The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa

A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW

BY

OLIVIA KAGULIRO MULERWA

Student No: 3368343

PREPARED UNDER THE SUPERVISION OF

Prof.Dr.Gerhard Werle

AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE

26 October 2013
# TABLE OF CONTENTS

**KEY WORDS**.................................................................................................................................5  
**DEDICATION**..................................................................................................................................7  
**DECLARATION**..................................................................................................................................8  
**ACKNOWLEDGMENTS**.....................................................................................................................9  
**ABBREVIATIONS AND ACRONYMS**..............................................................................................10  

**CHAPTER ONE** ............................................................................................................................11  
AN OVERVIEW OF THE STUDY...........................................................................................................11  
1.1 Problem Statement.......................................................................................................................11  
1.2 Significance of the Study .............................................................................................................13  
1.3 Research Questions .....................................................................................................................14  
1.4 Argument of the Study ................................................................................................................14  
1.5 Literature Review .......................................................................................................................16  
1.6 Chapter Outline of the Research Paper .......................................................................................17  
1.7 Research Methodology ................................................................................................................18  

**CHAPTER TWO** ............................................................................................................................19  
THE LEGITIMACY CRISIS OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA ........................................19  
2.1 Introduction..................................................................................................................................19  
2.2 Conceptualising Legitimacy .........................................................................................................19  
2.3 The Legacy of the International Criminal Tribunal for Rwanda ..............................................21  
2.3.1 Criticisms of the International Criminal Tribunal for Rwanda ...........................................23  
2.4 The Practice of the International Criminal Court .........................................................................27  
2.4.1 Criticisms of the International Criminal Court ......................................................................29  
2.5 Concluding Remarks ..................................................................................................................32  

**CHAPTER THREE** ..........................................................................................................................34  
AN OVERVIEW OF HYBRID COURTS ..............................................................................................34  
3.1 Introduction..................................................................................................................................34
3.2 The Creation of the Hybrid Courts ................................................................. 35
3.3 Characteristic Features of Hybrid Courts ..................................................... 37
3.4 Hybrid Courts and Legitimacy .................................................................... 40
3.5 Criticisms of Hybrid Courts ......................................................................... 42
3.6 Hybrid Courts and the International Criminal Court ................................. 44
3.7 Concluding Remarks ................................................................................... 45

CHAPTER FOUR ............................................................................................ 46
HYBRID COURTS IN AFRICA ....................................................................... 46
4.1 Introduction .................................................................................................. 46
4.2 The Special Court for Sierra Leone ............................................................... 46
4.2.1 Background .............................................................................................. 46
4.2.2 The Structure and Practice of the Special Court for Sierra Leone ......... 47
4.2.3 Special Court for Sierra Leone: Fostering Legitimacy ............................. 49
4.2.4 Criticisms of the Special Court for Sierra Leone ................................. 51
4.3 The Extraordinary African Chambers in the Courts of Senegal ............... 54
4.3.1 Background .............................................................................................. 54
4.3.2 The Structure of the Extraordinary African Chambers in the Courts of Senegal ................................................................. 57
4.3.3 Possible Contributions to Legitimacy ...................................................... 57
4.3.4 Preliminary Criticisms of the EACCS ..................................................... 58
4.4 Concluding Remarks ................................................................................... 59

CHAPTER FIVE ............................................................................................ 60
FINAL OBSERVATIONS .................................................................................. 60
5.1 Summary of Findings .................................................................................. 60
5.2 Conclusion .................................................................................................. 60
5.3 Recommendation ....................................................................................... 61

LIST OF REFERENCES .................................................................................. 63
A.PRIMARY SOURCES ................................................................................. 63
Agreements and Resolutions ................................................................. 63
Conventions, Treaties and Statutes ....................................................... 66
Cases ........................................................................................................ 68
Reports and Periodicals ................................................................. 72
B. SECONDARY SOURCES ................................................................. 76
Books ................................................................................................... 76
Chapters in Books ........................................................................... 77
Journal articles ................................................................................. 79
Internet Sources .............................................................................. 88
News Reports and Opinion pieces ........................................... 89
KEY WORDS

- African Union
- Extraordinary African Chambers in the Courts of Senegal
- Extraordinary Chambers in the Courts of Cambodia
- Hybrid Courts
- International Criminal Court
- International Criminal Justice
- International Criminal Tribunal for Rwanda
- Legitimacy
- Special Court for Sierra Leone
- Special Tribunal for Lebanon
ABSTRACT

Hybrid Courts are the latest innovation in the prosecution of international crimes after the era of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Examples include; the Extraordinary African Chambers in the Courts of Cambodia, the Regulation 64 Panels in the courts of Kosovo and the Special Court for Sierra Leone. The hybrid court model at its inception was believed to be the panacea for the short comings of purely international tribunals. The characteristic location of the tribunals in the locus of the atrocities and the participation of local judicial officers alongside their international counterparts was expected to promote legitimacy and foster capacity building for conflict ravaged transitional states.

Despite the criticisms of the model today, a new hybrid court has recently been inaugurated to prosecute Hissène Habré, the former President of Chad, for international crimes committed during his presidency. The promulgation of the Extraordinary Chambers in the Courts of Senegal suggests that the model continues to be useful, especially for Africa. This is of particular significance since international criminal justice has lately come under attack on the continent. The on-going feud between the African Union and the International Criminal court is only the most prolific example of this.

This research paper explores the dimensions of the challenges facing the legitimacy of international criminal justice in Africa and the extent to which the hybrid court model can provide a solution for them. In order to do so, the study begins by addressing the meaning of legitimacy within the African context. A general discussion of hybrid tribunals, as well as the specific manifestations of the model in Africa so far, follows. The Special Court for Sierra Leone and the Extraordinary African Chambers in the Courts of Senegal are distinguishable from each other in structure and are thus juxtaposed in order to illuminate possible improvements on the hybrid court model for the future.
DEDICATION

For my sister Sylvia Umutesi Karenzi, who is fearless and brave and who holds me up precisely when I most need it. I only have to look at you to remember how far we’ve come.
DECLARATION

I, Olivia Kaguliro Mulerwa, hereby declare that the work presented in this research paper entitled ‘The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa’ is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly recognised.

Student : Olivia Kaguliro Mulerwa

Signature : ___________________________

Date : ___________________________

Supervisor : Prof Gerhard Werle

Signature : ___________________________

Date : ___________________________
ACKNOWLEDGMENTS

I extend my sincerest gratitude to Prof. Dr. Gerhard Werle and Dr. Moritz Vormbaum of the South African German Centre for Transnational Criminal Justice for their invaluable contribution to my work, not just in the writing of this thesis but in the knowledge that has been imparted over the course of the year.

I am also grateful to Prof. Dr. Lovell Fernandez also of the South African German Centre for Transnational Criminal Justice for his encouragement and wise counsel.

I owe a debt of thanks to Prof. Dr. Koen of the faculty of law at the University of the Western Cape for his meticulous delivery of the course material and for reminding us, his students that academic writing is an art form.

I am grateful to Windel Nortjie of the South African German Centre for Transnational Criminal Justice who is the silent hero that makes sure everything functions as it should.

Finally, I am grateful to the German Academic Exchange Service (DAAD) for the financial support, without which this invaluable experience would have remained a dream.
### ABBREVIATIONS AND ACRONYMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>EACCS</td>
<td>Extraordinary African Chambers in the Courts of Senegal</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
<tr>
<td>RPF</td>
<td>Rwandan Patriotic Front</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>STL</td>
<td>Special Tribunal for Lebanon</td>
</tr>
<tr>
<td>UNMIK</td>
<td>United Nations Mission in Kosovo</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
</tr>
</tbody>
</table>
CHAPTER ONE

AN OVERVIEW OF THE STUDY

1.1 Problem Statement

Recent events suggest that international criminal justice is in crisis in Africa. On 12 of October 2013, the African Union held a special session to evaluate its relationship with the International Criminal Court (ICC) resulting in a decision, inter alia, asserting the immunity of sitting heads of state from prosecution by the Court.¹ This provision potentially contradicts one of the most pivotal principles of international criminal justice; that the criminal accountability of individuals for international crimes arises regardless of their official position within a sovereign state.² The decision follows a theme of discord between the African Union and the ICC that began with the Court’s issuance of an arrest warrant for Sudanese President Omar Al Bashir,³ and which has now peaked with the prosecution of the President and Deputy President of Kenya before the Court.⁴ This downward spiral has called into question the legitimacy of the ICC’s intervention in Africa given that Africa seems to be the


²House of Lords: Regina v.Bartle/Evans, ex parte Pinochet Judgment of 26 March 1999,38 ILM(1999), paras. 581-663 which opened the gates to the indictment and prosecution of several leading perpetrators of international crimes such as Slobodan Milosevic, Jean Kambanda and most recently Charles Taylor.


sole focus of the Court’s investigations and prosecutions. The prosecution of only Africans by the Court so far has given rise to the allegation by some African leaders that the Court is ‘witch-hunting’ Africans, and has caused sympathies to shift away from the Court to the perpetrators instead as has been suggested by Kenya.\(^5\)

Even before this impasse with the ICC, the questionable legacy of the International Criminal Tribunal for Rwanda (ICTR) called into question the utility of international criminal justice. Especially when contrasted with the success (or at the very least efficiency) of the domestic prosecution of genocide in Rwanda by the national and Gacaca courts.

The extensive criticism of the ICTR in fact spawned the idea for a new kind of court that was neither domestic nor international but an amalgamation of the best features of both. The hybrid court model at its inception was believed to be the panacea for the short comings of purely international tribunals. The characteristic location of the tribunals in the locus of the atrocities and the participation of local judicial officers would promote legitimacy and foster capacity building for the conflict ravaged transitional states. Hybrid courts would also promote the perpetration of rule of law norms.\(^6\) Unfortunately upon closer scrutiny hybrid tribunals have been intensely criticised as well.\(^7\) The ambitions of the proponents of the hybrid court model have since been exposed as idealistic. Hybrid courts are institutions that were often set up hurriedly and haphazardly to provide an immediate accountability mechanism. They were primarily focused on putting an end to impunity, all other considerations including legitimacy being secondary.\(^8\)

Even so, the inauguration of the Extraordinary African Chambers in the courts of Senegal (EACCS) for the trial of former Chadian President Hissène Habré on 8


\(^8\) McAuliffe P (2011) 21.
February 2013 alludes to a continuing possibility of at least some utility in the concept. It also suggests that there is still room for innovation in the structure of future hybrid courts since the EACCS follows a different approach from that of previous tribunals that were typically preceded by an agreement between the United Nations and the state in question. In the case of Hissène Habré, several extradition requests made by the government of Belgium were ignored. The idea of a tribunal composed of Judges from both Senegal and Belgium was also rejected in favour of a purely African solution.

