

Open Society Justice Initiative

# **OPTIONS FOR JUSTICE**

**A Handbook for Designing  
Accountability Mechanisms  
for Grave Crimes**

**OPEN SOCIETY  
FOUNDATIONS**



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# PREFACE

***Hans Corell***

**Former UN Under-Secretary-General for Legal Affairs and Legal Counsel**

In the field of international criminal justice, we have seen a tremendous development over the last 25 years. It started with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Four years later, in 1998, the Rome Conference adopted the Rome Statute of the International Criminal Court (ICC). This was then followed by the agreements between the United Nations (UN) and Sierra Leone on the Special Court for Sierra Leone (SCSL) in 2002, and then between the UN and Cambodia on the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003. There are many additional experiences in this field, including purely national proceedings in such places as the Democratic Republic of Congo and Argentina, and internationally assisted domestic proceedings in such places as Bosnia. But the examples I mention at the outset are very special to me, since I was directly involved in these efforts during the years when I was the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations in 1994–2004.

In the ensuing years, both the United Nations General Assembly and the Security Council have further entrenched norms of criminal accountability for the gravest of crimes. They have done this, in part, by adopting resolutions that emphasize the importance of the rule of law at the national and international levels. By way of example, reference could be made to the declaration adopted by the high-level meeting of the General Assembly on September 24, 2012 (A/RES/67/1).

In this resolution, heads of state and government and heads of delegation reaffirm their solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, all of which are indispensable foundations for a more peaceful, prosperous, and just world (para. 1). They further reaffirm that human rights, the rule of law, and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations (para. 5). In addition, they state that they are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development,

the eradication of poverty and hunger, and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law (para. 7). They also reaffirm the principle of good governance and commit to an effective, just, nondiscriminatory, and equitable delivery of public services pertaining to the rule of law, including criminal, civil, and administrative justice; commercial dispute settlement; and legal aid (para. 12).

Of particular interest in this context is that they commit to ensuring that impunity is not tolerated for genocide, war crimes, and crimes against humanity, or for violations of international humanitarian law and gross violations of human rights law. They also commit to ensuring that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law. For this purpose, they encourage states to strengthen national judicial systems and institutions (para. 22).

It should be emphasised that in a system under the rule of law, the protection of human rights and ability to deal with serious crimes through a proper criminal justice system both at the national and international levels are core elements.

From the vantage point of 2018, such language may strike many working in the field of international justice as relatively unremarkable. It is, however, worth recalling that the understandings now enshrined in UN resolutions were, not so long ago, far from self-evident. For those with backgrounds in domestic justice systems, they may still not be.

When I joined the United Nations as Under-Secretary-General for Legal Affairs and Legal Counsel, I had been a judge in my country, Sweden, for some 10 years, from 1962 to 1972. The main focus of the work in these courts was criminal law. In 1972, I joined the Ministry of Justice to do legislative work, and after 13 years in this ministry, the last three years as its Chief Legal Officer, I became the Legal Adviser of the Ministry for Foreign Affairs in 1984, a position that I held until I joined the United Nations.

In August 1992, the Conference on Security and Cooperation in Europe (CSCE), now the Organization for Security and Cooperation in Europe (OSCE), appointed me and two colleagues as war crimes rapporteurs in Bosnia and Herzegovina and Croatia. My colleagues were Ambassador Helmut Türk, the Legal Adviser in the Ministry for Foreign Affairs in Austria, and Gro Hillestad Thune, the Norwegian member of the Council of Europe Commission of Human Rights. On February 9, 1993, we

presented our final report: *Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia*. In this report, we proposed that a war crimes tribunal for the former Yugoslavia should be established on the basis of a treaty. This was the only legal avenue for the CSCE. At the same time, the question of establishing such a court was discussed in the UN Security Council. The CSCE therefore immediately forwarded our proposal to the United Nations. On February 22, 1993, the Security Council decided to establish the ICTY, mainly on the basis of a report just delivered by a UN Commission of Experts.

The reason I mention this here is that, as a judge at the national level, I was very doubtful about the idea of international criminal courts. I thought that they would be too politicized and that it would be difficult for such courts to deliver justice in a safe and secure manner. However, I completely changed my mind when I was charged with serving as war crimes rapporteur in the former Yugoslavia. I realized that nobody was doing anything about bringing to justice those who were responsible for the crimes that I had identified during our visit to Croatia. At the same time, I had become more aware of the interdependence between the rule of law and criminal justice. One of the major challenges in the future, if we want to create a world where people can live in dignity with their human rights protected, is to establish an effective criminal justice system at the national and international levels.

Against this background, it was with great interest that I read *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes*. With reference to the experiences over the years analyzed in the handbook and the requirements relating to the rule of law reaffirmed by the General Assembly of the United Nations, it is obvious that there will be a need for additional mechanisms to deal with the impunity that actually breeds new conflicts in the world. There are clear demands for justice from Syria to Sri Lanka, from El Salvador to South Sudan. It is therefore of the utmost importance to make use of the experiences of the institutions that have been established so far when designing new mechanisms.

The manner in which the handbook is organized should be of great assistance here. What I found particularly helpful is the way in which the material is presented: a summary of what is being examined, experience to date, lessons and considerations, and a key questions to make a determination in the subject matter. This will greatly assist those concerned. In particular, the key questions should assist in focusing on the specifics of the situation at hand. As stated in the handbook, these questions should serve as a checklist.

The value of comparative experience when designing new mechanisms and the need for models tailor-made to the particularities of each situation cannot be overemphasized. Of particular importance is that there will be a need for new models, despite the existence of the ICC.

Needless to say, I read the analyses of the institutions mentioned above with specific interest. The analyses are very much along the lines of my own assessment of the situations. This applies in particular to the analyses of the SCSL and the ECCC, where I represented the United Nations as chairman of the UN delegations responsible for negotiating the agreements with the two host states. The handbook takes note of serious flaws in the ECCC's design, and in my view, in the future, the United Nations imprint should not be given to institutions over which the organization does not have full administrative control. While I believe that the ECCC is not a model to be replicated, the handbook details the negative lessons while also noting some positive innovations.<sup>1</sup>

The purpose of this handbook is twofold: (1) to assist policymakers in deciding whether to establish or support a justice mechanism, and (2) to assist those who are charged with the task of developing models once the policy decision is made. In the latter category, we will find: state officials and diplomats, national investigation and prosecution authorities, staff and officials of the United Nations and other inter-governmental organizations, and those who work for national and international nongovernmental organizations. In my view, the handbook will serve these categories well. The policymakers are well advised to keep in mind also the requirements relating to the rule of law reaffirmed by the General Assembly of the United Nations and the commitments mentioned above.

Finally, there are three elements that I often reflect on when it comes to establishing criminal justice mechanisms: languages, the principle of legality, and financing.

With respect to languages, it is very important to keep in mind what is said in the handbook: that having too many official languages can cause delay and raise costs. One single additional language will have a dramatic impact on the costs for the institution contemplated.

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1. I have further developed my thoughts on this in my introduction to *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals*, ed. David M. Crane, Leila Sadat, and Michael P. Scharf (Cambridge: Cambridge University Press, forthcoming), see [cambridge.org/9781108424165](http://cambridge.org/9781108424165).

With respect to the principle of legality, in addition to what is said in the handbook, reference should be made to Article 15, second paragraph of the International Covenant on Civil and Political Rights:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The existence of the Rome Statute is an important clarification in this respect. I also think that the fact that the UN Security Council, on May 25, 1993, adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia must be taken into consideration when this provision is construed today (S/RES/827 [1993]).

With respect to financing, I realize that this sometimes has to be organized through voluntary contributions. However, as I have said in the past, I was deeply concerned that the funding of the SCSL was not made through assessed contributions. There is actually a constitutional element here too, which becomes apparent if one makes a comparison with funding of courts at the national level. What credibility would national courts have if they were funded by different donors and not from taxes or similar official revenues? It is obvious that the same reasoning should be applied at the international level. In my view, this is an element that should be borne in mind in designing new mechanisms.

These are just some of the lessons that I find to be of particular importance. There are many others found throughout this valuable handbook. Which lessons are most salient will depend on a given context. This handbook has content relevant to those designing accountability mechanisms for grave crimes in any location and under any circumstances. In the future, it should be possible to design smarter, more effective and efficient mechanisms to enforce the mounting expectation of criminal accountability reflected in international law.



# LIST OF ABBREVIATIONS

ABA-ROLI	American Bar Association Rule of Law Initiative
ACJHR	African Court of Justice and Human Rights (proposed criminal chamber)
AI	Amnesty International
ATS	Alien Torts Statute
AU	African Union
BiH WCC	Bosnia and Herzegovina War Crimes Chamber
CICIG	<i>Comisión Internacional contra la Impunidad en Guatemala</i> (International Commission against Impunity in Guatemala)
DESA	United Nations Department of Economic and Social Affairs
DPG	Development Partners Group (Uganda)
EAC	Extraordinary African Chambers (Senegal, for Chad Hissène Habré and ors.)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCL	Extraordinary Criminal Court for Liberia
EU	European Union
EULEX	European Union Rule-of-law Mission in Kosovo
FIDH	<i>Fédération Internationale des Droits de l'Homme</i> (International Federation for Human Rights)
GIEI	<i>Grupo Interdisciplinario de Expertos y Expertas Independientes</i> (Interdisciplinary Group of Independent Experts, Mexico)
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	International Crimes Division (High Court, Uganda)
ICJ	International Court of Justice
ICT	International Crimes Tribunal for Bangladesh
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHT	Iraqi High Tribunal

IIIM	International, Impartial and Independent Mechanism (Syria)
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JPL	Justice and Peace Law (Colombia)
KLA	Kosovo Liberation Army
KWECC	Kosovo War and Ethnic Crimes Chamber
MENA	Middle East and North Africa
OLA	Office of Legal Affairs (UN Headquarters, New York)
OSJI	Open Society Justice Initiative
Reg. 64 Panels	Panels Constituted under Regulation 64 of the United Nations Mission in Kosovo
SCB	Special Chamber for Burundi
SCC	Special Criminal Court for Central African Republic
SCIT	Special Crimes Investigation Team (East Timor)
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit (East Timor)
SITF	Special Investigative Task Force (EULEX, Kosovo)
SJP	Special Jurisdiction for Peace (Colombia)
SPSC	Special Panels for Serious Crimes (East Timor)
STK	Special Tribunal for Kenya
STL	Special Tribunal for Lebanon
SWCC	Special War Crimes Chamber (Serbia)
UN	United Nations
UNC	Charter of the United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNMIK	United Nations Mission in Kosovo
UNMIT	United Nations Mission in Timor Leste
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTAET	United Nations Transitional Administration in East Timor

# I. INTRODUCTION

## **Emergence of Accountability Mechanisms for Grave Crimes**

In the aftermath of World War II, the victorious powers created the first mechanisms dedicated to holding some perpetrators of grave crimes criminally accountable. The Nuremberg and Tokyo trials, which largely took place between late 1945 and 1947,<sup>2</sup> provided hope that future grave crimes would be punished. Perhaps the prospect of criminal justice could even deter such crimes, which were being defined by an emergent field of international criminal justice. However, soon after the conclusion of the Nuremberg and Tokyo experiments, the Cold War dawned and largely stalled the field's development for the next four decades.

Mass violence continued throughout this period and beyond. In the 63 years following World War II, an estimated 92–101 million people were killed in the course of some 313 armed conflicts along cultural, political, social, economic, racial, ethnic, and religious lines.<sup>3</sup> These figures do not include countless victims of other atrocities, including rape and other forms of sexual assault, enforced disappearance, and torture.

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### **“Grave Crimes”**

This handbook uses the general term “grave crimes” to refer to crimes of genocide, crimes against humanity, war crimes, and other serious forms of crime that merit international concern. Other common terms used to refer to overlapping categories of crimes include “international crimes,” “Rome Statute crimes,” and “crimes under international law.” “Grave crimes” are defined in some national legal codes, but this handbook does not use the term in the sense of any particular domestic definition. Internationally, the term is legally imprecise. This handbook uses “grave crimes” as shorthand when discussing a broad range of mechanisms that deal with international criminal law.

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By the early 1990s, the Cold War had ended, allowing diplomatic space for the establishment of ad hoc tribunals in response to grave crimes in the former Yugoslavia and Rwanda. In the 25 years since the creation of the two courts, there has been a proliferation of mechanisms around the world for the investigation, prosecution, and adjudication of grave crimes cases.

In 1998, states agreed to establish a permanent court for war crimes, crimes against humanity, and genocide: the International Criminal Court (ICC), which became operational in 2002. The ICC is a court of last resort, meant to complement national jurisdictions that retain primary responsibility to prosecute crimes under the Rome Statute.<sup>4</sup> States within this “Rome Statute system” and many of those that still fall outside of it have pursued various approaches to criminal justice for grave crimes.

Grave crimes continue to be committed on an alarming scale around the globe—in such places as Syria, Palestine, Iraq, South Sudan, Burundi, Afghanistan, Ukraine, Mexico, the Philippines, Myanmar, and North Korea. For those demanding criminal accountability in relation to these situations, the experiences of existing accountability mechanisms may hold important lessons.

Some models of criminal accountability have proved more effective than others. Mechanisms in such places as Senegal (in relation to grave crimes committed in Chad), Sierra Leone, Guatemala, and Bosnia have achieved notable successes, while others, in such places as East Timor / Timor-Leste, Kosovo, and Uganda have struggled. In part, results can be explained by operational performance. But in large measure, the *design* of accountability mechanisms for grave crimes has influenced their efficacy. Much can be learned from justice models of the past 25 years, which may inform the design of new institutions.

## **Purpose of this Report**

This handbook seeks to distill lessons from past experiences to help guide those designing new mechanisms of criminal accountability for grave crimes. There is no optimal mechanism model or set of models. In choosing which design elements best suit a new context, policymakers must weigh the strengths and weaknesses of different possibilities; certain design choices may be appropriate in some places but poor choices in others.<sup>5</sup> The lessons and considerations this handbook offers are meant to guide policymakers through often-thorny calculations about costs, benefits, and even contradictions in design choices. Adding a layer of complexity, stakeholders may have differing views on the issues at stake and the solutions that strike the right balance.

Extensive work has been done by a number of actors in the field of international criminal justice in extracting “lessons learned” and “best practices” from various international justice-related endeavors, including by a number of mechanisms themselves.<sup>6</sup> However, most of this body of work consists of reports on individual

mechanisms, or places great emphasis on their operations and proceedings. This handbook is distinct in the breadth of its comparative analysis and its focus on the *design* of mechanisms, as opposed to their operation. For example, questions of prosecution strategy (including who should be targeted for investigation, or prosecution, and how) are not considered. To be sure, the line between design and operational lessons is not always clear; mechanism design influences operational decisions. For example, the operational experience of a specific mechanism might have been negative because of a particular design flaw, such as its jurisdiction being too broad, or too narrow, or its independence compromised.

In the past, stakeholders have tended to approach decisions about post-conflict justice “in a reactive, improvised and often inefficient manner.”<sup>7</sup> With a more comprehensive overview of past experiences, stakeholders should be able to make better choices from a broader palette of options.

The handbook’s intended audience includes: state officials and diplomats, as well as national investigation and prosecution authorities; United Nations (UN) staff and officials; staff and officials of other inter-governmental organizations; and national and international nongovernmental organizations. The handbook examines mechanisms established in response to crimes in Africa, the Americas, Asia, Europe, and the Middle East. Domestic actors may prefer to look to regional examples first before examining other models. The demonstration effect of mechanisms within the same region may be strongest.

## **Methodology**

The identification of lessons from this large pool of diverse experiences relied on an extensive review of documents from international bodies and domestic governments regarding mechanism creation, as well as from primary and secondary legal instruments, reports from the mechanisms themselves, reports from civil society, and news reports. Where details on design were not obtainable through public sources, the Open Society Justice Initiative conducted interviews with officials involved in mechanism operation, and officials involved in the design and operation of mechanisms also offered detail in the course of commenting on drafts of this handbook.

Accountability mechanisms were selected for inclusion in the survey with a view to diversity of model and geography. Even with 33 mechanisms, the list is not exhaustive; it includes Argentina, Colombia, and Serbia, but not Chile, Peru, or

Ukraine. It includes the International Commission against Impunity in Guatemala (CICIG), because it has had success in dealing with serious crimes, even though international crimes fall outside of its mandate. It also includes an expert mission to Mexico, the Interdisciplinary Group of Independent Experts (GIEI), deployed to audit a domestic atrocity investigation, because a mechanism with such a limited, nonprosecution mandate may be the most politically feasible option in some situations. And it includes a UN-created International, Impartial and Independent Mechanism (IIIM) for Syria, which is an innovative model despite its lack of a direct prosecution mandate or structure for adjudication. The list of mechanisms includes some that are not yet fully operational, as well as other design proposals that are stalled or more definitively moribund. These can still help illustrate trends in the design of new models and provide examples for others in their regions.

Falling outside the scope of this study are: commissions of inquiry (which have commonly preceded the establishment of a prosecution mechanism),<sup>8</sup> truth commissions (which have typically preceded or existed alongside a prosecution mechanism), and forms of transitional justice not of a criminal justice nature.<sup>9</sup> Additionally, the survey omits review of isolated cases brought on the basis of universal jurisdiction,<sup>10</sup> or immigration-related proceedings that have often been based on alleged commission of international crimes.<sup>11</sup> Finally, the permanent ICC is not profiled in the annexes, as information about the court is abundant. Innovations from the Rome Statute and ICC are mentioned at times in this report, as is the ICC's relevance to some domestic prosecution initiatives.<sup>12</sup>

## **Structure of this Report**

The handbook's main body reviews the nine essential elements of mechanism design. This analysis begins with two elements of fundamental nature: the mechanism's purpose and its relationship to the domestic system. Decisions in those areas set important parameters for decisions to be made in the remaining seven areas: jurisdiction, basis of authority, location, structure, the integration of international judges and staff, financing, and oversight. Each section begins with a brief explanation of what is being examined. There follows a summary of experiences to date, describing the spectrum of options that have been pursued. The heart of each section is a list of lessons and considerations that stakeholders should take into account when designing that element. Finally, a list of key questions can serve as a checklist to ensure that important considerations are not overlooked.

The main part of the handbook makes frequent reference to prior mechanism designs, 33 of which are profiled in the annexes. (Where information in the main part of the handbook draws on detailed, sourced information from the annexes, it is not footnoted again, unless sources are directly quoted.) Each mechanism profile follows the same outline. The first three sections summarize the circumstances in which the mechanism was created or proposed: conflict background and political context, existing justice-sector capacity, and existing civil society capacity. These are followed by sections on the mechanism's creation (or events leading to its non-adoption), legal framework and mandate, location, structure and composition (including information on any involvement of international judges or staff), prosecutions, legacy, financing, and oversight and accountability.

## Notes

2. Officially named the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), respectively, these tribunals were established to prosecute international crimes committed by Nazi and Japanese political and military officials during World War II. See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011); Y. Tanaka, T. McCormack, and G. Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011).
3. M. Cherif Bassiouni, ed., *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Cambridge: Intersentia, 2010), xiii. These figures are based on data gathered 1945–2008 in Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*.
4. The ICC can only assert jurisdiction where states are “unable” or “unwilling” to prosecute international crimes at home. See *Rome Statute of the International Criminal Court*, UN Doc 2187, UNTS. 90, entered into force July 1, 2002 (Rome Statute), at Preamble, arts 17–20 and 53.
5. As the UN cautioned in 2004, while “the lessons of past transitional justice efforts help inform the design of future ones, the past can only serve as a guideline. Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local debates and decisions.” *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 16.
6. See, for example, *ICTY Manual on Developed Practices*, May 2009, available at: [icty.org/sid/10145](http://icty.org/sid/10145) (Topics covered include investigations, judgment drafting, management of the Detention Unit, and legal aid policies, as well as a range of other judicial support issues.); *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, January 2014, available at: [unictr.org/sites/unictr.org/files/legal-library/140130\\_prosecution\\_of\\_sexual\\_violence.pdf](http://unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf); *Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial*, February 2015, available at: [unictr.org/sites/unictr.org/files/legal-library/150210\\_complementarity\\_in\\_action.pdf](http://unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf).

7. Bassiouni, *The Pursuit of International Criminal Justice*, 8.
8. Where a Commission of Inquiry's work led to a mechanism being proposed or created, or affected its mandate, the mechanism profile may include such information.
9. For example, in the United States since the 1980s, a number of cases concerning torture, extrajudicial killing, war crimes, and crimes against humanity have been brought pursuant to the Alien Tort Statute (known as "ATS cases"). As the statute indicates, these claims have been brought pursuant to tort law (the law of civil wrongs) as opposed to criminal law, though the acts giving rise to the litigation have often related to the commission of grave crimes. For further reading on these types of cases, see the website of the Center for Justice and Accountability at: [cja.org/article.php?id=435](http://cja.org/article.php?id=435).
10. Universal jurisdiction is "a legal doctrine which permits domestic courts to try and punish perpetrators of some crimes so heinous that they amount to crimes against the whole of humanity, regardless of where they occurred, or the nationality of the victim or perpetrator." See the American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), *Questions and Answers on the ICC and Universal Jurisdiction*. The most well-known cases concerning the use of the universal jurisdiction doctrine include the UK House of Lords in *Ex Parte Pinochet*, as well as a number of Spanish prosecutions concerning Guatemalan, El Salvadoran, and Argentinian officials for international crimes. See [ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#Prominent\\_Cases\\_Involving\\_Universal\\_Jurisdiction](http://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#Prominent_Cases_Involving_Universal_Jurisdiction). See also Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands*, September 17, 2014.
11. With respect to immigration proceedings, a number of countries including the United States and Canada have specialized agencies concerned with pursuing immigration proceedings against those accused of grave crimes. Generally, however, the focus of these proceedings has not been criminal sanction, but immigration-related action, such as deportation.
12. For example, Kenya, Libya, Côte d'Ivoire, Uganda, Sudan (Darfur), Central African Republic, and the Democratic Republic of Congo are all situation countries before the ICC.

## II. THE ELEMENTS OF MECHANISM DESIGN

### A. Purpose

A mechanism's *mandate* is articulated in its source documents.<sup>13</sup> The term comprises the purpose behind its establishment as well as the scope of its authority (for more on the latter, see II. C. JURISDICTION).

What is the mechanism intended to achieve? What are its judicial aims (for example, criminal accountability for perpetrators)?<sup>14</sup> These are usually readily quantifiable. But what legacy, or lasting impact, should the mechanism aim to achieve?<sup>15</sup> Legacy, including impact outside the courtroom, is usually difficult to measure, especially in the near term. Should the mechanism attempt to address root causes of the conflict?<sup>16</sup> Does it aim to increase respect for the rule of law? Is it intended to spur justice sector reform and build technical capacity within the domestic justice system? Should it aspire to create an accurate record of disputed events, which may, in turn, foster reconciliation between previously warring factions of society?<sup>17</sup> Does it intend to deter future grave crimes? As former UN Secretary-General Kofi Annan has said, “It is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned.”<sup>18</sup>

### Experiences to Date

All mechanisms considered for the purposes of this handbook have the express or implied aim of delivering criminal accountability for the commission of grave crimes. For example, the Special Panels for Serious Crimes established in East Timor refer to a Security Council resolution stressing the importance of **bringing perpetrators of serious violations of human rights and international humanitarian law to justice**.<sup>19</sup> The preamble to the 1973 Act establishing the International Crimes Tribunal for Bangladesh (ICTB) states that it is “expedient to provide for the **detention, prosecution and punishment** of persons for genocide, crimes against humanity and war crimes.”<sup>20</sup>

The mechanisms have greater diversity when it comes to additional objectives. The Security Council Resolution establishing the International Criminal Tribunal for

the former Yugoslavia (ICTY) refers not only to **ending the commission of crimes** and **bringing perpetrators to justice**, but also **contributing to the restoration and maintenance of peace, halting violations, and providing effective redress**. The Security Council Resolution that established the International Criminal Tribunal for Rwanda (ICTR) describes aims of contributing to **national reconciliation** and to the **deterrence** of (future) commission of these crimes. The agreement between the UN and Cambodian government establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) refers to “the **pursuit of justice and national reconciliation, stability, peace and security**.”<sup>21</sup> Significantly, the Special Court for Sierra Leone’s (SCSL) resolution (1315 of 2000) mentions bringing perpetrators to justice “in accordance with **international standards**.” Further, it includes the establishment of “**a strong and credible court**” as one of its aims, as well as assisting in the “**strengthening of the Sierra Leone judicial system**.” The purpose of the establishment of International Commission against Impunity in Guatemala (CICIG) was to “**support, strengthen and assist [State institutions] responsible for investigating and prosecuting crimes** [within the mandate of CICIG].” The Security Council Resolution establishing the Special Tribunal for Lebanon (STL) mentions assisting Lebanon “in the **search for the truth**” about the Hariri assassination.<sup>22</sup> The creation of the Extraordinary African Chambers (EAC) was based on the African Union’s powers to intervene in a member state in respect of “grave circumstances” (war crimes, genocide, and crimes against humanity) and a right of member states to request intervention from the Union in order **to restore peace and security**.<sup>23</sup>

In the Democratic Republic of the Congo (DRC), the preamble of the bill proposing to create specialized chambers contains language on the connection between peace and justice. It states that whereas the country used to say “no justice without peace,” it was now taking the position of “**no peace without justice**.”<sup>24</sup> One of the draft Kenyan bills to establish a special tribunal listed as a purpose, “to **ensure that violations are effectively redressed and will not recur** in future; and for other purposes connected thereto;”<sup>25</sup> and to “**contribute to the process of national reconciliation**.”<sup>26</sup> Neither of these mechanisms has ultimately been established. In Uganda, the mission of its International Crimes Division (ICD) is to **fight impunity and promote human rights, peace, and justice**. It is also intended to ensure Uganda has a **strong and independent judiciary** that “delivers and is seen by the people to **deliver justice and contribute to the economic, social and political transformation of society** based on [the] rule of law.”<sup>27</sup>

Finally, the *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*,<sup>28</sup> which contemplates the establishment of a regional criminal mechanism, recognizes a number of purposes, including:

- **peace** (the settling of regional disputes through peaceful means; the promotion of peace, security, and stability);
- the **protection of human and peoples' rights** (mentioned at several junctures);
- the right of the AU to intervene in a Member State in respect of grave circumstances, namely, war crimes, genocide, and crimes against humanity;
- the respect for democratic principles, the **rule of law, and good governance**;
- the respect for the sanctity of human life, and the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression;
- a commitment to the **fight against impunity**;
- the interconnectedness of the promotion of justice and human and peoples' rights on the one hand and **political and socioeconomic integration and development** on the other; and
- the **prevention of serious and massive violations** of human and peoples' rights.

## Lessons and Considerations

### *Main Components*

1. **The mechanism's stated purpose should be consistent with other elements of mechanism design.** The mechanism's relationship to the domestic system, jurisdiction, basis of authority, location, means of including international judges and staff (if at all), structure, scale, cost, anticipated period of operation, and oversight should all be reasonably aligned with the stated ambitions. A mechanism claiming ambitions that it is not realistically structured to fulfill will disappoint people who expected those outcomes. For example, as a court with a majority of international judges, and characterized by the judges as not belonging to the domestic justice system, the Special

Court for Sierra Leone was ill suited to deliver on its goal of strengthening Sierra Leone's judicial system. And the ambition of Uganda's ICD to deliver social and political transformation of society based on the rule of law remains elusive in a context where the executive has opposed prosecutorial scrutiny of the country's military.

2. **The mechanism's purposes should be defined, taking into account related justice and peace initiatives.** This is important for coherence: avoiding overlap and gaps that can feed opposition to the mechanism, making the most of limited resources, and harnessing synergies. Where multiple domestic courts have overlapping subject matter jurisdiction, issues of **subsidiarity** (which court can assert primacy over a case or set precedents for a type of case) should be clarified. This has been a challenge in Bosnia, for example. (See II.B. RELATIONSHIP TO THE DOMESTIC SYSTEM.) The mechanism to be designed is often for a place where there are other existing or planned **transitional justice initiatives**, including those for reparation, truth-telling, memorialization, and guarantees of nonrecurrence. In the DRC, for example, the range of transitional justice mechanisms has included multiple domestic prosecution initiatives (extant and proposed), ICC cases, a UN "mapping exercise" of atrocities, and a truth commission. There have also been continuous efforts to disarm, demobilize, and reintegrate illegal combatants. In Colombia, the justice mechanism is bound to an integrated process that also includes demobilization and reintegration of combatants, truth-telling, amnesty, and reparation. The **relationship between prosecution mechanisms and truth commissions** may raise a variety of difficult questions and tensions (as was the case in Sierra Leone). Where both are to exist simultaneously or in close sequence to each other, special care must be taken to ensure coherence.<sup>29</sup> In almost every situation (with the usual exception of situations of ongoing conflict, as with the International, Impartial and Independent Mechanism [IIIM] for Syria), there will also be existing or planned **efforts to reform and build the capacity of the justice system**. Drafters should carefully examine how the nascent mechanism's purpose meshes with these. (See also lessons 6 and 8, below.)
3. **Consider including purposes in primary documents in order to create obligations.** By elevating certain purposes to founding issues and including them in main founding instruments, drafters can create core obligations to guide the actions of implementers. For example, the United Nations included in the ICTY and ICTR statutes a mandate to protect victims and witnesses, ensuring that the tribunals were obligated to prioritize such protection. When

empowered through language in the core mandate, implementers can give effect to obligations through subsidiary legislation, rules, policies, structures, and budgets. For budgetary reasons alone, emphasizing purposes in core documents is important. A recurring problem for many mechanisms is that core budgeting has come to refer to the financing of investigation, prosecution, adjudication, and basic administration only, with most other activities left to the vagaries of voluntary, supplemental funding. This adversely affects the ability of the mechanism to deliver on its promises. In the case of the ICTR, although the UN Security Council resolutions establishing the tribunal specifically recognized purposes that included the promotion of reconciliation and the strengthening of domestic courts, these ideas did not appear in the court's founding instrument. This resulted in significant delay in design and implementation of outreach, public information, and legacy programs. While including purposes in founding documents may increase the odds that priorities receive appropriate attention, it does not guarantee it. In Cambodia, the ECCC's mandate includes expansive rights to reparations, but these have been narrowly interpreted by judges unfamiliar with reparations theory and practice, and the court has only meager resources for implementation. (See H. FINANCING).

### ***Core Purposes***

4. **Those designing a new investigative and/or prosecution mechanism should be clear about the forms of justice it aims to provide in relation to crimes within its jurisdiction.** The mandate may include criminal accountability, truth, and reparation. That is, mechanisms should investigate and prosecute those against whom there is sufficient admissible evidence and impose punishments that take into account the nature of the crime. Mechanisms can aim to establish facts that lead to their broader acknowledgment in society. (See also recommendation 6, below.) And, as in Colombia, they can aim to provide victims with reparation, including compensation, restitution, rehabilitation, satisfaction, and guarantees of nonrepetition. For the vast majority of mechanisms examined by this handbook, holding perpetrators accountable, providing effective redress for grave crimes—and, in some instances where conflict is ongoing, ending the commission of grave crimes themselves—are their primary goals. Even in the case of Guatemala, where CICIG does not strictly have such powers, its primary goal is to “assist” national authorities in meeting such objectives.

5. **Strongly consider including outreach and public information functions as core components of the mechanism.** Grave crimes proceedings are very likely to touch on sensitive issues that may include conflict narratives, group identities, power politics, and economic interests. In an apparent attempt to undermine cooperation with the SCSL, allies of then-fugitive former Liberian President Charles Taylor actively spread false rumors that the SCSL would prosecute all former combatants in Liberia.<sup>30</sup> If not contested vigorously, such attempts to delegitimize an institution through falsehoods about its mandate, independence, funding, or individual cases can lead witnesses and sources to distrust court officials and refrain from cooperation. Effective and early organization of outreach to key stakeholders and the ongoing provision of accurate public information are vital antidotes to rumor and misinformation. Outreach is a dialogue with stakeholders through which a mechanism can share information on its mandate, procedures, and activities, and communities can share their expectations and their views on the process. Beyond countering the threat of misinformation, outreach is essential in order to allow those affected by events to see justice being done, to manage expectations of what the mechanism can and cannot do, to build national ownership over domestic mechanisms, to encourage witnesses and victims to participate in proceedings, to inform the public about legal concepts and build trust in the rule of law, to build public expectations about public access to state institutions in settings where this has not been the experience, and to encourage ordinary justice systems to improve the transparency of less controversial proceedings. However, designers and donors have too often viewed outreach as a “noncore” activity. (See also II.F. STRUCTURE and II.H. FINANCING.)

### ***Legacy Purposes***

6. **Strongly consider including an explicit truth-telling purpose to promote impartial and transparent justice.** If contributing to the building of an accurate historical record of crimes committed is an explicit part of a mechanism’s mandate, this provides important guidance to those who will operate it and affects other elements of mechanism design. First, it underscores the imperative of pursuing impartial justice, including following evidence to suspects, regardless of their group affiliations.<sup>31</sup> Even-handed justice can be key to dispelling old animosities and restoring lost faith in the justice system. Conversely, if a mechanism pursues only one side to a conflict and turns a blind eye to political elites, it may further entrench distrust.<sup>32</sup> In the

long term, such outcomes can fuel further tensions and contribute to ongoing political instability. Further, including truth-telling among the mechanism's purposes also encourages transparency, because the more limited act of producing historical records will be of questionable value if such records emerge in sequestered courtrooms and are then sealed away in judicial archives. Truth-telling suggests the need for active engagement with affected populations through outreach and public information.

7. **Be modest and realistic in stating purposes of reconciliation, deterrence, and sustainable peace.** The work of a mechanism may well contribute to these goals, and there may even be good reason to believe that these goals cannot be achieved without the criminal accountability for grave crimes that the mechanism is meant to deliver.<sup>33</sup> However, there are many factors that determine whether communities reconcile, would-be perpetrators refrain from committing atrocities, and sustainable peace can be achieved. Among others, these include political, possibly geopolitical, economic, and environmental factors, as well as the success or failure of myriad initiatives to address each. Accordingly, it is more appropriate to state that an accountability mechanism is intended to “contribute to” these outcomes.<sup>34</sup>
8. **Consult closely with rule-of-law assistance providers about purposes related to justice-sector reform and development.** Domestic and international officials involved in planning and implementing rule-of-law reforms and capacity building are important constituencies for any new accountability mechanism. Too often, proponents of international criminal justice and those involved in broader rule-of-law reforms have failed to communicate and understand each other's priorities.<sup>35</sup> This can result in overlap and conflict. It can also lead to frequently encountered skepticism within the development community that international justice mechanisms are expensive, politically disruptive, isolated, and unsustainable in their rule-of-law benefits, and that they draw resources at the expense of other, more worthy, justice-sector priorities. Such skepticism contributed to a lack of coherent international support for mixed chambers in the DRC, for example. While certain tensions may persist, they can be minimized through communication.<sup>36</sup> And there are numerous ways to design and implement international justice mechanisms in ways that maximize coherence with wider justice-sector reform agendas.<sup>37</sup> If that is to be an imperative for the model's design, then it should be explicitly stated as a purpose.

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## Key Questions to Help Determine Purpose

- *What are the main options for defining the judicial purpose, and what effect would each option have on the other elements of design, including jurisdiction, structure, and financing?*
  - *Are there functions—such as witness protection, outreach, public information, and reparation—that in a given context should be incorporated into the mechanism’s stated purpose in order to increase the chances that they are adequately reflected in other elements of design and in implementation?*
  - *Are there other relevant planned or proposed transitional justice initiatives, including other mechanisms dealing with criminal accountability for grave crimes (including the ICC) or truth-telling? If so, how can the mechanism’s purpose define a unique role within a coherent approach?*
  - *What is the strategy for justice-sector reform and development in the country, as articulated by the government, its international partners, and civil society? Can the mechanism’s purpose be refined for maximum congruence with this?*
  - *Do stakeholders want and expect the mechanism to contribute to the truth about contested facts and history?*
  - *In drafting the mechanism’s purpose, have all main domestic and international stakeholders (in government, victim communities, civil society, and the international community) working on issues of justice, peace, and the rule of law been consulted?*
- 

## B. Relationship to Domestic System

What is the relationship of the mechanism to the domestic judicial system? Is it an integrated part of the system, does it operate through parallel specialized institutions, or is it wholly outside of the system? Designers of a mechanism may begin with a preference for the nature of the relationship, or this may be derived from a series of discrete design decisions. In the end, to reflect the needs of a given context, a mechanism may be very integrated in some ways and remote in others.

There are many different design variables that determine or flow from a mechanism’s relationship to the domestic system. Some of these variables are examined in dedicated sections of this handbook, including BASIS OF AUTHORITY,

LOCATION, elements of STRUCTURE, whether international personnel are involved (discussed in INTEGRATION OF INTERNATIONAL JUDGES AND STAFF), FINANCING, and OVERSIGHT.

A number of other design variables concern legal features. Will the mechanism use the same legal system (civil law, common law, sharia, traditional or customary law, or some mixture) already present in the country? Among other things, decisions on criminal procedure may determine the extent to which victims can participate in proceedings, and the extent to which they are eligible for reparations. Will domestic amnesties, where present, be recognized? Will the mechanism use existing official languages, or also operate in one or more foreign languages or local dialects?

Overlaid across this set of questions is another relating to international standards in criminal procedure. For example, will the mechanism ensure fair trial rights, even if the existing domestic system has shortcomings in this area? Will it adhere to international standards with regard to pretrial detention and provisional release? How will it handle acquitted persons? Will convicted persons face the death penalty?

## **Experiences to Date**

The continuum of mechanisms has ranged from wholly international tribunals (ad hoc tribunals, established by the UN Security Council, exercising peace and security powers under Chapter VII of the UN Charter) to fully domestic mechanisms. But even those mechanisms considered to be fully domestic, such as the International Crimes Tribunal for Bangladesh (ICTB), or domestic prosecutions in Argentinian and Colombian courts, have at least some “international” dimensions, given their application (via domestic law) of a body of international criminal law.

Where mechanisms have fallen along the international-domestic spectrum has generally depended on a number of factors. The following table illustrates broad tendencies in the relationship of mechanisms to the domestic justice system. There are, however, important exceptions and caveats to these (addressed in the Lessons and Considerations section that follows this one).

In addition to these factors, since the establishment of the ICTY and ICTR in the early 1990s and the drive for a permanent ICC during that decade, there has been a trend away from “heavier,” more intrusive and international mechanism models. In recent years, states have exhibited a preference for “lighter,” more domestic models where possible.

FACTOR	MORE DOMESTIC	MORE INTERNATIONAL
<b>Mechanism purpose</b>	Intended to help advance general rule of law development and/or promote other transitional justice goals, in addition to delivering accountability through cases.	Focused more narrowly on delivering criminal accountability through the investigation, prosecution, and adjudication of cases.
<b>Political will</b>	Will or acquiescence (via domestic and/or international pressure) to adopt legislation and reform or create requisite institutions.	External imposition deemed necessary due to lack of domestic political will.
<b>Domestic technical capacity</b>	Higher investigative, prosecutory, and judicial capacity.	Lower investigative, prosecutory, and judicial capacity.
<b>Security situation</b>	Secure environment for participants in the proceedings.	Insecure environment for participants in the proceedings.
<b>Infrastructure</b>	Good or adequate.	Poor or non-existent.
<b>State of legal framework</b>	International criminal law and procedural law largely meet international standards (or planned passage of relevant reforms).	No international criminal law provisions in domestic code; procedural law that falls short of international standards.
<b>Openness to foreign involvement (in general, or with regard to particular foreign actors)</b>	Countries that experienced colonization and/or hegemony in living memory.	Countries seeking international integration (in general, or with particular alliances).
<b>Availability of international funding</b>	Low likelihood of substantial international funding	Higher likelihood of substantial international funding.
<b>Other significant international engagement, existing or planned</b>	Little or no significant intrusive international involvement.	Presence of international administration or robust peacekeeping.

Wholly international tribunals exist as independent institutions, outside of the domestic justice system. The ICTY and the ICTR have carried out their own, independent mandates entrusted to them by the global community, via the UN Security Council. Yet these ad hoc models encountered numerous challenges arising from their physical and legal remoteness from affected societies and states. Distance presented challenges in such areas as access to evidence and witnesses and making proceedings accessible to affected populations. Ultimately, remote tribunals (including the ICC) struggle for relevance when it comes to issues of domestic rule-of-law reform, truth-telling, and reconciliation. Remoteness has also been a factor in the slow pace of proceedings and a key driver of cost.

To an extent, the ad hoc tribunals reached past these limitations through liaison to other justice mechanisms operating within the countries concerned (Rwanda and the countries of the former Yugoslavia—Bosnia and Herzegovina, Croatia, Serbia, and Kosovo). The potential referral of cases to countries of the former Yugoslavia and Rwanda, and the ongoing monitoring of those cases by court-appointed observers as the cases have progressed, has been an important dimension to the relationship between the countries and the tribunals. The ICTY's completion strategy (of which Rule 11*bis* case referrals were a key component) was the catalyst for the international community's chief administrator in Bosnia (the High Representative) to create the State Court, the Prosecutor's Office, and its special divisions for dealing with international and other forms of serious crime. A series of failed attempts by the ICTR prosecutor to refer cases to Rwanda led to a number of amendments being made to Rwandan domestic legislation so that referrals could ultimately be granted.<sup>38</sup> Although the ad hoc tribunals exist wholly independently from the countries with which their proceedings are concerned, there has been a notable legal and political dialogue between them.

Between the two poles of wholly international and fully domestic mechanisms, there has been a vast array of hybrid, internationalized, and internationally-supported mechanisms with differing defining features.<sup>39</sup> These range from treaty-based institutions (such as the SCSL or the ICC) to domestic courts with international assistance (such as the ECCC) and include various combinations and degrees of foreign involvement. The Extraordinary African Chambers (EAC) are established within the Senegalese court system, pursuant to an agreement between the African Union (represented by the African Union Commission) and the government of the Republic of Senegal. The statute establishing the Iraq High Tribunal explicitly described it as "an independent entity and not associated with any Iraqi government departments."<sup>40</sup> In Bangladesh, the International Crimes Tribunal is a wholly domestic court (a separate court, with specific international criminal jurisdiction) established within the domestic court system. In the DRC, there have been approaches embedded in the domestic system (military and, more recently, civilian courts, including mobile courts) and proposed mixed chambers that would establish specialized institutions and involve international judges and officials.

The Special War Crimes Chamber (SWCC) in Serbia is a domestic chamber established pursuant to Serbian domestic law. In Croatia, although four specialized war crimes chambers were established in county courts, most trials are prosecuted before regular chambers in those courts. Prosecutors in 20 county court jurisdictions have territorial jurisdiction over war crimes cases and are supervised in their work by the chief state prosecutor.<sup>41</sup> Although beyond the scope of this handbook,

specialized war crimes units have been established in a number of countries for the purposes of investigating and prosecuting international crimes pursuant to universal jurisdiction.<sup>42</sup>

### ***Incorporation of International Standards in Criminal Procedure***

Mechanisms have incorporated international standards related to criminal procedure to varying degrees. (For discussion of international standards in substantive law, see C.1. SUBJECT MATTER JURISDICTION.)

