Israel Law Review **46**(3) 2013, pp 339–367. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2013.
doi:10.1017/S0021223713000125

How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone

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The International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) were created to deliver accountability for the atrocities committed during Rwanda's genocide of 1994 and Sierra Leone's civil war of the 1990s. The capacity of these courts, however, like other international criminal tribunals, is limited in terms of the number of persons they can prosecute. If most perpetrators evade justice, the ability of international tribunals to deliver accountability may be seriously undermined. To mitigate this risk, national justice systems should deal with the perpetrators who are not addressed by international tribunals. When national systems do not do so (or fail to do so effectively), international tribunals are well placed to encourage (or improve) national atrocity-related judicial proceedings, thereby increasing their chances of delivering accountability.

This article assesses empirically the impact of the ICTR and SCSL on national atrocity-related judicial proceedings in their target countries, thus contributing to an overall assessment of these tribunals. The article also compares the national impact of the 'pure international' ICTR to that of the 'hybrid' SCSL and tries to identify features that affect the national impact of an international tribunal. Understanding the interactions between international and national justice systems, and the features that affect the national impact of international tribunals, is particularly important given the shift to 'positive complementarity' at the International Criminal Court.

Keywords: international justice, international courts, international tribunals, transitional justice, Rwanda, Sierra Leone

1. Introduction

Some of the most shocking atrocities of the twentieth century were committed in Rwanda and Sierra Leone during the 1990s. In Rwanda, approximately 800,000 people were slaughtered between April and July 1994 in what is considered to have been the fastest genocide in history.[1]

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[1] For example, Alison Des Forges, *Leave None to Tell the Story* (Human Rights Watch 1999), http://www.hrw.org/reports/1999/03/01/leave-none-tell-story; Samantha Power, 'Bystanders to Genocide', *The Atlantic,* September 2001, http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571 (describing the genocide in Rwanda as 'the fastest, most efficient killing spree of the twentieth century'). The exact death toll is disputed. According to the Rwandan government, over one million people died during the genocide: see official website of the Republic of Rwanda, http://www.gov.rw/page.php?id_article=19.

https://doi.org/10.1017/S0021223713000125 Published online by Cambridge University Press

In Sierra Leone, during the country's civil war of 1991–2002, rebels and pro-government forces murdered and mutilated civilians, brutally raped women, and forced children to fight.[2] In response to these atrocious crimes, the international community created the International Criminal Tribunal for Rwanda (ICTR) in November 1994,[3] and the Special Court for Sierra Leone (SCSL) in January 2002.[4] These international courts were set up to deliver accountability, and thereby combat impunity and promote peace and reconciliation.[5] Because of their limited resources, however, they have tried only a small fraction of the many perpetrators associated with the atrocities. The ICTR has prosecuted around 70 individuals while the SCSL has tried only ten. Given such limitations, can these courts achieve their ambitious goals?

This question is relevant not only to the ICTR and SCSL, but to other international criminal tribunals (ICTs) which, in a world of limited resources, can target only a handful of perpetrators. Thus, even when atrocities are addressed by ICTs, the question of accountability rests largely with national jurisdictions. If most perpetrators evade justice, the ability of the ICTs to promote accountability for the atrocities (and thereby achieve its other goals) may be seriously undermined, even if the tribunals target the highest-level perpetrators. To mitigate this risk, national justice systems should deal with the perpetrators who are not addressed by the ICTs.

However, post-conflict states face serious political and practical challenges which often prevent them from addressing wartime atrocities. Indeed, the involvement of an ICT in a particular country is usually triggered by the inactivity of the national courts. In this light, once an ICT opens an investigation, there is a growing international consensus that national proceedings that are fair and genuine should be encouraged in parallel. This would ensure that the ICT's efforts to establish accountability are not undermined by an impunity enjoyed by most perpetrators. While national judicial proceedings can be encouraged through international measures such as judicial training and development aid, it seems that ICTs are particularly well placed to contribute to this end. For example, they can help to catalyse national proceedings by sharing their evidence and expertise with state authorities. They can also, through demonstrating their effects and by referring cases to national jurisdictions, create incentives for states to initiate or improve their domestic atrocity trials. This, at least, is the theory.

The aim of this article is to show where and when this theory holds true. It will do so by assessing empirically the impact of the ICTR and the SCSL on the justice systems of their target

[2] See, eg, Alison Smith, Catherine Gambette and Thomas Longley, 'Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002: Executive Summary', 10 March 2004, http://www.npwj.org/ICC/Conflict-Mapping-Sierra-Leone-Violations-International-Humanitarian-Law-1991-2002.html.

[3] The ICTR was established by UNSC Res 955(1994), 8 November 1994, UN Doc S/RES/955 (1994).

[4] The SCSL was established through an agreement between the United Nations (UN) and the Government of Sierra Leone: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Special Court Agreement), 16 January 2002, http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx. The Special Court Agreement was concluded after the UN Security Council requested the UN Secretary-General to negotiate the establishment of such a court with the Government of Sierra Leone: see UNSC Res 1315(2000), 14 August 2000, UN Doc S/RES/1315 (2000).

[5] UNSC Res 955 (n 3) preamble, paras 6–8; UNSC Res 1315, ibid preamble, para 7.

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countries.[6] The article will also compare the national judicial effects of the 'purely international' ICTR with those of the 'hybrid' SCSL. Hybrid courts include international and national judges, have jurisdiction over national and international crimes, and are usually based in the country where the crimes were committed.[7] A number of observers have asserted that hybrid courts have a greater national impact than purely international courts, which are geographically removed from the crimes, staffed only by foreign judges, and exclusively apply international norms. However, my research underscores that the SCSL has actually generated significantly less national impact than has the ICTR.[8] This suggests that although an ICT's hybrid structure may enhance its national impact, other factors can hinder this impact. As shown below, the different approaches of Rwanda and Sierra Leone towards national accountability help to explain the variation in the respective national judicial influences of the ICTR and SCSL. Moreover, the policies and practices of key members of an ICT can affect its national impact.

The analysis in this article also aims to shed light on the interactions between international and national justice systems, and on the features of ICTs that may enhance their ability to encourage domestic legal reform. Finding ways to increase such national legal effects of ICTs is particularly important given the shift to 'positive complementarity' at the International Criminal Court (ICC).[9]

Sections 2 and 3 of this article will address, respectively, the ICTR and the SCSL. Following a brief background section, each section will assess the impact of the relevant ICT on atrocity-related proceedings in its target country through identifying its influences on: (1) national legal norms; (2) rates of, and trends in, national atrocity-related prosecutions; (3) national sentencing practices; and (4) national judicial capacity. These four areas of focus were chosen as

[6] Their national judicial impact should be evaluated in light of the fact that neither of these ICTs was explicitly mandated or designed to proactively encourage national judicial developments, despite references in their constitutive instruments to the 'need for international cooperation' to strengthen the national justice systems of Rwanda and Sierra Leone. See UNSC Res 955 (n 3) preamble, para 9; UNSC Res 1315 (n 4) preamble, para 11.

[7] Despite the SCSL's mixture of international and national components, it is still an international court in the sense that it operates under international law. See, eg, *Prosecutor v Morris Kallon, Sam Hinga Norman, Brima Bazzy Kamara*, Cases No SCSL-2004-14-PT, SCSL-2004-15-PT and SCSL-2004-16-PT, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para 55 ('the Special Court Agreement is an international agreement governed by international law. The Special Court is accordingly an international tribunal'). See also *Issa Hassan Sesay and Others v The President of the Special Court and Others*, Case No SC 1/2003, 10 May 2003 (in which Sierra Leone's Supreme Court recognised the SCSL as an independent court which is external to the national court system). It is also noted that the SCSL's international components are more dominant than its national components: for example, although the SCSL is mandated to prosecute international and national crimes, it chose to prosecute only international crimes.

[8] Another relevant difference between the SCSL and the ICTR is the nature of their legal basis: the former was established through a bilateral agreement between Sierra Leone and the UN; the latter was created unilaterally by the UN Security Council. See UNSC Res 955 (n 3); Special Court Agreement (n 4).

[9] It is noted that ICTs can also have national legal effects that may be in tension with local notions of justice. However, for the purposes of this article, the national legal effects of ICTs are considered to be desirable in that they increase both the number and quality of national proceedings in a manner that is conducive to national accountability. On 'positive complementarity' see, eg, ICC, 'Prosecutorial Strategy 2009–2012', 1 February 2010, paras 15–17, http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (explaining that positive complementarity requires the ICC to 'encourage genuine national proceedings where possible').

https://doi.org/10.1017/S0021223713000125 Published online by Cambridge University Press

indicators of whether the ICTR and SCSL have encouraged national accountability processes in their target countries. The article will conclude with comparative observations in Section 4.

In terms of methodology, the research is empirically grounded and qualitative in nature. It is based primarily on interviews and is supplemented by documentary analysis. The assessment of the national judicial impact of the ICTR and SCSL poses methodological obstacles because the interactions between ICTs and national judiciaries are not always documented, and domestic judicial decisions are often unpublished. To overcome these methodological difficulties, I interviewed over 50 professionals affiliated with the ICTR, the SCSL and the national justice systems of Rwanda and Sierra Leone.[10] The interviewees were asked open-ended questions which allowed them to describe in detail the interactions between the international and national judicial responses to the atrocities, and the national effects of these interactions.

Additional sources of information include documents of the UN and non-governmental organisations (NGOs), international and national jurisprudence, academic articles and media reports. I also relied on my own professional experience between the years 2003 and 2010, working in legal positions with both the ICTR and the SCSL. The first-hand knowledge of the operation of these courts, and the ways in which they interact with national jurisdictions, guided my choice of interviewees and questions, and helped me to contextualise the answers.

2. The ICTR and Rwanda

2.1 Background: The Atrocities and their Judicial Responses

The Rwandan genocide targeted civilians belonging to the Tutsi ethnic group, which had been persecuted in Rwanda since the country's independence. The victims were often tortured and raped before they were killed, many hacked to death with machetes. The perpetrators included soldiers, militia members and civilians, mostly of Hutu ethnicity. Serious crimes were also committed by Tutsis against Hutu civilians.[11] The genocide was perpetrated at the tail end of a four-year civil war between government forces and the Tutsi-dominated rebel group, the Rwandan Patriotic Front (RPF). The RPF won the war and put an end to the genocide. On 18 July 1994, it established a new Government of National Unity. The government immediately began to arrest suspected genocide perpetrators, but most of the high-ranking ones had by then fled from Rwanda.

[10] The interviews were conducted in Arusha, Kigali, Freetown and The Hague between 2008 and 2012. Interviewees were selected based on their seniority and familiarity with the relevant justice systems. They included top judicial policy makers and prominent lawyers at the international and national levels, as well as experts who contribute to the development of the relevant national judiciaries. Since many of the interviewees did not want the information they provided to be attributed to them, they are referred to in generic terms such as 'a senior Rwandan official', or 'a SCSL judge'.

