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International Courts And The Domestic Judiciary In Africa

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I Introduction

From the establishment of the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) to the investigations by the International Criminal Court (ICC) international criminal justice in Africa has taken an increasingly domestic approach. This trend is premised on recognition by the international community that there can be no substitute for serious efforts to strengthen the rule of law domestically; it is in stabilising the rule of law and building and maintaining judicial institutions that courts will have a lasting effect on peace in a post-conflict nation.[1] Capacity building and legal and institutional reform are vital in ensuring this lasting legacy. In recent years, international courts have established mechanisms to localize justice and incentivise domestic judiciaries to demonstrate their willingness and capacity, however, the international courts operating in Africa have fallen short in propelling domestic capacity building and institutional reform.

The International Criminal Tribunal for Rwanda (ICTR) was established as a result of a number of United Nations investigations into the humanitarian situation in Rwanda following the assassination of the Rwandan President in April 1994. Although Rwanda initially requested an international tribunal, it eventually voted against Security Council Resolution 995 which created the International Criminal Tribunal for Rwanda in 1994 and publicly adopted an uncooperative and disruptive position against the ICTR. The ICTR's location outside Rwanda in Tanzania has been a factor in this dissatisfaction.

Although the Completion Strategy was initially set for trials at first instance to be completed by the end of 2008 and all work by the end of 2010,[2] predictably the terms of office of a number of judges were extended to 31December 2012 and all remaining work be finished by 31 December 2014.[3] In an attempt to fulfill the completion date the Rules of Procedure and Evidence were amended in 2003 to allow for referrals to national jurisdictions under Rule 11 *bis*.[4] A referral is made at the request of the Prosecutor if the Tribunal decides the nations domestic legal system meets 'competency' requirements pursuant to Rule 11 *bis* (C), 'whether the Accused will receive a fair trial in the courts of the State concerned that the death penalty will not be imposed or carried out'.[5] The first and only successful referral was made on 28 July 2011 by the Referral Chamber in *Prosecutor v Uwinkindi.* ***[6]*** Pre-dating this case by three years were a series of rejections, in which *Prosecutor v Munyakazi* was the most comprehensive and critical of the Rwandan legal system. On first glance, the recent successful application would appear to indicate an improved Rwandan legal system of adequate competency, however, this may merely be a reflection of superficial legal reform and the pressures of an impending completion date.

Unlike the ICTR, the Special Court for Sierra Leone (SCSL) was established by treaty between the Sierra Leonean government and the United Nations in 2002 after the President requested assistance from the international community to try those responsible for crimes in the brutal Sierra Leone civil war. The SCSL was the first hybrid court completely independent of national courts located in the country of conflict. With jurisdiction over both national and international crimes and a mixture of national and international staff the international community had high expectations of what the Special Court could do in the rebuilding of the post-conflict Sierra Leonean justice system. Purely its location and structure as a hybrid court gave it an advantage in transferring knowledge, building

infrastructure and rebuilding judicial institutions. Unlike the ICTR there is no basis for referring indictees to national jurisdiction – the judiciary must be improved through training and employment of national staff and the permeation of international norms through the courts presence.

The International Criminal Court operates differently again as it operates from The Hague and chooses a handful of situations to focus on. The ICC is intended merely to complement, not to replace, national criminal justice systems. It can only prosecute cases if national justice systems do not carry out proceedings or claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely. This is the fundamental principle of complementarity, which works to incentivise countries to conduct their own trials and develop their judicial system. Complementarity can be seen as a delicate balance between State sovereignty and the need for the ICC to step in as an agent of the international community where the effective prevention of the Rome Statute crimes is not guaranteed.[7] For the purposes of this paper the situations of Sudan, Democratic Republic of Congo (DRC), and Uganda will be examined – Uganda and the DRC are both self-referrals, although Uganda later made an attempt to retract the referral, and Sudan is the first referral by the Security Council acting under Chapter VII of the UN Charter.

II Capacity Building

A recent UN policy tool defines legacy as a 'court's lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity'.[8] Tangible capacity-building focusing on rebuilding and developing judicial institutions is vital in order to help strengthen decimated domestic justice systems in post-conflict societies. In order to ensure any impact is lasting institutional capacity must be improved, individuals in the justice sector must enhance their skills through training and employment, and international norms must penetrate the domestic legal framework. Such capacity-building aims to strengthen justice and rule of law on the ground. The impact of a court is not often direct, but catalytic by demonstrating the importance of rule of law and creating an incentive to mirror international best practice. It must be stressed that outreach is vital in ensuring capacity building efforts are understood and embraced. The courts must provide outreach in educating locals on the workings of the court, and also in responding to local concerns and perceptions of justice, otherwise it may undermine public confidence in fair justice reinforcing cynicism rather than helping to build public trust in justice and the rule of law.[9] The Special Court has a built-in advantage over the ICC and the ICTR in contributing to domestic capacity due to its location and the possibility for direct participation of nationals in the day-to-day running of the court.