The International Covenant on Civil and Political Rights (ICCPR) sets out bedrock standards for due process in criminal proceedings. Article 14 of the ICCPR outlines such concepts as:<sup>43</sup> the right to equality before the law; the right to a fair and public hearing by a competent, independent, and impartial tribunal; the right to presumption of innocence;<sup>44</sup> and the right to a number of minimum fair trial guarantees.<sup>45</sup> It also refers to the right to appeal,<sup>46</sup> to compensation following wrongful conviction, and to protection against double jeopardy.<sup>47</sup> Article 15 of the ICCPR provides the right not to be punished through retroactive application of national or international law, but notes that individuals can be prosecuted and punished for an act or omission that was illegal under customary international law at the time of commission.<sup>48</sup> Under international law, the requirement of competence, independence, and impartiality of a tribunal in the sense of ICCPR Article 14 is an absolute right that is not subject to any exception.<sup>49</sup>

Other international standards relevant to the design of a new mechanism include the UN Basic Principles on the Independence of the Judiciary,<sup>50</sup> the Bangalore Principles of Judicial Conduct, the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>51</sup> and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>52</sup>

Generally, mechanisms dealing with grave crimes that are most remote from domestic systems, including the ICTY, ICTR, and SCSL, have anchored international standards in founding documents. They have done so through explicit reference to the ICCPR and other international covenants, or such regional instruments as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights. For mechanisms more integrated with domestic justice systems, the extent of compliance with international standards in criminal procedure has generally

reflected the given country's general adoption of those standards. With regard to the independence of the judiciary, degrees of compliance with international standards are determined by constitutional and statutory laws that set out processes for the appointment and removal of judges and the independence of the body in charge of making judicial selections/appointments, including how its members are chosen.

As also provided by the Vienna Convention on the Law of Treaties,<sup>53</sup> states parties to the ICCPR must respect the guarantees in Article 14 of the covenant regardless of their legal traditions and their domestic law.<sup>54</sup> Some states parties to the ICCPR have expressed reservations on certain aspects of Article 14. Among these are countries that have created mechanisms to deal with grave crimes. For example, Bangladesh has reserved the ability to try accused persons in absentia under certain circumstances.<sup>55</sup> And in both Bangladesh and Iraq, mechanisms have carried out the death penalty in contravention of international standards.<sup>56</sup>

With varying degrees of success, the introduction of mechanisms to deal with grave crimes has led countries to accept new international standards. For example, Rwanda abolished the death penalty in order to try grave crimes cases transferred from the ICTR. By contrast, Cambodia resisted pressure to adopt international standards during the negotiations that led to the ECCC's creation.<sup>57</sup>

## **Lessons and Considerations**

### ***Security***

1. **Where conflict is ongoing or there is reason to believe that significant security threats to participants in judicial proceedings persist, a mechanism with more external characteristics may be most appropriate.** Most notably, this may relate to location, as with the ICTY (which began its work in the midst of ongoing war in the former Yugoslavia), the IIIM for Syria (established at a time when there is no end in sight to the conflict), and the Kosovo Specialist Chambers (established in The Hague due to witness protection concerns in Kosovo). (For more detailed considerations, see E. LOCATION.) It may also be possible to proceed with an in-country mechanism that relies on external actors to provide security. Several mechanisms operating in conflict or fragile post-conflict settings have relied on UN peacekeeping operations. These include the Special Criminal Court for the Central African Republic (SCC), the Special Court for Sierra Leone, and domestic mobile courts hearing international crimes cases in remote locations

of the eastern Democratic Republic of Congo. Mechanisms in insecure environments may also seek to externalize witness protection through agreements with foreign witness protection agencies.

### ***Legitimacy***

2. **Usually, a mechanism more integrated with the domestic system can be expected to enjoy greater domestic legitimacy than would a mechanism external to it.** A mechanism that is external in location includes international officials or introduces foreign legal concepts may naturally arouse doubt and suspicion within the affected population. Societies that experienced traumatic foreign control or influence, including through colonization (e.g., most of sub-Saharan Africa), invasion (e.g., Iraq), or hegemony (e.g., the Cold War experience in most of the developing world) are likely to have heightened sensitivity to mechanisms that concede elements of national sovereignty.
3. **There may be greater popular acceptance for external elements where the mechanism exposes crimes associated with the former colonial power or hegemon.** Thus in Guatemala, victims of grave crimes perpetrated by U.S.-aligned military governments during the Cold War have embraced CICIG's role in making prosecutions possible (perhaps despite the fact that CICIG has enjoyed American government support). In Ukraine, many officials, civil society organizations, and victims have welcomed international assistance in grave crimes cases; some even seek the temporary inclusion of international officials in the country's justice institutions. The relative openness to Western international involvement is tied to the role of former hegemon and current adversary Russia in the perpetration of alleged crimes.
4. **Where the domestic justice system is widely discredited or viewed as partial, a mechanism external to it may enjoy greater popular legitimacy.** Populations that broadly distrust their justice systems are more likely to want mechanisms external to those systems. In Mexico, popular distrust means that only one in ten crimes are reported to authorities.<sup>58</sup> There, the involvement of the Interdisciplinary Group of Independent Experts (GIEI), deployed by the Inter-American Commission of Human Rights to audit the investigation of high-profile killings and enforced disappearances, was broadly accepted; the GIEI notably secured the trust of victims' families who rejected the legitimacy of the investigation by Mexican authorities. Similarly, many Kenyans distrustful of national police and prosecutors, including top members

of the political opposition, advocated for creation of the external Kenya Special Tribunal; and a large majority of the population welcomed the involvement of the entirely international ICC despite government efforts to portray it as a neocolonial institution.

### ***Political Will***

5. **Where domestic authorities have a genuine desire to hold perpetrators to account for grave crimes without regard for their faction or rank, generally, better conditions are created for a mechanism that is integrated with the domestic justice system rather than external to it. Greater political will can also lead to greater openness to international involvement where this may be needed to add technical capacity.** Prosecutions before the domestic courts of post-junta Argentina provide a good example of the former. The Special Court for Sierra Leone is a good example of the latter.
6. **Governments opposed to or wishing to control grave crimes proceedings are reluctant to accept mechanisms that are sufficiently external and independent.** Government opposition has ultimately led to the defeat of proposals for mechanisms in locations including Liberia, Kenya, Burundi, and Darfur, Sudan. In negotiations with the United Nations to create the ECCC, Cambodia's government insisted on safeguards that would allow it to place limits on the proceedings. The UN conceded to a model of co-administration that has led to obstruction, operational problems, and tremendous inefficiencies. Creating a mechanism despite government obstruction requires extensive international engagement (e.g., ICTY) and/or the persistent efforts of organized, capable civil society organizations (e.g., CICIG) to change the political dynamics.

### ***Jurisdiction***

7. **In planning a new mechanism, it is important to ensure clarity in the relationship between its jurisdiction and existing courts with overlapping jurisdiction.** This relationship may concern international courts. In Rwanda and the former Yugoslavia, international tribunals had clear primacy of jurisdiction over national courts with overlapping jurisdiction. Within the Rome Statute system, the primary obligation to investigate and prosecute international crimes lies with national authorities, and in accordance with the

principle of complementarity, the ICC may only step in if states are unable or unwilling to do so. But questions of subsidiarity may relate to other domestic courts, as in Croatia and Bosnia. The Bosnia and Herzegovina War Crimes Chamber (BiH WCC) exists alongside local courts trying grave crimes cases, but the latter are not required to follow War Crimes Chamber jurisprudence. There has also been a lack of clarity over division of cases between the courts, making it difficult to develop a national strategy. Different entities in Bosnia have also interpreted applicable law differently.

8. **External investigative mechanisms that operate alongside national institutions can be effective where political circumstances are conducive to collaboration.** In Guatemala, CICIG has conducted independent and joint investigations with a willing Attorney General's Office, and forged a productive, cooperative relationship with its prosecutors. By contrast, in Mexico, the GIEI conducted a parallel investigation into a notorious atrocity, but encountered obstruction by the Federal Prosecutor's Office. The GIEI's members were illegally surveilled by Mexican government institutions, and their findings, including the identification of leads not followed by national investigators, have remained largely ignored.
9. **Nevertheless, parallel investigations in the absence of national political will can still deliver benefits.** A prerequisite for providing value despite a lack of effective collaboration with national authorities may be strong support from domestic civil society and the international community. This was the case in Mexico, where the GIEI mechanism developed extensive new information on the disappearance of 43 students. The students' grieving family members found value in this. And by revealing deep flaws in the federal government's investigation of the case, as well as possibly greater government involvement in the perpetration of the crimes, the GIEI also contributed to a civil-society-driven national debate on the causes of impunity and the need for justice reform.

### ***Capacity and Infrastructure***

10. **The less developed the country's existing justice-sector capacity is, the more likely it is that a mechanism will need international characteristics to succeed.** At issue are the capacities of officials across the judicial chain, including criminal investigators, prosecutors, judges, defense counsel, court administrators, witness protection officers, and prison officials, as well as

physical infrastructure, including offices, courthouses, and detention facilities. Where a country's basic capacities have suffered from conflict and/or neglect, as in Timor-Leste, Kosovo, or the Central African Republic, it is more difficult for a domestic criminal justice system to address ordinary crimes, much less complicated international crimes, without significant foreign involvement. Where baseline capacities are stronger, as in Senegal or Argentina, the need for external participation or support is usually more specific to expertise in international criminal law or other special needs associated with complex grave crimes cases, such as forensics, witness protection, and outreach. Countries with higher baseline capacities may need external elements on a temporary basis (as with domestic proceedings in Bosnia), whereas international support and involvement are likely to be longer-term needs in countries with less developed justice systems (as in the DRC).

### ***Strengthening the Rule of Law***

11. **If part of the mechanism's purpose is to strengthen the rule of law in the country concerned, then seeking maximum integration of the mechanism with the domestic justice system is *usually* preferable.** The placement of a mechanism within the domestic system has the greatest potential for benefits to spill over into the justice sector as a whole, and the greatest potential that the mechanism itself will benefit from existing justice-sector development efforts. Mechanisms that are remote in physical location (e.g. the Special Tribunal for Lebanon), in applicable legal framework (e.g., the Special Court for Sierra Leone), or in participation of national staff (e.g., the Kosovo Specialist Chambers and Specialist Prosecutor's Office), generally have reduced chances of leaving legacies in one or more of the areas of domestic jurisprudence, domestic technical capacities, and physical infrastructure. The more remote a mechanism's key characteristics, the less it can usually serve to enhance the capability and credibility of the domestic justice system.
12. **However, under certain circumstances, mechanisms not integrated with the domestic system can still have substantial impact on justice-sector reform.** This has occurred where external mechanisms have had legal or political leverage over domestic authorities, and where they have invested in legacy programs, capacity building, and outreach. In Guatemala, the CICIG mechanism that exists in parallel with domestic authorities has played a major role in the successful promotion of rule-of-law reform, the advancement of reformist justice-sector officials, the introduction of new investigative

capacities, and the nurturing of a skilled group of prosecutors and investigators within the Attorney General's Office who have asserted their autonomy from political elites. By successfully developing criminal cases against powerful individuals and successfully galvanizing political pressure, as well as through mentorship and collaboration with Guatemala's Attorney General's Office, CICIG has "helped Guatemalans reach a juncture where major political reform has become a real possibility for the first time since the signing of the Peace Accords 20 years ago."<sup>59</sup> The ICTY and the ICTR influenced the domestic systems with which they were concerned through the conditioned transfer of cases involving lower-level suspects to those jurisdictions; the conditional transfer of cases proper to those jurisdictions, via Rule 11*bis* proceedings; and various training initiatives. In the case of the ICTY, the completion strategy had the effect of shifting funds to national-level proceedings, where they contributed to general justice-sector development. While neither the SCSL nor the ECCC has transferred any cases to their respective domestic jurisdictions, they have each developed other legacy-related initiatives.<sup>60</sup> The SCSL viewed outreach and legacy as core elements of its work from a very early stage, with corresponding discernible benefits.<sup>61</sup>

13. **Under the wrong conditions, mechanisms more integrated with domestic systems risk damaging that system's legitimacy.** A mechanism proximate to a politicized judiciary, as in Cambodia, can reinforce the notion that strong executive control over the reach of criminal accountability efforts is normal. Similarly, even where there is greater judicial independence, as in Uganda and Kenya, mechanisms may remain at the mercy of police and prosecution services that refuse to investigate or prosecute any cases or advance cases only in relation to members of anti-state groups or the political opposition. Prosecutions that clearly align with the interests on one side of a political, ethnic, or religious divide (e.g., in Bangladesh, Iraq, and Côte d'Ivoire) taint the entire endeavor and may ultimately be destabilizing.
14. **Mechanisms integrated with the domestic system open greater opportunities for synergy between international support for the mechanism and other existing or planned rule-of-law development initiatives.** A mechanism focused on grave crimes will have some needs specific to the nature, gravity, complexity, and controversy usually inherent to this type of case. Special needs arise in substantive international criminal law, and usually in areas such as provision of psychosocial assistance to victims and witnesses, enhanced witness protection, and outreach. The rule-of-law support

community has often expressed concern that donor support for high-profile specialized grave crimes mechanisms can detract from support for sustainable justice-sector reform and capacity building. However, there is broad overlap between the needs of a mechanism dealing with grave crimes and a domestic justice system when it comes to requisite technical skills and infrastructure. It follows that the more integrated a mechanism is with the domestic system, the more opportunities there will be for synergy in such areas as legal reform; training for police, prosecutors, defense attorneys, and judges; courtroom and detention facility refurbishment; or the design of new institutions, such as witness protection agencies.<sup>62</sup> However, this prospect does not guarantee mutual support. In the DRC, for example, some donors still worried that proposed mixed chambers for war crimes within the domestic system would detract from other rule-of-law priorities, and this contributed to the proposal's collapse.

### ***International Standards***

15. **If the intent is to create a mechanism that comports with international standards and best practices, then the extent to which the existing legal system already meets these, or the state is willing to adopt them, sets a key parameter for the mechanism's potential integration with the domestic system.** Relevant standards include those in the areas of substantive international criminal law, fair trial rights, reparations, victim participation, witness protection, and detention.
16. **Where domestic amnesties and other legal provisions do not meet international standards or are abused to shield perpetrators of grave crime, there is greater reason for a mechanism that is more external in nature.** In recent decades, case law has increasingly constrained the granting of amnesty and immunities for crimes under international law and serious human rights violations.<sup>63</sup> There is a growing consensus that amnesties for crimes under international law are prohibited, as they deny the right of victims to justice, truth, and reparation; the prohibition is clearest for genocide, crimes against humanity, and war crimes.<sup>64</sup> Apart from amnesty laws, states sometimes grant statutory immunity to heads of state and other high officials or have statutes of limitations for grave crimes that do not comport with international standards. In some countries with weak judiciaries, elements including pardons, the prohibition on double jeopardy, plea bargaining, the filing of interlocutory appeals, requests for judges' recusal, and other common

criminal procedures are sometimes inappropriately applied to shield the perpetrators of grave crimes. Such domestic obstacles might persist until there is a change in the political situation that removes them, as happened with amnesty laws for grave crimes in Argentina. Or an externalized mechanism can make international law directly applicable in ways that circumvent inappropriate domestic legal obstacles. For example, it has been argued that the SCSL “could not exist as part of the domestic legal system without raising complex questions relating to a prior amnesty law and the sovereign immunity of Charles Taylor.”<sup>65</sup>

17. **The introduction of external legal concepts may bring greater conformity with international standards, but can create complications that must be anticipated and addressed.** To be effective, new legal concepts require implementation by officials familiar with them. This could mean **including foreign legal experts** in direct implementation and mentoring, as in East Timor, Kosovo, or Bosnia, and meeting the challenges that this entails. (See G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.) Or where internationals are not directly involved in implementation, it could mean undertaking extensive **training** in other ways, as has been done across a large range of mechanisms. **Changes to legal codes** in order to meet international standards (or for other reasons) create inherent challenges. For example, in Bosnia, the creation of the War Crimes Chamber was accompanied by the introduction of adversarial concepts such as judicial notice and plea bargaining that were unfamiliar to judges, prosecutors, and defense counsel.<sup>66</sup> In Iraq, elements of the IHT statute inserted by U.S. officials were alien to Iraqi law and caused confusion.<sup>67</sup> Mechanisms in Cambodia and East Timor encountered similar difficulties. The introduction of new substantive law through statute or application of customary international law may raise significant questions about the principle of legality, as it has in Uganda. (See also C.1. SUBJECT MATTER JURISDICTION.) New standards may **challenge amnesties**, as has happened in Argentina and Sierra Leone. And the application of international standards in a specialized mechanism’s detention facility can create a situation in which those accused of the gravest of crimes enjoy much better conditions of detention than those accused of lesser crimes, who are locked up in national prisons.
18. **The operation of a more integrated mechanism holds the potential to create jurisprudence that is helpful in propagating international standards in the judiciary’s future interpretation of substantive and**

**procedural law, especially in common law systems.** The logic of this remains largely theoretical. In Uganda, for example, there has been so little activity by the International Crimes Division that it has not developed much jurisprudence of any kind. In Bosnia, which adopted many common law elements in its criminal procedure at the same time its War Crimes Chamber was created, there is still no system of precedent; the Chamber's jurisprudence is not binding on lower courts dealing with grave crimes cases throughout the country.

19. **A thorough review of the existing legal framework and system should be conducted in order to weigh the advantages and risks of incorporating domestic elements that do not (yet) meet international standards.** In Sierra Leone, the creation of the SCSL outside of the national justice system, along with the prosecutor's decision not to apply domestic law (although possible under the statute), may have missed opportunities to bolster the application of international legal standards in the domestic system. However, the court arguably had an impact on improving standards in other areas. For example, the transfer of the SCSL detention facility to national authorities, and the experience of many Sierra Leonean guards at the SCSL may well have raised the standards of detention for some incarcerated Sierra Leoneans. The Iraq High Tribunal had inadequate protections for defense rights and foresaw the death penalty, in contravention of international standards. This resulted in rushed proceedings and the execution of Saddam Hussein and others following the hearing of only partial evidence. Victims interested in justice for other crimes and the truth-telling component of the proceedings were disappointed. In any situation, an assessment must be conducted before it is determined what kind of relationship between the mechanism and the domestic system best suits the circumstances.
20. **A mechanism that flouts international standards will have fewer potential sources of international cooperation and support.** For example, the applicability of the death penalty and deficits in fair trial rights at the Iraq High Tribunal and International Crimes Tribunal of Bangladesh alienated potential partners and donors.<sup>68</sup>
21. **If the mechanism's purpose includes reparation to victims, in accordance with emerging standards in international law, there may be need for a more externalized mechanism if the domestic framework does not include or cannot be amended to include provision of reparations as**

**part of the criminal process.** However, the existence of formal norms and procedures for reparation are no guarantee that they will be applied. (See II.F. STRUCTURE, and II.H. FINANCING.)

### *Language*

22. **More integrated mechanisms are likely to face fewer difficulties in making trials comprehensible to affected populations than are external mechanisms involving international officials who speak foreign languages.** Nevertheless, if the existing justice system does not already have a facility to interpret proceedings into minority languages of the country, special provision may need to be made to make trials accessible to minority communities affected by the underlying events. Uganda's ICD, for example, has had to work with the Acholi language of northern Uganda, where it has also held hearings.
23. **Having too many official languages can cause delay and raise costs.** Following the experience of the ad hoc tribunals, many court officials, administrators, and diplomats have concluded that it was a mistake for the ICTY and ICTR each to have three official languages, because each foreign language added (French and English) meant an immense cost for interpretation and translation, and led to delays. At the ECCC, many have regarded the need to interpret and translate everything into English *and* French as a vast waste of resources and a cause of significant delay. In East Timor, the use of four official languages (Portuguese, Tetum, Bahasa Indonesian, and English) delayed proceedings before the Special Panels.
24. **External sources of law can cause difficulties if not precisely translated.** In Iraq, translation errors in the criminal procedure code created confusion over the standard of proof that would be applicable at the IHT.
25. **In areas where a major world language is not in official use, a mechanism that relies on external sources of law may struggle to find relevant international jurisprudence in the local language(s).** In Bosnia, this necessitated a major effort to translate jurisprudence into Serbo-Croatian. But even where there has been investment in the translation of jurisprudence, judgments can be too long or complex to be of much use in the national context. Investing in local-language digests and annotations of the mechanism's decisions, as the UN's Office of the High Commissioner for Human Rights (OHCHR) has done to an extent regarding the ECCC

in Cambodia, can increase their accessibility to domestic judges and thus increase the lasting effect on national judicial practice.

### ***Acquittals and Sentencing***

26. **External mechanisms may face additional challenges in dealing with persons acquitted and those sentenced.** Purely domestic mechanisms located in the country often face challenges in providing secure and humane detention and prison facilities for sentenced persons, and they often lack means to protect and support acquitted persons. Additionally, if a mechanism is located outside the domestic system of suspected perpetrators' country of citizenship, the mandate must contemplate what will happen with those who are sentenced and acquitted. External courts, including the ICTR, ICTY, and SCSL, must negotiate agreements with states on the enforcement of sentences if the affected country is unable to securely detain convicted persons in accordance with international standards. It can be more difficult to find states willing to accept acquitted persons. Defendants acquitted at the ICTR, for example, were unable to return to Rwanda and found states unwilling to grant them visas due to lingering perceptions of their guilt, despite court rulings to the contrary. Many have had to continue living in UN "safe houses" in Arusha, Tanzania, while the UN and its Mechanism for International Criminal Tribunals (MICT) have struggled to resolve a problem that should have been anticipated at the tribunal's inception.<sup>69</sup>

### ***Transition Strategies***

27. **The design of external mechanisms must contemplate transitional issues.** External mechanisms are extraordinary and temporary. Upon their completion, some apparatus must assume their residual functions, including the pursuit of remaining fugitives and their potential trials, the adjudication of new legal issues concerning conditions of detention, and witness protection and support. To deal with such issues following the expiration of the ICTY and ICTR mandates, the UN Security Council created the MICT in 2010. Similarly, the Residual Special Court for Sierra Leone was created as a bare-bones but expandable entity to deal with the SCSL's residual functions. In Bosnia, external components of the War Crimes Chamber and Special Division for War Crimes in the Prosecutor's Office were phased out, leaving in place purely domestic mechanisms. In such places as Argentina, there is no transition because the proceedings occur within a domestic system that will continue to exist.

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## Key Questions to Help Determine the Relationship to the Domestic System

- *Does the security situation in the country allow for a domestically located and operated mechanism, or does insecurity suggest that an external location and/or inclusion of international officials may be necessary for it to function?*
- *Is there popular domestic sensitivity about the involvement of foreigners in internal affairs (as opposed to more limited government sensitivity, which could be based on self-interest)? If so, is that sensitivity general in nature or particularly acute with regard to certain countries (such as former colonial powers) or regions?*
- *Does the domestic justice sector enjoy popular credibility? If not, is there reason to believe that the incorporation of external elements, including foreign sources of law or the involvement of international officials, would increase the mechanism's legitimacy?*
- *Has the executive respected the independence of domestic judges and the autonomy of prosecutors? If not, are there any promising measures being taken to strengthen judicial independence?*
- *What is the capacity of officials across the justice chain to conduct proceedings in accordance with law and to do so fairly and efficiently? Are there areas of need specific to proceedings for the grave crimes in question?<sup>70</sup>*
- *Are there existing plans for general justice-sector development that could obviate the need for some external elements of mechanism design?*
- *Does the country's substantive law meet international standards, especially with regard to crime definitions under international criminal law? If not, are there reasonable prospects for legal reform in the near future?*
- *Does the country's criminal procedure comport with international standards and best practices, including in the areas of fair trial rights, prohibition of capital punishment, reparation, victim participation, witness protection, and conditions of detention?*
- *Are there domestic amnesties, immunity laws, statutes of limitation, or other legal provisions in place that might obstruct the prosecution of suspected perpetrators of grave crimes if the mechanism operates under domestic law?*
- *If the introduction of foreign legal concepts into the domestic system is being contemplated, are there resources available to ensure effective implementation through mentoring, training, translation of resource documents, or other means?*

- *Would embedding the mechanism in the domestic system increase the chances that its functioning could strengthen standards in the regular justice system? In the country in question, could an integrated mechanism create positive judicial precedent in relation to the interpretation of substantive and/or procedural law?*
  - *What is the risk that integrating a mechanism in a politicized domestic justice system will result in proceedings that lack fairness and credibility? What types, intensity, and duration of external involvement would be needed to mitigate identified risks?*
  - *Which working languages are essential for the mechanism to function, and what would be the implications of adding one or more foreign languages to facilitate possible international participation?*
  - *Is relevant international jurisprudence already available in the possible working languages of the mechanism? If not, what are the implications of translation needs, in terms of cost and time?*
  - *If an external mechanism is contemplated, where will convicted persons serve their sentences, and what will happen to those who are acquitted and to convicted persons who have completed their sentences? Are international cooperation agreements necessary?*
  - *If an external mechanism is contemplated, what institution(s) will handle residual issues, including the prosecution of fugitives, legal challenges to the conditions of detention, witness protection, and the implementation of awarded reparations?*
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## **C. Jurisdiction**

The jurisdiction component of a mechanism's mandate encompasses subject matter, personal, temporal, and geographic (or territorial) jurisdiction. In other words, who will be subject to the court's authority and pursuant to which forms of criminal liability, for which crimes, occurring when, and where? This section looks at each of these components in turn.

### **1. SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is the list of crimes a mechanism is authorized to investigate, prosecute, and adjudicate. This forms the core of a mechanism's mandate.

## Experiences to Date

Most mechanisms considered for the purposes of this handbook have focused on three core international crimes: genocide, crimes against humanity, and war crimes. These core three, however, are in the process of making way for a fourth: the crime of aggression.<sup>71</sup> In the Democratic Republic of Congo, for example, a proposal for the establishment of specialized chambers reflected the currency of these developments.<sup>72</sup> Meanwhile, in Bangladesh, despite its founding Act, which dates back to 1973, the International Crimes Tribunal for Bangladesh (ICTB) may have been ahead of its time in subject matter jurisdiction: it has jurisdiction over the core three, as well as “crimes against peace” (including waging a war of aggression).<sup>73</sup> Mechanisms considered by this handbook that have been proposed but not implemented feature the core three. For example, with regard to Burundi, the Arusha Agreement of 2000 contemplates the establishment of an “international criminal tribunal to try and punish those responsible [for] acts of genocide, war crimes and crimes against humanity.”<sup>74</sup> Similarly, the August 2015 peace agreement for South Sudan<sup>75</sup> includes the proposed establishment of a hybrid court “to investigate and prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law,” in particular the core three and “other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence.”<sup>76</sup> The proposed Special Court for Darfur would have jurisdiction over “gross violations of human rights and serious violations of international humanitarian law.”<sup>77</sup>

Some mechanisms have jurisdiction over crimes other than the core three, and this has legal consequences. The inclusion of additional crimes allows the prosecution of offenses without needing to prove additional contextual elements that would qualify them as “core three crimes” (such things as scale, policy, or the existence of a military conflict). However, while statutes of limitation, amnesties, and immunities should not apply for international crimes, including at least war crimes, crimes against humanity, and genocide, such limitations on prosecution may apply for ordinary crimes included in the mandate.

The Statute of the Extraordinary African Chambers specifically names the crime of torture in addition to the core three. Other mechanisms, such as the SCSL and ECCC, have had mandates to prosecute certain domestic crimes in addition to core international crimes. Others have had mandates to investigate and prosecute crimes that straddle the domestic/transnational crime divide, such as terrorism. The Special Tribunal for Lebanon only has jurisdiction over offences under the

Lebanese Criminal Code, most notably intentional homicide and acts of terrorism. The International Crimes Division of the Ugandan High Court has jurisdiction to deal with those who have committed “serious crimes,” which include the core three, as well as crimes of terrorism, human trafficking, piracy, and “other international crimes.”<sup>78</sup> Some of these ideas are reflected also in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which would give the court international criminal jurisdiction.<sup>79</sup> Discussions and proposals for a Special Tribunal for Kenya contemplated subject matter jurisdiction over “genocide, gross violations of human rights, crimes against humanity and such other crimes as may be specified in the Statute.”<sup>80</sup>

The Iraqi High Tribunal (IHT) had jurisdiction over the core three, as well as “violations of Iraqi laws.” Broadly, this provision encompassed “interference in the affairs of the judiciary or attempting to influence its functioning; the wastage and squandering of national resources; the abuse of position and the pursuit of policies that have almost led to the threat of war.”<sup>81</sup> In Kosovo, international judges recruited by the UN could sit not only on grave crimes cases but also whenever “necessary to ensure the independence of the judiciary or the proper administration of justice.”<sup>82</sup> One of the most ambitious articulations of subject matter jurisdiction among the mechanisms reviewed for this handbook is that in the draft statute for the (proposed) Extraordinary Criminal Court for Liberia (ECCL). The document proposed several pages of international, transnational, and domestic crimes, including economic crimes. It aimed to give the ECCL both criminal and administrative jurisdiction. On the administrative side, it sought to establish jurisdiction over “final administrative acts of the institutions and or bodies of the Republic of Liberia, determine the legality of individual and general administrative acts taken under State authority, resolve property disputes and levy tort penalties in accordance with Liberian law and international standards.”<sup>83</sup>

Mechanisms in South and Central America provide additional, diverse examples of subject matter jurisdiction. In Guatemala, CICIG has three categories of jurisdiction. First, to investigate the existence of illicit security forces and clandestine security organizations that commit crimes affecting the fundamental human rights of the citizens of Guatemala and to identify the structures of these illegal groups as well as their activities, operating modalities, and sources of financing. Second, to help the state to disband these structures and to promote the investigation, criminal prosecution, and punishment of the crimes committed by the members of such groups. Third, to make recommendations to the state of Guatemala regarding public policies to be adopted—including the necessary judicial and institutional reforms—

to eradicate and prevent the reemergence of clandestine security structures and illegal security forces. In other words, the subject matter jurisdiction of the CICIG is really an anomaly in comparison with the more “traditional” mechanisms established to deal with core international crimes, but nonetheless an available model for states seeking to target other forms of criminal activity contributing to a broader culture of human rights abuses.

In Colombia, extrajudicial killings and serious human rights abuses by state and nonstate actors have been prosecuted in domestic courts, including (more recently) on the basis of domestically implemented Rome Statute provisions. Similarly, in Argentina, widespread killings, systematic torture, and abductions by death squads—while formerly prosecuted as domestic crimes—have increasingly been labeled as crimes against humanity. In Haiti, although the death of Jean-Claude “Baby Doc” Duvalier subsequently ended proceedings, on February 20, 2014, a decision of the Court of Appeals of Port-au-Prince recognized that the concept of crimes against humanity was “part of customary international law and that customary international law is part of the national law of Haiti.”<sup>84</sup>

In Europe, there are a number of domestic or hybrid mechanisms that illustrate the complexities involved—at the more domestic end of the spectrum—in deciphering applicable laws and in ensuring their adequacy. For example, the Supreme Court of Kosovo returned a number of war crimes cases for retrial before UN Regulation 64 Panels due to confusion over applicable law. The Regulation 64 Panels’ successor, the European Union Rule-of-law Mission in Kosovo (EULEX), relied on provisions in the criminal code of the Socialist Federal Republic of Yugoslavia (SFRY), but these provisions only included war crimes, not crimes against humanity or genocide. Inadequacy of laws has also been an issue for prosecutions in Croatia, particularly with regard to notions of command responsibility and crimes of sexual violence.<sup>85</sup> In Bosnia, there was an attempt to avoid some of this confusion through sequencing processes: first, in 2003, the adoption of new criminal and criminal procedure codes, and then the planning for the establishment of the War Crimes Chamber, which was inaugurated in March 2005. Nevertheless, there are still disputes over applicable law at the BiH WCC and in local courts, and the new codes and old SFRY codes are still in use.

The Kosovo Specialist Chambers and Specialist Prosecutor’s Office has jurisdiction over crimes against humanity, war crimes, and crimes under Kosovo Law, but only with reference to allegations in a “Council of Europe Assembly Report.”<sup>86</sup> The mechanism’s jurisdiction is thus limited by reference to particular allegations.

In the Central African Republic (CAR), the Special Criminal Court has jurisdiction over gross violations of human rights and international humanitarian law, as well as international crimes defined under the CAR criminal code (genocide, crimes against humanity, and war crimes, including those under current investigation and those to be investigated in future). Finally, although not the only crimes within their jurisdiction, mobile courts operating in remote parts of the DRC have been heavily devoted to hearing cases involving sexual offenses.

All mechanisms—particularly special mechanisms established entirely outside of a domestic jurisdiction, or in parallel to it—have come to require additional subject matter jurisdiction over offenses against the administration of justice (such as perjury, obstructing or interfering with witnesses, or obstructing or bribing court officials). In the case of the earlier (ad hoc) tribunals, jurisdiction over these offenses was left to subsidiary legislation (their Rules of Procedure and Evidence).<sup>87</sup> By the time the Rome Statute was adopted, such offenses were included in primary legislation.<sup>88</sup> Also included in this category of jurisdiction is the power to sanction counsel for misconduct.

## **Lessons and Considerations**

1. **Subject matter jurisdiction should reflect the realities of the conflict in question.** The broad consensus about prosecution initiatives for international crimes is that they should focus on international crimes of genocide, crimes against humanity, and war crimes. However, some models have excluded categories of crime that did not feature in the conflict; for example, the statute for the SCSL did not include genocide. More commonly, founding documents have granted mechanisms jurisdiction over a broader set of offenses. These have included some domestic offenses (for example, in the ECCC and SCSL mandates) included for legal or policy reasons. Other mechanisms have included a broader raft of international crimes, including such matters as terrorism and piracy (for example, in the Uganda ICD statute).
2. **Scoping missions or commissions of inquiry can provide guidance on which crimes to include in the mechanism's mandate.** An example of this is the Liberian Truth and Reconciliation report providing recommendations for the establishment of a criminal court (i.e., the ECCL) and annexing a draft statute to the report. The report included a list of potential targets for investigation/prosecution. Caution must be exercised, however, in relying wholly on such findings—they should be viewed as preliminary only and within

the limitations under which the inquiries were conducted. Such missions may overlook some forms of crime, especially such commonly stigmatized crimes as sexual and gender-based violence; subject matter jurisdiction must provide for all potential forms of atrocity-crime, even where there may be silences around their commission.<sup>89</sup>

3. **Mention of specific crimes of concern can provide guidance to the mechanism's implementers.** Explicitly granting the mechanism authority over specific crimes (such as sexual violence or torture) may be duplicative of a broader mandate over war crimes, crimes against humanity, or genocide, or can expand subject matter jurisdiction to include instances of crimes that do not fulfill additional contextual elements to qualify as international crimes. Doing so may be desirable where particular crimes featured heavily in the underlying situation. This can provide important guidance to the mechanism's operators and send a signal to affected populations that these offenses will not be ignored.
4. **Statutes should define subject matter jurisdiction consistent with international standards.** The use of criminal definitions that comport with international standards (including those of the Rome Statute and/or customary international law) can help ensure that the law's scope is sufficiently comprehensive with regard to specific criminal acts and chapeau elements, can prevent the application of statutes of limitations to grave crimes, and can facilitate the use of jurisprudence from other jurisdictions. If the country in question has already domesticated international crimes in accordance with international standards, or allows the direct application of such definitions, this may not be of concern. However, where neither of these is the case, the establishment of a new mechanism may present an opportunity to introduce criminal definitions of core international crimes that are in accordance with international standards. By contrast, the drafting of a mechanism's subject matter jurisdiction should avoid introducing definitions at odds with international standards. This was the case with the statute for the ECCL, recommended by Liberia's Truth and Reconciliation Commission (TRC).<sup>90</sup>
5. **Defining the mechanism's subject matter jurisdiction should take account of the subject matter jurisdiction of other relevant judicial authorities.** It may be appropriate for the new mechanism to have overlapping subject matter jurisdiction with other institutions, but only if mandates are differentiated in other ways. For example, it may be understood that an existing international

court (such as the ICC, ICTY, or ICTR) will take on complex cases against more senior-level suspects, while domestic courts (for example, military courts in the DRC, the BiH WCC, or Rwandan domestic and *Gacaca* courts) deal with simpler cases involving lower-level perpetrators. This may be important to address the sheer number of cases in a given situation. Within a domestic system, there may be reasons for a mechanism to have differentiated temporal jurisdiction from existing authorities dealing with the same kinds of crime. However, if there is insufficient differentiation from the mandates of extant authorities, then there is a heightened risk of legal ambiguity, and even the political manipulation of such ambiguity as a means of evading accountability. Within the Rome Statute system, the principle of complementarity may make this phenomenon more common.

6. **A mechanism with jurisdiction over domestic crimes may have a greater impact on the country's legal system.** At least in theory, this may be especially true in common law countries, where jurisprudence can set important legal precedents. However, granting a mechanism an ability to apply domestic law does not guarantee that this will happen. The SCSL mandate allowed the prosecution of “crimes under relevant Sierra Leonean law,” in addition to international crimes. In practice, however, the prosecutor decided against using this latitude.
7. **Subject matter jurisdiction that is too broad may create unrealistic expectations, open avenues for obstruction, and/or render the mechanism unworkable.** Creating a mechanism that has very broad subject matter jurisdiction suggests a larger and costlier structure that is more likely to raise questions of feasibility. Such questions have emerged with regard to the proposed criminal jurisdiction of the African Court of Justice and Human Rights (ACJHR) and may have contributed to Liberia's inability to create a specialized prosecution mechanism. Further, granting a mechanism with authority over a wide range of international crimes, as with the Uganda International Crimes Division, may allow governments to attract resources in the name of trying core international crimes, while building the infrastructure for a mechanism devoted mainly to dealing with other types of crime (such as terrorism).<sup>91</sup>
8. **The mechanism will need powers to investigate and prosecute crimes against the administration of justice in addition to the international and/or transnational crimes that form its core mandate.** Any judicial

mechanism will require the requisite powers to control its own proceedings, including the power to impose criminal sanctions on those giving false evidence before it. It is preferable that this jurisdiction be created in primary, rather than subsidiary, legislation (with foresight).

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## **Key Questions to Help Determine Subject Matter Jurisdiction**

- *In determining subject matter jurisdiction, have all major stakeholders been consulted, including victims and others in affected communities?*
  - *What were the main crimes of concern perpetrated during the conflict?*
  - *What major sources of human rights and criminal documentation exist that can help determine this (including commissions of inquiry, scoping reports, and domestic and international civil society reports)?*
  - *What crimes carry particular social stigma in the society in question, such that their occurrence may have been underreported. Have organizations or entities that are focused on those types of crimes in particular been consulted?*
  - *Does the country concerned have legal definitions consistent with international standards?*
  - *Can the country directly apply treaty law, allowing it to use criminal definitions from treaties to which it is party? If so, does the judiciary have an established practice of doing so?*
  - *What other judicial authorities have jurisdiction over grave crimes? Are overlaps likely to strengthen or dilute chances for genuine and fair criminal enforcement?*
  - *Is the proposed subject matter jurisdiction realistic?*
  - *Could granting the mechanism jurisdiction over some domestic laws lead to jurisprudence that would aid broader legal reform?*
  - *Does the mechanism need explicit jurisdiction over crimes against the administration of justice, or will other elements of the justice system handle such offenses as perjury and witness intimidation?*
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## 2. PERSONAL JURISDICTION AND MODES OF LIABILITY

Personal jurisdiction comprises the set of actors subject to the legal power of a judicial mechanism's authority. Modes of liability comprise the basis in law by which individuals can be considered criminally responsible for crimes. Decisions to define personal jurisdiction and modes of liability narrowly or broadly will have implications for the total number of cases a mechanism might be expected to handle, with ramifications for its scale, structure, and financing. Further, it will play a major role in determining the potential liability of senior officials, with potential political consequences.

### Experiences to Date

#### *Personal Jurisdiction*

Most mechanisms considered in this handbook have the power to investigate and prosecute “natural persons.”<sup>92</sup> However, some recent mechanisms and proposed mechanisms, including in the DRC and Guatemala, have begun to include broader notions of personal jurisdiction, so as to include those who finance or benefit from grave crimes.<sup>93</sup> The draft Convention on Crimes against Humanity, provisionally adopted in 2017 by the International Law Commission, contains a provision on the liability of legal persons.<sup>94</sup>

Whereas the ad hoc tribunals for Rwanda and the former Yugoslavia were granted personal jurisdiction over any perpetrator of crimes under their statutes, many hybrid and internationalized courts, including the SCSL and ECCC, have had their personal jurisdictional mandates limited through language directing them to focus on perpetrators in leadership positions and/or those most responsible for crimes.

Some models, such as Colombia's Justice and Peace Law (JPL) and Special Jurisdiction for Peace (SJP), have limited personal jurisdiction by explicitly accommodating amnesties granted to some types of suspected perpetrators (as well as through a directive from the attorney general narrowing the JPL's broad prosecution mandate in law to those “most responsible”). As in post-apartheid South Africa, the proposed statute for Liberian war crimes court cited suspects' cooperation with the truth commission as a reason to forgo their prosecution. The International Crimes Tribunal for Bangladesh recognizes an amnesty provided to those on one side of the conflict, and personal jurisdiction is further limited because it may not hear cases related to persons living outside of the country.

## ***Modes of Liability***

Different mechanisms have had a wide variety of modes of liability. The ad hoc tribunals contemplate criminal liability for those who plan, instigate, order, commit, or aid and abet in the planning, preparation, or execution of a crime within their subject matter jurisdiction. They specify that official position does not exempt an individual from criminal liability; they note the concept of command responsibility (the responsibility of superiors for the actions of their subordinates, under certain circumstances); and they note that acting pursuant to the orders of a superior does not absolve an individual from liability. These concepts have been picked up in the SCSL Statute and ECCC Law. Additionally, judges have interpreted criminal liability to include the concept of acting in concert (joint criminal enterprise).<sup>95</sup>

The Malabo Protocol, which (if ratified by a sufficient number of states) will establish criminal jurisdiction for the African Court of Justice and Human Rights controversially limits criminal liability based on official capacity. It grants immunity to serving heads of state and government and “other senior officials” in relation to official acts. (See the discussion of international standards in relation to amnesties and immunities in II.B. RELATIONSHIP TO DOMESTIC SYSTEM.) In Colombia, a deviation from the Rome Statute’s definition of command responsibility in the 2016 law creating the Special Jurisdiction for Peace has led some observers to believe that military commanders may have de facto immunity.

