

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW



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**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 Master of Law**

**UNIVERSITY of the
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Title: Evaluating the Legal Framework of the Hybrid Court for South Sudan

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KEYWORDS

- African Union
- Agreement on the Resolution of the Conflict in the Republic of South Sudan
- Hybrid Courts
- International Criminal Court
- International Court of Justice
- Legal framework
- Legitimacy
- Special Court for Sierra Leone
- International crimes
- Individual criminal responsibility



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DEDICATION

I dedicate this research paper to my grandfather, Karlo Mwaka Paito.



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DECLARATION

I, Taban Romano, declare that the work entitled 'Evaluating the Legal Framework of the Hybrid Court for South Sudan' is my own work and that I have not submitted it for any degree or examination at any university. All sources utilised, alluded to or cited have been properly acknowledged.

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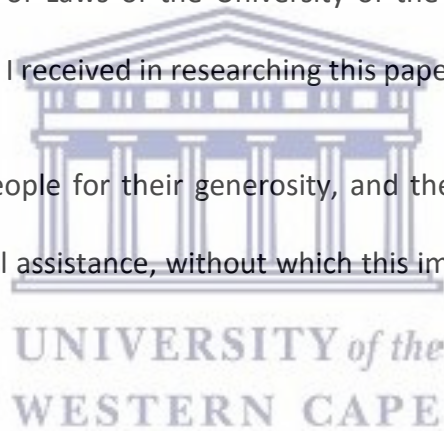
ACKNOWLEDGEMENTS

I must express my sincere appreciation for the commitment and guidance shown by my supervisor, Prof. Gerhard Werle, and Dr Mershet Tadesse Tessema of the South African-German Centre for Transnational Criminal Justice.

I am likewise appreciative of Prof Lovell Fernandez of the South African-German Centre for Transnational Criminal Justice and Prof Volker Nerlich of the ICC for their advice and direction.

I am thankful to the Faculties of Laws of the University of the Western Cape and Humboldt University for all the assistance I received in researching this paper.

Finally, I thank the German people for their generosity, and the German Academic Exchange Service (DAAD) for the financial assistance, without which this important experience would not have been possible.



ABBREVIATIONS AND ACRONYMS

AU	African Union
EACCS	Extraordinary African Chambers in the Courts of Senegal
ECC	Extraordinary Chambers in the Courts of Cambodia
HCSS	Hybrid Court for South Sudan
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OAU	Organisation of African Unity
R-ARCSS	Revitalised Agreement for the Resolution of Conflict in South Sudan
SCSL	Special Court for Sierra Leone
UNMIK	United Nations Mission in Kosovo
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor

TABLE OF CONTENTS

KEYWORDS	i
DEDICATION.....	ii
DECLARATION.....	iii
ACKNOWLEDGEMENTS	iv
ABBREVIATIONS AND ACRONYMS	v
TABLE OF CONTENTS	vi
CHAPTER ONE	1
1.1. Background to the study.....	1
1.2. Problem Statement	4
1.3. Research questions	6
1.4. Research methodology	6
1.5. Significance of the study.....	6
1.6. Chapter outline.....	7
CHAPTER TWO: OVERVIEW OF THE KEY ISSUES IN THE CONFLICT	8
2.1. Introduction.....	8
2.2. Nature of Conflict after Independence.....	8
2.3. The Peace Agreement	10
2.4. Transitional justice mechanism in the Peace Agreement.....	10
2.4.1. Criminal prosecution	11
2.4.2. Truth and Reconciliation Commission	12
2.4.3. Reparations.....	13
2.4.4. Revamp and Institutional reform	14
2.5. Criticism of Transitional Justice Mechanisms.....	15
2.6. Concluding remarks.....	16
CHAPTER THREE: EVALUATION OF OTHER HYBRID COURTS: LESSONS FOR HCSS	17
3.1. Introduction.....	17
3.2. Special Court for Sierra Leone.....	17
3.2.1. Background.....	17

3.2.2.	The Structure and Practice of the Special Court for Sierra Leone	19
3.2.3.	Contributions of the Special Court for Sierra Leone	20
3.2.4.	Criticism of the Special Court for Sierra Leone.....	21
3.3.	Extraordinary African Chambers in the Courts of Senegal	24
3.3.1.	Background.....	24
3.3.2.	The Structure and Practice of the Extraordinary African Chambers in the Courts of Senegal	26
3.3.3.	Criticism of the Extraordinary African Chambers in the Courts of Senegal.....	27
3.4.	Extraordinary Chambers in the Courts of Cambodia	27
3.4.1.	Background.....	27
3.4.2.	The Structure and Practice of the Extraordinary Chambers in the Courts of Cambodia .	28
3.4.3.	Contribution of the Extraordinary Chambers in the Courts of Cambodia.....	30
3.4.4.	Criticism of the Extraordinary Chambers in the Courts of Cambodia	31
3.5.	Lessons to be drawn for the Hybrid Court of South Sudan	31
3.6.	Concluding remarks.....	31
CHAPTER FOUR: THE HYBRID COURT FOR SOUTH SUDAN		33
4.1.	Introduction.....	33
4.2.	The Establishment of the Hybrid Court for South Sudan.....	33
4.3.	Jurisdiction, mandate and primacy of the HCSS	34
4.4.	Personnel and appointments.....	35
4.5.	Rights of victims and witnesses	36
4.6.	Modes of Participation, and Penalties	37
4.7.	Use of findings, documentation and evidence.....	38
4.8.	Rights to Fair Trial.....	40
4.9.	Challenges of the Hybrid Court for South Sudan.	46
4.10.	Concluding remarks.....	47
CHAPTER FIVE.....		48
5.1.	Findings and Recommendations.....	48
5.2.	Conclusion and Findings.....	48
5.3.	Conclusions.....	48
5.4.	Recommendations	49
A.	PRIMARY SOURCES.....	51

Treaties and Resolutions.....	51
B. SECONDARY SOURCES.....	52
I. Books	52
II. Chapters in Books.....	53
III. Journal Articles	54
IV. Internet Sources	55



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CHAPTER ONE

1.1. Background to the study

The Republic of South Sudan became independent from the Republic of Sudan on 9 July 2011. South Sudan has an area of 644, 329 km² and a total estimated population of around 12, 6 million.¹The original state of Sudan was intensely divided along ethnic, religious and ideological lines. The general population of the Republic of Sudan is mainly Sunni Muslim whereas the South Sudanese are mostly Christian, with small populations that still practice African indigenous religions.²While the Republic of Sudan is predominantly Arabic-speaking, English and over sixty local languages are spoken in South Sudan.³

The new Republic of South Sudan was born after one of the longest and most ruthless wars fought in Africa. The war between the government of Sudan and the Southerners had its roots in 1955 as resistance to "Sudanisation" began in the run-up to Sudanese independence. Provincial administration⁴favouring the better-educated northerners over southerners and further conflict fuelled by "Islamisation" strategies and the inability to actualise a government framework that would ensure self-governance for the South led to a protracted civil war between the north and south.⁵ The Addis Ababa Agreement that ended the first civil war in

¹World Bank 2017 estimate. <https://data.worldbank.org/country/south-sudan> (access 10 September 2018).

²Deng F 'New Sudan in the Making?' (2010) 367.

³Liah K 'Disarmament, Demobilization and Reintegration (DDR) in post conflict South Sudan' (2011)1 available at <https://oda.hioa.no/.../disarmament-demobilization-and-reintegration-ddr-in-post-conf>(accessed 10 September 2018). For further references, see Johnson H *South Sudan: The Untold Story from Independence to Civil War* (2016) and Cockett R, *Sudan: The Failure and Division of an African State* (2016) 1.

⁴UNDP, *South Sudan: National Human Development Report, Chapter 5 Lasting Peace and Reconciliation: the long Road Ahead*, (2015)63-64 available at www.ss.undp.org/content/south_sudan/en/home/library/undp...reports/SSNHDR.html(accessed 25 September 2018).

⁵'South Sudan National Action Plan 2015-2020 on UNSCR 1325 on Women, Peace and Security and Related Resolutions' available at www.ss.undp.org/.../southsudan/.../southsudanotherdocuments/SS%20NAP%201325.... (accessed 25 September 2018).

1972 did not resolve political pressures and when Sharia law was introduced in 1983, it reignited the north-south conflict.⁶ The Second Sudanese Civil War ended with the signing of the Comprehensive Peace Agreement (CPA) in January 2005. The CPA ended a period of constant war between 1955 and 2005 barring an eleven-year truce that isolates two savage stages.⁷

The CPA gave the general population of South Sudan the opportunity to opt for self-determination after a six-year interim period after which they had to decide whether to stay in a united Sudan or to secede.⁸ The South Sudanese voted overwhelmingly to secede from Sudan in a referendum and secession was formally proclaimed on 9 July 2011.

However, independence brought little joy to the South Sudanese. Within two years, the country again fell into conflict. The conflict started as a power struggle within the leadership of the ruling Sudan People's Liberation Movement/Army (SPLM/A), but soon developed into an ethnic conflict⁹.

After independence, the incumbent President Salva Kiir and inaugural Vice-President Riek Machar had many rifts over issues related to the political, economic, security, justice and social structures¹⁰. In July 2013, Kiir, an ethnic Dinka, dismissed Machar (a Nuer) and removed many political, military and party leaders from power. The violent conflict that began by the end of

⁶Fitzgerald M 'Throwing the Stick Forward: The Impact War on Southern Sudanese Women, UNIFEM and UNICEF' (Nairobi, 2002); personal communication interview 7 June, published on 8 August 2011.

⁷Pinaud M 'Number of conflict events in South Sudan' (2017) available at <https://www.crisis.acleddata.com/category/south-sudan/> (accessed 27 September 2018).

⁸Article 1.3 of the Comprehensive Peace Agreement (2005). See further: Article 1(2) of the Charter of the United Nations (1945) states as one of the purposes of the United Nations: 'To develop a friendly relationship among nations based on respect for the principle of ...(self-determination of peoples)'; Article 20 (1) of the African Charter on Human and People's Rights of (1981); and Deng F, *New Sudan in the Making?* (2010) 312.

⁹Deng F *South Sudan National Dialogue: Conceptual Reflections* (2017) 43.

¹⁰Reeve R 'Peace and Conflict Assessment of South Sudan' (2012) 11.

that year resulted in over two million people losing their lives and about four to five million more being displaced.¹¹All sides involved in the war have been implicated in human rights violations such as killings, enforced disappearances, torture, and displacement.

