THE RETURN OF HYBRID COURTS: OMEN OR PROMISE?

According to Greek mythology, chimeras were monstrous hybrid creatures made up of the parts of different animals, usually a lion, a goat and a snake. These monsters were regarded as nature's abortions and their appearance was considered an omen for disaster.

Just like chimeras, hybrid courts are courts whose staff and applicable law consist in a combination of heterogeneous elements: the international and the domestic. However, should the return of hybrid courts on the international stage be considered as ominous as that of their mythological ancestors?

During the last decades, the hybrid design slowly emerged as the standard design for transitional justice courts, its success relying largely on its ability to get the best of both worlds: respect for international fair trail standards and a decent degree of domestic ownership. Unlike purely international courts, hybrid courts are said to enjoy greater legitimacy, since they rely heavily on local staff, lay their seat in the countries where the atrocities occurred, apply a blend of international and domestic law and set out legacy-building mechanisms. On the other hand, unlike purely domestic courts, they stir international capacity into the domestic judicial system, promote compliance to international legal standards and ensure the independence of proceedings.

After the adoption of the Rome Stature, but before it became fully operational, hybrid courts enjoyed their golden age: between 2002 and 2006 the Special Panels for East Timor, the Special Tribunal for Sierra Leone (STSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Kosovo's Regulation 64 Panels, the Bosnia's War Crimes Chamber (BWCC) were established and the creation of the Special Tribunal for Lebanon (STL) was already underway.

And yet, after the creation of the International Criminal Court (ICC), few would have guessed such a bright destiny for hybrid courts. Squeezed between the universal mandate of the ICC and domestic prosecution of international crimes, their survival on the international stage appeared unrealistic, as no room had been left for a third actor in the binary (domestic/international) system envisaged by Art. 17 of the Rome Statute. In the face of the ICC's complementarity regime, their role was to be secondary and short-lasting, and those who already celebrated the "promise of hybrid courts" were regarded as romantic and naïve.
Most recently, after a phase of both "practical obsolescence and theoretical disfavour", the hybrid design has regained the spotlight as several hybrid criminal justice mechanisms have been set up, such as the Specialist Chambers for Kosovo, the Special Jurisdiction for Peace in Colombia, the Special Criminal Court for the Central African Republic and the African Union-backed Hybrid Court for South Sudan.

This revival of the hybrid design comes with a question: have hybrid courts kept their promise?
The original promise of hybrid courts lay in the capacity of such courts to overcome the drawbacks of both domestic courts and ad hoc international tribunals while drawing on their respective strengths in terms of ownership, legacy-building and rule-of-law enforcement. Whether hybrid courts have delivered this promise or not, however, is a question that does not have, nor deserves, an answer.

"Hybrid courts" is a definition encompassing a patchwork of transitional justice mechanisms, each one displaying its specific design as shaped by the historical, geographical, social and legal context in which it is embedded. As a consequence, there is no way to assess the promise of hybrid courts per se. In each case, the circumstances under which the court operates, the challenges it faces and the aims it chases must be taken into account.

Besides, this promise has been largely misplaced. Since its first appearance, the hybrid design has been

advertised as the ultimate stage of an evolutionary process leading from UN-based ad hoc tribunals (such as the ICTY and the ICTR) to domestic courts enforcing universal jurisdiction and, eventually, to hybrid courts. This enthusiastic propaganda created false expectations, portraying hybrid courts as a panacea for every setback in international justice, as well as unnecessary concerns, raising the suspicion that hybrid courts were secretly spoiling the ICC of its jurisdiction by overriding the complementarity regime established by Art. 17 of the Rome Statute.

On the one hand, the promise of a long-lasting legacy of rule-of-law in the countries where hybrid courts have been established is deceptive. As stated in a recent report by the Office of the United Nations High Commissioner for Human Rights, "legacy needs a strategy and will not necessarily happen automatically or by osmosis." Hybrid courts have so far been designed as ad hoc courts with a relatively short lifespan and no other major task than to provide accountability for the atrocities perpetrated. In fact, policy-makers have always been more concerned about building agile and cost-effective transitional courts, rather than all-round, all-purpose courts. In most cases, capacity and legacy building schemes have been secondary to the delivery of early convictions. In other words, if there is one way hybrid courts have achieved a lasting legacy and promoted a culture of accountability, it is by successfully bringing to justice the perpetrators of the gravest breaches of international criminal law, rather than by relying on their capacity-building mechanisms.

On the other hand, the assumption that hybrid courts would override the ICC's complementarity regime is misleading and reveals a poor comprehension of the dynamics of the unfolding international justice system.

