



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

ABA Day 2015

**"New avenues for accountability in respect of international
crimes: hybrid courts"**

Remarks

by

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United Nations Headquarters
New York, Conference Room A

27 April 2015

President Hubbard,
Distinguished delegates, colleagues and friends,

I am pleased to address you here in New York for the second time in my capacity as United Nations Legal Counsel, and I would like to thank the American Bar Association for its continued interest in the work of the Organization and in particular in the work of the Office of Legal Affairs. It is a pleasure to host you.

I would also like to renew my gratitude to Mr. William C. Hubbard and the ABA's International Law Section, for their continued and valued partnership with the United Nations.

Last year, I provided you with an overview of the work of the United Nations with regard to accountability for sexual violence crimes.

This year, I propose to focus on the unique experiences of hybrid jurisdictions established in recent years to try the most serious international crimes committed in Sierra Leone, Cambodia, Lebanon and Chad.

These hybrid jurisdictions follow in the footsteps of the United Nations tribunals for Rwanda and the former Yugoslavia, which, as you are aware, will soon complete their mandates.

However, by contrast to tribunals of a strictly international character, these jurisdictions allow direct national ownership through a national component, alongside an international component.

These developments will, in turn, provide me with an opportunity to brief you on how the United Nations is involved in considering accountability options with regard to specific situations.

First, I should stress that I do not claim to be exhaustive. There are more examples of hybrid mechanisms than the courts I will mention here, including instances which have involved the United Nations in Kosovo and East Timor.

Distinguishing features for the purposes of this presentation are that these other experiences of hybrid justice arose within the context of an interim mandate of administration given to the United Nations; and that these other hybrid mechanisms (the so-called “Regulation 64 Panels” in Kosovo and the Special Panels for Serious Crimes in Dili) were not standalone courts.

[The Special Court and the Residual Special Court for Sierra Leone]

The first hybrid, stand-alone jurisdiction I propose to address here, is the Special Court for Sierra Leone. The Special Court was established by an Agreement between the United Nations and the Government of Sierra Leone, pursuant to a Security Council resolution adopted in August 2000. This resolution followed an initial request from the then-President of Sierra Leone, Ahmed Tejan Kabbah, to the Secretary-General.

The Special Court for Sierra Leone combined a national and an international component. International judges, alongside of a minority of national judges, successfully adjudicated a series of most serious international crimes committed by those considered to have borne the greatest responsibility for the conflict in that country - including the former Head of State of Liberia, Charles Taylor.

With the advantage of its location in Freetown, the Special Court was able to engage dynamically with Sierra Leone’s population, making the institution accessible to victims in a way that previous, remotely-located courts had not been able to do. At the same time, the Special Court recognized the

security risks in the case of the high-profile trial of Charles Taylor, the former President of Liberia, and it chose to hold that trial in The Hague. Charles Taylor is currently serving a sentence of life imprisonment in a prison in the United Kingdom, pursuant to an agreement with the Special Court.

The Special Court completed its judicial mandate at the end of 2013. It thus became the first of the tribunals of the modern era to close its doors - even before the ICTY and the ICTR. It has tried a total of 21 persons, 16 of whom were convicted and two acquitted, while three died prior to the conclusion of the proceedings.

Its successor, the Residual Special Court for Sierra Leone (RSCSL), is located both in Freetown and The Hague and it continues important legacy functions, on a modest scale. These functions include preserving the judicial archives, monitoring the enforcement of sentences, protecting victims and witnesses and trying the only fugitive if apprehended. As part of the enforcement of sentences, the Residual Special Court also considers requests for conditional release. The Residual Special Court has judges and a prosecutor on stand-by lists, who take up their duties only as and where the need arises.

[The Extraordinary Chambers in the Courts of Cambodia]

The Extraordinary Chambers in the Courts of Cambodia (in short, the ECCC) is also located in the country where the crimes were committed, and it also comprises both international and national judges. In this case, however, the national judges are a majority.

The ECCC was created, like the other hybrid courts, on the basis of an international agreement signed between the United Nations and the concerned State, after a Security Council resolution inviting the Secretary-General to conclude such agreement and a request of the State in question.

The ECCC has been in existence since June 2003 and it has so far convicted three key figures in the Khmer Rouge regime. Its judges handed down the ECCC's first conviction against an accused called "Duch", the former head of the infamous Tuol Sleng (S-21) prison in Phnom Penh where thousands were held during the Khmer Rouge period. Duch was convicted of crimes against humanity, including through murder and torture, and grave breaches of the Geneva Conventions of 1949. His conviction became final in February 2012.