A *Transfer of Knowledge*

The varied styles of international courts each have their own advantages when approaching capacity building and norm penetration, and they all face unique challenges in their attempts to enhance the domestic legal system. The Special Court, as a hybrid court located in Sierra Leone itself, had great potential to employ and train local professionals, build lasting infrastructure and export best practices. In 2006, the UN Security Council expressed appreciation for the Special Court's 'vital contribution to the establishment of the rule of law in Sierra Leone and the subregion'.[10] As a hybrid court the SCSL seems best situated to facilitate domestic reform through skills transfer to local lawyers, police officers and judges who work at the court, however, its operation completely outside the Sierra Leonean legal system created challenges in improving domestic legal framework and involving national legal professionals.

The ICTR and ICC have engaged in capacity building in a less direct manner, working to create an incentive for national governments to build capacity and establish a legal system to the standards of the international community. The ICTR has been active in placing computers at courthouses around Rwanda to enable citizens to learn about international law and also for domestic professionals to do legal research and follow the activities of the court. The ICC's focus on Africa has put leaders on alert and prodded governments into action in creating institutions to implement their obligations under international law, a most notable example of this is Sudan. However, there remain questions as to whether the ICC will be prepared to take a more proactive role in capacity building, providing

assistance to governments in setting up these institutions and whether the threat of ICC prosecution is really leading to lasting improvement to the rule of law.

1 Employment of Locals

The Special Court for Sierra Leone was established in a position to foster capacity development and knowledge transfer by increasing the skills and experience of local legal professionals involved in the court's work as judges, prosecutors, defense counsel, administrators, and investigators.[11] Although the SCSL has done well by involving police in the Office for the Prosecutions investigations team, Sierra Leoneans have largely been hired by the court in non-legal positions where language skills are required. With the exception of four African judges, two of whom were Sierra Leoneans, not one Sierra Leonean national occupied a senior position in the prosecution, registry, or chambers of the court in its first three years.[12] Until Justice King became the court's president in 2006, none of the top judicial officials of the SCSL were Sierra Leonean. Even though Article 15 of the Court's Statute mandates that the deputy prosecutor should be Sierra Leonean, this provision was amended to allow the appointment of an international deputy prosecutor.[13]

A number of factors have contributed to the SCSL's disappointing lack of Sierra Leonean involvement in the Court. The political situation when the Court was established meant that the government wanted to maintain a distance from the court and ensure its independence, for this reason it did not push the local agenda or ensure the involvement of nationals in the running of the Court. One-third of the judges were appointed by the Sierra Leonean government, yet they chose to appoint primarily international judges.***[14]*** According to a 2006 report by the International Centre for Transitional Justice, the government's 'hands off' attitude contributed to the perception that the Special Court is imposed and run by internationals, which has diminished its relevance.[15] On the other hand, this independence also had a beneficial effect in promoting a positive local perception of the Special Court, as most locals had little faith in the national courts.[16]

The fact that the SCSL also works completely outside of the Sierra Leonean legal system has cemented a high degree of separation between the SCSL and national institutions reducing the ability for a direct affect on these institutions. Moreover, the Court's dependency on voluntary contributions meant that the Court was constantly chasing funding to meet its budget. As a result, the international community had a disproportionately influential voice ensuring the Special Court did not focus on local capacity building, but remained a small, symbolic enterprise of justice.[17] The focus of legacy for the first two years was solely on bringing cases to trial. While it engaged in some capacity building for institutions that promote accountability, these initiatives were conducted more as an afterthought than through careful planning.[18]

Additionally, the courts establishment as completely separate from the domestic legal system also had an impact on the possibility of precedent and legal reform, and it served to alienate the domestic legal professionals creating resentment towards the court and nationals who benefited from the experience at the SCSL. The gap between resources and salary of the SCSL and national courts also cemented the gulf between the hybrid court and domestic institutions.[19] Sadly, this has resulted in accounts of nationals who worked at professional levels in the SCSL stating that lessons and techniques learned cannot be put to use in the national system because of this hostility, squandering the opportunity for local staff to transfer valuable experience to the domestic justice sector.[20]

There is one area of the domestic legal system where the Special Court has undoubtedly left a successful and lasting legacy, and that is the recruitment and training of members of the Sierra Leone Police (SLP) force as police investigators. Members of the SLP joined the OTP investigations team and intensive training classes were provided on case management, witness management and protection, and fundamental investigation techniques.[21] This has also helped to address the Sierra Leonean mindset that arrested and detained persons are guilty and must have their innocence proven at trial. The police were accustomed to discouraging exculpatory evidence and witnesses giving evidence contrary to the prosecution, however, this was something that changed directly as a result of police involvement with the SCSL.[22]

