

## AD HOC TRIBUNALS IN AFRICA

*A wealth of experience but a scarcity of funds*

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International judicial norms developed slowly during the Cold War but have recently begun to draw on the experiences of the Criminal Tribunal in the former Yugoslavia and Rwanda. These ad hoc bodies had to respond quickly to emergency situations by combining different international approaches to justice and prosecution. The Special Court for Sierra Leone is the latest of these experiments. Despite having had more time for reflective discussion and negotiation, the Special Court faces the same challenge and constraint: the parameters of time and resources are set by political imperatives. The International Criminal Court goes some way to addressing the problems of funding, good judicial appointments and contrasting legal systems, the details of future trials will not be easy. Ad hoc tribunals will probably still have a role to play in cases where the ICC cannot intervene.

### Introduction

While it is clear that the International Criminal Court has been conceived in the minds of jurists even before the commencement of the hostilities of the Second World War,<sup>1</sup> it has taken more than half a century to become a reality.<sup>2</sup> The greater part of this period consisted of the Cold War, which was the principal obstacle to global co-operation in an area of state sovereignty, criminal jurisdiction, which states guard quite jealously.

The end of the Cold War presented the political opportunity and the appropriate circumstances for the first experiment in international

criminal justice since Nuremberg and Tokyo.<sup>3</sup> The horrors of the conflict in the former Yugoslavia cried out for justice. With no time to embark upon ambitious plans like a permanent court, use was made of the existing powers of the Security Council of the United Nations in matters of international peace and security. Thus, the Security Council passed a resolution creating the International Criminal Tribunal for the Former Yugoslavia,<sup>4</sup> an ad hoc criminal tribunal consisting of international judges and lawyers and funded by the United Nations budget.

This was a unique project. Nothing quite like it had ever existed before. The international punishment of universal crimes was

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certainly not a new idea. The earliest international tribunal for the prosecution of war crimes that we know of is said to be in 1474, when a panel of international judges from the Holy Roman Empire tried Peter Von Hagenbach in Breisach, Germany, for crimes against God and Man.<sup>5</sup> An attempt to set up an international tribunal to try the Kaiser following the First World War<sup>6</sup> failed due to the Netherlands' refusal to extradite him, as did the envisaged prosecution of the Turks for the Armenian massacres.<sup>7</sup> The International Military Tribunals at Nuremberg and Tokyo constituted the first veritable international criminal tribunals of the modern era and the models of later tribunals yet to be established many years later. However, in these tribunals rules were scarce and representation was limited. The International Criminal Tribunal for the former Yugoslavia and its successors have a truly international character with judges and lawyers being drawn from around the world.

The International Criminal Tribunal for the Former Yugoslavia (the Yugoslav Tribunal) was to be emulated in the International Criminal Tribunal for Rwanda (the Rwanda Tribunal), created one year later in exactly the same manner following the massacre in 1994. Africa has now become the stage for another ad hoc tribunal: the Special Court for Sierra Leone (the Special Court).<sup>8</sup> It seems politically likely that the first case before the International Criminal Court will also come from the African continent. The Rwanda Tribunal and the Special Court are going to produce a wealth of rich jurisprudence and experience<sup>9</sup> that is bound to assist and influence the work and operation of the International Criminal Court.<sup>10</sup>

Despite the value and achievement of these courts, their ad hoc nature has given rise to a number of obstacles to achieving the ends of justice.

## Funding

Funding has been a major concern for the ad hoc tribunals in Africa, as elsewhere. Justice, like health, is not a commodity where the cheapest options are easily palatable. To be credible, criminal courts require good man-

agers, competent technicians and highly skilled judges, prosecutors, defence lawyers, investigators and experts.

The reality of the creation of ad hoc tribunals fails to provide the proper foundation for these prerequisites because they are political creations. These courts are not created out of a need for justice alone, but also from a political need and by virtue of political decision taken by politicians in political circumstances. Those that create them may not fully appreciate the enormity of the moral responsibility attached to their operation as they do appreciate the moral importance of their function. In so far as they do, they are not ultimately accountable for their creation because they can generally hide behind the personality of a state or an international organisation whose links to any individual state remain unclear.