In 2015, South Sudan's warring parties signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan of August 2015 ("Peace Agreement") but the peace agreement was violated, leading to more conflict in 2016. The African Union Commission embarked on a consultative mission to Juba from 20 to 22 July 2017, to engage the Transitional Government of National Unity on implementing Chapter 5 (3) of the Peace Agreement, which relates to the establishment of the Hybrid Court for South Sudan.¹²

The 2015 agreement differs from the 2018 agreement, in the sense that the 2015 peace agreement collapsed when a new war broke in July 2016. Later the warring parties came on the table and signed the 2018 revitalised peace agreement.

Although the AU has an obligation to push for the establishment of the Hybrid Court¹³ there are several challenges to the establishment of the Hybrid Court. Despite the agreement by both warring parties to establish the court, building an institution to conduct the trials would present significant challenges.¹⁴

¹¹World Vision 'South Sudan Conflict' (2018) available at <https://www.worldvision.org/refugees-news-stories/south-sudan-refugee-crisis-facts>(accessed 6 November 2018).

¹² AU 'South Sudan Communique' (2017) available at <https://au.int/.../pressreleases/20170725/african-union-commission-and-south-sudan-tr...> (Accessed 30 September 2018).

¹³Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) Chapter V, article 3.1.1 (2015).

¹⁴Ciorciari J &Heindel A *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (2014) 21.

1.2. Problem Statement

The notion of a hybrid court, which would combine aspects of the existing courts and international law and practice, emerged from a perception of the international tribunals as being marred by four essential flaws: their costly nature, the excessive length of their proceedings, their remoteness from the territory where crimes have been perpetrated and consequently the limited impact of their judicial output on the national populations concerned, and the focused character of the prosecutorial targets resulting in trials of several low-ranking defendants.¹⁵

Recent trends of establishing a hybrid court with internationalised elements can be traced back to the challenges that faced ad hoc courts such as the International Criminal Tribunal for Rwanda.¹⁶ They hope that, the internationalised courts would address sovereignty concerns, promote local ownership, legitimacy and victim involvement, build capacity in post-conflict societies and deliver credible but less expensive justice.¹⁷

The Hybrid Court can be defined as a blend of international and national judicial mechanisms, that will have jurisdiction regarding the crimes of genocide, war crimes, crimes against humanity and other serious crimes committed under national and international law.¹⁸

¹⁵ Cassese A 'Report on the Special Court for Sierra Leone' (2006),8.

¹⁶ Schabas W The UN International Criminal Tribunals The former Yugoslavia, Rwanda and Sierra Leone(2006)89.

¹⁷ Cryer R, Friman H, Robinson D, & Wilmschurst E *An Introduction to International Criminal Law and Procedure*(2014)181. See Cryer R *Prosecuting International Crimes: Selectivity and International Criminal Law Regime*(2005)61. Whether these represent an advance or retrenchment of international criminal law remains a matter of dispute. Further, Schabas W *An Introduction to the International Criminal Court* (2006) 11.

¹⁸ Romano T 'Hybrid Court Key For Effective Justice and Accountability', available at <https://unmiss.unmissions.org/advocate-romano-hybrid-court-key-effective-justice-and-accountability> (accessed 25 November 2018).

Courts usually apply a mix of national and international law (both procedural and substantial laws) and it features a blend of international and national elements.¹⁹

The idea is to establish lean and agile courts sitting in the territory where the crimes have been committed.²⁰Crucially, the Hybrid Court will prosecute state officials and other perpetrators in South Sudan. The Hybrid Court for South Sudan has not been yet established due to lack of law and fund.

Objectives of the study

The general aim of this study is to evaluate the legal framework of the Hybrid Court for South Sudan.

More concretely, the study aims to:

- Examine the applicable laws of the Hybrid Court for South Sudan;
- Assess the nature of the crimes under the subject jurisdiction of the Hybrid Court;
- Identify the legal loopholes in the legal framework; and
- Evaluate the relationship between the Hybrid Court and the other transitional justice mechanisms.

¹⁹Cante F *Handbook of Research on Transitional Justice and Peace Building in Turbulent Regions* (2016) at 217.

²⁰Cassese *An International Criminal Law* (2008) 332,333.

1.3. Research questions

This research seeks to answer four questions:

- What are the applicable laws for the Hybrid Court for South Sudan?
- What is the ambit of the jurisdiction of the Hybrid Court for South Sudan?
- Are there any legal loopholes in the legal framework of the Hybrid Court for South Sudan?
- How will the Hybrid Court for South Sudan relate to the other transitional justice mechanisms?

1.4. Research methodology

The study used desktop research to gather both primary and secondary sources. Primary sources, such as the legislation of several countries, international treaties and conventions and case law, were consulted and used in this study. Secondary sources such as books, journals articles and reports by regional and international institutions and NGOs were used.

1.5. Significance of the study

This study is undertaken with the purpose of evaluating the Hybrid Court of South Sudan holistically and critically. It is expected that this study will fill the knowledge gap as there is little scholarly writing or critical analysis on the viability of the court, the Peace Agreement for South Sudan and on the Hybrid Court for South Sudan. A critical and objective analysis of the legislation and the feasibility of the court being able to effectively bring perpetrators to account and provide justice and healing to the business is likely to stimulate further debate.

1.6. Chapter outline

Chapter One

This Chapter provides an introduction and framework for the paper and serves as a roadmap for the rest of the discussion. It includes the problem statement, the research questions, objectives and methodology of the study and establishes the context for the discussion.

Chapter Two

This Chapter summarises the key issues related to the conflict in South Sudan after independence. It also briefly introduces the transitional justice mechanisms provided for in the Peace Agreement.

Chapter Three

This chapter critically evaluates the previous hybrid courts and lessons that can be drawn for the Hybrid Court of South Sudan.



Chapter Four

This chapter deals with the legal framework of the Hybrid Court of South Sudan.

Chapter Five

This, the final Chapter, provides the findings of the study on the evaluation of the legal framework of the Hybrid Court for South Sudan, makes recommendations and draws conclusions based on the findings of the research.

CHAPTER TWO: OVERVIEW OF THE KEY ISSUES IN THE CONFLICT

2.1. Introduction

The causes of conflict in South Sudan are broad and complex. This has made it difficult for the role-players to resolve the conflict by using the various transitional justice mechanisms. This chapter examines the history of conflict, the peace agreement and various transitional justice mechanisms envisaged for South Sudan. In 2018, a peace agreement was signed: the “Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan”.²¹ The Peace Agreement accommodated the arrangement of a transitional government in South Sudan. Chapter V of the Agreement covers issues of transitional justice, responsibility, compromise and reconciliation. This section incorporates the foundation of the Commission for Truth, Reconciliation and Healing, a Hybrid Court for South Sudan, and a Compensation and Reparation Authority.²² The Agreement stipulates that the Hybrid Court will have the mandate to examine and prosecute people accused of infringement of international law and/or South Sudanese law, committed from 15 December 2013 throughout the transitional period.²³

2.2. Nature of Conflict after Independence

After decades of political disagreement, including warfare between South Sudan and the Republic of Sudan,²⁴ South Sudan finally gained independence on 9 July 2011. Since then, South Sudan has been a country in deep turmoil with many growing pains, most notably a tribal conflict between forces loyal to President Kiir and former Vice-President Machar. The SPLM

²¹Revitalised Agreement for the Resolution of Conflict in South Sudan, 12 September 2018 (R-ARCSS) Chapter I, (2018).

²²R-ARCSS Chapter V (2018).

²³R-ARCSS Article 3 (2018).

²⁴Breidlidet al. *A Concise History of South Sudan* (2014) 344.

party leaders have had difficulties shedding their military mentality and accepting participation in decision making by the citizenry.²⁵

As a result, on the eve of celebrating its third year of existence as an independent country, war broke out again on 15 December 2013. The reasons for this conflict are: First, the President and the former Vice-President are from two distinct tribes. After promising to work together, mistrust among the leaders made them accuse each other of political oppression, war-mongering and fomenting a dictatorship. Second, the government has been both corrupt and disorganised, has managed its resources and the economy poorly, and has lost the complete confidence of many countries that initially provided help, including the United States and Great Britain. Third, many non-governmental organisations (NGOs) have abandoned the country because of death threats and political instability. Fourth, there is no stable infrastructure in South Sudan and chaos and anarchy pervade the landscape. Fifth, while the history of South Sudan as a country is brief, the region has a history dating back thousands of years. The long-standing ethnic hatred and rivalry between the Dinka and Nuer tribes heightened during the civil war with all sides perpetrating violence throughout the country. The human rights violations such as killings, the displacement of millions of people, reported torture, enforced disappearances and destruction of property occurred on a scale so egregious that a new process of healing and justice was thought necessary to ensure peace.²⁶

²⁵Breidlidet al. (2014) 344.

²⁶Amnesty International 'Calls for justice to ends cycles of violence and broken promises in South Sudan' (2018) available at <https://www.amnesty.org/en/documents/afr65/9082/2018/en/> (accessed 6 November 2018).

2.3. The Peace Agreement

The Peace Agreement states the need to establish a Transitional government that will be composed of all the warring parties and signatories to the agreement. The Peace Agreement prescribed political power-sharing for the pre-election period and principles for transitional justice. Accepting the immediate need to bring an end to the tragic conflict in South Sudan, the parties to the Agreement also agreed to promote national reconciliation, accountability, healing and to combat impunity.²⁷

2.4. Transitional justice mechanism in the Peace Agreement

Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations which are so numerous and so serious that the normal justice system cannot provide an adequate response.²⁸

Transitional justice also refers to 'a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive and even violent systems'.²⁹ Using comprehensive transitional justice mechanisms offers a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assists in the start of a process of reconciliation and transformation'.³⁰

Various factors affecting transitional justice mechanisms including human resources, funding and lack of political will. These factors impact the way transitional justice mechanisms are perceived and the long-term effectiveness of the transitional justice mechanisms.

²⁷R-ARCSS (2018)Preamble 6.

²⁸ICTJ definition of transitional justice, available at <https://www.ictj.org/about/transitional-justice> (last visited 4 May 2018).

²⁹Boraine A & Valentine S *Transitional Justice and Human Security* (2006) 24.

³⁰Boraine A & Valentine S(2006) 25.

According to the United Nations, “transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation.”³¹ Before discussing the transitional justice mechanisms provided in the Peace agreement, it is judicious to briefly discuss the transitional justice mechanisms available at the disposal of transitioning society.