Nonetheless, there were fundamental challenges that must be overcome in order for this training to make a lasting

impact on the domestic legal system. Firstly, there has been no reform in the Sierra Leone police conduct hand book and without this, the training remains informal practice rather than an established protocol. Further, similar to issues facing all nationals who worked at the SCSL, police find there is resentment from their superiors when trying to implement new practices learnt at the Court. A senior police officer, the former director of the Criminal Investigations Department, appreciated the value of the training and experience, however, stated that those in lower ranks would 'create problems with their immediate superiors' if they attempted to use the techniques learnt at the Court.[23]

The ICTR has similarly recruited many accomplished Africans in senior positions, however, it has only involved Rwandans nationals in low-mid-level positions and only eight years into the life of the court.[24] Regarding the possible employment of Rwandan judges, a senior ICTR official considered that the Tribunal could not have involved Rwandan judges in the early years of the Tribunal's establishment because of the risk that they may not be objective due to the ongoing bitterness and lack of trust across the ethnic divide in Rwanda.[25] Its location in Tanzania doesn't ensure local employment and contribution, and this has been a harsh criticism by Rwandans. In a 2006 survey, Rwandans showed dissatisfaction with the location and operation of the ICTR, particularly the use of funds, hiring of genocide suspects and location.[26] Moreover, while Rwandans are largely aware of ICTR judgments, many do not consider the Tribunal relevant.[27]

The UN Security Council Resolution[28] which established the Tribunal did not include capacity-building in its mandate and Resolution 1503[29], although urging capacity building, did so in the form of transfers under Rule 11 *bis* to the Rwandan domestic legal system. Nevertheless, the tribunal performed large-scale training for Rwandan legal professionals in the form of workshops and training sessions. The Tribunal also provides opportunities for Rwandan law students and young lawyers to get hands-on experience as interns and legal researchers assisting the Prosecution, Defense, and Chambers in conducting legal research and working alongside the Tribunal's legal officers.[30] There is also a fellowship program funded by the European Union for Rwandan law student to conduct research at the Tribunal for their final thesis.[31] While these are worthwhile activities furthering the development of the Rwandan legal system, provided the recipients choose to practice in Rwanda, these is still a vast gap in on-the-job learning and involvement by Rwandan legal professionals, particularly lawyers and judges in high level positions.

The ICC being situated in The Hague faces a fundamental obstacle in the transfer of knowledge in that it is not directly involved with local legal professionals. It does not provide for the recruitment of nationals of investigated countries or engage in training. Alternatively, if a country reacts to the ICC threat of indictment, the government will often implement some legal reform and institution building in an attempt to attain the standards required to engage the complementarity provision of the Rome Statute. It is also significant to note that the DRC, for example, is still experiencing ongoing conflict and other situations that the ICC is looking into are unstable making capacity building difficult.

Ironically, this inability to provide for capacity building in training and employment does not stop the ICC from negatively impacting the capacity of countries it investigates. In Sudan, as a direct result of the 2008 arrest warrant of President Omar Al Bashir, the national security forces carried out a campaign of arbitrary detentions and arrests of human rights defenders, expelled humanitarian organizations and closed down three national organizations with humanitarian and human rights functions.[32] These are the professionals and institutions which provide training and employment in the human rights and legal sector, the removal of which has resulted in a significant decrease in capacity and a serious impediment to local and international capacity building efforts.

2 Personnel training

The limitations faced by the ICTR due to its location in Tanzania are partially compensated for by the outreach and training it performs in Rwanda and in Arusha for Rwandan legal professionals. The most recent letter of the President of the ICTR to the Security Council discusses the 'fruitful framework of cooperation' the ICTR has established with Rwandan legal institutions, including a particular emphasis on legal research and the library and information management.[33] The Tribunal has embarked on extensive training in provincial centres in Rwanda, training judges, lawyers, law students and library students.[34] This training is intended to have a lasting effect, given the hopes to transfer the remaining trials to the Rwandan legal system, as is demonstrated with the Tribunal's

training-of-trainers sessions on internet legal research. In training members of the Kigali Bar Association as trainers, the Court demonstrates an attempt to create a sustainable capacity-building program for legal research.[35] The Tribunal also conducts ongoing training for Rwandan judges, prosecutors, defence counsel and court staff, including training sessions in international criminal law, adversarial criminal procedures and court administration and information management.[36]

After a series of judicial decisions denying the transfer of cases to Rwanda under Rule 11 *bis* in 2008, ICTR prosecutors have collaborated closely with the Rwandan authorities to promote the transfer of cases to Rwanda.[37] The impending completion date under Resolution 1932 has also given the OTP further incentive to address the weaknesses in the Rwandan justice system, which were identified by the Tribunal's judges in *Prosecutor v Munyakazi*.[38]

The Special Court for Sierra Leone has not engaged in the same level of training with the domestic legal system as the ICTR. It has organized a variety of seminars for the Sierra Leone Armed Forces, the Sierra Leone Police force and the legal profession, however, the training came without careful planning making it difficult to achieve any lasting impact.[39] Furthermore, there have been significant imbalances in the training, for example, until March 2004 judges, prosecutors and investigators for the prosecutor received frequent training, whereas the defence counsel had received only one training session and investigators appointed to defence teams had received none.[40] The Special Court doesn't have an incentive of referrals to conduct extensive training and ensure the local judiciary is up to an international standard and, furthermore, the fact that it is located in Sierra Leone gives the Court a false sense that locals are benefiting regardless of whether they are undertaking official training sessions.