The “principle of legality” can also limit modes of liability. (See also *Temporal and Territorial Jurisdiction*, below.) At the ECCC, judges found that the form of joint criminal enterprise known as JCE III (or “extended” joint criminal enterprise)<sup>96</sup> was not a form of liability “foreseeable to the Charged Persons in 1975-79” and that therefore the “principle of legality” required the court to “refrain from relying on the extended form of JCE in its proceedings.”<sup>97</sup> Uganda’s International Crimes Division has been unable to use modes of liability from the Rome Statute, which were largely incorporated into the domestic ICC Act that came into effect in 2010. The ICC Act cannot be retroactively applied due to a strict understanding of the principle of legality expressed in the country’s constitution and judicial practice. The STL Statute has been criticized for violating the principle of legality by applying uniquely international forms of criminal responsibility (namely joint criminal enterprise and command responsibility) to domestic (Lebanese) crimes.<sup>98</sup>

## Lessons and Considerations

1. **Personal jurisdiction and modes of liability should reflect evolving international standards.** Accordingly, mandates should not include immunities for heads of states and government, or other persons based on offices they hold. Perpetrators of grave crimes are often highly ranked individuals who oversaw (rather than personally physically perpetrated) the crimes, so modes of liability written into any applicable laws should be broad enough to capture a wide range of conduct. The case law of several mechanisms illustrates that the availability of various concepts of liability is particularly important to ensure that criminal accountability can be secured for crimes of sexual violence. Extended form joint criminal enterprise—crimes outside the scope of an original common plan, but nonetheless foreseeable as a consequence of the original plan—is the form of liability that has been most commonly used to secure accountability for crimes of sexual violence. States and mechanisms contemplating adoption of Rome Statute standards should note that it is disputed whether the Statute encompasses this form of liability.<sup>99</sup>
2. **Drafters should take account of the principle of legality as understood in the country’s law and practice, as well as customary international law.** They should be clear about which modes of liability apply to which period of events under existing law, and what statutory or constitutional changes may be desirable as part of the mechanism authorization package to ensure that prosecutors and judges have the discretion to consider cases involving key suspected perpetrators.
3. **Personal jurisdiction should not be defined to shield possible perpetrators on any side of the conflict from legal scrutiny.** Exercises in one-sided or “victors” justice further divide riven societies and underscore perceptions that justice systems serve power rather than law. Although the president of Sierra Leone initially requested United Nations assistance in creating a court to try members of the Revolutionary United Front who committed atrocities (implicitly ignoring crimes by members of other fighting factions), the UN appropriately insisted on removal of this specification in the Special Court’s mandate. In the end, the SCSL convicted members of different factions, including those of a pro-government militia.
4. **Personal jurisdiction should be defined broadly enough to capture potential targets (leaving room for prosecutorial and judicial discretion), yet sufficiently defined so as not to create an indefinite mandate and**

**unmanageable costs.** Almost across the board, prosecution mechanisms show that significant investment and expenditure is incurred during the start-up phase, with investigations and prosecutions becoming more streamlined and efficient as experience, expertise, and institutional memory accrues.<sup>100</sup> Where a government's acceptance of an independent mechanism is questionable, particular care should be given to wording that narrows mandates. In Cambodia, critics accuse some court officials of inappropriately exploiting the mandate's wording on personal jurisdiction as a convenient legal basis to shield suspects from investigation.<sup>101</sup>

5. **Personal jurisdiction should be defined with awareness of other existing or planned prosecution and transitional justice mechanisms.** It should take express account of types of perpetrators of that may be left to lesser (or higher) courts, as is the case in Bosnia. It should also account for those who receive amnesty for noninternational crimes, as well as truth commissions that may deal with lower-level perpetrators (perhaps also through grants of amnesty for noninternational crimes in exchange for cooperation). Colombia offers a (troubled) example of a holistic approach to transitional justice.

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## Key Questions to Help Determine Personal Jurisdiction and Modes of Liability

- *In determining personal jurisdiction and modes of liability, have all major stakeholders been consulted, including victims and others in affected communities?*
- *Should the mechanism have jurisdiction beyond natural persons (for example, corporate actors)?*
- *Which standards are to be applied to the mechanism's personal jurisdiction and modes of liability, and with what implications?*
- *Does existing criminal procedure (where it is to be applied) comport with international standards on personal jurisdiction and modes of liability? If not, what constitutional and/or statutory changes might be necessary?*
- *What limits does existing domestic law (where it is to be applied) place on the application of new modes of liability, through law and practice related to the principle of legality?*
- *Do judges have a practice of applying customary international law?*

- *Does the proposed personal jurisdiction single out particular factions for scrutiny and/or shield others?*
  - *Is the potential pool of suspects large enough that limiting language may be necessary (e.g., “most responsible”) to narrow personal jurisdiction, while remaining consistent with the mechanism’s intended purpose?*
  - *If personal jurisdiction is narrowed, do prosecutors and judges nonetheless retain sufficient discretion to apply the mandate to a broad enough group of potential suspects?*
  - *Do other existing or planned prosecution or non-prosecution mechanisms of transitional justice have jurisdiction over suspects who committed crimes under the mechanism’s subject matter jurisdiction? If so, how can the mechanism’s personal jurisdiction be tailored, consistent with international standards, to take account of these?*
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### **3. TEMPORAL AND TERRITORIAL JURISDICTION**

Temporal jurisdiction is the time period of underlying events over which a judicial mechanism may exercise authority. Territorial, or geographic, jurisdiction is the defined physical territory where events occurred, over which a judicial mechanism may exercise authority. The definition of each will affect the number of cases a mechanism may be expected to handle, with ramifications for its scale, structure, and cost. These definitions may also have important consequences for a mechanism’s fairness, popular legitimacy, and legacy, as well as the potential for creating political controversy. Finally, the definition of temporal jurisdiction may raise questions about the retroactive application of law.

#### **Experiences to Date**

##### ***Temporal Jurisdiction***

With regard to temporal jurisdiction, there have been three typologies of jurisdiction. First, many mechanisms have jurisdiction over precise time periods. These include the mechanisms for Cambodia, Rwanda (the ICTR), Bangladesh, Iraq, and the Extraordinary African Chambers in the Courts of Senegal. Second, some mechanisms have mandates over particular events: the Special Tribunal for Lebanon’s jurisdiction related to an assassination; the Interdisciplinary Group of Independent Experts was dispatched to Mexico in relation to crimes that unfolded

over two days; a proposed Special Tribunal for Kenya (STK) would have had a mandate over postelection violence that occurred during just a few months in 2007–2008. Finally, there are also mechanisms that have had a defined start date for their temporal jurisdiction, but no defined end date. This was the case with the ICTY; it is the case with the International, Impartial and Independent Mechanism for Syria; and investigations and prosecutions in Côte d’Ivoire related to events following 2010 presidential elections, none with a specified end date.

Some mechanisms have struggled with issues of temporal jurisdiction as it relates to the principle of legality. (See also *Personal Jurisdiction and Modes of Liability*, above.) Courts applying international law are often required to retroactively apply contemporaneously created legal provisions. This means they must analyze whether the conduct referenced in those provisions was criminal under national or international law at the time of the commission of the offenses.<sup>102</sup> Concerns around the interpretation of the principle of non-retroactivity of criminal law have been raised in relation to Uganda’s ICD. Similarly, the court of justice of the Economic Community of West African States (ECOWAS) controversially found that Senegalese legislative changes adopted in 2007, which incorporated international crimes into its Penal Code, “would violate the principle of non-retroactivity of criminal law if applied to prosecute crimes allegedly committed by Habré almost 20 years before.” For this reason, Senegal had to establish “extraordinary,” and internationalized chambers in order to try the Habré case.<sup>103</sup> In Sierra Leone, the SCSL’s Appeals Chamber ruled in pretrial hearings that the forced recruitment of child soldiers had “crystallized” in customary international law by the time of the underlying events in question, and thus could properly be charged by the prosecutor.

### ***Territorial Jurisdiction***

The territorial jurisdiction of any mechanism is usually defined to encompass the territory on which grave crimes occurred. In most cases, it is defined as the entire territory of countries concerned (including mechanisms in Serbia, Croatia, Bosnia, Kosovo, Sierra Leone, Liberia, Argentina, Guatemala, and Colombia). Where conflicts relate to a specific part of a country, there is precedent for limiting territorial jurisdiction to that area (the proposed Hybrid Court for Darfur). By contrast, there is also precedent for territorial jurisdiction that spans international borders, as with the ICTY’s jurisdiction over all countries on the territory of the former Socialist Federal Republic of Yugoslavia, and the proposed criminal chamber of the African Court of Justice and Human Rights, which would have jurisdiction over an entire continent.

There have also been models of limited and unlimited extraterritorial jurisdiction. The ICTR's jurisdiction extended to Rwandan citizens responsible for crimes committed in the territory of neighboring states. The Extraordinary African Chambers in the Senegalese Courts had jurisdiction over crimes in Chad. And, although beyond the scope of this handbook, many countries have legal frameworks allowing various forms of universal jurisdiction over grave crimes perpetrated outside their territory.

## Lessons and Considerations

### *Temporal Jurisdiction*

1. **Temporal jurisdiction should not be defined in order to bring about selective accountability.** By itself, this is no guarantee of accountability on all sides (as seen with the ICTR in Rwanda<sup>104</sup>), but it is a fundamental prerequisite to fairly applied criminal accountability. Foresight at the time of a mechanism's design could enhance maximum accountability and avoid shielding certain perpetrators. From a mandate and purpose perspective, this could be ensured by the use of strong preamble language in the founding legislative instrument and/or the founding agreement with an international body. Temporal jurisdiction can be designed to enhance these prospects, or at least to provide a legal basis to ensure that all perpetrators could—theoretically—be captured.<sup>105</sup> In Sierra Leone, the start date of the SCSL's temporal jurisdiction was chosen as a “non-politically biased date.”<sup>106</sup> Nevertheless, choosing a start date may present difficult choices between a need for inclusivity and questions of ambition. In the former Yugoslavia, the ICTY had no jurisdiction over previous grave crimes committed during and after World War II; in Côte d'Ivoire, grave crimes committed during cycles of violence prior to 2010 have not been investigated and prosecuted; and neither the ICTR nor the Gacaca mechanism have examined grave crimes in the decades prior to the Rwandan genocide.
2. **Where a mechanism is being designed to address crimes in the more distant past, stakeholders must be aware of inevitable additional challenges.** For example, if evidence was not gathered contemporaneously to the events, it may be difficult to do so now. Many of those who perpetrated or experienced atrocities (victims and witnesses) may no longer be alive. The lapse of time has burdened the ECCC's attempt to investigate and prosecute historical crimes (committed 1975–1979, corresponding to the period of Khmer Rouge rule). Key accused persons, suspects, and witnesses have died in the

intervening years and during the court's proceedings. Similar challenges have faced proceedings in Argentina, Guatemala, Bangladesh, and Senegal (in relation to Chad). Prosecuting crimes of a more distant past means that often younger generations are not familiar with the facts and issues involved. This can be a challenge, but also an opportunity for mechanisms to play a truth-telling role. To do so, mechanisms may need to place special emphasis on reaching youth through outreach and public information.

3. **Mechanism designers should anticipate challenges arising from the bar on retroactive application of criminal law.** One option might be for the founding legislation to make clear that the content of the laws are taken from customary international law and, therefore, do not violate the principle of non-retroactivity. However, where it is not clear that this is indeed the case, mechanisms can become bogged down in complex pretrial litigation.

### ***Territorial Jurisdiction***

4. **Territorial jurisdiction should not be defined in ways that shield particular factions suspected of perpetrating grave crimes.** If crimes perpetrated by different factions occurred disproportionately in different geographical locations, it will be especially important to ensure that the mechanism's territorial jurisdiction encompasses these. This will be critical to the mechanism's fairness and legitimacy.
5. **Territorial jurisdiction that extends across national borders will raise ancillary considerations for those designing a mechanism.** These will include matters such as state sovereignty, cooperation, and the potential need for additional agreement(s) allowing state actors to access evidence, witnesses, territories, and suspects. Nonetheless, an expanded territorial jurisdiction may be necessary to capture the extent of criminality, especially where suspects have fled into neighboring states, or where conflict (and related atrocities) has expanded beyond state borders. This may be of increasing relevance, as many conflicts are moving away from traditional state-based (or entirely intrastate) conflict to criminal organizations operating simultaneously across multiple territories (such as Daesh / Islamic State, al-Shabaab, Boko Haram, or the Zetas cartel).

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## Key Questions to Help Determine Temporal and Territorial Jurisdiction

- *In determining temporal and territorial jurisdiction, have all major stakeholders been consulted, including victims and others in affected communities?*
  - *When and where were the main crimes of concern perpetrated during the conflict?*
  - *What would be the effect on the mechanism's fairness and perceived legitimacy of any proposed constraints on temporal and territorial jurisdiction?*
  - *Were acts under the mechanism's subject matter jurisdiction criminal under applicable domestic law during all times of the proposed mechanism's mandate? If not, were they criminal under customary international law, and does the system in which the mechanism will operate have legal provisions allowing direct application of customary international law or a practice of recognizing customary international law?*
  - *Where crimes have been perpetrated across borders, is there support from affected states and regional or international bodies to create a mechanism with jurisdiction beyond one country's territory? If so, what agreements may be needed to secure access to evidence, witnesses, and suspects, and to conduct other functions, including outreach, across borders?*
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## D. Basis of Authority

In the establishment of a mechanism for criminal accountability, consideration must be given to the body or source providing official permission or approval for its creation. Some examples of the sources of authority—in terms of a body as well as an instrument—are:

- the United Nations Security Council (UNSC; via the instrument of a resolution);
- the United Nations General Assembly (via the instrument of a resolution);
- a domestic government, in partnership with the UN (via an agreement between the state and the United Nations);
- a domestic government, in partnership with a regional body (via an agreement between the state and the regional body);

- the relevant domestic legislative body (via a domestic legislative instrument, or series of legislative instruments); and
- a decision of the executive, where legally possible.

Clearly, there can be overlap in these categories, as some mechanisms require both international and domestic authorization.

The basis of a mechanism's authority is closely related to its relationship with the domestic system. (See II.B.) For example, a mechanism that derives its authority from a UN Security Council resolution will likely have a more distant relationship with the domestic judicial system. Conversely, a mechanism whose authority derives solely from domestic legislation will have a more proximate relationship to the domestic judicial system.

## **Experiences to Date**

The UN Security Council authorized the establishment of the ICTY and the ICTR (through the passing of resolutions, pursuant to powers under Chapter VII of the UN Charter). In both instances, the Council determined that the situations in the former Yugoslavia and Rwanda constituted threats to international peace and security. The authority for both the SCSL and the ECCC largely derives from agreements between the UN and the Sierra Leonean and Cambodian governments, respectively. In the case of the ECCC, however, the agreement regulates Cambodia's relations with the UN in terms of international assistance to the court, whereas the ECCC Law (domestic Cambodian legislation) establishes the court. In essence, therefore, the ECCC derives its legal authority from domestic legislation.

Authority for the Extraordinary African Chambers also emanates from an agreement between the Republic of Senegal and the African Union, and like the ECCC, the EAC are located within an internationalized domestic court system (Senegal's). The Special Tribunal for Lebanon is an anomaly on this spectrum of tribunals established by a Security Council resolution or by a treaty between the UN and a domestic government because it borrows from both. There was an attempt to create the STL as a treaty-based tribunal with domestic (Lebanese) implementing legislation, similar in nature to the ECCC (though located outside of Lebanon). However, when the Lebanese government met crippling opposition in passing domestic implementing legislation, the UN Security Council stepped in to pass a binding resolution (Resolution 1757) establishing the Tribunal.<sup>107</sup>

The UN General Assembly has a long history of involvement in efforts to create accountability for international crimes, including the affirmation of the Nuremberg Principles following World War II, requesting the drafting of the Genocide Convention, and passing a resolution (60/147) in 2005 to set forth “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.” The General Assembly has also had indirect and direct roles in authorizing specific mechanisms. It authorized the Secretary-General to negotiate the agreement with the government of Cambodia to create ECCC and approved the draft agreement that emerged from those negotiations. In the face of Security Council deadlock over accountability for crimes in Syria, in December 2016 the General Assembly authorized the creation of the IIIM for Syria.<sup>108</sup>

Certain mechanisms, while deriving their authority from domestic legislation, have been precipitated by a partnership between domestic and international authorities for some kind of international assistance. For example, CICIG in Guatemala is a body created through a partnership between the UN and a domestic government. Although the commission derives its authority from an agreement, following endorsement by the Constitutional Court of Guatemala, the agreement was ratified by Guatemala’s Congress. The Kosovo Specialist Chambers and Specialist Prosecutor’s Office required a constitutional amendment and is part of Kosovo’s judicial system, though proceedings will be held in The Hague.

Several countries, including the Democratic Republic of Congo, Uganda, CAR, Argentina, Colombia, Haiti, Bangladesh, Croatia, and Serbia have either already-existing or emerging mechanisms that derive their authority from domestic legislation. It should be noted, however, that while all derive authority from one or more domestic legal instruments, the types of mechanisms created across these countries vary greatly; for example, CAR created a hybrid mechanism, while many other countries make use of either existing or new specialized divisions of domestic courts. In some cases, such as that of the DRC, a monist approach to the treatment of international law means that the provisions of the Rome Statute are domestically applicable from the date on which the statute came into effect for that country.<sup>109</sup> Proposals for specialized chambers in Burundi, Kenya, Liberia, and DRC have invariably stalled at least in part *because* of the fact that they require legislation to be passed domestically before being funded and becoming operational.

Another category consists of international criminal justice mechanisms that derive authority from a temporary or transitional authority or administration. Examples of

mechanisms falling within this category are the Regulation 64 Panels established by the UNMIK in Kosovo; the Special Panels for Serious Crimes (SPSC, and Serious Crimes Unit [SCU]) established by the UN Transitional Administration in East Timor (UNTAET); and the Iraqi High Tribunal (IHT) established by the Coalition Provisional Authority (CPA).

## **Lessons and Considerations**

### ***Security***

1. **Where conflict is ongoing, creation of a justice mechanism is more likely to require authorization by external entities.** However, even where this is the case (as in the former Yugoslavia and Rwanda), the establishment of peace can then open the door to the creation of additional accountability mechanisms (for example, the BiH WCC, domestic prosecutions in Serbia and Croatia, Regulation 64 Panels in Kosovo, and domestic prosecutions and Gacaca proceedings in Rwanda). The ICTY and the ICTR notably helped to pave the way for these more domestic initiatives.
2. **Where the security situation has led a transitional authority or administration to create a mechanism, attention must be paid to how authority for it will be transferred to the new government, once established.** For example, in Kosovo the UN Regulation 64 Panels passed authority to EULEX, which has devolved greater authority to domestic prosecutors and judges.

### ***Political and Legal Circumstances***

3. **Where governing authorities might be implicated in crimes, or feel that investigations and prosecutions may be destabilizing, a mechanism requiring domestic authorization will become more difficult.** Such governments may overtly oppose the creation of any mechanism (as in Syria), support creation in theory but create obstacles in practice (as in Kenya), or create a mechanism that can be controlled to prevent the investigation and prosecution of government officials, forces, or allies (as in Uganda). In such instances, potential international partners will have a few main options: (1) try to work with the government to accept a credible mechanism that is not one-sided, as the UN succeeded in doing with the government of Sierra Leone in establishing the SCSL; (2) internationally authorize a mechanism, as the UN

Security Council did in relation to Lebanon (i.e., STL), and the UN General Assembly has done for Syria (i.e., IIM); (3) make concessions to government influence over the mechanism, as the UN did in the process of creating the ECCC; or (4) decide not to participate in the authorization of a tainted mechanism. In making these choices, stakeholders should be clear-eyed about potential long-term ramifications on a mechanism's legitimacy with different constituencies, its effectiveness, and its efficiency (including cost), and weigh these factors against potential moral, security, rule-of-law, political, and financial costs of withholding participation.

4. **Where there is political will and domestic law allows, some parts of specialized mechanisms can be created by the judiciary.** In Bosnia, for example, the plenary of judges in the State Court's War Crimes Chamber acted to create the Criminal Defense Support Section (the Odsjek Krivične Odbrane, known by its Serbo-Croatian acronym, OKO). However, politics may constrain such initiatives. For example, if a judiciary has the power to create a specialized division for international crimes, but police and prosecutors are unwilling or unable to investigate and prosecute those offenses, the division will be of little use.

### *Legitimacy*

5. **Where a transitional authority or administration creates a mechanism, the authorizing authority's public legitimacy will broadly determine the public legitimacy of the mechanism created.** For example, in Iraq, the IHT lacked public legitimacy, especially among Sunnis, because it was created by the United States-led Coalition Provisional Authority and then run by a Shia-dominated government.
6. **Where a mechanism is established via a treaty between an international organization (such as the UN, the AU, or the EU) and a sovereign state, its perceived legitimacy and credibility can depend on that of the party with the balance of authority.** This can be seen in the slightly different sources of authority for SCSL and ECCC. In the case of Sierra Leone, the SCSL's Statute formed part of the treaty, whereas in the case of Cambodia, the Agreement and the Law addressed different substantive matters. The Cambodian government forged ahead in enacting the ECCC Law while the UN felt that there were still numerous outstanding issues to resolve (including the method of judicial appointment and oversight). The result in the case of the SCSL was

a partnership between the UN and the Sierra Leonean government, while the ECCC became a domestic court with more contested international assistance. These differences are also compounded by the different balance of power in the prosecutor's offices and judicial chambers within those courts.<sup>110</sup> The extraordinary process leading to the creation of the ECCC, and the nature of the resulting institution, has had grave implications for its functioning, legitimacy, and credibility. Any international organization contemplating a form of hybrid partnership with a domestic government in the creation of a mechanism must be cautious about lending its authority to the creation of an institution over which it has little real control. Extreme caution should be exercised in circumstances where there is ample evidence of executive control over the judiciary in the state concerned.

### ***Enforcement***

7. **The use of a UN Security Council resolution adopted pursuant to Chapter VII of the UN Charter to create a mechanism can be beneficial for enforcement.** If the mechanism is created in this way, the resolution and its provisions (including arrest orders and provisions for access to evidence) become binding on all UN Member States. In practice, the authority of any UNSC resolution may be tested by opponents, and compliance in such circumstances will depend on Member States' willingness and ability to ensure enforcement.<sup>111</sup> UNSC authorization may even impair the perceived legitimacy of a mechanism and exacerbate some challenges to enforcement. For example, the UNSC's authorization of the Special Tribunal for Lebanon's Statute after a domestic bill to create the mechanism by an act of the Lebanese Parliament failed has been criticized as undermining the democratic process and impeding state sovereignty. Further, because the Security Council is a political body in which five powerful states hold veto power, it is able to agree to create mechanisms in some places but not in others (e.g., Syria). This can leave mechanisms created through Security Council resolutions prone to criticism that they exist to do the bidding of world powers.

### ***Clarity of Law***

8. **When an international source authorizes an ad hoc or hybrid mechanism, this can provide clarity about applicable law and procedure.** While embedding specialized international criminal investigations and prosecutions

in already existing courts or offices can have myriad discernible benefits (see II.B. RELATIONSHIP WITH DOMESTIC SYSTEM), it can be difficult to reconcile the application of domestic laws and procedures with specialized prosecutions. This can create confusion and, if not resolved prior to the commencement of investigations/prosecutions, can lead to time-consuming and resource-heavy litigation.<sup>112</sup> As noted by the OHCHR:

It is critical to clarify from the outset which domestic laws apply. Moreover, in some cases the need to amend domestic laws which are contrary to international standards could usefully form part of the negotiations on the creation of the [mechanism]. For example, in Cambodia, prior reform of the criminal procedure code and of the law of the Supreme Council of the Magistracy [the Cambodian body responsible for judicial appointments] would have greatly assisted the Extraordinary Chambers.<sup>113</sup>

### ***Time***

9. **Where domestic authorities create a mechanism, the inherently political legislative process—possibly including necessary constitutional amendments—may lead to delay or defeat.** Proposals for mixed chambers in the DRC, a special tribunal for Kenya, and proposed courts in Liberia and Burundi all failed to gain parliamentary approval. In the absence of a Security Council resolution bringing it into being, the STL might never have been established.
10. **Where the UN authorizes a mechanism, its procedures, rules, and regulations can also lead to delays in operations, the appointment of judges, and the start of trials.** This can also contribute to lengthy pretrial detention, as was notoriously the case with the ICTR.<sup>114</sup> Mechanisms that are backed by the UN but are not part of it (such as the SCSL, STL, and CICIG) have greater flexibility in recruitment and other areas and are typically nimbler. Similarly, other sources of international authorization (such as the Office of the High Representative in Bosnia) may be less bureaucratic. (See also G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF; H. FINANCING; and I. OVERSIGHT.)

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## Key Questions to Help Determine Basis of Authority

- *Is there a government with effective control over the state in question?*
  - *Are domestic authorities interested in genuine criminal accountability for grave crimes, regardless of faction?*
  - *Is there domestic political opposition to the creation of a mechanism (by one or more factions)? If so, would an international organization's support likely help in overcoming this opposition?*
  - *Does domestic law include an adequate framework for handling international crimes? If not, would international authorization or co-authorization of a mechanism aid in establishing a suitable legal framework?*
  - *Taking account of international and treaty law, as well as geopolitics and regional politics, which international or regional bodies could potentially authorize or co-authorize a mechanism?*
  - *Is there reason to believe that there would be significant difficulties in enforcing the decisions of a mechanism related to the country, such that a UN Chapter VII mandate could be especially desirable?*
  - *Are there imperatives of timing (i.e., a peace negotiation or a political window of opportunity) that weigh against domestic or international means of authorizing a mechanism that would likely take too long?*
  - *Where a treaty-based hybrid mechanism is contemplated, what is the public perception of the partner organization being contemplated?*
  - *From the viewpoint of the partnering organization, in real terms, where will the balance of power lie with the institution being contemplated (i.e., domestic authorities, international organization, or genuinely shared)? Is this the best model for balancing the imperatives of judicial independence and fair trial rights with the need for legitimacy and desire for positive impact on broader justice-sector development and reform?*
  - *If a transitional authority proposes to create an accountability mechanism, what body will take on responsibility for the mandate when the transitional authority expires?*
  - *Under domestic law, are there elements of the mechanism that can be authorized by the judiciary?*
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## **E. Location**

Should the mechanism be located in the country in which crimes were committed (or in a specific part or parts of that country) or in an alternative place? If it will be outside the affected country, it may nevertheless be necessary to have in-country offices. If so, where should satellite offices be located, and what functions should they have?

There is currently consensus in the field of international criminal justice that where circumstances permit, trials should be held in-country. This is encapsulated by the principle of complementarity, upon which the ICC is based. In-country proceedings can have several benefits: (1) facilitating greater local ownership and legitimacy over investigations and prosecutions; (2) having positive flow-on effects on the justice sector and the legal profession (fostering rule-of-law development); (3) allowing greater direct participation of affected communities in the proceedings; (4) allowing a greater breadth of inquiry; (5) improving access to evidence and witnesses; (6) ensuring that mechanism officials have a better understanding of the context; and (7) being more cost-effective. Conversely, security may not allow in-country proceedings, or the judicial system may be so politicized or weak that credible investigations, prosecutions, and trials are impossible.

## **Experiences to Date**

The modern era of international criminal justice began in the early 1990s with the creation of two ad hoc tribunals, for Rwanda and the former Yugoslavia, based outside the affected countries—in Arusha, Tanzania, and The Hague, in The Netherlands, respectively. There followed a shift from wholly international mechanisms to more localized ones. Recent exceptions to this are the Special Tribunal for Lebanon (located in The Hague), the Extraordinary African Chambers (located in Dakar, Senegal, dealing with crimes committed in Chad), and the Kosovo Specialist Chambers and Specialist Prosecutor's Office (located in The Hague). The Hague was also the venue for the trial of former Liberian President Charles Taylor, although the Special Court for Sierra Leone held all other proceedings in Sierra Leone. The Hague has likewise been home to the joint appeals chamber of the ICTY and ICTR; the Mechanism for International Tribunals, which will handle remaining legal matters for both tribunals; and the similarly mandated Residual Special Court for Sierra Leone. If it comes into effect, the Malabo Protocol would expand the jurisdiction of the African Court of Justice and Human Rights, creating an Arusha-based international justice mechanism for Africa, which could also sit in AU member states (with their permission).

Most of the mechanisms considered by this handbook are located in-country. They range from hybrid or internationalized institutions (including those in Sierra Leone, Iraq, Cambodia, and Guatemala) to purely domestic initiatives (including Argentina, Colombia, Côte d'Ivoire, Haiti, and Croatia). There are a number of additional countries where proposals for hybrid or wholly domestic initiatives have been considered and rejected, or are emerging (including Kenya, Darfur, South Sudan, and CAR). In relation to wholly domestic initiatives, in some instances, trials have been heard only in a specific court or courts, often in the capital city, as in Bangladesh, and in others cases, have been heard throughout the country, as with Gacaca proceedings in Rwanda, specialized courts in four Colombian cities, or federal district courts across Argentina. The DRC has mobile courts, in which judges, prosecutors, and defense counsel “resolve disputes and dispense justice in areas where the nearest formal courthouse is more than a week’s journey away.”<sup>115</sup>

## **Lessons and Considerations**

### ***Security***

1. **If a mechanism is placed in-country amidst ongoing conflict or general instability, there can be serious implications for the security of trial participants (accused persons, witnesses, judges, prosecution and defense counsel, and other staff), as well as the protection of the mechanism’s premises, evidence, and court records.** At the Iraq High Tribunal the assassination of judges, defense counsel, and witnesses marred the proceedings.<sup>116</sup> Security concerns were central to the decisions to locate the ICTR, the ICTY, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone’s trial of Charles Taylor in alternative places. Similar considerations influenced the decision to locate the Kosovo Specialist Chambers and Specialist Prosecutor’s Office in The Hague. Some lessons can be drawn from these experiences. For example, security risks arising from the profile of individual accused persons can be addressed by moving particular (high-risk) trials to another location, while keeping the bulk of (less controversial) proceedings in-country. Where there are serious ongoing security concerns, trials should generally not be located in-country. This is not just a matter of the security of the participants, which is paramount, but also the credibility and cost of the proceedings. The mechanism must be able to guarantee the safety of all witnesses so that they are able to give a truthful account of events without fear of reprisals.

## ***Legitimacy and Access to Justice***

2. **Proceedings within or close to affected societies are often perceived to be more legitimate than proceedings at mechanisms outside of the country.** Typically, there are understandably high levels of suspicion about foreign mechanisms in countries whose histories are marked by colonialization and other forms of international exploitation. The degree to which this lesson applies also depends on the level of trust that local populations have in the justice system to handle grave crimes cases. This, in turn, can vary along ethnic, linguistic, religious, regional, or other conflict fault lines. Lopsided trust in grave crimes proceedings may reflect the realities of a lopsided conflict, as in Guatemala or Bosnia, where certain communities (i.e., indigenous Mayan groups and Bosniaks) disproportionately suffered atrocities. In such cases, domestic proceedings can polarize society, but may encourage necessary historical reckoning through court proceedings. In other places, as in Côte d'Ivoire or Uganda, the pursuit of one-sided justice may be seen as legitimate by groups associated with the government, while alienating communities who watch as the system fails to hold accountable the perpetrators of atrocities against them. Indeed, in such places, many may view an externally located mechanism (including the ICC) as having greater legitimacy.
  
3. **Locating a mechanism outside the country in which crimes were committed usually makes it more difficult for affected communities to access justice.** Externally located mechanisms usually present significantly greater logistical hurdles to victims and witnesses interacting with investigators, prosecutors, and victim representatives. And with greater distance, it becomes very difficult for average citizens or even local journalists to observe the trials. Because a mechanism located externally typically has greater difficulty managing public information available to citizens of the affected country, it is more prone to misinformation or demonization campaigns by those who oppose its mission or its pursuit of particular cases. This can create problems for legitimacy, which in turn can make witnesses more reluctant to participate in proceedings. This makes outreach and public information efforts all the more important. Broadcasting proceedings to local populations is one way to try to mitigate the problems of distance. However, in-country proceedings are generally the best way to facilitate outreach to affected communities and reduce transportation costs of accused persons, witnesses, and participating victims. Proximity can improve public attendance (as evident in Cambodia), though not necessarily so (as evident in Bosnia).

It can also engender greater public discussion and understanding of a conflict's history. This may have a positive flow-on effect upon general human rights discourse, such as freedom of speech.

### ***Prosecutorial and Judicial Independence***

4. **When a mechanism is located in a country with systemic problems of judicial independence, a weak judiciary, and/or strong executive control over the judiciary, there is a greater risk that such issues will pervade the mechanism itself (as in Bangladesh and Cambodia), unless it has a strong international character (as in Sierra Leone).** This may be a reason to favor locating the mechanism outside the country, though doing so may not overcome such issues entirely.<sup>117</sup> Deciding to locate a mechanism in-country in circumstances where there is political opposition to genuine justice (for example, because members of the incumbent government are potential targets for investigation and prosecution) may cause insurmountable delays to the establishment of the mechanism itself, including in passing legislation creating the mechanism (or creating subsidiary bodies within already-existing judicial mechanisms). This has been the experience in Kenya, Darfur, and Burundi.

### ***Rule of Law Development***

5. **When a mechanism is located inside the country in which crimes were committed, spill-over benefits to the domestic system, including through transfer of skills and/or infrastructure, can be greater.** For example, BiH WCC introduced modern courtrooms, detention facilities, and offices that could also be used for dealing with other forms of serious crime. Uganda's High Court has benefited in similar ways from the establishment of the ICD. The SCSL left to the domestic system a campus that includes a courthouse with two modern courtrooms and a detention facility. In Guatemala, CICIG has empowered a cadre of prosecutors and judges to assert their independence from the executive; through work with CICIG and protection by it, justice-sector officials have developed investigative, prosecutorial, and trial management capacities that are applicable to a broad range of criminal cases. In some places, skills and knowledge vacuums (including those created by the deliberate targeting of judges and lawyers during the conflict, as in Cambodia, East Timor, and Rwanda) can be filled by internationals working alongside nationals. This also has the potential to contribute to justice-sector reconstruction and reform.

6. **When a mechanism is situated in-country, the risks of a “reverse-legacy” are much greater.** In the case of the ECCC, despite some positive impacts, there has been a reverse-legacy in the sense of further entrenched popular skepticism about the independence of the domestic judicial system. Even with a mechanism with a partial international judiciary, the Cambodian government was still able to exercise a significant amount of control over the court’s docket (and over both Cambodian and international judicial appointees). Two independent studies (conducted in 2008 and 2010) by the University of Berkley demonstrated that, in spite of the general satisfaction of the Cambodian population with the ECCC, there was a worsening of Cambodians’ perceptions of the credibility of the justice system during the same period.<sup>118</sup>

### ***Time and Money***

7. **If trials are located in-country, the cost-effectiveness of a mechanism will generally be greater.** Remote courts, including the ICC, ICTY, and ICTR, have had to expend tremendous resources to send investigative, outreach, and witness protection missions to affected countries, and to transport victims and witnesses internationally to trial. Further, such operating costs as construction, rent, and maintenance for a court in The Hague or other remote locations usually far outpaces those of in-country mechanisms. By contrast, in-country mechanisms facilitate access to evidence and witnesses, and increase officials’ understanding of the context, which can help them avoid costly mistakes in the interpretation of evidence.
8. **However, in-country proceedings are no guarantee for cost-effectiveness.** If there is ongoing conflict, (as was the case in CAR as of late 2017), providing security for the mechanism can be costly. Politics are also a factor. For example, the ECCC, located in-country, has not been cost-effective, in part due to the complexity of its structure, some of which is duplicative (lengthy pretrial proceedings, followed by lengthy trials). Significantly, however, certain parts of the court—particularly the Office of Co-Investigating Judges who investigate and indict—have not been able to function for lengthy periods fully staffed. Most of this relates to the political context: government opposition to the pursuit of certain suspects. In Uganda, the international community has provided substantial support to the ICD tasked with handling international and other serious forms of crime. However, the ICD has shown no sign of dealing with alleged crimes by the Ugandan military, and as of October 2017, it was only handling one case related to the Lord’s Resistance Army. Resources

can be wasted if key actors or offices in the mechanism are unable to proceed with cases for political reasons. (See also H. FINANCING.)

9. **In locations where there is little in the way of basic infrastructure, an elaborate setup can lead to lengthy delays in operations.** In East Timor, the integration of the justice mission within a UN mission did not guarantee a smooth launch of the SPSC. The SCSL and CICIG—both UN-backed institutions, but not part of UN missions—faced numerous similar challenges in becoming operational. These problems can also arise for mechanisms located outside of the affected country, as they did for the ICTR in establishing itself in Arusha, Tanzania. (Nairobi had initially been floated as the preferred location for the Tribunal because its infrastructure is more developed than that of Arusha.) By contrast, mobile courts in eastern DRC have demonstrated that credible proceedings for international crimes need not necessarily involve elaborate physical and technological infrastructure.
10. **A hybrid tribunal that is in-country and has significant international involvement may also have positive flow-on effects on the local economy.** But where insufficient planning is given to exit strategy, this may have drastic, though unintended, negative consequences for local communities, particularly in developing countries. Transition planning needs to be discussed from conception so that, for example, gradual draw-down or handover of offices is adequately provided for.

### ***Choosing a Location inside the Country***

11. **If a decision is made to locate the mechanism inside the country, decisions must be made about where to locate the headquarters office and any satellite or mobile offices.** Standard practice is for in-country mechanisms to be based in-capital, although there may be reasons to temporarily or permanently base operations in other locations. For example, out of security concerns and because its Freetown headquarters was not yet complete, for part of 2003, the SCSL operated in large part from a temporary courthouse and detention facility on remote Bonthe Island. In a very large country, such as the DRC, it is not possible or practicable for investigators, prosecutors, or judges in the capital to handle proceedings in distant parts of the country. Likewise, victims are unlikely to have access to justice mechanisms in a distant capital. Courts in eastern DRC, including mobile courts, have largely handled grave crimes cases.

12. **Where the population is polarized and segregated, the choice of location can, perhaps unavoidably, create or reinforce perceptions of bias.** The decision to base the State Court of Bosnia and Herzegovina, with its War Crimes Chamber, in the country's capital of Sarajevo became inevitably caught up in heated disputes over federalism and secessionism. For some Bosnian ethnic communities, this location reinforced a perception of a Bosniak (Muslim)-dominated central government. The alternative in this case was far from clear, because any other solution may have fed harmful narratives of state disintegration. Nevertheless, the experience suggests that in similar contexts, the implications of location must be carefully considered.

### ***Choosing a Location outside the Country***

13. **Where there is a need to locate a mechanism outside the country in which atrocities were carried out, it may be preferable to locate it within the same region in order to capitalize on the financial, linguistic, cultural, and rule-of-law benefits.** In other words, justice may still be viewed as local (and therefore have more local legitimacy) if there is as much physical proximity to the country in which the crimes were committed as circumstances permit. For example, the ICTR was located in Rwanda's neighbor, Tanzania; and the EAC (for Chad) in Senegal.

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## **Key Questions to Help Determine Location**

1. *Is conflict ongoing or are there other major security concerns in the country/ies in which the crimes were committed?*
2. *Will trial participants (including witnesses, victims, judges, prosecutors, defense counsel, and accused persons) and/or their families assume unacceptable levels of risk if they participate in local trials?<sup>119</sup> If so, what measures could be taken to mitigate these risks?*
3. *Is there good reason to believe that an in-country mechanism would further destabilize the country/region?*
4. *Are there political obstacles to the creation of an in-country mechanism that could be expected to operate fairly, with autonomy, and in keeping with international standards?*
5. *Would an externally located mechanism increase or decrease the affected society's trust in proceedings?*

6. *If in-country, will existing infrastructure support the creation of a court/mechanism?*
  7. *Are there significant justice-sector reform or development efforts that could mitigate concerns about an in-country mechanism, and strengthen and be strengthened by its establishment?*
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## **F. Structure**

What institutional form should an accountability mechanism take? Should it be one entity with subsidiary organs and sections, or should multiple agencies and offices be responsible for implementing different pieces of the mandate? What are the main options for the design of organs/units/offices to implement proceedings across the judicial chain? When should structures be created, and when and how should they be phased out?

### **Experiences to Date**

Mechanisms designed to administer criminal accountability for grave crimes typically fulfill functions across the judicial chain, including investigations and prosecutions, defense, adjudication, witness protection, and detention. The mandates of some mechanisms limit them to working on only one or a few of these elements. Whether they have limited or comprehensive mandates, mechanisms have operated with various structural forms that can broadly be considered to fit along a spectrum.

At one end are mechanisms that are distributed across multiple, already-existing, domestic institutions: an attorney general's office or investigative judges working with police to develop cases; ordinary trial and appellate chambers hearing them with the support of court administrators; and national prison administrators dealing with detention issues. Of the mechanisms examined in this handbook, Argentina and the DRC offer the clearest examples of such a distributed model.

Further along the spectrum are mechanisms located within existing institutions, but where one or more structures have been specialized to handle the particular burdens of grave crimes cases. There have been many examples of this type, including the EAC in the Courts of Senegal, Colombia's specialized prosecution and magistrate courts for implementing the Justice and Peace Law, the Bosnian model, Uganda's ICD, the ICTB, and the proposed Special Chambers for Burundi. The mechanisms

may be temporary (as in Senegal, or with regard to Colombia's SJP) or created as permanent fixtures of the domestic justice system (as in Uganda).

Finally, there are mechanisms whose structures are both specialized and unified within one extraordinary entity. The wholly international ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the proposed ACJHR, belong to this type. So do the hybrid models seen in Sierra Leone and the CAR, as well as Rwanda's Gacaca model. A recently developed subset of this group includes independent entities that work in parallel with national counterparts on the same cases: the CICIG in Guatemala and the GIEI in Mexico. With the notable exceptions of the permanent ICC and ACJHR, all of these unified, extraordinary mechanisms have been conceived as temporary constructs.

## **Lessons and Considerations**

### ***General Approach to Mechanism Structures***

#### ***Alignment with Mandate***

1. **The mechanism's purpose and mandate should determine the types of structures needed.** A mandate may limit a mechanism to focus on particular parts of the judicial chain. For example, in Guatemala and Mexico, the focus of CICIG and the GIEI (respectively) is on investigations. Or, more commonly, the purpose and mandate will encompass other aspects, including the judiciary, defense, and reparations. Colombia's JPL and SJP both feature ambitious transitional justice mandates beyond prosecutions. As in Colombia, every mechanism should have access to existing or new structures that correspond to each element of its mandate.
2. **The mechanism's purpose and mandate should determine the scale of its structures.** The scale of mechanism structures, including the number of prosecution divisions and the number of trial chambers, should correlate with the mechanism's stated ambition. A court to try those "bearing greatest responsibility" for international crimes (Sierra Leone) may have only three trial chambers, whereas countries contemplating more comprehensive prosecutions (including Argentina, Bosnia, and perhaps most dramatically, Rwanda's Gacaca proceedings) will need to have broader structures in place. Where broad mandates exist, a lack of adequate structures can impede implementation: a problem encountered in the DRC and Colombia.

