overlap in the type of evidence each mechanism will utilize, especially regarding proof of Russia's initial invasion into Ukraine in February 2022. Accordingly, the Special Ukrainian Tribunal should adopt rules of evidence and procedure that closely mirror those already implemented by the ICC.

Further, efforts to promote the legitimacy of the Special Ukrainian Tribunal are imperative, as its legitimacy is already being questioned—even before concrete plans have been implemented for the tribunal's establishment.[217] Thus, it is critical that all members of the Special Ukrainian Tribunal—from the judges, to the prosecutors, to the staff—act in accordance with international norms of professionalism. The Special Ukrainian Tribunal could utilize the same codes of conduct already established within the ICC. By closely mirroring these overarching rules, the Special Ukrainian Tribunal can ensure consistency with the ICC and thereby foster its legitimacy and effectiveness, both within Ukraine and worldwide.

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212. *Code of Judicial Ethics,* ICC-BD/02-02-21, INT'L CRIM. CT. (Jan. 19, 2021), https://www.icc-cpi.int/sites/default/files/Publications/Code-of-Judicial-Ethics.pdf.

213. *Code of Conduct for the Office of the Prosecutor*, INT'L CRIM. CT. (Sept. 5, 2013), https://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf.

214. *Code of Professional Conduct for Counsel,* INT'L CRIM. CT. (Dec. 3, 2005), https://www.icc-cpi.int/sites/default/files/Publications/Code-of-Professional-Conduct-for-counsel.pdf.

215. Ainley & Kersten, *supra* note 43, at 30.

216. Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SECURITY (Sept. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/.

217. Kai Ambos, *A Ukraine Special Tribunal with Legitimacy Problems?* VERFASSUNGSBLOG (Jan. 6, 2023), https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/.

VI. CONCLUSION

As Professor Jane Stromseth has astutely recognized, "the blending of international capacity and local aspirations and abilities in the pursuit of criminal justice is a complex human endeavor—one that will never be free of tension or turbulence."[218] However, despite these inevitable challenges, efforts must be made to change international criminal law from a handful of courts with distinct objectives and independent operations into a more cohesive and evolving field. Not only would such a movement lead to greater accountability for international crimes, which is vital in light of growing impunity, it would also provide significant benefits for victims (in the form of more comprehensive justice) and the courts themselves (through more effective and efficient use of minimal resources).

Efforts towards creating a more collaborative and less disjointed field of international criminal justice have already resulted in one cohesive, jurisdiction-sharing relationship between the ICC and a hybrid tribunal—the Special Criminal Court in the Central African Republic. However, given the lack of transparency surrounding the practicalities of this relationship, it fails to provide a framework for future jurisdiction-sharing relationships. This Article hopes to lay the foundations of such a framework and implant the idea that one is vital to the future of international criminal law. Synergy and stronger relationships between international criminal mechanisms will undoubtedly translate into more widespread and comprehensive justice worldwide, and these benefits certainly outweigh any inevitable challenges.

218. Stromseth, *supra* note 163, at 445.