It can be argued, however, that in an indirect sense the courts novel structure, including an Office of the Principal Defender, may have an affect on the Sierra Leonean view on arrested persons, balancing the skew away from an assumption of guilt. The Defence Office promotes fair trial for defendants and an 'equality of arms' allowing for greater equivalence between the prosecution and defence, although in practice the immense underfunding of the Defence Office completely undermined this lofty ideal and ensures disparity between the two offices.[41] Nevertheless, the theoretic focus on a fair trial for the defendants may have indirectly influenced local practice and understanding of criminal law.

B *Institutional Capacity*

The referral system in the ICTR has been a great incentive for Rwandan authorities to carry out institutional reform which has many obvious advantages over an internationally funded reform project, primarily increased local ownership, legitimacy, and cultural and social understanding. Rwanda's institutional reforms include establishing a Witness Protection Unit within the Judiciary to allow Rwandan judges to take evidence and testimony from abroad with a video-link for the local audience in Rwanda, and granting immunity to witnesses visiting Rwanda from abroad, allaying witnesses' fears of being indicted themselves.[42] While these are largely only relevant with respect to the transfer of defendants from the ICTR in Arusha, these developments will pervade the local legal system with time, ensuring respect of international human rights standards. The establishment of the WPU was one of the primary reasons for the successful referral by the ICTR in *Uwinkindi*.

However, the Referral Chamber in *Uwinkindi* makes a series of troubling contradictions when it discusses the substantive aspects of a fair trial regarding witness testimony. The Trial Chamber in *Munyakazi* was explicit in its conclusion that the Accused's right to a fair trial included being able to 'obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution' – this established that the Accused's fair trial rights would be violated if most defence witnesses were to testify by video-link while most prosecution witnesses testified in person.[43] The Referral Chamber in *Uwinkindi* makes an equally unambiguous statement that 'the possibility that witnesses will testify outside Rwanda cannot be regarded as prejudicial to the right to a fair trial', despite the fact that the Defence have submitted that all of its 41 witnesses living abroad have indicated that they would not travel to Rwanda to testify. Although the Referral Chamber cites video-link facilities enabling witnesses to testify from outside Rwanda as in line with the defendant's fair trial rights, the Trial Chamber's view in *Munyakazi* is that the 'principle of equality of arms is undermined'.[44]

The Chamber in *Munyakazi* also agrees with the International Criminal Defence Attorneys Association who submits in an *amici* brief that it is 'extremely unlikely' that witnesses will feel secure enough to testify in transferred cases. The treatment of those who criticize the government is evidence enough of a complete lack of security. The Referral Chamber in *Uwinkindi* acknowledges that the concerns in the *amici* and defence submissions regarding intimidation and harassment of witnesses are 'materially the same' as those expressed in past failed referral cases, where these submissions were heavily relied upon to reject the referral application. Yet the Chamber appears to rely, not on an increase in capacity or institutional reform, but 'Rwanda's willingness and capacity to change'.[45] Rather than making the referral based on the current situation of the domestic legal system, the Chamber appears to look at the legal framework seeing the potential for the Rwandan legal system to reach the standard required.

Unlike the ad hoc tribunals with primacy over national jurisdictions, the ICC is complementary to the national jurisdiction, which can either incentivise local ownership and capacity building in the domestic legal system or end up undermining it. Following Uganda's self-referral of the Lord's Resistance Army the Ugandan government attempted to retract the self-referral after the first indictments were unsealed. As the ICC investigation is conducted with regard to the entire conflict the government became concern that it was not immune from the investigation.[46] Nevertheless, it has since worked alongside the ICC and has increased its institutional capacity, building a new chamber of the Ugandan High Court in 2009 – the War Crimes Division – to try war crimes and other serious violations of international law, and a corresponding unit in the Department of Public Prosecutions to investigate and prosecute such crimes.[47] Additionally, the government passed an International Criminal Court Act in 2010 incorporating the Rome Statute into Ugandan law.

Criticisms have been made that Uganda's steps towards improving the domestic legal system have come in order to ensure that were any government officials indicted they would have adequate means to conduct the case in the Ugandan courts, thus ensuring the case is not admissible in the ICC under the complementarity provisions. Evidently, even when it is the main motivation of the Government of Uganda to create judicial institutions in order to use the complementarity provisions to avoid the jurisdiction of the ICC, the capacity of the domestic legal institutions is still significantly improved.