[11] Preliminary Report of the Independent Commission of Experts (29 September 1994), annexed to Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, 4 October 1994, UN Doc S/1994/1125, paras 146–48; Human Rights Watch, 'World Report 2009: Events of 2008' (HRW World Report 2009), http://www.hrw.org/world-report-2009.

https://doi.org/10.1017/S0021223713000125 Published online by Cambridge University Press

In November 1994, the UN Security Council established the ICTR to prosecute the major perpetrators of the atrocities committed in 1994 in Rwanda (and by Rwandans in neighbouring countries). The ICTR began its first proceedings in 1996. It indicted a total of 92 persons, and has prosecuted 72.[12] In 2003 and 2004, through its resolutions 1503 and 1534, the UN Security Council requested the ICTR to adopt a 'completion strategy' ensuring that it would complete its work by 2010.[13] This deadline has since been extended to 31 December 2014.[14] The completion strategy resolutions also request the ICTR to submit a progress report to the Security Council every six months. Until the adoption of the resolutions, explained a senior ICTR official, the tribunal operated with no real strategy or time limit in mind.[15]

To help meet its closure deadline, the completion strategy resolutions urged the ICTR to transfer cases involving mid- and low-level accused to 'competent national jurisdictions, as appropriate, including Rwanda'.[16] Accordingly, in 2004, the ICTR amended rule 11 *bis* of its Rules of Procedure and Evidence to allow the referral of cases from the ICTR to national jurisdictions, to include states 'in whose territory the crime was committed'.[17] The amended ICTR rule 11 *bis* provides[18] that

> [i]n determining whether to refer the case … the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

The rule also allows the ICTR to monitor or recall cases after having transferred them to national courts.[19] Under this rule the ICTR Prosecutor has, since 2006, made several requests to refer cases to European national jurisdictions (two of which were granted). In September 2007, the Prosecutor began to request the tribunal judges to refer cases to Rwanda.[20]

In Rwanda, national courts started to prosecute genocide suspects in late 1996 under a newly enacted law criminalising genocide and crimes against humanity.[21] By 1998, mass arrests in Rwanda led to the detention of over 120,000 suspected genocide perpetrators. As investigations

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[12] This does not include individuals convicted of contempt. See Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 11 May 2012), 22 May 2012, UN Doc S/2012/349 (2012).
[13] UNSC Res 1503(2003), 28 August 2003, UN Doc S/RES/1503(2003); UNSC Res 1534(2004), 26 March 2004, UN Doc S/RES/1534(2004).
[14] UNSC Res 1966(2010), 22 December 2010, UN Doc S/RES/1966 (2010), para 3.
[15] Interview notes with author.
[16] UNSC Res 1503 (n 13).
[17] ICTR, Rules of Procedure and Evidence (ICTR Rules), adopted pursuant to art 14 of the ICTR Statute (entered into force on 29 June l995), r 11 *bis* (A)(i), http://www.unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx.
[18] ibid r 11 *bis* (C).
[19] ibid r 11 *bis* (D)(iv), (F), (G).
[20] The first five requests made by the ICTR Prosecutor to refer cases to Rwanda were denied by the tribunal judges in 2008 (n 30 and accompanying text). Only in 2011 did the ICTR judges begin to grant prosecution requests for the referral of cases to Rwanda (n 31 and accompanying text).
[21] Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 (1996 Genocide Law).

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progressed, the list of suspects compiled by the Rwandan authorities exceeded one million individuals. To cope with the case load, in 2001 the government created a system of 'gacaca courts' designed to handle mass trials.[22] The gacaca courts are based on a traditional community justice mechanism. They were presented by the government as a means to deliver accountability and contribute to national reconciliation by bringing together community members to discuss the atrocities. By mid-2006, gacaca courts had taken over the vast majority of the country's genocide-related cases, leaving to the national courts only the cases which involved the gravest crimes and the most senior suspects.[23]

Gacaca courts concluded their work in June 2012, after prosecuting approximately 400,000 mainly low- and mid-level suspects.[24] Rwandan national courts have handled slightly over 10,000 genocide cases and are now set to adjudicate some genocide cases transferred from the ICTR and third states.[25] Both the gacaca and national courts in Rwanda have been internationally criticised for failing to meet minimum fair trial standards and for meting out 'victor's justice' against Hutus while allowing Tutsis to enjoy impunity.[26]

The discussion that follows focuses on the effects of the ICTR on the norms and practices of Rwanda's national courts. This does not negate the possibility that the ICTR also influenced gacaca proceedings. However, the ICTR interacts in a more direct and influential way with the Rwandan national courts which, like the tribunal, address high-profile cases (while gacaca courts dealt with less serious cases).

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[22] Organic Law No 40/2000 of 26 January 2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed between October 1, 1990 and December 31, 1994 (2001 Gacaca Law). In 2004 a new law was adopted to render the gacaca process more efficient: Organic Law No 16/2004 of 19 June 2004 Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity Committed between October 1, 1990 and December 31, 1994 (2004 Gacaca Law).

[23] The 1996 Genocide Law (n 21) classified genocide-related crimes into four categories, depending on the level of the perpetrator and gravity of the crime. Category One included the most serious crimes and most senior offenders, which continued to be sent to national courts even after the gacaca courts had been established. Some of the categories set by this law were redefined in later laws, but the principle that the most serious crimes are handled by national courts remained intact.

[24] Phil Clark, 'How Rwanda Judged its Genocide', 2 May 2012, http://africaresearchinstitute.org/files/counterpoints/docs/How-Rwanda-judged-its-genocide-E6QODPW0KV.pdf. According to the Rwandan government, nearly two million genocide-related cases were adjudicated by the gacaca courts: see official website of the Republic of Rwanda, Ministry of Justice, 'Closing Ceremony of Gacaca Courts', 19 June 2012, http://www.minijust.gov.rw/MoJ/AX_Articles.aspx?id=1146&cidl=14. These figures can be reconciled if we consider that certain individuals may have been involved in more than one gacaca case (which is especially likely in genocide-related property cases, of which there were many before the gacaca courts).

[25] On the number of genocide cases tried so far by national courts in Rwanda see Bert Ingelaere, 'The Gacaca Courts in Rwanda' in Luc Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (Stockholm, International IDEA 2008) 25, 45; William A Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 879, 888; Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', 25 July 2008, Annex 1, http://www.hrw.org/en/reports/2008/07/24/law-and-reality-0. On cases recently referred from abroad, see n 31.

[26] See, eg, HRW World Report 2009 (n 11); Amnesty International, 'Report 2009: The State of the World's Human Rights', http://report2009.amnesty.org/; Nicholas A Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Routledge 2010) 100; Decision of the High Court of England and Wales in *Brown (aka Vincent Bajinja) and Others v Government of Rwanda and Others* [2009] EWHC 770 (Admin).

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2.2 IMPACT OF THE ICTR ON RWANDAN LEGAL NORMS

2.2.1 DUE PROCESS NORMS IN RWANDA'S TRANSFER LAW

Consistent with its national policy of maximum accountability for genocide-related crimes, the Rwandan government has long been interested in receiving cases from the ICTR.[27] To satisfy the ICTR's referral requirement, in 2007 Rwanda adopted a law to regulate cases received from the ICTR or third states (Transfer Law).[28] The Transfer Law implemented nationally many of the ICTR's due process standards, requiring their application in cases transferred to Rwanda from the ICTR or third states.[29] Notwithstanding this development, the first five requests by the ICTR Prosecutor to refer cases to Rwanda were denied by the tribunal's judges in 2008.[30] However, following additional legal reforms in Rwanda (discussed below) the tribunal started to grant such requests in 2011, a development which also paved the way for genocide suspects to be transferred to Rwanda from third states.[31] Rwanda is expected to commence trials shortly in some

[27] 'Rwanda Wants to Detain Defendants, to Try Them and to Possess the Archives', *Hirondelle News Agency*, 11 December 2007, http://www.hirondellenews.com/ictr-rwanda/407-collaboration-with-states/collaboration-with-states-rwanda/21296-en-en-111207-ictruno-rwanda-wants-to-detain-defendants-to-try-them-and-to-possess-thearc hives1034710347; Stephanie Nieuwoudt, 'Rwandan Tribunal under Pressure to Wind Up', *Institute for War & Peace Reporting*, 29 January 2007, http://www.iwpr.net/report-news/rwandan-tribunal-under-pressure-wind.

[28] Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States (Transfer Law).

[29] Transfer Law, ibid arts 13–17. While the Transfer Law does not adopt all of the ICTR's due process norms, it covers the most important ones such as those concerning the rights of the accused.

[30] ICTR, *Prosecutor v Munyakazi*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, ICTR-97-36-R11*bis*, Appeals Chamber, 8 October 2008; ICTR, *Prosecutor v Kanyarukiga*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, ICTR-02-78-R11*bis*, Appeals Chamber, 30 October 2008; ICTR, *Prosecutor v Hategekimana*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, ICTR-00-55B-R11*bis*, Appeals Chamber, 4 December 2008; ICTR, *Prosecutor v Gatete*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ICTR-00-61-R11*bis*, Trial Chamber, 17 November 2008; ICTR, *Prosecutor v Kayishema*, Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda Appeals Chamber, ICTR-01-67-R11*bis*, Trial Chamber, 16 December 2008.

[31] So far, eight cases have been transferred to Rwanda from the ICTR (these include two apprehended accused and six fugitives). See ICTR, *Prosecutor v Ndimbati*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-95-1F-R11 bis, Trial Chamber, 25 June 2011; ICTR, *Uwinkindi v Prosecutor*, Decision on Uwinkindi's Appeal against the Referral of His Case to Rwanda and Related Motions, ICTR-01-75-AR11 *bis*, Appeals Chamber, 16 December 2011; ICTR, *Prosecutor v Kayishema*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-01-67-R11 *bis*, Trial Chamber, 22 February 2012; ICTR, *Prosecutor v Sikubwabo*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-95-1D-R11 *bis*, Trial Chamber, 26 March 2012; ICTR, *Prosecutor v Ntaganzwa*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-96-9-R11 *bis*, Trial Chamber, 8 May 2012; ICTR, *Prosecutor v Munyagishari*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-05-89-R11 bis, Trial Chamber, 6 June 2012; ICTR, *Prosecutor v Ryandikayo*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-95-1E-R11 *bis*, Trial Chamber, 20 June 2012; ICTR, *Munyarugarama v Prosecutor*, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, MICT-12-09-AR14, Appeals Chamber, 5 October 2012. Regarding referrals from third states, a recent example is Canada's deportation of Leon Mugesera to Rwanda to stand trial for genocide-related charges: see *Mugesera v Ministry of Immigration and Others*, Federal Court of Montréal (Québec), Judgment, Dossier IMM-9680-11, Ref 2012 CF 32, 11 January 2012. According to a senior

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of these cases and apply the Transfer Law in their proceedings. That the ICTR, through its referral procedure, has encouraged Rwanda to improve its due process norms is already a significant development. The promised application of these norms in actual cases could even further increase the ICTR's impact on Rwandan judicial procedures. This is especially likely given that the ICTR will monitor the national proceedings, with the possibility of remanding cases that do not meet international standards.[32]

2.2.2 OTHER LEGAL NORMS

Interestingly, interviewees noted that ICTR staff members were among the international law experts consulted by Rwanda in connection with its national legal reforms of 2003–04.[33] In these reforms, Rwanda adopted certain norms such as the principle of command responsibility[34] and certain rights of the accused.[35] While these post-genocide legal developments in Rwanda could, at first glance, seem attributable to the ICTR, interviews did not support such a conclusion. However, consulting tribunal members in connection with national reforms may suggest that Rwanda considered ICTR norms to be a source of inspiration for national laws. In addition, Rwanda's increased awareness of international norms may, in part, be attributable to the work of the ICTR.[36]

Turning to the development of judicial norms, interviewees suggested that the ICTR's norms and jurisprudence had little (if any) impact on Rwandan case law.[37] However, such impact must be reassessed once Rwandan courts become fully engaged with cases transferred from abroad.[38]

Rwandan prosecutor, Rwanda has so far requested the extradition of over 100 suspected genocide perpetrators from the United States and European countries. Interview notes with author.