3. **The possibility of mobile court structures and/or the possibility of in situ hearings should be included in the design of mechanisms mandated to promote access to justice and visibility of the proceedings—especially where crime bases are in remote locations.** In the DRC, mobile courts foreseen under the domestic criminal code have made justice accessible to communities in remote parts of the country; trials for war crimes and crimes against humanity are among those that have been heard by itinerant courts sitting temporarily in small towns and villages. Similarly, Uganda’s ICD, which is usually based in Kampala, has held hearings in the country’s north, where communities most affected by the crimes at issue find it much easier to follow the proceedings. (See also II.E. LOCATION.)
4. **Structures prescribed in the mechanism’s primary instruments (legislation or statutes) can help ensure that there are human and financial resources to implement important elements of the mandate.** Where such structures are not specified but instead left to judges and mechanism administrators to create, there is a risk that they will be insufficiently robust, emerge with delay, or not emerge at all. This has been seen with regard to defense at the ICTY and ICTR, and with outreach and reparations at many mechanisms. In East Timor, there was no mention of witness protection in the UN decisions authorizing the serious crimes process, and no witness protection structures were created, seriously marring the proceedings. (See specific lessons on structures for each of these areas, below.)
5. **Prescribing structures in primary instruments should be weighed against potential benefits of flexibility when mechanism operators have delegated authority to determine structures.** Operators may be better placed to determine the design of structures that account for operational need, dynamic political contexts, and the availability of complementary efforts by other state, international, or civil society actors. There is arguably a higher premium on flexibility when dealing with highly fluid contexts and new types of institutions. The success of CICIG in Guatemala has been ascribed, in part, to the great discretion left to the institution to determine its priorities and the internal structures best suited to meeting them. Similarly, in creating the IIIM for Syria—which must operate in parallel and in conjunction with a large number of diverse stakeholders in a tremendously complex context—the UN General Assembly specified the types of experts who should fill out a Secretariat, but did not prescribe how the mechanism should be internally structured.

## *Autonomy*

6. **The advisability of creating mechanism structures that are autonomous from national or international institutions is highly context-specific.**  
An assessment of the real and perceived independence and integrity of authorizing institutions (whether national governments or international institutions), and that of mechanism implementers should determine the appropriate level of autonomy for a mechanism's structures. The IHT suffered from its strong dependence on the widely distrusted American-led CPA. In Cambodia, the ECCC was arguably designed with insufficient reliance on the United Nations and has suffered from its dependence on a national judiciary prone to executive influence. The structures of the proposed hybrid court for Darfur would likely have faced distrust from victims and the international community due to its reliance on the Sudanese state, which was heavily implicated in the underlying crimes. By contrast, in Senegal, the EAC successfully relied on the institutions of a willing, impartial state and its capable, independent judiciary. The question of appropriate structural autonomy intersects with other aspects of mechanism design. (See II.A. PURPOSE; II.B. RELATIONSHIP TO DOMESTIC SYSTEM; and II.D. BASIS OF AUTHORITY.)
7. **Autonomous institutions often lack political support when they take actions that have significant political implications, and so they must have structures capable of building constituencies for enforcement.** When the SCU in East Timor indicted powerful Indonesian General Wiranto—at the time a presidential candidate in Indonesia—both the United Nations and the Timorese government distanced themselves from the decision, leaving the mechanism politically orphaned. At the ICTY, despite its Chapter VII mandate, most states were unwilling to prioritize cooperation issues in their relationships with Serbia at a time when it was shielding major war crimes indictees, including Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic; it used financial leverage derived from the U.S. Congress and the determination of The Netherlands and Belgium to block progress in Serbia's accession to the European Union in order to eventually achieve custody of the fugitives.<sup>120</sup> Similarly, the SCSL faced a major challenge in achieving the arrest of former Liberian President Charles Taylor, following his exile to Nigeria pursuant to an agreement among Nigeria, the United Nations, the AU, South Africa, the United States, and the United Kingdom.<sup>121</sup> The eventual successes of the ICTY and SCSL in securing politically sensitive arrests over fierce opposition was, in part, due to capacity within the prosecutors' offices

and registries of both mechanisms to play appropriate political and diplomatic roles within broader coalitions demanding enforcement.

### *Efficiency*

8. **Trying to implement an accountability mechanism in partnership with a government not fully committed to the project can require additional structures, thus creating inefficiency.** The ECCC is often said to follow a civil law tradition (and structure), yet it is a much more procedurally and substantively complex structure than the Cambodian domestic court system, or the French system from which it is derived. A case before the ECCC travels through a pipeline of often duplicative processes. In addition to having more steps in the process, there are more judicial officers involved at all stages of the proceedings than in the SCSL, ICTY, or ICTR, for example. In order to ensure that the ECCC could be established more or less on the terms demanded by the Cambodian government, the UN had to create additional processes designed to overcome political interference in the court's docket (known as disagreement procedures). These additional mechanisms have resulted in additional litigation before the court's Pre-Trial Chamber (disputes between the co-prosecutors and the co-investigating judges) and associated costs and expenditures.
9. **Phasing in structures only as they are needed can lead to cost savings.** The agreement between the UN and the Cambodian government to establish the ECCC contemplated a "phased-in approach ... in accordance with the chronological order of the legal process"<sup>122</sup> with a view to achieving efficiency and cost-effectiveness. In Sierra Leone, the Special Court only created a third Trial Chamber when the first two were occupied and new cases were ready. In Senegal, the Appellate Chamber at the EAC was only created following the trial verdict. And in the CAR, the SCC was operationalized in phases. However, poor timing can cause problems. In East Timor, the late establishment of the Appellate Chamber for the Special Panels created inefficiencies and delays throughout the judicial process. Careful strategic planning within each specific legal context is needed to determine which structures will be needed at which times.
10. **For temporary mechanisms, the phase-out of structures should be planned at the outset.** One option for mechanisms operating in countries undergoing broader justice-sector reform is for its structures to devolve

responsibilities to national institutions as the reform process progresses. For example, the temporary international Registry accompanying the BiH WCC and specialized prosecution office was initially responsible for the selection of international judges; once a reformed national High Judicial and Prosecutorial Council became functional, it took over this responsibility as one step of a gradual phase-out of international involvement in the mechanism. Other mechanisms have transferred responsibilities at the end of their mandates. The SCSL, for example, transferred responsibility for the ongoing protection of witnesses to national authorities as part of its exit strategy. In Sierra Leone, court infrastructure was also handed off to state authorities as the mechanisms' mandates drew to a close.

### ***Considerations for Specific Structures***

#### ***Chambers / Judiciary***

11. **Decisions about the mechanism's purpose and its relationship to the domestic system, which in turn should take account of various factors (See II.A. and II.B.), will largely determine if it can make use of existing chambers, or if specialized chambers are required.** Countries with generally more advanced capacities, including Argentina, have used existing courts, as has the DRC, through its ordinary military and (more recently) civilian courts. Other countries have chosen to use domestic courts, but establish specialized chambers with judges trained in international criminal law and possessing such skills as dealing with victim witnesses. These include Uganda, Bosnia, and Senegal, as well as proposals for mixed chambers in the DRC and a Special Tribunal in Kenya. Some of these specialized chambers have included international participation, while others have not. (See II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.)
12. **Creation of high-risk courts can boost judicial independence.** Judges who face severe security threats may be more prone to compromising their judicial independence. Guatemala established "High Risk Courts" to deal with sensitive cases, including those involving grave crimes and grand corruption. The judges on these pretrial, trial, and appellate courts receive security protection for themselves and their families, and the courtroom facilities are more robust. Some judges serving in these purely domestic courts have made rulings against the interests of very powerful individuals even as they have continued to receive threats.

13. **Where long, complex trials are anticipated, the inclusion of reserve judges on the panel can ensure continuity in the event that a judge is unable to continue.** At the ICTY, the presiding judge in the years-long trial of former Serbian President Slobodan Milošević had to step down just as the prosecution was completing its case. The appointment of a “substitute judge” who had to review evidence presented to that point caused further delay.<sup>123</sup> The SCSL included a reserve judge on the panel hearing the case of former Liberian President Charles Taylor, and the STL has two reserve judges (one national and one international) on its panels. Reserve judges hear evidence and listen to but do not participate in judicial deliberations.

### *Investigations and Prosecutions*

14. **Strong consideration should be given to establishing an investigation and prosecution office with specialized knowledge and skill.** For these types of cases, investigators and prosecutors must have strong familiarity with international criminal law and skills in such areas as the management of complex cases; interviewing witnesses; interacting with vulnerable witnesses; interacting with “insider” witnesses; ensuring the protection of witnesses who may face severe threats; identifying and using expert witnesses; using documentary evidence; conducting financial investigations; and using evidence from forensic investigations. In contexts where extensive atrocities have been committed, prosecutors must also have the skill to draw up a prosecution strategy that determines which cases to pursue and how. Many of these skills will be largely or wholly unfamiliar to police and prosecutors who have only ever handled ordinary crime cases. Unless there is an ambition to comprehensively prosecute all grave crimes (see II.A. PURPOSE) and attempt to develop these skills among police and prosecutors across the board, then it makes sense to focus on skill development for officials working in specialized teams. Thus, even in such locations as Argentina and Guatemala, where cases have been adjudicated before nonspecialized chambers in the ordinary justice system, prosecution and investigation teams have been specialized.
15. **Even in mechanisms that are largely external in nature, vetted national police investigators should be included in investigation and prosecution teams where possible.** Domestic police are familiar with local communities, speak local languages, and have myriad useful contacts. Foreign investigators will never have these advantages. In many difficult settings, vetting processes can be used to identify and select conscientious, motivated local investigators

to be integrated into investigation and prosecution teams. In Sierra Leone, the Special Court's success in conducting investigations and achieving the cooperation of local police in politically controversial arrests would not have been possible without the integration of Sierra Leone police in the Office of the Prosecutor's investigations division. However, it is inadvisable to draw on domestic police if the forces were heavily implicated in atrocities, are hopelessly politicized, and/or marked by ethnic, linguistic, religious, or other biases. Where local police forces are extensively discredited, mechanisms can still seek investigators with strong local knowledge from among individuals who have documented crimes on behalf of national human rights commissions or local civil society organizations.

16. **There are significant advantages to building joint investigation–prosecution teams.** In settings where national criminal procedure determines structures, this will often define the roles of investigators, investigative judges, and/or prosecutors, as well as their relationships and the structures within which they interact. (See II.B. RELATIONSHIP TO DOMESTIC SYSTEM.) In some systems, the process will be “horizontal,” with cases moving from office to office depending on the stage of the case (pretrial investigation, trial, or appeals); for mechanisms handling a large number of similar cases, such an approach may create efficiencies.<sup>124</sup> However, in most situations, mechanisms tasked with the investigation and prosecution of grave crimes face the challenge of developing a relatively small number of highly complex cases, and thus a “vertical” structure is more advantageous.<sup>125</sup> Accordingly, where the drafters or operators of new mechanisms have discretion to determine these structures, they should strongly consider organizing teams that integrate prosecutors and investigators under a prosecutor's direction. At the ICTY, ICTR, and SCSL, practice shifted in this direction over time because the development of joint teams ensured better communication throughout the process of case development, decreased institutional tensions between investigation and prosecution divisions, better ensured that investigators were focused on pursuing high-priority leads from a multitude of possibilities, and helped avoid instances of investigators using practices (such as excessive witness compensation) that could later create problems for prosecutors at trial. At the ICC, the Office of the Prosecutor formed joint teams composed of three divisions of the office (investigations, prosecutions, and cooperation), but a model based on consensus among the three led to tension and inefficiency.<sup>126</sup> By 2015, the office had shifted to integrated teams directed by senior trial attorneys, along the lines of best practices developed at the ad hoc tribunals.<sup>127</sup>

17. **The merits of organizing investigation and prosecution teams by geography, suspected perpetrators, or other factors should be carefully weighed, and decisions should be made in light of the needs of the particular context.** In Bosnia, the Special Division for War Crimes in the Prosecutor's Office created five teams, each responsible for a particular region of the country, and a sixth dedicated to one large-scale crime (Srebrenica). This had the advantage of allowing investigators and prosecutors to develop detailed knowledge of events and actors in the regions of interest. In Sierra Leone, prosecution and investigation teams were largely organized by armed factions under investigation: rebels and an allied military junta, and a pro-government militia.<sup>128</sup> This allowed team members to develop particular expertise on the hierarchies of the organizations involved. Some prosecutors' offices have also hired experts in particular kinds of crime, such as sexual and gender-based violence, or crimes against children. This can help ensure that crimes that are often under-investigated receive appropriate attention.
18. **To avoid the pitfalls of investigators and prosecutors working in silos, prosecutors' offices should ensure resources for cross-cutting structures.** Common criminal analysis sections can help ensure that evidence collected by different teams is analyzed for patterns. In Argentina, the autonomy of district prosecutors pursuing grave crimes cases created a natural geographic specialization. However, because the prosecutors were initially not working together, they failed to detect the kinds of patterns in crime occurring across their jurisdictions—evidence that crimes were widespread or systematic, which are necessary elements to establish crimes against humanity. Argentina eventually established a Coordination Unit for this purpose. Similarly, a legal advisory section working for all teams, as in Bosnia, can help ensure consistency of legal argumentation across different cases. And experts in particular crimes (such as sexual and gender-based violence, crimes against children, or enforced disappearances) or investigative methods (such as financial forensics, mass-grave exhumation, or wiretapping) can serve as common resources to teams.

## *Defense*

19. **To ensure that fair trial rights are upheld, a mechanism must provide for defense structures at the outset.** When the UN peacekeeping mission established offices for the prosecution and adjudication of international crimes in East Timor, it initially made no provision for a defense office. The establishment of a Defense Lawyer's Unit two years later led to some

improvement, but inadequate representation of accused persons amounted to an abuse of their fair trial rights.

20. **Defense structures should be autonomous to ensure that they serve the accused and not politically biased officials or the bureaucratic priorities of court administrators.** In domestic systems, local bar associations may be aligned with government or other factions, leading to the assignment of counsel for the accused who have conflicts of interest; this can ultimately damage the mechanism's fairness and credibility. In such situations, it may be desirable to establish an independent defense office to supplant or augment the ordinary process.<sup>129</sup> In Kosovo, the Organization for Security and Cooperation in Europe (OSCE) established a Criminal Defense Resource Center to support defense before the UN-administered Regulation 64 Panels; in Bosnia, a Criminal Defense Support Section was initially part of the Registry but became an independent organization. Within international tribunals, there has been an evolution in the status of defense offices.<sup>130</sup> While the statutes of the ICTY and ICTR articulated a number of fundamental due process guarantees,<sup>131</sup> the creation of offices to ensure that those guarantees were properly respected was left to the Registry, almost by default (and provided for through subsidiary judge-made rules).<sup>132</sup> At the ICC and SCSL, the defense offices were still formally within the Registry, but granted significant autonomy. At the STL, the defense office was created as a fourth independent court organ.<sup>133</sup> Momentum in this direction is also reflected in the design of the proposed ACJHR, where a defense office would have the same status as the prosecutor's office.
21. **There should be clarity about which structure is responsible for administering the list of eligible defense counsel before the mechanism, and which office is responsible for administering a transparent appeals process for lawyers whose applications are refused.** In domestic systems, which lawyers will have standing to appear before the courts will normally be clear under local law, but this will likely need to be augmented by a special mechanism that can screen potential defense lawyers for skills beyond those required to appear in ordinary criminal cases; upholding fair trial rights will require counsel knowledgeable in international criminal law and its application. In Bosnia, a new kind of hybrid defense office has offered training and expertise to domestic lawyers and is responsible for determining which members of the local bar associations are qualified to appear before the specialized BiH WCC. In hybrid and ad hoc tribunals, as in Sierra Leone

or Rwanda, a defense office typically develops and administers the criteria by which lawyers are chosen for a list of available legal representatives, from which clients may choose. A Registry or judges would be responsible for hearing appeals from lawyers who want to challenge rejections. No matter which structural options are chosen to fulfill these responsibilities, transparency in the process is paramount.<sup>134</sup>

### *Victim Participation*

22. **Where the purpose and mandate of a mechanism foresee victim participation, there must be structures in place to facilitate this and handle large numbers of applications.** Some domestic systems, particularly civil law systems, may already have structures in place to facilitate victim participation in the proceedings, including legal representation in court, but also the provision of psychosocial assistance to those appearing in court and assistance in accessing procedures for reparation. In Senegal, for example, victim participation in proceedings is a standard practice. In Colombia, the National Ombudsman's Office is responsible for providing legal aid to victims under the JPL. Where the mechanism is less integrated in a domestic system with such structures, there may be need to create new offices, as at the ECCC and the STL. Such structures will need to be able to establish streamlined processes to determine whether victims are eligible to participate in the proceedings. Considering the number of victims inherent to most contexts in which grave crimes have been committed, they will also likely need to be responsible for establishing databases that can help manage large numbers of victim files. For fulfillment of some functions beyond victim legal presentation in the proceedings (such as provision of psychosocial assistance), it may be possible for the mechanism to establish referral agreements with external actors, including nongovernmental organizations.
23. **In designing structures to facilitate victim legal representation before the mechanism, thought must be given to how to represent large numbers of victims in court.** In Colombia, the JPL provides victims a right to directly question the accused about crimes that affected them. The ECCC initially allowed victims to be represented in trials either individually or in groups, but when that proved unwieldy, it shifted to a system of collective representation in which co-lead counsel coordinated actions by lawyers representing different groups. Other variations of common legal representation have been used at the ICC and STL. When designing criteria to group victims for the purpose of

joint legal representation, it is important to ensure that victims with conflicting interests are represented by separate lawyers. Further, the structure should have capacity to support victim lawyers in fulfilling their obligation to consult regularly with their clients, who often may be quite numerous and—depending on the context—possibly spread over large, remote geographical areas; hard to reach electronically; and/or in communities with high rates of illiteracy.

### ***Reparation***

24. **Structures must exist to administer reparations where this is a part of the mechanism's purpose and foreseen in its mandate.** Where mechanisms are established within domestic systems that already have an established procedure and practice for administering reparations, structures and responsibilities may be clear. Yet these may still not be equipped to deal with issues that may emerge in grave crimes cases. Structures administering reparations for grave crimes will likely need to be authorized to trace and freeze the assets of (possibly powerful) convicted persons and to cooperate with officials in other states toward these ends. Further, it is commonly the case that the assets of convicted persons cannot be located, or they are indigent. For this common eventuality, it can be important to establish a reparations trust fund, as at the EAC in Senegal. As this experience shows, however, a trust fund alone will likely be inadequate unless it is staffed to raise funds or where another office (such as an administrator or registrar) is clearly mandated to do so. (See II.H. FINANCING.)

### ***Administration***

25. **The nature of structures for administration of the mechanism will be determined by its relationship to the domestic system, its basis of authority, and whether it incorporates international judges and staff.** A purely domestic process, as in Argentina, will use established structures for court administration. Where there is temporary international involvement and/or a limited mandate, as in Senegal or Bosnia, domestic institutions may need to be temporarily supplemented to handle the special needs inherent to grave crimes cases. These include the management of nonjudicial functions that may include outreach and public information, the management of relations with the international community around the proceedings, and the recruitment and management of participating international officials. At the EAC, this supplemental capacity took the form of an additional administrator

within the Registry of the domestic system. In Bosnia, where the external component was much more pronounced, it took the form of an adjunct Registry that gradually transitioned from international to domestic control. A heavily externalized hybrid or ad hoc court, such as the STL, ICTY, or ICTR, may have a large Registry to manage all aspects of court administration, including personnel, finance, security, procurement, court management, interpretation and translation, outreach, witness protection and support, and the maintenance of archives.

## *Outreach*

26. **Any mechanism of accountability for grave crimes must have a dedicated structure to conduct outreach to affected communities and stakeholders.** In East Timor, the UN launched the SCU and Special Panels with no outreach structure or capacity, leaving their activities opaque to the communities they were meant to serve.<sup>135</sup> The ICTY had no outreach program in its first six years, ceding the space to define its role and activities to nationalist forces in the former Yugoslavia, which had self-serving reasons to oppose the work of the Tribunal.<sup>136</sup> The IHT never had a structure for outreach. By contrast, the outreach unit of the SCSL developed innovative ways to interact with communities across the country before, during, and after trials. With strong support and engagement from court principals, these methods included interactive forums at schools and other venues, where victims, school children, police, members of the military, or the general community could hear from court officials and share their views on the court's work; the unit also screened summaries of trial proceedings, participated in radio call-in shows, and organized theater skits and conferences about the court. The court's Registry organized the Special Court Interactive Forum, in which local civil society representatives could meet monthly with senior SCSL staff from all sections to ask questions and exchange views. The court was often at pains to convince donors to support outreach, which many viewed as not being a "core" court activity. (See II.H. FINANCING.)
27. **Civil society organizations can augment and be vital partners for mechanism outreach structures, but not replace them.** To be effective, outreach cannot be simply outsourced to nongovernmental organizations. To gain public trust, accountability mechanisms must be able to articulate information about what they are doing and why. And if affected communities are to feel that the mechanism is aware of their views, then mechanism

officials must participate in outreach events, even if there are limits on what they can say about active cases. While this kind of engagement requires resources and structure, civil society organizations can still be vital partners. For example, in Sierra Leone, local and international nongovernmental organizations (NGOs) conducted outreach-type events about the SCSL mandate prior to and during its establishment. The EAC in the Courts of Senegal developed a novel approach to outreach to deal with the challenge of engaging communities in both Senegal and Chad. The court's administrator contracted with an NGO consortium comprised of international experts and local organizations in the two countries that were familiar with the local context and community networks. The consortium was able to organize events and trial screenings, and provide community feedback to court officials. However, delegating outreach functions to civil society organizations is not a simple solution to limitations in the mechanism's funding, because NGOs may have similar difficulties in fundraising for outreach activities.

### ***Witness Protection and Support***

28. **An assessment should determine whether new structures for witness protection and support are required.** Countries in question may already have provisions for witness protection measures and witness support that may be rooted in the criminal procedure code, criminal code, executive decrees, rules of court, or special legislation. An assessment should be conducted to determine whether existing mandates and structures are effective at assessing the risks faced by individual witnesses, reducing risk inside and outside the courtroom, maintaining witness privacy where required, responding to threats, and relocating witnesses when necessary. Similarly, there may be provisions already in place to provide psychosocial and medical assistance to vulnerable witnesses, but the efficacy of existing measures to deal with the nature and scale of the crimes should be assessed.
29. **Where state institutions mandated to implement protection measures may be implicated in crimes or controlled by or allied with perpetrators, they will not perform well.** In Serbia, for example, the police Witness Protection Unit, mandated to protect witnesses in war crimes trials, has been accused of having perpetrators among its ranks and engaging in witness intimidation. Within a deeply divided society, such as in Bosnia or Côte d'Ivoire, witness protection officials may have the trust of one community while enjoying little in others. This may be a matter of perception or

reflect a reality of “victors’ justice” being pursued by a mechanism that is fundamentally flawed (as in Bangladesh). Where there is reason to believe that societal divisions will cause mistrust of domestically administered protection measures or programs, new accountability mechanisms should consider establishment of a witness protection structure under international leadership (as was temporarily the case in Bosnia) or with international participation. (See II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.)

30. **Where mechanisms lack witness protection and support structures and capacities, outside actors can mitigate some of the risk of harm.** In the DRC, domestic grave crimes trials have proceeded without resources or structures for witness protection and support, and this has left witnesses exposed to physical risk, intimidation, and trauma. Although an inadequate solution, the UN peacekeeping mission, diplomatic missions, and nongovernmental organizations have filled some of this gap by taking such actions as relocating some witnesses or referring them for psychosocial assistance.<sup>137</sup>
31. **Mechanism designers should make a point of consulting rule-of-law reformers, implementers, and donors with regard to witness protection in the country concerned because it is an area ripe for collaboration.** The creation of a new accountability mechanism, whether temporary or permanent, can provide impetus for countries to establish witness protection programs for the first time. In Guatemala, one of CICIG’s early priorities was to propose the establishment of a witness protection program within the Attorney General’s Office and new court rules allowing protected witnesses to testify by video connection.<sup>138</sup> Both have been vital not only to CICIG-developed grand corruption cases but also to the ability of national prosecutors to pursue grave crimes cases against powerful suspects. In Uganda, officials involved in the establishment of the ICD recognized witness protection as a priority early on,<sup>139</sup> and several years later, a witness protection bill is on the parliamentary agenda.
32. **Structures for witness protection and support must exist after the departure of a temporary mechanism.** Some witnesses will have protection and support needs long after a temporary mechanism closes down, and from the beginning, there should be a plan to ensure that vulnerable witnesses are cared for by follow-up structures. For example, the MICT will take on judicial oversight of protection issues in relation to the ICTY and ICTR, and the Residual Special Court for Sierra Leone (RSCSL) will do the same in relation

to the SCSL. Furthermore, in Sierra Leone, the SCSL's Victim and Witness Section invested time and resources in training dozens of national police who would be responsible for implementing ongoing protection.

## ***Detention***

33. **If detention facilities are inadequate, it can undercut the mechanism's achievements and impact.** The lack of adequate detention facilities can prevent the conduct of effective investigations and threaten the security of witnesses and that of mechanism personnel and premises. In the DRC, tremendous efforts by national courts to conduct trials for international crimes, which have received significant assistance from NGOs and international donors, have been diminished by reliance on unreliable domestic prisons. Numerous individuals convicted of grave crimes have easily escaped.<sup>140</sup>
34. **If new detention facilities are established that meet international standards to serve an accountability mechanism for grave crimes, attempts should also be made to improve conditions in the country's ordinary detention facilities.** Otherwise, the juxtaposition between alleged war crimes suspects enjoying proper conditions while those accused of lesser crimes are in squalid, overcrowded prisons may lead to criticism of the mechanism as a whole. This was a challenge for the SCSL, although perhaps somewhat mitigated by the court's investment in the training of national prison staff and the eventual transfer of its modern detention facility to the government.

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## **Key Questions to Determine Structure**

- *For each element of the mechanism's stated purpose and mandate, what institutional structures may be required to enable implementation?*
- *What does the breadth of the mandate suggest about the scale of structures necessary for implementation?*
- *What design options exist that would allow the most affected communities to access the mechanism—for example, enabling mobile courts or in situ hearings?*
- *In the context at hand, is there risk that some elements of the mandate important to the mechanism's success will receive insufficient attention without structures that are prescribed through primary instruments (legislation or statutes)?*

- *Does the fluidity of the situation at hand suggest that key decisions about mechanism structures should be left to mechanism operators to determine?*
- *Are domestic governments and/or international institutions that are authorizing the mechanisms perceived as impartial by affected populations; and can national governments be trusted not to politicize judicial structures? If not, would mechanism structures that are more autonomous from the state and/or international bodies be protected from improper influence and be perceived as more legitimate?*
- *If it is expected that the mechanism will face domestic and/or international resistance to its judicial decisions, will its structures have the capacity to engage effectively in diplomatic and political discussions to encourage enforcement?*
- *What structures will be critical at the outset of the mechanism's establishment, and which might await establishment until more advanced stages of the judicial process or a scaling-up of operations?*
- *For temporary mechanisms, how will structures phase out over time, and what institutions will take over necessary residual functions?*
- *Do national justice sector capacities suggest that it would be feasible to use existing structures (in one or more areas), or rather, that creation of new, specialized structures is required?*
- *Do judges and their family members face significant threats that could be mitigated through the creation of high-risk courts?*
- *Are investigators and prosecutors familiar with international criminal law; the management of complex cases; dealing with insider, expert, and vulnerable witnesses; and using documentary and forensic evidence of types that are likely to occur in the given context?*
- *Is it possible to involve domestic police in investigations, including through setting up a vetting mechanism? If not, what other sources exist for the recruitment of domestic investigators with strong knowledge of the context?*
- *Is it anticipated that the mechanism will process a high number of cases—suggesting a more “horizontal” structuring of investigations and prosecutions—or relatively few large cases, such that a “vertical” structure makes more sense?*
- *What prosecution office structures or means of collaboration are required to allow prosecutors to see patterns of criminality across areas of focus for particular teams of investigators and prosecutors?*
- *In domestic systems, are local bar associations seen as impartial and independent by affected populations, or is there need for an independent defense office to deal with grave crimes?*

- *Is there clarity about which structure will determine which counsel will have standing to represent the defense before the mechanism and which structure will hear rejected lawyers' appeals?*
- *Where victim representation is included in the mechanism's mandate, which structure will be responsible for organizing it?*
- *How many victims might be expected to seek representation in proceedings before the mechanism, and how can structures be designed to facilitate coordination among individual victim representatives, group representation, and consultation by victim counsel with affected communities?*
- *Where reparations are part of the mandate, what types are foreseen, and what structure will administer individual and/or group reparations, trace and freeze the assets of convicted persons, and/or establish a trust fund and raise resources for it?*
- *What administrative competencies can be implemented by structures of the ordinary justice system, and which may necessitate the creation of supplementary structures or a large, special registry?*
- *Which structure will be responsible for the design and implementation of outreach to communities affected by the mechanism's work? How do the geography of affected communities and the existence of civil society capacity affect the structure's design?*
- *Are existing mechanisms for witness protection and support effective and trusted by the population? How large is the pool of prospective threatened and vulnerable witnesses, what types of risk and trauma do they face, and what domestic and international partners may be available to assist the mechanism to provide protection and assistance?*
- *Have those tasked with protection and implementation mandates in the ordinary justice system been implicated in the crimes, or are they perceived by affected communities to be allied to any group of suspected perpetrators of grave crime?*
- *Have reformers, donors, and implementers working on the ordinary justice system been consulted about potential areas of overlap in the provision of witness protection and support?*
- *If the mechanism is temporary, what structures will assume continuing obligations of witness protection and support at the end of its mandate?*
- *Are there adequate detention facilities and management to meet the mechanism's expected needs?*
- *How can the development of new or improved detention facilities and capabilities in relation to grave crimes cases benefit detention facilities and management in the broader justice sector?*

## **G. Integration of International Judges and Staff**

Under what conditions does it make sense to include international judges and staff in a mechanism? Where they are included, and what is the scale and form of their participation? What qualifications should the mechanism expect from international participants? What form should the selection process take in order to recruit international participants, and how should they be held accountable for their conduct while working for the mechanism? What processes can be put in place that foster collegial relationships among national and international officials, with benefits for capacity building and the mechanism's casework?

### **Experiences to Date**

Accountability mechanisms that have included international judges and staff have done so for one or more of these main reasons: (1) to insert impartiality into a mechanism dealing with issues that have polarized societies and domestic institutions, and thus to enhance public trust in the objectivity of a mechanism's operation and outcomes; (2) to lend substantive expertise in contexts where local justice-sector officials lack knowledge or experience in international criminal law or other relevant skills (including logistics, security, and other operational matters); and (3) to build the capacity of local officials through collaboration and training. Success has varied in response to a variety of factors. Most notably, these have been the quality of international officials recruited, and whether international involvement is designed in ways that foster collegiality with national counterparts rather than generate resentment.

The extent of international participation in accountability mechanisms has varied widely. In some places, as in Argentina, Bangladesh, and Uganda, there has been practically no international involvement apart from occasional expert advisors or trainers. At the Extraordinary African Chambers, domestic Senegalese judges and officials were predominant, but internationals played roles on the trial bench, in victim representation, and in outreach. In Sierra Leone, international officials played a much more prominent role through all sections of the court's operations, and at the fully international ad hoc tribunals for the former Yugoslavia and Rwanda, there were only international judges, and international staff predominated.

The form of international participation has also varied. In many models, internationals' primary responsibility has been to directly administer proceedings as judges, prosecutors, victim and defense counsel, and court administrators, among

others. These include the ad hoc tribunals and mechanisms for Cambodia, CAR, East Timor, and Lebanon. In internationalized domestic courts, such as those in Bosnia and Kosovo, there has been a heavier emphasis on capacity building for domestic counterparts. International involvement through mentorship has been even more pronounced elsewhere, taking various forms, and with varying levels of success. In the DRC, UN-organized Prosecution Support Cells have placed international investigators into active domestic investigations in an advisory capacity. Initially, the model—which has been adapted for use in the CAR—struggled because the international investigators’ contracts were so short that they could not understand the context and cases well enough to make useful contributions before their departure. In Guatemala, CICIG has a mandate that allows it to conduct independent investigations, but in order to come to court, cases must be introduced by the Attorney General’s Office. CICIG has played a major role in recommending reforms to that office, and as these reforms have taken hold, CICIG has increasingly conducted joint investigations with national counterparts. The result has been the development of a skilled cadre of local prosecutors and police who take their autonomy seriously.

The qualifications required of international judges and staff, and the resulting quality of international officials, have varied across mechanisms and within them. Some judges and staff have contributed substantive knowledge gained through years of experience, been motivated by the mission of implementing justice effectively, and have been respectful, effective colleagues to national counterparts (where applicable). However, other internationals have had insufficient experience or knowledge, shown little dedication to their work, and treated national counterparts with condescension. While quality of personnel varies in any organization, when it comes to the quality of international judges and staff, selection processes have largely determined which qualifications apply and the ultimate mix of good and bad.

The selection of judges at the UN tribunals and the ICC has relied on states to make nominations according to disparate, often nontransparent criteria. At the ICTY and ICTR, judges were elected by the General Assembly from a list submitted by the Security Council. The intrusion of domestic politics and diplomatic horse-trading in the nomination and selection process has frequently resulted in the selection of candidates who were not the best qualified.<sup>141</sup> Similar arbitrariness and uneven outcomes have resulted where mechanisms have received foreign judges and been staffed through secondment. Where mechanisms have been created under the auspices of the United Nations, or a regional inter-governmental body (as with the Kosovo Specialist Chambers and Specialist Prosecutor’s Office, or the GIEI in

Mexico), it can be difficult for them to adapt flexible recruitment policies and avoid pitfalls of some international organizations' long-established appointment and recruitment processes.

With UN or EU pay scales, benefits, and tax advantages, mechanisms have attracted many good officials, but also internationals more interested in money than the mission. Meanwhile, such institutions as nongovernmental organizations or other transitional justice mechanisms (such as Sierra Leone's Truth and Reconciliation Commission) have been able to attract highly motivated, skilled international legal professionals with modest pay and benefits. Medical NGOs also regularly attract motivated doctors to serve in difficult locations, despite modest pay. Pay discrepancies between national and international officials within the same institutions can lead to significant resentment; in the DRC, government and civil society concerns about the prospect of a significant pay gap between international and national officials contributed to the defeat of proposed mixed chambers for grave crimes.

Where mechanisms have been backed by an international organization, but not been a formal part of it (CICIG in Guatemala or the SCSL in Sierra Leone), they have had greater flexibility to define the criteria by which international participants are recruited. Yet mechanisms such as the SCSL that have relied on voluntary contributions have also often had to accept in-kind contributions from states in the form of seconded personnel, with mixed results.

The extent to which a mechanism has fostered an environment conducive to capacity building has depended in large part on the international officials recruited, their open-mindedness, their willingness to learn from national colleagues about local legal practice and culture, their willingness to be respectful, and their skill and experience in explaining legal or practical concepts. This underscores the importance of the recruitment process for the selection of international participants.

## **Lessons and Considerations**

### ***Form of International Participation***

1. **The reasons for international involvement in the mechanism's operation should determine the extent of international participation.** These reasons should align with decisions made about the mechanism's purpose and its relationship to the domestic system. (See II.A. and II.B.) Where insecurity,

a lack of domestic political will, a high degree of societal polarization, and/or the devastation of a country's justice sector and infrastructure suggest need of more external elements in the mechanism's design, countries will usually experience a greater need for international involvement. It would have been difficult to conceive of credible mechanisms without international participation for the former Yugoslavia while the war was still underway, or in immediate postwar Rwanda or Sierra Leone. Where there is a high degree of domestic capacity and political will, as in post-junta Argentina or Senegal, there may be no need for international participation. At the Extraordinary African Chambers, international judges were only included due to a ruling from the ECOWAS Court requiring that the EAC not be wholly a component of the Senegalese justice system.

2. **Consider changing what form international participation takes over time.** The conditions that lead to a need for international participation may change, thus there should be allowance for changing its form to meet new realities over time and possibly phasing it out altogether. The ICTY, SCSL, and other heavily international courts arguably could have transitioned to management by nationals from the affected countries as wars ended and domestic capacities accrued. Perhaps the greatest innovation of the Bosnian model was its preplanned phase-out of international judges, prosecutors, and defense support, ultimately transitioning to an all-domestic mechanism. In Bosnia, the phase-out was planned according to a timeline, which may have encouraged political attacks by politicians opposed to the court. A phased approach to withdrawing international participation could be pegged to justice reform benchmarks; this could create incentives for a government to implement reforms and provide greater integration between the effort to achieve accountability for grave crimes and general rule-of-law development.
3. **Consider whether mentorship-only models may obviate the need for direct international involvement.** There may be constitutional or statutory restrictions on involving international judges and officials directly in a domestic justice system. Even if legally possible, in settings where there is pronounced sensitivity about foreign influence (as in the DRC), any direct inclusion of internationals may be discrediting and/or politically impossible. And if one of the mechanism's aims is to develop domestic capacity (as with CICIG in Guatemala), under some circumstances it may be preferable to use a lighter approach anyway and establish a model whereby internationals work alongside but are not officials of the system in question.

4. **If international prosecutors are directly or indirectly involved in supporting cases, then there should be provision for international support for defense teams as well as any victim representatives.** Especially where local defense capacities are very low, as was the case in East Timor, international support for the defense is vital to upholding fair trial rights. Establishing rights-of-audience for foreign lawyers in domestic courts may be challenging and require changes to court rules, the agreement of the local bar association, or a legislative amendment.<sup>142</sup>

## **Qualifications**

5. **International participants' motivations and attitude are factors at least as important to their value as their expertise and experience.** International judges and officials can make invaluable contributions to the success of a mechanism when they do the following: participate because they believe in the mission; treat their national colleagues with respect; are willing to learn from national counterparts about local context and applicable law and practice; embrace opportunities to share their own expertise without condescension; and are present long enough to learn the context and make real contributions. By contrast, the benefits of international involvement are diminished or nullified when officials are motivated primarily by high, tax-free pay, generous per diems, or lives of privilege and lack of personal accountability in “exotic” locations; when they treat national counterparts with arrogance; when they refuse to learn about applicable laws and legal customs; when they show little commitment to the job; or when they are on short-term contracts and never get their bearings. Every mechanism with international participation has attracted judges and officials who fall along a spectrum between these two extremes. However, the balance of this mix has varied depending on the selection process, and designers of new mechanisms should aim for significant improvement over past practice. (See lessons under *Selection process* and *Accountability*, below.)
6. **International officials must themselves have outstanding records on ethics issues.** Prospective judges should have a consistent record of independence, impartiality, integrity, propriety, equality, and diligence—consistent with the Bangalore Principles of Judicial Conduct<sup>143</sup>—in their home jurisdictions and any previous national assignments. Judges and lawyers should have clean ethics records with all relevant oversight bodies in their home jurisdictions.

7. **Internationals must be familiar with the legal system in which they will be working.** When this is not the case, as in East Timor and Kosovo, it causes difficulties. For example, common law judges who don't understand victim representation, or civil law investigative judges who don't understand plea bargaining, will struggle to add value to mechanisms where these are legal features. In Bosnia, where adversarial elements were introduced into a civil law criminal code, international prosecutors were largely from common law backgrounds, while international judges were largely from civil law backgrounds, leading to difficulties in harmonizing practice before the BiH WCC.
8. **Internationals should have strong substantive expertise and experience commensurate to the roles they will fill.** In the case of the ad hoc tribunals, judges must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices."<sup>144</sup> In addition to this, in the overall composition of the chambers, "due account" must be taken of "the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."<sup>145</sup> These requirements are replicated in the SCSL Statute.<sup>146</sup> Practical skill and experience in legal drafting and case management is also important. In Bosnia, judges and prosecutors were required to have eight years' experience in dealing with complex criminal matters. To avoid a source of resentment in mixed institutions, such requirements should never be lower for international participants than for domestic counterparts.
9. **Where possible, internationals should be fluent in the working language of national colleagues.** Working through interpreters and translators is costly, time-consuming, prone to error and misunderstanding, and less conducive to the building of collegial relationships that foster trust and capacity building. There are large pools of judges and lawyers experienced in international criminal law who speak English, French, and Spanish, and where one of these is the mechanism's working language, fluency in that language should be an absolute requirement. In some places, such as East Timor or Kosovo, it may be obvious that the pool of internationals who speak the local language is insufficiently large to make fluency a requirement. And in other places (for example, where Russian and Arabic are spoken), an assessment may be necessary to determine whether there are enough internationals who are language proficient and meet the mechanism's substantive needs.

## ***Selection Process***

**10. The recruitment of international judges and staff should be transparent.**

Foreign judges at the BiH WCC were initially seconded by governments, which resulted in some judges lacking in experience, expertise, and commitment.<sup>147</sup> Later, a newly established High Judicial and Prosecutorial Council, responsible for selecting national judges and prosecutors, took over the process for choosing international judges and prosecutors in accordance with criteria applied to their national counterparts. The involvement of a domestic institution in the selection of international judges or other officials becomes problematic, however, where the institution is politicized; this has been the experience in Cambodia, where a politicized Supreme Council of the Magistracy was granted a role in formally approving UN-appointed judges to the ECCC.

**11. The process should emphasize gender equity and gender competence.**

The Rome Statute contains useful provisions on judicial selection and appointment. In addition to the *ad hoc* tribunals' requirement for due regard to the representation of the principal legal systems of the world, the Rome Statute requires "equitable geographical representation" and a "fair representation of female and male judges."<sup>148</sup> Experience demonstrates that it is essential that fair gender representation among judicial officers (and staff) be written into founding legislation. These legal provisions are essential to ensuring equal or equitable representation, and in providing a basis for accountability where judicial appointing authorities fail to meet these standards. In the case of mechanisms backed by the UN, there is also a long-stated UN goal of achieving a 50–50 gender distribution at all levels of the UN, with particular attention to those at decision-making levels (including judicial officers).<sup>149</sup> In addition to equality arguments, and improved decision-making through consideration of different perspectives, there is some evidence to suggest that the gradual shift of earlier international criminal justice institutions toward taking rape and other sexual crimes seriously, and investigating them zealously, can be traced to the participation of women in the *ad hoc* tribunals as investigators, researchers, judges, legal advisors, and prosecutors.<sup>150</sup>

**12. Avoid exorbitant pay and benefits for international judges and staff.**

Unless the basis of authority binds the mechanism to an existing UN or other system characterized by high pay, mechanisms should be designed with the flexibility to establish more reasonable rates and benefits. A needs-assessment may be required to establish what appropriate pay and benefits are required. High-risk, nonfamily posts may require higher pay to recruit qualified officials

for an extended period. This has been a challenge for the SCC in the CAR. Where high pay is necessary, the importance of targeted advertising to experts in the field (rather than relying on standard UN or other listings) becomes more important in order to attract well-qualified internationals. (See also II.D. BASIS OF AUTHORITY.)