More recently, in August 2014, two of the surviving senior leaders of the Khmer Rouge movement after Pol Pot, Nuon Chea and Khieu Samphan who was known as “Brother Number Two”, were convicted of crimes against humanity and sentenced to life imprisonment. This Judgment is now on appeals. The ECCC has also formally charged an additional three individuals in two remaining cases under judicial investigation.

[The Special Tribunal for Lebanon]

The third hybrid tribunal with UN involvement, the Special Tribunal for Lebanon, was created in 2009. Contrary to the ECCC and the Special Court for Sierra Leone, it is not seated in Lebanon but in The Hague, although it has an office in Lebanon. It was created at the request of the Government of Lebanon, principally to try those responsible for the bomb attack of 14 February 2005 in Beirut, in which at least 22 persons were killed, including Lebanese Prime Minister Rafik Hariri, and in which many others were injured.

Pending the arrest and surrender of the five persons standing accused before it, the STL has embarked on their trial *in absentia*. It is also conducting contempt proceedings against two media entities and journalists, following the alleged disclosure of protected witness information.

[Funding]

These courts operate on the basis of voluntary contributions by Member States. The Special Court for Sierra Leone was integrally funded in this manner, as is the Residual Special Court, while the Governments of Lebanon and Cambodia each contribute towards the national component of their respective courts. This funding modality was not the choice of the Secretary-General. In fact, the United Nations has consistently advocated for a financing mechanism based on assessed contributions of all Member States. This would have provided these courts with more certainty and stability for the entire duration of their activities, including at the residual stage.

Frankly, this has constantly preoccupied my office. Regularly, gaps in financing require that we revert to Member States and ultimately, to the United Nations General Assembly to secure sufficient funding to allow for continued operations. On a more positive note, reliance on voluntary contributions has, of necessity, led these tribunals to innovate, taking into account the advice of their

management committees, which include the main donor countries, to keep costs at modest levels.

As the Secretary-General's Legal Counsel, my attention is regularly drawn to situations where serious international crimes have been, or may have been committed, on such a scale that a demand for accountability must be acknowledged at the international level.

[Syria, Central African Republic and South Sudan]

In Syria, as is well known, the scale of crimes is exceptionally shocking. The UN's Commission of Inquiry, led by Paulo Pinheiro, has described in detail the systematic and widespread nature of the atrocities committed. Recently, Mr. Pinheiro stressed the regional dimension of these atrocities and how the most vulnerable segments of the population are targeted by Government and anti-Government forces as well as terrorist groups. How could we not agree that there is an obligation, not only to bring this war to an end, but also to hold the perpetrators of these atrocities to account.

In a number of countries, domestic proceedings have advanced against perpetrators of serious crimes. That is a welcome, though necessarily partial, step. At the international level, too often, the calls for accountability remain unheeded, due to the lack of political will or consensus among Member States or, even, due to a deadlock in the Security Council. Syria has fallen victim to this dynamic. Too often, also, the perception that a political solution should come first pushes further away any discussion or serious consideration of accountability measures.

In at least two crucial situations, the UN and willing Member States are currently seeking to make a difference.

The first is the Central African Republic, where the UN peacekeeping mission, MINUSCA, will be providing support to a special criminal court within the national judicial system, under a memorandum of understanding signed in August 2014 with the CAR Authorities.

This memorandum of understanding was adopted following a resolution of the Security Council allowing MINUSCA to take urgent temporary measures to maintain basic law and order and fight impunity in the CAR, "within the limits of its capacities and areas of deployment, in areas where national security forces are not present or operational".

The memorandum of understanding includes the agreement of MINUSCA and the CAR that - consistent with its mandate - MINUSCA has the authority to arrest and detain individuals in the CAR, and collect and keep evidence of crimes committed. The urgent temporary measures have thus given rise to new and interesting challenges both from the perspective of UN peacekeeping and from the point of view of criminal justice.

A law establishing the Special Criminal Court was adopted a few days ago by the CAR Transitional Parliament. In the UN's view, this law does not fully conform to the standards envisaged in the Memorandum between MINUSCA and the CAR Authorities.

Among other issues, internationally-recruited magistrates do not have a majority in all the stages of proceedings. Nonetheless, to the extent that the law does not cross the UN's baseline standards for the provision of assistance, including the fact that it does not include the death penalty nor measures of amnesty for international crimes or serious human rights violations, the UN has concluded that it is not in principle precluded from providing appropriate support to the Special Criminal Court.

Throughout the process, it was essential to ensure MINUSCA's exclusively international character and, at the same time, to preserve the national ownership of the Special Criminal Court and the independence of its personnel. I stress, in this connection, that the CAR Special Criminal Court is not a hybrid court. While the United Nations, through MINUSCA, will provide assistance to it, the United Nations will not be a part of it.