The challenge then remains to establish whether the hybrid court model per se is flawed and irrelevant or whether the criticisms of the operations of the existent hybrid tribunals relate only to the shortcomings of the specific tribunals. That being the case, it would be unfortunate to throw the baby out with the bath water especially if no better alternatives are perceived.

1.2 Significance of the Study

The ultimate goal of international criminal justice is to prevent impunity by punishing perpetrators so as to establish and maintain the rule of law. For this to happen, the victim communities must engage with the judicial institutions and perceive them as legitimate. Otherwise any efforts in norm penetration will be futile. The long term success of institutions such as the ICC depends on this perception of legitimacy. Considering that Africa represents the largest regional bloc of States Parties to the Rome Statute, the Court needs to be viewed as legitimate by Africans. The perception of international criminal justice on the continent of which the Rome Statute regime is its most prolific manifestation is therefore very crucial. Finding ways to establish and maintain the legitimacy of this and other international criminal justice institutions is urgent; given the current challenges in Africa.

---


This research paper explores the extent to which hybrid tribunals provide a solution. In light of the fact that the hybrid tribunal model is constantly evolving and each new tribunal is distinguishable from the others, it is necessary to add to the existing literature on the subject.

1.3 Research Questions

The primary question that this research paper seeks to answer is: Can the hybrid court model improve the legitimacy of international criminal justice in Africa? In answering this question two sub-themes also need to be explored:

1. Does international criminal justice face a particular legitimacy challenge in Africa and if so, why?

2. To what extent is the hybrid court model able to foster an increased appreciation for international criminal justice in Africa?

1.4 Argument of the Study

The premise and thus argument of this research undertaking is that in spite of the enumerated failures of the extant hybrid tribunals so far, such failures do not necessarily render the entire hybrid court model irrelevant. In this respect, one may argue that the challenges experienced by the operations of the various hybrid tribunals are unique and related more to the particular context of each tribunal and not necessarily to any inherent flaws in the model. In any case, critics of the model will be quick to admit that there are no better alternatives to fill the impunity gap left by the ICC’s preoccupation with only the most serious offenders in a given conflict situation. Hybrid tribunals are also an answer to the judicial shortcomings of post conflict states which render domestic prosecutions difficult or unfeasible. In support of the hybrid court model as a solution is the recent promulgation of the Extraordinary

---

African Chambers in the Courts of Senegal which proves that the hybrid court model is still a desirable option for the prosecution of international crimes.

Specifically regarding the question of legitimacy, it has been postulated by some authors that the hybrid court model is unable to provide a viable solution to this challenge since concerns of legitimacy, among others, are not the primary focus of the establishing authorities for these tribunals. Typically, hybrid tribunals have been set up in the past following negotiations between the United Nations and the government in question, and their primary concerns have often been security and putting an end to impunity, not legitimacy.

It has also been suggested that such expectations of hybrid tribunals are unrealistic. One may argue that this is not necessarily the case especially when the unique challenges facing legitimacy in Africa are considered. Specifically, the African public often feels removed from international criminal trials and finds it difficult to identify with international criminal justice because the accused receive light sentences and wind up in comfortable conditions much better than those of the victims. As such hybrid tribunals normally bring the trials closer to home and enable the victims to own the process. This has been one of the major accomplishments of the Special Court for Sierra Leone for example and is a very good reason for a continued adaptation of the hybrid court model.

---

1.5 Literature Review

Literature on the subject of hybrid tribunals is abundant, including general literature on the hybrid tribunal model as well as specific accounts of each tribunal. \(^{16}\) The literature can be broadly classified in relation to the proponents and critics of the model. \(^{17}\) In support of hybrid courts, Dickinson \(^{18}\) has argued that the hybrid court model is the best form of international criminal prosecutions for the future as it is able to promote the legitimacy of international criminal justice among the victim states as well as foster norm perpetration and capacity building of local judicial systems through the interaction of local and international judicial officers. A similar view is held by Higonnet \(^{19}\) who goes a step further to expound on the capacity building potential of hybrid tribunals especially when contrasted with the Adhoc Tribunals (ICTY and ICTR). However, neither of these authors or others on the subject focus specifically on the question of legitimacy but rather, they confine their discussion to the hybrid tribunal model generally \(^{20}\) or else offer extensive analyses of particular tribunals. \(^{21}\) Further still, none of them tackle the particular challenges of legitimacy in the African context or the potential of hybrid courts to address that challenge.

There has also been a recent proliferation of literature on the challenges of international criminal justice in general \(^{22}\) as well as the specific circumstances in


\(^{19}\) Higonnet E (2005) 2, 13, 71.


Africa especially with regard to the International Criminal Court and the African Union. There is however no literature on the subject of hybrid tribunals within the African context. This research paper therefore adds to the existing literature in that regard.

1.6 Chapter Outline of the Research Paper

The discussion is broken down into five chapters.

The first chapter provides an introduction and framework for the paper and acts as a road map for the rest of the discussion. Inter alia, it provides the problem statement, outlines the research questions and establishes the context for the discussion. It also presents an overview of the arguments of the paper as well as a review of the literature on the research area.

Chapter two tackles the question of the legitimacy of international criminal justice. In particular it addresses the unique manifestations of this question in the African context.

The third chapter provides a general discussion of the hybrid tribunal model and its potential to improve the legitimacy of international criminal justice.

Chapter four discusses the two examples of hybrid tribunals in Africa in detail. The Special Court for Sierra Leone and the Extraordinary African Chambers in the Courts of Senegal are distinct in their mode of establishment and structure. By juxtaposing them it is possible to illuminate possible innovations for the future of the model.

Chapter five provides some concluding observations on the author’s research.

---


1.7 Research Methodology

This research relies on a qualitative desk top research method. As such no interviews were conducted or data collected. Rather, extensive study of primary sources such as domestic and international legislation pertaining to, interalia, the establishment and mandates of the various extant hybrid tribunals has been done. Secondary sources such as the existing literature in the field of international criminal justice relating to hybrid courts have been studied as well.
CHAPTER TWO

THE LEGITIMACY CRISIS OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

2.1 Introduction

The concept of legitimacy within the international justice context is broad and complex. The legitimacy of international tribunals is affected by various factors including those that are legal and sociological. These factors impact the way various international tribunals are perceived. This perception in turn affects the long term effectiveness of the tribunals. This chapter defines the parameters of legitimacy under debate in the study. It focuses on the prevailing discourse on the legitimacy of international criminal justice within the African context and the particular challenges encountered.

2.2 Conceptualising Legitimacy

International criminal justice goes beyond the traditional punitive concerns of criminal law to place itself within the wider transitional justice context. Ending impunity and rehabilitating post conflict states into functional democracies are its ambitious goals. These are long term concerns that require continued effort beyond the duration of a criminal trial and necessitate the engagement of the local population to set up and maintain democratic institutions such as impartial and competent domestic court systems. The extent to which these stakeholders identify with a tribunal’s processes and decisions is a key issue in the realization of each tribunal’s goals. Legitimacy is thus an important consideration for the success of international criminal justice.

In this context legitimacy is understood as the manner in which international criminal courts are perceived by the key stakeholders including the victim communities and

---

their leaders. A legitimate tribunal is one which is perceived to be effectively dispensing justice; fairly and impartially by those most affected by its decisions. This perceived or sociological legitimacy is defined in relation to the subjective views of international criminal tribunals by the victim communities. It can be improved or undermined depending on the extent to which the tribunal’s procedure and judgments are acceptable to the various populations observing it. The positive perceived legitimacy of international criminal courts is affected by the manner in which these courts are set up and run. Factors such as the process of creation, the trial procedure, the structure of the tribunal and the extent to which local ideas of justice are incorporated in the tribunal’s makeup all have an impact on its legitimacy. Since these factors depend on the tribunal’s accessibility to the victim community, the location of the court is also an important consideration. The composition of the court’s staff and the extent to which local presence is incorporated into its ranks also enables the tribunal not to seem like a foreign imposition. Crucial among these factors is the court’s outreach efforts since it is this outreach that informs the community of the court’s activities and connects them to the formal justice process. Thus, in order for international criminal tribunals to be perceived as legitimate, they must meet these criteria.

Although it has been argued that perceived legitimacy is primarily affected by the extent to which the judgments of a tribunal resonate with the narrative of blame in the

---

29 It has been argued for example that international courts and tribunals lack legitimacy because they are not democratically selected by the victim communities and are not always the preferred mode of justice. See e.g. Glasius M ‘Do International Criminal Courts Require Democratic Legitimacy?’ (2012) 23 European Journal of International Law 44, Branch A ‘Uganda’s Civil War and the Politics of ICC Intervention’ (2007) 21 Ethics and International Affairs 188, 191.
community, evidence reveals that all of these factors contribute to some degree to the legitimacy of international tribunals in a particular context. Attempts must be made to the greatest extent possible to bring the international criminal justice mechanisms within the purview of the victim communities.

These considerations are particularly pertinent in Africa where international criminal justice is often perceived as an external imposition that has little consideration for prevailing ideologies of justice in the region. The unflattering legacy of the ICTR and the controversial practice of the ICC over its first decade have also further alienated the region. The political rhetoric which often underscores every decision and judgment of the international criminal courts also encourages mistrust for international justice. A legitimacy gap has now been created. The following sections illustrate how Africa’s interaction with the ICTR and the ICC have created and maintained this gap.

2.3 The Legacy of the International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council on the 8 of November 1994 to prosecute the persons responsible for planning and carrying out the 1994 genocide and other serious violations of international humanitarian law in Rwanda committed between 1 January and 31 December 1994. Its fundamental purpose is to hold individuals accountable for their conduct so as to ‘contribute to the process of national reconciliation and to the restoration and maintenance of peace. Justice should serve as the beginning of the end of the cycle of violence that has taken so many lives, Tutsi and Hutu, in Rwanda.’

---

34 Stuart Ford for example argues that perceived legitimacy is primarily affected by the court’s judgments and the extent to which they coincide with the prevailing narrative of who is to blame for the conflict in a particular community Ford S (2012)434-39.
International prosecutions were preferred because they would give the atrocities the global platform that was necessary to underscore the magnitude of the crimes and prevent future atrocities of this nature in Rwanda and elsewhere. In order to accomplish this task, the ICTR was given jurisdiction over the crimes of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.\(^{38}\)

In August 2003, the Security Council adopted a completion strategy aimed at dispensing with all the ICTR trials by 2008 and all appeals by 2010. Although this initial goal was not accomplished, the ICTR is well on its way to completing its work. So far out of a total of 75 cases, the ICTR has passed final judgment in 46 cases and completion of the others is expected in 2014 except for the Butare case which is expected to be completed by August of 2015.\(^{39}\)

The ICTR has made several contributions to the development of international criminal justice, including establishing a factual account of the genocide. It has established individual criminal responsibility for the perpetrators of the genocide which removes the stigma of group criminalisation from the community. The ICTR prosecuted several political, military and other leaders in the society, including 15 former Ministers. The most prominent defendant, Jean Kambanda, who was the Prime Minister of Rwanda in 1994, became one of the first, heads of government convicted for genocide and crimes against humanity in Africa.\(^{40}\) To some extent, the Tribunal has also given a voice to the victim community by providing an avenue for the validation of their experience of suffering. Holding the perpetrators accountable on the international stage has also enabled the restoration of the rule of law in the country.\(^{41}\)

\(^{38}\) Article 2, 3 & 4 ICTR Statute.


