A Critical Analysis of the Hybrid Court for South Sudan

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DOI: https://dx.doi.org/10.47772/IJRISS.2024.806099

Received: 17 May 2024; Revised: 31 May 2024; Accepted: 04 June 2024; Published: 08 July 2024

ABSTRACT

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 article analysis, inter alia, the composition and structure, jurisdiction of Hybrid Court for South Sudan, its relationship with domestic courts and other transitional mechanisms.

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.[1]

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".[2]

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 infrastructure, funding mechanisms, enforcement mechanism, the applicable jurisprudence, number and composition of judges, privileges, and immunities of Court personnel or any other related matters".[3]

The Special Court for Sierra Leone (SCSL) was set up to bring to justice[4]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.[5] The SCSL is an autonomous entity having primacy over the domestic courts of Sierra Leone concerning crimes under its jurisdiction.[6] 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.[7] They made the SCSL of three essential organs namely the Chambers, the Office of the Prosecutor and the Registry.[8]

ISSN No. 2454-6186 | DOI: 10.47772/IJRISS |Volume VIII Issue VI June 2024

South Sudan Hybrid Court 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'.[9]

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.[10]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 complementarity jurisdiction respectively,' HCSS has' primacy over any national courts of the Republic of South Sudan.'[11]

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 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".[12]

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".[13]

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.[14]

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.[15]

The Registrar of the HCSS shall be appointed from African states other than the Republic of South Sudan. [16]

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 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.[17]

The SCSL to prosecute persons who have committed mass atrocities in Sierra Leone after 3oth 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.

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.[18]

Further more, 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.[19]

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."[20]

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". [21]

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 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.

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.[22]

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.[23]

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.[24]

The HCSS shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties.[25]

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.[26]

The HCSS shall leave a permanent legacy in the State of South Sudan upon completion of its HCSS mandate.[27]

USE OF FINDINGS, DOCUMENTATION AND EVIDENCE

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.

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.

The Peace Agreement provides for the 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 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.[28]

Another concernrelates 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. [29]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.

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.[30]

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”.[31]

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.

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

ISSN No. 2454-6186 | DOI: 10.47772/IJRISS |Volume VIII Issue VI June 2024

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.[32]

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* ."[33]

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.

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.

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 ."[34]*

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 a vacuum. In Sudan Government Vs Ibrahim Mohamed Fadol[35], 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.[36]*

The phrase:"*Actio personalis moritur cum persona "; appeared in refrence 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 —"[37]

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 attain 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 that, the accused pleads guilty in writing or appears by his or her pleader or other permissibly agent."[38]*

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 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 …"[39]

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. [40]

They have not yet established the hybrid court for South Sudan, raising questions when it will be realise.[41] Where they were expected to promote legitimacy, hybrid tribunals have instead often been rejected by and faced extensive criticism from the local population.[42]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.[43].

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. [44]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.[45]

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.

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FOOTNOTES

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[6]Article 8Special Court Statute.

[7]Article 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.

[8]Article 11 Special Court Statute.

[9] R-ARCSS (2018)Chapter 5, article 3.1.3.

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