It is their ad hoc nature that really compromises and chips away at the sense of responsibility of their creators, since they are created in a hurry with little time for proper reflection and discourse. The Rwanda Tribunal was established in the same year as the conflict giving rise to it and barely a year after the conceptualisation of the Yugoslav Tribunal on which it was modelled. The Special Court for Sierra Leone was established after the Rwandan experience, and through a negotiated treaty given greater scope for reflective discussion, though its political initiation was as rapid as Rwanda's. In both cases, the full magnitude of the task and its likely cost were not clearly planned or foreseen. The result has been pressure for results and deadlines to achieve them. The Rwanda Tribunal has until 2008 to finish its work, with the first government trial about to start,<sup>11</sup> together with more than 47 indictments still to be handled and only 15 trials completed. The Special Court for Sierra Leone has just three years to complete a mandate that involves the trial of three separate parties to the conflict, currently involving nine detainees, and probably three separate trials. What criminal court can truly guarantee the highest standards for a fair trial if the parameters of time and resources are set by political imperatives?

The Special Court is a less ambitious venture than the Rwanda Tribunal for a number

of reasons. A deliberate choice has been made to focus only on those most responsible for the commission of serious crimes against international law,<sup>12</sup> with a view to decreasing the number of defendants significantly. The Court is based in Freetown, the seat of the evidence and the role players, unlike the Rwanda Tribunal, which has its seat in a separate state<sup>13</sup> thereby increasing the cost of travel. Also, the court in Freetown excludes the most costly crime in terms of witness proliferation: genocide. All this notwithstanding, the funding crisis of the Special Court for Sierra Leone is potentially far more serious than that of the Rwanda Tribunal.<sup>14</sup> It is set up as an independent international organisation<sup>15</sup> that is not a unit of the United Nations and therefore not an automatic beneficiary of United Nations funding. It thus relies exclusively on the voluntary contributions of states, at a time when the majority of states have made a political and financial commitment to the establishment of a permanent international criminal court in The Hague.

Uncertainties about and restrictions on funding have necessarily influenced decisions and led to difficulties. All travel and other expenses involved in the preparation of a case must be authorised.<sup>16</sup> The preparation of the defence of an accused is stifled by a number of factors. In the Rwanda Tribunal, defence teams are limited in the number of pre-trial visits to the seat of the court as well as the sites of investigations in Rwanda.<sup>17</sup> Team members are restricted in the number of hours they can work per month and even the functions that they can perform.<sup>18</sup> Defence counsel may only claim for work done in direct preparation of the case,<sup>19</sup> which appears to be restrictively interpreted to exclude all administration including photocopying. In the Special Court these aspects are still developing, but according to the current arrangements, the Defence case is restricted by a maximum sum of money that may be spent on a defence based on potentially unrealistic assumptions and investigations are limited to a six-month period. This paves the way for insecurity about whether the funds might not run out during the trial or investigations halted through inability to continue. The knock-on effect of such difficulties may be a

lowering in the standard of lawyers who are prepared to take on such cases, and a reduction in the quality of output that should ensure a fair and rigorous trial.

This problem of limited funds has contributed to significant delays. In the Rwanda Tribunal, detainees have been held without trial for as long as five years.<sup>20</sup> In the Special Court, delays have manifested themselves in several ways, including the construction of a court building and detention facilities, restrictions on helicopter trips to Bonthe where the accused were previously detained for reasons of security and the settling of a fee structure for defence counsel, all of which might be indirectly attributable to funding constraints.

Even the judicial process itself may be affected by funding problems. Thus, the pressure for timely results has led to trials being run in tandem by the same panel of judges, either on a rotation of monthly periods or even more disturbingly on a morning and afternoon rotation.<sup>21</sup> The potential for confusion of inquiry, as well as perceptions of evidence, is great in a process that focuses on the same set of events. Even the most seasoned judges might humbly admit difficulty in keeping the two trials separate in judicial consideration of the situation of particular accused persons. Such infection of ideas and impressions from one trial cannot be considered, or countered, by the prosecution or defence counsel in the other trial.