\(^{40}\) The Prosecutor v. Jean Kambanda ICTR 97-23-S Judgement of 4 September 1998 available at [http://www.unictr.org/Portals/0/Case%5CEnglish%5Ckambanda%5Cdecisions%5Ckambanda.pdf](http://www.unictr.org/Portals/0/Case%5CEnglish%5Ckambanda%5Cdecisions%5Ckambanda.pdf) (accessed 26 October 2013).

The ICTR has also encouraged the development of the judicial system in Rwanda over the course of its operations to bring it into conformity with international standards in order to eventually hand over the tribunal’s cases to national courts. To that end Rwanda has since abolished the death penalty.\textsuperscript{42} Rwanda abolished the death penalty because it wanted to have genocidaires extradited and prosecuted there.

In spite of these contributions, the ICTR has faced extensive criticism to the detriment of its legitimacy. Criticism from the government and people of Rwanda as well as the international community has plagued the Adhoc Tribunal from the moment of its inception to date.\textsuperscript{43} The government of Rwanda is one of its greatest critics in spite of the fact that it initiated the Tribunal’s existence by requesting the UN to help in trying genocide suspects. Rwanda eventually cast the only vote in the General Assembly against setting up the ICTR.\textsuperscript{44} Aside from accusations of mismanagement and incompetence as well as some incidences of corruption in its initial stages, the ICTR has since been criticized for a number of reasons all of which have culminated in the alienation of its primary beneficiaries, the victim community.

\textbf{2.3.1 Criticisms of the International Criminal Tribunal for Rwanda}

The ICTR has been primarily criticized for being slow and expensive. With over 800 employees and a budget of over 90 million US dollars at the pinnacle of its operation, it diverted enormous resources that critics believe could have been better invested in Rwanda and perhaps devoted to rebuilding its shattered judiciary.\textsuperscript{45} Even today as the Court works towards finishing its mandate its budget is still exorbitant with its annual budget for this year alone going to well over 170 million US dollars and it still has staff of over 600 employees.\textsuperscript{46} This expense is even more pronounced when compared with genocide prosecutions elsewhere. For example a universal jurisdiction

\textsuperscript{42}BBC News ‘Rwanda scraps the death penalty’ \textit{BBC News} 8 June 2007 available at \url{http://news.bbc.co.uk/2/hi/africa/6735435.stm} (accessed 26 October 2013).


\textsuperscript{45}Higonnet E (2005)53.

\textsuperscript{46}ICTR 2013 Report A/68/270–S/2013/460.
prosecution of a Rwandan genocidaire\textsuperscript{47} in Canada cost just 1.3 million dollars whereas a comparable ICTR trial costs as much as 22.6 million dollars.\textsuperscript{48} It is not surprising that one of the major reasons for the move to a hybrid tribunal approach in the prosecution of international crimes is because of the expense involved with the Adhoc Tribunals and the reluctance of the United Nations to continue shouldering the bulk of the cost.\textsuperscript{49} The figures are even bleaker when compared with the cost of similar trials in Rwanda. To further compound this problem, the ICTR has been historically slow in its judicial process. Seven years after its establishment and more than four years since the beginning of the first trial, the ICTR had handed down verdicts on only nine individuals. The Court’s highly paid judges have been known to go as long as 28 months at one time without hearing a substantial matter.\textsuperscript{50}

The ICTR has also been criticized for being physically and culturally inaccessible to the Rwandan people.\textsuperscript{51} The United Nations Security Council made the decision to locate the tribunal in Arusha Tanzania for security reasons, among others.\textsuperscript{52} It was greatly criticized by the Rwandan government, which had hoped for a court based in Kigali with the Rwandan judiciary playing a key role.\textsuperscript{53} The location of the tribunal outside Rwanda has since continued to create and maintain a rift between the Court and the victim community. Genocide survivors have often found the Court to be foreign and unsupportive and in some cases even offensive.\textsuperscript{54} Although the Court’s outreach program was developed to address this, critics believe that it was too little

\textsuperscript{47}R v Desire’ Munyaneza (2009) QCCS 2201.
\textsuperscript{51}Higonnet E (2005) 51.
too late.\textsuperscript{55} The outreach program has been criticized for being ineffective and one-sided to the extent that it consists mostly of information being handed down without any actual interaction with the communities. A better approach would be a more interactive and frequent engagement between the tribunal staff and the population.\textsuperscript{56} This would also help the tribunal to get a sense of how it is perceived in Rwanda and work to improve that image.

The fact that the ICTR has never indicted or prosecuted any member of the Rwandan Patriotic Front (RPF) which was engaged in a civil war with the government of Rwanda at the time, is a serious flaw in its mechanisms and promotes accusations of victor’s justice.\textsuperscript{57} It also supports the view that the Tutsi-led Rwandan government controls the Tribunal’s prosecutorial agenda for its political ends.\textsuperscript{58} The legitimacy of the Court both internationally and among many Hutus has been affected by this.\textsuperscript{59} In 2008, the ICTR Prosecutor Hassan Jallow made the decision to transfer one of its investigations a massacre of clergy in Kabgayi by RPF soldiers, to the Government of Rwanda for domestic prosecution. The result was a sham trial that ignored crucial evidence in an apparent attempt to shield senior RPF members from criminal responsibility. Despite being alerted to these shortcomings, the ICTR Prosecutor subsequently stated that the trial was fair and that his office did not plan to prosecute any other RPF cases.\textsuperscript{60} This situation sowed the seeds for the understanding of international criminal justice as a tool for political manipulation rather than a legitimate judicial process.

A further criticism of the ICTR has been the fact that it employs an alien system of justice which propagates the notion that it is a western imposition. The ICTR adopted the rules of procedure and evidence of the International Criminal Tribunal for the


\textsuperscript{56} Peskin V (2005) 954-55.

\textsuperscript{57} Peskin V (2008)237.

\textsuperscript{58} Carla Del Ponte, Chief Prosecutor of the ICTR at the time tried to prosecute members of the RPF but was prevented from doing so. See Del Ponte C & Sudetic C Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity (2009)227-30.


Former Yugoslavia (ICTY) and its judges and prosecutor have been appointed by the United Nations General Assembly from a list provided by the Security Council all of which emphasize the idea of the court as an imposition on the Rwandan people. Additionally, the ICTR loses legitimacy in the eyes of the people because the punishment of the genocidaires convicted at the ICTR differs drastically from those convicted in Rwandan courts. More than ten thousand individuals have been tried for genocide by national criminal courts in Rwanda and a number of the convicted perpetrators received the death penalty and were executed. It is difficult to justify why the ICTR should prescribe more lenient sentences for similar crimes. The perpetrators prosecuted by the ICTR also wind up serving out their sentences in conditions far superior to those in Rwandan prisons and villages, and they have the detached anonymity of being away from their victims and fellow Rwandans. The ICTR is bound to observe international standards of justice in its proceedings but this does nothing to improve the court’s legitimacy for the Rwandan people.

The ICTR has often fallen short of Rwandans’ expectations of justice with regard to the people prosecuted and the judgments rendered by the Court. The acquittal of several individuals considered to be leading perpetrators of the genocide has left the impression that the ICTR was a betrayal. For example, the acquittal of Zigiranyirazo, the brother-in-law of the late Rwandan President Habyarimana, who was initially found guilty by the trial chamber and Nsengimana, a Catholic priest who was arrested in 2002 and was originally thought to have been at the center of a

---

66The Prosecutor v.Protais Zigiranyirazo ICTR-01-73-T available at [http://www.unictr.org/Portals/0/Case%5CEnglish%5CZigiranyirazo%5CJudgement%5C081218e.pdf](http://www.unictr.org/Portals/0/Case%5CEnglish%5CZigiranyirazo%5CJudgement%5C081218e.pdf) (accessed 26 October 2013).
group of Hutu extremists that carried out attacks in Nyanza in 1994, sparked protests.68

In this light the establishment of the Gacaca Courts can be viewed as a protest to the imposition of the ICTR’s brand of justice. The Gacaca Courts resonated better with traditional conceptions of justice that prioritise family, community structure and reconciliation.69 In just under eight years the Gacaca Courts tried nearly two million genocide suspects.70 The accomplishments of the Gacaca Courts in prosecuting a large number of perpetrators over a shorter length of time and for a fraction of the cost are further indictments on the effectiveness of the ICTR.71 However, it is also true that the Gacaca Court structure was informal and resembled more a quasi-judicial body than a court of law. The relative success and expeditiousness of the process can probably be attributed to this absence of formal procedures and standards.

2.4 The Practice of the International Criminal Court

The International Criminal Court was set up as a permanent court with jurisdiction over persons for the ‘most serious crimes of international concern’, namely: genocide, crimes against humanity, war crimes and, potentially the crime of aggression.72 So far twenty cases in eight situations have been brought before the ICC. Four of these cases have been the result of self-referrals by Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali. The United Nations Security Council has also referred the situations in Darfur Sudan, and Libya both of which are not States Parties to the Rome Statute. Additionally, the ICC’s prosecutor opened investigations into the situation relating to the post-election violence in Kenya and

72 Article 1 Rome Statute.
Côte d’Ivoire on the basis of his propio-motu powers. The ICC has so far issued a trial judgment in one case and an acquittal in another.

The African region was particularly instrumental in the creation and beginning of the ICC’s operation. African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was adopted. The historic ratification of the Rome Statute by Senegal on 2 February 1999, capped African support for the Court. African States Parties ‘played a very important role prior to and during the establishment of the Court and perhaps, without Africa’s support, the Rome Statute would never have been adopted.’ Significantly, of the 122 current States Parties to the Rome Statute 34 are African States. This makes Africa the largest regional bloc of ICC membership.