The notion of transitional justice. They expects the issues of gross human rights violation to emerge during the transitional justice mechanism. It will take various shapes in handling the processes. The evidence gathered or information to be gathered need to be collected processed and stored well.

Conditional amnesty usually can assist to bring out the truth. It may not suit everyone, and is likely to face opposition from civil societies and international community.

Generally, five means or dimensions of the notion of transitional justice can be distinguished, namely prosecution, the truth commission, , reparation and revamp.³²

2.4.1. Criminal prosecution

Criminal prosecution is an essential part of an integrated response to massive human rights violations and should be pursued whenever possible. The pursuit of criminal prosecution, however, must always apply full measures of due process and fair trial guarantees. These

³¹UN ‘Guidance Note of the Secretary General:United Nations Approach to Transitional Justice’ (2010) available at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf(last visited 4 May 2018).

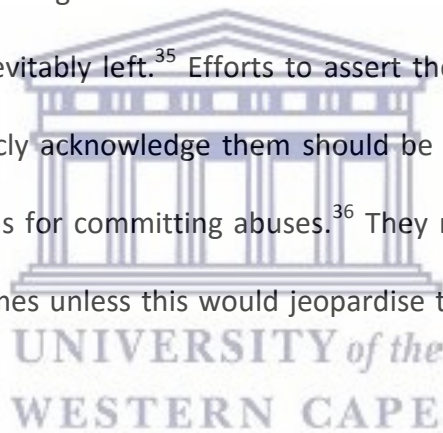
³²UN (2010).

principles cannot be sacrificed, regardless of the circumstances. These include the important issue of the legitimacy of the origin of the courts called upon to hear these cases.³³

Criminal prosecution can be conducted before national courts, internationalised courts or international criminal courts.³⁴

2.4.2. Truth and Reconciliation Commission

Truth-telling represents another key approach to transitional justice. The truth about human rights abuses should not be thought of as an alternative to justice. Truth-telling can, in fact, be an effective means of covering a larger universe of cases than trials, limiting the “impunity gap” that prosecutions will have inevitably left.³⁵ Efforts to assert the undeniable, discover hidden facts, disclose them and publicly acknowledge them should be comprehensive, impartial and neutral to political justifications for committing abuses.³⁶ They must be honest and complete and include the naming of names unless this would jeopardise the ability to pursue justice by tainting future prosecutions.³⁷



The particular sequencing of truth-telling efforts with other transitional justice mechanisms should be left to the contextual and local decisions. However, the fact-finding element of a well-run truth commission can help distil cases of abuse that deserve attention from those which prosecutable evidence is available, thereby making the whole transitional justice process more efficient. It can also lay the foundation for a sound reparations policy by identifying the

³³ Boraine A & Valentine S (2006) 245.

³⁴ See Special Courts for Sierra Leone, International Criminal Tribunals for former Yugoslavia, Rwanda and ICC.

³⁵ Boraine A & Valentine S(2006) 248.

³⁶ Hayner P *Unspeakable Truths: Facing the Challenge of Truth Commissions*(2002).

³⁷ Boraine A & Valentine S(2006) 248.

harm done and victims. It can also form the basis for sound vetting programmes, prosecutions and reconciliation.³⁸ South Africa's Truth and Reconciliation Commission, for example, was considered a best practice in terms of its outcome and implementation.

2.4.3. Reparations

Reparations to victims of human rights violations are essential elements of the state's set of obligations in a post-conflict or post-dictatorship society.³⁹ In this approach, there may be a smaller role to play for international role-players, for whom it is impossible to determine the scope, manner and the amounts of reparations as a general, universally applicable rule. These matters should be decided domestically, based on resources and cultural idiosyncrasies. However, amounts and types of reparations should be such that they help to restore civic trust between citizens and the state and between citizens themselves, and uphold the dignity of victims. Reparations should be designed to signify that the victim's status as a citizen is now fully restored and recognised. It is also advisable to include non-monetary reparations in any programme, such as restitution, official apologies, memory preservation initiatives and the promotion of cultural manifestations of memory.⁴⁰

A transitional justice programme that offers monetary compensation but suppresses all possibilities of criminal prosecution, truth-telling and institutional reform is unacceptable to the

³⁸Boraine A & Valentine S(2006) 248.

³⁹Greiff P *Justice and Reparations, in Repairing the Past: Compensation for Victims of Human Rights Violations*. See more:Magarrel L *Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice* (2003) 85-98.

⁴⁰Boraine A & Valentine S(2006) 249.

international community. It should also ensure that victims can collect reparations benefits and that processes for claiming them are simple, timely and fair.⁴¹

2.4.4. Revamp and Institutional reform

The reform of abusive public institutions represents a final approach to transitional justice. States used to think of institutional reform as part of the guarantee of non-recurrence, as stated in the “Joinet principles” prepared for the United Nations.⁴² These types of institutions are the best check on abuse and authoritarianism. Institutional reform, therefore, is a condition for building a democratic state in which democracy is visible not during elections, but every day, in the harmonious functioning of mutually independent institutions, and where institutions are there to offer citizens protection from abuse.⁴³ Vetting public institutions and excluding abusive individuals serve two purposes: first, it helps to generate civic trust between citizens and their institutions; and, second, it increases the state’s effectiveness in meeting the challenge of fighting crime and redressing wrongs by allowing it to count on the cooperation of its citizens. It is important to remember, however, that the process itself of exclusion of those abusive elements from a newly made up institution must be rigorously based on due process and principles of fairness. States and citizens must insist on individual responsibility rather than guilt by association.⁴⁴

⁴¹Boraine A & Valentine S(2006) 249.

⁴²Joinet L UN Special Rapporteur on Impunity, Revised Final Report on the Impunity of Perpetrators of Human Rights Violations, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997).

⁴³Boraine A & Valentine S(2006) 250.

⁴⁴Boraine A & Valentine S(2006) 250-251.

The Peace Agreement stipulates various proposals on transitional justice mechanisms to address the past legacy of human rights violations and end the culture of impunity in South Sudan.

The Peace Agreement provides a wide range of transitional justice mechanisms, namely judicial reforms⁴⁵, the establishment of a Hybrid Court for South Sudan (HCSS), a Commission for Truth, Reconciliation and Healing (CTRH), and a Compensation and Reparation Authority (CRA).⁴⁶

Following their establishment, the CTRH, HCSS and CRA shall independently promote the common objectives of facilitating truth, reconciliation and healing, compensation and reparation in South Sudan.⁴⁷ The transitional government of national unity, which is yet to be established, shall fully support and facilitate the operations of the CTRH and cooperate with the HCSS.⁴⁸

According to the Agreement, the transitional government of national unity will commit to fully cooperate and seek the help of the African Union, the United Nations and the African Commission on Human and People's Rights to design, implement and facilitate the work of the agreed transitional justice mechanisms provided for in the Agreement.⁴⁹

2.5. Criticism of Transitional Justice Mechanisms

At the time of writing, there have not been palpable efforts to set in motion the transitional justice mechanisms provided in the Peace Agreement. One of the overarching problems that the transitional justice mechanisms are likely to face is the unwillingness of some political

⁴⁵R-ARCSS (2018)Chapter 1, article 12.

⁴⁶R-ARCSS (2018) Chapter 5.

⁴⁷R-ARCSS (2018)Chapter 5, article 1.3.

⁴⁸R-ARCSS (2018)Chapter 5, article 1.4.

⁴⁹R-CRCSS (2018)Chapter 5, article 1.5.

leaders to fully implement the mechanisms.—lack of political will. As in so many other parts of the world, it was the foot soldiers, the middle management of the security forces and even the generals who were blamed for implementing the policies and laws devised by political parties and political leaders.⁵⁰ They could repeat this trend in South Sudan where leaders have already been reluctant to push for the establishment the Hybrid Court.

Failing to prosecute will disillusion many victims and encourage the view that the government endorses impunity and that the beneficiaries of mass atrocities can escape prosecution for their actions.

Amnesty can be another challenge for full implementation of transitional mechanisms and prosecution in particular. As the President Salva Kiir has already granted amnesty to some politicians and military officers in 2016. Many victims and survivors would see this as an incentive to the perpetrators.



2.6. Concluding remarks

The parties to the Revitalised Peace Agreement are unwilling to accept and implement the peace agreement. Continued fighting in the country has made the country fragile. The full support of the African Union and the international community at large is required to have the warring parties implement the Peace Agreement. Although the drafters of the Peace Agreement fully endorsed the need to ensure accountability in South Sudan for the mass atrocities committed both by the government and the armed opposition, this has not come to fruition.

⁵⁰Rotberg R & Thompson D (2000) 156.


CHAPTER THREE: EVALUATION OF OTHER HYBRID COURTS: LESSONS FOR HCSS

3.1. Introduction

This chapter discusses the Special Court of Sierra Leone, the Extraordinary Chambers in the Courts of Senegal and the Extraordinary Chambers of Cambodia within the Hybrid Court context. It will discuss the foundations, structure and mandates of these Hybrid Courts will be discussed in relation to developments that might be conceivable for the future Hybrid Court of South Sudan.

3.2. Special Court for Sierra Leone

3.2.1. Background



In March 1991, a dissident group known as the Revolution United Front (RUF)⁵¹ began an assault on the administration of Sierra Leone with the help of Charles Taylor, President of neighbouring country, Liberia.⁵² This was the start of a decade-long war that ended with the mediation of international powers. The war destroyed the monetary, political and social foundation of the nation and left a critical proportion of the populace dead, maimed, in a state of banishment or uprooted. It also triggered destabilisation in the greater West African region.

Several attempts at peace and the election of a civilian government in 1996 did not end the conflict. After a coup and intervention by The Economic Community of West African States Monitoring Group (ECOMOG) renewed peace negotiations resulted in Foday Sankoh, the RUF

⁵¹Mulerwa O 'The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa'. LLM research paper, UWC.(2013), available at, <https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

⁵²Peters K 'War and the Crisis of Youth in Sierra Leone' (2011) 1.

commander, receiving the vice-presidency.⁵³ After further fighting, military intervention by Britain in 2000, pressure on Liberia to end its support of the RUF and the capture of Foday Sankoh, the country returned to peace and an elected civilian government.⁵⁴ A Special Court for Sierra Leone was conceived when President Ahmad Tejan Kabbah asked the United Nations Security Council to:

...start a procedure whereby the United Nations would resolve on the setting up of an extraordinary court for Sierra Leone to bring to sound justice those individuals from the Revolutionary United Front (RUF) and their assistants in charge of carrying out violations against the general population of Sierra Leone... [a solid and valid court that will meet the aims of bringing justice and guaranteeing enduring peace].⁵⁵

This court would meet international guidelines for the conduct of criminal cases on Sierra Leonean soil while having jurisdiction derived from a mix of international and national Sierra Leonean law. The UNSC recognised this request and the Special Court for Sierra Leone was founded in 2002 following an agreement between the legislature of Sierra Leone and the Secretary-General of the United Nations.⁵⁶

⁵³ Pitts M Sub-Regional Solutions for African Conflict: The ECOMOG Experiment (1999), available at <https://journals.lib.unb.ca/index.php/jcs/article/view/4379/5057> (accessed 27 November 2018).