[32] Transfer Law (n 28) arts 19–20. The Transfer Law also encourages cooperation between Rwanda and the ICTR: arts 18–19.

[33] Interview notes with author.

[34] The principle of command responsibility in relation to international crimes was recognised in Rwanda's 2004 Gacaca Law (n 22) art 53 (which applies both in gacaca and national courts). See also Law No 33*bis*/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, art 18. In this context see the ICTR finding in *Hategekimana* (n 30) para 12.

[35] These include, eg, the right of the accused to legal counsel guaranteed in Rwanda's Constitution of 2003 and Code of Criminal Procedure as amended in the context of the 2003–04 national judicial reforms: see Constitution of the Republic of Rwanda, 26 May 2003, arts 10–44. See also Law No 13/2004 of 17 May 2004 concerning the Code of Criminal Procedure, published in the *Official Journal* of 30 July 2004, arts 64, 89, 96 (granting defendants the rights to legal counsel and to be brought before a judge following their arrest).

[36] Further research in this area could perhaps reveal stronger links between the ICTR norms and Rwandan norms.

[37] Interview notes with author.

[38] The ICTR's referral procedure also encouraged Rwanda to amend some of its sentencing laws to meet the tribunal's conditions for referring cases to national jurisdictions. These legal developments are discussed below (at 2.4) in connection with the ICTR's impact on Rwandan sentencing practices.

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2.3 Impact of the ICTR on Rwandan Prosecution Rates and Trends

2.3.1 Genocide Prosecutions

Rwanda's ambitious attempt to prosecute all genocide perpetrators seems to have emanated from national initiatives rather than external pressure. This was confirmed by Rwandan officials and lawyers, who stressed that the ICTR did not play a role in encouraging national prosecutions of genocide perpetrators.[39] Nonetheless, the ICTR has influenced certain trends in these proceedings. For example, in 2005, when the ICTR Prosecutor transferred investigation files to Rwanda, he encouraged Rwanda to take domestic accountability to a new level by initiating proceedings against high- or mid-level genocide suspects.[40] Many of the files concerned suspects who were based outside Rwanda, explained a senior ICTR official, which helped to lead Rwanda to seek the extradition of genocide suspects from third states.[41]

2.3.2 War Crimes Trials

In connection with war crimes prosecutions, the ICTR appears to have had a more discernible impact on Rwanda than in the area of genocide trials. In 2008, the ICTR Prosecutor deferred to Rwanda a case concerning four RPF officers suspected of committing war crimes by executing 13 Catholic priests and two civilians in Kabgayi, Rwanda. The ICTR Prosecutor suggested that he would not indict them if Rwanda genuinely tried them nationally. The four were eventually prosecuted before a military court in Kigali in June 2008 on charges of war crimes. The trial, referred to as the 'Kabgayi trial', was the first war crimes prosecution in Rwanda. Previously, some war-related crimes committed by RPF members were prosecuted as ordinary crimes.[42] Although Rwanda claimed that it had been investigating the Kabgayi killings, several interviewees noted that Rwanda would not have held the Kabgayi trial had it not been for the involvement of the ICTR.[43]

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[39] Interview notes with author.

[40] In 2005, the ICTR Prosecutor transferred to the Rwandan authorities about 35 investigation files (dossiers) of suspects who were investigated but never indicted by the ICTR: see Letter from the ICTR Prosecutor to the Executive Director of Human Rights Watch, 22 June 2009 (ICTR Letter), 2, http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf. Since these suspects have not been formally charged by the tribunal, it was within the Prosecutor's discretion to transfer their files to Rwanda without requiring the authorisation of ICTR judges.

[41] Interview notes with author.

[42] Several dozen members of the RPF were tried by military courts for crimes related to the war: see official website of the Republic of Rwanda, Ministry of Justice, 'RPF Never Ignored to Punish Soldiers Guilty of War Crimes' (RPF Never Ignored War Crimes), http://www.minijust.gov.rw/spip.php?article133; ICTR Letter (n 40); Human Rights Watch (n 25) 4 (with details of these trials in Annex 2, 103–09).

[43] Interview notes with author. One interviewee, a human rights expert who focuses on Rwanda, suggested that the ICTR Prosecutor's deferral of this case to Rwanda was motivated by political considerations, in particular, his desire to mitigate the international criticism that the ICTR has been pursuing one-sided justice.

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The Kabgayi trial was held in public.[44] The defendants included Brigadier General Gumisiriza and three junior officers. Gumisiriza and one of the junior officers were acquitted, while the two remaining officers, who admitted to having shot the victims, were convicted and sentenced to five years' imprisonment. Representatives of the ICTR Prosecutor who monitored the Kabgayi trial reported that it complied with fair trial standards.[45] However, Human Rights Watch complained about the short proceedings and light sentences, and called the trial 'a political whitewash'.[46] Concerns over the quality and genuine nature of the process were also voiced by others.[47] The Rwandan Justice Minister responded that a 'five year sentence is not a small punishment for a person who admitted to hav[ing] committed the crime'.[48]

Human Rights Watch also criticised the Rwandan government for prosecuting the four officers only because the ICTR had prepared a case against them, and complained that neither Rwanda nor the ICTR anticipate further prosecutions of RPF members.[49] Nonetheless, a national war crimes trial against RPF officers (including a high-ranking commander) is a significant event in Rwanda and merits evaluation on its own terms, even if it was exceptional and conducted only to prevent ICTR trials of RPF officers. Besides, the threat of international trials is a legitimate means by which ICTs can encourage national trials.[50] Thus, for example, the principle of complementarity, enshrined in the Rome Statute of the ICC (ICC Statute), may encourage states to prosecute atrocities in order to avoid proceedings before the ICC.[51]

2.4 Impact of the ICTR on Rwandan Sentencing Practices

2.4.1 Abolition of the Death Penalty

When Rwanda first criminalised genocide-related crimes in 1996, its law imposed a mandatory death penalty in certain genocide cases.[52] The first death penalties imposed under this law were

[44] According to a Rwandan official, the military court heard the case in the civilian courthouse in Nyamirambo, Kigali, to accommodate the many people who were expected to attend the trial. Interview notes with author.
[45] ICTR Letter (n 40) 2–3.
[46] Human Rights Watch, 'Rwanda: Tribunal Risks Supporting Victor's Justice', 1 June 2009, http://www.hrw.org/en/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice.
[47] See, eg, Lars Waldorf, 'A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal' (2011) 33 *Fordham International Law Journal* 1221.
[48] RPF Never Ignored War Crimes (n 42).
[49] HRW World Report 2009 (n 11).
[50] Whether such pressure is an effective means of encouraging national trials is a separate question.
[51] Rome Statute of the International Criminal Court (ICC Statute) (entered into force 1 July 2002) 2187 UNTS 90, art 17.
[52] 1996 Genocide Law (n 21) art 14 (providing that Category One offenders were 'liable to the death penalty'), art 5 (prohibiting reduction of sentences in Category One cases even when an accused has confessed). On the 'categorisation' of genocide crimes see discussion at n 23 above. The death penalty also applied in Rwanda to certain ordinary crimes such as murder, but the introduction of the death penalty in the 1996 Genocide Law is interesting when considered in light of Rwanda's practical moratorium on the death penalty since the early 1980s. See William A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd edn 2002) 250 (explaining that the death penalty had not been applied in practice in Rwanda since the early 1980s, with the then Rwandan President commuting all outstanding death penalties in 1992).

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enforced in 1998, when 22 individuals convicted of genocide were publicly executed (by firing squad).[53] By mid-2007 Rwandan national courts had imposed the death penalty in over 1,300 genocide cases.[54] It is recalled that Rwanda was interested in receiving cases from the ICTR. It therefore had to satisfy the ICTR that the transferred accused would not receive the death penalty in Rwanda.[55] Indeed, in March 2007, through its Transfer Law, Rwanda excluded the death penalty from cases received from the ICTR. Four months later, in July 2007 Rwanda took a further step in this direction and abolished the death penalty altogether from its criminal system.[56] In September 2007 the ICTR judges were requested by the tribunal Prosecutor for the first time to refer cases to Rwanda.[57]

Most interviewees felt that Rwanda abolished the death penalty to satisfy the ICTR's referral conditions, even though these conditions merely demanded that the penalty be excluded from transferred cases and not from all cases.[58] Interviewees who explicitly endorsed this view included non-Rwandan members of the ICTR, foreign legal experts based in Rwanda, Rwandan university lecturers and a prominent Rwandan lawyer.[59] But Rwandan officials also alluded to a connection between the ICTR and the abolition, even without explicitly stating this. For example, when asked about the abolition, a senior Rwandan official explained that such national reforms were prompted by local considerations, but these included Rwanda's wish to receive cases from third states.[60] Courts in third states have relied on the ICTR's referral decisions in deciding whether to transfer genocide suspects to Rwanda.[61] Thus, satisfying the ICTR's referral requirements may have been a way for Rwanda to receive cases from third states. Another senior Rwandan official, while firmly denying that the abolition was encouraged by the ICTR, admitted that excluding the death penalty from the Transfer Law had intensified internal discussions in Rwanda about abolishing the penalty altogether.[62]

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[53] See 'Rwanda Executes Genocide Convicts', *BBC News*, 24 April 1998, http://news.bbc.co.uk/1/hi/world/africa/82960.stm. Also see Amnesty International, 'Rwanda: 22 People, Executed on 24 April', 27 April 1998, http://www.amnesty.org/es/library/asset/AFR47/015/1998/es/285a93fd-f880-11dd-b378-7142bfbe1838/afr470151998en.pdf. This was the last time anyone was executed in Rwanda following the imposition of a death penalty.

[54] Florence Mutesi, 'Death Row: Over 1300 Survive Gallows', *New Times*, http://www.newtimes.co.rw/news/views/article_print.php?i=1269&a=473&icon=Print (referred to in Human Rights Watch (n 25) fn 82 and accompanying text).

[55] ICTR Rules (n 17) r 11 *bis*, as amended in 2004.

[56] Organic Law No 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (abolishing all pending death penalties and commuting them to life sentences).