The once cordial relationship between the African region and the ICC has since gone sour beginning with the African Union opposition to the arrest warrant for Sudanese President Omar Al Bashir in 2009 and 2010 on allegations of war crimes, crimes against humanity and genocide committed in Darfur. The subsequent issuance of an

---

74Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06 available at [http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (accessed 26 October 2013).
79Bashir arrest warrants ICC-02/05-01/09 & ICC-02/05-01/09.
arrest warrant for Muammar Al Gadhafi, the Libyan President at the time and finally the indictment and prosecution of Uhuru Kenyatta and William Ruto, the President and Deputy President of Kenya, have had an adverse effect on the relationship between the ICC and the African Union which implies that the practice of the ICC so far has alienated its biggest constituency.

2.4.1 Criticisms of the International Criminal Court

The International Criminal Court has made several efforts to improve its accessibility to victim communities by facilitating victim participation in proceedings and conducting outreach in situation countries. Still, the euphoria and expectations that surrounded the coming into force of the Rome Statute have not been realized in the practice of the Court to date. The Court is facing much criticism particularly centred on its seeming preoccupation with the prosecution of only Africans. At present all of the ICC’s cases so far have been of Africans and all the situations the ICC is currently dealing with, concern African countries. Although this is not strictly a fair assessment since four of the situations in question were referred to the ICC by the States themselves. Two other situations are the result of Security Council referrals and two are a result of exercise of the Prosecutor’s own discretion. This focus on Africa is problematic for the legitimacy of international justice in the region on several fronts.

First, the ICC has alienated the African Union. Since the arrest warrant for the Sudanese President was issued by the ICC, the African Union has passed several resolutions demonstrating its growing disregard for the ICC, including encouraging member states not to cooperate in effecting the arrest warrant and even refusing the

81Kenyatta and Ruto cases ICC-01/09-02/2011, ICC-01/09-01/11.
setting up of a liaison office by the Court at the AU headquarters in Addis Ababa.\textsuperscript{85} These have culminated in the latest decision of 12 October 2013, which asserts the immunity of sitting heads of state from prosecution by the ICC and urges the President of Kenya to refrain from appearing before the Court in the on-going case against him.\textsuperscript{86} The impasse between the AU and the Court is problematic because the ICC depends on the cooperation of member states for the exercise of its functions.\textsuperscript{87} As is evidenced by the \textit{Bashir} case which has failed to go forward since no African Country has effected the arrest warrant against him even though he regularly visits other countries that are States Parties to the Rome Statute.\textsuperscript{88}

Secondly, the ICC’s focus on Africa anchors the argument that it is a weapon of western imperialism in the region. The referral of the situations in Darfur, Sudan and Libya both of which are not parties to the Rome Statute by the United Nations Security Council, some of whose permanent members are themselves not States Parties, supports this view. It gives the impression that the ICC and the UNSC are cohorts in the service of the interests of western powers.\textsuperscript{89} This position is emphasized by the fact that the Security Council referred those situations and yet has chosen to take some others such as the on-going conflict in Syria less seriously. The decisions of both the former and current chief Prosecutors to exclusively concentrate on African situations and to ignore the commission of international crimes in Iraq (by British forces), Colombia, the Comoros (by Israel’s attack on a ship registered in the Union of the Comoros ‘the Mavi Marmara’) and Palestine\textsuperscript{90} when contrasted with the

\textsuperscript{85}Para 5, 8 & 9 AU Assembly Doc. Assembly/AU/10 (XV).
\textsuperscript{86}Para 10(i) Ext/Assembly/AU/Dec October 2013.
\textsuperscript{87}See Part 9 & 10 Rome Statute.
\textsuperscript{88}See \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir}, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-139 available at \url{www.icc-cpi.int/iccdocs/doc/doc1287184.pdf} (accessed 26 October 2013), \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir}, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-140 available at \url{www.icc-cpi.int/iccdocs/doc/doc1384955.pdf} (accessed 26 October 2013).
\textsuperscript{90}See Palestinian National Authority, Declaration Recognising the Jurisdiction of the International Criminal Court 21 January 2009 available at \url{www.icc-cpi.int/NR/rdonlyres/74EE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf} (accessed 26 October 2013), See
determination to proceed with the cases from Kenya and Mali where much less harm was done confirms the allegations of bias.\textsuperscript{91} This has encouraged many in Africa to buy into the accusations of imperialism and has led to a shift of sympathies away from the court to the perpetrators as has been suggested in the case of Kenya.\textsuperscript{92}

This state of events emphasizes the political dimension of international criminal justice in general and the ICC in particular. It presents the ICC as a political organ influenced by political considerations rather than the interests of justice in its decisions and practice.\textsuperscript{93} If the primary considerations of international criminal justice are political then the victims are nothing but dispensable pawns.

Aside from the ICC’s focus on Africa, the Court also faces the common legitimacy challenges associated with international tribunals. Inter alia, the employment of vast resources to try a relatively small number of people who receive lenient sentences compared to the ones they would receive at home including imprisonment in relative comfort causes it to be viewed in a negative light.\textsuperscript{94} The first judgment of the ICC in the Lubanga case reflects this dilemma. Thomas Lubanga who was a notorious warlord in the Democratic Republic of Congo has now been sentenced to fourteen years imprisonment for the war crime of conscripting and enlisting child soldiers.\textsuperscript{95} When this is weighed against the death and destruction that occurred and continues to occur in the DRC because of militias operated by Lubanga and other war lords, it seems like a very small price to pay.\textsuperscript{96} Similarly in the Ugandan situation

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{94}Oketchuwu O (2008)365-375.
\end{flushright}

\begin{flushright}
\textsuperscript{95}The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06.
\end{flushright}

\begin{flushright}
\textsuperscript{96}Bueno O (2012)10.
\end{flushright}
where prosecution of the leaders of the Lord’s Resistance Army is pending before the ICC,\(^97\) many believe that justice requires that they be tried in Uganda where there is a better guarantee of a heavy sentence should they be prosecuted, including perhaps the death sentence should they be prosecuted.\(^98\)

The ICC and indeed international tribunals in general also face the challenge of restorative versus retributive justice. In post conflict states, victim communities are often more concerned with restoring peace than holding people accountable through a criminal justice process. These expectations are then projected onto international tribunals that are not always able to deliver the desired outcome. In several situations, the ICC has been perceived negatively because of this. In the Democratic Republic of Congo for example, interviews with victim communities concerning their expectations from the ICC revealed this pattern.\(^99\) In Uganda as well, the initial support for the ICC’s involvement in prosecuting members of the Lord’s Resistance army eventually waned when the ICC’s indictment of Joseph Kony and other LRA leaders appeared to prevent the conclusion of a peace agreement between the government of Uganda and the rebels.\(^100\)

### 2.5 Concluding Remarks

The intense criticism directed at both the ICTR and the ICC reflects the volatile relationship that Africa has had with internal criminal justice. The resulting legitimacy crisis is thus comprehensible. In the end, both institutions have helped to cement the idea that international criminal justice is a foreign concept that is neither useful nor necessary in Africa. In order to alter this misconception international justice institutions need to adapt to ideologies of justice in the region. Proponents of


the hybrid tribunal model believe that these tribunals have the ability to accomplish this task. The following chapters investigate the extent to which this is true.
CHAPTER THREE

AN OVERVIEW OF HYBRID COURTS

3.1 Introduction

Hybrid tribunals are alternately referred to as internationalized criminal tribunals or the third generation of international prosecutions as distinct from the first generation of the Nuremberg and Tokyo tribunals and the second generation of the Adhoc Tribunals (ICTR and ICTY). They represent a radical move from the notion that purely international courts are the best way to ensure the impartiality of a fair judicial process that meets approved international standards.101

When criminal justice is viewed as one tool in the broader arsenal of transitional justice measures, the vitality of engaging the local population in on-going judicial processes is revealed. Hybrid tribunals have been perceived as the best way to accomplish the goals of international criminal justice. They promise to end impunity while building the capacity of local judiciaries and thereby promoting the rule of law.103 Usually situated at the scene of the atrocities, they foster reconciliation by having a cathartic effect on the victim community and promote procedural effectiveness.104 Hybrid courts respond to the legitimacy challenge often posed by the alien nature of international criminal justice by bringing the judicial process closer to home and providing an avenue for the local population to engage with it.

These advantages associated with the hybrid tribunal model have not been realised to expected proportions in the practice of the extant hybrid tribunals so far leading to criticism and a recommendation by some scholars that the model be abandoned altogether.105 This chapter provides an overview of the hybrid tribunals in existence

so far and the current debate relating to their utility especially with regard to promoting the legitimacy of international criminal justice in post conflict situations.

### 3.2 The Creation of the Hybrid Courts

It has been argued that the existing examples of hybrid tribunals are too distinct from each other to be properly assessed together as one model of international criminal prosecutions. Each hybrid tribunal is distinct in historic background, its manner of establishment and legal personality. In Cambodia for example the Extraordinary Chambers in the Courts of Cambodia were the result of a long drawn out negotiation process between the United Nations and the Government of Co-Prime Ministers Hu Sen and Norodom Ranariddh from 1997. Points of contention included the fact that the government of Cambodia wanted to limit the level of international involvement in order to have more control of the process. The United Nations on the other hand was concerned about the effect the control of the government would have on the fairness and impartiality of the process. A compromise was eventually reached when a Memorandum of Understanding was agreed on and ratified by the Cambodian Parliament in October 2004.

In Sierra Leone on the other hand an agreement for the Special Court was quickly reached between the Government and the United Nations Secretary General following a request by President Ahmad Tejan Kabbah to the Security Council. The

---

agreement was ratified by Sierra Leone in March of that same year.\textsuperscript{112} Elsewhere in Kosovo and East Timor the hybrid tribunals were created by the United Nations transitional administrations\textsuperscript{113} in those countries and were thus under the complete control of the United Nations.