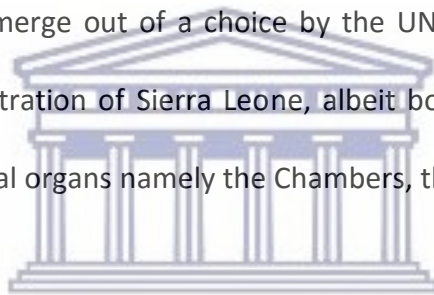
⁵⁴ Mustapha M & Bangura J 'Sierra Leone beyond the Lomé Peace Accord' (2010) 4-5.

⁵⁵ Human Rights Watch (2004) Bringing Justice: the special Court of Sierra Leone: Accomplishments, Shortcomings, and Needed Support.

⁵⁶ Malan M, Rakate P & McIntyre A 'Peacekeeping in Sierra Leone: UNAMSIL hits the home straight' (2002) 32. See UNSC Resolution, 2000 S/RES/1315(2000) available at <http://www.un.org/en/sc/documents/resolutions/2000.shtml> (accessed 29 September 2018).

3.2.2. The Structure and Practice of the Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was set up to bring to justice⁵⁷ those responsible for crimes against humanity, infringements of the Geneva Convention and certain violations of the national laws of Sierra Leone carried out inside the borders of Sierra Leone since 30 November 1996.⁵⁸ The SCSL is an autonomous entity having primacy over the domestic courts of Sierra Leone concerning crimes under its jurisdiction.⁵⁹ They have portrayed it as a sui generis arrangement-based organ which has the qualities related to traditional international bodies (distinct legal identity; accessibility, independence and autonomy). It is distinct from previous hybrid courts since it didn't emerge out of a choice by the UNSC and isn't controlled by the United Nations or the administration of Sierra Leone, albeit both influence the court.⁶⁰ They made the SCSL of three essential organs namely the Chambers, the Office of the Prosecutor and the Registry.⁶¹



The Court has both legal and non-legal functions. For instance, the Registry, which is to manage the Court, also oversees the legal functions of the Court, and saves and oversees access to the Court's documents. The SCSL is controlled by a Management Committee which depends on funding from UN member states. Individuals from the Committee include delegates from the

⁵⁷Mulerwa O 'The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa'. LLM research paper, UWC.(2013), available at <https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

⁵⁸Article 1 Special Court statute.

⁵⁹Article 8 Special Court Statute.

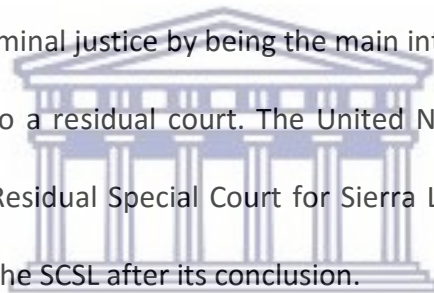
⁶⁰Article 12 and 15 Special Court Statute authorise the government of Sierra Leone and the Secretary-General to appoint a prosecutor and judges for the Court.

⁶¹Article 11 Special Court Statute.

governments of the United States, the United Kingdom, Canada, Nigeria and the Netherlands besides agents from the United Nations and the government of Sierra Leone.⁶²

The SCSL to prosecute persons who have committed mass atrocities in Sierra Leone after 30th November 1996 and during the Sierra Leone Civil War. The court had jurisdiction to try any persons who have committed Crimes against humanity, violated the Geneva Convention of 1949 and crimes under the Sierra Leone's law.

The prosecution of Charles Taylor was a noteworthy achievement for the SCSL. It was the first case of an African head of state being tried for international crimes. The SCSL is set to break new ground in international criminal justice by being the main international court to finish all its legal procedures and change to a residual court. The United Nations and the government of Sierra Leone have set up the Residual Special Court for Sierra Leone (RSCSL) to complete the legal and managerial duties of the SCSL after its conclusion.



3.2.3. Contributions of the Special Court for Sierra Leone

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The SCSL was a progressive development in the Hybrid Court in contrast with previous courts (former Yugoslavia and Rwanda), particularly as to procedural fairness. The SCSL has significantly delivered international justice in Sierra Leone.

A national review in Sierra Leone and Liberia on the effect and legacy of the SCSL found that 79.16 percent of individuals in Sierra Leone and Liberia believe the SCSL has achieved its objective and re-established justice, peace and the rule of Law.

⁶²Mochochoko P & Tortora G 'The Management Committee for the Special Court for Sierra Leone' in Romano CPR, Nollkaemper A & Kleffner JK (2004) 141-156.

The design of the programme enabled empowered Sierra Leoneans to identify with the Court. The Registry included an office mostly staffed by Sierra Leoneans that conducted outreach to make the general population aware of the existence and purpose of the Court and its endeavours to change national justice. These included town meetings attended by the Prosecutor and Registrar, production of information booklets in the Krio language, training and trained workshops with specific target audiences such as the armed forces, radio and TV programmes, video screenings, and the organising of school human rights and peace clubs.

The capture and prosecution of Charles Taylor had a critical effect on the credibility of international justice. He had threatened the area for over 10 years and given his influence and intense associations it would have been ill-considered for any domestic court to put him on trial. His effective conviction by the SCSL helped to foster confidence in the utility of an international special court that was enabled to exploit extra resources to convey him to justice. Anything less than a conviction of Charles Taylor would have left a negative impact on perceptions of the general ability and success of the Court.

3.2.4. Criticism of the Special Court for Sierra Leone

The choice to transfer the Charles Taylor case to the Hague in 2006 was a blow to the credibility⁶³ of the SCSL among Sierra Leoneans, many of whom wished to have him tried locally with some demanding access to the trial. His trial was the showpiece of the Special Court given the extent of his impact in the civil war. It would have been valuable for the general population to observe his trial directly and the inability of the Special Court to achieve this was a genuine

⁶³Mulerwa O 'The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa'. LLM research paper, UWC.(2013), available at,<https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

flaw. Regardless, this aspect is one of the key strengths of any Hybrid Court even if holding the trial in an alternate nation disadvantaged both the direct victims of the wrongdoer and the others impacted by the crimes and undermined the retributive and therapeutic components of the trial that were vital in developing the court's credibility.⁶⁴

The selection of cases and specifically the CDF trial was another bone of contention for the Special Court. Many Sierra Leoneans saw the CDF as a liberation movement and were therefore opposed to the court and the prosecution of Samuel Hinga Norman whose CDF had supported the government of President Kabbah against the RUF. This position was underscored by the vindication of the two by the main Sierra Leonean judge who expressed a view supported by many Sierra Leoneans at the time that fighting for the reclamation of majority rule government could be seen as a demonstration of both patriotism and charitableness. The modest number of cases was likewise a test of the Court's credibility. By issuing only 13 arraignments, the court neglected to meet the desires of the general population with respect to achieving justice for a war that traversed over 10 years.

The Court has additionally been censured for applying a basically western convention on a regional African culture and forcing foreign international law standards on the people. The offences of recruiting or enticing child soldiers and the charges of forced marriage were especially scrutinised.⁶⁵ The charge of recruiting child soldiers relied on a comprehension of adulthood commencing on coming to a specific age. Yet adulthood to the general public may commence at a perception of maturing which may occur at different ages in years. A

⁶⁴McAuliffe P 'Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to the Hague Defeats the Purpose of Hybrid Tribunals' (2008)*Netherland International Law Review* 378.

⁶⁵Article 4(c) Special Court Statute.

comparative predicament emerged as to the offence of forced marriage which was hard to distinguish from certain customary types of marriage. In any case, given that the thirteen individuals who were arraigned by the Court were charged with various offences it can't generally be said that these prosecutions united the populace against the court.

The court in Sierra Leone was required to have a national character in changing the local legal structure. The Statute of the Court indicated that the representative Prosecutor should be a Sierra Leonean. However, a British QC was delegated to the role which estranged and angered the domestic legal fraternity. At the time this research was conducted, Sierra Leoneans had not occupied the higher positions in the Office of the Prosecutor and just a single Sierra Leonean served on the Appeal Bench.

The initial hopes regarding the future utility of the Court site itself have of late cooled. The International Centre for Transitional Justice at one time proposed that the infrastructure and resources could significantly assist the struggling and under-resourced national justice system. It is presently clear that the courts are not integrated into the local judicial system and the administration does not have the assets to maintain the site. The building currently risks turning into a white elephant with its primary prospect currently mooted of being transformed into a dancehall.

The SCSL has been censured for retaining aspects of the significant inadequacies of the adhoc Courts. Perhaps this is on account of its structure and legitimate system aligning it more to the international courts than with Hybrid Courts.⁶⁶ As indicated by Schabas, the Special Court 'is a

⁶⁶Mulerwa O 'The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa'. LLM research paper, UWC.(2013), available at, <https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

nearby relative of the Hybrid Courts', however, it is more precisely characterised with the impromptu courts since it is an animal of international law, not domestic law. Like the ad hoc courts, the SCSL experienced negative feedback with respect to the length of its trials and the costs incurred and in this sense failed to be a huge improvement.

It is believed that:

“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 each year. Thus it is too expensive for the court to be run like that especially on the African continent”.