As a result of pressure for completed trials, judges may also be tempted to interfere with choices in the sequence and number of witnesses as well as in the length of examination and cross-examination to an extent that is unnecessary from a purely procedural point of view, and beyond what they would consider wise in a national context, where funding and time constraints are not so severe.

The Rules of Procedure and Evidence provide examples of rules that can easily be explained as measures to ensure trial without undue delay, but which perhaps mask a more fundamental concern about the cost of the proceedings. An interesting example of this lies in the August amendment to Rule 72 of the Rules of Procedure and Evidence of the Special Court, which effectively prevents

challenges to the jurisdiction of the Court from being dealt with at first instance and at appeal. It requires the Trial Chamber to refer 'serious questions of jurisdiction' to the Appeal Chamber. While this measure conceivably reduces delay in the trial to some extent, it also saves substantial costs. However, from a judicial and forensic point of view, it reduces delay to the accused in a manner that also removes a very valuable safeguard to the proper determination of the question of jurisdiction, the right of appeal. The question arises whether this choice would have been made had it not been for the budgetary constraints.

#### *Judicial appointments*

A judiciary of the highest standing and competence is essential to the credibility and proper functioning of an international criminal tribunal mandated to hear the most serious crimes. The Statutes of all international criminal tribunals provide as much by requiring individuals of integrity and the necessary experience and standing to be eligible for the highest judicial appointments in the countries where they practice.<sup>22</sup> Unfortunately, the system for the appointment of judges in the Rwanda Tribunal, as reflected in the International Criminal Court, does not guarantee this. In both of these models of criminal justice, judges are nominated by states and elected by the General Assembly of the United Nations in one case<sup>23</sup> and the Assembly of State Parties of the International Criminal Court<sup>24</sup> in the other. States are very reluctant to interfere with the internal procedures adopted by other states for the nomination of judges and states will adopt differing levels of scrutiny and integrity in their process of selection of candidates for nomination.

The election of judges by states is subject to all the bargaining and power dynamics of any other collective decision of the international community of states. So, again, political considerations may become an important component of the outcome of the ultimate composition of the bench.

The Special Court has adopted a much more acceptable method of appointment,<sup>25</sup> at least potentially, by more or less excluding the political power play of state negotiations from

the process. One can see the results in the fact that all of the chosen judges are of the highest standing, most of them being drawn from the benches of the Supreme Courts of their respective countries. The president of the Court, Geoffrey Robertson, while not having served as a judge in the House of Lords, is a practitioner of indisputable standing, international reputation and experience in criminal and international human rights law. In this court, the government of Sierra Leone and the Secretary-General of the United Nations select the judges in consultation with each other, although they do select from state nominations.<sup>26</sup> It appears to have had a positive effect on the quality of the judicial appointments made because selection focuses more on the credentials of the individual than the political interests of states. In an election, the nationality, race and sex of an individual become the predominant factors simply because a large degree of trust is placed in the nominations of states and the election takes place in an arena that lends itself the usual dynamics of state negotiation. The focus is then drawn away from the individual credentials to political considerations and interests.

#### *Marriage of convenience between contrasting legal traditions*

One of the most striking features and interesting challenges born out by the ad hoc tribunals is the bringing together in the Statute, the Rules of Procedure and Evidence as well as the judges and practitioners the philosophies, legal methodology and usages of the legal systems of different countries and the legal backgrounds of differing professions. There are significant differences between the procedure, evidential rules, ethics, and tactics of lawyers practising in civil law legal systems and common law legal systems, lawyers from the American tradition, and from the British tradition, practitioners and academics, international lawyers and criminal lawyers. The International Criminal Tribunals have brought these components together into one vast experimental legal cocktail.

Notwithstanding the richness and intellectually stimulating nature of this experiment, the mix does not always make for a happy

marriage. The judges from a tradition of the practice of criminal law tend to want to restrain themselves strictly within the confines of the facts at hand in their rulings, while the international law academics find the temptation to address the broader legal picture almost irresistible. The civil lawyers struggle with cross-examination but like it, while the common lawyers find it difficult to accept the admission of hearsay evidence but grin and bare it. The British lawyers find the American advocacy unnecessarily abrasive and at times unfair, while the American attorneys prefer an aggressive approach to litigation and accuse the British barrister of thinking that a criminal case is a gentleman's sport. Often the biggest problem lies in the pride with which lawyers carry their national baggage.