In East Timor, the United Nations Transitional Administration in East Timor (UNTAET) established a partly internationalized institution in the capital, Dili. Acting under the jurisdiction of the District Court of Dili, the hybrid applied both international law and the hybrid laws of the UNTAET administration. The tribunal had both national and international judges and Special Panels were created to exercise jurisdiction over cases of Serious Crimes.\textsuperscript{114}

In Kosovo, the possibility of a special Kosovo War and Ethnic Crimes Court was considered to prosecute the cases that did not fall within the ICTY’s jurisdiction over only the most serious crimes\textsuperscript{115} but was never implemented. Instead the United Nations Mission in Kosovo (UNMIK) adopted regulations providing for the involvement of international and domestic judges in the district courts of Kosovo. These regulations led to the creation of the Regulation 64 Panels in the courts of Kosovo applying a combination of international and domestic law.\textsuperscript{116}

\textsuperscript{116}United Nations Regulation UNMIK/REG/2000/6 granting the UN Special Representative the authority to appoint and remove from office international judges and prosecutors to the courts in Mitrovica as amended by UNMIK/REG/2001/2 (on the specific powers of the international prosecutor), United Nations Regulation UNMIK/REG/2000/34 expanding the authority of UNMIK/REG/2000/6 to appoint and remove from office international judges and prosecutors beyond the District Court of Mitrovica to all five district courts in Kosovo, United Nations Regulation UNMIK/REG/2000/64 s. 1 & 2 prolonged by UNMIK/REG/2001/34, United Nations UNMIK/REG/2002/20 and UNMIK/REG/2003/36 on the regulation 64 panels.
The Bosnian War Crimes Chamber began in March 2005 as a part of the ICTY’s completion strategy\(^{117}\) pursuant to a United Nations Security Council decision that the ICTY should complete all its trials in 2008 and all activities in 2010 and then transfer unfinished cases to competent national jurisdictions. An agreement between Bosnia and Herzegovina and the High Representative established the War Crimes Chamber within the Bosnia judiciary.\(^ {118}\)

The Special Tribunal for Lebanon was established under Chapter VII of the Charter of the United Nations by Security Council Resolution 1757 of 13 May 2007.\(^ {119}\) Its purpose is to prosecute the persons responsible for the acts of terrorism that resulted in the death of the former Lebanese Prime Minister Rafic Hariri when a quantity of explosives was detonated close to his and other vehicles in his convoy in a street in Beirut on 14 February 2005.\(^ {120}\) The mandate of the tribunal stretches to other international crimes committed in relation to this assassination.

### 3.3 Characteristic Features of Hybrid Courts

The examples demonstrate the extent to which each hybrid tribunal is distinguishable. Still, enough similarities exist to point to the existence of a hybrid tribunal model. The hybrid tribunals discussed share several important features including the combination of domestic and international elements in the institutions and the applicable law. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local and international lawyers and at the same time, the judges apply domestic law that has been reformed to include international standards.

---


On one end of the spectrum is Sierra Leone where the Statute of the Special Court provides for appointment of the majority of the judges in the Trial and Appeals Chambers by the UN Secretary General and the remainder by the Sierra Leonean government.\textsuperscript{121} The Registrar and the Prosecutor are also appointed by the Secretary General\textsuperscript{122} and the Statute requires the Deputy Prosecutor to be Sierra Leonean.\textsuperscript{123} On the other end of the spectrum is Cambodia’s Extraordinary Chambers where Cambodian judges are in the majority. The international judges are nominated by the UN Secretary General but must be appointed by Cambodia’s Supreme Council of the Magistracy.\textsuperscript{124} A ‘super-majority’ rule has been developed so that at least one international judge has to vote in favor of every decision for it to pass.\textsuperscript{125} A Cambodian and an international serve as equal co-prosecutors\textsuperscript{126} and as co-investigating judges. The office of administration is headed by a Cambodian with an international deputy responsible for the international matters.\textsuperscript{127}

In Kosovo according to Regulation 64, the UN Special Representative can designate an international prosecutor, an international investigating judge or a panel of three judges with at least two internationals, on the request of the prosecutor, the defense counsel or the accused.\textsuperscript{128} In East Timor the Special Panels were presided over by two international judges and one East Timorese judge.\textsuperscript{129} The Deputy General Prosecutor for Serious Crimes had exclusive prosecutorial authority over the crimes and was an international,\textsuperscript{130} assisted by nationals.\textsuperscript{131} The Special Tribunal for Lebanon also allows for international and domestic judges and prosecutors to work alongside each other.\textsuperscript{132}

\begin{flushright}
\footnotesize
\textsuperscript{121} Article 12 Statute of the Special Court for Sierra Leone.
\textsuperscript{122} Article 15(3) & 16 Special Court Statute.
\textsuperscript{123} Article 15(4) Special Court Statute.
\textsuperscript{124} Articles 9-11 Amended Extraordinary Chambers Law.
\textsuperscript{125} Article 14 Amended Extraordinary Chambers Law.
\textsuperscript{126} Article 16 Amended Extraordinary Chambers Law.
\textsuperscript{127} Article 30 Amended Extraordinary Chambers Law.
\textsuperscript{128} UNMIK/REG/2000/64.
\textsuperscript{129} S.9,10(3) & 22 UNTAET/REG/2000/15 in accordance with UNTAET/REG/2000/11 as amended by UNTAET/REG/2001/25.
\textsuperscript{131} S.14 (6) UNTAET/REG/2000/16 as amended.
\textsuperscript{132} Article 8 &11 Statute of the Special Tribunal for Lebanon.
\end{flushright}
The combination of domestic and international law is another important feature of hybrid courts. The documents establishing the hybrid courts in Sierra Leone, Cambodia and East Timor mandate the panels to directly apply both substantive international criminal law and substantive domestic law. In all three cases direct reference is made to crimes under international law and under domestic law. Thus, the Extraordinary Chambers Law grants the Chambers the authority to prosecute three specific crimes under the 1956 Penal Code of Cambodia (homicide, torture and religious persecution) as well as the international crimes of genocide, crimes against humanity, grave breaches of the 1949 Geneva Convention, the destruction of cultural property and crimes against internationally protected persons. Likewise, the Statute of the Special Court incorporates both international crimes (crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of humanitarian law) and crimes under Sierra Leonean law (offences relating to the abuse of girls and offences relating to the wanton destruction of property). The Serious Crimes Panels in East Timor had the widest substantive jurisdiction over murder and sexual offences under the applicable Penal Code of East Timor and over most of the recognized international crimes. Moreover, it is the only hybrid court, and the only international crimes court in general that claimed universal jurisdiction.

Similarly, although the hybrid panels in Kosovo and the War Crimes Chamber in Bosnia have jurisdiction only over crimes under domestic law, the applicable domestic law also incorporates international crimes. In the Kosovo courts international criminal law is applied indirectly, through the vehicle of pre-existing domestic legislation. In Bosnia and Herzegovina, legislation has been amended to include international crimes. Although the Special Tribunal for Lebanon provides for the application of Lebanese law relating to the crime of terrorism and associated

134Articles 3-8 Amended Extraordinary Chambers Law.
135Articles 2-5 Special Court Statute.
136S.4-9 UNTAET/REG/2000/15.
offences, the tribunal of necessity takes customary international criminal law into account.

Hybrid tribunals share other characteristics that are not tied to their hybrid nature but contribute to their collective identity as a distinct mode of international criminal prosecution. Key among them is the location of the tribunals in the locus of the atrocities. This is true for all hybrids apart from the Special Tribunal for Lebanon and the Extraordinary African Chambers in the courts of Senegal, which are located in The Hague and Dakar respectively. Hybrid tribunals have also shared a characteristic United Nations involvement in some capacity although the trend has now evolved to envisage other forms of regional and international cooperation as exemplified by the EACCS, which was established pursuant to an agreement between the African Union and the Government of Senegal.

In addition, hybrid tribunals share an adhoc nature in that they are created to respond to special situations. They also have a similar level of financial independence from the United Nations in contrast to the ICTR and ICTY which were completely funded by the UN. Hybrid tribunals typically rely on funding from the Government in question and independent donations from the international community. The distinctions between the various examples of hybrid tribunals can thus be seen as primarily contextual and do not negate their classification as an independent mode of international criminal justice.

3.4 Hybrid Courts and Legitimacy

The aim of hybrid tribunals is to marry the best of two worlds; the professional experience of the international community and the perceived legitimacy of local participation. As such hybrid courts have the potential and in several cases have indeed improved the legitimacy of international criminal justice.

---

139 Article 2 Statute of the Special Tribunal for Lebanon.
The addition of international judges to the judicial process improves the perceived fairness and impartiality of the judicial process. Criminal prosecutions in a transitional justice context are highly political and can easily be manipulated into a tool to vindicate one side of the conflict to the detriment of the other. They are also vulnerable to biased influence by local leaders and are thus prone to unfairness.\footnote{143}{Burke-White WW (2003)742.} This was especially true in Kosovo where previous domestic prosecutions were often considered biased by ethnic Serbs since many of the Judges were ethnic Albanians. Serbian judges refused to cooperate with their Albanian counterparts and the judgments passed by these courts were regarded as flawed. The addition of international judges helped to improve the image of the judicial process and promote wide acceptance of the judgments.\footnote{144}{Dickinson LA (2003)306, Organisation for Security and Cooperation in Europe (OSCE) Report (2002)\textcopyright available at \url{http://www.osce.org/secretariat/13603} (accessed 26 October 2013).}

On the other hand the participation of local judges promotes local ownership of the process and ensures respect and sensitivity for the historical and cultural context. It also allows the otherwise alien international criminal justice process to be more accessible to the local community.\footnote{145}{Rapoza P ‘Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?’(2006)21 American University International Law Review 525.} Aside from judges, hybrid tribunals inevitably hire other local judicial and non-judicial staff all of whom improve the cultural accessibility of the tribunal since they are more in tune with the cultural nuances of the society in question.\footnote{146}{Higonnet E (2005)16.} Conducting trials in the local language makes them accessible to the community. Local media, which plays a big role in influencing the perception of the tribunal in the society are also better placed to access the courts when they are situated in the victim society.\footnote{147}{Higonnet E (2005) 20.}

The physical location of the tribunal where the atrocities occurred is also important in improving legitimacy since the local population is more likely to be involved with and engage with the tribunal when it is physically accessible. It also enables a more efficient and cost effective outreach process which is an important element for the legitimacy of the tribunal and the perpetration of rule of law norms.\footnote{148}{Cohen D (2007)6.}
The situation of the tribunals within the domestic judicial structure also has the potential to leave a long term impact on the capacity of the local justice system.\textsuperscript{149} Although this expectation has not generally been realised it is still possible to envisage circumstances where international judicial officers leave some lasting skills with their domestic counterparts.

The incorporation of the domestic law of the land also makes the process more accessible and acceptable to the community since it recognises the established understanding of justice in the community. It also allows local lawyers and judicial officers to play a leading role in the tribunal.

The often ad hoc nature of hybrids means that they can be set up as and when required in a particular post conflict society. They can thus be tailored to respond to the specific context of the conflict in question. They do not have to be constrained in terms of jurisdiction. In this way they maintain the advantage of the ICTR and the ICTY.

\subsection*{3.5 Criticisms of Hybrid Courts}

Despite the many positive attributes of hybrid courts, they have experienced criticism for failing to meet the expectations of their greatest proponents. In several cases instead of combining the advantages of both international and domestic prosecutions they have exhibited the worst traits of both such as the ignorance of international actors of the local environment along with the weakness of the local judicial institutions that caused the breakdown of the State in the first place.\textsuperscript{150}

Where they were expected to promote legitimacy, hybrid tribunals have instead often been rejected by and faced extensive criticism from the local population.\textsuperscript{151} The exclusion of local participation in the design process of the courts has left a negative perception among the people and alienated even the most natural allies such as the lawyers and other elites. Local moral authorities are also explicitly excluded from the decision making of the tribunals.\textsuperscript{152} For example in East Timor the sidelining of

\textsuperscript{149}Higonnet E (2005)\textsuperscript{12}.
\textsuperscript{150}Cockayne J (2005)\textsuperscript{619}.
\textsuperscript{151}Higonnet E (2005)\textsuperscript{410}, Ramji-Nogales J (2010)\textsuperscript{31}.
\textsuperscript{152}Ramji-Nogales J (2010)\textsuperscript{31}. 
traditional healers who were respected and considered important moral authorities by the people was criticized. They employed traditional methods of dispute resolution that had worked so well in the past and which the Timorese people believed could be incorporated into the tribunal’s procedure. The complex legal concepts and structures are also inaccessible to the vast majority of the population and locals are disappointed with the scope and pace of the court processes.