[57] ICTR, *Prosecutor v Munyakazi*, Prosecution's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, ICTR-97-36, Trial Chamber, 7 September 2007. The Government of Rwanda was granted the status of *amicus curiae* by the ICTR for the purposes of these proceedings, and accordingly submitted to the ICTR its own arguments in support of the prosecution's referral requests.

[58] Interview notes with author.

[59] Interview notes with author.

[60] Interview notes with author.

[61] See, eg, *Brown* (n 26) para 47; *Mugesera* (n 31) paras 66–67.

[62] Interview notes with author.

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Other Rwandan interviewees attributed the abolition to internal public pressure.[63] One of them explained that the public execution of 22 genocide perpetrators in 1998 was perceived negatively by the population, and gave rise to local demands to abolish the death penalty.[64] Nonetheless, the death penalty was not formally abolished in Rwanda until nine years later, by which time over 1,300 additional individuals were sentenced to death.[65] Rwanda's current Justice Minister, who sponsored the abolition bill, recalled the great challenges he had to overcome to obtain the support of other ministers, but insisted that their eventual support of the bill in 2007 was not motivated by a desire to receive cases from the ICTR or third states.[66] However, a Rwandan news report published shortly after the abolition of the death penalty confirmed that the abolition 'was largely motivated by the government's desire to have genocide suspects extradited and be tried here'.[67] According to the report, Rwandan judge (and current Chief Justice) Samuel Rugege said that the international community's push for abolishing the death sentence was not the main reason, though he admitted it was one of the factors that encouraged the abolition.[68]

A non-Rwandan defence counsel with the ICTR, in support of his position that the abolition was prompted by the ICTR's referral conditions, recalled that Rwanda's post-genocide government supported the death penalty so strongly that it voted against establishing the ICTR because the tribunal would exclude this penalty.[69] Against this background the abolition of the death penalty in Rwanda could be seen as a surprising development, although in the years following the creation of the tribunal Rwandan legislators and judges seem to have become increasingly less eager to impose the death penalty in genocide cases. While the 1996 Genocide Law required a mandatory death penalty in some cases,[70] this requirement was dropped in 2001.[71] In parallel, Rwandan courts became less inclined to impose this penalty over time: statistics published by Amnesty International indicate that the percentage of cases that received the death penalty out of all genocide cases in Rwanda decreased on an annual basis from 30.8 per cent in 1997 to

[63] Interview notes with author.

[64] Interview notes with author. The interviewee placed the execution in 1997, but he seems to have been referring to the public execution of the 22 genocide convicts which took place in Rwanda on 24 April 1998. See n 53 and accompanying text. For a discussion of Rwanda's inclination towards abolishing the death penalty irrespective of the ICTR's impact see Audrey Boctor, 'The Abolition of the Death Penalty in Rwanda' (2009) 10 *Human Rights Review* 99, 105.

[65] See n 54 above.

[66] Interview with Rwandan Justice Minister, August 2012. Interview notes with author.

[67] See n 54 above.

[68] ibid.

[69] Interview notes with author. Indeed, during the meeting on the setting up of the ICTR, Rwanda's representative to the UN stressed that the tribunal's exclusion of the death penalty, despite its applicability in Rwanda, 'is not conducive to national reconciliation in Rwanda': see UN Doc S/P.V.3453, 16.

[70] See n 52.

[71] 2001 Gacaca Law (n 22) art 68 (which requires judges hearing Category One cases to choose between life imprisonment and the death penalty when the conviction was not based on a confession, and to impose between 25 years' imprisonment and a life sentence when the conviction was based on a confession). See also 2004 Gacaca Law (n 22) art 72 (which retains the sentencing rule for convictions not based on a confession in Category One cases, but reduces confession-based sentences in Category One cases to between 25 and 30 years' imprisonment).

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just 3.4 per cent in 2002.[72] However, this reduction must be evaluated in the context of a more general movement towards lenient sentences in Rwandan genocide cases.[73] Scholar Mark Drumbl attributes these trends, at least in part, to the facts that (i) the perpetrators prosecuted in the earlier trials were more notorious than those prosecuted later, and (ii) recourse to guilty pleas became more popular with time.[74] Thus it seems reasonable to conclude that while national dynamics may partly explain the death penalty abolition, the ICTR's referral requirements tipped the scales in favour of abolition. A recent study by a Rwandan academic also supports this conclusion.[75]

2.4.2 Exclusion of Life Imprisonment in Isolation

When the death penalty was abolished in Rwanda in September 2007, life imprisonment with 'special provisions' replaced it as the maximum punishment. However, the ICTR found that in Rwanda this penalty could mean life imprisonment in isolation, which amounts to cruel and inhuman treatment and thus violates international norms. It was partly on this basis that, in 2008, the tribunal refused to refer cases to Rwanda;[76] within weeks, Rwanda excluded this penalty from cases transferred from the ICTR or third states.[77] In 2010 Rwanda adopted a law providing that life imprisonment with special provisions must be interpreted in light of the national constitutional prohibition of torture.[78] As a result of this development, the ICTR referred the first case

[72] Amnesty International, 'Rwanda: Gacaca: A Question of Justice', 17 December 2002, 17, http://www.amnesty.org/en/library/info/AFR47/007/2002 (referring to statistics compiled by the Rwandan NGO Liprodhor, indicating that the percentage of cases that resulted in the death penalty out of all genocide cases in Rwanda was 30.8 per cent in 1997, 12.8 per cent in 1998, 11 per cent in 1999, 6.6 per cent in 2000, 8.4 per cent in 2001 and only 3.4 per cent in 2002).

[73] ibid. The report provides an annual breakdown of all sentences imposed in genocide cases in Rwanda between 1997 and mid-2002 and identifies the following trends: (i) a gradual decline in the percentage of death penalties (from 30.8 per cent in 1997 to 3.4 per cent in 2002); (ii) a gradual decline in the percentage of life imprisonment sentences (from 32.4 in 1997 to 20.5 per cent in 2002); (iii) an increase in fixed prison terms (from 27.7 in 1997 to 47.2 per cent in 2002); (iv) the acquittal rate almost tripled (from 8.9 in 1997 to 24.8 per cent in 2002).

[74] Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 76. It is noted that under Rwandan law confessions in genocide cases almost automatically lead to reductions in sentence. Drumbl also notes that the 'Amnesty International statistics, however comprehensive, do not illustrate the factors the domestic courts consider in sentencing that transcend the guidelines provided by the Organic Law. The statistics are silent as to how the Rwanda genocide courts exercise their limited discretion with regard to punishing Category 2 and 3 offenders. Nor do they reveal the ways in which the Rwandan courts at times mold the statutory framework to suit unusual circumstances; or how, through the language, tone, and texture of their judgments, they give voice to certain penological goals'.

[75] Aimé Muyoboke Karimunda, 'The Death Penalty in Rwanda: Surrounding Politics and the ICTR's Battle of Abolition' in Madoka Futamura and Nadia Bernaz (eds), *The Politics of the Death Penalty in Countries in Transition* (Routledge, forthcoming August 2013) (draft with author).

[76] See, eg, *Kanyarukiga* (n 30) 15.

[77] Organic Law No 66/2008 of 21 November 2008, amending Organic Law No 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (excluding the application of the penalty of life imprisonment in isolation in cases transferred from the ICTR and third states).

[78] Life Imprisonment with Special Provisions Law 2012 (Rwanda). See also Edwin Musoni, 'Parliament Expunges Solitary Confinement', *AllAfrica News*, 3 April 2010, http://allafrica.com/stories/201004050423.html (noting that the Rwandan parliament has approved the abolition of life imprisonment in isolation).

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to Rwanda.[79] Interviews confirmed that discussions in Rwanda on precluding life imprisonment in isolation had been prompted by the ICTR's referral decisions.[80]

2.5 Impact of the ICTR on Rwanda's Judicial Capacity

The ICTR influenced the capacity of judicial professionals and institutions in Rwanda both through direct engagements such as training (and possibly employing Rwandans), and through incentives such as the possibility of holding trial proceedings in Rwanda, referring cases to Rwanda and enforcing sentences in Rwanda.[81] These incentives, in turn, prompted reforms in Rwanda. As is shown below, the case referral incentive was by far the most significant in this regard (as it was in relation to the other types of impact discussed in this article). Eventually, enhanced levels of collaboration allowed the ICTR to engage in capacity-building activities in Rwanda, even when they were unrelated to case referrals. These positive interactions stand in sharp contrast with the lack of cooperation between Rwanda and the ICTR in the tribunal's first ten years of operation,[82] which suggests that the ICTR's referral procedure significantly increased the tribunal's ability to impact on Rwanda. The following sections address in detail the various influences of the ICTR on Rwandan judicial capacity.

2.5.1 Training Activities

According to Rwandan and ICTR officials, since 2006 the tribunal's prosecution section has been training Rwandan prosecutors and investigators in areas such as investigation technique, crime analysis, evidence management, international criminal law, trial advocacy and indictment drafting.[83] This training has been funded mainly by the European Union (EU).[84] Some, but not all, of the initiatives were intended to facilitate the transfer of cases to Rwanda.[85] Two members of the ICTR prosecution described a training session involving indictment drafting as being especially

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[79] ICTR, *Prosecutor v Uwinkindi*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, ICTR-01-75-R11 *bis*, Trial Chamber, 28 June 2011, para 51 (noting that, with regard to punishments, 'the ambiguities which existed … have been adequately addressed by Rwanda').

[80] Interview notes with author.

[81] These possibilities are provided, respectively, under ICTR Rules (n 17) rr 4, 11 *bis* and 103(A). The possibility of enforcing sentences in Rwanda is also provided for under the Statute of the International Criminal Court for Rwanda (ICTR Statute), annexed to UNSC Res 955(1994) (n 3) art 26.

[82] Sigall Horovitz, 'Rwanda: International and National Responses to the Mass Atrocities and their Interaction', DOMAC, September 2010, DOMAC/6, 58–60, http://www.domac.is/media/veldu-flokk/DOMAC6—Rwanda.pdf.

[83] Interview notes with author.

[84] Senior ICTR officials spoke about the financial challenges faced by the tribunal in connection with its capacity-building efforts in Rwanda. Even after UNSC Res 1503 (n 13) was issued in 2003, the UN refused to fund these initiatives. Consequently, the ICTR established a voluntary trust fund to finance its capacity-building activities in Rwanda. The EU is a major contributor to the ICTR Trust Fund, and also provides direct funding to ICTR capacity-building projects in Rwanda. Interview notes with author.

[85] A senior ICTR official explained that eventually the ICTR and Rwanda managed to build a relationship which allows capacity-building projects to take place even when they are not related to the referral of cases to Rwanda. Interview notes with author.