The Sudanese government, however, did not oblige the ICC in the same way as self-referred countries such as the DRC and Uganda. The referral by the Security Council of the situation in Sudan was contrary to the will of the government and this, unsurprisingly, resulted in a lack of cooperation. The Sudanese government undertook a series of legal, diplomatic, political and propaganda strategies aimed to discredit the ICC and hinder its investigations.[48] When the Sudanese government realized that the ICC investigations were inevitable, it established several investigative and judicial bodies to uncover crimes that occurred in Darfur, including a Special Criminal Court for Events in Darfur (SCCED) which was created one day after the ICC officially announced its investigation.[49] However, the performance of the SCCED has proven to be disingenuous in its efforts to end impunity in Darfur. Since its inception, it has only considered low-rank individuals charged with relatively minor charges, such as theft, unlawful possession of arms, damage and loss of property. [50] The SCCED is quite clearly an initiative intended to shield high-ranking individuals from ICC prosecution and, unfortunately, it is not possible to commend an indirect increase in capacity of the domestic legal system as in Uganda. The cases brought before the SCCED are few and do not address the issue of accountability in the region, dealing mainly with individual abuses which are 'marginally related to the serious and widespread violations committed in Darfur '.[51] Additionally, the cases are not reflective of international standards – there have been reports that most of the initial trials were held in a single day, often in the absence of witnesses and defence lawyers.[52]

The DRC self-referral is possibly the best demonstration of government willingness and cooperation with the ICC. Of the five indictees, two had already had proceedings initiated against them by the Congolese justice system.[53] Nonetheless, the ICC didn't believe that complementarity applied as they weren't charged for the same crimes the ICC indicted them for and argued that the Congolese courts did not have the capacity to prosecute them for the international charges. The ICTJ conducted a study of international crimes tried before Congolese military courts, which revealed that the courts did not respect fair trial standards, and encounters procedural limitations and a lack of safeguards of judicial independence.[54] Additionally, the standards of detention facilities enabled the majority of convicted perpetrators to quickly escape from prison.[55] Nonetheless, victims found great satisfaction in seeing the

trials take place in the DRC and the government exercise its power to enforce the law – something that will be unachievable in trials of the DRC indictees conducted in The Hague.[56]

While the ICC was not wrong in doubting the capacity of Congolese domestic legal institutions, it is a shame the Congolese government was unable to remedy them. The lack of proactive complementarity in the ICC's operations in Africa is its greatest obstruction in creating a lasting impact on domestic legal systems, particularly in a situation where the government is responsive.

III Legal and institutional reform

The Special Court for Sierra Leone had great potential as a hybrid tribunal its jurisdiction containing a small amount of domestic law which would have allowed for the creation of precedence. It was hoped the international law would impact the domestic legal system and create jurisprudence that the local judiciary could use in developing and interpreting the national law. Unfortunately, in an early decision, the Special Court Appeals Chamber held that the treaty-based nature of the court removed it from the national legal system thus rendering it an international tribunal.[57] This effectively destroyed one of the unique advantages of the hybrid court, by applying the domestic provisions the Special Court could have had an impact on domestic norms, instead the Special Court missed an important opportunity to interpret and develop national law, and promote a public debate on international law and norms.[58]

War-related crimes have been prosecuted as ordinary crimes at the High Court in Freetown after the establishment of the Special Court. There was no reference made to the Special Court's normative framework, despite the fact that some of the defence attorneys, including the lead defence counsel, had been involved with the Special Court and, more disturbingly, it was suggested that 'referring to Special Court rules in national trials would have been useless, as the bench would not have applied such provisions'.[59] Additionally, the amount of due process violations during the trials suggests that the High Court did not benefit from the standards of the Special Court.

A *Rule 11 bis and Rwanda's Transfer Law*

Rwanda has enacted large amounts of law reform in order to satisfy the requirements under Rule 11 *bis*, primarily the Organic Law No. 11/2007 (the 'Transfer Law'), to regulate cases transferred to Rwanda from the ICTR and improve domestic standards and rights of defendants in the legal system. The Transfer Law implemented many of the ICTR's due process and fair trial standards, applying them to defendants that were transferred from the ICTR or third states.[60] In light of the Transfer Law, the OTP filed a series of motions in 2007 to transfer cases to Rwanda under Rule 11 *bis*. The Court denied these requests as it was not assured, among other things, that the accused would receive a fair trial and that the death penalty would not be imposed. The Transfer Law did not allay all of the international Tribunal's concerns about the Rwandan judicial system.

On 28 June 2011, *Prosecutor v Uwinkindi* was the first referral to be accepted by the Trial Chamber[61] and this would appear to be a clear indication that there has been sufficient norm penetration in the Rwandan legal system to allow for standards equivalent to international requirements. Furthermore, this decision reflects that these reforms are practically effective and ensure the defendant's rights are fully protected. However, on comparing the judgment in *Uwinkindi* and *Munyakazi*, the decision to transfer rests on a handful of changes and the standards lacking in the previous denials appear only to be improved superficially by legislation, the *amici* concerns remain the same. In reality, this referral appears be the product of international pressure to dissolve the court in time for its impending completion date rather than a reflection of an improved domestic legal system.