Specific hybrids have been criticized on various grounds. In East Timor for example the Special Panels were criticized for only prosecuting lower level perpetrators and ignoring the major perpetrators many of who were enjoying asylum in Indonesia. As mentioned above, the tribunal was also criticized for not addressing the need for reconciliation through traditional methods of dispute resolution and the desire to locate missing persons which was a key concern of the Timorese people. The absence of an outreach program was also a major flaw that seriously undermined the tribunal’s ability to have a lasting impact on the country. The Special Panels were marred with difficulty and eventually only achieved limited success because of poor management, lack of funding, experienced personnel, and political will.

In Kosovo as well, the failure of UNMIK to engage the local population in the process of creating the Regulation 64 panels led to a bias among the people which was compounded by an absence of efforts to sensitize them about the purpose and mandate of the panels. Many ethnic Albanians thought that the Kosovo Liberation Army were national heroes and resisted their prosecution. As a result many of them boycotted the panels altogether. The hybrid experiment in Kosovo thus largely failed

---

because of a poor design compounded by an absence of funds and capacity for its successful implementation.\textsuperscript{160}

The law of the Extraordinary Chambers in the Courts of Cambodia has been criticised for having insufficient references to international law and for having an overly limited jurisdiction. This turn of events can be attributed to the difficulty of the negotiation process between the United Nations and the Cambodian government which led to major compromises on the part of the UN to the detriment of international law standards.\textsuperscript{161} Additionally the ECCC has been plagued with accusations of bias and corruption. According to Scully, the insufficient legal protections, limited jurisdiction, political interference and lack of judicial independence coupled with the bias and corruption that was rampant in the court reflected negatively on the court’s image and undermined its legitimacy.\textsuperscript{162} The Special Court for Sierra Leone also experienced a lot of criticisms which will be discussed in detail in the following chapter.

Many of the shortcomings of hybrid tribunals are similar to those attributed to the international tribunals such as the ICTR which has prompted critics of the model to say that they are not an improvement as such. However it is also possible to view the criticisms of the tribunals so far as simply kinks in the development of the model that need to be ironed out.

3.6 Hybrid Courts and the International Criminal Court

The prominent examples of hybrid tribunals were established before the International Criminal Court was operational. As such it begs the question as to what the place of hybrid tribunals is in relation to the Court. The ICC operates on the principle of complementarity which means that the court can only prosecute cases when the State Party having jurisdiction over the matter is unable or unwilling to do so.\textsuperscript{163} This implies that there is room for the possible co-existence of hybrid tribunals and the


\textsuperscript{162}Scully S (2011)331-8.

\textsuperscript{163}Article 1&17 Rome Statute.
ICC. Given that hybrid tribunals are usually established pursuant to an agreement to which the country concerned is a party, it is possible for the establishment of a hybrid tribunal to fall within a State’s obligation to prosecute international crimes.

In any case, the jurisdiction of the ICC is limited to prosecuting only those most responsible for the commission of international crimes within its jurisdiction.¹⁶⁴ This limited scope leaves an impunity gap that can be filled by the establishment of a hybrid tribunal. Although hybrid tribunals have until now also focused on the prosecution of perpetrators bearing the greatest responsibility, it can be argued that broadening the jurisdiction of future hybrid courts would be an improvement on the model since previous tribunals have been criticized for their limited prosecutions.

The jurisdiction of the ICC is also limited to acts relating to state parties which occur after the State becomes a party. Hybrid tribunals can thus be used to fill this gap since they do not need to have such jurisdictional constraints. Hybrid courts can also be used to avoid the controversy that arises from having to wait for a Security Council referral for non-state parties as was the case in Libya and Darfur. A hybrid tribunal in each of those cases would have been a more legitimate option of seeking accountability for the crimes committed.

3.7 Concluding Remarks

It is true that hybrid courts have faced similar shortcomings to the adhoc tribunals. However the major criticisms of the various tribunals have been related more to the context and practice of the specific tribunal in question. This suggests that the hybrid tribunal model per se is not necessarily flawed and can still be exploited to improve the legitimacy of international criminal justice. In Africa, where only one hybrid tribunal has operated so far, there is still room for the development of the model to suit the context of particular post conflict communities especially when consideration is given to the advantages of the model that allow for flexibility.

¹⁶⁴ Article 11 Rome Statute.
CHAPTER FOUR

HYBRID COURTS IN AFRICA

4.1 Introduction

This chapter places the discussion of hybrid tribunals within the African Context. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Senegal are the two hybrid tribunals that have been established in Africa so far. Whereas the SCSL is in the final stages of discharging its mandate and is about to close, the EACCS has not yet even tried its first case. The different approaches to the establishment, structure and operation of these tribunals presents an interesting case study of the innovations that may be possible with future tribunals.

4.2 The Special Court for Sierra Leone

4.2.1 Background

In March 1991 a rebel group known as the Revolutionary United Front (RUF) launched an attack on the government of Sierra Leone with the help of Charles Taylor, President of neighbouring Liberia. This was the beginning of a war that spanned over a decade and ended only with the intervention of regional and international forces. The civil war ruined the economic, political and social infrastructure of the country and left a significant proportion of the population dead, severely injured, in exile or internally displaced not to mention acting as a trigger for destabilization in the wider West Africa sub region. Although during the course of the conflict several efforts at a peaceful reconciliation of the various warring factions were attempted these were ultimately unsuccessful and peace was only eventually


166 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) of 30 November 1996 available at
returned to the country after a military intervention by British forces and the subsequent capture of Foday Sankoh the leader of the RUF.\textsuperscript{167} The failure of the peaceful solutions sowed the seeds for a criminal justice response. The idea for a Special Court for Sierra Leone\textsuperscript{168} was born when President Ahmad Tejan Kabbah requested the United Nations Security Council to ‘initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone…to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone…a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace.’\textsuperscript{169} This court would ‘meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil.’\textsuperscript{170} The UNSC acknowledged this request and the Special Court for Sierra Leone was born following an agreement between the government of Sierra Leone and the Secretary General of the United Nations which entered into force on 12 April 2002.\textsuperscript{171}

4.2.2 The Structure and Practice of the Special Court for Sierra Leone

The Special Court for Sierra Leone was set up to try those bearing the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law as well as crimes under the domestic law of Sierra Leone committed within the territory of Sierra Leone since 30

\textsuperscript{167}Anthony C ‘Historical and Political Background to the Conflict in Sierra Leone’ in Ambos K & Othman M (eds) New Approaches in International Criminal Justice (2003)131-149.


\textsuperscript{169}Permanent Representative of Sierra Leone to the United Nations ,Letter to the President of the Security Council,9 August 2000 UN Doc. S/2000/786 (10 August 2000). Attached to this letter was an annex containing the letter of the President of Sierra Leone.

\textsuperscript{170}UN Doc.S/2000/786 at 3.

November 1996.\textsuperscript{172} The SCSL is not a part of the Sierra Leone judicial structure but is an independent institution having primacy over the domestic courts of Sierra Leone with regard to the crimes within its jurisdiction.\textsuperscript{173} It has been described as a sui generis treaty-based organ which has ‘the characteristics associated with classical international organizations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members)’.\textsuperscript{174} It is distinct from preceding hybrid tribunals because it did not arise out of a decision by the UNSC\textsuperscript{175} and is not run by the United Nations or the government of Sierra Leone although both have an influence on the court.\textsuperscript{176} The SCSL is composed of three primary organs; the Chambers, the Office of the Prosecutor and the Registry.\textsuperscript{177}

The Court has both judicial and non-judicial functions. For example, the Registry, which is responsible for administering the Court, also manages detention matters, negotiates the necessary agreements with states and preserves and manages access to the Court's archive. The SCSL is run by a Management Committee which relies on donations from UN member States for its budget. Members on the Committee include representatives from the Government of the United States, the United Kingdom, Canada, Nigeria and the Netherlands as well as representatives from the United Nations and the Government of Sierra Leone.\textsuperscript{178}

The SCSL eventually prosecuted nine individuals in four cases summarized as the Armed Forces Revolutionary Council (AFRC),\textsuperscript{179} the Revolutionary United Front (RUF),\textsuperscript{180} the Civil Defence Forces (CDF)\textsuperscript{181} trials and the Charles Taylor trial.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{172} Article 1 Special Court Statute
\item \textsuperscript{173} Article 8 Special Court Statute.
\item \textsuperscript{175} Rather it followed an agreement between the President of Sierra Leone and the United Nations Secretary General.
\item \textsuperscript{176} Article 12 & 15 Special Court Statute authorises the government of Sierra Leone and the Secretary General to appoint a Prosecutor and Judges for the court.
\item \textsuperscript{177} Article 11 Special Court Statute.
\item \textsuperscript{178} Mochochoko P & Tortora G ‘The Management Committee for the Special Court for Sierra Leone’ in Romano CPR, Nollkaemper A & Kleffner JK (2004)141-156.
\end{itemize}
The cases against Foday Sankoh and Sam Bockarie were withdrawn due to their confirmed deaths and Samuel Hinga Norman also died while in the custody of the court in the period between the conclusion of his case and issuance of the judgment. The deaths of these key perpetrators dealt a major blow to the legitimacy of the court and left only Charles Taylor as the major perpetrator to be tried by the court. With their appeals now exhausted, the eight surviving convicts from the RUF, AFRC and CDF trials have since been transferred to Mpanga Prison in Rwanda to serve their lengthy sentences.

The Judgment in the case of Charles Taylor was a major accomplishment for the SCSL and was a great milestone towards the completion of its mandate. It was also the first time that an African head of state was brought to justice and convicted for international crimes. The SCSL is set to break new ground in international criminal justice by being the first international tribunal to complete all of its judicial proceedings and transition to a residual Court. The United Nations and the Government of Sierra Leone have agreed to establish the Residual Special Court for Sierra Leone (RSCSL) to carry out the judicial and administrative responsibilities of the SCSL after its closure.