13. **Contracts for foreign judges and officials should be a minimum of two years in duration.** The short-term nature of international-expert contracts in East Timor, Kosovo, and the DRC meant that international experts were frequently more of a burden than a help. And where international judges stay for only one year, as some did in Bosnia, they may be unable to sit on cases that may not conclude before their contracts are up. Longer contracts may not be possible where a leading or partnering international organization has problematic internal rules or procedures, or there are funding bottlenecks that prevent the issuance of contracts of longer duration. However, even under such circumstances, candidates who express a willingness to extend their contracts should receive preference over those who do not.

### ***Accountability***

14. **Mechanisms should have strong codes of conduct and enforcement procedures in place for international judges and staff from the beginning, with required trainings for new officials.** At the time when a senior international investigator at the SCSL was accused of raping a child, almost two years after the SCSL launched operations, there was still no staff code of conduct in place; the allegations and resulting criminal trial divided staff and damaged the court's reputation.<sup>151</sup> Such incidents are less likely to occur where there are strong codes of conduct that are communicated to staff and there are enforcement mechanisms in place. Mechanisms with defined procedures can more adeptly react when allegations arise. Enforceable codes of conduct signal to international judges and staff that there is still accountability for personal behavior, even if there are agreements in place granting them legal privileges and immunities. (See also II.I. OVERSIGHT.)

### ***Integration Process***

15. **In a mechanism embedded in the national justice system, the roles and responsibilities of international judges and staff should be clear from the outset.** To avoid confusion, it must be clear when internationals work within

the hierarchies of the domestic system, and when (if at all) they answer to an international Registry or administrators.

16. **Where applicable, there should be an expectation that international judges and staff will participate in trainings by national counterparts on the domestic justice system.** This has the substantive benefit of improving their grasp of applicable criminal procedure and local legal culture. Furthermore, it demonstrates respect for local colleagues.
17. **There should be a system for national and international colleagues to collaborate in identifying what trainings and resources are most needed to build national capacity.** New accountability mechanisms may be inundated with offers of trainings from NGOs, governments, and academic institutions. However, often such short-term trainings are repetitive, too abstract, and distract officials from the cases that need their attention. A process that gives national officials a full say in choosing only the most relevant training or mentorship offers, with advice from international officials, can make better use of resources and facilitate an atmosphere of collegiality.

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## **Key Questions to Determine the Integration of International Judges and Staff**

- *In light of political circumstances and domestic capacity, which positions need to be filled by internationals, and why?*
- *If the circumstances requiring international participation may change over time, how might its scale and form change over time to adapt to new circumstances?*
- *Are there legal restrictions on the involvement of internationals in the domestic system, such that a model with internationals in advisory roles makes sense?*
- *Even if allowed under the law, are there particular societal sensitivities about direct foreign involvement in the justice sector, such that a mentorship model might be preferable?*
- *If international involvement in prosecutions is foreseen, to ensure fairness, how will defense and victim representation be granted the same opportunity?*
- *How will the recruitment process be structured to favor open-minded and highly motivated candidates?*

- *For the number and types of internationals sought, is there a pool of eligible candidates large enough that speak the mechanism's working language, such that fluency can be required of candidates?*
  - *What steps are possible to ensure a transparent, merit-based recruitment process? Is the domestic procedure for judicial appointments independent and capable enough to take on the task?*
  - *What pay and benefit levels are absolutely necessary to attract qualified international participants, without attracting those mainly interested in high salaries?*
  - *Has the recruitment process been designed to achieve gender balance among international officials?*
  - *Who will be responsible for ensuring that enforceable codes of conduct are in place before international participants are recruited?*
  - *Where a separate Registry or international administration is foreseen, is it clear when international participants answer to it and when they answer to hierarchies within the justice system they are working?*
  - *What procedures will exist that include national staff to screen external offers of training and prioritize capacity-building needs?*
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## **H. Financing**

Can the mechanism be funded from the domestic budget, or should it rely on the international community? Are there disadvantages to receiving reliable budget appropriations from the state or assessed funding from an international institution? What are the implications of relying on voluntary funding? What are the implications of leaving some mechanism functions outside of the mechanism's core budget?

## **Experiences to Date**

Funding for accountability mechanisms for grave crimes have been fixed (or "secured"), voluntary, or some combination of these. The model of a mechanism's financial support has been heavily influenced by decisions about its relationship to the domestic system (see II.B.) and its basis of authority (see II.D.). In turn, the funding model used has had implications for mechanism structures (see II.F.) and how, where applicable, international judges and staff have been recruited (see II.G.).

In a domestic system, fixed or secured funding derives from the national budgeting process. This has been the case in Argentina, for example. Colombia also funds grave crimes proceedings from its national budget, which has also been used to provide a majority of the compensation provided to victims (although under the Justice and Peace Law, this should be paid from perpetrators' assets). For international or mixed mechanisms, "fixed funding" refers to assessed contributions from the UN or another international or regional organization's member states. For example, both the ICTY and ICTR had a secure source of funding through the expenses of the UN in accordance with Article 17 of the UN Charter (although both also came to rely on voluntary funds for some expenses).

Mechanisms have relied on voluntary funding when there has been no fixed source of funding, though there may be particular interested parties (states or international organizations) who have expressed a willingness to contribute funding to the mechanism. The SCSL was initially funded through voluntary contributions from governments. The ECCC, the EAC, the CICIG, and the SCC for the CAR have likewise relied on voluntary contributions of the international community.

Some domestic mechanisms have also received external, voluntary contributions. Most of the Congolese justice system, including the elements involved in grave crimes cases, has relied on donor support. In Uganda, the ICD has received support from countries including the United States, Denmark, Ireland, The Netherlands, Austria, Norway, and Sweden. In Colombia, the U.S. Department of Justice and the Inter-American Development Bank have funded significant justice-sector-related projects.

In some places, the balance of funding has changed over time. Quite early on, the General Assembly established a "Voluntary Trust Fund" for aspects of the ICTR's work. In Sierra Leone, shortfalls in voluntary contributions required the Special Court to seek and receive UN subvention grants in 2004, 2011, and 2012. In East Timor, the United Nations Mission of Support to East Timor (UNMISET) funded both the Special Crimes Unit and the Special Panels through both assessed and voluntary contributions, whereas the later-created Special Crimes Investigation Team (SCIT) was funded through assessed contributions.

In relation to the SCSL, private foundations and international agencies have played a significant role in funding "non-core functions," such as outreach and judicial trainings. For several years, the Open Society Foundations was the primary funder of a mobile court project for gender justice in the DRC.

## Lessons and Considerations

1. **Advantages and disadvantages to fixed and voluntary funding should be considered in light of the specific context.** Some previous assessments of mechanism design and operation have recommended assessed funding models and avoidance of voluntary funding.<sup>152</sup> However, even if the advantages of fixed funding generally outweigh the disadvantages, the totality of experiences to date suggests that the question should be examined on a case-by-case basis.
  - a. **Advantages of fixed-only funding and disadvantages of voluntary funding:**
    - i. A secure stream of funding provides a level of certainty for the mechanism, which aids operators in planning. The uncertainty of voluntary funding and the vagaries of different donor budget and planning cycles can make planning more difficult.
    - ii. Gaps in funding can delay proceedings and lead to other inefficiencies, including difficulties in recruiting and retaining staff.
    - iii. Voluntary funding requires senior mechanism administrators to invest significant time in fundraising, with associated support and travel expenses.
    - iv. Fixed domestic funding can underscore national ownership over a mechanism, and fixed international funding (such as assessed contributions from UN member states) creates political distance between financial backers and judicial operators. By contrast, reliance on foreign voluntary donors (for example, U.S. support to the Iraq High Tribunal) can harm a mechanism's legitimacy.
  - b. **Disadvantages of fixed-only funding and advantages of voluntary funding:**
    - i. A mechanism reliant on a state's regular budget can be more prone to political pressure. Where states have demonstrated a pattern of executive interference in the judiciary, and/or a strong desire for one-sided justice (as in Bangladesh or the proposed hybrid court for Darfur), domestic fixed funding can damage the mechanism's real or perceived independence and legitimacy. By contrast, external voluntary funding for mechanisms in polarized societies may lend greater legitimacy to mechanisms (such as those in Bosnia and Kosovo) than they would have if primarily funded through the budgets of states strongly

associated with one narrative of contentious events (as in Croatia and Serbia).

- ii. Fixed funding from the United Nations and other international or regional bodies comes with significant bureaucracy. Attendant procedures and regulations exist to ensure that mechanisms operate in accordance with such virtues as transparency, fairness, and financial responsibility. However, in practice, requirements pertaining to recruitment, pay and benefits, and oversight can be unwieldy, create perverse incentives in hiring, be costly to implement, and significantly prolong the time needed for mechanism establishment. (See also II.D. BASIS OF AUTHORITY, and II.G. INTEGRATION OF INTERNATIONAL JUDGES and STAFF.)

2. **If the mechanism is funded through a mix of fixed and voluntary contributions, leaving important aspects of the mandate outside of “core activities” can lead to non-implementation or delay.** Multiple mechanisms have relegated aspects of their work, including outreach, victim representation, reparations, and legacy to separate “non-core,” voluntary funds. With regard to outreach, this has led to damaging delays in the ability of mechanisms to generate understanding of their mandates, as has happened with the ICTY, ICTR, BiH WCC, and ECCC. Victim representation can make a mechanism’s proceedings more relevant to affected individuals and communities; but apart from the STL and ICC, mechanisms have generally not foreseen legal aid for victim representation. In Bosnia, victim representation is foreseen under the criminal procedure code, but funding constraints have led to non-implementation before the War Crimes Chamber. There has been a similar problem in Colombia, where broad victim participation rights are constrained by inadequate funding. In Cambodia, the ECCC relied on NGO projects to fund victim representation. Reparations are often very important to affected communities and could increase prospects for the mechanism’s proceedings to contribute to reconciliation; however, in many situations, funds for reparations are sparse. Provisions for reparations under Congolese law have never received adequate funding; any reparations awarded have usually not been implemented.<sup>153</sup> This has led some victims to question the utility of the criminal process. As of October 2017, the reparations trust fund established for the EAC was similarly in danger of disappointing many victims of convicted former Chadian President Hissène Habré. For temporary mechanisms, legacy too “should be explicitly mandated and receive support from the core budget.”<sup>154</sup>

3. **Whether funded through fixed or voluntary contributions, funders should ensure balance in support for different parts of the judicial process.** At the outset of serious crimes proceedings in East Timor, the UN provided extensive funding for investigations and prosecutions, with only about 10 percent of that amount for adjudication and none at all for defense. This resulted in abuses of fair trial rights and extensive delay and inefficiency.
4. **Mechanisms that don't meet international standards will struggle to raise voluntary funds.** Mechanisms that fail to meet international standards in key areas, including judicial independence and fair trial rights, will find it difficult to attract voluntary contributions. Continuing concerns about Cambodian government meddling in the proceedings of the ECCC have contributed to that mechanism's chronic difficulties in raising donor funds. The ICTB has not had international support due to violations of fair trial standards and perceptions that it is run, in part, to serve a political agenda. Similarly, the European Union, many European states, and many civil society organizations refuse to assist a mechanism with the death penalty. This left the IHT overwhelmingly dependent on the United States for financial and other forms of support.
5. **Where in-country mechanisms receive international assistance, whether assessed or voluntary, consider planning for a shift in funding sources over time, possibly tied to a phase-out of the involvement of international judges and staff (where applicable).** Building in a transition from international to national funding can help increase local ownership, ensure integration of effort with general justice-sector development, enhance confidence in the sustainability of the justice effort in countries where reforms are taking hold, and ease donor concerns about open-ended commitments. However, there is also potential risk. If national authorities agree to take over funding but then do not, the mechanism's continued proceedings could be imperiled.

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## Key Questions to Determine Financing

- *In determining how the mechanism should be financed, have all major stakeholders been consulted, including victims and others in affected communities?*
- *For mechanisms integrated into national justice systems, does the state have the will and means to provide adequate funding?*

- *In such contexts, is there a danger that the state might use financing to inappropriately influence prosecutorial and judicial decisions?*
  - *Would state financing of the mechanism enhance or detract from its perceived legitimacy among affected communities?*
  - *If the court is authorized or co-authorized by an international or regional body, is there support for a stream of assessed funding to last for the expected duration of the mechanism's mandate?*
  - *If so, would funding from the international or regional body in question enhance or detract from the mechanism's perceived legitimacy among affected communities?*
  - *If fixed funding from an international or regional body is contemplated, what rules and regulations would flow from the decision, including with regard to recruitment, remuneration, procurement, and oversight? Where such rules and regulations would have undesirable implications for such things as the quality of international officials recruited, the time it would take to establish the mechanism, or overall expense, would it be possible to negotiate changes that mitigate these effects?*
  - *Where voluntary funding is contemplated, are a sufficient number of states, organizations, and possibly private donors interested and likely to sustain interest for the years it will take for the mechanism to complete its mandate?*
  - *Would contributions from expected donors more likely enhance or detract from the mechanism's legitimacy in the eyes of affected communities?*
  - *Are there existing rule-of-law development projects in the affected country that could be adapted to support aspects of the mechanism's operations?*
  - *How are possible deficiencies in the mechanism's adherence to international standards likely to affect donor interest, and can these deficiencies be avoided or remediated?*
  - *Are all aspects of the mechanism's mandate considered "core"? If not, what are the implications for the mechanism's success if "non-core" aspects are not funded or underfunded?*
  - *Where a mechanism is externally funded, could it be possible to transition to domestic funding for all or part of the budget over time without compromising its mandate or operations?*
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## **I. Oversight**

What means of formal oversight should exist, including processes for the appointment and removal of judges and prosecutors; ethics guidelines and processes to ensure their enforcement; and structures to hold the mechanism accountable for nonjudicial decisions and management of its budget? What means of informal oversight are needed to hold the mechanism accountable for fulfilling its mandate fairly and effectively, including court monitoring, civil society advocacy, and media coverage?

### **Experiences to Date**

#### ***Formal Oversight***

The means of mechanism oversight has been heavily determined by the mechanism's relationships to the domestic system (see II.B.), basis of authority (see II.D.), and structure (see II.F.). Oversight functions may be distributed across the different offices and agencies responsible for different parts of the domestic judicial chain (as in Argentina and Uganda); special mechanisms within the domestic system may have some extraordinary oversight elements (as in Bosnia and, to a lesser extent, at the EAC), or be much more consolidated in the case of extraordinary, stand-alone international mechanisms. Within this last group, mechanism oversight has been defined in primary instruments and might, in part, rely on existing oversight agencies and procedures of the international or regional authorizing body, including the United Nations (for the ICTY and ICTR),<sup>155</sup> the Inter-American Commission on Human Rights (for the GIEI), and the AU (for the proposed criminal chamber at the ACJHR).

Some UN-backed mechanisms have opted-in to some UN oversight functions, as was the case at the SCSL. Although the SCSL was not a UN body, it followed UN accounting practices by outsourcing its internal audit to the United Nations Office for Internal Oversight Services; and its external audit to the United Nations Board of Auditors. Both internal and external audits were conducted according to the same practices as would apply to audit a UN institution.<sup>156</sup>

Additionally, at the SCSL, unlike the ECCC that came before it, a management committee was created, comprised of representatives of donor states, Sierra Leone's government, and the UN Secretary-General.<sup>157</sup> Its functions included oversight of the court's annual budget and other financial matters, and the provision of advice and policy direction on nonjudicial aspects of the court's operations, including questions

of efficiency.<sup>158</sup> The committee made annual visits to the court. This management committee model has been adapted by subsequent mechanisms, including the STL.

In Uganda, a “Court Users Committee” foreseen for any specialized court in the country, provides another model of formal public transparency. Under the ICD’s practice directions, the committee is to include key official stakeholders in the court, as well as members of the public, and is granted an advisory role. However, funding constraints have prevented the committee from convening. The Kosovo Specialist Chambers have a novel “Ombudspersons Office” within the Registry. It has a mandate to receive and investigate complaints with regard to the fundamental rights and freedoms of those interacting with the mechanism.

In Cambodia, oversight functions at the ECCC have been bifurcated: domestic and UN procedures, for Cambodian and international officials and staff, respectively. And in response to persistent reports of corruption, the UN and Cambodian government agreed to the creation of an independent counselor to investigate allegations, although reports from that office have never been made public. In Guatemala, CICIG has had little formal external oversight, neither from the United Nations, nor a management committee; it has relied on internal procedures and the performance of one powerful commissioner.<sup>159</sup>

For situations falling under the potential jurisdiction of the ICC, the principle of complementarity provides another formal, external source of oversight. Many countries under “preliminary examination” by the ICC’s Office of the Prosecutor wish to avoid cases being taken to The Hague; these include such states as Colombia or the United Kingdom (in relation to alleged crimes in Iraq), and even states (such as Israel) that are not party to the Rome Statute but whose nationals could be investigated for alleged crimes committed on the territory of a state party. These states must show that they are delivering on their obligations to genuinely investigate and prosecute crimes under international law in order to prevent the OTP from opening a full investigation. And where investigations are already open, states can face ICC demands for arrest of senior figures if they are not genuinely tried domestically, as has happened in Côte d’Ivoire.

### ***Informal Oversight***

Beyond formal oversight mechanisms, informal oversight of accountability mechanisms has taken various forms. States, international organizations, civil society organizations, and the media have all been important actors in this regard.

Donors to mechanisms have provided some measure of accountability for budget and performance, even where they lack a formal role in a management committee. For example, in Uganda, justice-sector donors formed the Development Partners Group (DPG), a body that liaises with the national justice-sector coordination mechanism. Through the DPG, donors have coordinated in the prioritization of assistance to the ICD, allowing them to set some conditions for how their aid is spent.<sup>160</sup>

Trial monitoring and the monitoring of institutional developments has been another key source of informal oversight. The prospect of having shortcomings in operations or proceedings exposed can provide a powerful incentive for mechanism officials to keep operations on track. Such exposure can also serve to trigger action by formal oversight bodies. The OSCE has monitored domestic proceedings in Bosnia, Kosovo, and Serbia. In some locations, international nongovernmental organizations or academic institutions have monitored grave crimes trials (for example, *Avocats Sans Frontières* in the DRC, the Open Society Justice Initiative in Cambodia and Guatemala, and the University of California, Berkeley's War Crimes Studies Center in Cambodia and Sierra Leone). Local NGOs have also played important roles in trial monitoring in such places as Serbia, Kosovo, Senegal, and Sierra Leone. Their ability to play this role depends in part on their capacity, which ranges from quite high (as in Serbia and Kenya) to very low, especially where conflict is ongoing or has just ended (as in East Timor and the CAR). It can be more difficult for local NGOs to act as effective forces for oversight in countries with highly polarized societies, as in Syria, Côte d'Ivoire, or Bosnia, or where state repression limits their freedom to operate, as in Sudan or Burundi, and to lesser extents in such places as Cambodia and Mexico.

Finally, journalists have provided a vital source of informal oversight by questioning mechanisms' performance and exposing injustices, politicization, corruption, and inefficiency. The degree to which they are able to perform this function has depended on general levels of media capacity and freedom in the affected country.

## **Lessons and Considerations**

### ***Formal Oversight***

1. **Ensure that all mechanism officials are bound by enforceable codes of ethics.** Whether through well-functioning offices of a country's ordinary justice system, ad hoc documents and structures, or long-established policies and agencies of an international or regional organization, every judge and staff

member at an accountability mechanism for grave crimes should be bound by a code of ethics enforced by capable, independent officials. In no case should a mechanism fail to have such codes in place at the outset of operations, as happened at the SCSL. (See also II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.) The issue of enforceable codes of conduct for judges is delicate, with two scenarios that should be avoided: judges with sole discretion to oversee “their own,” and judges responding to an oversight body that may have (or be perceived to have) a political agenda or bias.

2. **Have clear and strong means of external review of budget, whether through capable and independent national auditing offices, existing bodies of international organizations, or newly created special structures.** The absence of clear lines of fiscal accountability for the domestic aspects of the ECCC’s operations embroiled the court in corruption scandals, whereas in Sierra Leone—a country, like Cambodia, with a history of extensive official corruption—the SCSL made use of UN internal and external financial auditing procedures and avoided financial scandal.
3. **Avoid shared oversight where this could result in obstruction of the mechanism’s work.** In some situations, shared forms of oversight can work. For example, at the EAC, all senior officials (except the presiding judges on the Trials and Appeals Chambers) were Senegalese and nominated by Senegal, but formally appointed by the AU. This presented no difficulties because both parties supported the EAC’s mission. In Cambodia, however, a similar arrangement involving a UN nomination of an international co-investigating judge, requiring only formal approval by Cambodia, broke down and triggered diplomatic tension when Cambodia refused to grant its assent.
4. **In politicized systems, consider external, specialized, more transparent processes for appointments and removals.** Mechanisms lose credibility when they depend on officials from within politicized justice systems. For example, in Uganda, state prosecutors have not scrutinized serious allegations of war crimes perpetrated by the national army, threatening to make the ICD a mechanism destined to apply one-sided justice. Similar dynamics have reduced the credibility of grave crimes proceedings in Côte d’Ivoire and Bangladesh, and prevented them altogether in Kenya and Liberia. In Mexico, where federal prosecutors similarly refused to investigate indications of military and federal police involvement in a large-scale atrocity, it was left to internationally appointed experts with the GIEI to develop these leads.

5. **Require mechanism administrators to report regularly to an oversight body.** In a domestic system, this may occur in piecemeal fashion, with judges, prosecutors, and police investigators reporting to respective management officials within the system. Elsewhere, there can be a requirement of regular reports to standing international organizations or ad hoc structures. For example, IIIM for Syria is required to report to the UN General Assembly twice yearly, the SCSL registrar reported monthly to the court's management committee, the STL's president reports annually to the UN Secretary-General and the government of Lebanon, and the proposed criminal chamber of the ACJHR would be required to submit an annual activity report to the AU Assembly of Heads of State and Government as well as financial reports to the AU Executive Council.

### ***Informal Oversight***

6. **Ensure that transparency is a key value for the mechanism and that it is expressed in founding documents.** Informal oversight depends on information, and while the mechanism will need to keep some secrets (on such matters as judicial deliberations and operational witness protection), it should be designed to accommodate requests for information about its proceedings and operations, including in the areas of efficiency, finances, and ethics. Founding documents should emphasize an ethos of transparency.
7. **Donors to a mechanism should coordinate their activities to the extent possible.** Even if this is not through a formal oversight structure, such as a management committee, donor coordination not only reduces gaps and duplication in support, but allows donors to act as an external source of accountability for the mechanism's use of their funds. Donor coordination in DRC has been weak, whereas in Uganda it has been effective.
8. **Identify potential international organizations that could monitor proceedings.** An international organization that has no role in the mechanism's administration but is operating in the same country can play a valuable role in monitoring operations and proceedings. This has been the case with OSCE monitoring of proceedings in the former Yugoslavia.
9. **Those who are supporting the creation of a new mechanism should help ensure that domestic civil society organizations and journalists have the freedom and resources to access the mechanism, to monitor its proceedings and operations, and to criticize it.** The ultimate utility of a

mechanism will depend on the credibility of its work. In turn, that credibility hinges on a mechanism's ability to withstand public scrutiny from civil society advocates and monitors, as well as journalists. Where necessary, states and international organizations should prioritize diplomatic interventions on behalf of civil society advocates and the media, and support their capacity to engage with the mechanism being created.

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## **Key Questions to Determine Oversight**

- *In determining means of mechanism oversight, have all major stakeholders been consulted, including victims and others in affected communities?*
- *Are there functioning oversight bodies for the justice system in the affected country, including for judges, prosecutors, defense and victim counsel, and civil servants?*
- *Are there strong and enforceable codes of ethics that can be referenced in founding documents, whether national or international in origin?*
- *Are there functioning domestic institutions available to oversee the mechanism's budget, or are there prospects for outsourcing this to an international or regional organization?*
- *Where shared roles in some or all oversight functions are contemplated, are all parties supportive of the mechanism, and is that support likely to continue no matter what judicial decisions it makes? Are there scenarios that could lead to deadlock or the abuse of oversight authority to obstruct implementation of the mechanism's mandate?*
- *Would use of a particular existing mechanism for the appointment and removal of officials enhance or detract from the mechanism's credibility within the affected population? If so, what changes could mitigate or avoid this risk?*
- *Are mechanism administrators required to report regularly on judicial proceedings, operations, and finances to an oversight body?*
- *How can the value of transparency be reflected in the mechanism's founding documents?*
- *Where a mechanism receives donor support, are donors coordinating to ensure enhanced accountability for the use of their funds?*
- *Are there national or international organizations working in the affected country that could engage in independent monitoring of the mechanism's proceedings and operations?*

- Do civil society organizations and journalists have the freedom and capacity to engage with, monitor, and report on the mechanism's proceedings, operations, and finances? If not, what can be done to support them?
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## Notes

13. The source documents for current, past, and emerging mechanisms are generally the legislative instruments establishing them (and in some cases, subsidiary instruments). In the case of mechanisms at the domestic end of the spectrum, the relevant legislative instruments may only add substantive jurisdiction to already-existing courts. In some cases, the mandate may even require a constitutional amendment (as was under discussion for some time in Kenya, for example).
14. This is what the OHCHR's *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, HR/PUB/O8/2 (New York and Geneva, 2008) refers to as its "core mandate" (6). Whether the mechanism's legacy forms part of its core mandate, the publication notes, "is a matter of some controversy" (7).
15. The United Nations defines "legacy," in the context of international criminal justice, as the "lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity." OHCHR, *Rule of Law Tools (Hybrid Courts)*, 4–5.
16. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 2011, 5.
17. As noted in OHCHR's *Rule of Law Tools (Hybrid Courts)*, "Ascribing goals of achieving a sustainable peace, or reconciliation, to criminal trials should [...] be avoided. These are very complex objectives that require an approach that goes beyond criminal prosecutions" (6n10).
18. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 46.
19. UNSC Res 1272 (1999) UN Doc S/RES/1272.
20. The International Crimes (Tribunals) Act, Act No. XIX of 1973; The International Crimes (Tribunals) (Amendment) Act, July 14, 2009 (Act No. LV of 2009), available at: [parliament.gov.bd/14%20July%202009\(5699-5701\)\(2\).pdf](http://parliament.gov.bd/14%20July%202009(5699-5701)(2).pdf).
21. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Preamble. See also UNGA Res. 57/228, December 18, 2002.
22. Few mechanisms mention the concept of "truth" in their founding documentation, and those that do are generally in such places as Cambodia and Lebanon, which have inquisitorial legal systems. The ECCC mentions "truth" several times in its Internal Rules (a subsidiary instrument) though not in its founding instruments (agreement or law). See ECCC *Internal Rules*, Rule 55.5, "In the conduct of judicial investigations, the co-investigating judges may take any investigative action conducive to ascertaining the truth. ... They shall conduct their investigation impartially, whether the evidence

is inculpatory or exculpatory.” *Internal Rules* 60, 85, 87, and 91 also make significant mention of the truth as a guiding principle in the collection of evidence (in and out of court). Although beyond the scope of this handbook, the Rome Statute of the ICC (Article 54(1)(a); which reflects many inquisitorial law aspects) states that the prosecutor must (“shall”) “in order to establish the truth, extend the investigation to cover all facts and evidence ... [and] investigate incriminating and exonerating circumstances equally.” In terms of the evidence received by the court, Article 69.3 gives the court authority to “request the submission of evidence that it considers necessary for the determination of the truth” (all emphases added).

23. Constitutive Act of the African Union (Article 4 (h) and (j)).
24. Projet de loi modifiant et complétant la loi organique no. 13/O11-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l’order judiciaire en matière de répression des crimes de génocide, des crimes contre l’humanité, et des crimes de guerre (bill dated May 2, 2014, and on file with author).
25. Civil Society Draft Bill for the Special Tribunal for Kenya (Explanatory Memorandum / Long Title), available at: [iccnw.org/documents/Draft\\_Bill\\_for\\_the\\_Special\\_Tribunal\\_for\\_Kenya1.pdf](http://iccnw.org/documents/Draft_Bill_for_the_Special_Tribunal_for_Kenya1.pdf).
26. Civil Society Draft Bill for the Special Tribunal for Kenya (Preamble), available at: [iccnw.org/documents/Draft\\_Bill\\_for\\_the\\_Special\\_Tribunal\\_for\\_Kenya1.pdf](http://iccnw.org/documents/Draft_Bill_for_the_Special_Tribunal_for_Kenya1.pdf).
27. See ICD website at [judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html](http://judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html).
28. African Union, EX.CL/846(XXV) Annex 5, STC/Legal/Min/7(1) Rev. 1, May 15, 2014, Preamble, available at: [iccnw.org/documents/African\\_Court\\_Protocol\\_-\\_July\\_2014.pdf](http://iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf).
29. For detailed analysis of these issues, see Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012); William A. Schabas and Patricia M. Wald, “Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience,” *Proceedings of the Annual Meeting* (American Society of International Law), vol. 98 (March 31–April 3, 2004), 189–95.
30. The SCSL had a mandate limited to those bearing “greatest responsibility” for crimes perpetrated on the territory of Sierra Leone. See Eric Witte, “Beyond ‘Peace vs. Justice’: Understanding the Relationship Between DDR Programs and the Prosecution of International Crimes,” in *Disarming the Past: Transitional Justice and Ex-combatants*, ed. Cutter Patel, De Greiff, and Waldorf (ICTJ and Social Science Research Council, 2009), 99–100 n60.
31. A government’s refusal to pursue particular perpetrators or parties to a conflict will often not be overcome by legal drafting; this is more likely to be tackled via political wrangling or operational decisions (for example, prosecutorial strategy). However, legal language can provide domestic and international stakeholders with additional tools to advocate for the mechanism’s impartial operation.
32. Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms,” *Law and Contemporary Problems* 59 (1996): 127.
33. If Chapter VII of the UN Charter is the source of power used to establish the mechanism, then sustainable (national, regional, international) peace will naturally inform the content of the mechanism’s purpose. However, the question of whether international criminal prosecutions deter the future commission of atrocities remains open and, as such, goals related to peace (expressed as general and/or specific deterrence) should be conservatively stated. See David Wippman, “Atrocities,

Deterrence, and the Limits of International Justice,” *Fordham International Law Review* 23: 488. For a recent, more comprehensive examination of questions around the deterrent effect of the prosecution of international crimes, see Jennifer Schense and Linda Carter, eds., “Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals,” International Nuremberg Principles Academy, 2016, available at: [nurembergacademy.org/fileadmin/media/pdf/publications/The\\_Deterrent\\_Effect\\_of\\_International\\_Criminal\\_Tribunals\\_.pdf](http://nurembergacademy.org/fileadmin/media/pdf/publications/The_Deterrent_Effect_of_International_Criminal_Tribunals_.pdf).

34. The UN Office of the High Commissioner for Human Rights advises against including these purposes altogether. “Ascribing goals of achieving a sustainable peace, or reconciliation, to criminal trials should [...] be avoided. These are very complex objectives that require an approach that goes beyond criminal prosecutions.” OHCHR, *Rule of Law Tools (Hybrid Courts)*, 6 n10.
35. See Elena Baylis, “Function and Dysfunction in Post-Conflict Justice Networks and Communities,” *Vanderbilt Journal of Transnational Law* 47, no. 625 (2014).
36. For a useful discussion of these issues, see the publication of the OHCHR, *Rule of Law Tools (Hybrid Courts)*, available at: [ohchr.org/Documents/Publications/HybridCourts.pdf](http://ohchr.org/Documents/Publications/HybridCourts.pdf).
37. See Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011. (Also available in French and Spanish.)
38. While Rwanda had abolished the death penalty prior to the ICTR prosecutor’s first attempts to refer cases to Rwanda, a number of significant legislative amendments were made following the first round of unsuccessful attempts, including the passing of legislation to do the following: abolish solitary confinement; afford immunity and other protections to defense teams and witnesses; provide for alternatives to live testimony, in which witnesses were located outside of Rwanda; and review and amend the so-called “Genocide Ideology” law. See *Complementarity in Action: Lessons Learned from the ICTR Prosecutor’s Referral of International Criminal Cases to National Jurisdictions for Trial*, February 2015, paras. 50–63, available at: [unictr.org/sites/unictr.org/files/legal-library/150210\\_complementarity\\_in\\_action.pdf](http://unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf).
39. For a definition of “hybrid tribunal,” see *Rule-of-Law Tools (Hybrid Courts)*, available at: [refworld.org/docid/47ea6fbb2.html](http://refworld.org/docid/47ea6fbb2.html). The definition used is as follows: “Courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred” (1). See also Sarah Williams, *Hybrid and Internationalised Tribunals: Selected Jurisdictional Issues* (Oxford: Hart Publishing, 2012), 249: “There is no comprehensive definition of a hybrid or internationalized tribunal. There do appear to be several defining features: (1) the tribunal performs a **criminal judicial function**; (2) the **temporary or transitional nature** of such institutions (or at least the international component); (3) there must be at least **the possibility** of the participation of international judges sitting alongside national judges and **for international involvement** in other organs of the tribunal; (4) the provision of international assistance in the financing of the tribunal, although this on its own will not internationalize an otherwise national institution; (5) a **mix of international and national elements in the material jurisdiction** of the tribunals, or at least that **crimes within the jurisdiction are of concern to the international community**; and (6) the **involvement of a party other than the affected state**, such as the United Nations, a regional organization or another state(s)” (emphases added).

40. Coalition Provisional Authority Number 48, entitled, *Delegation of Authority Regarding an Iraqi Special Tribunal*, December 10, 2003, available at: [iraqcoalition.org/regulations/](http://iraqcoalition.org/regulations/).
41. Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, 2010, 13, available at: [amnesty.eu/content/assets/doc2010/croatia\\_behindwallofsilence.pdf](http://amnesty.eu/content/assets/doc2010/croatia_behindwallofsilence.pdf).
42. See Human Rights Watch, *The Long Arms of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014, available at: [hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and](http://hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and). The report notes that, in addition to France, Germany, and the Netherlands (whose experiences are explored in the report), Belgium, Canada, Croatia, Denmark, Norway, South Africa, Sweden, Switzerland, the United Kingdom, and the United States have specialized war crimes units (2n1).
43. See ICCPR, Article 14.1, generally.
44. Article 14.2.
45. Minimum guarantees are
  - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) to be tried without undue delay;
  - (d) to be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
  - (g) not to be compelled to testify against himself or to confess guilt. (Article 14.3)
46. Article 14.5.
47. “Double jeopardy” also known by the French *autrefois acquit* is a fair trial guarantee which—as a legal matter—protects an individual from being twice tried for the same offense.
48. *Nullum crimen sine lege* (along with *nulla poena sine praevia lege poenali*) is a fair trial guarantee that—as a legal matter—protects an individual from being tried and punished for an act or omission that was not criminal at the time of the act or omission:
  - (a) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

- (b) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. (Article 15.1)
49. CCPR/C/GC/32, Human Rights Committee, *General Comment Number 32, Article 14: Right to Equality Before Courts and to a Fair Trial*, para. 19. “The requirements of independence refers in particular to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age ... **and the actual independence of the judiciary from political interference by the executive branch and legislature**” (emphasis added). In its *General Comment Number 32, Article 14* of the ICCPR, the UN Human Rights Committee (HRC) stated that “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”
  50. Available at: [www2.ohchr.org/english/law/indjudiciary.htm](http://www2.ohchr.org/english/law/indjudiciary.htm).
  51. Article 2.2: “A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary,” available at: [unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).
  52. Available at: [ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx](http://ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx).
  53. Vienna Convention on the Law of Treaties, Article 27.
  54. CCPR/C/GC/32 Human Rights Committee, *General Comment Number 32, Article 14*, August 23, 2007, para. 4, available at: [refworld.org/docid/478b2b2f2.html](http://refworld.org/docid/478b2b2f2.html).
  55. Bangladesh states that “while the existing laws of Bangladesh provide that, in the ordinary course, a person shall be entitled to be tried in his presence; it also provides for a trial to be held in his absence if he is a fugitive offender, or is a person who, being required to appear before a court, fails to present himself or to explain the reasons for non-appearance to the satisfaction of the court.” Bangladesh’s reservations to the ICCPR are available at: [treaties.un.org/Pages/Declarations.aspx?index=Bangladesh&lang=\\_en&chapter=4&treaty=326](http://treaties.un.org/Pages/Declarations.aspx?index=Bangladesh&lang=_en&chapter=4&treaty=326).
  56. International law does not explicitly ban capital punishment per se, although its application under many circumstances is illegal. For a summary of legal standards on the death penalty, see [ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx](http://ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx).
  57. In February 2002, the United Nations withdrew from negotiations with the Cambodian government based on the conclusion that, at that time, and on the basis of the government’s position, “the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment.” See “Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York, 8 February 2002,” available at: [un.org/news/dh/infocus/cambodia/corell-brief.htm](http://un.org/news/dh/infocus/cambodia/corell-brief.htm). The negotiations between the UN and the Cambodian government had originated from a request by Prince Ranariddh and Hun Sen (by letter of June 21, 1997), at the time co-Prime Ministers of Cambodia. In February 2003, the General Assembly, “desiring that the international community continued to respond positively” to efforts to investigate Khmer Rouge-era atrocities and asked the Secretary-General to resume negotiations “without delay” (see A/RES/57/228, February 27, 2003). The agreement between the

UN and the Cambodian government concerning the ECCC was finally signed in 2003 and entered into force in October 2004.

58. According to a respected survey of Mexican households conducted by Mexico's national statistics agency (INEGI), in 2014, Mexicans reported only 7.2 percent of crimes to authorities. *National Poll of Victimization and Perception on Public Security (ENVIPE 2015)*, Main Results, September 30, 2015, 23–25.
59. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 11. "CICIG's resolution of the *Rosenberg* murder and indictment of former President Portillo and former Interior Minister Vielmann demonstrated that a large, well-funded, well-equipped, well-secured prosecution entity could hold the 'untouchables' accountable. These results alone would have been enough to justify CICIG's \$15 million average annual budget. In addition, the Commission publicly challenged the election of judges it categorized as unfit to serve on Guatemala's highest courts, orchestrated the dismissal of two attorneys general, facilitated the appointment of an outstanding chief prosecutor, and successfully pushed for the removal of some 1,700 police officers. CICIG prepared and lobbied for an extensive set of constitutional and legislative reforms. Its use of wiretapping and sophisticated forensic technologies demonstrated the potential for dramatically increasing Guatemala's criminal investigation capacity."
60. For example, in the case of Cambodia, the Office of the High Commissioner for Human Rights in Phnom Penh has undertaken various legacy initiatives (in collaboration with the ECCC) concerning judicial trainings and annotations of the Cambodian Penal Code with relevant ECCC case law. UN Women has worked with the court in relation to various gender-related initiatives.
61. Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia*, September 2012, 2.
62. For a comprehensive review of how support for a mechanism can be integrated into general rule-of-law development, see Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011.
63. See ICTY, *Furundzija*, IT-95-17/1, Trial Chamber Judgment, December 10, 1998, para. 155; IACtHR, *Barrios Altos v. Peru*, Judgment, May 14, 2001, para. 44; ECHR, *Ould Dah v. France*, Decision of March 17, 2009; SCSL, *Prosecutor v. Moinina Fofana*, Appeals Chamber Decision on Preliminary Motion on Lack of Jurisdiction, Illegal Delegation of Jurisdiction by Sierra Leone, May 25, 2004, para. 3. See also UN Human Rights Council, *Concluding Observations, Chile*, CCPR/C/CHL/CO/6, August 13, 2014, para. 9; and UN Committee against Torture, *Concluding Observations, Spain*, CAT/C/ESP/CO/5, December 9, 2009, para. 21(2).
64. J-M. Henckaerts and L. Doswald Beck, *Customary International Humanitarian Law: Volume I: Rules, Rule 159* (Cambridge: International Committee of the Red Cross), 611–14.
65. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 12.
66. This challenge was somewhat mitigated by the hiring of local, continental system lawyers to draft commentaries on Bosnia's new Criminal Procedure Code.
67. This represented a missed opportunity to grapple with reform to the Iraqi system on its own terms and limited the general impact on Iraqi legal development.
68. For example, the death penalty meant that the UN was unable to engage with the IHT. Williams, *Hybrid and Internationalised Criminal Tribunals*, 115.

69. See K. Gibson and C. Buisman, “Acquitted by Law, Prosecuted by Propaganda,” 2014 [blog post], available at: [justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/](http://justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/). See also P. Besnier, deputy registrar of the ICTR, at the International Legacy Symposium of the ICTR, November 2014, in this video presentation [youtube.com/watch?v=IEDeoDEZiVo](http://youtube.com/watch?v=IEDeoDEZiVo) (see video at 1:43 min). See also Kevin Jon Heller, “What Happens to the Acquitted?” *Leiden Journal of International Law* 21: 663–80, available at: [ssrn.com/abstract=1005772](http://ssrn.com/abstract=1005772).
70. For identification of what these extra needs may be, see Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011.
71. See Article 8bis of the Rome Statute as to the definition of “crime of aggression.”
72. The subject matter jurisdiction of the proposed chambers includes genocide, war crimes, crimes against humanity, and aggression. This is due to the fact that the DRC is a monist state and, as such, Rome Statute provisions are directly applicable domestically from the date of DRC’s ratification of the Statute (and, in relation specifically to the crime of aggression, the date of ratification of any subsequent amendments).
73. See Article 3 of the International Crimes (Tribunals) Act, 1973, available at: [ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/o/0618daaa2660e9b3c125771a00264b13/\\$FILE/International%20Crimes%20\(Tribunals\)%20Act,%201973%20\(as%20amended%20in%202009\).pdf](http://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/o/0618daaa2660e9b3c125771a00264b13/$FILE/International%20Crimes%20(Tribunals)%20Act,%201973%20(as%20amended%20in%202009).pdf).
74. Article 6.11 (Chapter II, Solutions), Arusha Peace and Reconciliation Agreement for Burundi, August 28, 2000.
75. Agreement on the Resolution of the Conflict in the Republic of South Sudan, August 17, 2015, available at: [unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](http://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf).
76. Agreement on the Resolution of the Conflict in the Republic of South Sudan, August 17, 2015, 42–43, available at: [unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](http://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf).
77. This body has been largely perfunctory. It also had a number of predecessors, such as the Special Criminal Court for Darfur.
78. Taken from Uganda ICD website: [judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html](http://judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html).
79. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on June 27, 2014 (but not yet in force). Article 28A of the protocol gives the International Criminal Law section of the court power to try persons for the core three, as well as “unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.” It also notes that the assembly may extend this jurisdiction. African Union, EX.CL/846(XXV) Annex 5, STC/Legal/Min/7(1) Rev. 1, May 15, 2014, available at: [iccnw.org/documents/African\\_Court\\_Protocol\\_-\\_July\\_2014.pdf](http://iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf).
80. Constitution of Kenya (Amendment) Bill, 2009, insertion of new section 3A, available at: [kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2009/The\\_Constitution\\_of\\_Kenya\\_\(Amendment\)\\_Act\\_2009.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2009/The_Constitution_of_Kenya_(Amendment)_Act_2009.pdf).
81. Article 14, Resolution No. 10 of 2005, Law of the Supreme Iraqi Criminal Tribunal.