The Rwandan Death Penalty Law was enacted in 2007 abolishing the death penalty and providing for life imprisonment "with special provisions" as the heaviest penalty.[62] Article 4(1) of the Organic Law states that 'special provisions' require that a convicted person be kept in solitary confinement, the possibility of which was a large contributing factor for the Trial Chamber's rejection of the referrals in 2007. It found 'special provisions' without

adequate safeguards (which were absent in Rwandan law) to violate the accused person's right not to be subject to cruel, inhumane or degrading treatment.[63] Article 4(1) was amended in 2008 ensuring that life imprisonment with special provisions cannot be imposed in cases transferred to Rwanda's courts from the ICTR[64] and the Referral Chamber in *Uwinkindi* was satisfied that this amendment was adequate in ensuring accused persons would not face life imprisonment with solitary confinement.[65] It must be stressed that neither Article 4(1) nor its amendment affect the Rwandan legal system with regards to accused persons who have not been transferred from the ICTR.

The judgment further dismissed concerns of inadequate detention facilities by the *amici* submissions as 'merely speculative at this juncture' and looked to the Transfer Law requirements for detention standards as the determining factor ensuring appropriate conditions of detention. The judgment looks largely to the changes made in Rwandan law to accord with internationally recognized standards and uses these to conclude that, despite *amici* submissions to the contrary, there is no reason to believe that the Rwandan government won't follow these standards. This conclusion can easily be refuted by Rwanda's 2011 report to the Committee Against Torture, stating that the measures it takes to protect citizens against torture are laws prohibiting 'specific acts of violence as well as torture and ill treatment', the punishment for which is a maximum of life imprisonment with special provisions – the punishment itself equating to torture.[66]

Although it is understandable that the Referral Chamber was satisfied in *Uwinkindi* that those transferred would not be imprisoned with special provisions pursuant to the enactment of the Transfer Law, the internationally recognized sentencing practices have not made their way into domestic criminal law. Again, while Rwanda has been commended by the ICTR for making significant process in terms of the standard of prisons to accommodate the ICTR's convicts,[67] this standard is not reflected in the capacity of the entire prison system.

The Trial Chamber in *Munyakazi* was very concerned about the independence and impartiality of the judiciary, particularly with regards to political pressure by the Rwandan government on a single judge at first instance. The Chamber acknowledged the Rwandan government's 'tendency to pressure the judiciary'. The Referral Chamber in *Uwinkindi* acknowledges the lack of judicial independence and impartiality due to government influence as demonstrated by examples in *amici* submissions, yet the Chamber allays concerns of possible impartiality facing the Accused by distinguishing his case from those given by the *amici* submission.[68] The examples in the *amici* briefs are labeled as cases of a 'political nature' which are largely members of the opposition party or journalists publicly criticizing government policies, who are then charged with 'divisionism' (inciting ethnic divisions), endangering public order and national security and charges of 'minimising the genocide' and 'genocidal ideology'.[69] If the Referral Chamber regards charges of 'minimising the genocide' and 'genocidal ideology' as political it is difficult to see how the case of Jean Bosco Uwinkindi, accused genocidaire, would not also be of a political nature.

An additional concern is also the reliance the Chamber places on a requested monitoring mechanism through the African Commission on Human and People's Rights. It appears that the Chamber recognises that the referral is relying on the legal framework in place rather than the current Rwandan practice and requires the ACHPR to monitor the practice. The Chamber suggests that if there are reports that fair trial rights have not been respected, the Tribunal may invoke the revocation clause under Rule 11 *bis* and recall the case from Rwanda, however, it seems that such a measure would not be invoked considering the ICTR is referring cases in order to wind up its operation.

It appears that the *Uwinkindi* referral has come at a time when the Completion Strategy has been extended to its limits creating substantial pressure to begin transferring cases to Rwanda in order to wind down the activities of the ICTR. On comparing the *Uwinkindi*decision to refer with the *Munyakazi* decision to reject the referral, the same arguments made in *Munyakazi* criticizing the practice and standards in Rwanda – as not reflecting the international standards in the legal framework – are now dismissed by the Chamber as 'speculation', and are allayed by the presence of a monitoring body and the possibility to 'revoke' an order to transfer if fair trial rights are not upheld.[70] Although the trials are three years apart, there appears to be the same issues with the Rwandan legal system. The ICTR does not appear to have made great progress with the standards of the domestic judiciary and the rights of the defendant despite appearances by superficial legal and institutional reform. Furthermore, despite the advances in legal reform these don't extend to the domestic legal system as a whole, but are specific to those referred from the ICTR.

B *Complementarity and Disingenuous Reform*

Law reform has been slow in countries being investigated by the ICC apart from a willingness to enact laws integrating the Rome Statute into the domestic legal system. This could be blamed on the approach of the ICC towards complementarity. The Prosecutor originally appeared to support a proactive approach to complementarity, encouraging and even perhaps assisting national governments to prosecute international crimes.[71] However, the OTP has since made it clear that it is not a capacity building agent, nor does it work in any legal advisory capacity to help countries develop domestic legislation to incorporate the crimes of the Rome Statute.[72] While complementarity creates incentives for legislative reform, enforcing the standards in practice is outside of the ICC's current approach. This is reflected in the situations it is currently investigating.