As harmless as all this might seem at first sight it can give rise to some fundamental difficulties. These courts have essentially adopted the adversarial system with a heavy dose of civil law tradition in the management of evidence.<sup>27</sup> This can be like mixing oil and water, since the adversarial system sees a contest based on a challenge to meet a specific standard of proof, while the civil law tradition is based on the court being on a quest or inquiry for the truth. In the common law tradition, lawyers clash swords in an attempt to test the opposing parties evidence, while in the civil system the judges control and direct the proceedings in the frame of a common dossier of evidence for all to see. These are so fundamentally different philosophies that the some approaches to evidential questions fit uneasily in an adversarial regime. For instance, the rules on disclosure are interpreted in such a way that the defence has the burden of demonstrating that material which they seek is likely to assist them, when in the adversarial system, in most cases the defence has no real way of knowing unless it already knows the existence of a specific document.<sup>28</sup> This is a philosophy that suits the civil law system since both parties, prosecution and defence have equal access to the dossier, but it makes little sense in a system where the prosecution control and conduct the investigation, and, in many cases, where the defence can only see what the prosecution chooses to provide.

Sometimes the lawyers embrace each other's *modus operandi* as eminently sensible. Thus, it is noteworthy that the written pleading of argument as well as fact is very much closer to the civil lawyer's experience,<sup>29</sup> but has been readily adopted by the Special Court as a preferable option to oral argument, as illustrated by the tendency to address all arguments on protective measures for witnesses on the basis of written motions and without oral hearing, as fundamental as the topic might seem for a fair trial. This has an obvious attraction as a cost saving mechanism as well as a means of not requiring the continual presence of lawyers and judges during the pre-trial phase.

#### *Difficulties in the search for and securing of evidence*

It is an unfortunate characteristic of ad hoc tribunals, and particularly one like the Rwanda Tribunal where the evidence is located in one state and the court in another, that investigations can be a logistical nightmare. They require the co-operation of authorities, which may not always be readily forthcoming in an international case. They involve the use of different languages<sup>30</sup> and the understanding of unfamiliar cultures. Witnesses might be scattered across the globe owing to the aftermath of the conflict. This point is closely linked to that of funding since such investigations require substantial resources.

#### *Victor's justice and obstacles to reconciliation*

One of the greatest obstacles to ad hoc tribunals achieving their ultimate aim—peace and reconciliation within a former warring territory or territories—is the perception of victor's justice that might be created as a result of the manner of creation and operation of the court. The Rwanda Tribunal was formed by the Security Council as a result of a request from the emergent government, a former liberation movement, and winner of an armed conflict, in the context of an ethnic rivalry and contest for national power going back decades into the history of Rwanda.<sup>31</sup> The Special Court for Sierra Leone was created by an agreement between the United Nations and a government that had, with the help of

ECOWAS states, successfully persuaded their opponents to lay down their arms. This agreement was the instruction of the Security Council of the United Nations negotiated by the government of Sierra Leone,<sup>32</sup> not the victor of the war but the victor of power through political ruse and advantage.

Such courts have little chance of avoiding the accusation of victor's justice. In each case the governments play a less than impartial role in the fate of the accused. The case of *Prosecutor v Barayagwiza*<sup>33</sup> is instructive here. In that case, Barayagwiza was charged with genocide principally by virtue of his role as principal spokesman for the CDR and a principal shareholder in RTL, a radio station said to have been instrumental in inciting the massacres. He was arrested and detained in Cameroon. An application for abuse of process on the basis of the mistreatment, which he had received in Cameroon succeeded before the Appeal Chamber, and his immediate release, ironically, and by majority, to the authorities of the Cameroon, was ordered.<sup>34</sup> The Rwandan government then threatened to withdraw its support for the Court. This was followed by an application to the Court by the Prosecution for a review of the Appeal Chamber's own decision on the basis of new facts. This application succeeded.<sup>35</sup> While it is difficult to state affirmatively that the Court was influenced by political factors, the Court's functioning is largely dependant on the co-operation of the Rwandan government, and this case illustrates how a state can exercise considerable pressure in such circumstances.