82. UNMIK/REG2000/64, Article 1.1.
83. The Draft Statute for an Extraordinary Criminal Court for Liberia, Article 11.4. The document appears as Annex 2 to the 2009 *Truth and Reconciliation Commission Report* (the ECCL was one of the recommendations arising from the TRC). The full report is available here: [trcofliberia.org/resources/reports/final/trc-of-liberia-final-report-volume-ii.pdf](http://trcofliberia.org/resources/reports/final/trc-of-liberia-final-report-volume-ii.pdf).
84. Unofficial English translation available at: [cja.org/cja/downloads/Duvalier%20Decision%20of%20the%20Court%20of%20Appeals%20of%20Port-au-Prince.pdf](http://cja.org/cja/downloads/Duvalier%20Decision%20of%20the%20Court%20of%20Appeals%20of%20Port-au-Prince.pdf).
85. See Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, 2010, 5, available at: [amnesty.eu/content/assets/Doc2010/Croatia\\_BehindWallofSilence.pdf](http://amnesty.eu/content/assets/Doc2010/Croatia_BehindWallofSilence.pdf). “One of the key findings of Amnesty International’s research is that the legal framework itself in Croatia is inadequate for prosecution of war crimes cases. This is because it fails to define in accordance with current international standards the crucial concepts related to prosecution of crimes under international law such as command responsibility, war crimes of sexual violence and crimes against humanity.”
86. Article 6.1 of the Law No. 05/L-053, Law on Specialist Chambers and Specialist Prosecutor’s Office, states that the Specialist Chambers “shall have jurisdiction over crimes set out in Articles 12–16 **which relate to the Council of Europe Assembly Report**” (emphasis added). Article 6.2 gives the Specialist Chambers additional jurisdiction over certain offences in the Kosovo Criminal Code. These include offences against the administration of justice and offences against public officials, but again Article 6.2 limits the jurisdiction to those offences relating to the “official proceedings and officials” of the Specialist Chambers.
87. See, for example, *Rule 77: Contempt of the Tribunal, of the ICTR Rules of Procedure and Evidence*, available at: [unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf](http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf). Rule 77 was introduced into the RPE along with a number of amendments to the rules in May 2003, some years into the tribunal’s operation.
88. See Rome Statute of the International Criminal Court, Articles 70 and 71. For a recent example of the application of these provisions in practice, see ICC press release, “*Bemba et al.* Case: Chamber VII Finds Five Accused Guilty of Offences Against the Administration of Justice,” October 19, 2016, available at: [icc-cpi.int/pages/item.aspx?name=pr1245](http://icc-cpi.int/pages/item.aspx?name=pr1245). The five were sentenced on March 22, 2017, details of which are available here: [icc-cpi.int/Pages/item.aspx?name=pr1287](http://icc-cpi.int/Pages/item.aspx?name=pr1287).
89. In Cambodia, early researchers concluded that crimes of sexual violence, outside the context of forced marriage, were not a feature of Khmer Rouge atrocities. This may have had a disproportionate influence on early decision-making within the Office of the Co-Prosecutors. While this example is an operational one, by analogy, it highlights the danger of basing decisions on early fact-finding deficits.
90. The proposed statute included an overly broad definition of “terrorism” and a definition of the crime of “forcible recruitment of child soldiers” that was too narrow. See Human Rights Watch, *Justice for Liberia: The Truth and Reconciliation Commission’s Recommendation for an Internationalized Domestic War Crimes Court*, December 2009, available at: [hrw.org/news/2009/12/11/liberia-trc](http://hrw.org/news/2009/12/11/liberia-trc).
91. As of October 2017, more than nine years after establishment of the ICD (initially called the “War Crimes Division”), the division had begun (but not completed) only one war crimes case. See the annex to this report on Uganda.

92. See, for example, Article 5, ICTR Statute, available at: [unictr.org/en/documents](http://unictr.org/en/documents). Pursuant to Article 6(2), the “official position of any accused person, whether as Head of state or government or as a responsible government official,” does not relieve him or her of criminal responsibility nor mitigate punishment. Further, according to Article 6(4), acting pursuant to official/superior orders is not a defense, but may be considered in mitigation.
93. The proposed Specialized Chambers in the Democratic Republic of Congo would have had jurisdiction over “legal entities.” Additionally, while nonjudicial in nature, the Commission against Impunity in Guatemala (CICIG) has power to, inter alia, “determine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing, [etc.]” and to “collaborate with the State” in the dismantling of them (Article 2.1 (a) and (b) of the CICIG Agreement). While the function of the CICIG is to promote the investigation, criminal prosecution and punishment of the “members” of the aforementioned groups (Article 2.1 (b), CICIG Agreement), it also has a role in seeing them eradicated and/or dismantled.
94. Text of the draft articles on crimes against humanity adopted by the commission on first reading, UN Doc. A/72/10, 2017, Article 6(8) (“Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offenses referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.”)
95. Although beyond the scope of this handbook, joint criminal enterprise has been found to encompass three categories (known as JCE I, II, and III, respectively) and—in respect of the ICTY and ICTR Statutes to be read into the word “committed” in Article 7(1)/6(1) of the ICTY/ICTR Statutes, respectively. See *Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgment, July 15, 1999. See also, Giulia Bigi, “Joint Criminal Enterprise in the Jurisprudence of the [ICTY] and the Prosecution of Senior Political and Military Leaders: The *Krajišnik* Case,” available at: [www.mpil.de/files/pdf3/mpunyb\\_02\\_bigi\\_14.pdf](http://www.mpil.de/files/pdf3/mpunyb_02_bigi_14.pdf).
96. This form of joint criminal enterprise liability holds an individual who intentionally participates in a JCE responsible for crimes committed outside of the common plan if those crimes were reasonably foreseeable yet he/she willingly took the risk that they would be committed.
97. See Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), May 20, 2010, para. 87, available at: [eccc.gov.kh/sites/default/files/documents/courtdoc/D97\\_15\\_9\\_EN.pdf](http://eccc.gov.kh/sites/default/files/documents/courtdoc/D97_15_9_EN.pdf). See also, M. Karnavas, “Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision Against the Application of JCE III and Two Divergent Commentaries on the Same,” *Criminal Law Forum* 21 (2010): 445–94.
98. See M. Milanović, “An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon,” *Journal of International Criminal Justice* 5 (2007): 1139–52.
99. States basing modes of liability on the Rome Statute may not be using the most inclusive definitions of liability. At least according to some commentators, while the Rome Statute criminalizes joint commission and contributing to the commission of an offence via a common purpose, it doesn’t contemplate extended form joint criminal enterprise liability. See, generally, Article 25 of the Rome Statute, in particular

paragraphs (3)(a) and (d). For commentary to the effect that the Rome Statute does not encompass JCE III liability, see, for example, K. Heller, “JCE III, the Rome Statute, and Bashir,” available at: [opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute](http://opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute).

100. In the case of the ICTY and the ICTR, broad personal jurisdictional mandates (i.e., “persons responsible”) resulted in open-ended, lengthy investigations and long dockets which—after some years of operation—required Security Council and judicial attention. This resulted in the passing of amendments to the tribunals’ respective Rules of Procedure and Evidence in the form of Rule 11*bis*, so that the tribunals could focus on more serious cases while cases against less serious offenders were transferred to domestic jurisdictions.
101. For a comprehensive analysis of this issue, see, for example, Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update*; and Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011 Update*. See in particular, November 2011 Update report at pages 13–15 (incl.), which describes personal jurisdiction as a “legal ruse” and a “legal solution to a political problem.”
102. In many cases, such challenges on the basis of *nullem crimen sine lege* have been overcome when judges concluded that the underlying conduct was criminal under national or international law at the time of commission. Jurisprudence has established that the *nullum crimen* test can be satisfied even if the conduct is not criminalized in the exact same way it is later prosecuted. See, for example, *The Prosecutor v. Milutinović, et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 38 (ICTY Appeals Chamber, May 21, 2003) (“*Nullum crimen* does not prevent a court from interpreting and clarifying the elements of a particular crime”); *The Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber, November 12, 2002) (“In interpreting the principle of *nullem crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offense in substantive criminal law, is of primary relevance,” para. 62), (“The principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated,” para. 165).
103. Valentina Spiga, “Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga,” *J Int Criminal Justice* 9, no. 1 (2011): 5–23, at 1. The author says, “The Court of Justice was wrong in holding that there would be a difference between an ad hoc tribunal (which would be entitled to apply criminal law retroactively) and a Senegalese court (which would instead not be empowered to do so).”
104. The ICTR’s temporal jurisdiction was specifically designed to allow scrutiny of alleged atrocities committed by the Rwanda Patriotic Front (RPF). However, the ICTR failed to indict anyone from the RPF side, which formed the incumbent government in Rwanda. The Office of the Prosecutor transferred some case files involving RPF suspects to Rwanda, where prosecutions were carried out, though these trials were criticized as being a “whitewash”—generally low-level players were “scapegoated” for the alleged actions of those further up the chain of command.
105. For example, the ICTR’s mandate comprised the full calendar year of 1994 in spite of the fact that the Rwandan genocide was largely perpetrated over the course of 100 days (from April to July 1994). In theory, this could have allowed for the prosecution of those who perpetrated crimes on the side of the RPF.

106. Sigall Horovitz, "Sierra Leone: Interaction between International and National Responses to the Mass Atrocities," *DOMAC/3* (December 2009): 33–34.
107. See B. Tabbarah, "The Legal Nature of the Special Tribunal for Lebanon," in *The Special Tribunal for Lebanon*, ed. Alamuddin, Jurdi, and Tolbert (Oxford: Oxford University Press, 2014), 49. "The Special Tribunal for Lebanon is a sui generis international institution. ... The Tribunal is not a treaty-based international tribunal because its founding instrument is not a treaty duly ratified by Lebanon. Neither is it a tribunal duly integrated into the Lebanese court system."
108. See Beth Van Schaack, "The General Assembly and Accountability for Grave Crimes," *Just Security*, February 27, 2017, available at: [justsecurity.org/38145/general-assembly-accountability-international-crimes](http://justsecurity.org/38145/general-assembly-accountability-international-crimes). Russia argued unsuccessfully that the General Assembly should not be able to authorize the IIIM because it is "prosecutorial in nature." See Alex Whiting, "Russia Maintains Objection to General Assembly's Mechanism for Syria," *Just Security*, February 24, 2017, available at: [justsecurity.org/38084/russia-maintains-objection-general-assemblys-mechanism-syria/](http://justsecurity.org/38084/russia-maintains-objection-general-assemblys-mechanism-syria/).
109. Even though state parties to the Rome Statute with monist systems can directly apply the Statute's provisions, the experience in DRC has shown that a lack of implementing legislation can create complications to doing so. See Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, 2011, 27–29, available at: [opensocietyfoundations.org/reports/putting-complementarity-practice](http://opensocietyfoundations.org/reports/putting-complementarity-practice).
110. The SCSL had an international prosecutor and international judges who constituted the majority in each chamber of the court. (Rather than "international" versus "Sierra Leonean" officers, the distinction was between who had the power of appointment: the UNSG, or the government of Sierra Leone). In the case of the ECCC, there was equal balance of power between the co-prosecutors (one international and one Cambodian) and the co-investigating judges (one international and one Cambodian), though with special legal provisions intended to resolve disputes between them.
111. Although the binding nature of the legal instruments creating the ICTY and the ICTR proved fruitful in many instances, it should be noted that both states acquiesced in the investigation and prosecution of cases on their territories (at least to a large extent).
112. Ad hoc and early hybrid tribunals were not immune to this litigation; however, since challenges to these tribunals' authority (i.e., the power of the Security Council to establish an ad hoc tribunal pursuant to its UN Charter peace and security powers) were also brought in the early operational phase of these courts.
113. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 12.
114. The UN itself has acknowledged shortcomings at both the ICTR and ICTY that have had adverse effects on the rights of the accused. See UN Secretary-General's Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 45. "Many suspects before the two ad hoc tribunals have had to spend lengthy periods in detention waiting for their trials to start. With regard to the ad hoc international tribunals, many of those trials have taken a very long time to complete, due in part to the complexities of prosecuting international crimes."
115. Open Society Justice Initiative, *Justice in DRC: Mobile Courts Combat Rape and Impunity and Eastern Congo*, January 2013.
116. "Security Main Concern in Saddam Hussein Trial," *Voice of America*, October 27, 2009.

117. For example, despite the ICTR's establishment as a wholly international tribunal located outside the country, the Rwandan government was still able to greatly influence the tribunal's docket so that no indictments were ever laid by the ICTR against members of the Rwanda Patriotic Front (RPF). There are also other examples of Rwanda's political influence on judicial decision-making in the ICTR. For a discussion of these, see, for example, Reydam, Wouter, and Ryngaert, eds., *International Prosecutors* (Oxford: Oxford University Press, 2012), 379–85.
118. P.N. Pham, P. Vinck, M. Balthazard, and S. Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkeley, 2011).
119. However, even if the mechanism is located outside of the affected country, witnesses, victims, and families still located in the affected country may face danger. While the Kenya cases before the ICC are not specifically part of this handbook, it is noteworthy that the remote location of trials against senior officials did not shield the cases, nor the witnesses in those cases, from risk. The ICC's Kenya prosecutions collapsed amid extensive allegations of witness tampering and killings. See, for example, "Claims of Witnesses in ICC Kenya Trial Disappearing," *BBC*, February 8, 2013.
120. See Tracey Gurd, "Arresting the 'Big Fish': Lessons on State Cooperation for the International Criminal Court," in *The Enforcement of International Criminal Law*, ed. Aegist Trust (2009), 27–34.
121. See Jo Becker, "Campaigning for Justice: Human Rights Advocacy in Practice," *Stanford Studies in Human Rights* (2013): 113–30.
122. ECCC Agreement, Article 27(1).
123. Gideon Boas, et al., *International Criminal Procedure*, International Criminal Law Practitioner Series, vol. 3 (Cambridge: Cambridge University Press, 2011), 260–61.
124. For discussion of "horizontal" versus "vertical" prosecution structures, see Guénaël Mettraux et. al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, December 2014, 63–65.
125. *Ibid.*, 64.
126. See War Crimes Research Office (American University Washington College of Law), *Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor*, October 2012, 19–23.
127. International Criminal Court, Office of the Prosecutor, *Strategic Plan 2016–2018*, November 16, 2015, 40.
128. The investigation of former Liberian President Charles Taylor did not start in earnest until after his apprehension and transfer to the court in 2006. The team on that case drew extensively on those who previously worked on the investigation and prosecution of members of the Taylor-aligned Revolutionary United Front and Armed Forces Revolutionary Council.
129. Rupert Skilbeck, "Ensuring Effective Defence in Hybrid Tribunals," *Revue Québécoise de Droit International* (2010): 95.
130. *Ibid.* See also Rupert Skilbeck, "Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone," *Essex Human Rights Review* 1, no. 1 (2004).
131. Both ICTY and ICTR statutes outline a number of due process guarantees that correspond with those in Articles 9(2), 14, and 15 of the International Covenant on Civil

- and Political Rights (see Articles 9, 19, and 20 of the ICTR statute, as well as Articles 10, 20, and 21 of the ICTY statute).
132. Articles 14 and 15 of the statutes of the ICTR and ICTY, respectively, grant power to the judges of the tribunals to adopt rules of procedure and evidence “for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate measures.”
  133. Article 13 of the STL statute—which deals with the defence office—grants power to the UN Secretary-General (in consultation with the president of the tribunal) to “appoint an independent Head of the Defence Office” who is responsible for the appointment of staff in that office and also for the drawing up of a list of defence counsel. It also articulates the responsibilities of the office. This STL was the first mechanism of its kind to give equal formal status to defence and prosecution offices. (See John R.W.D. Jones and Miša Zgonec-Rožej, “Rights of Suspects and Accused,” in *The Special Tribunal for Lebanon*, ed. Alamuddin, Jurdi and Tolbert, 191.
  134. Skilbeck, “Ensuring Effective Defence,” 93.
  135. Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transitional Justice, March 2006, 31–32.
  136. Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Justice Initiative, 2010, 101–5.
  137. Open Society Justice Initiative, *Putting Complementarity into Practice*, 2011, 36–37.
  138. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 2016, 118.
  139. Open Society Justice Initiative, *Putting Complementarity into Practice*, 72–73.
  140. *Ibid.*, 42.
  141. See Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, QC, *Selecting International Judges: Principle, Process, and Politics*, International Courts and Tribunals Series (Oxford: Oxford University Press, 2010).
  142. With regard to implications for fair trial rights, see Skilbeck, “Ensuring Effective Defence,” 92.
  143. The Bangalore Principles of Judicial Conduct, 2002.
  144. Article 13, ICTY Statute, Article 12 ICTR Statute.
  145. Article 13.1, ICTY Statute, Article 12.1, ICTR Statute.
  146. Article 13, SCSL Statute.
  147. Alejandro Chehtman, “Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a ‘Success Story,’” *Journal of International Criminal Justice* 9 (2011): 566.
  148. Rome Statute, Article 36 (8).
  149. See “Beijing +20: Past, Present and Future: The Representation of Women and the United Nations System,” available at: [unwomen.org/en/digital-library/publications/2015/03/the-representation-of-women-and-the-united-nations-system](http://unwomen.org/en/digital-library/publications/2015/03/the-representation-of-women-and-the-united-nations-system).
  150. See Kelly Askin, *The Power of Women in Advancing the Cause of Gender Justice*, Open Society Foundations, March 7, 2013, available at: [opensocietyfoundations.org/voices/power-women-advancing-cause-gender-justice](http://opensocietyfoundations.org/voices/power-women-advancing-cause-gender-justice).
  151. The author, then an official in the Office of the Prosecutor, participated in a working group that had drafted a code of conduct that had not been approved by the court’s

principals or circulated to staff. For background on the incident, in which the investigator was eventually acquitted of the charges, see “‘I Was Brutalised,’ Says Cleared UN Worker,” *Sydney Morning Herald*, October 15, 2005.

152. An expert commission reviewing mechanisms in East Timor concluded in 1999 that “it would be remiss to recommend the establishment of any form of criminal tribunal without a corollary emphasis on first, the importance of secure, sufficient and sustainable levels of funding.” See *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, May 26, 2005, 28. Similarly, a report from the Secretary-General in 2004 concluded, in reference to the experience at the Special Court for Sierra Leone, that “the operation of judicial bodies cannot be left entirely to the vagaries of voluntary funding.” See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 43. In relation to the ECCC, see also David Scheffer, “No Way to Fund a War Crimes Tribunal,” *New York Times*, August 28, 2012, “This is no way to fund a major war-crimes tribunal with a historic mandate to achieve accountability, finally, for one of the 20th century’s worst slaughters of innocent civilians. Voluntary government assistance for war crimes tribunals is a speculative venture at best, and depends on so many unpredictable variables as years roll by that the original objective is sometimes forgotten.”
153. In 2011, victims in one case received reparations with the support of UN Women. See [monusco.unmissions.org/en/un-supports-songo-mboyo-rape-victims-drc](http://monusco.unmissions.org/en/un-supports-songo-mboyo-rape-victims-drc).
154. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 8, available at: [ohchr.org/Documents/Publications/HybridCourts.pdf](http://ohchr.org/Documents/Publications/HybridCourts.pdf).
155. By Resolution 74 (I) of December 7, 1946, the General Assembly Established the United Nations Board of Auditors to audit of the accounts of the United Nations organization and its funds and programs and to report its findings and recommendations to the General Assembly through the Advisory Committee on Administrative and Budgetary Questions, available at: [daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/25/IMG/NRO03325.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/25/IMG/NRO03325.pdf?OpenElement).
156. *First Annual Report of the President of the Special Court for Sierra Leone, for the Period between December 2, 2002, and December 1, 2003*, 29, available at [sc-sl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176](http://sc-sl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176).
157. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, Article 7, available at [sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176](http://sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176).
158. United Nations Secretary-General, *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, S/2002/246, March 8, 2002, Appendix 3, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/2002/246](http://un.org/en/ga/search/view_doc.asp?symbol=S/2002/246).
159. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 2016, 8.
160. Open Society Justice Initiative, *Putting Complementarity into Practice*, 2011, 79–80.

# III. ANNEXES

## Annex 1: Mechanisms in Africa

### **AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS WITH CRIMINAL JURISDICTION**

#### **Conflict Background and Political Context**

The African continent has experienced extensive armed conflict and violations of international law and human rights since the mid-20th century. Over the last 25 years, this has included the Rwandan genocide, protracted civil war and genocide in the Darfur region of Sudan, interethnic conflict and armed violence between government forces and militia groups in the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), postelection violence in Kenya and Côte d'Ivoire, Islamic terrorism by al-Shabaab in Somalia, and more recently by the militant Islamist group Boko Haram in Nigeria and neighboring countries.

Since the 1990s, Africa has increasingly paid attention to the prosecution of (international) crimes through a variety of international, regional, and local approaches. At the same time, the African legal framework for the prosecution of international crimes has grown. The African Charter on Human and Peoples' Rights (African Charter), adopted in 1981 and entered into force on October 21, 1986, was the first legal instrument for the protection of human rights of people on the African continent. Beyond the inclusion of civil, political, economic, social, and cultural rights, as enshrined in most international human rights instruments, the African Charter recognizes a range of collective "group rights" and "third-generation rights," such as the rights to a healthy environment and natural resources—rights which are of particular importance to African peoples.<sup>161</sup> In the first years of its existence, the quasi-judicial African Commission on Human and Peoples' Rights (African Commission) oversaw the protection and promotion of human rights.<sup>162</sup> Subsequently, the African Union (AU) created the African Court on Human and Peoples' Rights (ACHPR) to adjudicate human rights cases. A proposal for an African criminal court was also considered in the 1980s, but the AU only seriously started discussing the creation of a mechanism with jurisdiction to prosecute international crimes within the AU structures in 2007–2008.<sup>163</sup> Subsequent development and

debate of the idea has proceeded in parallel with continued debate over the role and actions of the International Criminal Court (ICC) in Africa, especially following ICC charges against Sudanese President Omar Al-Bashir in 2009 (see text box).

However, AU interest in a regional court with jurisdiction over international crimes preceded the charges against Al-Bashir.<sup>164</sup> AU member states had already been involved in discussions over the use of the principle of universal jurisdiction, following numerous European proceedings against senior African officials for crimes under international law.<sup>165</sup> The momentum for the prosecution of former Chadian President Hissène Habré added impetus to the discussion. And the AU faced a requirement to implement a provision of the 2007 African Charter on Democracy, Elections, and Governance (ACDEG) to hold accountable “perpetrators of unconstitutional change of government” before a “competent court of the Union.”<sup>166</sup> This combination of factors galvanized support within the AU to create a criminal chamber within the African Court.<sup>167</sup>

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## Africa and the International Criminal Court

At the international level, African support for the creation of the ICC had been strong since discussions on the creation of the first permanent criminal court commenced. As of October 2017, there were 124 signatories to the Rome Statute, 34 of which were African states, comprising the largest regional block of states parties to the ICC.<sup>168</sup> As of October 2017, nine out of 10 ICC investigations concerned African situations. In the first years of the ICC’s existence, African states were generally supportive of the ICC’s investigation into Uganda and the DRC, situations self-referred by African governments and in which the prosecutor mostly investigated crimes committed by rebel groups. However, when in March 2009 the ICC issued a first arrest warrant for President Omar Al-Bashir of Sudan in relation to grave crimes in the Darfur region of Sudan, the relationship between the AU and the ICC changed drastically. In the words of scholar Charles Jalloh: “Several African states began to perceive the Court not as a court for Africa, but one against it.”<sup>169</sup> In 2010, the AU rejected “for now” ICC overtures to open a liaison office in Addis Ababa.<sup>170</sup>

ICC proceedings against Uhuru Kenyatta and William Ruto (by then president and vice president of Kenya, respectively) for alleged perpetration of grave crimes during the aftermath of the 2007 Kenyan elections greatly exacerbated the already difficult relationship between the ICC and the AU. From 2011 onward, in parallel with confirmation of charges against Kenyans including Kenyatta and Ruto, the

government of Kenya played an increasingly energetic role in pressing for the adoption of AU resolutions critical of the ICC. There was also concern within the AU that the United Nations (UN) Security Council had not debated or acted on a longstanding AU request to defer proceedings against Al-Bashir under Article 16 of the Rome Statute.<sup>171</sup> And states including South Africa were concerned about what they regarded as an unwillingness of the Assembly of States Parties (ASP) to the Rome Statute to acknowledge that an obligation to arrest an ICC fugitive who is a head of state (Al-Bashir) conflicts with obligations not to effect such an arrest following previous AU decisions.<sup>172</sup>

In January 2016, the AU tasked a ministerial committee with “the urgent development of a comprehensive strategy including collective withdrawal [of African states parties to the Rome Statute] from the ICC.”<sup>173</sup> In 2016, Gambia, Burundi, and South Africa filed notifications of withdrawal from the Rome Statute, although Gambia and South Africa later reversed course.<sup>174</sup> In January 2017, the AU Assembly adopted a “Withdrawal Strategy.” Despite the name, the document did not actually entail a strategy for collective withdrawal from the Rome Statute. Rather, it set out a number of institutional and legal strategies as well as diplomatic and political engagements for further pursuit of the implementation of AU policies related to the ICC.<sup>175</sup>

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## **Existing Justice-Sector Capacity**

Africa has seen a rise in justice and accountability for international crimes since the 1990s. The continent “has been [a] fertile ground for accountability experimentation ... with approaches ranging from judicial to non-judicial mechanisms like truth commissions, reparations and community-based processes.”<sup>176</sup> Justice solutions in Africa include local accountability mechanisms examined throughout this handbook. Among these are the *Gacaca* mechanism in Rwanda, domestic prosecutions in the Democratic Republic of Congo, the International Criminal Tribunal for Rwanda (ICTR), and hybrid and internationalized courts such as the Special Court for Sierra Leone (SCSL), the Extraordinary African Chambers (EAC) in Senegal for the prosecution of former Chadian President Hissène Habré, the new Special Criminal Court (SCC) for the Central African Republic (CAR), and the proposed hybrid mechanism for South Sudan.<sup>177</sup> These experiences and others, including the involvement of African states in cases before the ICC, have resulted in a significant group of African lawyers, administrators, and experts with deep experience in international criminal law and the mechanisms for its implementation. Despite positive developments, horrendous crimes continue to be committed on the African continent, with little criminal accountability for grave crimes.

## Existing Civil Society Capacity

African civil society has repeatedly acted to put an end to impunity of international crimes in Africa. In its 2013 report on international criminal justice in Africa, the Pan African Lawyers Union stressed that “members of African civil society and local communities—from Sudan to Kenya to Mali—have been on the front lines of embedding and expanding the reach of international justice whether through advancing principles and standard-making or engaging directly with mechanisms such as the ICC. Many have put their lives on the line for their commitment to the transformative promise of equitable global justice.”<sup>178</sup> Civil society groups in countries under investigation by the ICC have been particularly active in calling for accountability for international crimes, monitoring trials, and organizing public information campaigns.<sup>179</sup>

Civil society has been involved in the creation of the criminal justice component of the ACJHR. African civil society organizations and legal experts have made recommendations to the AU and its member states,<sup>180</sup> and published analysis and advocacy pieces in relation to the issue.<sup>181</sup> Many African civil society organizations have signed on to a series of letters with counterparts from international civil society organizations at various points as AU bodies have deliberated over ACJHR issues. Ahead of the AU Assembly meeting in July 2012, for example, where adoption of the draft protocol on amendments to the African Court was on the agenda, 47 organizations called upon African states parties to the ICC to consider deferring signing endorsement of the draft protocol in order to permit further consultation and study on a variety of remaining issues. The letter stressed that the draft protocol did not fully comprehend the complexity of the establishment of a regional criminal court, that no discussions had taken place on the financial implications of a merged court, and that the relationship between the African Regional Court and the ICC needed to be further clarified before the Protocol could be adopted.<sup>182</sup> Although the AU has not taken up these and other civil society recommendations, the adoption of the draft protocol was postponed at this time partly because of civil society involvement. Since then, international and local civil society groups have continued to actively monitor developments and commented on other versions of the draft protocol and the creation of a regional criminal court.<sup>183</sup>

## Creation

There have been two related but distinct aspects to creating a court with jurisdiction over international crimes. The first has entailed steps to merge existing courts to

create an African court with criminal jurisdiction (the African Court of Justice and Human Rights, ACJHR); the second entails the effort to provide the resultant ACJHR with jurisdiction over grave crimes (the Malabo Protocol).

### ***The African Court on Human and Peoples' Rights***

In 1981, the Organization of African Unity (OAU, the precursor to the AU) created the African Commission on Human and Peoples' Rights to protect and promote rights and interpret the African Charter on Human and Peoples' Rights.<sup>184</sup> In 1998, the OAU created the African Court on Human and Peoples' Rights to supplement the mandate of the African Commission in the interpretation and protection of the African Charter on Human and Peoples' Rights. Their intention was to create a judicial body that could issue decisions that would be binding on states. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in 1998, entered into force in January 2004. The court started operations in 2004, but only became fully operational at the beginning of 2006.<sup>185</sup> The court issued its first decision on December 15, 2009.

### ***African Court of Justice***

The AU adopted the Protocol of the Court of Justice of the African Union in 2003, and it entered into force in February 2009. The AU envisaged the African Court of Justice (ACJ) as its main judicial organ, responsible for adjudicating a range of legal disputes, including AU treaty law and "any question of international law."<sup>186</sup> The Protocol of the Court of Justice of the African Union entered into force in February 2009 when it received the requisite 15 ratifications. However, as the protocol almost coincided with the 2004 entry into force of the ACHPR, the idea of merging courts gained traction. With the adoption of a new proposal for a merged ACJHR in 2008, the AU has not operationalized the ACJ.

### ***African Court of Justice and Human Rights***

The 2008 Protocol on the Statute of the ACJHR sets out that the ACJHR will have a general affairs section with the authority to interpret AU treaties and solve legal disputes between African states. It will also have a human rights section, which, like the ACHPR, would be responsible for the interpretation and the application of the African human rights charter and other human rights instruments. As of June 2017, 30 states had signed and six states had ratified the 2008 Protocol on the Statute of the ACJHR.<sup>187</sup> While the requisite ratifications are still pending for the merged

court to come into force, simultaneously the AU put forward a second proposal for a tripartite mandate of the ACJHR: the Malabo Protocol.

### ***The Malabo Protocol***

The Constitutive Act of the African Union, adopted in 2000, suggested the need for the creation of a criminal court. It established that the AU has the right “to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity,” and that “condemnation and rejection of impunity” is a shared principle.<sup>188</sup> The proposal to give the ACJHR criminal jurisdiction paralleled other AU proposals to establish a regional or special court to prosecute crimes committed by Hissène Habré in Chad and an inchoate proposal to add human rights jurisdiction to the East African Court of Justice.<sup>189</sup> Discussions also paralleled the emergence of tensions in the African relationship with the ICC and with European states over the application of the principle of universal jurisdiction.

During the AU Assembly of Heads of State and Government in February 2009, the AU adopted a resolution tasking the AU Commission, in consultation with the African Commission on Human and Peoples’ Rights and the ACHPR, “to assess the implications of recognizing the jurisdiction of the African Court to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.”<sup>190</sup> With the help of consultants from the Pan African Lawyers Association (PALU), a draft protocol amending the Protocol to the Statute of the ACJHR was prepared, and then discussed and amended during several AU meetings throughout the second part of 2010. Over the course of 2011, three meetings on the draft protocol with government experts preceded the November 2011 provisional adoption of the draft protocol and the amended Statute for the ACHPR in Addis Ababa.<sup>191</sup> Throughout 2012 and 2013, additional meetings were held by the AU Commission to discuss remaining contentious issues, which prevented the AU Assembly from adopting the draft protocol in June 2012. These issues were the financial implications of a merged court and the definition of the crime of unconstitutional change of government.

In June 2014, the AU Assembly of Heads of State and Government, meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (commonly known as the Malabo Protocol). The protocol will come into force 30 days after its ratification by 15 AU member states. As of October 2017, 10 states had signed the Malabo Protocol, but no states had ratified it.<sup>192</sup>

## Legal Framework and Mandate

Once created, the ACJHR will be the AU's main judicial organ. It will have jurisdiction over "all cases and all legal disputes submitted to it in accordance with the present Statute which relate to the interpretation and application" of the AU Constitutive Act, legal instruments and decisions of the AU, the African human rights charter, the crimes contained in the Statute, and other questions of international law.<sup>193</sup> Thus the ACJHR will take over the human rights responsibilities of the current ACHPR, which has operated since 2006, and will additionally be granted the mandate to deal with general legal affairs and the prosecution of international crimes under the statute.

With entry into force of the Malabo Protocol, the ACJHR would also have material jurisdiction to try 14 different crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.<sup>194</sup> Additionally, there is a provision allowing states parties to further extend the court's jurisdiction.<sup>195</sup> The statute's definition of war crimes, crimes against humanity, and genocide are taken from the Rome Statute of the ICC. The offenses of unconstitutional change of government, mercenarism, and crimes relating to the environment are completely new to criminal tribunals. These new crimes included in the Malabo Protocol are generally of "particular resonance to Africa for which only Africa may be interested in dealing with."<sup>196</sup>

Beyond its extended list of crimes, the Malabo Protocol is innovative in its expansion of criminal liability to corporations under certain circumstances.<sup>197</sup> This is a first for an international criminal court.<sup>198</sup> Africa is rich in conflicts over natural resources, often fueled by the actions of international corporations. Thus, expanding criminal responsibility to corporations could present an opportunity for Africa to deal with a characteristic sort of conflict within its borders, in a world where multinational corporations have been shielded from criminal responsibility for their actions.<sup>199</sup>

The territorial jurisdiction of the ACJHR will be limited to crimes committed within the territory or by nationals of states parties, and is temporally limited to the entry into force of the Malabo Protocol or the specific date of ratification for any particular state.<sup>200</sup>

The most controversial aspect of the Malabo Protocol is its provision on immunity for sitting heads of state and government. Article 46A provides that “no charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”<sup>201</sup> Many African and international scholars and civil society organizations have criticized this provision.<sup>202</sup> While head of state immunity is a disputed concept in international law, since the 1990s there has been a developing norm that official capacity is no bar to prosecution when it concerns international crimes. No other international or hybrid criminal tribunal allows for such immunity, and the statutes of many even include a provision stating the opposite. The ICTR, SCSL, and EAC have all prosecuted African leaders for their involvement in international crimes, which has contributed to the global trend in international law policy and practice over recent decades. Further, the Malabo Protocol leaves the term “other senior state officials” undefined, so the article’s reach in shielding state officials is ambiguous, and potentially extensive.

The Malabo Protocol states that the court is complementary to national jurisdictions and the courts of regional economic communities, where they are specifically provided for by the communities.<sup>203</sup> This provision has faced criticism for being weaker than the similar complementarity provisions of the Rome Statute.<sup>204</sup> Complicating matters, the Rome Statute makes the ICC complementary to national jurisdictions, but makes no mention of regional criminal courts.<sup>205</sup> Similarly, the Malabo Protocol makes no mention of the Rome Statute or the ICC. If and when the ACJHR starts operations, there will be a need for clarity with regard to situations under investigation by both, as well as issues of cooperation in the arrest and surrender of suspects. Additionally, potentially conflicting legal obligations arising for African states who are party to both the ACJHR and ICC need to be resolved.<sup>206</sup>

## **Location**

The Malabo Protocol provides that “the Seat of the Court shall be same as the Seat of the African Court of Human and People’s Rights. However, the Court may sit in any other Member State, if circumstances warrant, and with the consent of the Member State concerned. The Assembly may change the seat of the Court after due consultations with the Court.”<sup>207</sup> This means that, at least initially, the ACJHR will be based in Arusha, Tanzania, where the ACHPR has been seated since 2007.

## **Structure and Composition**

The ACJHR will be composed of three main sections: a General Affairs Section, a Human and Peoples' Rights Section, and the International Criminal Law (ICL) Section.<sup>208</sup> Beyond these three chambers, the ACJHR will have an independent Office of the Prosecutor, an independent Defense Office, and a Registry.

### ***Chambers***

The ACJHR will have a total of 16 judges, with five judges appointed to the General Affairs Section, five to the Human and Peoples' Rights Section, and six to the of the ICL Section.<sup>209</sup> The ICL Section will consist of a Pre-trial section of one judge, a Trial Chamber of three judges, and an Appellate Chamber of five judges.<sup>210</sup> The AU Executive Council elects the judges, who are appointed by the AU Assembly, with consideration of equitable regional and gender representation.<sup>211</sup> The full roster of judges elects a president and vice president during the Criminal Law Chamber's first ordinary session, and the appointment is for a period of two years.<sup>212</sup>

Some have voiced concerns that the total number of judges of the ACJHR, and the number of judges assigned to the criminal law chamber, will not be sufficient for the court to carry out its mandate effectively.<sup>213</sup> With only six judges available for all three stages of trial, it seems inevitable that the ICL Section will face cross-contamination issues. (Cross-contamination occurs when a judge is later assigned to another chamber dealing with the same case in a later stage of the trial.) Based on the experience of the ICC—where the Pre-trial and Trial Chambers are composed of three judges and the Appeals Chamber of five judges—it seems impossible for the ICL Section to cover a full trial with six judges without having to assign the same judges to multiple divisions, causing concern about the fairness of the proceedings. Furthermore, with the wide range of crimes incorporated in the ACJHR's mandate, it will be difficult to find a roster of judges with expertise in all areas.<sup>214</sup>

### ***The Office of the Prosecutor***

Under the amended ACJHR statute, "The Office of the Prosecutor (OTP) shall be responsible for the investigation and prosecution of the crimes specified in this Statute and shall act independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other sources."<sup>215</sup> The OTP has the power to question victims and witnesses, to collect evidence, and to conduct investigations at the sites of crimes. The AU Assembly appoints the prosecutor and deputy prosecutor to nonrenewable terms of seven years and four years,

respectively. The chief prosecutor is responsible for the appointment of other staff in the OTP.<sup>216</sup>

To a similar extent as the ICC prosecutor, the ACJHR prosecutor will have *proprio muto* powers to initiate investigations into any crime under the statute. Criminal law cases and legal disputes may also be brought to the court's attention by states parties, several internal AU institutions including the AU Assembly and the Peace and Security Council, and staff members of the AU (in the case of legal disputes).<sup>217</sup> Regional and national human rights organizations, individuals, and nongovernmental organizations may also submit cases to the Human and Peoples' Rights Section with regard to violations of human rights.<sup>218</sup>

### ***The Registry***

The Registry fulfills administrative and court management tasks. The court appoints a registrar to lead the Registry for a single, nonrenewable seven-year term. Three assistant registrars and other staff support the registrar in his or her work. The statute provides that the Registry will have a dedicated Victims and Witnesses Unit and a Detention Management Unit.<sup>219</sup>

### ***The Defense Office***

The ACJHR Statute provides that "the Court shall establish, maintain and develop a Defense Office for the purpose of ensuring the rights of suspects and accused and any other person entitled to legal assistance."<sup>220</sup> A principal defender appointed by the AU Assembly heads the Defense Office. The inclusion of an independent Defense Office in the ACJHR's structure to help ensure the "equality of arms" between the prosecution and defense has not been a feature in most other international criminal courts.<sup>221</sup>

### ***The Victims and Witnesses Unit***

The Registry will house a Victims and Witnesses Unit, which shall provide "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses."<sup>222</sup> In addition to a specialized unit for the protection and support of victims and witnesses, the statute provides that the AU Assembly may establish a trust fund to grant legal aid and assistance to victims and their families in accordance with court decisions.<sup>223</sup>

## **Prosecutions**

As of October 2017, the ACJHR was not in operation. As of late 2017, six states had ratified the 2008 “merger protocol” to create the ACJHR, and none had ratified the Malabo Protocol.<sup>224</sup> The merged African Court will have jurisdiction to adjudicate general international law disputes and human rights violations, and if the Malabo Protocol enters into force, also to prosecute international crimes. Obtaining the necessary ratifications will likely take several years.

## **Legacy**

The proposal to create the ACJHR has sparked intense debate between proponents who emphasize its potential positive impact at local, regional, and international levels, and opponents who question the proposal’s feasibility, as well as the motivations behind it.