3.3. Extraordinary African Chambers in the Courts of Senegal

3.3.1. Background

The Extraordinary African Chambers in the Courts of Senegal were introduced in February 2013 to try the worst perpetrators of international crimes committed in Chad between the years 1982 and 1990. This hybrid court was set up to try the former Chadian President Hissène Habré’s for the human rights violations committed during his administration in Chad from 1982 to 1990. Habré fled into exile in Senegal in 1990. A Chadian commission of inquiry into his administration in 1990 implicated him in thousands of political murders and other human rights violations and several entities thereafter conducted investigations with the aim of having him stand trial.⁶⁷

An attempt to try him for torture and crimes against humanity was made in Senegal in mid-2000 but the charges against him were dismissed by the Dakar Appeals Court and affirmed by the Senegalese Court of Cassation in light of the fact that Senegal did not have legislation that

⁶⁷Mulerwa O ‘The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa’. LLM research paper, UWC.(2013), available at, <https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

criminalizes the offence of crimes against humanity and that the Code of Criminal Procedure did not give Senegalese court's jurisdiction over acts of torture carried out by non-natives abroad.⁶⁸

Habré was also tried and convicted in absentia in Chad for war crimes and crimes against humanity in connection with his alleged support of a dissident movement opposed to President Déby.⁶⁹ On 15 August 2008, a court in N'djamena condemned him to death for crimes against the state. A proposal by the African Union requesting that Senegal indict and guarantee that Habré would be tried in the interest of Africa by a suitable Senegalese court with assurances of a fair trial at that point took the case back to Dakar. The Court of Justice of the Economic Community of West African States (ECOWAS) became engaged with the case after the African Union asked Senegal to try Habré.⁷⁰ Despite Habré's objection that Senegal's amendments to the country's laws purposely focused on him and infringed upon the principle of non-retroactivity of criminal law (the same principle was cited by the ICC which ruled that his crimes preceded its establishment in 2002), the ECOWAS court directed Senegal to convene an ad hoc tribunal as was the international custom in comparable circumstances.⁷¹ The court reasoned

⁶⁸Mulerwa O 'The Hybrid Court Model and the Legitimacy of International Criminal Justice in Africa'. LLM research paper, UWC.(2013), available at, <https://etd.uwc.ac.za/handle/11394/3916> (Accessed 27 November 2018).

⁶⁹ Human Rights Watch(2017) Senegal/Chad: Court upholds Habre Conviction, available at <https://www.hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction> (accessed 28 November 2018).

⁷⁰ Brody R Brining a Dictator to Justice(2015)15.

⁷¹ VOA, ECOWAS Courts Rules Senegal Must Use Tribunal to Try Hissene Habre(2010), available at <https://www.voanews.com/a/ecowas-court-rules-senegal...tribunal-to.../156868.html> (accessed 28 November 2018).

that prosecuting Habre for core crimes before international/internationalized court does not violate ex post facto prohibition. But prosecuting him for same crimes before Senegalese courts flies against the principle

The findings of the court as regards non-retroactivity principle should be clearly set out. The court reasoned that prosecuting Habre for core crimes before international/internationalized court does not violate ex post facto prohibition. But prosecuting him for same crimes before Senegalese courts flies against the principle. On 20 July 2012, the International Court of Justice found that Senegal had neglected to meet its commitments under the Torture Convention and requested Senegal to quickly prosecute or extradite Habré to Belgium. This provoked the decision to institute the Extraordinary African Chambers within the Senegalese judiciary.

3.3.2. The Structure and Practice 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.⁷² 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.⁷³ The Trial Chamber and the Appeals Chamber each have two Senegalese judges and a president from another member state of the AU. 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

⁷²MulerwaO(2013).

⁷³Article 2 EACCS Statute

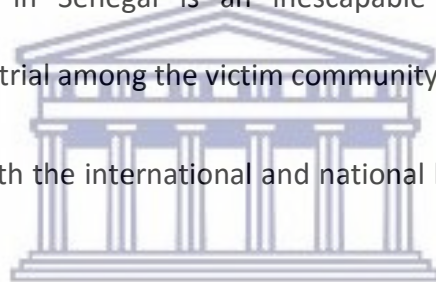
1990, corresponding to the duration of Habré's rule.⁷⁴The Statute also allows for the participation of victims as civil parties, represented by legal counsel.⁷⁵ The Chambers may also make orders for reparations to be paid into a victim's fund.

The historic trial ended in May 2016 with the conviction and sentencing to life imprisonment of Habré for human rights abuses and ordering the killing of as many as 40 000 people.

3.3.3. Criticism of the Extraordinary African Chambers in the Courts of Senegal

The mandate of the EACCS in Senegal is an inescapable after effect of its founding circumstances which limits the trial among the victim community.

Also, the court has to apply both the international and national law. The laws in question were difficult to reconcile.



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3.4. Extraordinary Chambers in the Courts of Cambodia

3.4.1. Background

In April 1975, following an intense five year civil war, a progressive movement driven by the Communist Party of Kampuchea, also called the Khmer Rouge, vanquished the U.S sponsored administration of General Lon Nol and seized state control. The Khmer Rouge quickly implemented an extreme version of Cambodian culture using a level of brutality rarely found in modern history. In their push to build an agrarian utopia, they attacked and suppressed the concepts of urban communities, cash, religion and even families. Any resistance was met with

⁷⁴Article 4-8 EACCS Statute

⁷⁵Article 14 EACCS Statute

murderous brutality and an estimated 1.7 to 2.2 million individuals out of a population of under 8 million died in under four years.⁷⁶ Measured by the proportion of the national populace lost it was perhaps the deadliest social transformation ever perpetrated?

The Khmer Rouge was removed from power in 1979 through defeat by an invading Vietnamese army, although many of its soldiers continued fighting until 1989. In the 1990s, elements of the Khmer Rouge were included in government. In 2003, the United Nations and the Cambodian government established the Hybrid Court in Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC was mandated with investigating crimes perpetrated under the Khmer Rouge regime of Pol Pot.⁷⁷ A few highlights make the Khmer Rouge Tribunal a unique experiment in international criminal justice. Unlike other hybrid courts, most of the judges were drawn from the Country. The ECCC is independent of international bodies and mostly staffed by Cambodians. It operates within the Cambodian legal system. It was also the first to focus on the victims, who were encouraged to attend the trial proceedings.

3.4.2. The Structure and Practice of the Extraordinary Chambers in the Courts of Cambodia

The prosecutorial and legal parts of the ECCC comprise the office of the Co-Prosecutors, the office of Co-Investigating Judges and three chambers, -the Pre-Trial Chamber, the Trial Chamber

⁷⁶ Short P, Pol Pot: The History of a Nightmare(2013),78.

⁷⁷ FIDH(2011), available at https://www.fidh.org/IMG/pdf/dpcambodgedec2011_final.pdf (accessed 28 November 2018).

and the Supreme Chamber. IN the office of the Co-Prosecutors, there is a national Co-Prosecutor and an international Co-Prosecutor. The Office of the Co-investigating Judges investigates cases and has a national Investigating Judge and an international investigating Judge. The Pre-Trial Chamber and the Trial Chamber each has three national judges and two international judges.

In the Supreme Court Chamber, there are four national judges and three international judges. The ECCC does not have a Registrar. Court administration is controlled by a Cambodian Director of administration assisted by a UN-delegated Deputy Director, who is in charge of the UN budget and workforce.⁷⁸

The legal procedure at the Khmer Rouge Tribunal starts with a primary examination by the Office of the Co-Prosecutors. The Co-Prosecutor identify crimes and suspects and supporting evidence, and the thereafter make a preliminary submission to the Co-Investigating Judges. The judges then complete a detailed legal examination of the assertions contained in the introductory submission. The investigating Judges are obliged in their examination to consider both exculpatory and exculpatory proof. Should a disagreement emerge between the Co-Prosecutors in regards to a proposed preliminary submission, or if a party disputes a decision of the Co-investigating Judges, the issue is settled by the five judges of the Pre-Trial Chamber. At the completion of the Legal examination, the Co-Investigating Judges return the case documents to the Co-Prosecutors who present their last submissions on the issue to the Co-Investigating Judges.⁷⁹ If the Co-Investigating Judges make a decision to proceed with the case, the final arrangement or charge sheet is settled by the Pre-trial Chamber and is transmitted to the Trial Chamber for trial. Upon judgment by the Trial Chamber, the Parties may engage the Supreme Court Chamber, which is the final arbiter.

⁷⁸ Ciorciari J The Khmer Rouge Tribunal(2006),201.

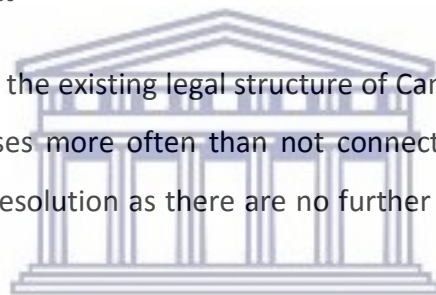
⁷⁹ Ciorciari J (2006), 203.

A special test of the ECCC is the extended period between the commission of the crimes and the trial of the accused which has caused practical difficulties for the prosecution of cases. Crime scenes are disturbed or vanish, witnesses pass on or lose interest and archives are lost or destroyed.

3.4.3. Contribution of the Extraordinary Chambers in the Courts of Cambodia

The ECCC was set up with the support of the United Nations and the legislature of Cambodia which places it in a credible position in relation to Asia and possibly assisting in the present difficulties that best the implementation of international criminal justice in Asia by presenting itself as an Asian arrangement.⁸⁰

The location of the ECCC inside the existing legal structure of Cambodia additionally guarantees to limit the substantial expenses more often than not connected with international criminal courts. It likewise guarantees resolution as there are no further legal processes after the court makes its final judgments.



The ECCC prosecutorial processes have been assisted by the length of time that researchers and scientists have had to gather data on human rights violations. For example, a Yale University venture named the Cambodian Genocide Program and an NGO it set up known as the Documentation Centre of Cambodia have amassed a huge data base of contemporaneous reports from the Khmer Rouge administration.⁸¹

⁸⁰ ECCC, Introduction to the ECCC, available at <https://www.eccc.gov.kh/en/introduction-eccc> (accessed 28 November 2018).

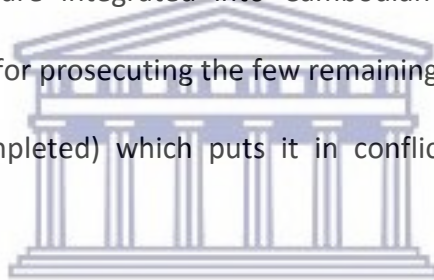
⁸¹ Yale Cambodian Genocide Program, available at <https://gsp.yale.edu/case-studies/cambodian-genocide-program> (accessed 29 November 2018).

The government has also used trials to educate the people about the atrocities and provided transport for thousands of citizens to attend trials, as well as conducted public and school education programmes based on the ECCC.

3.4.4. Criticism of the Extraordinary Chambers in the Courts of Cambodia

As described above, the challenges faced by the ECCC were tremendous.