The ICC's complementarity regime encourages the enforcement of universal jurisdiction at its earliest stage by letting the Court step in only when domestic courts are unable or unwilling to carry out the investigations or the proceedings. This, however, is also the case when the establishment of a hybrid court is taken into consideration. In fact, transitional justice takes place, by definition, right in the aftermath of wars or civil conflicts, when domestic capacity is too scanty, biased or flawed to deliver meaningful justice. And yet, according to their detractors, hybrid courts would usurp ICC's jurisdiction by sneaking in between unwilling or unable domestic courts and the Court itself.
This allegation largely overrates the centrality of the ICC within the international justice framework. The ICC was designed as "a relatively small and jurisdictionally constrained institution with a fairly low budget." As a consequence, its jurisdiction is, as a matter of fact, confined to the prosecution of those who were most responsible for the commission of the most serious crimes. There is actually a high chance that, at least in the near future, the ICC's outreach will remain soft and symbolic in nature, while domestic and hybrid courts take on the burden of prosecution. Therefore, it is because of the congenital shortcomings of the ICC's jurisdiction, rather than despite them, that hybrid courts should back up its action.

A remarkable example in this respect is the Special Criminal Court (SCC) for Central African Republic. Since the outbreak of an armed conflict between the Islamic rebel group of the Séléka and the Christian/Animist Anti-Balaka militias following a failed coup d'état to overthrow president Francois Bozizé in December 2012, impunity has spread across the country. CAR's situation has been under scrutiny by the ICC since 2004.

Most recently, on the 3rd of June 2015, current interim president Catherine Samba-Panza promulgated a law creating a Special Criminal Court to investigate and prosecute grave violation of human rights and international humanitarian law committed in the country since January 2003.
Considering it is the first time a hybrid tribunal has been set up in a country that is also under investigation by the ICC, the creation of the SCC marks an unsteady first step towards a partnership between hybrid courts and the ICC where the former are a complement, rather than an alternative, to the latter. Because the SCC is part of the judicial system of CAR, its relationship with the ICC falls under the complementarity regime of Art. 17 of the Rome Statute, which gives primacy to domestic prosecution. However, given the high number of indicted expected and the budgetary bonds of ICC, it is expected that the bulk of prosecution will be borne by the SCC, with the ICC going after the "big fishes", according to a case-load sharing scheme already rehearsed by the Bosnian War Chambers and the International Criminal Tribunal for the former Yugoslavia. Whereas it is naïve to believe that the SCC will bring peace and justice to CAR by itself, its example could set a strong case of horizontal cooperation between the ICC and hybrid courts in prosecuting international crimes.

Hybrid courts will also play a leading role in combating impunity for crimes falling outside the ICC's ambit. This could be just the case of the Hybrid Court for South Sudan (HCSS) which, despite the resistance put up by the South Sudanese government and the countless challenges standing in its way, could be a game-changer in the eradication of the "entrenched culture of impunity" spread across country.

The August 2015 Agreement between President Salva Kiir and Riek Machar, military leader of the Sudan People's Liberation Movement and former Vice-President, which formally settled the armed conflict raging in the country since December 2013, dedicates an entire section to the establishment of an hybrid court "to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law." Because South Sudan did not ratify the Rome Statute, nor did the Security Council consider a referral to the ICC, the Court cannot claim any jurisdiction over the crimes committed in the country. This means that the burden of the creation of a hybrid court for South Sudan will lie entirely on the African Union, but also that the eagerly-awaited court will play the lead in the fight against impunity in South Sudan and get a chance to reiterate the success already gained by other hybrid courts.

As these recent examples show, the return of hybrid courts still holds a good deal of promise. Rather than evanescent all-purpose courts, rather than usurpers of ICC's jurisdiction, rather than chimeras, hybrid courts have been, and will remain, an asset in the fight against impunity for international crimes.

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References

1. P. Mcauliffe, "Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child became an Orphan", Journal of International Law and International Relations, 2011, Vol. 7, p. 5.
2. Report by the Office of the High Commissioner for Human Rights on "Rule-of-law Tools for Post-Conflict States", 2008, p. 5.
3. M. Holvoet, "The Continuing Relevance of Hybrid Criminal Courts in the Era of the ICC", 9 November 2015, http://law.wustl.edu/harris/lexlata/?p=801
4. Final report of the African Union Commission of Inquiry for South Sudan, 14 October 2014, § 991.
5. Agreement on the Resolution of the Conflict in the Republic of South Sudan, § 3.1.1.