### ***The Malabo Protocol’s Potential***

As described in the preceding sections, the Malabo Protocol’s innovations include expanded jurisdiction over international and transnational crimes, a regional approach to criminal justice, the possibility for the prosecution of corporations for international crimes, and the court’s structuring to include a designated victim’s office and the establishment of a Defense Office with status equivalent to that of the Office of the Prosecutor. Thus, a merged African Court could “expand the scope and reach of international law, and possibly trigger similar efforts in other regions or even at the ICC.”<sup>225</sup> In the court’s regional approach to international criminal justice, proponents see potential for it to have a positive influence on the development of a regional culture of accountability and the development of local justice systems and legal norms.<sup>226</sup>

### ***Doubts about Feasibility and Motivation***

However, skeptics doubt the wisdom of building a court with such expansive jurisdiction, especially in light of experience at the ICC and other international tribunals, where complex cases can take years to conclude. “The scope of the court’s jurisdictional reach is breathtaking. Even before the International Criminal Law (ICL) Section was introduced, the court would have had its hands full. With the ICL section added, there must be legitimate questions about the capacity of the court to fulfill not only its newfound ICL obligations, but also about the effect that such

stretching will have on the court's ability to deal with its general and human rights obligations."<sup>227</sup> There is concern that the merged court will undermine the work of the ACHPR, which started operations in 2010. With a small total number of judges, it could be difficult for the court to attract judges and staff with requisite skills and competences in all aspects of its diverse mandate.<sup>228</sup>

Skeptics also question whether there is sufficient political commitment within the AU to make the ACJHR an effective institution. Some have argued that "the establishment of the Chamber is not motivated by the genuine desire to bring to justice the alleged perpetrators of international crimes."<sup>229</sup> Despite a range of motives for the ACJHR with criminal jurisdiction, some states (such as Kenya and Sudan) first heavily engaged in the diplomatic push for its creation in the context of controversial cases at the ICC and European universal jurisdiction cases against African leaders. Thus, doubters view the ACJHR as a means for African leaders to assert control over international crimes cases and so possibly shield themselves from prosecution in other courts.<sup>230</sup> The inclusion of a broad official immunity provision in the Malabo Protocol feeds this doubt.<sup>231</sup> Some commentators fear that extending the ACHJR's jurisdiction would lead to an institutionalized impunity gap, "forum-shopping," and a "regional African exceptionalism to international criminal law and international justice."<sup>232</sup>

Finally, operating a court of this ambition will require significant financial resources. Some civil society groups and observers are skeptical that the African Union would commit the resources to dramatically expand and restructure the court, especially given that the ACHPR has been underfunded.<sup>233</sup>

## **Financing**

The AU is responsible for financing the court because it is an AU treaty body.<sup>234</sup> The court's tripartite jurisdiction means a large budget. During negotiations on the creation of the criminal chambers, the AU estimated that in order to properly function, the ICL Section of the ACJHR alone would require a minimum annual budget of US\$4,422,530.<sup>235</sup> For the year 2017, the ACHPR had a proposed budget of US\$11,282,179, which was an almost 10 percent increase over the 2016 budget.<sup>236</sup> By comparison, these numbers represent a small fraction of the ICC's 2017 budget.<sup>237</sup> This is striking, especially since the ICC's mandate (albeit pertaining to a much broader geography) currently only includes three crimes, while the ACJHR would have jurisdiction over a much larger range of crimes, in addition to its general and

human rights affairs mandates. Given past experiences with complex international crimes cases (e.g., the cost of the relatively inexpensive trial of Hissène Habré trial in the EAC was around US\$9 million<sup>238</sup>), “the cost of prosecuting one international crime could well outstrip the annual budget of the African Court as a whole.”<sup>239</sup>

## **Oversight and Accountability**

Under the statute, the AU Executive Council nominates judges, the prosecutor, and the deputy prosecutor, who are appointed by the AU Assembly.<sup>240</sup> The court is required to submit an annual report to the AU Assembly on its investigations, prosecutions, decisions, and issues of state cooperation.<sup>241</sup> The AU Assembly is responsible for oversight of the court’s budget, as well as the enforcement of sentences.<sup>242</sup>

## **BURUNDI: PROPOSED SPECIAL CHAMBER**

### **Conflict Background and Political Context**

Colonial powers Germany (until 1916) and then Belgium pursued divide-and-rule tactics in Burundi, sharpening tensions between the Hutu majority and a favored Tutsi minority.<sup>243</sup> From the time of independence in 1962, Burundi has suffered waves of ethnic violence between Hutus and Tutsis, as well as armed rebellion, political assassinations, and massive internal displacement of people. In 1972, the government engaged in “genocidal repression” of Hutus, killing over 100,000.<sup>244</sup> Violence targeting Tutsis in 1993 led to the deaths of an estimated 300,000 people. At times, observers have characterized the ethnic violence as genocide.<sup>245</sup> In 1996, President Pierre Buyoya assumed power through a coup. Years of peace negotiations and power-sharing agreements between the Tutsi-controlled government and several Hutu rebel groups culminated in the Arusha Agreement of 2000,<sup>246</sup> which established a five-year transitional government, and along with a 2003 ceasefire agreement, contributed to relative peace and stability over these five years. The agreement also granted limited immunities to rebel leaders of the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD). In 2005, led by President Pierre Nkurunziza, the CNDD-FDD’s political wing won general elections.

Despite periodic outbreaks of violence, after 2005 there were signs of increasing stability. The government and the last major rebel group, the Forces for National Liberation (FNL) signed a ceasefire in 2006, and the UN ended its peacekeeping mission the following year. The FNL transitioned from an armed group to a political party in 2009.

However, in 2010 President Nkurunziza won re-election amid complaints of election rigging and a boycott by the main opposition parties, during which time he also started showing increasingly authoritarian tendencies. In Nkurunziza’s second term, hard-liners within his government sought to erode an ethnic quota system for government and military appointments enshrined in the 2000 Arusha Agreement.<sup>247</sup> The government passed a restrictive media law in 2013. In 2014, as the end of Nkurunziza’s second term approached, the UN warned that the government was forming an armed youth wing and the government jailed an opposition leader for slander. In 2015, Nkurunziza ran for a third term, which the Constitutional Court approved amid reports that judges faced intimidation. The decision ran counter to

a two-term limit in the Arusha Agreement and in Burundi's 2005 constitution.<sup>248</sup> Despite mass demonstrations against his bid for a third term, opposition from the second vice president (who fled the country), mounting violence in April 2015, and a failed coup attempt the following month,<sup>249</sup> the elections proceeded, and Nkurunziza claimed victory in the July 2015 vote. Civil society organizations promptly challenged the legality of his third term at the East African Court of Justice.<sup>250</sup>

As of September 2017, there were reports that from the onset of renewed large-scale political violence in April 2015, over 1,200 Burundians had been killed, and (as of October 31, 2017) over 400,000 had fled as refugees to neighboring countries.<sup>251</sup> In September 2017, a UN Commission of Inquiry reported to the Human Rights Council that there were reasonable grounds to believe that Burundi's National Intelligence Service, police, army, and *Imbonerakure* (the ruling party's youth wing) had been committing crimes against humanity since April 2015. More specifically, the commission concluded that these forces had perpetrated acts of extrajudicial execution; arbitrary arrest and detention; enforced disappearance; torture and cruel, inhuman, or degrading treatment; and sexual violence.<sup>252</sup>

From 2000 onward, there has been increased focus on the question of criminal accountability for grave crimes in Burundi. That year, the Arusha Agreement contained provisions for a possible track leading to an international criminal tribunal authorized by the UN Security Council. In 2005, a mission deployed by the Secretary-General issued its report (the "Kalomoh Report"), recommending the creation of a Special Chamber within Burundi's judiciary to deal with grave crimes.<sup>253</sup>

In December 2004, Burundi's ratification of the Rome Statute of the International Criminal Court (ICC) came into effect. After violence and reports of grave crimes increased in 2015, ICC Prosecutor Fatou Bensouda announced in April 2016 that her office was opening a preliminary examination into the situation in Burundi.<sup>254</sup> In October 2016, the UN Human Rights Council created a commission of inquiry to "conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015, including on their extent and whether they may constitute international crimes, with a view to contributing to the fight against impunity," as well to identify perpetrators of those crimes.<sup>255</sup>

In response to mounting pressure, the government of Burundi announced that it would withdraw from the Rome Statute, and a parliamentary vote in October 2016 began the process of withdrawal.<sup>256</sup> Reporting to the Human Rights Council in September 2017, the UN Commission of Inquiry recommended that the ICC open a

full investigation (a significant step beyond preliminary examination).<sup>257</sup> By the time Burundi's withdrawal from the Rome Statute took effect on October 27, 2017, there had still been no announcement of a full ICC investigation. However, on November 9, 2017, the ICC announced the unsealing of a decision by a Pre-trial Chamber, which approved the opening of an investigation two days prior to Burundi's withdrawal. The judges decided that the ICC may exercise its jurisdiction over Burundi for events occurring during its time as a state party to the Rome Statute—and that Burundi remained obligated to cooperate.<sup>258</sup>

## **Existing Justice-Sector Capacity**

The Kalomoh Report found that Burundi's justice sector suffers from a heavy ethnic imbalance, executive interference, and a lack of independence; it faces severe resource and capacity shortcomings, including minimal infrastructure, a lack of qualified judicial personnel, and low salaries.<sup>259</sup> Without significant international involvement and technical assistance, the Kalomoh Report concluded, the justice system's "capacity to deal with complex cases involving genocide, crimes against humanity and war crimes is virtually non-existent."<sup>260</sup> In 2015, the UN Special Rapporteur on transitional justice concluded that "the executive branch and the governing political party continue to control the justice sector at all levels."<sup>261</sup> In 2017, the UN Commission of Inquiry found that "pervasive impunity [for serious violations of human rights perpetrated in 2016 and 2017] was aggravated by a judiciary lacking independence."<sup>262</sup>

## **Existing Civil Society Capacity**

Even prior to the worsening violence that commenced in April 2015, donor countries and civil society organizations had grown increasingly skeptical about Burundi's commitment to the establishment of a mixed chamber, noting the tightening of political freedoms and threats to civil society independence. Accordingly, civil society was focused less on calling for accountability for past atrocity crimes than on defending shrinking political freedoms. The government continued to crack down on civil society organizations, including freezing their bank accounts and cancelling activities.<sup>263</sup> Following government suspension of several Burundian NGOs in October 2016, five organizations filed a complaint before the East Africa Court of Justice, citing violations of the right to freedom of association as well as other concerns.<sup>264</sup>

Tutsis are prevalent among civil society leaders, and this has fueled government hate speech targeting civil society organizations; a “significant number” of civil society leaders were among the hundreds of thousands who had fled the country by mid-2016.<sup>265</sup> The government has banned civil society organizations that have documented grave crimes and human rights abuses and spoken out about the causes of violence.<sup>266</sup> In February 2017, a group of UN experts observed: “The situation for human rights defenders has been dramatically deteriorating for more than a year and a half. Those who have not yet left the country fear for their life and are under relentless intimidation, threat of arbitrary detention, torture and enforced disappearance.”<sup>267</sup>

## Creation

The Arusha Agreement of 2000 called for the UN to create an international judicial Commission of Inquiry. Should the report of the commission “point to the existence of” acts of genocide, war crimes, and crimes against humanity, the Arusha Agreement stipulated that the government of Burundi would request “the establishment by the United Nations Security Council of an international criminal tribunal to try and punish those responsible.”<sup>268</sup>

The UN did not create a post-2000 international Commission of Inquiry. Instead, in January 2004, following a request by then-President Pierre Buyoya, the Secretary-General dispatched an assessment mission to Burundi to advise on the added value of creating an international judicial Commission of Inquiry, considering the series of international and national commissions of inquiries since 1993.<sup>269</sup> Buyoya’s request came at a critical political period: months before the end of the transitional governance period, and ahead of interim elections scheduled for October 2004.

The assessment mission’s March 2005 report (the “Kalomoh Report”), advised against establishing an international judicial Commission of Inquiry. Instead, the report recommended a hybrid Truth and Reconciliation Commission (TRC) and a Special Chamber for genocide, crimes against humanity, and war crimes in Burundi, with mixed international and national judges, prosecutors, and registry staff, located within the Burundian courts.<sup>270</sup> The mission explicitly modeled its recommendation on the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH WCC).<sup>271</sup> (See the Bosnian mechanism profile in Annex 4.)

The Security Council adopted the assessment mission’s recommendations and requested the Secretary-General to negotiate the creation of the two mechanisms.<sup>272</sup>

In October 2005, the Secretary-General delivered a brief preliminary report, noting that negotiations with the Burundian government had stalled.<sup>273</sup> Two more rounds of negotiations between the UN and Burundi in March 2006 and March 2007 both failed to reach an agreement on establishing the mechanisms.<sup>274</sup> National consultations in 2009 among the government of Burundi, Burundian civil society, and the United Nations resulted in recommendations in 2010 for the establishment of a hybrid TRC and a hybrid special tribunal.<sup>275</sup> The government signaled to the UN Human Rights Council that a TRC would be constituted first and a mixed chamber would then follow, although other civil society analysts perceived a general lack of political will to create a special tribunal.<sup>276</sup> The government circulated a draft bill for the TRC in 2011, which met with criticism from civil society leaders and international NGOs.

A bill to create the TRC finally passed in May 2014, providing the new body with a mandate to cover events from 1962 through 2008.<sup>277</sup> In December 2014, the National Assembly elected 11 commissioners, whom the president appointed later that same month.<sup>278</sup> Critics, including Burundian civil society leaders, have sharply criticized the TRC, saying that it is dominated by the ruling CNDD-FDD party, claiming that three commissioners are themselves suspected of perpetrating grave crimes, and noting that the bill to create the commission made no mention of the criminal accountability mechanism agreed to at Arusha.<sup>279</sup>

Since 1993, the UN Security Council's overall policy toward transitional justice in Burundi has privileged peace and stability over judicial accountability. Observers have noted the Security Council's decision to delay the publication of the Kalomoh Report's recommendation for the Special Chamber until after the end of the transitional government and elections—at which point the new government stalled negotiations. The failure to establish criminal justice mechanisms in Burundi for grave crimes can be explained in part by contrasting the post-conflict political situation in Burundi to the situation of its neighbor, Rwanda. After the 1994 Rwandan genocide, “there was a clear winner and a new political regime ... in such a setting it was much more ‘easy’ [*sic*] for the international community to establish an international criminal tribunal to prosecute those responsible.”<sup>280</sup> Unlike in Rwanda (where justice mechanisms have been criticized for a failure to examine grave crimes committed by the government and its forces), there has been no clear winner in Burundi. As the CNDD-FDD has consolidated power since 2010, and especially since 2015, it could end up being such a winner, possibly ushering in transitional justice mechanisms designed to punish enemies rather than deliver impartial justice.

## **Legal Framework and Mandate**

The Kalomoh Report recommended that Burundian law form the basis for the Special Chamber's work, "with the necessary modifications introduced to ensure procedural guarantees of fair trial and due process of law."<sup>281</sup> The report noted that in order to secure UN backing, the Special Chamber should not permit the death penalty, or recognize amnesties for international crimes.<sup>282</sup> The chamber would have subject matter jurisdiction over genocide, crimes against humanity, and war crimes; personal jurisdiction over those "bearing the greatest responsibility"; and temporal jurisdiction over specific parts of the conflict during the period, "at a minimum," of 1972–1993.<sup>283</sup>

## **Location**

The Kalomoh Report noted that "given the available infrastructure in the Palais de justice in Bujumbura, additional premises will have to be provided by the Government, and refurbished, if necessary, by the special chamber."<sup>284</sup>

## **Structure and Composition**

The mission recommended creating a mixed criminal chamber, "forming part of the Burundian court system (a 'court within a court'), with a view to strengthening the judicial sector in material and human resources, leaving behind a legacy of trained judges, prosecutors, defense counsel and experienced court managers."<sup>285</sup>

The Kalomoh Report modeled its proposal for the Special Chamber upon the BiH WCC, which in 2004 was in the process of being established. The mission "examined the variety of UN-based or assisted tribunals, their legal status, financial mechanism, efficiency and cost-effectiveness and the legacy they left," but rejected other models because of high cost, lengthy procedures, and reduced impact of proceedings not located in situ.<sup>286</sup>

The TRC and Special Chamber would complement overall judicial reform, capacity building, and rule-of-law initiatives.<sup>287</sup> The mission proposed the following structure and design for the Special Chambers:<sup>288</sup>

- A bilateral agreement between the UN and Burundi would determine the modalities of cooperation in the "establishment and operation" of the chamber.<sup>289</sup>

- The chamber would be comprised of a three-judge trial panel or panels, and a five-judge appellate panel.
- The chamber would have mixed composition, with a majority of international judges, an international prosecutor, and international registrar. The staff of the prosecutor's office and court management sections would include a "substantial international component."

## **Prosecutions**

As of October 2017, the Special Chamber had not been created, and there had been no proceedings for grave crimes.

## **Legacy**

Twelve years after the UN assessment mission's recommendation to create a Special Chamber in Burundi's courts, there is no sign of the government acting to do so. Rather, violence has worsened, and the UN and others have identified new grave crimes perpetrated mainly by government actors. Limited and temporary immunities included in the Arusha Agreement of 2000 have grown in scope and extended in time, further cementing a lack of accountability.<sup>290</sup> Burundi's withdrawal from the Rome Statute suggests that the government is determined to avoid any form of judicial scrutiny for its alleged role in extrajudicial killings, torture, sexual violence, enforced disappearances, or other grave crimes.

## **Financing**

The Kalomoh Report stated that while both the TRC and Special Chamber would be national entities, "the establishment of any accountability mechanism will have to rely in its entirety on international funding, whether in the form of voluntary contributions or, in part at least, through assessed contributions."<sup>291</sup> The mission reported that relying on voluntary contributions alone, as at the Special Court for Sierra Leone, would jeopardize the chamber's impact and continuity.<sup>292</sup>

## **Oversight and Accountability**

The Kalomoh Report did not specify how oversight and accountability would work at the proposed Special Chambers. However, its recommendation that the government of Burundi and the United Nations jointly establish the chamber suggests that a mix of national law and UN provisions would determine formal oversight.

# CENTRAL AFRICAN REPUBLIC: SPECIAL CRIMINAL COURT

## Conflict Background and Political Context

The Central African Republic (CAR) was ravaged by the slave trade—a rapacious form of French colonial rule that pitted CAR’s diverse peoples against each other—and a series of brutal dictatorships and foreign interventions following independence in 1961.<sup>293</sup> France continued military interventions following CAR’s independence, and the country has seen involvement by forces from Libya, Sudan, Chad, the Lord’s Resistance Army, and various rebel groups from the Democratic Republic of Congo (DRC).

CAR’s leaders increasingly politicized north-south ethnic divisions from the 1980s onward, as presidents from the two regions stacked their administrations and military ranks with regional loyalists and ethnic favorites.<sup>294</sup> Because the country’s religious divides roughly parallel regional ones (a largely Christian south and largely Muslim north), this politics of favoritism and exclusion increasingly bred resentment and armed mobilization along religious lines.<sup>295</sup>

After President Ange-Félix Patassé, a northerner, fostered resentment in his own region through economic neglect and exclusion of previously favored tribes, his erstwhile Army Chief of Staff François Bozizé attempted to overthrow him in 2002 with the support of northern militias and Chad. Patassé put down that rebellion with support from Libya and Congolese rebel leader Jean-Pierre Bemba, but Bozizé succeeded in overthrowing Patassé in 2003. Bemba’s forces were widely accused of rampant crimes in CAR, eventually leading to his arrest and trial in relation to murder, rape, and pillage at the International Criminal Court (ICC). (See text box on the ICC, below.)

Despite peace agreements with several armed groups, instability in CAR continued throughout Bozizé’s time as the country’s leader. A coalition of rebel groups from the heavily marginalized northeast region of the country banded together as “Séléka” (“union” or “alliance” in the Sango language) to overthrow Bozizé in March 2013 and install their leader, Michel Djotodia, as president.<sup>296</sup> Séléka forces went on a rampage of killing, rape, and looting that largely targeted Christians; in response, mostly Christian “Anti-Balaka” (“anti-machete” in Sango) self-defense groups formed, which quickly devolved into vigilante militias that targeted Muslims and extensively perpetrated grave crimes.<sup>297</sup> Facing criticism for a failure to control

his forces, President Djotodia disbanded the Séléka in September 2013, but the northeastern militias have since splintered and at times targeted each other.<sup>298</sup>

Under pressure from France and the Economic Community of the Central African States, Djotodia resigned in January 2014.<sup>299</sup> A National Transitional Council appointed Catherine Samba-Panza as interim leader. She served as president until elections were organized under a new constitution. Faustin-Archange Touadéra, a former prime minister under Bozizé, won a February 2016 run-off election.

As of November 2017, violence and the perpetration of grave crimes in CAR were continuing, despite the new constitution, a peaceful presidential election, and the presence of a UN peacekeeping mission (MINUSCA). Government control barely extended beyond the capital, Bangui, and a multitude of armed factions continued to fight each other and target civilians, often along religious and ethnic lines.<sup>300</sup> Reliable figures for the number of Central Africans killed are not available. As of September 17, the UN Office for the Coordination of Humanitarian Affairs reported that the conflict had generated 518,000 refugees and more than 600,000 internally displaced persons.<sup>301</sup>

## **Existing Justice-Sector Capacity**

The court system in CAR has a reputation for lacking independence and for being corrupt and politicized.<sup>302</sup> Significant challenges have long plagued the court system.<sup>303</sup> The outbreak of armed conflict exacerbated these problems, and CAR's judiciary and prison system were seriously weakened or completely destroyed, creating a situation of endemic impunity for grave crimes.<sup>304</sup> According to the UN Commission of Inquiry, longstanding impunity for grave crimes was a major factor in fueling the armed conflict.<sup>305</sup>

According to the International Legal Assistance Consortium, the justice sector lacks even the most basic infrastructure and administrative capacities.<sup>306</sup> Amnesty International reports that the justice system needs to be rebuilt “almost entirely” in order to combat entrenched impunity.<sup>307</sup> However, the challenges of such a reform are many, including a distrust of the justice system by the local population; lack of physical infrastructure; lack of specialized and qualified human resources (judges, lawyers, magistrates); insecurity; a dysfunctional corrections system; and a lack of financial resources, an issue compounded by a lack of prioritization of justice-sector funding by successive governments.<sup>308</sup> Moreover, detention centers

are often inadequate and the judicial police lack capacity for conducting investigations into grave crimes.<sup>309</sup> In some cases, prosecutors re-classified cases in order to refer them to civil courts, where the charges did not reflect the gravity of the crimes.<sup>310</sup> In 2015 and 2016, UN partners extended their support to help reopen a number of courts and resume basic justice and security services. However, concerns remain about the ability of ordinary courts to bolster the accountability efforts spearheaded by the SCC.<sup>311</sup>

## **Existing Civil Society Capacity**

Civil society has played an active role in peacebuilding in CAR and continues to be influential in the political transition and in restoring stability. For example, in August 2015, a group of national and international civil society organizations called for financial and technical support to expedite the establishment of the SCC.<sup>312</sup>

There are at least 140 organizations actively engaged in peacebuilding, human rights, and development work across the country.<sup>313</sup> Traditional leaders, as part of the broad scope of civil society, also play a role in the peacebuilding process by using their influence to stop and prevent violence by communities and armed groups.<sup>314</sup> However, many of the larger national and international NGOs are based in Bangui, the capital, and lack the resources and funding to extend their activities to rural regions. In addition, many local organizations are dependent on external technical and financial support, and projects may not be able to continue when that support ends.

## **Creation**

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### **The ICC's Involvement**

CAR ratified the Rome Statute on October 3, 2001, and in 2004 referred the situation in its territory since July 1, 2002, to the ICC. The ICC prosecutor opened a preliminary examination to determine whether he would open an investigation into crimes committed in CAR. The ICC is intended to be complementary to national jurisdictions. In 2006, the CAR *Cour de Cassation* (the highest criminal court in CAR) held that the CAR judicial system was unable to investigate and try those responsible for grave crimes. In May 2007, the ICC prosecutor opened an investigation in CAR into crimes allegedly committed in 2002 and 2003.

The 2007 investigation led to charges against Jean-Pierre Bemba Gombo. Bemba was a politician, businessman, and former militia leader in the DRC. Patassé requested Bemba's support to counter Bozizé's forces, and Bemba deployed 1,500 fighters to CAR in 2002. The ICC prosecutor charged Bemba with five counts of war crimes and two counts of crimes against humanity allegedly committed in CAR from October 26, 2002, to March 15, 2003. Bemba, who had been living in Belgium, was arrested by Belgian authorities and sent to the ICC in July 2008. An ICC Pre-trial Chamber confirmed five charges against him: the war crimes of murder, rape, and pillaging, plus the crimes against humanity of murder and rape. The trial started in November 2010. On March 21, 2016, the judges of Trial Chamber III found Bemba guilty of all charges on the basis of command responsibility. The judges found that he knew that his Movement for the Liberation of Congo (MLC) militia troops were committing or about to commit crimes, but he failed to take reasonable measures to deter or punish these crimes. The judges sentenced him to 18 years in prison. As of October 2017, Bemba's appeal of his conviction was still pending.

In 2014, on the basis of another referral from the transitional government of CAR,<sup>315</sup> the ICC prosecutor opened another preliminary examination, and later an investigation, into the situation in CAR. The prosecutor is investigating crimes allegedly committed in CAR since 2012, including war crimes and crimes against humanity.<sup>316</sup>

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### ***Commission of Inquiry and UNSC Sanctions***

In late 2013, the UN Secretary-General established an international Commission of Inquiry to investigate the violation of international human rights and humanitarian laws in CAR since January 2013.<sup>317</sup> The commission started work in April 2014, submitting a preliminary report in June 2014 and a final report in December 2014.<sup>318</sup> The commission concluded that all parties to the conflict were involved in serious violations of human rights and international humanitarian law.<sup>319</sup> The resolution in 2013 had also established a sanctions regime, which in January 2017, the Security Council extended until 2018.<sup>320</sup> The sanctions regime includes an arms embargo as well as a travel ban and assets freeze on individuals designated by the commission.<sup>321</sup>

### ***The SCC***

In May 2015, a large grassroots gathering convened in CAR's capital; the "Bangui Forum on Reconciliation" called for accountability mechanisms, including the SCC and a TRC.<sup>322</sup> Following on the recommendations of the Commission of Inquiry, CAR's transitional president, Catherine Samba-Panza, promulgated Act No. 15.003 of June 3, 2015, which established the SCC.<sup>323</sup> The SCC is not an international or hybrid court—it is a national court that sits within the national judicial system and

will primarily apply domestic laws.<sup>324</sup> However, it has both national and international judges, an international prosecutor, and an international deputy registrar. It is being heavily supported by MINUSCA as explicitly mandated by the UN Security Council,<sup>325</sup> as well as by the United Nations Development Programme (UNDP) and other international partners.

The SCC has an initial mandate of five years starting from the date of its establishment (renewable if necessary) and is being developed in phases.<sup>326</sup> As of late 2017, the process of establishing and operationalizing the court remained slow. A major step forward came with the February 2017 appointment of Toussaint Muntazini Mukimapa, a former military prosecutor from the DRC, as special prosecutor.<sup>327</sup> As of November 2017, five national magistrates as well as an international deputy prosecutor (from Canada) and two international investigating judges (from Burkina Faso and France) had also been appointed. The Rules of Procedure and Evidence were being drafted prior to consultations and adoption, and the SCC's prosecutorial strategy and a witness and victim protection plan for the SCC as well as the wider national court system were also under development.<sup>328</sup>

## **Legal Framework and Mandate**

The SCC legal framework and mandate is grounded in *Loi Organique 15.003*. The SCC has jurisdiction to investigate, prosecute, and adjudicate grave violations of human rights and international humanitarian law committed on the territory of CAR since January 1, 2003. The SCC has jurisdiction over the entire territory of CAR and jurisdiction over acts committed in foreign territories where CAR has a mutual assistance agreement in place, or in the absence of such an agreement, where the rules of international criminal cooperation apply.<sup>329</sup> The SCC also has primacy of jurisdiction whenever jurisdictional conflicts may arise with other national courts,<sup>330</sup> although there is a lack of clarity with respect to the jurisdiction of military courts over crimes against humanity, war crimes, and genocide.<sup>331</sup> The SCC will not compete with the ICC for cases. According to Law 15.003, if the ICC and the SCC have concurrent jurisdiction over a case, then the SCC will defer to the jurisdiction of the ICC.<sup>332</sup>

The SCC's subject matter jurisdiction is based on domestic law.<sup>333</sup> International substantive norms and procedural rules apply to the extent that there are gaps or inconsistencies with the domestic legal framework.<sup>334</sup> This raises some concerns about divergences between CAR domestic law and the ICC's Rome Statute, in particular

with respect to the definitions of genocide, war crimes, and crimes against humanity.<sup>335</sup> The procedural law applicable before the SCC is generally that outlined by CAR's code of criminal procedure, complemented by international procedural rules.<sup>336</sup>

The court will have 27 judges—14 Central Africans and 13 internationals—plus a Central African president and an international prosecutor, as well as an international deputy registrar. It will have an Investigations Chamber, a Special Prosecution Chamber, a Trial Chamber, and an Appeals Chamber. It will also have an Office of the Special Prosecutor, including the Special Judicial Police Unit and a Registry. The SCC law does not state whether there will be an office for defense counsel. However, a special unit of lawyers will be established in relation to the SCC to serve all parties to the proceedings.<sup>337</sup>

While the SCC law acknowledges the importance of witness protection, there is no mention of a witness protection unit. However, with the assistance of the UNDP and MINUSCA, as of late 2017, the SCC was developing a witness and victim protection plan. Similarly, the SCC was developing an outreach strategy and had already held some outreach meetings with civil society organizations.<sup>338</sup>

## **Location**

The seat of the SCC is Bangui, though exceptional circumstances may allow it to transfer its seat to other places within the territory of CAR.<sup>339</sup>

## **Prosecutions**

As of October 2017, the SCC was not yet fully operational, and there had not yet been prosecutions. In 2017, the UN released a mapping report on serious crimes committed in CAR between 2003 and 2015. It outlined 620 incidents that could fall within the SCC's jurisdiction. These included a wide range of serious human rights abuses, violations of international humanitarian law, as well as war crimes and crimes against humanity. The report recommended that the SCC prioritize cases involving the most serious crimes, considering the scale of crimes committed and the impossibility of prosecuting all perpetrators.<sup>340</sup> The report underscored the need for the prosecutor to publicize a clear prosecutorial strategy that would explain to the general public and victims the rationale for case prioritization.<sup>341</sup>

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## Domestic Proceedings apart from the SCC

With support from the UN, CAR prosecutors have undertaken some trials for crimes related to the armed conflict. For example in 2016, the Court of Appeal of Bangui heard 30 cases related to abuses committed during the conflict, mostly implicating Anti-Balaka members. Charges, however, were for relatively minor crimes such as criminal association, armed robbery, intentional injury causing death, and illegal possession of weapons. None were tried for war crimes or crimes against humanity.<sup>342</sup> Of these cases, judges acquitted 25 accused or convicted them of minor charges and released them with credit for time served. In 27 of those cases, the trial and sentencing took place in absentia because the accused had escaped prison. In general, cases suffered from poor preparation and insufficient evidence, exacerbated by witnesses fearing to testify and inadequate witness protection mechanisms.<sup>343</sup>

Two notable cases—against Rodrigue Ngaïbona (aka Andilo), a high-level Anti-Balaka leader, and Yanoué Aubin (aka Chocolat), an Anti-Balaka commander—demonstrated the challenges of prosecutions in the regular domestic courts. Ngaïbona’s case was delayed even though his case file was ready for trial and his detention exceeded legal limits. Aubin was tried and sentenced to two years in prison for relatively minor offenses—forgery and possessing forged documents—even though he has been implicated in the commission of grave crimes. He was released at the end of his trial when the judge determined that he had served his sentence in pretrial detention.<sup>344</sup>

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## Legacy

Although the SCC is not yet fully operational, it has the potential to have a positive effect on the national judiciary in CAR and on combating CAR’s endemic impunity. In particular, the UN and civil society are working to ensure that the efforts to operationalize the SCC can also contribute to capacity building in the national judiciary more broadly. The SCC’s Rules of Procedure and Evidence and its victim and witness protection plan can fill gaps in CAR’s legal framework. As of late 2017, other aspects of the SCC’s legacy remained aspirational, including its goal of fighting impunity at the highest levels and instilling a sense of justice and rule of law among CAR citizens, especially victims of grave crimes.

## **Financing**

According to Law 15.003, the court's infrastructure is financed through the state budget, but the court's operating budget falls to the international community through voluntary contributions.<sup>345</sup> International officials of the SCC are not UN personnel, but are seconded by their governments to the SCC. As of October 2017, the court has raised only US\$5 million of the needed US\$7 million for its first 14 months of operations from donors that include the United States, France, and the Netherlands, in addition to MINUSCA.<sup>346</sup> Additional funding does not appear to be forthcoming, suggesting that the SCC may face constant funding crises similar to those experienced by the SCSL and the ECCC. This could seriously disrupt SCC proceedings and detract from its potential legacy.<sup>347</sup> Providing security for the SCC premises and personnel will be costly, particularly outside Bangui, and require robust support from MINUSCA.

The Reference Group of Member States in Support of the Special Criminal Court and the Rule of Law in the CAR is comprised of representatives of Permanent Missions in New York and chaired by Morocco (as chair of the Peacebuilding Configuration on CAR). The Reference Group meets regularly to mobilize political support as well as financial and human resources for the SCC and other rule of law initiatives in CAR. DPKO and UNDP jointly serve as the secretariat for the Reference Group. The Reference Group first met in May 2015.<sup>348</sup>

## **Oversight and Accountability**

As of late 2017, most details of oversight at the SCC were pending finalization of the Rules of Procedure and Evidence. The SCC law provides that the CAR minister of justice would refer misconduct by international officials to MINUSCA, following an approval by two-thirds of the judges on recommended measures in accordance with the Rules of Procedure and Evidence.<sup>349</sup>

## **CÔTE D'IVOIRE: DOMESTIC PROCEEDINGS**

### **Conflict Background and Political Context**

Following presidential elections held in Côte d'Ivoire on November 28, 2010, the incumbent President Laurent Gbagbo refused to step down and concede defeat to his opponent, Alassane Ouattara, who was declared the winner of the elections by the Independent Electoral Commission.<sup>350</sup> During the five months of violence that followed, the UN and others documented widespread violations.<sup>351</sup> An international Commission of Inquiry established by the UN Human Rights Council concluded that some 3,000 people may have died and that different parties perpetrated many serious violations of human rights and international humanitarian law, some of which might amount to crimes against humanity and war crimes.<sup>352</sup> As a result of intense fighting in the capital, Abidjan, and in other parts of the country, particularly the west, the UN Human Rights Council estimated that up to a million people could have been displaced by the violence.<sup>353</sup> Brutality was alleged on both sides. Gbagbo was alleged to have used forces loyal to him to attempt to crush the opposition through killings, arbitrary arrest and detention, enforced disappearances, looting, and sexual violence. Forces loyal to Ouattara were accused of killings, rape, and burning villages in the course of their military offensive aimed at taking control of the country.<sup>354</sup>

The international community reacted rapidly and strongly to back the legitimacy of Ouattara's election victory. The ECOWAS and the AU, among others, swiftly recognized his election as president. The UN Security Council passed resolution 1975 (2011), urging Gbagbo to respect the will of the people and immediately step aside, and adopted financial and travel sanctions against individuals including Gbagbo and his wife. The AU put together a High-Level Panel to work toward a political solution. Finally, on April 11, 2011, Gbagbo was arrested following military operations conducted by forces loyal to Ouattara, as well as the United Nations Operation in Côte d'Ivoire (UNOCI) and French troops. On May 6, 2011, Ouattara was sworn in as president. In October 2015, he won another five-year term in elections that were considered by the AU and ECOWAS as largely free and fair.

The 2010 presidential elections had been intended to help bring an end to cycles of political violence that were fueled by ethnic divisions largely between northern and southern peoples, as well as unresolved rural land issues. A civil war in 2002 led to the country being divided into two and triggered internationally supported

peacebuilding efforts. A peace agreement was reached in January 2003, and the 2010 elections were supported by the international community as part of that peace process. The UNOCI, had already been established in 2004 to facilitate the implementation of the peace agreement. Its mandate evolved and was extended several times until it was finally wound up in June 2017.

Impartial justice is widely seen as a prerequisite for reconciliation in Côte d'Ivoire, and perceptions that President Ouattara has been seeking to pursue victors' justice may be hampering progress toward stability.

## **Existing Justice-Sector Capacity**

After more than a decade of intermittent violence and instability in the country, the Ivorian justice system was weakened by the time President Ouattara was inaugurated in 2011. During the period when the country was divided, many courts in rebel-held areas had ceased to operate, and in government-controlled areas the courts were overburdened, outdated, and inefficient.<sup>355</sup> The sheer number of internationally supported projects to strengthen the justice sector is an indication of the sector's needs.<sup>356</sup> Freedom House assessed the Ivorian judiciary in 2016 as not independent, with judges highly susceptible to external interference and bribes.<sup>357</sup>

The government has argued that it has successfully restored the country's justice system, including announcing in October 2013 that the Special Investigative Cell (*Cellule Speciale d'Enquete*) was no longer needed because the situation had returned to normal (though it quickly backtracked and renewed the Special Cell's mandate).<sup>358</sup> Arguing before the ICC in September 2013 that Simone Gbagbo should be tried before Ivorian courts and not the ICC, the government asserted that while the functioning of the judicial system had been seriously affected by the political crisis in the country since 2002—for instance, during the 2010–2011 crisis, during which 17 of the country's 37 courts were damaged and pillaged—there had been substantial improvements, and all the courts and judicial institutions were now reopened. Thus, Côte d'Ivoire was now both able and willing to pursue the case itself.<sup>359</sup> The ICC did not directly consider these assertions, as it found that the case should continue before the ICC on other grounds.

## Existing Civil Society Capacity

One UN expert complimented Ivorian human rights organizations for their “unfailing vitality,” and civil society in Côte d’Ivoire has been very active in pushing for accountability for grave crimes arising out of the 2010–2011 violence as well as for other violations both before and afterward.<sup>360</sup> There are several leading Ivorian human rights organizations, and they work on a number of fronts, which include conducting advocacy with national and international actors calling for accountability and monitoring national justice efforts, assisting victims in filing criminal complaints, campaigning for legislation such as to implement the Rome Statute and human rights treaties, and monitoring the trials for grave crimes before the ICC and domestically. The technical work in particular is often done in partnership with international groups, including publishing reports on the national justice mechanisms, filing victims’ complaints together with the International Federation for Human Rights (FIDH), and conducting trial monitoring in partnership with a Dutch media group, RNW.<sup>361</sup> The Human Rights Section of UNOCI has run capacity-building projects. Victims’ groups focused on justice and accountability are often organized according to ethnic or political affiliation. However, Ivorian civil society across the board has been particularly vocal in criticizing the one-sided nature of the prosecutions conducted by both the ICC and national authorities so far, and in urging that those responsible for crimes on all sides of the conflict be held accountable.

## Creation

Calls for accountability for the violence arose during the crisis itself: alongside efforts to reach a political solution, the UN Human Rights Council on March 25, 2011, set up the independent international Commission of Inquiry. The commission concluded that there could be no lasting reconciliation in the country without justice and recommended that the Ivorian government should ensure that those responsible for violations are brought to justice.<sup>362</sup>

After Ouattara was installed as president, he was under pressure to take steps to promote reconciliation and bring perpetrators of the violations committed during the crisis to justice. He quickly announced the establishment of three bodies: (1) a National Commission of Inquiry (*La Commission Nationale d’Enquête*); (2) a Commission for Dialogue, Truth, and Reconciliation (*La Commission Dialogue, Vérité et Réconciliation*, CDVR); and (3) a Special Investigative Cell for the post-electoral crisis (*La Cellule Spéciale d’Enquête relative à la crise post-électorale*).

The Special Investigative Cell was created in June 2011 by interdepartmental order (*arrêté interministériel*), responding to the need to shed light on crimes committed following the announcement of the presidential election results in November 2010.<sup>363</sup> It was initially established for one year, subsequently renewed to the end of 2013.

In December 2013, when its announcement that the Special Cell was no longer needed provoked national and international opposition, the government backtracked and announced it was not only maintaining the Special Cell but was extending its mandate. On December 30, 2013, President Ouattara signed decree 2013-915, creating the Special Investigative and Examination Cell (*Cellule Spéciale d'Enquête et d'Instruction*, CSEI), to replace the *Cellule Spéciale d'Enquête*. This decree put the new body on a more permanent footing, as its mandate no longer had to be renewed every year.

On July 20, 2016, a government communiqué announced the decision of the Council of Ministers to adopt a decree expanding the mandate of the CSEI to include terrorism.<sup>364</sup> According to the government, this was necessary to enable the country to face the new challenge of the threat of terrorism after an attack in March 2015 that killed 20.

Politically, support on the part of the government for the CSEI's very existence has waxed and waned, and President Ouattara has several times tried to wind down the body, only to have to maintain and reinforce it following intense pressure from both Ivorian civil society and the international community.<sup>365</sup> However, over time, this attention and pressure have waned.

## **Legal Framework and Mandate**

According to Article 1 of decree 2013-915, the CSEI is a Special Cell of the Tribunal of First Instance in Abidjan. Article 2 provides that it is charged with investigation and judicial instruction relating to crimes committed at the time of the crisis following the presidential elections of 2010 and any infractions connected to those crimes. No further specificity is given as regards its jurisdiction.

Article 12 of decree 2013-915 provides that the CSEI will apply the Ivorian Code of Criminal Procedure and the provisions of the decree. As far as can be ascertained, in every aspect, the CSEI applies Ivorian law and procedure, and there are no special regulations or other relevant dispositions.

Côte d'Ivoire became a party to the Rome Statute of the ICC in 2013, and in 2014 the Ivorian Parliament adopted amendments to the criminal code and criminal procedure code that allow domestic prosecution of the crimes in the Statute. However according to the Coalition for the International Criminal Court, the legislation only partially satisfies complementarity since it contains clauses allowing immunity based on official capacity and the possibility of presidential pardon.<sup>366</sup>

The CSEI is a specialized body within the Ivorian justice system created to investigate, gather, and hear evidence, including taking statements from victims and witnesses, to determine whether a case should proceed to criminal trial. It does not itself conduct trials, but under the supervision of an investigating judge, prepares cases for trial before the Ivorian civilian criminal courts. Its stated purpose was to respond to the need to shed light on atrocities and crimes committed following the announcement of the presidential election results in November 2010.<sup>367</sup> Its establishment represented an effort to create a specialized body that would lead efforts to prepare cases to go before the national courts. As Human Rights Watch noted, investigations of serious international crimes are complex and require specialized expertise and can take years to complete, so consolidating resources, expertise, and support into one unit was a promising step.<sup>368</sup>

The CSEI has no formal international element other than possible contributions toward its budget. In its early days, however, international experts placed in the Cell provided advice to its officials.

## **Location**

The CSEI and all its personnel are located in the capital, Abidjan. Public communiqués refer to teams of investigators going out to other areas of the country affected by the violence to interview victims.<sup>369</sup>

## **Structure and Composition**

Article 3 of presidential decree 2013-915 provides that the CSEI is composed of the following: the public prosecutor of the Tribunal of First Instance of Abidjan, a deputy, and two other prosecutors; three investigating judges assigned from the Tribunal of First Instance of Abidjan; judicial police from the national police and gendarmerie; registrars; and an administrative secretariat. The CSEI is directed by

the public prosecutor,<sup>370</sup> who works under the authority of the general prosecutor of Abidjan.<sup>371</sup> The general prosecutor answers to the minister of justice, raising concerns that the lines between the executive and judiciary are blurred.

The Special Cell has around 50 personnel and is divided into two entities: an administrative entity comprising around 20 administrative and similar staff, and a judicial entity of 33 comprising seven judges, 20 judicial police, and six registrars.<sup>372</sup>

Personnel are assigned to the Special Cell from other parts of the justice system. For instance, Article 8 of decree 2013-915 provides that judicial police will be put at the disposal of the CSEI at the request of the public prosecutor, and Article 13 provides the same for administrative personnel. As regards selection, Article 11 of decree 2013-915 provides that the minister of justice (*Garde des Sceaux*) will nominate the personnel and will consult with the *Conseil Supérieur de la Magistrature* when appointing the judges.

In March 2015, the UN High Commissioner for Human Rights specifically called on the government of Côte d'Ivoire to take prompt measures to adopt the draft law on victim and witness protection, declaring that this will be important once the conflict-related human rights violations cases start to come before the courts.<sup>373</sup> In September 2017, the cabinet reviewed and adopted a draft law on witness protection in development since 2013; as of October 2017, the next step was a debate and vote on the bill in the National Assembly.