In addition, besides the international law, the ECCC has to apply the law of Cambodia. This is conceivably an issue since the atrocities over which the Court has jurisdiction happened in Cambodia. The ECCC was created to prosecute Khmer Rouge leaders, many of whom have passed on, are in hiding or are integrated into Cambodian society. It may be that the government has little appetite for prosecuting the few remaining elderly perpetrators (only two cases have actually been completed) which puts it in conflict with the points of view of international law.



3.5. Lessons to be drawn for the Hybrid Court of South Sudan

One of the lessons is that in all the three courts, the international community plays tremendous roles in its establishment as well as the funding.

There is also need for the Hybrid Court for South Sudan to have the officials of the Hybrid Court from both international and national as well.

The application of both international and national laws is another good lesson for the Hybrid Court for South Sudan.

3.6. Concluding remarks

Despite the fact that the Hybrid courts discussed above assisted the advancement of international criminal justice and reinforced the foundation of responsibility and the rule of law,

the mixed results experienced suggest a requirement to encourage change in the practice of the hybrid court. The next chapter discusses the hybrid court for South Sudan, informed by the past experiences examined above.

And I believe chapter three should come after chapter four: in other words reshuffle chapter three and four. Chapter three should be chapter four and chapter four should be chapter three



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CHAPTER FOUR: THE HYBRID COURT FOR SOUTH SUDAN

4.1. Introduction

It has been shown above 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 its historical background, its manner of establishment and legal personality. The South Sudan Hybrid Court is no exception. This chapter analysis, inter alia, the composition and structure, jurisdiction of Hybrid Court for South Sudan, its relationship with domestic courts and other transitional mechanisms.

4.2. The Establishment of the Hybrid Court for South Sudan

To address the mass atrocities committed in South Sudan, the African Union and the government of South Sudan have agreed to establish adopt a wide range of transitional mechanisms that include the Hybrid Court for South Sudan, Truth and Reconciliation, Reparation Commission.⁸²

The agreement states that: “There shall be established an independent hybrid judicial court, the Hybrid Court for South Sudan (HCSS). The Court shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period”.⁸³

This Court will involve the combined efforts of the international community and national institutions in South Sudan. The Hybrid Court will employ both national and international judicial role-players and incorporate both domestic and international law in its statute.

The terms establishing the HCSS shall conform to the terms of this Agreement and the AUC shall provide broad guidelines relating to and including the location of the HCSS, its

⁸² R-ARCSS(2018) Chapter 5.

⁸³ R-ARCSS (2018) Chapter 5, article 3.1.1.

infrastructure, funding mechanisms, enforcement mechanism, the applicable jurisprudence, number and composition of judges, privileges, and immunities of Court personnel or any other related matters.⁸⁴

This is within the jurisdiction of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (the 2015 Peace Agreement). ‘The Chairperson of the Commission of the AU shall decide the seat of the HCSS’.⁸⁵

4.3. Jurisdiction, mandate and primacy of the HCSS

The HCSS shall have jurisdiction with respect to the crimes of genocide, crimes against humanity, war crimes, other serious crimes under international law and relevant laws of the Republic of South Sudan including torture, gender-based crimes and sexual violence.⁸⁶ What is the territorial jurisdiction of the court (crimes committed in the territory of south Sudan only? It will try cases from 15th December 2013 up to the end of the Transitional Period.

Unlike the Nuremberg Military Tribunals and the ICC, which have exclusive and complementary jurisdiction respectively, HCSS has primacy over any national courts of the Republic of South Sudan.⁸⁷

According to Nerlich:

“Procedural diversity also exists in the prosecution of international crimes before domestic courts. While domestic laws implementing substantive international criminal law should mirror, to the extent possible, the underlying international norms, it has never been suggested that in the adjudication of such cases, domestic courts should follow a set of common procedural rules. Such an

⁸⁴ R-ARCSS (2018)Chapter 5, article 3.1.2.

⁸⁵ R-ARCSS (2018)Chapter 5, article 3.1.3.

⁸⁶ R-ACRCS (2018)Chapter 5, article 3.2.1.

⁸⁷ R-ACRCS (2018)Chapter 5, article 3.2.2.

approach would be highly problematic, given that the differences in procedural traditions are often expressions of cultural differences more generally. It would be difficult, if not impossible, to find asset of procedural rules that fits all domestic jurisdictions. There is, of course, a lowest common denominator for any criminal jurisdiction trying international crimes, be it domestic, internationalized or international: the accepted standards of international human rights law”.⁸⁸

4.4. Personnel and appointments

The Agreement on the Resolution of the Conflict provides that

Judges, prosecutors, investigators and defence counsel and the Registrar of the HCSS shall be persons of high moral character, impartiality and integrity, and should demonstrate expertise in criminal law and international law, including international humanitarian and human rights law.⁸⁹

The Peace Agreement provides that a majority of judges on all panels, whether trial or appellate, shall be judges from African states other than the Republic of South Sudan. The judges of the HCSS shall elect a president of the court from amongst their members.⁹⁰

Prosecutors and defence counsels of the HCSS shall comprise personnel from African states other than the Republic of South Sudan, notwithstanding the right of defendants to select their own defence counsel in addition to, or in place of, the duty personnel of the HCSS.⁹¹

⁸⁸Nerlich V (2013) 779.

⁸⁹ R-ARCSS (2018)Chapter 5, article 3.3.1.

⁹⁰ R-ARCSS (2018)Chapter 5, article 3.3.2.

⁹¹ R-ARCSS (2018)Chapter 5, article 3.3.3.

The Registrar of the HCSS shall be appointed from African states other than the Republic of South Sudan.⁹²

The personnel of the Hybrid Court for South Sudan but not limited to Judges, prosecutors, defence counsel and the Registrar shall be selected and appointed by the Chairperson of the African Union Commission. The same selection and appointment processes shall apply to South Sudanese judges and judges from other African states.⁹³

Furthermore, the prosecutors and defence counsel shall be assisted by such South Sudanese and African staff of other nationalities as may be required to perform the functions assigned to them effectively and efficiently.⁹⁴

4.5. Rights of victims and witnesses

The issue of witnesses and victims has been provided for in the Agreement.

“The HCSS shall implement measures to protect victims and witnesses in line with applicable international laws, standards and practices”.⁹⁵

The Agreement provided for the right to a fair trial.

“The rights of the accused shall be respected in accordance with applicable laws, standards and practices”.⁹⁶

The victims of crimes also have rights. These rights must be secured while the crime is being researched and the suspects are charged and tried in court.

These rights include reasonable treatment, regard for the victims’ respect and security, notices of the time, date, and place of all court procedures, including the offence and the indictment

⁹² R-ARCSS (2018)Chapter 5, article 3.3.4.

⁹³ R-ARCSS (2018)Chapter 5, article 3.3.5.

⁹⁴ R-ARCSS (2018)Chapter 5, article 3.3.6.

⁹⁵ R-ARCSS (2018)Chapter 5, article 3.4.1.

⁹⁶ R-ARCSS (2018)Chapter 5, article 3.4.2.

faced by the charged individual, being advised about the conviction, sentence, detention and discharge of the accused individual and their, protection from the accused individual during the criminal procedure, having the wellbeing of the victims and their families considered in setting safeguards and conditions for the discharge of the accused, being at the trial and every hearing wherein the accused individual is present, bringing an interpreter, advocate or other supporting individual to court and restitution or reparation paid for damage, injury, or lost or stolen property.

In the instance of witnesses to a crime that have been requested to appear at the Hybrid Court, witnesses have certain rights, including the right to notices of the time, date and place of all court procedures, the assistance of employers to limit the loss of pay and advantages, secure waiting areas at court away from the accused individual, and the right to an interpreter.

A witness should also be informed when accused individuals have appealed their convictions, has been paroled or released.



4.6. Modes of Participation, and Penalties

The agreement state individual criminal responsibility as follows: A person who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime referred to in Chapter V, Article 3.2.1. of the Agreement shall be individually responsible for the crime.⁹⁷

⁹⁷R-ACRSS (2018) Chapter 5, article 3.5.1.

The HCSS may order the forfeiture of the property, proceeds and assets acquired unlawfully or by criminal conduct and their return to their rightful owner or to the state of South Sudan.⁹⁸

While all judgments of the court shall be consistent with the accepted International Human Rights Law, International Humanitarian Law and International Criminal Law, the HCSS shall also award appropriate remedies to victims, including but not limited to reparations and compensation.⁹⁹

The HCSS shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties.¹⁰⁰

No one shall be exempted from criminal responsibility on account of their official capacity as a government official, an elected official or claiming the defence of superior orders.¹⁰¹

The HCSS shall leave a permanent legacy in the State of South Sudan upon completion of its HCSS mandate.¹⁰²



4.7. Use of findings, documentation and evidence

Where several individuals are present that fulfil the definition of perpetrators of a crime, it must be examined whether, in light of the applicable crime, they performed the same conduct in a legal sense. In carrying out its investigations, the HCSS may use the report of the African Union Commission of Inquiry (COI) on South Sudan and draw on other existing documents, reports and materials, including but not limited to those in the possession of the African Union, or any other entities and sources, for use as the Prosecutor deems

⁹⁸R-ARCSS (2018) Chapter 5, article 3.5.2.

⁹⁹R-ARCSS (2018) Chapter 5, article 3.5.3.

¹⁰⁰R-ARCSS (2018) Chapter 5, article 3.5.4.

¹⁰¹R-ARCSS (2018) Chapter 5, article 3.5.5.

¹⁰²R-ARCSS (2018) Chapter 5, article 3.5.6.

necessary for his or her investigations and/or the prosecution of those alleged to have committed serious human rights violations or abuses, war crimes or crimes against humanity. Such documents, reports and materials shall be used in accordance with applicable international conventions, standards and practices.¹⁰³

Another concern relates to the evidence that will be accumulated and also the trial records. The Office of the Prosecutor-General will maintain a database of original criminal records. Regarding the issue of secrecy of witness statements and the fate of protected witnesses, there ought to be guarantees that the data would not be shared.

Court records should be fundamentally open to the scrutiny of the overall population.¹⁰⁴ Procedures to enhance access may incorporate making short documentaries or films, distributing summaries of judgments and incorporating information about the law into the school curriculum. Associations with NGOs that would safeguard documentation could be investigated, for example, the change of the Documentation focuses into an examination office. Clear strategies should be created from the start with a view to encouraging the archiving of court files and different materials for posterity.

¹⁰³R-ARCSS (2018) Chapter 5, article 3.6.1.