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successful.[86] A senior Rwandan official confirmed that this particular training has improved the capacity of many local prosecutors in Rwanda. He generally considered the ICTR training activities in Rwanda to be useful.[87] ICTR members explained that the ICTR registry and chambers also engage in capacity-building in Rwanda, in particular by training Rwandan judges and defence lawyers, lecturing to Rwandan law students and assisting in setting up libraries.[88]

After the refusal of the ICTR to refer cases to Rwanda in 2008, the tribunal's prosecution and registry continued to collaborate with the Rwandan authorities in addressing the weaknesses identified by the ICTR judges: it was found, for example, that defendants might not receive a fair trial in Rwanda because potential witnesses may be reluctant to testify for the defence out of fear of harassment.[89] In response, the tribunal began to train Rwandan witness protection officers in an effort to increase their effectiveness in addressing security concerns of potential defence witnesses.[90] A stronger national witness protection programme, it must be stressed, could improve Rwanda's judicial capacity to handle not only atrocity cases but also any other type of criminal case.

2.5.2 Employment of Rwandans by the ICTR

Arguably, the ICTR has been contributing to Rwanda's judicial capacity by employing Rwandans. This assumes that those Rwandans eventually return to their home country with the knowledge they acquired by working at the tribunal. Indeed, two Rwandans who work in relatively senior positions at the ICTR indicated that they plan to return to Rwanda once the tribunal winds up.[91] Interviewees stressed that Rwandans are involved in the tribunal as staff members, interns and legal researchers.[92] An ICTR prosecutor stated that in his section Rwandans

[86] Interview notes with author. The training was requested by the Rwandan Prosecutor General, who wanted to improve the indictment format used in Rwanda (which contained only a summary of the charges, without informing the accused of his rights).
[87] Interview notes with author. However, he added that the ICTR as an institution has not contributed to the development of judicial capacity in Rwanda. Rather, such contribution was achieved through sporadic personal initiatives of certain ICTR officials.
[88] Interview notes with author.
[89] *Munyakazi* (n 30) para 37; *Kanyarukiga* (n 30) para 26. This finding helped to support the tribunal's conclusion that fair trials were not available in Rwanda, one of the grounds on which it ultimately based its refusal to transfer cases to Rwanda. The other ground for this refusal, as discussed earlier, was the possibility that a life sentence in isolation would be imposed following conviction in transferred cases: see n 76 above and accompanying text. It is noted that the tribunal also found that potential defence witnesses may be reluctant to testify in Rwanda out of fear of being subjected to gacaca trials or charged with the crime of 'genocide ideology'. This also encouraged reform of the legal system in Rwanda. However, these developments started to take place after I concluded my research for this article, and will therefore not be discussed here.
[90] ICTR Press Release, 'Tribunal Trains Rwanda Witness Protection Officers', ICTR/INFO-9-2-623.EN', 16 November 2009, http://www.unictr.org/News/PressReleases/tabid/64/Default.aspx.
[91] Interview notes with author. One of the interviewees stressed that working at the tribunal has enhanced his knowledge of international law, his understanding of the crimes which were committed in Rwanda, and the ability to be objective and think independently. These skills, he believed, would make him a good practitioner in Rwanda.
[92] Interview notes with author.

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serve as trial attorneys and associate investigators.[93] According to an ICTR judge, in its early years, the tribunal employed Rwandans only as translators. However, at a later stage, the ICTR adopted a policy of including Rwandans in other sections, such as the Witness and Victims Support Section, the Protocol Unit, the Outreach Programme and the prosecution. In addition, every ICTR defence team has Rwandan investigators. The judge stressed that in 1996–97 it would have been impossible to let a Tutsi attorney cross-examine a Hutu witness (or vice versa), but this has changed over time and today the ICTR prosecution employs several Rwandan lawyers.[94] Tribunal officials also mentioned that an 'attachment programme' is being planned, under which Rwandan professionals will be seconded to the ICTR for three-month terms.[95]

Despite all this, two senior Rwandan officials criticised the ICTR for not employing Rwandan prosecutors and investigators before 2003, and for not including Rwandan judges until today.[96] A senior ICTR official considered that the tribunal could not involve Rwandan judges because they may not be (or perceived to be) objective.[97] According to an ICTR judge, the bitterness and lack of trust across the ethnic divide in Rwanda in 1994 made it impossible for the tribunal to engage Rwandan judges in its early years. Even later, he added, such tension made it problematic for the ICTR to employ Rwandan judges.[98]

2.5.3 Infrastructural Development

The ICTR Statute allows the tribunal to transfer its convicts to Rwanda to serve their sentences.[99] In view of this possibility, explained a senior Rwandan official, prison facilities in Rwanda were improved (with financial support from the Netherlands).[100] An ICTR official confirmed that Rwanda has been able to build a prison that conforms with international standards. In this light, the ICTR Registrar signed an agreement on the enforcement of sentences with Rwanda. However, at the time of writing, no ICTR prisoner has yet been transferred to Rwanda.[101]

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[93] Interview notes with author. The Prosecutor explained that the associate investigators were qualified attorneys back in Rwanda. At the ICTR they assist with crime analysis. Their fluency in Kinyarwanda is highly valued in light of the prosecution's limited language resources. These employees could return to their local system to work, which could be a way of transferring skills to Rwanda. However, some of them may end up being employed by other ICTs.

[94] Interview notes with author. A Rwandan working at the ICTR also confirmed that the ICTR had not wanted to employ Rwandans in the past, based on its belief that the animosity between Hutus and Tutsis would influence the quality of their work and jeopardise their objectivity. Interview notes with author.

[95] Interview notes with author.

[96] Interview notes with author. It is noted that there is nothing in the ICTR Statute (n 81) that precludes Rwandan judges from serving with the ICTR.

[97] Interview notes with author.

[98] Interview notes with author.

[99] ICTR Statute (n 81) art 26; ICTR Rules (n 17) r 103(A).

[100] Interview notes with author. The interviewee stressed that the Netherlands rather than the ICTR paid for these improvements; this is in contrast to the situation in other African countries that received ICTR convicts, such as Mali and Benin, where the ICTR financially supports prison infrastructure development.

[101] An ICTR official explained that the tribunal must be convinced that Rwanda can guarantee the safety of its prisoners before it transfers them to Rwanda. Interview notes with author.

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Another ICTR official noted that, in addition to improving prison facilities to meet the tribunal's standards, Rwanda also built a chamber that could host ICTR proceedings in its Supreme Court. This was done in the hope that ICTR judges would hold trial sessions in Rwanda, a possibility provided for by the ICTR Rules but which never materialised.[102]

3. THE SCSL AND SIERRA LEONE

3.1 BACKGROUND: THE ATROCITIES AND THEIR JUDICIAL RESPONSES

From March 1991 to January 2002, Sierra Leone was engaged in a brutal civil war, in which government armed forces and the pro-government Civil Defence Forces (CDF) fought against two rebel groups – the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). The war killed between 50,000 and 75,000 people, and displaced almost half of the country's population. All factions involved committed atrocities against civilians, including murder, torture, rape and other sexual crimes, abductions, recruitment of child soldiers, burning of villages and amputation of limbs.[103] On 7 July 1999 Sierra Leone's President and the leader of the RUF signed a power-sharing peace agreement in Lomé, Togo.[104] This agreement provided a blanket amnesty protecting all combatants from prosecution by national courts for all crimes pre-dating the agreement (the Lomé Amnesty).[105]

But the AFRC and RUF forces neither disarmed nor did they release abducted civilians and, despite the peace agreement, resumed attacks on the CDF and on the civilian population.[106] In light of the resumption of hostilities and the abduction of 500 UN peacekeepers by the RUF in May 2000, Sierra Leone's then President, Ahmad Tejan Kabbah, requested UN assistance in setting up a special court to prosecute in respect of RUF atrocities.[107] Consequently, the SCSL was established on 16 January 2002 by an agreement between the UN and the Sierra

[102] Interview notes with author. The ICTR official noted that this court renovation project started as early as 1997, and was eventually completed years later with EU funding. See also http://www.delrwa.ec.europa.eu/en/whatsnew/Cour-Minijust-en.pdf. The possibility of holding ICTR sessions away from the seat of the tribunal is provided for under ICTR Rules (n 17) r 4.

[103] The RUF's 'trademark' was hacking off limbs with machetes. RUF fighters would invade a village and ask the inhabitants to choose between 'long sleeves' (having their hands cut off) and 'short sleeves' (having their arms cut off above the elbow). Other notorious crimes committed during the war included opening the abdomens of pregnant women in order to settle bets by rebels concerning the sex of the foetus.

[104] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999 (Lomé Peace Agreement), http://www.sierra-leone.org/lomeaccord.html.

[105] ibid art IX.

[106] Michael P Scharf, 'The Special Court for Sierra Leone', *ASIL Insight*, October 2000, http://www.asil.org/insigh53.cfm, para 3; Human Rights Watch, 'Sierra Leone Rebels Violating Peace Accord', 30 August 1999, http://199.173.149.120/press/1999/oct/sierra1027.htm.

[107] UNSC, Letter dated 12 June 2000 from President of Sierra Leone to the Secretary-General, 10 August 2000, UN Doc S/2000/786.

https://doi.org/10.1017/S0021223713000125 Published online by Cambridge University Press

Leonean government.[108] Two days later, peace was officially declared in Sierra Leone. On 14 May 2002 President Kabbah was re-elected for another five-year term. The political wing of the RUF, known as the Revolutionary United Front Party (RUFP), did not win a single seat in parliament.

The SCSL became operational in August 2002 and had issued 13 indictments by September 2003. The suspects included RUF and AFRC leaders and their alleged patron, the then President of Liberia, Charles Taylor.[109] Senior members of the pro-government CDF were also indicted, including government minister, Sam Hinga Norman.[110] The SCSL eventually prosecuted ten individuals for the atrocities in Sierra Leone.[111] Apart from the case of Charles Taylor, the SCSL has concluded its trials and is expected to complete all judicial activities by September 2013.[112] As noted above, the SCSL is a hybrid international court, and therefore includes both national and international judges and staff members. In addition, it is authorised by its statute to prosecute certain Sierra Leonean national crimes, such as abusing young girls and burning buildings.[113] The statute also mandates the SCSL to follow national criminal procedures when it amends or adopts rules of procedure and evidence.[114] However, the court has refrained from resorting to national norms.

In sharp contrast to Rwanda's judicial response to the genocide, Sierra Leonean courts have hardly prosecuted any of the wartime atrocities. Two exceptions are the two multi-accused trials held in 2005 and 2006 before the High Court in Freetown in which a total of 88 rebels were tried for war-related crimes committed in 2000 (and thus not covered by the Lomé Amnesty). Since Sierra Leonean law does not cover international crimes, the accused were charged with national

[108] Special Court Agreement (n 4). It is noted that the Special Court was set up to prosecute not only members of the RUF, as requested by President Kabbah, but also members of other factions, including the pro-government militia CDF.

[109] Charles Taylor was indicted by the SCSL on 7 March 2003, while still sitting as the head of state of Liberia, for his alleged support and assistance to the AFRC and RUF forces in carrying out their mission. Almost three years later, on 29 March 2006 Taylor was arrested in Nigeria and transferred to Liberia, from where he was immediately surrendered to the custody of the SCSL.