4.2.3 Special Court for Sierra Leone: Fostering Legitimacy

The SCSL is considered to be an improvement on the hybrid tribunal model in comparison to the preceding tribunals especially with regard to procedural

---

185 See The Residual Special Court for Sierra Leone Agreement (Ratification) Act 2011 available at [www.sc-sl.org/LinkClick](http://www.sc-sl.org/LinkClick) (accessed 26 October 2013).
fairness.\textsuperscript{186} Aside from the advantages associated with hybrid tribunals in general the SCSL has had a significant impact on the legitimacy of international justice in Sierra Leone and elsewhere.

The court’s relative success in the fulfilment of its mandate has made a positive contribution to legitimacy. A nationwide survey in Sierra Leone and Liberia on the impact and legacy of the SCSL found that 79.16 per cent of people in Sierra Leone and Liberia believe the SCSL has accomplished its mandate to carry out prosecutions and restore justice, peace and the rule of law.\textsuperscript{187}

Notable among its contributions is the work of the outreach program which enabled Sierra Leoneans to have a relationship with the Court.\textsuperscript{188} The program was established as an office under the Registry in 2003 and is mostly staffed by Sierra Leoneans with a network reaching into the districts. It educates the public about the existence and operation of the Court and its efforts to rebuild the national judiciary.\textsuperscript{189} Through activities such as town hall meetings attended by the Prosecutor and Registrar, production of informational booklets in Krio, Training and Trainer workshops with target groups such as the army, radio and television programs, video screenings, formation of School Human Rights and Peace Clubs, quizzes and debating competitions.\textsuperscript{190}

The capture and prosecution of Charles Taylor made a significant impact on the legitimacy of international justice. He had terrorised the region for over a decade and given his level of influence and powerful connections it would have been virtually impossible for any domestic court to put him on trial.\textsuperscript{191} His successful conviction by

\textsuperscript{186}Higonnet (2005)33.
\textsuperscript{188}Kerr R & Lincoln J ‘The Special Court for Sierra Leone: Outreach, Legacy and Impact’ King’s College London War Crimes Research Group, Department of War Studies, Final Report (2008)11.
\textsuperscript{189}Cruvellier T ‘From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test’ International Centre for Transitional Justice and Sierra Leone Court Monitoring Program (2009)29.
\textsuperscript{191}Interviews revealed that people in Sierra Leone perceived Charles Taylor as being one of those most responsible for the civil war see Perriello T & Wierda M (2006) 27.
the SCSL therefore lends credence to the utility of an international component in the special court that allowed it to take advantage of additional resources in bringing him to justice. Anything less than a conviction of Charles Taylor would have left a negative impression on the overall role and success of the Court.192

The SCSL is currently working with its Management Committee, the Government of Sierra Leone and the United Nations to ensure the set up and successful transition of its responsibilities to the Residual Special Court for Sierra Leone. At the same time, the Court is also striving to consolidate its legacy by preserving and handing over ‘its intellectual assets including archives, replicable programs and jurisprudence’ to the Government of Sierra Leone.193 This organised transition process is important for the maintenance of the legacy of the court.

4.2.4 Criticisms of the Special Court for Sierra Leone

The decision to transfer the Charles Taylor case to the Hague194 dealt a serious blow to the legitimacy of the SCSL among Sierra Leoneans, as many wished to have closer and easier access to the trial.195 His trial was the piece de resistance of the Special Court given the extent of his influence in the civil war.196 It would have been very important for the people to witness his trial first hand and the failure of the Special Court to deliver this was a serious short coming. In any case the location is one of the key positive features of any hybrid tribunal and holding the trial in a different country robbed both the immediate victims of the crime and the victim community as a whole

192Njikam O (2013)35.
and undermined the retributive and restorative elements of the trial that are indispensable in establishing the tribunal’s legitimacy.\textsuperscript{197}

The choice of cases and in particular the CDF trial was another bone of contention for the Special Court. Many Sierra Leoneans viewed the CDF as a liberation movement and were thus biased against the court. The indictment of Samuel Hinga Norman and not President Kabbah who had also been part of the CDF and had in fact been Norman’s superior smacked of bias.\textsuperscript{198} This position was emphasized by the acquittal of the two final accused in that case by the only Sierra Leonean judge who believed that ‘fighting for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act both of patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of prescriptive norms’\textsuperscript{199} This dissenting view was in accord with the popular opinion of Sierra Leoneans at the time. In relation to this the small number of cases in itself is also a challenge to the Court’s legitimacy. By issuing only 13 indictments, the court failed to meet the expectations of the people regarding the delivery of justice for a war that spanned over a decade.\textsuperscript{200}

The Court has also been criticised for adapting an essentially western institution to a local African culture and imposing alien international law norms on the local population. The offences of recruiting or enlisting child soldiers and the charges of forced marriage were particularly criticised.\textsuperscript{201} The charge of recruiting child soldiers depends upon an understanding of adulthood premised on reaching a certain

\textsuperscript{197}McAuliffe P ‘Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial To the Hague Defeats the Purposes of Hybrid Tribunals’ 2008 Netherlands International Law Review 378.
\textsuperscript{201}Article 4(C) Special Court Statute.
biological age yet adulthood in the society is rather forged in the practice of secret society initiation which may take place at a variety of ages.\textsuperscript{202} A similar dilemma arose with regard to the offence of forced marriage which was often difficult to distinguish from traditional forms of marriage.\textsuperscript{203} However given that the thirteen people who were actually indicted by the Court were charged on numerous offences it cannot really be said that these provisions biased the population against the court.

Although the situation of the Court in Sierra Leone was expected to leave a powerful legacy by transforming the domestic legal sector, this was not the case. The Statute of the Court specified that the deputy Prosecutor should be a Sierra Leonean, but the Government of Sierra Leone chose to quietly amend the legislation and appoint a British QC instead which caused domestic lawyers to feel alienated from the court and resentful of it.\textsuperscript{204} Until recently Sierra Leoneans have not occupied the higher positions in the Office of the Prosecutor. At present only one of the Trial Chamber judges is Sierra Leonean and there is only one Sierra Leonean on the Appeals Bench as well.

The initial optimism surrounding the future utility of the Court site itself has recently cooled. The International Centre for Transitional Justice for example at one time speculated that buildings, offices, computers and detention centres could all greatly assist a struggling and under-resourced national legal sector.\textsuperscript{205} It is now clear however that the courtrooms are not really appropriate to the needs of the domestic legal sector and the government lacks the funds to maintain the site.\textsuperscript{206} The building now risks becoming a ‘white elephant’ with its main prospect at the moment being conversion into a dancehall.\textsuperscript{207}

\begin{footnotesize}
\textsuperscript{204}Perriello T & Wierda M ‘The Special Court for Sierra Leone Under Scrutiny’ International Centre for Transitional Justice(2006) 40.
\textsuperscript{206}Cruvellier T (2009)40-1.
\textsuperscript{207}Kerr R & Lincoln J (2008)29.
\end{footnotesize}
The SCSL has also been criticised for repeating some of the major shortcomings of the Adhoc tribunals. Perhaps this is because its structure and legal framework align it more with the international tribunals than with hybrid tribunals. According to Schabas, the Special Court ‘is a close relative of the ‘hybrid tribunals’, but is more accurately classified with the ad hoc tribunals because it is a creature of international law, not domestic law.’

Like the Adhoc tribunals the SCSL experienced criticism with regard to the duration of its trials and the expense involved and thus failed to be a significant improvement on their record. The cost of approximately 23 million dollars for each trial is perhaps too high especially in the context of Sierra Leone’s justice system which operates on less than one million dollars each year. Thus, it is not surprising to hear that many Sierra Leoneans consider the overall cost of the SCSL too high a price to pay for what they have received in return.

4.3 The Extraordinary African Chambers in the Courts of Senegal

4.3.1 Background

THE Extraordinary African Chambers in the Courts of Senegal were inaugurated in February 2013 to prosecute the person or persons most responsible for international crimes committed in Chad between 1982 and 1990. This hybrid tribunal was set up to hold former Chadian President Hissène Habré accountable for the crimes committed during his presidency in Chad from 1982 to 1990 when he was deposed by Idriss Déby Itno, the current President. Habré fled to Senegal in 1990 and has been

---

210 According to the 2010 budget for example the Supreme Court, Court of Appeals and High Court have a combined budget of 1420.3 million Leones (361 200 USD). Even when combined with the budgets for other law enforcement institutions the total budget for law enforcement is 3 774.1 Leones (about 959 800 USD) Government of Sierra Leone, Budget Profile, Fiscal Year 2008-2010 available at http://www.mofed.gov.sl/index.php?option=com_content&task=view&id=13&Itemid=28 (accessed 26 October 2013).
212 Article 3 EACCS Statute.
213 See Government of Chad ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and Accessories: Investigations of Crimes Against the Physical and Mental Integrity of Persons and their Possessions,’
living in exile there since. He has until recently successfully evaded justice for his crimes. On 2 July 2013, Hissène Habré was charged with crimes against humanity, torture and war crimes and placed in pre-trial detention by the EACCS.  

Prior to this, several attempts had been made to hold him accountable for his crimes. Domestic criminal proceedings accusing him of torture and crimes against humanity were initiated in Senegal in early 2000. The case was eventually unsuccessful and the charges against him were dismissed by the Dakar Appeals Court  a decision then confirmed by the Senegalese Court of Cassation  on the grounds that Senegal did not have legislation domesticating the offence of crimes against humanity and that the Code of Criminal Procedure did not give Senegalese courts jurisdiction over acts of torture committed by foreigners abroad.

Subsequently Belgium opened investigations against Habré under its universal jurisdiction law culminating in the issuance, in September 2005, of an international arrest warrant against Habré for crimes against humanity, torture, war crimes and other human rights violations. Belgium then requested Senegal for his extradition. Extradition was denied because Habré enjoyed immunity from prosecution as a former Head of State. Similar extradition requests in August 2011 and January 2012 were also denied. A recommendation by the African Union asking Senegal to prosecute and ensure that Hissène Habré be tried ‘on behalf of Africa by a competent


Senegalese court with guarantees for fair trial’ then brought the case back to Dakar.\textsuperscript{218} Habré was also prosecuted in absentia in Chad for allegedly supporting a rebel movement opposed to the current Chadian President Idriss Deby. On 15 August 2008, a court in N’djamena sentenced him to death for crimes against the state.\textsuperscript{219} The Court of Justice of the Economic Community of West African States (ECOWAS) also became involved in the case\textsuperscript{220} Habré brought a complaint to the Court against Senegal claiming that changes in the country’s legislation deliberately targeted him and were in violation of the principle of non-retroactivity of criminal law.\textsuperscript{221} The changes had been made after the African Union requested Senegal to take action against Habré. According to the ECOWAS court the only way Senegal could carry out the mandate assigned to it by the African Union was by setting up an Adhoc Tribunal ‘in accordance with the international custom which has emerged in similar situations.’\textsuperscript{222}

On 20 July 2012, the International Court of Justice found that Senegal had failed to meet its obligations under the Torture Convention and ordered Senegal to immediately prosecute or extradite Habré.\textsuperscript{223} These decisions prompted an agreement to create the Extraordinary African Chambers within the Senegalese judicial system. On 17 December 2012 the Senegalese National Assembly adopted the law establishing the EACCS.\textsuperscript{224} Apart from Habré the Prosecutor of the EACCS has requested the indictment of five further officials of Habré’s administration suspected of having committed international crimes.