This situation of Sudan is complex, as it has adequate international human rights standards in its constitution and has ratified some of the major international human rights instruments, yet due to the unwelcome Security Council referral Sudan has reverted to using legislative reforms to hinder the ICC's progress. Legislative reforms since 2005 indicate the Sudanese government is attempting to entrench its power and ensure the ICC cannot prosecute its leaders under the complementarity provisions.[73] For example, Article 34 of the Armed Forces Act 2007 provides immunity for police, military, and security forces for any acts committed in the course of their duties.[74] These provisions provide far-reaching immunity from any civil suits or criminal prosecutions, including cases where human rights violations were committed in carrying out an order.[75] With the ICC's indictments of Sudanese government leaders, such attempts to legalise state sanctioned human rights violations are a direct response to the ICC's investigations.

On the other hand, the SCCED Decree, in addition to the Interim National Constitution, has provided for some important due process rights. It ensures defence council of the defendant's choice, allows for defence counsel to cross-examine witnesses, however, it only ensures the defendant be provided with a list of indictments 72 hours before the scheduled hearing date.[76] This is not an adequate time frame to prepare a defence and demonstrates a lack of fair trial standards completely at odds with legal guarantees.[77]

With regards to institutional reform, the SCCED has been joined by a number of other *ad hoc* mechanisms and institutions. The Government of Sudan established a Special Prosecutions Commission in 2006 to look at offences which have taken place after the International and National Commissions of Inquiry;[78] a Judicial Investigations Committee to investigate incidents identified in the report of the UNCOI and National Commission of Inquiry; and a committee of representatives from the government and former rebels to investigate human rights infraction raised by either side[79]. Although the ICC doubts the Sudanese government's attempts are genuine, and for this reason does not accept a contest under the complementarity provisions, there is potential in the establishment of these institutions which in itself is positive.

The legislative reform made in Uganda and the DRC have been more positive with the incorporation of the Rome Statute into domestic law. The Ugandan Parliament passed the International Criminal Court Bill, 2006, in March 2010 making provision in Uganda's law for the punishment of the international crimes of genocide, crime against humanity and war crimes.[80] The Bill creates a framework for cooperation with the ICC in the performance of its functions and enables the ICC to conduct proceedings in Uganda. This is an important step towards proactive complementarity, as it would allow the ICC to conduct trials in Uganda, instead of at The Hague.

The DRC has amended the military criminal codes and granted military courts exclusive jurisdiction over international crimes.[81] Although, the revisions did not adopt the Rome Statute's definitions of crimes against humanity, genocide, or war crimes, DRC's *Haute Cour Militaire* recently confirmed that judges could rely on international law for the definitions of international crimes, rather than the less precise definitions adopted by Congolese military law.[82] Furthermore, trials have been prosecuted on crimes against humanity, particularly for rape and sexual violence, using the Rome Statute as operative law and the basis for the convictions.[83] Additionally, following the ICC indictments a number of senior officials and key government figures tried to argue that Congolese courts were competent to try the cases in the ICC's investigation.[84] This indicates genuine willingness by the government to implement international law and the courts to apply international law. This demonstrates the extent to which the ICC

can foster reform in a legal system through its investigations, but equally this demonstrates a situation were the ICC could have instead assisted a willing government to increase its domestic capacity to meet the international legal standards.

Institutional reform has also taken place in Uganda, the impact of the ICC has resulted in the formation of a War Crimes Division (WCD), as a special chamber of the Ugandan High Court, to try war crimes and other serious violations alongside a special unit in the Department of Public Prosecutions to investigate and prosecute such crimes.[85] Important public debate has arisen due to the passage of the International Criminal Court Bill and the creation of the WCD. This debate has covered complex areas of law and policy, such as the domestication of international crimes, the depth of which has affected the capacity of the domestic justice sector by exposing Ugandan lawyers and judges to new concepts of international criminal law.[86]

Although much legal reform has taken place on account of all three international courts operating in Africa, it is important to ensure active participation by courts as legal reform is merely an empty framework without actual government will and cooperation behind it and strong, functioning institutions. This is an issue the ICC must reflect on, particularly when its success and efficiency is claimed by its Chief Prosecutor, Luis Moreno Ocampo, to be measured by an 'absence of trials before [the ICC]'.[87] The ICC's approach must become more proactive in order for its strategy to reflect this statement, particularly in assisting willing governments where legal frameworks are in place but there is a lack the institutional capacity. This is not to say that the ICC should give domestic courts jurisdiction under the complementarity provision more easily – the ICTR's referral of *Uwinkindi* to Rwanda is illustrative of this concern, a judiciary is deemed ready simply because there is a legal framework in place and a willing government despite significant issues with institutional capacity.

