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This is the first paper in a series of three ICTJ briefs corresponding to the recommendations proposed by the African Union High Level Panel on Darfur in *Darfur: The Quest for Peace, Justice and Reconciliation* (October 2009).

Benchmarks for Independent and Legitimate Hybrid Criminal Courts

Background

The recently released report by the African Union High-Level Panel on Darfur (the Panel) recommends that steps on justice and reconciliation are central to resolving the conflict in Darfur, and that certain measures should be taken to ensure justice and reconciliation on the national level. On the issue of criminal justice, it states:

During the Panel’s consultations it encountered, amongst the victims of the conflict in Darfur, as well as from other Sudanese interlocutors, very strong calls for external involvement within the criminal justice system in any response to crimes in Darfur. As already stated, in the various discussions the Panel had across Darfur and with other stakeholders, including representatives of the Armed Groups, the Panel found a very profound lack of trust in the justice system.¹

For this reason, the Panel recommends, along with the strengthening of the Sudanese domestic criminal justice system and the establishment of a truth and reconciliation commission, the formation of a hybrid tribunal for crimes committed in Darfur.

Hybrid tribunals may take many forms. This paper draws on the experiences of other contexts where hybrid courts (also known as “mixed” or “internationalized” tribunals) were established or considered,² to make various recommendations on the form such a court could take in the context of Sudan.

The main value of a hybrid tribunal, as recognized by the Panel in its report, is its potential to demonstrate independence and impartiality, particularly in situations where the domestic system is lacking in trust. The proposed hybrid court should ideally be constituted as a new, independent organization established by way of an international treaty between the African Union and the Government of Sudan.³ The legal framework establishing the court—in the form of an agreement and/or statute—should guarantee the court’s total independence, including adequate protection from political interference (notably during investigations and trials). The hybrid court should demonstrate impartiality and professionalism through the caliber of its staff. It should build legitimacy through the quality of its activities and through outreach. Its legal framework should guarantee fair trials, due process, and adequate witness protection. All these measures are necessary to garner sufficient international support. An adequate and sustainable funding basis should be established from the outset.

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Benchmarks for Independent and Legitimate Hybrid Criminal Courts

Hybrid Courts

Hybrid courts are a recent phenomenon, the first ones having been established in the 1990s. They include the Special Panels in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the War Crimes Chamber in the Court of Bosnia-Herzegovina, and the Tribunal for Lebanon. There are as many models as there are courts, but they share some characteristics, thus creating benchmarks for future, similar courts

East Timor The Special Panels of the Dili District Court were created in 2000 by the United Nations Transitional Administration in East Timor to try cases of “serious criminal offences,” including crimes against humanity, war crimes, murder, rape, and torture.

Cambodia The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea was created jointly by the Government of Cambodia and the UN. They have jurisdiction over senior leaders of the Khmer Rouge and those most responsible for genocide, CAH

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The Panel states:

The people of Sudan should therefore consider adopting a Hybrid Criminal Chamber to be located within the Sudanese justice system, consisting of a combination of Sudanese and international judges, prosecutors, defence lawyers and investigators. It would apply national laws and, as far as possible, be integrated into the Sudanese system.⁴

In this respect, the Panel seems to be advocating a national chamber with international participation, as has been implemented in Bosnia and Herzegovina, and more recently Uganda. The Report recognizes that this would require amendments to current legislation in Sudan. Extensive amendments to domestic criminal law formed the basis for the establishment of the Bosnian War Crimes Chamber, whereas in Uganda an International Crimes Bill is currently under discussion. But this approach is perilous. What if such amendments to the law prove difficult to pass? Can the Court’s actions be tied up in Constitutional challenges? Legal technicalities could easily be used to mask an absence of political will.

Other hybrid tribunals in Sierra Leone, Cambodia and Lebanon were established outside domestic legal structures. In Sierra Leone, a constitutional challenge against the Special Court for Sierra Leone was launched in the national courts, on the basis that the constitution forbids the operation of courts not listed in the constitution. This challenge was not acknowledged by the Special Court.

Conversely, a hybrid tribunal established by way of Agreement between the African Union and the Government of Sudan would not be subject to any constitutional or other judicial review in Sudan. The tribunal would not be the subject of Sudanese laws (except insofar that some domestic crimes could be incorporated in its Statute). In particular, barriers to prosecutions that currently exist under Sudanese laws, including any amnesties or immunities, would not apply to the hybrid tribunal.

Mandate and Jurisdiction

The proposed hybrid court should have the authority to investigate and try individuals, and independently judge individual criminal responsibility. It should have the authority to independently identify the individuals to be investigated and tried, notably those deemed to bear the greatest responsibility for the crimes. In this respect, the hybrid tribunal should be able to conduct all elements of the judicial process, including the investigation, and should not have to depend on national institutions for its functions. Investigations are particularly sensitive, from both a political and a security perspective, and there should be a high proportion of non-Sudanese involved in that dimension of the court’s work.