¹⁰⁴OHCHR(2008),34.

4.8. Rights to Fair Trial

As provided for in the Transitional Constitution of the Republic of South Sudan. Every person has the right to legal representation, a right to be informed about the charges et al.¹⁰⁵

According to Nerlich, the right to a fair and speedy trial should be observed:

“Noting that the length of international criminal proceedings was particularly problematic because the accused were often kept in custody throughout the pre-trial and trial proceedings, he observed that this state of affairs...is hardly consistent with the right to a “fair and expeditious trial” and the presumption of innocence accruing to any defendant’. Cassese’s concern is shared by many others; keeping international criminal proceedings to an acceptable length is arguably one of the biggest challenges of international criminal justice not only with regard to the right to an expeditious trial but also in terms of public perception and the interests of victims and affected communities”.¹⁰⁶

The right to public hearing :The right to public hearings as part of the right to a fair trial is enshrined in the Provision of Article ,19 (3) of the Transitional Constitution of the Republic of South Sudan 2011 (TCSS,2011) which states that: “ *In all Civil and criminal proceedings , every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law .*”

The right to a public hearing incorporates the principle that: “*justice should not only be done, but be seen to be done, by subjecting legal proceedings to public scrutiny.*” However, pre-trial decisions made by prosecuting authorities are not required to be made in public.

¹⁰⁵ Article 19 of the Transitional Constitution of the Republic of South Sudan 2011.

¹⁰⁶ Nerlich V ‘Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?’ (2012) 10 5 *Journal of International Criminal Justice* 1340.

Sometimes , Appellate Courts decisions may be made on the papers ,rather than on the basis of a public hearing .This will not breach the right to a public hearing if the material on which the court basis its decisions is publicly available , as in the decision its self.

The requirements provided in the Constitution, is that every person shall be entitle to a fair and public hearing is based on the principle that legal proceedings be subject to public scrutiny.¹⁰⁷

Some methods whereby witnesses give evidence, for example by video link, or where the witness is shielded from the accused, may raise issues regarding the right to a public hearing.Proceedings may also be closed to public in the interests of National Security .However, while each case should be considered on its merits, such measures are likely to be permitted, given their legitimate objectives.

The right to public hearing also anchored in Article , 14 (1) of the International Covenant on Civil and Political Rights which provides that :“ *the press and the public may be excluded from all or part of a public hearing or trial for reasons of morals , public order , National Security , the privacy of the parties , or when in the opinion of the Court that publicity would prejudice the interests of justice .*”¹⁰⁸

They may justify Suppression orders or close hearing may be justified in order to protect particularly vulnerable witnesses, for example, Child victims of sexual assaults .This is call trial in Camera.

¹⁰⁷ Article 19(3) of the Transitional Constitution of the Republic of South Sudan 2011(as amended).

¹⁰⁸ Article 14(1) of the Convention on Civil and Political Rights.

Except in narrowly defined circumstances, Court hearing in criminal proceedings should be open to the public and Court judgment should be published. All trials in criminal matters must in principle be conducted orally and publically .Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interests of the individual and society at large.

Every person facing prosecution for a criminal offence has the right to a public hearing in proceeding before a Court or Judge of first instance .However, the right to a public hearing does not necessarily apply to all Appellate Courts proceedings, which can take place on the basis of written representation or to pre- trial decisions taken by the prosecutors.

In other words, the right of accused to be present at trial must be ascertained .This means that every person charged with a criminal offence has the right to be tried in their presence so that they can hear and rebut the prosecution case and present a defence.

As far as trial in the presence of the accused is concern, The Court of Appeal for greater Bhar El Ghazal Circuit sitting in Rumbek decided in the case of Mangar¹⁰⁹, annulling the decision of the trial special court sitting in Yirol that tried the deceased in absentia and hold his brother to pay customary blood compensation of 51 head of cows for alleged murder of the deceased Mabordit Majok Henchieng Buong. In this case , the complainant who was the Father of the deceased Mabordit Majok Henchieng Buong filed a criminal case in Yirol West county against the Accused Marial Wal Jok.in trial proceeding before the Special Court late Manger Chayor Amuou was joined as the second accused based on the testimony of a blind man prosecution

¹⁰⁹ South Sudan Government Vs Mangar Chayor Amou Criinal Appeal No:137, Unreported.

witness called chok Manger Yok-Yok who testify before the special court that why the complainant is accusing Marial Wal Jok, while the person who killed the complainant's son is Manger Chayor Amuou then Malueng Amuou Aden who was an audience during the trial proceedings interfered and told the court to release Marial Wal Jok for reason that his cousin brother son Manger Chayor Amuou was the killer based on the testimony of the blind man that the late Manger Chayor Amuou was the killer.

The Court of Appeal mentioned above found that a fundamental right of the deceased Manger Chayor Amuou who was alleged to have killed was violated.

The fundamental principle of the administration of justice system and procedure is that " every living person who is charged with criminal offence must be present when the trial takes place according to provision of Article 19 (6) of TCSS , 2011 which runs as follows :

*" (6) Every accused persons shall be entitled to be tried in his or her presence in any criminal trial without undue delay ; the law shall regulate trial in absentia ."*¹¹⁰

The provision of Article (19) of our Constitution is telling us that in the criminal proceeding an Accused person must be a living person so that he or she can be arrested and be informed at the time of the arrest of the reasons for his or her arrest and be promptly inform of any charges against him or her before taken for trial before a competent court .The main reason for enactment of the Penal laws is primarily meant for punishing offenders, that is, living offenders and if there is none then the machinery of criminal law stops , for it cannot operate in

¹¹⁰ Article 19(6) of the Transitional Constitution of the Republic of South Sudan(as Amended).

a vacuum .In Sudan Government Vs Ibrahim Mohamed Fadol¹¹¹, The Honorable Court of Appeal emphasized that :in this respect , I should refer to Salmond , Jurisprudence , 443, where he said :The received Maxim :” Actio personalis moritur cum persona “; That means :A man cannot be punished in his grave “therefore , it was held that all action for penal redress , being in time mature instruments of punishment , must be brought against the living offender and must die with him.¹¹²

The phrase :”Actio personalis moritur cum persona “; appeared in reference to the principle that a dead person or the trial in the absence of accused is a nullity Ab initio for clear violation of the requirement of natural justice Audi Alteram Partem which means: “Hear both parties” .The accused in criminal matters must be present in person ;otherwise , he cannot be punish in absentia or in his grave pursuant to provision which states that : “a Criminal case shall lapsed and shall therefore not be subject to prosecution for any of the following reasons-(a) the matter is resolved by reason of the death of the accused ---”¹¹³

In principle, the accused should not be tried in absentia. However ,Accused may be tried in absentia in certain exceptional circumstances in the interests of the proper administration of justice, for example when accused persons who have been given sufficient advance notice or summon of their trial waived their rights to attend or refused to do so as stipulated in the provision which states that: “ Where a summon is issued , the Magistrate or Court may , if he , she or it sees reasons to do so , dispense with the personal attendance of the accused ; provided

¹¹¹ Sudan Government Vs Ibrahim Mohamed Fadol, Sudan Law Journal and Reports (1967)216.

¹¹² Salmond Jurisprudence 443.

¹¹³ Section 46(1) of the Code of Criminal Procedure Act 2008.

that , the accused pleads guilty in writing or appears by his or her pleader or other permissibly agent.”¹¹⁴

Most importantly, in order to comply with international Human Rights Standards on fair trial, trial in absentia requires that:

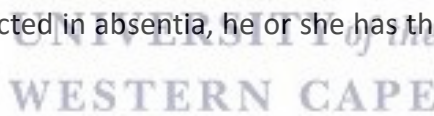
1-All necessary steps have been taken to inform the accused of the charges against them and notify them of the criminal proceedings.

2- All necessary steps have been taken to inform the accused sufficiently in advance of the date and place of their trial and to request of their attendance.

3- The Court or Tribunal has taken all necessary steps to ensure that the strict observance of the defence rights, in particular by assigning legal Counsel or Advocate, and upholds the basic requirements of a fair trial.



Notably, if the accused is convicted in absentia, he or she has the right to require a new trial in his or her presence.



In conclusion, the language of proceedings in various courts of south Sudan must be English according to provision of Article 6 (2) of The TCSS, 2011 read together with the provision of section 248 of the Code of Criminal Procedures Act, 2008. Article 6(2) reads as follows: “English shall be the official working language in the Republic of South Sudan, as well as the language of

¹¹⁴ Section 219 of the Code of Criminal Procedure Act 2008.

instruction at all level of educations.” Further the Code of Criminal Procedure Act states that: “the judgment in every trial under this Act shall be written in English ...”¹¹⁵

4.9. Challenges of the Hybrid Court for South Sudan.

Not including the South Sudanese legal fraternity in the Hybrid Court. Especially on the prosecution side, this will make it difficult to prosecute some of those cases.

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 role-players of the local environment along with the weakness of the local judicial institutions that caused the breakdown of the State.¹¹⁶

They have not yet established the hybrid court for South Sudan, raising questions when it will be realise.¹¹⁷ Where they were expected to promote legitimacy, hybrid tribunals have instead often been rejected by and faced extensive criticism from the local population.¹¹⁸ 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 lawyers and other elites. Local moral authorities are also explicitly excluded from the decision making of the tribunals.¹¹⁹

¹¹⁵ Section 248(1) of the Code of Criminal Procedure Act 2008.

¹¹⁶ Cockayne J ‘The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals’ (2005) 28 *Fordham International Law Journal* 619.

¹¹⁷ See article by ISS, available at https://issafrica.org/...analysis/will-the-hybrid-court-for-south-sudan-ever-try-the-curr_... (Accessed 30 September 2018).

¹¹⁸ Higonnet E ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2005) Yale Law School Student *Scholarship Papers Paper* 6410, Ramji-Nogales J (2010)31.

¹¹⁹ Ramji-Nogales J (2010)31.

The funding for the South Sudan Hybrid Court is problematic. The same was the case in other hybrid courts, because of a poor design compounded by an absence of funds and capacity for successful implementation.¹²⁰ The economic crisis in the country has seen even the civil servants and other employees going without salaries for months in South Sudan. The law is not yet in place for the establishment of the Hybrid Court. The peace monitoring body in South Sudan is toothless.¹²¹

4.10. Concluding remarks

The Hybrid Court for South Sudan though not yet established there is a high expectation by the people of South Sudan. They want to see that the perpetrators of the mass atrocities are prosecuted and their voices can be heard.