\textsuperscript{222} Para 58 ECOWAS Judgment.
4.3.2 The Structure of the Extraordinary African Chambers in the Courts of Senegal

The Extraordinary African Chambers have been created inside the existing Dakar District Court and the Appeals Court. The Chambers have four levels; an Investigative Chamber with four Senegalese investigative judges, an Indicting Chamber comprised of three Senegalese judges, a Trial Chamber and an Appeals Chamber.\(^{225}\) The Trial Chamber and the Appeals Chamber each have two Senegalese judges and a president from another Member State of the African Union. The Chamber’s Statute gives it jurisdiction over the crimes of genocide, crimes against humanity, war crimes and torture which were committed in Chad between 7 June 1982 and 1 December 1990, corresponding to the duration of Habré’s rule.\(^{226}\) The Statute also allows for the participation of victims as civil parties, represented by legal counsel.\(^{227}\) The Chambers may also make orders for reparations to be paid into a victims’ fund.\(^{228}\)

4.3.3 Possible Contributions to Legitimacy

The EACCS has an important advantage over previous hybrid tribunals which were established under the auspices of the United Nations. Arising from an agreement between the African Union and the government of Senegal places it in a position of greater legitimacy among Africans. It has the potential to respond effectively to the current challenges plaguing the legitimacy of international criminal justice in Africa by presenting itself as an African solution.\(^{229}\)

The location of the tribunal within the existing judicial structure of Senegal also promises to minimise the large costs usually associated with international justice tribunals. It also ensures that there are no issues of continuity after the tribunal discharges its mandate and avoids the embarrassing experience of the SCSL where resources were invested in building structures that don’t seem to have any use once

---

\(^{225}\) Article 2 EACCS Statute.
\(^{226}\) Article 4-8 EACCS Statute.
\(^{227}\) Article 14 EACCS Statute.
\(^{228}\) Article 28 EACCS Statute.
\(^{229}\) See Chapter 2.3.1 infra on the criticisms of the ICC.
the court finishes its work.\textsuperscript{230}

The fact that the court is in Senegal presents a picture of fairness compared to if it had been in Chad. The previous exparte prosecution of Hissène Habré in Chad can be dismissed as political posturing by the incumbent government but his present trial at the EACCS has the legitimacy of a fair and impartial judicial process.

\textbf{4.3.4 Preliminary Criticisms of the EACCS}

First, the location of the EACCS in Senegal is an inevitable result of the background to its establishment. It does however have the potential to impede the legitimacy of the trial process among the victim community. It may prove difficult to justify to the victims of his brutality why he is being tried in Senegal and not Chad. Serious outreach efforts are necessary to bridge this gap and the mandate of the tribunal to provide outreach should be exploited to do so.\textsuperscript{231}

Secondly, aside from the international law applicable the EACCS has the mandate to apply the domestic law of Senegal.\textsuperscript{232} This is potentially a problem since the atrocities over which the tribunal is presiding occurred in Chad. This may create a possible legitimacy gap. However this is mitigated by the fact that both Senegal and Chad are civil law countries thus their domestic laws are materially similar.

Thirdly, the African Union and the government of Senegal have the authority to appoint all the judicial and administrative officials of the tribunals.\textsuperscript{233} This side lines the victim community and does not allow them to participate in the Court’s processes. This State of events arises out Senegal’s obligations to extradite or prosecute Habré but it may have the unfortunate effect of alienating the victims. As it stands the tribunal appears to be a project for the benefit of Senegal. It would be useful for the engagement and involvement of the victim community if they were better represented in the administration of the court.

\textsuperscript{230} Cruvellier T (2009)40-1.  
\textsuperscript{231} Article 15(3) EACCS Statute.  
\textsuperscript{232} Article 16 & 17 EACCS Statute.  
\textsuperscript{233} Article 11, 12& 15 EACCS Statute.
4.4 Concluding Remarks

Although the Special Court for Sierra Leone made some important contributions to the development of international criminal justice as well as to the establishment of accountability and the rule of law in Sierra Leone, the criticisms experienced suggest a need for further improvement of the hybrid court model. The EACCS which is fundamentally different in structure from the SCSL and other hybrid tribunals before it attempts to address this issue. At this point it is too soon to tell what the impact of this new innovation will be on the legitimacy of international criminal justice in the victim community and the future utility of the hybrid tribunal model. The Court’s presentation as an African solution is however a refreshing change from the typical United Nations involvement and potentially encourages a more positive perception in Senegal, Chad and elsewhere in Africa.
CHAPTER FIVE

FINAL OBSERVATIONS

5.1 Summary of Findings

The research has revealed that the interaction of the African region with the various international criminal justice institutions thus far has created a particular legitimacy challenge. The extensive criticism and disenchantment of the Rwandan people with the ICTR set the stage for a negative perception that was not dissuaded by the practice of the ICC. The latter court’s preoccupation with the prosecution of Africans has come to be its Achilles heel.

Unfortunately, the challenges and shortcomings of the extant hybrid tribunals have compromised the utility of the model. In several cases, hybrid tribunals have exhibited the negative characteristics of the ICTR and the ICTY. In spite of this the relative success and accomplishments of the Special Court for Sierra Leone for example continues to suggest that hybrid courts are useful tools for accountability in post conflict situations. The operation of the EACCS also promises to provide some useful insights into the future of the model.

5.2 Conclusion

Although the International Criminal Court has been criticised for its focus on Africa, it is also true that the region has experienced and continues to experience more civil unrest than any other part of the world. The greatest atrocities are often committed by the people in authority which means that they usually escape justice in the domestic courts. In other situations the conflict leaves the country in shambles and devoid of any judicial structure.

Africa needs international criminal justice institutions. That said, the status quo cannot be maintained and new innovations are necessary to meet the dynamic needs of post conflict situations. The determination of the African Union to extend the jurisdiction of the African Court on Human and Peoples’ rights to cover international
crimes shows that there is a gap that needs to be filled. An African Union court would be at the regional level and just like the ICC would be removed from the victim communities. It does not therefore completely negate the need for hybrid tribunals to cater for particular post conflict situations. The hybrid tribunal model offers the dynamism and contextual sensitivity that the specific circumstances in post conflict situations require. This is why hybrid tribunals continue to be a viable option for post conflict justice and have been considered for several other States in transition such as the Democratic Republic of Congo and Burundi.\textsuperscript{234}

5.3 Recommendation

The challenges facing the legitimacy of international criminal justice in Africa are ultimately associated with the absence of a sense of ownership and the failure of international criminal tribunals to adapt to the understanding of justice in a particular context. These are exaggerated by the inevitable political dimensions of international criminal justice. Hybrid courts have the potential to address these challenges. However, in order for the hybrid court model to continue to be relevant as a mode of international criminal justice, it needs to find a place in a hierarchy where there is a functional international criminal court as well possible regional and sub-regional courts.

Future hybrid tribunals should be closer aligned to domestic judicial systems. Focus on the integration of hybrid tribunals within domestic judicial systems is in line with the current trend for the implementation of international criminal justice which is implementation at the national level.\textsuperscript{235} Closer alignment with the domestic judicial system allows hybrid tribunals to capitalize on the legitimacy of national prosecutions while harnessing the impartiality and fairness of international processes. Although previous such attempts in Kosovo and Bosnia were not successful, the lessons learnt from those experiences can be used to improve future interactions between


international and domestic components within the domestic judicial structures of States in Africa.
LIST OF REFERENCES

A. PRIMARY SOURCES

Agreements and Resolutions


Conventions, Treaties and Statutes


33. United Nations Mission in Kosovo Regulation UNMIK/REG/2000/34


Cases


available at http://www.scsl.org/CASES/
sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194(accessed 26 October 2013).

Decision on Immunity from Jurisdiction para 41 available at http://www.sc-
sl.org/LinkClick.aspx?fileticket=7OeBn4RulEg=&tabid=191(accessed 26 October 2013).

51. Prosecutor v. Morris Kallon, Sam Hinga Norman & Brima Bazzy Kamara
SCSL-04-15-PT-060-11 2004 Decision on Constitutionality and Lack of
Jurisdiction discussing the establishment of the SCSL in detail available at
http://www.sc-
sl.org/LinkClick.aspx?fileticket=QHwH%2fG1fDS0%3d&tabid=195
(accessed 26 October 2013).

available at http://www.sc-sl.org/LinkClick.aspx?filetick-
et=w81c%2bZX4wAI%3d&tabid=189(accessed 26 October 2013).


54. Senegal, Ministere Public et Francois Diouf Contre Hissene Habre (arrêt no.
135) 4 July 2000 Chambre d’accusation de la Cour d’appel de Dakar
(Criminal Chamber of the Dakar Appeals Court), available at
http://www.hrw.org/legacy/french/themes/habre-decision.htm (accessed 26
October 2013).

55. Senegal, relatif a’ la demande d’extradition de Hissene Habre par la
BelgiqueChambre d’accusation de la Cour d’appel de Dakar (Criminal
Chamber of the Dakar Appeals Court), Avis du 25 Novembre
(unreported). Excerpts available at
(accessed 26 October 2013).


60. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-140 available at www.icc-cpi.int/iccdocs/doc/doc1384955.pdf (accessed 26 October 2013).


**Reports and Periodicals**


71. Cruvellier T ‘From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test’ International Centre for Transitional Justice and Sierra Leone Court Monitoring Program (2009).


http://www.crisisgroup.org/~/media/Files/europe/Kosovo%2032.ashx (accessed 26 October 2013).


B. SECONDARY SOURCES

Books


**Chapters in Books**


**Journal articles**


Internet Sources


News Reports and Opinion pieces.


198. Mehari TM ‘The Future of the ICC and Africa: the good, the bad and the ugly’ Aljazeera 11 October 2013 available at


205. Press Release ‘Special Court for Sierra Leone, Special Court President Requests Charles Taylor be Tried in The Hague’ 30 March 2006 available at www.sc-sl.org/LinkClick.aspx?fileticket=gR%2bYCtzTfKg%3d&tabid=111 (accessed 26 October 2013).


207. Smith D ‘International Criminal Court to Deliver its First Judgment’ The Guardian 13 March 2012