Its subject-matter jurisdiction should at least cover core international crimes (war crimes, crimes against humanity, genocide and torture), but may also include relevant offences defined under Sudanese law. If a hybrid court is established by Agreement, it can use customary international law as its basis, as has been the case in Sierra Leone and Cambodia. If it is regulated by domestic law, issues of retroactivity and other kinds of barriers would need to be resolved. The nature of the relationship between the hybrid court and the Sudanese national criminal courts that may have concurrent jurisdiction over the crimes should be clarified from the outset. As suggested in the Panel report, in order to maximize the scope of accountability, the hybrid court should be concurrently competent with domestic courts, but it should have primacy over these courts, which entails the powers to ask these courts to defer any case to its competence at any stage of the proceedings.

Proceedings before the International Criminal Court will not be affected by the establishment of a hybrid tribunal, unless an admissibility challenge is raised and succeeds before the Court.

Composition

The nomination, selection and appointment processes of both international and national judges, prosecutors, and personnel is crucial and should be transparent and should guarantee the personnel's impartiality and professionalism.

The Panel suggested that the African Union should nominate or select the international component of the Court whereas the Sudanese government should select the Sudanese contingent.⁵ In order to best provide for a transparent appointment process and the independence of candidates, the final decision on the appointment of both international and national judges, prosecutors, and personnel should be left to the African Union in consultation with the Sudanese Government.

and war crimes committed in Cambodia between 1975-1979.

Sierra Leone The Special Court for Sierra Leone was established by agreement between the Government of Sierra Leone and the United Nations to try those bearing the greatest responsibility for CAH, serious violations of international humanitarian law and selected Sierra Leonean crimes committed in the territory of Sierra Leone after November 30 2000.

Bosnia-Herzegovina The War Crimes Chamber in the Court of Bosnia-Herzegovina is integrated into the domestic Bosnian legal system; its mandate extends to cases referred to it by the International Criminal Tribunal for the former Yugoslavia, but also over the most sensitive cases brought at a national or local level.

Lebanon Security Council Resolution 1757 of May 30, 2007, led to the establishment of the Special Tribunal for Lebanon. It is primarily concerned with the assassination of former prime minister of Lebanon Rafiq Hariri, and mandated to try crimes defined under Lebanese law, notably terrorism.

As has increasingly been the case with other hybrid tribunals, the nomination and selection processes of national and international officials alike should also be open to input from different actors, including the participation of civil society and of international human rights organizations.

Selection processes should give due consideration to gender balance, among both international and national judges, prosecutors, and personnel. The tribunal also should seek to balance geographical representation of the various regions/provinces of Sudan among the national judges, prosecutors, and personnel.

If a hybrid tribunal is established by an Agreement between the African Union and Sudan, it would not be bound by any specific national laws and procedure normally applicable in Sudan to select or appoint or dismiss judges, prosecutors and personnel, including nationality or professional requirements. Such provisions for dismissal of judges or prosecutors can easily be used to manipulate independence. Any disciplinary or dismissal procedure should be purely internal to the hybrid court, fully independent and based on professional performance only. In other tribunals, such dismissals have not been necessary although judges have occasionally recused themselves from cases. It is preferable that judges and prosecutors, once appointed, cannot be dismissed or replaced unless they independently resign.

Procedure

While the particular procedures to be applied to proceedings may be defined when the hybrid court is established, it would be preferable to leave it to the judges to draft the detailed rules of procedure and evidence and any subsequent amendments based on developed and accepted international criminal best practice. The procedures should respect minimal international standards for human rights in the administration of criminal justice. They should provide for fundamental guarantees notably the right to a fair and public trial. International procedural standards, notably those contained in the International Covenant on Civil and Political Rights should be fully respected at all stages and throughout the process.

As mentioned, the prosecutors (or investigating magistrates) should have authority to carry out their own investigations independently from national law-enforcement agencies.

In recent tribunals, the defense has also been supported by a Defence Office which allows them to carry out their own investigations, separately and independently.

As specified in the Panel report,⁶ the procedure should include specific and adequate measures to protect and support victims and witnesses, physically and psychologically, taking due account of specific gender needs. Measures pertaining to certain specific categories of victims, notably victims of sexual crimes, children and other vulnerable victims, should be included. It should also allow victims to participate in the proceedings.

The procedures should allow for reparations to be granted to victims, and victims should be allowed to be directly represented in the proceedings.

Cooperation and Resources

The statute of the hybrid court should enable it to receive the necessary cooperation from all relevant States and other authorities, including law-enforcement agencies to be enabled to function effectively and independently.

The hybrid court should be granted the necessary resources, including secure and sustainable funding throughout its 'life', to be able to function independently, impartially and effectively.

A substantial part of the costs of the hybrid court should be covered by the African Union, and not left to be covered only by Sudan. A specifically established trust-fund could be established to channel donations from international and/or regional organizations.

Endnotes

1. Panel's Report, para. 246.
2. For instance, a hybrid tribunal was recently considered in the context of Kenya.
3. An Agreement between the African Union and the Government of Sudan could be drawn up similar to Agreements between the UN and the Governments of Sierra Leone and Cambodia.
4. Panel report, para. 2532.
5. Panel report, p.323.
6. Panel Report, para. 336.