¹²⁰ International Crisis Group Balkans Report 'Finding the Balance: The Scales of Justice in Kosovo' (2002)21-22 available at <http://www.crisisgroup.org/-/media/Files/europe/Kosovo%2032.ashx> (accessed 30 September 2018).

¹²¹ JMEC Reports, 2017 available at <http://jmecsouthsudan.org/index.php/reports/arcss-evaluation-reports/56-chapter-v-transitional-justice/file> (accessed 30 September 2018).

CHAPTER FIVE

5.1. Findings and Recommendations

5.2. Conclusion and Findings

This chapter is devoted to the recommendations, findings and conclusion of the thesis.

5.3. Conclusions

This thesis is about the Hybrid Court for South Sudan -based on the revitalised peace agreement. It's provided for under chapter V of the peace agreement for South Sudan. The establishment of the Hybrid Court is one of the transitional justice mechanisms that people of South Sudan want and would like to see it being implemented.

Implementing the Peace Agreement has started, though at a slow pace. There is a need to support the Peace agreement by the international community and other stakeholders.

There is a high expectation from the victims and survivors. Implementing the Hybrid Court will not meet the expectation of the people in South Sudan. Since the institution is not yet established. It's believed that it will not yield any good result at the end of the day. But the perpetrators have to be brought to justice and the victims and survivors need to see justice is done.

The implementation of Chapter V of the Peace Agreement. Most people are sceptical about its implementation and how it will work.

5.4. Recommendations

Capacity building of the South Sudan Courts. This can be in terms of training, setting precedence and infrastructure. To set standards on building a reputable and trust Courts. Since there are gaps in the domestic Courts in South Sudan which requires to be assisted with the establishment of the Hybrid Court. Training for the lawyers, judges and other courts officials is also paramount. There are tendencies of revenge killing which requires a strong mechanism to address it.

Strengthening the referral system. This can be by making strong and clear referral system within the Courts system. Some cases might require local remedies which have to be integrated in the legal system.

In order for the Hybrid Court to gain credibility, it should have its own sources of funding. It's should be able to get funding from trusted sources not people with interest.

The judges and other employees of the Hybrid Court should come from countries with good legal institutions and people with credibility. If these people are coming out of different countries, it should be from countries with good legal institutions and had a similar experience of the events.

It should deal collections of evidence with in a professional manner. The culture of preserving evidence is a challenge in South Sudan. There must be good processes of documentation. This can affect issues of evidences that will be presented before Hybrid Courts. Our local justice system doesn't have proper ways of handling evidences.

Protection of witnesses. It must protect them proper since they will return to the communities where they come from.

The transitional government need to fully cooperate and support the implementation of the Hybrid Court in South Sudan. They should do it in line with the agreement and other laws to be enacted. This can be by surrendering suspect to the Hybrid Court.

They should observe the principle of fair trials in the proceedings of the Hybrid Court.



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LIST OF REFERENCES

A. PRIMARY SOURCES

Treaties and Resolutions

Agreement on the Resolution of the Conflict in the Republic of South Sudan (2015) available at www.smallarmssurveysudan.org/.../IGAD-Compromise-Agreement-Aug-2015.pdf (Accessed 28 September 2018).

The Comprehensive Peace Agreement between the Government of Sudan and the Sudan People's Liberation Movement/ Army (2005) available at <https://peaceaccords.nd.edu/sites/default/files/accords/SudanCPA.pdf> (Accessed 24 September 2018).

Revitalised Agreement for the Resolution of Conflict in South Sudan, 12 September 2018.

Statute of the United Nations Special Court of Sierra Leone UN Doc.S/RES/1315 (2000)

AU and South Sudan Communique, available at <https://au.int/.../pressreleases/20170725/african-union-commission-and-south-sudan-tr...> (Accessed 30 September 2018).

Transitional Constitution of the Republic of South Sudan 2011(as amended).

The South Sudan Code of Criminal Procedure Act 2008

CASES

Sudan South Sudan Government Vs Mangar Chayor Amou Criinal Appeal No:137, Unreported.

Government Vs I brahim Mohamed Fadol, Sudan Law Journal and Reports (1967)216.

B. SECONDARY SOURCES

I. Books

Boraine A and Valentine S *Transitional Justice and Human Security*(2006) Cape Town: International Centre for Transitional Justice

Breidlid A, Said AA, Breidlid AK, Farren A, and Wawa YHA *Concise History of South Sudan* (2014) Kampala, Uganda: Fountain Publishers

Cassese A *International Criminal Law* (2008) Oxford: Oxford University Press

Giorciari J and Heindel A *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (2014) Michigan: The University of Michigan Press

Cockett R *Sudan: The Failure and Division of an African State* (2016) Yale: Yale University Press

Concerned Citizen for Peace *Monitoring the Scenario for South Sudan 2020: Peace: the only thing worth pursuing* (2017)

Cryer R *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) Cambridge: Cambridge University Press

Cryer R, Friman H, Robinson D, and Wilmshurst E *An Introduction to International Criminal Law and Procedure* (2014) Cambridge: Cambridge University Press

Deng F *New Sudan in the Making?* (2010) Asmara: Red Sea Press Inc.

Deng F *South Sudan National Dialogue: Conceptual Reflections* (2017) Juba: Nzou Printer's limited

Hayner P *Unspeakable Truths: Facing the Challenge of Truth Commissions*(2002) New York: Routledge

Johnson H *South Sudan: The Untold Story from Independence to Civil War* (2016) London: IB Tauris Publisher

Rolandsen O and Daly M *A History of South Sudan: From Slavery to Independence* (2016) Cambridge: CambridgeUniversity Press

Rotberg R and Thompson D (eds)*Truth v. Justice:The Morality of Truth Commissions* (2000) New Jersey: Princeton University Press

Schabas W *An Introduction to the International Criminal Court* (2006) Cambridge: CambridgeUniversity Press

WerleGandJessbergerF*PrinciplesofInternationalCriminalLaw*(2014) Oxford: OxfordUniversityPress



II. Chapters in Books

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) Freiburg: Max Planck Institute

Cassese A 'The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality' in Romano CPR, Nolkaemper A & Kleffner JK (eds) *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*(2004) Oxford: OxfordUniversityPress

Schabas WA 'Internationalised Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone' in Romano CPR, Nolkaemper A & Kleffner JK (eds) *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) Oxford: Oxford University Press

III. Journal Articles

Akinrinade B 'International Humanitarian Law and the Conflict in Sierra Leone' (2001) 15 *Notre Dame Journal of Law, Ethics and Public Policy* 391-455.

Bruch EM 'Hybrid Courts: Examining Hybridity Through A Post-Conflict Lens' (2010) 28 *Boston University International Law Journal* 1-30.

Buergenthal T 'Proliferation of International Tribunals: Is it Good or is it Bad?' (2001) 14 *Leiden Journal of International Law* 267-75.

Cohen D 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future' (2007) 43 *Stanford Journal of International Law* 1-38.

Crane D 'Hybrid Tribunals in Internationalised National Prosecutions' (2007) 25 *Penn State International Law Review* 803-817.

Cockayne J 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2005) 28 *Fordham International Law Journal*.

Cruvellier T 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to Test' 2009 *International Centre for Transitional Justice and Sierra Leone Court Monitoring Program*

Higonnet E 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2005) Yale Law School *Student Scholarship Papers Paper 6*.

Nerlich V 'The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?' (2012) 105 *Journal of International Criminal Justice* 1339-1356.

Nerlich V 'Daring Diversity – Why There Is Nothing Wrong with 'Fragmentation' in International Criminal Procedures' (2013) 264 *Leiden Journal of International Law* 777-781.

Romano CPR 'The Price of International Justice' (2005) 4 *The Law and Practice of International Courts and Tribunals*.

Shraga D and Zacklin R 'The International Criminal Tribunal for the Former Yugoslavia' *European Journal of International Law* (1994) 5 360-380.

IV. Internet Sources

Human Rights Watch 'Bringing Justice: the special Court of Sierra Leone: Accomplishments, Shortcomings, and Needed Support' (2004) available at

<https://www.hrw.org/.../2004/.../bringing-justice-special-court-sierra-leone/accomplish...> (accessed 25 November 2018)

'South Sudan: Stop Delays on Hybrid Court' available at <https://www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court> (accessed 25 September 2018).

'South Sudan: Establish Hybrid Court and Facilitate work of UN rights' available at <https://www.hrw.org/.../south-sudan-establish-hybrid-court-and-facilitate-work-un-rig> (accessed 25 September 2018).

'Violence, fear, and looting grip South Sudan's capital Juba' *The Guardian* 19 July 2016 available at <https://www.theguardian.com/international.../2016/.../19/south-sudan-violence-fear-looting-j...> (accessed 26 September 2018)

Reeve R 'Peace and Conflict Assessment of South Sudan' *International Alert* (2012) available at [www.international-alert.org/sites/.../SouthSudan_PeaceConflictAssessment EN 2012...](http://www.international-alert.org/sites/.../SouthSudan_PeaceConflictAssessment_EN_2012...) (accessed 26 September 2018)

UNDP, South Sudan 'National Human Development Report, Chapter 5 Lasting Peace and Reconciliation: the Long Road Ahead' (2015) available at www.ss.undp.org/content/southsudan/en/home/library/undp...reports/SSNHDR.html (accessed 26 September 2018)

'South Sudan National Action Plan 2015-2020 on UNSCR 1325 on Women, Peace, and Security, and Related Resolutions' available at www.ss.undp.org/.../southsudan/.../southsudan/otherdocuments/SS%20NAP%201325 (accessed 26 September 2018)

Fitzgerald M 'Throwing the Stick Forward: The Impact War on Southern Sudanese Women, UNIFEM and UNICEF' (Nairobi, 2002); personal communication interview 7 June, published 8 August 2011.

'Number of conflict events in South Sudan' available at <https://www.crisis.aclldata.com/category/south-sudan/> (accessed 27 September 2018)

Clooney G and Prendergast J 'The Sentry Report: War crimes shouldn't pay' 2016 available at [https://thesentry.org/wp-content/uploads/2016/08/Sentry WCSP Final.pdf](https://thesentry.org/wp-content/uploads/2016/08/Sentry_WCSP_Final.pdf) (accessed 27 September 2018)

'South Sudan president fires cabinet' *Al Jazeera* 24 July 2013 available at <https://www.aljazeera.com/news/africa/2013/07/201372318388499663.html> (accessed 27 September 2018)



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