[110] Sam Hinga Norman, the most senior defendant in the CDF case, died from an illness after the closing arguments were made in his trial but before the chamber reached a judgment. The proceedings against him were terminated following his death in May 2007 and no judgment was issued in his case: see SCSL, *Prosecutor v Sam Hinga Norman*, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, SCSL-004-14-T, 21 May 2007.

[111] Two of the original indictees died before their trials started, and one of them, AFRC leader Johnny Paul Koroma, was never apprehended. These ten prosecutions do not include contempt of court proceedings.

[112] Charles Taylor was convicted by the SCSL Trial Chamber on 21 April 2012, and sentenced to 50 years' imprisonment on 30 May 2012. The appellate proceedings in his case are expected to conclude by September 2013: see Statement by the President of the Security Council, 9 October 2012, UN Doc S/PRST/2012/21 (2012). It is noted that on 20 June 2006, following a request by the UN Security Council, the proceedings against Charles Taylor were transferred for security reasons from Sierra Leone to The Hague, Netherlands. All the other SCSL trials were conducted in Freetown, Sierra Leone. See UNSC Res 1688(2006), 16 June 2006, UN Doc S/RES/1688 (2006).

[113] Statute of the Special Court for Sierra Leone (SCSL Statute) (entered into force 12 April 2002) 2178 UNTS 139, art 5, annexed to the Special Court Agreement (n 4), http://www.scsl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.

[114] ibid art 14(2).

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crimes. In any case, the accused were low-level fighters and the crimes were committed in connection with isolated incidents of hostilities.[115] The most serious atrocities in Sierra Leone were committed before the peace agreement was signed in July 1999, but their prosecution was prevented by a Lomé Amnesty.[116] In lieu of prosecutions, the peace agreement called for the creation of the Truth and Reconciliation Commission (TRC).[117] While truth commissions can establish some degree of accountability by providing a historical account of the atrocities and associating them with certain groups and individuals, it remains questionable whether the TRC managed to promote accountability in Sierra Leone.[118] Thus, while the SCSL tried a handful of 'big fish' and the national courts prosecuted very few 'small fry', all the mid-level perpetrators enjoy freedom sanctioned by the national amnesty.[119]

3.2 Impact of the SCSL on Sierra Leone's Legal Norms

A SCSL judge considered that the court, by not applying national norms, missed an important opportunity to interpret and develop national law and to promote a public debate on whether Sierra Leonean courts may prosecute certain atrocities.[120] Still, in theory, the SCSL could have affected the norms applied in the two national atrocity-related trials mentioned above, especially since both trials were held after the SCSL had started its proceedings. Thus, in an attempt to identify some normative effects of the SCSL in Sierra Leone these two national trials will be examined in the following paragraphs.[121]

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[115] The high-level perpetrators who were arrested in 2000 by the national authorities in connection with these proceedings were either transferred for trial to the SCSL (eg Foday Sankoh), or released before the national trials commenced (eg Mike Lamin).
[116] Lomé Peace Agreement (n 104) art IX.
[117] ibid art XXVI(1). The TRC submitted its final report to the Sierra Leonean government in October 2004. The report recommended, inter alia, increasing human rights protection, strengthening democracy and the rule of law, improving good governance and establishing a reparations fund for war victims: see Final Report of the Sierra Leone Truth and Reconciliation Commission, October 2004 (TRC Report), http://www.trcsierraleone.org.
[118] On the lack of implementation of some of the TRC's recommendations see, eg, HRW World Report 2009 (n 11); Amnesty International (n 26). On the TRC's difficulties in establishing the truth about the atrocities see, eg, Lydia Apori Nkansah, 'Restorative Justice in Transitional Sierra Leone' (2011) 1 *Journal of Public Administration and Governance* 157, 168–69.
[119] According to various reports, perpetrators who committed some of the worst atrocities evaded justice. See, eg, Michelle Staggs, 'Second Interim Report on the Special Court for Sierra Leone – Bringing Justice an Ensuring Lasting Peace: Some Reflections on the Trial Phase at the Special Court for Sierra Leone', University of California Berkeley War Crimes Study Center, March 2006, 135, http://socrates.berkeley.edu/~warcrime/documents/SecondInterimReport_003.pdf (naming four fairly senior mid-level perpetrators who escaped prosecution: former RUF spokesman Gibril Massaquoi, former CDF National Deputy Director of Operations Albert Nallo, and AFRC commanders Staf Al Haji (also known as Al Haji Boyoh) and Commander Savage.
[120] Interview notes with author. Another senior member of the SCSL suggested that the court's first Prosecutor refrained from charging the accused with national crimes because he assumed that the Lomé Amnesty would require the SCSL judges to cancel the charges. At the same time, however, the interviewee noted that it would have been useful to have charged some of the SCSL's defendants for the national crime of setting fire to property (under the SCSL Statute (n 113) art 5), as eventually their acts of burning became unpunishable. Interview notes with author.
[121] A valuable source of information about these trials was Clare da Silva, a Canadian lawyer who provided pro bono assistance to the defendants over a number of years.

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The first trial concerned the shooting of demonstrators on 8 May 2000, when at least 20 people were killed. The 57 defendants were members of the RUFP. They were charged with 81 counts of murder, conspiracy to commit murder and shooting with intent to murder.[122] The judgment was given in April 2006.[123] Of the 57 defendants, only ten were convicted,[124] but before their appeal was heard, they were released as a political gesture by the President of Sierra Leone. The exact reasons for their release are unknown. A defence lawyer who was involved in the case indicated that 'the former ruling government wanted to use them to disrupt the 2007 general elections'.[125] Another lawyer who assisted the defence case suggested that there was no political will to continue the trial.[126] She added that the trial was rife with violations of due process.[127]

The second trial concerned the abduction by rebels of 11 British soldiers near Freetown on 8 August 2000. The 31 defendants were members of the West Side Boys, a rebel group which had split from the AFRC. They were charged with 31 counts of conspiracy to commit murder, robbery with violence, wounding with intent, and wounding. In April 2006, the High Court convicted seven of the 31 defendants;[128] all seven appealed within the prescribed time limit. After waiting for about five years in detention for their appeal to be heard, they were finally released without a trial in 2009.[129] Due process violations were common throughout the proceedings.[130]

According to a Sierra Leonean lawyer, some of the defence attorneys in these national cases were also involved with the SCSL, although no references to SCSL norms were made during the national proceedings. The lawyer explained that referring to SCSL norms in national trials would have been futile, as the bench would not have applied the provisions.[131] This, combined with the above analysis of the national trials, suggests that the SCSL has had no normative impact on national criminal proceedings. This is unfortunate, as perhaps some of the due process violations

[122] I address this case in further detail in Sigall Horovitz, 'Sierra Leone: Interaction between International and National Responses to the Mass Atrocities', DOMAC, December 2009, DOMAC/3, 26-28, http://www.domac.is/media/domac/DOMAC3-SH-corr..pdf.
[123] The accused were all arrested between May and November 2000. The case was committed to the High Court in Freetown on 29 May 2002. The trial started on 7 June 2005 and the hearings lasted until December 2005.
[124] They were convicted on 15 counts of conspiracy to commit murder and received a sentence of ten years for each count to be served concurrently.
[125] Interview notes with author.
[126] I thank Clare da Silva for this information.
[127] It was stressed by Clare da Silva that the accused first obtained legal representation at around the start of the trial in June 2005, about five years after they were arrested in 2000. Also, the sentences were to start from the date on which the case was committed to the High Court (two years after the accused were arrested).
[128] They were convicted on ten counts of conspiracy to commit murder, and sentenced to ten years for each count to be served concurrently, starting from the date of conviction (six years after the accused were arrested and four years after their case was committed to the High Court). I address this case in further detail in Horovitz (n 122) 28–29.
[129] Based on an email from Clare de Silva dated 19 April 2012. According to Clare da Silva, there seems to have been little political interest in moving this trial forward.
[130] Clare da Silva explained that while the arrests were made in 2000, and the case committed to the High Court in Freetown on 29 May 2002, charges were not made known to the accused until several years later.
[131] Interview notes with author.

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would have been avoided had the SCSL's procedural norms been more visible in the national proceedings.

The Sierra Leonean lawyer added that national proceedings in Sierra Leone not only lack references to SCSL norms but they also lack references to SCSL jurisprudence more generally. He suggested that the development of criminal law in Sierra Leone is discouraged, and national courts do not normally rely on new jurisprudence, especially when it relates to human rights issues. He added that national judges and lawyers lack knowledge of SCSL jurisprudence.[132] As for certain doctrines followed by the SCSL, such as command responsibility and joint criminal enterprise, this lawyer noted that there was no need to apply them in the above national cases as these cases concerned the direct conduct of the accused.[133]

Indeed, according to two senior members of the SCSL who are familiar with the Sierra Leonean justice system, the court has been unable to encourage the national system to improve its procedural or substantive criminal norms.[134] However, the SCSL may still have an effect on legal reforms in Sierra Leone: at least two of its prosecutors (including a Sierra Leonean national) have been lobbying the government to incorporate the ICC Statute into national law.[135] Currently, Sierra Leone's national law does not cover international crimes. Thus, if the advocacy efforts of these two prosecutors prove to be successful, and international criminal law norms are consequently internalised into Sierra Leonean law, such a reform could be regarded as an impact of the SCSL.[136] But even if Sierra Leone were to implement the ICC Statute domestically, the implementing legislation would not apply retroactively to atrocities committed during the country's civil war of 1991–2002.[137] Still, the introduction of such a national law would have an important general effect on the national justice system, and signal that Sierra Leone no longer tolerates impunity following atrocities.[138]

3.3 Impact of the SCSL on Sierra Leone's Prosecution Rates and Trends

The potential of the SCSL to encourage the initiation of national proceedings in Sierra Leone was a priori limited, since such proceedings were prevented by the Lomé Amnesty (at least with regard to pre-Lomé crimes). Moreover, the creators of the SCSL did not consider it their task to encourage national trials in Sierra Leone and, accordingly, did not mandate the court to achieve this aim. This

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[132] Interview notes with author.
[133] Interview notes with author.
[134] Interview notes with author.
[135] Interview notes with author. It is noted that Sierra Leone has ratified the ICC Statute; however, as Sierra Leone is a dualist country, the ICC Statute must be incorporated into its national law before it can be applied nationally.
[136] While this norm internalisation is encouraged not by the SCSL directly but rather by its staff members acting in their personal capacity, it could still be considered to be an effect of the SCSL in that it was made possible by the court's presence in Sierra Leone. Further, one of the advocates of this norm internalisation is a Sierra Leonean, whose increased awareness of the importance of domesticating international criminal norms may have stemmed from his work at the SCSL.
[137] Interview notes with author.
[138] However, at the time of writing it is too early to tell whether the advocacy efforts of the SCSL prosecutors will in fact succeed.