I should also stress that the law establishing the Special CAR Criminal Court provides that its jurisdiction is without prejudice to the competence of the International Criminal Court, which has opened two investigations in the Central African Republic.

[South Sudan]

Another area of major concern for the United Nations has been the conflict which erupted in South Sudan roughly two years after its independence, in mid-December 2013.

The Security Council has since expressed grave concern at reports of serious violations of human rights and international humanitarian law in that country, including extrajudicial killings, ethnically targeted violence, rape and other forms of sexual and gender-based violence. It has also stressed the need

to bring to justice perpetrators of such crimes, while “taking note of the important role international investigations, and where appropriate, prosecutions can play (...)”.

Last year, the African Union appointed a Commission of Inquiry into the situation in South Sudan. President Obasanjo, chairing the Commission, has stressed the importance and the centrality of the report’s recommendations on accountability. Regrettably, this report was not taken up for consideration at the AU’s Summit in late January and the Commission’s recommendations remain unknown to the United Nations.

Meanwhile, an important step was reached on 1 February 2015, through the IGAD mediation process. The two major parties to the conflict agreed, in principle, to the establishment of an “independent hybrid judicial body” to prosecute those with greatest responsibility for violations of international humanitarian law and South Sudanese law since December 2013. Other than noting that South Sudanese and eminent African jurists should participate, no further detail has yet been articulated publicly.

Building upon this momentum, in February, the Secretary-General advised the Security Council that the UN Secretariat was engaged in developing possible options for criminal accountability and transitional justice processes for South Sudan.

While these options are not yet finalized, the ICC would in all likelihood remain a preferred option for the United Nations.

At the same time, even if the ICC were to be seized of the situation in South Sudan through a Security Council resolution or through acceptance by South Sudan of the Court’s jurisdiction, it could only handle prosecutions and trials of a very limited number of alleged perpetrators.

The lack of national accountability measures in South Sudan, to date, will inevitably lead to deeper consideration of an “independent hybrid judicial body” as mentioned in the 1st of February Agreement. Highly relevant is whether the political and security situation within the country would permit the location of such a body in South Sudan, or whether third States would need to be considered as hosts.

The degree to which South Sudanese investigative, prosecutorial and judicial capacities would form part of a hybrid mechanism is currently difficult to assess. It may be that adaptations of existing mechanisms are preferable to creating entirely new architectures. Lastly but fundamentally, assuring a sustainable funding basis for such a project will be an essential consideration.

[Extraordinary African Chambers in Senegal]

This briefing would not be complete, if I did not also refer to the Extraordinary African Chambers recently established within the Senegalese legal system to try the persons most responsible for the serious crimes and violations of international law committed in Chad between 1982 and 1990, during the rule of then-President Hissène Habré.

In this instance, it is the African Union, not the United Nations, which provides the international dimension to this judicial body. In a model with considerable similarities to the UN's assistance to the Khmer Rouge Tribunal in Cambodia, Senegal concluded a treaty with the African Union in August 2012, wherein Senegal agreed to set up the Extraordinary African Chambers in its own court system.

As in Cambodia, the Senegalese Extraordinary Chambers are staffed primarily with national judges, while internationally-nominated judges designated by the African Union bring broader experience and diversity of legal perspectives to the proceedings.

In February 2015, in a landmark step for the institution, the Chambers' investigating judges issued an order referring Hissène Habré to trial. This followed a complex investigation, in which thousands of victims and witnesses were interviewed, thousands of documents analysed and forensic examinations undertaken. The Chambers' Prosecutor has also sought to indict a further five former officials of the Habré regime. Just last week, the three judges who will hear the Habré trial took their oath of office, and trial has been announced to start in June 2015. Also of interest, is the fact that, in the Extraordinary African Chambers as well as in the ICC, victims are represented in the proceedings, and the Chambers may award them compensation.

This institution has shown that, under the right circumstances, regional accountability options are a viable option for hybrid courts. It will be essential that the international community continues to support this important new model. Such support is indispensable if the Extraordinary African Chambers as well as the other hybrid courts are to fully succeed.

[Conclusion]

In these short remarks, I have attempted to show how - through recent examples - an international or regional involvement in national justice processes can prove another, significant avenue for addressing serious crimes of international concern. This is in complementarity with concurrent justice processes, including any proceedings of the international criminal court.

Societies traumatized by gross violations of human rights yearn for all of us, legal practitioners, at our respective levels and in our respective roles, to contribute in some form or another to the fight against impunity ... for accountability, transparency, security and justice to prevail.

We must continue to heed these calls, by pressing for justice to be done or actively contributing to it, while remaining aware of the challenges ahead.

Thank you.