In Sierra Leone the former combatants were beneficiaries of an amnesty in terms of the Lomé Accord of 1999.<sup>36</sup> The government was able to circumvent this amnesty by negotiating with the United Nations for the establishment of a court and doing so through an international agreement, authorised by the Security Council of the United Nations.<sup>37</sup> The effect of the Lomé amnesty was nullified on the domestic level by the Special Court Act 2002 implementing the Special Court Agreement.<sup>38</sup> These circumstances not only show how the state was able to manipulate the international system to avoid its former

undertakings. They also show that any persons having arms or power may be reluctant to negotiate peace in the full knowledge that any amnesty will have no force or effect in the international arena. This is very well illustrated by recent events in Liberia, where Charles Taylor pulled out of peace negotiations sponsored by ECOWAS on the announcement of his indictment by the Prosecutor of the Special Court for Sierra Leone.<sup>39</sup>

### **The International Criminal Court and the future of ad hoc tribunals in Africa**

The creation of the International Criminal Court as a permanent institution goes a long way to addressing some of the difficulties outlined above. While funding still remains a problem, states are more willing to financially support a permanent institution under predictable arrangements. Furthermore, the international community has made the court a more measured investment by reversing the primacy of jurisdiction rule applicable in ad hoc tribunals in favour of a rule of 'complementarity',<sup>40</sup> taken to mean that the International Criminal Court will be a court of last resort, leaving the work of prosecution where possible to national jurisdictions. This is bolstered by the claim in the preamble that every state has the duty to prosecute international crimes.

The problem of victor's justice and the impact of such perceptions on reconciliation is also largely remedied by the fact that the International Criminal Court will have been established before the crimes at issue are committed. The Court in fact only has jurisdiction in relation to crimes committed after the Court Statute's entry into force, that is after 1 July 2002.<sup>41</sup>

While the difficulties associated with the investigation of international crimes continue, the International Criminal Court has a large international backing supported by the binding ratifications of the majority of states in the world. The United States lack of support for the court certainly creates a significant obstacle in so far as employing the Security Council

to enforce the Court's orders, but in practice the need to the resort to enforcement measures is rare where a mechanism can claim international political support.

The problem of the election of judges remains, but experience together with the wholehearted commitment of a number of states, as well as the studious and gradual approach to the establishment of the Court has, to some extent, tempered the potential compromise of standards invited by a system of election.

The bringing together of different legal traditions remains a serious challenge for the international criminal court, but its permanence provides for the development of a system over decades akin to the historical development of national legal systems where varying legal traditions have left their stamp.

So, what of the future of ad hoc tribunals on the African continent? Since Africa has a heavy representation in terms of ratifications, is there any more room for ad hoc tribunals in Africa? In the foreseeable future, the answer must be in the affirmative. For instance, the recent atrocities in Côte d'Ivoire could not be dealt with by the International Criminal Court because to date this state has signed but not ratified the Statute of the International Criminal Court. Furthermore, there is still scope for instances where the jurisdiction of the International Criminal Court fails to apply. So, the institution of the ad hoc tribunal has not yet necessarily met its last days. The experience and success or otherwise of the Special Court for Sierra Leone is likely to have a great influence of the political choices of the future.