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is despite a reference by the UN Security Council in its resolution in respect of the SCSL to 'the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone'.[139] Indeed, as is shown below, the SCSL did not try to encourage national atrocity-related proceedings in Sierra Leone even when it had the opportunities to do so. The court did not even encourage discussions about the possibility of initiating national proceedings.[140]

In one of its earliest decisions, the SCSL Appeals Chamber ruled that the Lomé Amnesty was inapplicable to cases before ICTs or national courts of third states applying universal jurisdiction.[141] The decision did not discuss the amnesty's applicability in cases before the national courts of Sierra Leone. This was probably because this issue was not raised before the judges or considered relevant to the matter at hand – namely whether the Lomé Amnesty prevented proceedings before the SCSL. However, discussing the amnesty's applicability in universal jurisdiction cases held in third states was also not absolutely necessary for determining the matter at hand, yet the judges chose to discuss this issue. Had the judges considered it within their interest or authority to encourage national atrocity-related trials in Sierra Leone, they might have addressed the amnesty's applicability in cases before Sierra Leonean national courts.

The SCSL also fell short of encouraging national prosecutions in Sierra Leone for post-Lomé atrocities (which are not covered by the amnesty). This was confirmed by a Sierra Leonean lawyer, who suggested that the abduction of 500 UN peacekeepers in 2000, a major post-Lomé atrocity, was not subject to prosecution in Sierra Leone because it was addressed by the SCSL.[142] However, the two court systems may legally address the same event as long as each deals with different defendants. Since the SCSL pursued only the top leaders of the crimes, the national courts could have prosecuted the mid- (and low-) level perpetrators involved in the abduction, but it chose not to do so.

A senior SCSL official considered that it is better not to have national trials if the local system is unable to offer fundamental guarantees. Even if the law does provide international standards of justice, national trials should be held only if these standards are applied in practice, which includes standards in relation to the protection of victims and witnesses. In Sierra Leone, added the court official, there are concerns regarding lack of fairness towards defendants and witnesses, and it may take some time before fair trials are achievable. However, the same official argued that the creators of ICTs should bear in mind that the international cases may eventually have to be handed over to national courts; they should therefore devise a plan in advance to ensure that the national courts are ready to receive these cases.[143]

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[139] UNSC Res 1315 (n 4) preamble, para 11 ('Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone').

[140] According to a Sierra Leone Supreme Court judge, national discussions on prosecuting pre-Lomé crimes never took place in Sierra Leone. Interview notes with author.

[141] SCSL, *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004.

[142] Interview notes with author. It is noted that only the top-level perpetrators are prosecuted by the SCSL while the mid- and low-level perpetrators who had been involved in the abduction were never prosecuted.

[143] Interview notes with author. Interestingly, the Secretary-General's report stated: 'The lifespan of the Special Court … will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, *an indication of the capacity acquired by the local courts to assume the prosecution of the remaining*

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On 27 May 2008 the Rules of Procedure and Evidence of the SCSL were amended to allow it to transfer cases to national courts, but the SCSL prosecution has never requested (or indicated that it would request) the court's judges to refer cases to Sierra Leonean courts. Such a referral request, or an indication that it was being contemplated, could have encouraged national discussion about the need to abolish or restrict the Lomé Amnesty to enable Sierra Leonean courts to prosecute crimes addressed by the SCSL. However, in contrast to the parallel ICTR rule on case referrals,[144] the relevant SCSL rule does not allow the court to monitor or recall cases after having transferred them to national courts. This, combined with the absence of fair and efficient criminal proceedings in Sierra Leone, militated against such a request by the SCSL prosecution.

3.4 Impact of the SCSL on Sierra Leone's Sentencing Practices

The maximum sentence in Sierra Leone is the death penalty, which was last carried out in 1998 in connection with treason charges.[145] In 2004, capital punishments were imposed by a Sierra Leonean court in a treason case, but the sentences were revoked on appeal in 2008.[146] By contrast, the SCSL's maximum penalty is life imprisonment. It has so far passed sentences ranging from 15 to 52 years' imprisonment. The sentences meted out by the Sierra Leonean courts in the two above-mentioned national war-related trials were much lower: a possible reason for this difference is that the crimes addressed by the national courts were of lesser gravity than those addressed by the SCSL.

Interestingly, SCSL norms are used by human rights groups in their efforts to advocate the abolition of the death penalty in Sierra Leone. For example, following the imposition of death penalties in 2004, Amnesty International lobbied for their abolition in Sierra Leone by calling for 'an end to the discrepancy [in sentencing practices] between national courts and the Special Court'.[147] However, aside from 'allowing' its sentencing norms to be used in this manner, the SCSL has not encouraged Sierra Leone to abolish the death penalty. A Sierra Leonean human

cases, or the unavailability of resources' (emphasis added). See UNSC Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915, para 28.

[144] See nn 17–19 and accompanying text.

[145] In October 1998 24 persons were publicly executed after a military court convicted and sentenced them to death on charges of treason. Although death sentences were imposed in Sierra Leone after this trial, none were carried out. As of the end of 2008, Amnesty International reported that 13 persons were on death row: see Amnesty International (n 26). Human Rights Watch reported that 12 individuals were on death row in early 2009: see HRW World Report 2009 (n 11).

[146] In 2004 the High Court in Freetown convicted and sentenced to death ten individuals in connection with a 2003 coup attempt. In 2008, the Sierra Leonean Court of Appeals overturned the convictions, revoked the death penalties and acquitted all the defendants: Amnesty International (n 26); Human Rights Watch (n 11). Regarding the 2004 conviction and death penalties see Amnesty International, 'Sierra Leone: Amnesty International Expresses Dismay at Ten Death Sentences for Treason', 21 December 2004, http://www.amnesty.org/en/library/info/AFR51/009/2004/en. The imposition of the death penalty in 2004 came only weeks after the TRC recommended its abolition: see TRC Report (n 117), Vol 2, Ch 3, para 54. In 2008, the Sierra Leonean Court of Appeals overturned the convictions, revoked the death penalties and acquitted all the defendants: ibid.

[147] Amnesty International, ibid.

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rights activist explained that the SCSL has also refrained from encouraging national actors to advocate for abolition.[148]

The revocation of the death penalties in 2008 by the Sierra Leonean Court of Appeals was reported to be 'the first successful appeal against a death penalty… opening the possibility of an eventual end to capital punishment [in Sierra Leone]'.[149] However, despite this expression of hope (and the TRC's recommendation in 2004 that the death penalty be abolished),[150] capital punishment still exists in Sierra Leone. Amnesty International reported that attempts made in August 2008 by civil society groups to pressurise Sierra Leone into abolishing the death penalty were unsuccessful and that Sierra Leone abstained, in December 2008, on a UN General Assembly resolution calling for a worldwide moratorium on executions.[151]

3.5 Impact of the SCSL on Sierra Leone's Judicial Capacity

As the SCSL's mandate comes to its end, it is increasingly engaging in judicial capacity-building activities in Sierra Leone.[152] Some of these activities are inspired by the aspirations of Sierra Leonean members of the SCSL to see their national system improve; others are motivated by the desire of the SCSL to leave behind a legacy, or to ensure that its ongoing residual obligations are fulfilled in the long term.[153] These SCSL activities are discussed in the following paragraphs.

3.5.1 National Witness Protection Scheme

The SCSL has recently become involved in helping Sierra Leone to plan and implement a national witness protection programme.[154] According to a court official, the government is receptive to its suggestions, and Sierra Leone's President and other senior officials agree that there is a need for such a scheme. Another SCSL official explained that the national demand for a witness protection scheme was as a result of the court's presence and processes in Sierra Leone. The Sierra Leonean public, content with the SCSL's witness protection measures, requested the SCSL to encourage the national authorities to set up a witness protection system.[155] According to yet another SCSL official, a witness protection scheme would allow the Sierra Leonean authorities to deal more effectively with criminal cases, as at present even basic contact with

[148] Interview notes with author.
[149] Mohamed Fofanah, 'Death Penalty – Sierra Leone: Successful Appeal Strengthens Case For Abolition', *IPS News*, 12 December 2008, http://ipsnews.net/news.asp?idnews=45088.
[150] TRC Report (n 117) Vol 2, Ch 3, para 54.
[151] Amnesty International (n 26).
[152] See, eg, UNSC Department of Public Information (News and Media Division), 'Special Court for Sierra Leone Faces Funding Crisis, as Charles Taylor Trial Gets Underway, Security Council Told Today in Briefing by Court's Senior Officials', 8 June 2007, UN Doc SC/9037.
[153] ibid.
[154] SCSL, 'Special Court Launches Witness Protection Training Programme', 5 November 2009, http://www.sc-sl.org/LinkClick.aspx?fileticket=kJu0OgoLU2E%3d&tabid=53.
[155] Interview notes with author. The official added that since such activities were not budgeted for in advance, the SCSL had to raise funds for this initiative.

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witnesses is lacking.[156] An official of the Sierra Leonean judiciary, who was generally critical of the SCSL, referred with satisfaction to the SCSL's intention to establish a national witness protection programme.[157]

3.5.2 Training Activities

A top SCSL official noted that since late 2008 the court has embarked on about 20 different training programmes for the local population. These range from teaching the national Anti-Corruption Commission how to use 'insider witnesses' in their proceedings to holding a course on defensive driving given by the SCSL transport unit.[158] According to other SCSL members, to ensure the transfer of skills to the national level the court has established a Legacy Working Group involving national institutions. The SCSL has assessed the needs of national institutions such as the prison service and police, and is training their personnel in the relevant areas; it is also training court reporters of the Sierra Leonean judiciary and investigators with the national Human Rights Commission and Anti-Corruption Commission.[159] The SCSL also holds seminars on international humanitarian law at Sierra Leone's Foray Bay College and at the local Bar school.[160]

Moreover, a SCSL staff member mentioned that the court is encouraging the establishment of a public defence office at the national level, which would select and assign duty counsel, and would rely largely on the local Bar association.[161] A senior Sierra Leonean official confirmed that the government has been encouraged by the SCSL to create a national public defender's office.[162] SCSL officials have also focused on developing a legal and institutional framework to prosecute future international crimes: as noted above, SCSL officials are promoting the incorporation of the ICC Statute into national law.[163] In addition, a SCSL official indicated that there are discussions within the SCSL about encouraging the establishment of a war crimes office under Sierra Leone's Ministry of Justice.[164] It is also noted that the SCSL intends to leave behind its physical building for local use.

3.5.3 Employment of Sierra Leoneans by the SCSL

The SCSL's reliance on national staff has a strong capacity-building component. It could ensure that once the court has completed its work, Sierra Leone will be left with professionals capable of supporting a rule of law society. More than half of the SCSL's staff members are Sierra Leoneans. While many of them are employed in non-professional posts such as drivers, security

[156] Interview notes with author.
[157] Interview notes with author.
[158] Interview notes with author.
[159] Interview notes with author.
[160] Interview notes with author.
[161] Interview notes with author.
[162] Interview notes with author.
[163] Interview notes with author.
[164] The official explained that while there is no political will to hold national trials for past atrocities, a war crimes office may be useful in the event of future incidents of atrocity. Interview notes with author.