IV Conclusion

The major failures of the courts have been at odds with the high hopes and perceived advantages at their creation. The Special Court, though located in Sierra Leone, was incredibly isolated from the domestic legal system and sufficient efforts were not made to bridge the gap. The opportunity to employ local legal professionals was not maximized and training was sporadic. Furthermore, due to its operation outside the Sierra Leonean legal system and a lack of referral mechanisms there was little need for the court to push for national legal reform. While the ICTR was much more successful in running training programs and incentivising the Rwandan government to conduct extensive legal and institutional reform, there appear to be significant gaps between the legal framework and practice. Despite this, it was the ICTR which prompted the international community to pay more attention to the possibility of cooperating with local courts through the use of referrals to the Rwandan domestic legal system.[88]

Localisation of international criminal justice works to improve capacity building efforts through direct engagement with the domestic justice system. Giving legal professionals the opportunity to work with international norms and standards is an unparalleled advantage in the overall improvement of the national judiciary. The involvement of the international courts by providing incentives for states to ameliorate their current standards has allowed for vast legal reform and institutional reform providing a foundation for improvements in capacity and closer alignment with international standards.

The ICC is in a position to influence the next stage of international criminal justice, and while it is still in early days of operation it is difficult to make significant findings on its influence on the domestic legal systems of the its situations, however, the ICC has a fundamental strength where the other courts have struggled. The purpose of the ICC as a court to complement, rather than replace, national criminal proceedings reflects its significant role as a catalyst in encouraging national jurisdictions to enhance the capacity of their legal system. Where the ICTR and SCSL experienced isolation from national jurisdictions and difficulty in engaging with the domestic courts in order to build capacity, the ICC can circumvent this by directly affecting the national jurisdiction. The ICC, however, cannot continue to approach countries recovering from mass atrocities with passive complementarity allowing domestic legal systems to remain in a state of disrepair. Only through a more robust approach actively assisting domestic legal systems in gaining the standards and capacity required to avoid the complementarity provision, the ICC can ensure a lasting legacy of peace and rule of law.

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[2] SC Res 1503, UN SCOR, 4817th mtg, UN Doc S/RES/1503 (28 August 2003) ('*Resolution 1503*'); SC Res 1534, UN SCOR, 4935th mtg, UN Doc S/RES/1534 (26 March 2004) ('*Resolution 1534*').

[3] SC Res 1932, UN SCOR, 6349th mtg, UN Doc S/RES/1932 (29 June 2010) ('*Resolution 1932*'); SC Res 1901, UN SCOR, 6243rd mtg, UN Doc S/Res/1901 (16 December 2009).

[4] Amendment of Rule and Evidnce …

[5] *Prosecutor v Munyakazi (Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-36-R11bis, 28 May 2008) [16] ('*Munyakazi*').

[6] *Prosecutor v Uwinkindi (Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda)* (International Criminal Tribunal for Rwanda, Referral Chamber, Case No ICTR-2007-75-R11bis, 28 June 2011) ('*Uwinkindi*').

[7] Jakob Pichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals*Ahmad Harun* and *Ali Kushayb* before the International Criminal Court' (2008) 8 *International Criminal Law Review* 185-228, 185.

[8] Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, 2008, 5.

[9] Jane Stromseth, 'Justice on the Ground: Can international Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) *Hague journal on the Rule of Law* 87-97, 96.

[10] SC Res 1688, UN SCOR, 5467th mtg, UN Doc S/RES/1688 (16 June 2006).

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[12] Simone Monasebian, 'Africa, International Criminal Courts, and Peace Building: Reflections on the Experience of Ad-Hoc and Mixed Tribunals' (2007) 101 *Proceedings of the Annual Meeting (ASIL)* 148-151, 150.

[13] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra* Leone, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) art 3 (*Statute of the Special Court for Sierra Leone*').

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[17] Thierry Cruvellier, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test' (International Center for Transitional Justice, 2009), 37.

[18] Mohamed Suma, 'The Charles Taylor Trial and Legacy of the Special Court for Sierra Leone' (Briefing Paper, International Center for Transitional Justice, 2009) 2.

[19] Marieke Wierda, 'Comparison of the Legacy of the Special Court for Sierra Leone and the ICC Intervention in Uganda from a Practical Perspective' (2007) 101 *Proceedings of the Annual Meeting (ASIL),* 148-151, 149.

[20] Cruvellier, above n 17, 35.

[21] Ibid, 33.

[22] Ibid, 34.

[23] Ibid, 35.

[24] Simone Monasebian, 'Africa, International Criminal Courts, and Peace Building: Reflections on the Experience of Ad-Hoc and Mixed Tribunals' (2007) 101 *Proceedings of the Annual Meeting (ASIL)* 148-151, 150.

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[34] *Letter Dated 12 November 2009 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council*, UN SCOR, UN Docs S/2009/587 (12 November 2009) [68].

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[36] *Letter Dated 12 November 2009 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council*, UN SCOR, UN Docs S/2009/587 (12 November 2009) [67].

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