## Notes

1. See Convention for the Creation of an International Criminal Court, protocol to the League of Nations Convention for the Prevention and Punishment of Terrorism of 1937.
2. Cherif Bassiouni, 'From Versailles to Rwanda in seventy-five years: the need to establish a permanent international criminal court' (1997) 10 *Harvard Journal of Human Rights* 11; Benjamin B Ferencz, *An International Criminal Court. A Step Towards World Peace – A Documentary History and Analysis*, 1980; 'UN observer report: toward an International Criminal Court: an historical perspective' *American Society of International Law Newsletter* March-April (1998) 9.
3. The trials created an indelible blueprint for future work on international criminal courts. In 1946, the General Assembly of the United Nations endorsed in resolution 95 (1) the principles of international law recognised by the Nuremberg Charter. The Nuremberg judgment may be found in (1947) 41 AJIL 172 at 217.
4. UNSC resolution on Yugoslavia.
5. See G Schwarzenberger, *International Law as Applied by International Courts and Tribunals, 1968, vol II: The Law of Armed Conflict*, at 462-6.
6. See articles 227, 228 and 229 of the Treaty of Versailles of 1919 (1919) UKTS No 1.
7. See the Treaty of Sevres of 1920 (1920) UKTS No 11, terminated by the Treaty of Lausanne of 1923, (1923) UKTS No 16, granting a general amnesty.
8. See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone 2000, UN Doc. S/2000/915.
9. See [www.ictcr.org](http://www.ictcr.org) and [www.sc-sl.org](http://www.sc-sl.org) respectively for decisions of the Trial and Appeal Chambers of these bodies.
10. At the time of writing, there is a meeting in The Hague on defence issues at the ICC, with representatives, former employees and counsel from both the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.
11. On 3<sup>rd</sup> November 2003: see [www.ictcr.org](http://www.ictcr.org) (under diary).
12. See Article 1 of the Statute of the Special Court for Sierra Leone.
13. The Rwanda Tribunal is based in Arusha, Tanzania.
14. See A O'Shea, 'A Special Court for Sierra Leone: delayed justice or an empty promise' (2001) 31 *Africa Insight* No 3.
15. See Article 2 of the Statute of the Special Court for Sierra Leone.
16. See [www.ictcr.org](http://www.ictcr.org) (under Defence Counsel Management Section)
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. This is the case for instance with respect to Andre Rwamakuba due to be tried on 3 November 2003, but arrested in 1998: See *Prosecutor v Karamera et al.*, ICTR 98-44-1 (Government I).
21. See [www.ictcr.org](http://www.ictcr.org) (under Diary).
22. See Article 36 of the Statute of the International Criminal Court, Article 12 of the International Criminal Tribunal for Rwanda, Article 13 of the Statute of the Special Court for Sierra Leone, Article 2(3) of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of A Special Court for Sierra Leone and Article [] of the Statute of the International Criminal Tribunal for the Former Yugoslavia.
23. See Article 12 of the Statute of the International Criminal Tribunal for Rwanda.

24. See Articles 35 and 36 of the Statute of the International Criminal Court.
25. See Article 2(2) and (3) of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of A Special Court for Sierra Leone and Article 13 of the Statute of the Special Court for Sierra Leone.
26. Ibid.
27. This is evident from an examination of the respective Rules of Procedure and Evidence as well as analysis of evidential problems in the numerous decisions, orders and judgments.
28. See, for example, *Prosecutor v Brdjanin*, Decision on Motion by Momir Talic for Disclosure of Evidence, 27 June 2000.
29. Except in the United States and similar systems where written motions are common in criminal proceedings.
30. In the cases of the Rwanda Tribunal the languages are English, French and Kinyarwanda while in the Special Court for Sierra Leone it is English and Kriol.
31. See generally G Prunier, *The Rwanda Crisis: History of a Genocide*, 1995; C Braeckman, *Rwanda: histoire d'un genocide*, 1994.
32. See Security Council resolution 1315 (2000) of 14 August 2000.
33. *The Prosecutor v Barayagwiza*, Case No: ICTR-97-19.
34. *Jean Bosco Barayagwiza v The Prosecutor*, Case No: ICTR-97-19-AR72, Decision Legality of Arrest and Detention, 3 November 1999 (AC).
35. *Jean Bosco Barayagwiza v The Prosecutor*, Case No: ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000 (AC).
36. See Agreement between the RUF and the Government of Sierra Leone 1999.
37. See Security Council resolution 1315 (2000) of 14 August 2000 and Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of A Special Court for Sierra Leone.
38. See the Special Court Act 2002.
39. See M Abramowitz and P Williams, 'Peace before Prosecution?', *Washington Post*, August 25, 2003.
40. See Preamble and Article 17 of the Statute of the International Criminal Court.
41. See Articles 11 and 24 of the Statute of the International Criminal Court.