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guards and cleaners, others are placed in senior positions. In addition, both the defence and prosecution sections have been recruiting Sierra Leonean lawyers and interns.[165] Furthermore, Sierra Leonean police officers and investigators are seconded to the SCSL for 90-day periods to familiarise them with complex criminal investigation and evidence handling techniques.[166]

Senior SCSL members explained that the court has exposed its Sierra Leonean employees to international standards of trial conduct, which affects national capacity by developing knowledge and expertise in the country. However, a Sierra Leonean lawyer considered that there are too few national legal practitioners involved in the SCSL process to be able to influence national criminal proceedings. When several local lawyers tried to participate in criminal proceedings before national courts in a manner influenced by their previous practice before the SCSL, their approach was too foreign for their local colleagues to accept. In his view, had more national lawyers been involved in the SCSL process, a more significant local impact would have resulted.[167] Another interviewee, a Sierra Leonean human rights activist, noted that some Sierra Leoneans who had worked at the SCSL and subsequently returned to the national judiciary did not eventually use the skills they acquired at the SCSL to improve national processes.[168] Moreover, SCSL officials stressed that Sierra Leonean nationals serving in senior positions at the SCSL may not return to the national system after the court winds up, preferring instead to seek international jobs. From this perspective, the court may be depleting instead of improving national capacity.[169]

3.5.4 Outreach Activities

Commentators have repeatedly praised the SCSL's extremely active Outreach Section for its effectiveness.[170] Yet none of the interviewees mentioned the potential of the SCSL's outreach activities to enhance local judicial capacities (or any type of impact discussed in this article). It is possible that while these outreach activities have enhanced the level of knowledge of

[165] A Sierra Leonean lawyer, who was involved with the SCSL, explained that the defence teams at the SCSL were initially hesitant to employ Sierra Leoneans. However, when the Registry allocated resources for this purpose (out of a special EU fund) the defence teams began to recruit young Sierra Leonean lawyers as 'Junior Professional Consultants'. This was done to build national capacity, and also to reinforce the defence teams. From 2007, the lawyer added, the prosecution also began to admit national lawyers as Junior Professional Consultants. Interview notes with author.

[166] Tom Perriello and Marieke Wierda, 'Prosecutions Case Studies Series: The Special Court for Sierra Leone Under Scrutiny', *International Center for Transitional Justice*, March 2006, http://www.ictj.org/static/Prosecutions/Sierra.study.pdf.

[167] Interview notes with author.

[168] Interview notes with author.

[169] Interview notes with author.

[170] See, eg, Antonio Cassese, 'Report on the Special Court for Sierra Leone', 12 December 2006, paras 270 and 30, http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176 (referring to the SCSL outreach programme as 'the crown jewel of the Special Court', and noting that the programme 'has proved to be exemplary and should constitute a model for future ICTs'); Perriello and Wierda (n 166) ('[t]he Special Court for Sierra Leone boasts the strongest outreach program of any tribunal to date').

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many Sierra Leoneans about the SCSL, this knowledge has not influenced national judicial norms, practices or capacities.[171]

4. CONCLUSION

This article has identified the judicial impact of the ICTR and the SCSL on their target countries. The SCSL has had a relatively limited impact on Sierra Leone's justice system, which in turn has limited its contribution to the promotion of accountability in Sierra Leone. Indeed, the government's amnesty regime prevented national atrocity-related proceedings, thus limiting the ability of the SCSL to impact on such proceedings. However, Sierra Leone's amnesty policy was clear from the time when the SCSL was established. Given these circumstances, the court could have tried to encourage national prosecutions in Sierra Leone by sending a clearer message at the national level that international law is developing in the direction of prohibiting such blanket amnesties from covering international crimes, even in national courts. The SCSL could have done so explicitly through its judgments, or through outreach activities that encourage discussion about such international legal developments. To encourage national willingness and the capacity to address accountability, the court could have created better links with national judicial institutions through its current or former Sierra Leonean staff members. Moreover, the SCSL could have made greater efforts to apply national law and thus contribute to national legal developments, but instead of making such efforts, the SCSL kept a distance from the national justice system.

Thus, the lack of significant SCSL influence on Sierra Leone's justice system is not exclusively explained by national practices such as the amnesty, but also by international practices, which include the SCSL's hands-off approach towards the national justice system.[172] The combination of such national and international approaches helps to explain why the SCSL generated minimal impact on national accountability procedures despite having structural features – such as a hybrid composition, presence in the target country and a commendable outreach programme – that were expected to generate a significant effect nationally. In addition, it seems that the SCSL did not employ those structural features to increase its impact on the national justice system, but used them instead to improve its own processes. For example, the celebrated SCSL outreach programme focused mainly on improving the court's own work (by explaining its processes to the local population and thus gaining their support for those processes) rather than on encouraging

[171] The SCSL's Outreach Section keeps the local population informed about the SCSL's missions and activities, thus enhancing the court's national relevance and legitimacy. For more details see Sigall Horovitz, 'Transitional Criminal Justice in Sierra Leone' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Beyond Truth versus Justice: Transitional Justice in the Twenty-First Century* (Cambridge University Press 2006) 43, 58–59.

[172] It is noted that Sierra Leone also took measures to keep a distance from the SCSL. For example, in the early years of the SCSL, the government either failed to appoint Sierra Leoneans to several of the key SCSL positions that were allocated to government appointees, or appointed Sierra Leoneans who live abroad and thus are less likely to seek employment with the local judiciary: see Alejandro Chehtman, 'Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone and Colombia', DOMAC, June 2011, DOMAC/9, fn 73 and accompanying text, http://www.domac.is/media/domac/Domac-9-AC-Final-Paper.pdf.

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national judicial procedures. Nonetheless, the court did have a certain degree of impact on Sierra Leone's capacity to handle criminal proceedings, for example, by encouraging the development of a witness protection programme. The SCSL may still inspire legal reforms in Sierra Leone, as discussed in this article, such as the abolition of the death penalty and the incorporation of the ICC Statute into national law.

In Rwanda, where scores of genocide suspects have been prosecuted at the national level, the ICTR may not have needed to focus on influencing the quantity of national trials, but rather on helping Rwanda to improve the quality and fairness of its national procedures. A senior Rwandan prosecutor was of the view that if the UN Security Council wanted the ICTR to have an impact on national trials in Rwanda, it should have opted for an ICT model that was more complementary with national proceedings.[173] However, research shows that other existing models of ICTs were not necessarily more successful in influencing national proceedings. The ICC, for example, even though its jurisdiction is complementary with that of national courts, has thus far not been able to encourage national atrocity-related prosecutions in its target countries.[174] Similarly, as shown above, the SCSL has not managed to affect national proceedings in Sierra Leone, despite having jurisdiction over national crimes and including national judges. By contrast, the ICTR has managed to encourage significant legal reforms in Rwanda, including strengthening guarantees of due process and promoting the abolition of the death penalty. The ICTR also motivated the improvement of Rwandan prison facilities,[175] and encouraged a national war crimes trial involving RPF defendants.

The ICTR managed to generate many of the above national effects by introducing a procedure for referring cases to national jurisdictions which, for the Rwandan government, presented an opportunity to assert its jurisdiction over relatively high-profile genocide perpetrators. Interestingly, while the ICTR's referral procedure created an incentive for Rwanda to improve its legal norms and institutions (in order to hear ICTR cases), it also created an incentive for the ICTR to cooperate more seriously with Rwanda, particularly through training activities (aimed at facilitating the transfer of its cases to national courts). As shown above, these enhanced levels of cooperation between the ICTR and Rwanda, and the resulting increased mutual trust, generated the most unexpected result of a trial in Rwanda against four RPF officers accused of committing war crimes against Hutu civilians. The willingness of the ICTR Prosecutor to

[173] Interview notes with author.

[174] Sigall Horovitz, 'DR Congo: Interaction between International and National Responses to the Mass Atrocities', DOMAC, February 2012, DOMAC/14, http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf; Sigall Horovitz, 'Uganda: Interaction between International and National Responses to the Mass Atrocities', DOMAC, January 2013, DOMAC/18, http://www.domac.is/media/domac-skjol/DOMAC-18-Uganda.pdf; Sigall Horovitz, 'Sudan: Interaction between International and National Responses to the Mass Atrocities in Darfur', DOMAC, April 2013, DOMAC/19, http://www.domac.is/media/domac/DOMAC-19–Sudan–SH.pdf. However, there is evidence that the ICC has had some success in encouraging national atrocity-related proceedings in Colombia: see Alejandro Chehtman, 'The Impact of the ICC on Colombia: Positive Complementarity on Trial', DOMAC, October 2011, DOMAC/17, http://www.domac.is/media/domac-skjol/Domac-17-AC.pdf.

[175] Ironically, following these improvements, Rwanda's prison facilities have been deemed to conform to international norms by none other than the SCSL, which has preferred to send its own convicts to serve their sentences in Rwanda over sending them to prisons in West Africa or elsewhere.

https://doi.org/10.1017/S0021223713000125 Published online by Cambridge University Press

defer jurisdiction to Rwanda over certain suspects, and to meaningfully engage in capacity-building activities in Rwanda, was an important factor that enabled the ICTR to influence the Rwandan justice system. Significantly, Rwanda's own approach was also crucial in this regard, as many of the ICTR's national influences were facilitated by Rwanda's policy of maximum accountability for genocide-related crimes and by the country's repeated efforts to make adjustments to meet the ICTR's requirements for transferring cases. In other words, the ICTR's referral procedure was an impact-enhancing mechanism because Rwanda was interested in receiving ICTR cases and because the ICTR Prosecutor was willing to cooperate with the Rwandan authorities.

Thus, in order to explain when, and how, some ICTs (such as the ICTR) have significant influence on national judicial proceedings while others (such as the SCSL) have far less influence, it is important to understand not only the ICT's structure (hybrid or purely international, presence in or out of the target country, strength of outreach programme), but also other factors such as the national policies of the target country (amnesty versus accountability) and the approach of key ICT members towards the target country's judiciary (proactive engagement or distance). The latter factor will often be related to the ICT's mandate, or how key ICT actors interpret it. The constitutive instruments of both the ICTR and SCSL stress the need to strengthen the national judicial system of their target country through international cooperation.[176] However, these words were not understood as mandating these ICTs to actively strengthen the relevant national judicial system. For the ICTR this changed when the UN Security Council urged it to adopt a completion strategy and refer cases to national courts. From that moment, as explained above, ICTR key officials considered it within their mandate to encourage national proceedings in Rwanda – and indeed they became proactive in this regard. It is therefore likely that an international court's impact on national justice systems is connected with the question of whether it is specifically mandated (or understood by its key actors as mandated) to have such an impact.

Since the ICTR and SCSL are still engaged in national capacity-building activities as they prepare for closure, and since their jurisprudence and legacies may still affect local courts, their national judicial impact may need to be reassessed in the future. However, by identifying the degree of this impact to date, the article has hopefully enriched our understanding of whether and how these ICTs have contributed so far to promoting accountability in Rwanda and Sierra Leone, respectively. In addition, by focusing on the potential and the limitations of the ICTR and SCSL in terms of influencing national judicial procedures, the article has tried to stress some of the promises and pitfalls of complementarity or 'positive' complementarity.

[176] See n 6.

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