In the Ivorian judicial system, crimes are tried by assize courts. Under the Code of Criminal Procedure, an assize court is not a permanent court, but is instead required to sit at each Court of First Instance (CFI)<sup>374</sup> every three months.<sup>375</sup> Cases that go forward for criminal trial in the Ivorian criminal courts after being dealt with by the CSEI are subject to appeal to the Court of Appeal only on very narrow grounds, in accordance with the Ivorian criminal justice system.<sup>376</sup>

## **Prosecutions**

The Special Cell started work rapidly after its establishment. According to a public communiqué of July 22, 2011, the Special Cell's investigators were receiving complaints from victims and testimonies of witnesses at its offices. Since opening on July 12, they had already registered 147 victims.<sup>377</sup>

Nevertheless, progress in completing investigations and moving to prosecutions resulting from its work has been slow. Until late in 2014, the Special Cell appeared understaffed and lacking government support. In 2013, Human Rights Watch criticized the CSEI for not having prepared a plan, or mapping out the crimes committed around the country, or explaining how it proposed to carry out its work. Human Rights Watch also criticized the government for having done nothing to help protect witnesses or judges, or otherwise show it was serious about pursuing justice for the crimes committed during the post-electoral conflict.<sup>378</sup>

The Ivorian proceedings have also been criticized as one-sided justice. While the national Commission of Inquiry concluded in July 2012 that violations were carried out by both sides, initially only cases against Gbagbo loyalists went forward to the courts. The first cases to emerge were all against individuals from the pro-Gbagbo camp: a number of senior military officers were tried and sentenced, starting with ex-Republican Guard General Brunot Dogbo Blé, who was sentenced to 15 years in prison in October 2012. Ivorian human rights organizations have continued to be very critical of the fact that the Ivorian national justice system has largely only investigated one side to the conflict, the pro-Gbagbo side.

Three human rights organizations (the Paris based FIDH and two Ivorian partner organizations) have been able to follow the progress of the CSEI investigations and resulting trials closely, as they were accepted as NGO civil parties in the judicial proceedings in several cases, alongside individual victims. In a report issued in October 2013, they described how the prosecution had initially decided to open three separate investigations, differentiating among attacks on state security, “blood crimes,” and crimes against property, even though they targeted the same individuals.<sup>379</sup> FIDH and its partners reported that since 2011, the Ivorian civil and military courts had charged and imprisoned more than 130 people connected to former President Gbagbo, but only one person from the pro-Ouattara side, military commander Amadé Ouéremi.<sup>380</sup> This imbalance occurred despite the CSEI’s having taken witness testimonies implicating pro-Ouattara elements in crimes. The human rights groups have criticized the CSEI for leaving gaps in its investigations; failing to make use of evidentiary materials in its possession, including documents recovered from the presidential palace and the results of exhumations; and for lacking consistency in charging. They further reported that a number of key members of Gbagbo’s movement were released following a political dialogue and appeasement process.

In a report issued in December 2014, FIDH and its local partners reported that while two judicial investigations relating to the attacks on civilians were now

progressing within the CSEI with multiple accused, out of 150 persons implicated, only two belonged to the pro-Ouattara camp.<sup>381</sup> They again criticized the continued operational difficulties, the slow pace of the proceedings, and the lack of support and resources being given to the CSEI, as well as the gaps in the investigations and lack of internal coordination and apparent policy. Pointing out that the CSEI seemed to be subject to external political influence, they accused the authorities of prioritizing crimes against the state over crimes that had targeted civilians.<sup>382</sup> Further, they reported continued blockages in the investigation of pro-Ouattara elements and claimed that even the one case that had been opened in the previous period, against Amadé Ouéremi, appeared to have stalled.

Simone Gbagbo, wife of Laurent Gbagbo, was among those put on trial in 2016, accused of crimes against humanity during the post-electoral crisis. She had already been convicted for crimes against the state, but was acquitted of the new charges by the Ivorian High Court on March 18, 2017, amidst civil society concern that weak evidence had been presented.<sup>383</sup> Fair trial concerns were also raised; notably, her lawyers suspended their participation when the president of the court refused to call witnesses considered crucial to her defense, namely five senior public officials, one of which was the president of the National Assembly.

Another controversy was that Simone Gbagbo was also wanted by the ICC, which issued an arrest warrant for her on February 29, 2012, for four counts of crimes against humanity, including murder, rape, inhuman acts, and persecution, allegedly committed during the post-electoral violence.<sup>384</sup> The ICC Pre-trial Chamber confirmed its finding from November 2011 that “due to the absence of national proceedings against those appearing to be most responsible for crimes committed during the post-election violence, and in light of the gravity of the acts committed,” the case would be admissible because it satisfied the ICC’s complementarity principles.<sup>385</sup> On September 30, 2013, the Ivorian government filed a submission challenging the admissibility of the case before the ICC, claiming that in February 2012, domestic proceedings had been instituted against Simone Gbagbo based on allegations similar to those in the ICC’s arrest warrant.<sup>386</sup> This was rejected by the Pre-trial Chamber on the basis that the government had not demonstrated that its domestic authorities were undertaking tangible, concrete, and progressive investigative steps for the same conduct as that alleged in the ICC proceedings, a decision that was upheld on appeal.<sup>387</sup> While the government argued that it was taking investigative steps, and that the establishment of the Special Cell had permitted the institution of the proceedings but that this was taking time due to the complexity and gravity of the case, the Pre-trial Chamber found that the steps taken

were “sparse and disparate,” and in 20 months of investigations, they appeared to be limited to a single activity: the questioning of Simone Gbagbo.<sup>388</sup>

Following the renewal and expansion of the Special Cell in 2014, and especially during 2015, the Special Cell’s work did seem to gather pace, and it was announced that around 20 former military commanders, including some who were pro-Ouattara, had been summonsed. It is not clear whether they appeared or whether any judicial proceedings followed, however.<sup>389</sup> In June 2015, human rights organizations again reacted to what they considered to be credible information that some of the investigations were to be closed, sending a public letter to President Ouattara appealing to him to allow the cases to continue.<sup>390</sup> The CSEI continued its activities, however, including against several high-level commanders from the pro-Ouattara forces, though it is unclear whether these have progressed to trial.<sup>391</sup> In June 2017, a UN independent expert reported that according to statistics from December 2016, 17 cases linked to the post-electoral crisis were still pending before the courts, while 31 out of 66 cases had already been tried, 29 had been brought before the Indictment Division, and six were before the Court of Appeal.<sup>392</sup>

Outside observers, including the UN, have continued to complain of slow progress. In her statement to the UN Security Council in January 2016, the Special Representative of the Secretary-General for Côte d’Ivoire encouraged the government to ensure the investigations of the Special Cell are completed in order to create the conditions for the prosecution of those guilty of serious violations of human rights, regardless of their political affiliation.<sup>393</sup>

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## **The International Criminal Court in Côte d’Ivoire**

The ICC prosecutor opened an investigation relating to the situation in Côte d’Ivoire on October 3, 2011, after obtaining authorization from a Pre-trial Chamber of the Court. The investigation can cover crimes committed from September 19, 2002, onward, but has focused on alleged crimes against humanity committed during the 2010–2011 post-electoral violence. The prosecutor announced her intention to investigate the actions of both pro-Gbagbo and pro-Ouattara forces, but as of September 2017, only two cases had been brought, both against those on the pro-Gbagbo side: a joint case against Laurent Gbagbo himself and Charles Blé Goudé, and a case against Simone Gbagbo. Both cases involve allegations of murder, rape, other inhuman acts, and persecution committed during four specific incidents. In January 2016, the trial of Laurent Gbagbo and Charles Blé Goudé on four counts

of crimes against humanity commenced in The Hague after the Ivorian authorities surrendered them to the court in November 2011 and March 2014, respectively. An arrest warrant was issued against Simone Gbagbo for the same alleged crimes, but as of September 2017, Ivorian authorities had refused to surrender her on the basis she has been investigated and prosecuted in the country's domestic system.

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## Legacy

It is not easy to ascertain the specific impacts the Special Cell has had on the regular justice system or conscious efforts to ensure legacy. However, personnel who work at the CSEI, which received support and capacity building from the United Nations Operation in Côte d'Ivoire (ONUCI) and others, and which at least at times has been afforded the necessary resources to function adequately, may have benefited from the experience of specializing in investigating and prosecuting grave crimes.

As regards the relationship between the CSEI and other transitional justice mechanisms, it is not easy to see how the plethora of different institutions established to deal with the 2010–2011 crisis relate to each other, if at all, as no formal attempt seems to have been made to link them. The CDVR (Commission for Dialogue, Truth and Reconciliation) collected victims' accounts of serious violations by both Gbagbo and Ouattara forces, and its report was transmitted to President Ouattara in December 2014 (though the government has been criticized for not making it public until October 2016).<sup>394</sup> Although the CDVR was established with a truth-seeking and not a judicial mandate, some civil society organizations have criticized it for failing to refer to the CSEI the thousands of victims it registered.<sup>395</sup> The National Commission of Inquiry published a summary of its findings in August 2012, concluding that during the 2010–2011 crisis crimes were committed by both sides and stressing the importance of trying all perpetrators. That report was transmitted to a CSEI investigative judge, but as of October 2017, it was not clear that it had been acted on. In 2015, the government created a National Commission for Reconciliation and Compensation for Victims (CONARIV) to oversee a reparations program. CONARIV's final report, presented in April 2016, included a consolidated list of victims of the crisis in Côte d'Ivoire between 1990 and 2012, a national reparation policy proposal, and a draft reconciliation action plan,<sup>396</sup> but it is not easy to ascertain whether cases dealt with by the CSEI that result in conviction will feed into that program.

## Financing

Presidential decree 2013-915 provides that running costs of the CSEI will come from the state budget (Article 16) and that the minister of the Economy and Finance will assign an official to be responsible for financial management and accounting. The public prosecutor reports to the Ministry of Justice every trimester on the CSEI's activities and budget.

Details of the CSEI's budget and sources of funding do not seem to be publicly available. Civil society has continued to say that CSEI has insufficient funding, and to claim that the lack of political will on the part of the government, particularly the Ministry of Justice, to resource it properly has also discouraged potential international funding.<sup>397</sup>

While it is not clear whether any international donors contributed to the CSEI's budget as such, contributions of material support for its operations have been reported. For instance, ONUCI and the ICRC indicate that they provided equipment to the Ivorian authorities in March 2013 to help with exhumations intended to provide evidence in the context of the CSEI's investigations.<sup>398</sup>

## Oversight and Accountability

Theoretically, the ICC's complementarity regime exists as a check on non-genuine investigations and prosecutions. This has been put to the test in the case of Simone Gbagbo, where the ICC examined the investigative activities undertaken by the Ivorian justice system and found that they failed to demonstrate that meaningful steps had been taken over a period of two years. If it ever brings charges against perpetrators among President Ouattara's supporters, the ICC may ultimately be the only venue for accountability for their crimes.

There are numerous external sources of pressure, including donors, media, domestic and international civil society, states, and international organizations, all of which have followed the work of the CSEI and ensuing prosecutions, and weighed in at moments when political will seemed to be wavering. This appears to have been quite effective: for instance, in October 2013 when the government announced that the Special Cell was no longer needed, pressure from these many quarters seemed to influence the government, leading it to strengthen the CSEI. The ONUCI has been among those consistently calling for the investigations to target both sides and to be followed through to prosecution,<sup>399</sup> so the ending of ONUCI's mandate in June 2017 gives some cause for concern.

## DEMOCRATIC REPUBLIC OF CONGO

This annex covers two approaches to justice in the Democratic Republic of Congo (DRC): (1) domestic prosecution mechanisms, including internationally assisted mobile courts; and (2) a proposal for mixed domestic-international specialized courts. Common sections covering background on the conflict and the capacities of the domestic justice sector and civil society precede separate detail on each mechanism.

### Conflict Background and Political Context

The DRC (previously Zaire) has a long history of violence and impunity. The legacy of unpunished violence dates back to the early 16th century with foreign slave raids and continued in the 19th and 20th centuries with the appropriation of the Congo by King Leopold II and ensuing Belgian colonization.<sup>400</sup> Immediately after gaining its independence in 1960, Congo became embroiled in the Cold War, with U.S.-backed dictator Mobutu Sese Seko ruling through repression and patronage. His rule extended over three decades marked by human rights abuses, which became particularly acute between 1993 and 1996, and especially in the province of North Kivu.<sup>401</sup> The situation further deteriorated following the 1994 Rwandan genocide, when hundreds of thousands of Hutu civilians, as well as Hutu *génocidaires*, fled into refugee camps in eastern Zaire. The refugee camps served as bases for continued attacks on Rwanda. The first Congo war began in November 1996, when Rwandan and Ugandan troops backed Congolese rebel forces (the *Alliance des Forces Démocratiques pour la Libération du Congo*, or AFDL) to seize towns and villages in the east, and neighboring countries became involved. During the war, the rebel forces not only attacked Hutu guerrillas, but also massacred thousands of Hutu civilians. The Congolese army collapsed, and Mobutu was toppled. AFDL leader Laurent Kabila came to power in 1997 and renamed the country Democratic Republic of the Congo.<sup>402</sup>

The Second Congo War began in August 1998, as Kabila turned against Rwanda, and Rwandan and Ugandan forces again supported an invasion by various rebel groups. Uganda's involvement led to proceedings at the International Court of Justice (ICJ) following referral by the DRC government; the court found that Ugandan forces committed widespread human rights violations in Congolese territory.<sup>403</sup> Laurent Kabila sought support from Angola, Namibia, and Zimbabwe; while rebel forces multiplied and side-conflicts developed.<sup>404</sup> Atrocities were committed by all sides, and the first UN peacekeeping mission (MONUC) was established in 1999.<sup>405</sup> Kabila was assassinated in 2001 and succeeded by his son, Joseph Kabila, who is currently

president. A peace agreement signed in South Africa formally ended the war in December 2002.<sup>406</sup> An estimated three million Congolese died as a result of the conflict, especially in eastern DRC, and massive sexual violence was committed with near-absolute impunity.<sup>407</sup> A UN mapping exercise documenting the most serious violations committed in the DRC during the 1993–2003 period found the following:

This decade was marked by a string of major political crises, wars and multiple ethnic and regional conflicts that brought about the deaths of hundreds of thousands, if not millions, of people. Very few Congolese and foreign civilians living on the territory of the DRC managed to escape the violence, and many were victims of murder, mutilation, rape, forced displacement, pillage, destruction of property or economic and social rights violations.<sup>408</sup>

A transitional government was established in 2003. Joseph Kabila won election as president in 2006 and reelection in 2011, although voting irregularities sparked protests and violence across the country. Violent conflicts have continued to devastate the country, fueled by regional and local dynamics, state weakness, ethnic tensions, elite interests, and the lucrative exploitation of natural resources.<sup>409</sup> The conflicts in North and South Kivu and in the Ituri region continue to date, amid continuing allegations of Rwandan and Ugandan involvement.<sup>410</sup> The UN peacekeeping mission (renamed MONUSCO in 2010) was given a more robust mandate by the Security Council in 2013, but violence persists.<sup>411</sup> As of late 2017, the reluctance of President Kabila to relinquish power in accordance with constitutional term limits led to severe human rights abuses against opponents, especially in the Kasai region, and fear of renewed violence on a national scale. This was despite a major political agreement reached on December 31, 2016, between Kabila and the opposition that was intended to regulate a smooth transition to the elections of 2017.<sup>412</sup>

Overall, the repeated conflicts have led to over six million deaths, both as a direct result of fighting and indirectly because of disease, displacement, and malnutrition.<sup>413</sup> The number of internally displaced people has risen to 3.8 million.<sup>414</sup> The conflicts are also characterized by widespread sexual and gender-based violence committed against women and girls, with allegations of mass rapes and countless sexual assaults.<sup>415</sup>

Despite the ongoing violence, a weak judicial infrastructure marked by corruption and underfunding, as well as limited state presence in vast swathes of the territory, the country has several functional processes for the prosecution of international crimes. Military courts have prosecuted atrocity crimes since 2002, and the recent

adoption of the Rome Statute implementation bill has shifted jurisdiction over war crimes, crimes against humanity, and genocide to civilian courts. Military courts conducting mobile sessions have successfully addressed the prevailing culture of impunity in remote areas and conducted a few significant trials. Parliament twice considered legislation proposing the establishment of mixed specialized chambers to prosecute atrocities, but finally rejected the bill. Beyond domestic initiatives, the government referred the situation on its territory to the ICC in 2004, which led to two convictions and one ongoing trial for crimes against humanity and war crimes (see text box, below). The Congolese government's genuine commitment to accountability, however, remains in serious doubt. Criminal accountability has been constrained by meager funding for the justice sector, poor coordination of justice initiatives, and political interference in cases involving allegations against senior-ranking perpetrators. To the extent that the DRC government has allowed and facilitated the domestic prosecution of grave crimes, it may have done so to reduce the chances of ICC cases against political leaders.

Nearly all of the types of justice mechanisms discussed in this handbook have been or could be deployed in the DRC, including an international fact-finding commission, prosecutions by the ICC, domestic prosecutions, and proposed mixed chambers. These multiple accountability projects make the DRC an incubator of international justice approaches and serve as a grim reminder of the vast number of atrocity crimes the war-torn country has experienced over the decades. In the DRC, “the needs are so great that realizing complementarity ... means first focusing on basic development of the criminal justice system.”<sup>416</sup>

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## **UN Investigative Missions in the DRC**

- (1) Joint Mission Charged with Investigating Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire (now the DRC) since September 1996 (1997);<sup>417</sup>
- (2) Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the DRC (1997–1998);<sup>418</sup>
- (3) Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003 (UN Office of the High Commissioner for Human Rights [OHCHR], 2007–2010).<sup>419</sup>

## **Creation**

In 1997 and 1998, the UN empowered two successive investigations into serious human rights violations in the DRC. Both missions faced obstruction from the government of Laurent Kabila. The first was stillborn and reconstituted by the Secretary-General. However, the government prevented the second mission from conducting full-scale investigations.<sup>420</sup>

The discovery in 2005 by MONUC of three mass graves in North Kivu, relating to crimes committed in the first Congo war, triggered the third mission, or Mapping Exercise.<sup>421</sup> The OHCHR initiated an investigation into these mass graves and, with the support of the UN Secretary-General,<sup>422</sup> the investigation was broadened to include crimes committed between 1993 and 2003. In 2007, Congolese President Joseph Kabila accepted the full deployment of the exercise, and the UN Security Council approved the terms of reference for the mission.<sup>423</sup> The mapping exercise was the first time that the vast crimes committed during the First and Second Congo Wars were “comprehensively analyzed, compiled, and systematically organized in an official UN report.”<sup>424</sup> In addition, the Mapping Exercise emphasized the victimization of women and children, and devoted significant attention to sexual violence against women.

## **Mandate**

The creation of the first investigative mission was based on a resolution by the Commission on Human Rights, requesting the Special Rapporteur on the situation of human rights in Zaire; the Special Rapporteur on extrajudicial, summary, and arbitrary executions; and a member of the Working Group on Enforced or Involuntary Disappearances to “carry out a joint mission to investigate allegations of massacres and other issues affecting human rights which had arisen from the situation prevailing in eastern Zaire since September 1996,” and to report back to the General Assembly and the commission.<sup>425</sup> This mission was obstructed and replaced by the second mission mandated to investigate “serious violations of human rights and international humanitarian law alleged to have been committed in the Democratic Republic of the Congo,” with a temporal mandate extending back to March 1993 in view of the objections of the Congolese government to the mandate of the first mission.<sup>426</sup> The third investigative mission was mandated to map the most serious violations of human rights and international humanitarian law committed in the DRC between March 1993 and June 2003, assess the capacity of the national justice system to deal with human rights violations, and identify appropriate transitional justice options.<sup>427</sup>

## **Conclusions and recommendations**

The final report of the Secretary-General’s investigative team led to a call for the Security Council to create a full-fledged investigative commission and a panel

of experts to further study the creation of an ad hoc international tribunal. The report issued very qualified, limited, and nonspecific findings about the existence of massacres and other grave violations, and about the possible identity of the armed forces involved, and stated that “it has not been possible, as a rule, to quantify these violations, that is to determine with a reasonable degree of certainty the number of victims, or even the number of specific types of violations.”<sup>428</sup> The report concluded that “the interests of justice can only be served by endowing an international tribunal with competence over these crimes.”<sup>429</sup> The team recommended that the “temporal and personal competence of the International Criminal Tribunal for Rwanda should be expanded” to cover the crimes committed in the DRC.<sup>430</sup>

The period under examination by the Mapping Exercise included multiple and overlapping conflicts and the tangled involvement of rebel forces and national armies from the DRC, Rwanda, Uganda, Burundi, Angola, Sudan, Zimbabwe, and Chad.<sup>431</sup> The report found significant evidence that crimes under international law had been committed, including war crimes and crimes against humanity, on a massive scale.<sup>432</sup> The report made a qualified judgment as to whether acts of genocide against Hutus had taken place, calling for a full judicial investigation to resolve whether genocide had been committed.<sup>433</sup> The scope of the exercise was too broad to adequately conduct investigations into allegations of individual criminal responsibility, and the report did not name individual perpetrators, but it did identify armed groups allegedly responsible for violations. The Mapping Exercise stored information on the identity of alleged perpetrators in a confidential database submitted to the UN High Commissioner for Human Rights.<sup>434</sup> A draft of the final report of the mapping exercise leaked to the public in August 2010. The ensuing furor and sharp criticisms from Rwanda and Uganda led the OHCHR to revise some of the language of the report, clarifying the nonjudicial mandate of the Mapping Exercise, and to solicit written comments from the countries implicated, but the UN stood by the substance of the findings.<sup>435</sup>

The mapping report evaluated various options for transitional justice, including domestic and military courts, the establishment of an ad hoc international tribunal, and the creation of a mixed mechanism. The report recommended the adoption of a “holistic policy of transitional justice” based on the creation of diverse and complementary mechanisms,<sup>436</sup> including a nonjudicial TRC and a hybrid prosecution mechanism that could try crimes committed by foreigners, as well as a comprehensive security sector reform and a state-run reparations program. The report also noted the positive contribution of the ICC to accountability and positive complementarity in the DRC.

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## International Criminal Court Investigations in the DRC

The government ratified the Rome Statute in April 2002 and referred the situation in its territory to the ICC in April 2004. The ICC Office of the Prosecutor (OTP) launched investigations, focusing on alleged war crimes and crimes against humanity committed mainly in eastern DRC, the Ituri region, and the North and South Kivu provinces, since July 1, 2002.<sup>437</sup> The OTP acknowledged that alleged crimes were reported before that date, but the ICC's temporal jurisdiction is limited to the statute's date of entry into force.<sup>438</sup> The investigations led to six arrest warrants. Two suspects were tried and convicted, one is still on trial, one is awaiting transfer to the court for his trial to start, one was acquitted and released, and the Pre-trial Chamber declined to confirm charges against the last suspect.<sup>439</sup> In addition, the court also conducted investigations into Congolese nationals for charges stemming from the situations in other African countries. Former Congolese Vice President Jean-Pierre Bemba was convicted for crimes against humanity and war crimes committed in the CAR during an operation in 2002–2003.<sup>440</sup>

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## Existing Justice-Sector Capacity

The DRC has struggled to establish an effective judicial system throughout its history. Under Mobutu, the judiciary served “merely as an extension of executive power” and, under Laurent Kabila, judicial officials obeyed the executive's orders.<sup>441</sup> Today, under President Joseph Kabila, the justice sector is still subject to frequent political interference, and it lacks capacity in all areas needed for effective investigations.<sup>442</sup> Significant gaps are partly filled by the international community, especially by MONUSCO, but this dependency is not a viable solution in the long-term.<sup>443</sup>

The persistent lack of funding, shortage of basic infrastructure and staff, ongoing insecurity, and corruption at all levels seriously inhibit the establishment of an effective justice sector. Judicial staff and physical infrastructure are rare, and existing resources are concentrated in urban areas, leaving rural areas badly underserved.<sup>444</sup> Low salaries and persistent insecurity for judges and magistrates make them prone to corruption and bribery.<sup>445</sup> There was no regime for the protection of victims and witnesses until the adoption of the Rome Statute implementation bill in 2015, and the police and military forces contribute to insecurity instead of tackling it.<sup>446</sup> Perpetrators often hold positions of power, which

leads to intimidation and threats when sensitive cases are addressed.<sup>447</sup> The capacity of detention facilities and prisons is almost nonexistent, and frequent escapes seriously undermine the rule of law.<sup>448</sup> Lack of funding and staff also impair criminal defense and court management.<sup>449</sup> Military courts do slightly better in terms of capacity and funding, but they are still subject to corruption and political meddling, especially when they attempt to address high-level cases.<sup>450</sup> In addition to political interference in specific cases and circumstances, the government has generally resisted institutional reforms that aim to improve judicial independence.<sup>451</sup> In the words of the UN *Mapping Exercise Report*:

In summary, given the limited engagement of the Congolese authorities in strengthening the justice system, the minimal resources granted to the judicial system, the tolerance of interferences by political and military authorities in judicial affairs, resulting in the judiciary's lack of independence, the inadequacy of the military justice system, bearing exclusive jurisdiction, to deal with the number of crimes under international law, many of which were committed by security forces, and the fact that judicial practice of military courts and tribunals over recent years is poor, not always substantiated in law, and reflects a lack of independence, it can be concluded that the resources available to the Congolese justice system in order to end impunity for crimes under international law committed between 1993 and 2003 are no doubt insufficient. Furthermore, given the current state of affairs, Congolese military courts, in the eyes of many victims, have neither the capability nor the credibility required in order to step up efforts to the fight against impunity for the many violations of fundamental rights committed against them in the past.<sup>452</sup>

## **Existing Civil Society Capacity**

International civil society plays a major role in supporting accountability for atrocity crimes in the DRC. International organizations including Human Rights Watch, Avocats Sans Frontières (ASF), the Coalition for the ICC (CICC), the Open Society Initiative for Southern Africa (OSISA), and Réseau Citoyens-Citizens Network (RCN) have investigated and documented human rights abuses, advocated for security and judicial reforms and the passing of new legislation, supported national proceedings for international crimes, and helped to build capacity in the justice sector. These organizations played a crucial role in the adoption of the Rome Statute domestication bill.<sup>453</sup>

The capacity of national and local civil society organizations, however, is much weaker and varies depending on the region and the type of organization.<sup>454</sup> Most civil society organizations were created in the early 1990s and focus on social and economic development in their communities, providing essential goods and services that the state fails to deliver.<sup>455</sup> Increasingly, local, regional, and national organizations have begun to play a role in accountability efforts, including by channeling complaints, facilitating judicial referrals, and providing support to victims.<sup>456</sup> However, most organizations are constrained by the lack of sustainable funding.<sup>457</sup> Some local organizations have played an important role as implementing partners in multidonor programs (such as EU-led REJUSCO, PARJ, and PARJE) and have received substantial funding and training,<sup>458</sup> but many suffer from the lack of basic infrastructure and means of communication.<sup>459</sup> In addition, legal and administrative constraints on the freedom of association and recent crackdowns on criticism have constrained civil society activities.<sup>460</sup>

## **Domestic Prosecutions (2005–Present)**

### **Creation**

A series of legal developments that unfolded over the past two decades made possible the prosecution of international crimes at the national level. Military courts began to prosecute international crimes in 2002, and civilian courts initiated such proceedings more recently. Key legal milestones include the ratification of the Rome Statute in March 2002, the adoption of new military criminal codes in November 2002, the promulgation of an organic law in 2013 reorganizing the judiciary, and the adoption of the Rome Statute domestication bill in 2015. Further detail on each is provided in the section on Legal Framework and Mandate, below.

### ***Mobile Courts***

Mobile courts have been part of the Congolese legal system since 1979 and have been implemented with the assistance of international organizations since 2004.<sup>461</sup> Mobile courts, known as *audiences foraines* in the Congolese legal system, make use of judicial officials sitting in one district who travel to remote areas under their jurisdiction to investigate and prosecute cases. Internationally backed mobile courts have mainly focused on sexual and gender-based violence, but mobile sessions have

also included other crimes such as murder and property crimes.<sup>462</sup> The first mobile courts program with international support in the DRC was implemented in 2004 by ASF. The organization provided support to “move the Courts of three provinces, during short periods of time, from the main cities where they were based to local towns under their jurisdiction,” in order to “bring justice closer to the population.”<sup>463</sup>

Since then, mobile court programs have been widely replicated with the involvement of a number of different implementing and supporting partners—including the American Bar Association Rule of Law Initiative (ABA-ROLI), RCN Justice et Démocratie, the OHCHR, MONUSCO (Justice and Corrections Sections and the UNJHRO), as well as national associations and NGOs—and funded by several international donors, including the EU, UNDP, DanChurchAid, and the Open Society Foundations. Apart from ASF’s initial program, other significant mobile court support projects include the EU’s REJUSCO program (*programme de la restauration de la justice à l’Est de la RDC*), which backed mobile courts in the east of the country from 2007 to 2010,<sup>464</sup> and its successor projects PARJ and PARJE-E (*project d’appui au renforcement de la Justice à l’Est de la RDC*), which included mobile court programming in collaboration with ASF from 2012 to 2016.<sup>465</sup> The ABA-ROLI is also a major supporting partner of mobile courts in eastern DRC, as it coordinated the operation of “gender mobile courts” with funding from the Open Society Foundations from 2009 through 2013.<sup>466</sup> The UNDP assisted mobile court sessions from 2011 to 2012,<sup>467</sup> and MONUSCO’s Justice and Correction Section and Joint Office for Human Rights (UNJHRO) has also provided technical and logistical backing.<sup>468</sup> The MONUSCO-organized Prosecution Support Cell program has chaired meetings of the *Cadres de Concertations*, a forum to coordinate efforts of all partners involved in supporting investigations and mobile courts.<sup>469</sup>

In recent years, national NGOs and associations have become increasingly involved in mobile court proceedings, and the state has also begun to assume a greater role.<sup>470</sup> The Superior Council for Magistrates (CSM) adopted a Guide for Mobile Courts in 2014 (drafted by ASF and PARJE), and some of its principles have become law.<sup>471</sup> The Office of the Personal Representative of the President in charge of the fight against sexual violence and the recruitment of children that was created in 2014 has also backed some mobile court sessions.<sup>472</sup> Since 2015, ASF has organized activities to pass on their expertise and transfer the administration of mobile courts to the Ministry of Justice.<sup>473</sup>

## Legal Framework and Mandate

The DRC ratified the Rome Statute in March 2002, and under its monist constitution, the treaty can be directly applied, although without domestic implementing legislation there were many uncertainties.<sup>474</sup> In November 2002, the adoption of a new military Criminal Code and Code of Criminal Procedure granted jurisdiction to military courts over genocide, war crimes, and crimes against humanity.<sup>475</sup> Military prosecutors initiated investigations and prosecutions on this basis, and beginning in 2006, they began applying the Rome Statute directly. Civilian courts, however, refrained from applying the Rome Statute due to the absence of any mention of international crimes from the Criminal Code and the Code of Criminal Procedure, which resulted in the exclusive prosecution of atrocity crimes by military courts.<sup>476</sup>

The exclusive competence of military courts over international crimes was highly controversial. Civil society and international organizations were concerned about the practice of prosecuting civilians in military courts, in violation of international standards; deficiencies in the quality of military investigations and prosecutions; provisions that only allowed soldiers to be tried by judges with a higher rank, effectively barring the prosecution of senior officers; and inconsistencies in the resolution of conflicts between domestic law and the Rome Statute by different military tribunals due to the absence of a coherent legal framework (e.g., with regard to witness and victim protection, as well as sentencing).<sup>477</sup>

To address these shortcomings, Congolese civil society and international NGOs began a long struggle for the adoption of a Rome Statute Implementation Bill, which would shift jurisdiction to civilian courts and include more procedural safeguards.<sup>478</sup> A new Organic Law was adopted in 2013, empowering the civilian Courts of Appeals to hear cases of war crimes, crimes against humanity, and genocide, but this reform was incomplete.<sup>479</sup> The Rome Statute domestication law was finally adopted in June 2015. It is divided into four main parts, respectively amending the Criminal Code, the Code of Criminal Procedure, the Military Criminal Code, and the Military Code of Criminal Procedure. The law introduced major changes for the prosecution of atrocity crimes and significantly reordered the civilian and military justice systems. The law removed the exclusive competence of military courts over atrocity crimes and created a regime of shared competence between the civilian and military justice systems; it added to the Criminal Code the crimes of genocide, war crimes, and crimes against humanity, as defined in the Rome Statute, as well as offenses against the administration of justice; it adopted certain procedural safeguards protecting

the rights of the accused, victims, and witnesses; it affirmed the imprescriptibility of Rome Statute offenses, the irrelevance of official capacity, and the inapplicability of any immunity; it adopted the Rome Statute's maximum penalties, adding the death penalty; and it reinforced the regime of cooperation with the ICC.<sup>480</sup>

Since the adoption of the bill, civilian courts are competent to prosecute war crimes, crimes against humanity, and genocide committed on Congolese territory, irrespective of the perpetrator's official position or any immunity that he/she may hold under national or international law. Military courts may still hear cases of atrocity crimes, but only when the authors of the crimes are exclusively military.<sup>481</sup>

### ***Mobile Courts***

Under Congolese legislation, courts and tribunals may hold mobile sessions outside of their ordinary seat of jurisdiction, when the proper administration of justice so requires.<sup>482</sup> Mobile sessions may be held by the first-instance and appeals levels of civilian and military justice, and the ordinary rules of jurisdiction apply, including jurisdiction over international crimes.

International and national organizations have relied on this existing legal framework to bring a measure of justice to remote regions of the DRC that have been ravaged by the repeated conflicts and widespread sexual violence. Mobile court programs designed by international organizations aim to address the problem of lack of access to justice in remote areas and the prevailing culture of impunity by reinforcing the presence and functioning of judicial institutions.<sup>483</sup> Existing programs have focused mainly on sexual and gender-based violence in eastern parts of the country, but some have adopted a wider focus (e.g., REJUSCO, PARJ, and PARJE). These programs generally include the following components: training for judicial personnel on international criminal law and sexual violence (for instance, ABA-ROLI conducted numerous trainings for investigators, judicial police, magistrates, and judges); providing lawyers and legal aid to the victims and the defense; assisting in the preparation of cases; providing logistical support; creating oversight and monitoring mechanisms; and conducting outreach functions.

### **Location**

Domestic prosecutions for atrocity crimes are conducted within the ordinary Congolese court system. In the DRC, each court has jurisdiction over a certain territory. Within this territory, they have an ordinary seat fixed by presidential

decree, and they may have one or more secondary seats where they may hold periodic sessions. By law, civilian and military lower courts are distributed across the country, while higher instances are generally seated in Kinshasa. In practice, rural areas are seriously underserved, and the limited number of courts that exist are concentrated in urban areas.<sup>484</sup>

### ***Mobile Courts***

Military and civilian courts may conduct mobile sessions outside their ordinary and secondary seats to access remote areas.<sup>485</sup> Most mobile court projects have focused on the eastern part of the country, especially North and South Kivu, where most of the violence derived from the repeated conflicts has been concentrated. The sessions are held in, or close to, the site of the crimes, and they are generally housed in temporary structures, such as tents.<sup>486</sup>

### **Structure and Composition**

The organization of the Congolese judiciary has been in transition since the constitutional reform of 2006. The 2006 constitution divides the judicial system into three different court systems for judicial matters (both civil and criminal), administrative matters, and the military.<sup>487</sup> Since the adoption of the Rome Statute domestication bill and the Organic Law of 2013, both the civilian and military court systems are competent to hear cases of war crimes, crimes against humanity, and genocide.<sup>488</sup>

In the civilian system, the Court of Appeals is the first instance to hear claims related to genocide, crimes against humanity, and war crimes.<sup>489</sup> According to the Organic Law of 2013, the Court of Appeals comprises one first president, one or several presidents, judges (*conseillers*), and one registrar.<sup>490</sup> The court is generally composed of three members, except for Rome Statute offenses for which it has five members.<sup>491</sup> Since the 2006 constitutional reform, the appellate court for the Court of Appeals is the Cour de Cassation, which will be composed of four chambers for its different subject matters, with three members per chamber.<sup>492</sup> However, as of late 2017, the Cour de Cassation had not yet been created. Until its creation, the Supreme Court was to remain the highest instance court for criminal matters.<sup>493</sup>

The military justice system is competent to hear cases of war crimes, crimes against humanity, and genocide since the 2002 reform of the military criminal and criminal procedure codes.<sup>494</sup> These crimes are prosecuted according to the

ordinary rules of procedure of military justice, composed of the following instances in ascending order of jurisdictional reach: *tribunaux militaires de police*, *tribunaux militaires de garnison*, *cours militaires*, and *hautes cours militaires*. Military courts are also under the control of the Cour de Cassation.<sup>495</sup> Each instance is composed of a first president, presidents, and judges, all appointed by the DRC president. They comprise five members including a certain number of “career judges” (*juges de carrière*), except for the *tribunal militaire de police*, which is composed of only one career judge.<sup>496</sup> Since the 2006 constitutional reform, a Superior Judiciary Council (*Conseil Supérieur de la Magistrature*) is responsible for the administration of justice, including military justice.<sup>497</sup> It was created in 2014.

The military and civilian courts receive significant support from international organizations for the prosecution of international crimes, especially from MONUSCO, the UN stabilization mission in the DRC. MONUSCO’s Justice and Corrections Section supports civilian and military court systems to be more effective in delivering justice within its mandate to “support the government in strengthening the capacity of judicial institutions.”<sup>498</sup> Security Council Resolution 1925 (2010) mandated MONUSCO to “support national and international efforts to bring to justice, including by establishing Prosecution Support Cells to assist the FARDC military justice authorities in prosecuting persons arrested by the FARDC.”<sup>499</sup> Its main project consists of the creation and operation of five Prosecution Support Cells,<sup>500</sup> composed of “experienced civilian prosecutors and police investigators” who provide technical advice and logistical support to military authorities that conduct investigations into war crimes and crimes against humanity; most of that work is done in support of mobile courts.<sup>501</sup> MONUSCO also provides support to the *Conseil Supérieur de la Magistrature* and assists in the implementation of reforms to improve the efficiency of the judiciary.<sup>502</sup> In addition, a number of other international organizations provide training and capacity building to improve the capacity of the judicial system in the DRC (e.g., REJUSCO, PARJ, PARJE).

Any outreach initiative in the DRC faces significant obstacles, including a vast territory, poor transportation and communication infrastructure, low literacy rates, and a diversity of local languages. Combined with the minimal budget available to the justice sector, the state has almost no structure or capacity to provide information on the work of the judiciary. Most international programs providing support to the justice sector contain an element of outreach, such as public education about the justice system, which is often implemented through international or local NGOs.<sup>503</sup>

## **Mobile Courts**

Mobile courts are embedded within the domestic legal system and staffed by domestic judicial personnel, including magistrates, judges, prosecutors, legal representatives of the victims and defendants, police, and investigators. Mobile tribunals include both the first instance and appeal levels of military and civilian court systems. Military mobile courts generally include one judge, four lay assessors, a military prosecutor, and a bailiff. Civilian courts comprise three judges, two assessors, one prosecutor, and a bailiff. The mobile team may also include a registrar and interpreters.<sup>504</sup>

The sessions are implemented on an ad hoc basis according to the needs identified by the courts or NGOs (generally, serious criminal cases, especially related to sexual violence, or clearing backlogs), and require there be a minimum number of cases in a particular place before traveling to it. Cases are prepared in advance by judicial and military police together with partner organizations, which are then delivered to the prosecutor. The mobile court team then travels to the location of the hearing and holds sessions that usually last 10 to 14 days. Other conditions may include that the perpetrator is in custody and the evidence is *prima facie* sufficient.<sup>505</sup>

Victims and the accused are represented by lawyers, mainly from partner organizations or members of bar associations. Lawyers also assist victims to achieve the implementation of potential reparations, which may be awarded by the courts. Security support is provided by the Congolese police or the armed forces with the support of MONUSCO, under its mandate to “strengthen the capacity of the judicial institutions.”<sup>506</sup> As mentioned above, national and international organizations play an important role in providing training, assisting investigations, and preparing and overseeing cases. In recent years, local NGOs and community networks have formed to channel complaints and facilitate judicial referrals.<sup>507</sup>

International and national organizations have also conducted outreach, including through community meetings with students, civil society representatives, and the police commissioners. ABA-ROLI has sponsored radio programs, public service announcements, and billboards sensitizing individuals about the consequences of rape and sexual violence.<sup>508</sup> Other outreach efforts and legal awareness programs have been conducted by the Congolese Bar Association through Legal Aid Units, but these efforts have been limited.<sup>509</sup>

## Prosecutions

While military courts have been competent to hear international crimes cases since 2002, and civilian courts gained competence in 2013, many factors have impeded the effective prosecution of atrocity crimes (see *Legacy* section, below). In the military justice system, there were around 40 trials in the period 2005–2015 for war crimes and crimes against humanity, including some cases of sexual violence.<sup>510</sup> Around two thirds of the cases implicated members of the FARDC, and the rest involved members of armed groups.<sup>511</sup> Since 2006, the majority of the judgments invoke the Rome Statute. The first conviction by a military court to apply the Rome Statute was the *Songo Mboyo* case in 2006, which led to the conviction of seven FARDC soldiers for rape and looting as crimes against humanity.<sup>512</sup>

Prosecutions by civilian courts are very limited, with only one conviction for atrocity crimes by a civilian court as of November 2016. In September 2016, the Court of Appeals of Lubumbashi convicted four defendants for genocide, applying the Organic Law of 2013 for the first time. Subsequently, judges in South Kivu also initiated investigations.<sup>513</sup> As of late 2017, there had not been any prosecutions under the 2015 Rome Statute implementing legislation.

### *Mobile Courts*

The number of judicial decisions issued at mobile sessions (mostly within the military justice system) significantly exceeds the number typically decided at an ordinary session. However, it is difficult to obtain precise figures on the number of sessions and convictions achieved by mobile courts.

The ASF program supported 10 mobile sessions in 2012 that included 82 cases of sexual violence, seven sessions in 2014, and four sessions in 2015.<sup>514</sup> During their first 20 months of operation, the ABA-ROLI-backed mobile courts held 14 sessions, disposing 248 cases, 140 of which resulted in convictions for rape and 49 convictions for other serious offenses, and 44 acquittals.<sup>515</sup> From 2011 to 2012, UNDP provided support to 16 mobile sessions, disposing of 206 cases, 60 percent of which related to sexual violence, with a conviction rate of 76 percent.<sup>516</sup> Numerous other sessions have been supported by other national and international organizations, with a high conviction rate. Through MONUSCO's Prosecution Support Cell Program,<sup>517</sup> over 700 case files have been processed since 2012, with a total of 685 convictions and sentences. Mid- to senior-level officers have been prosecuted based on command responsibility for crimes against humanity.

A number of prominent cases have been decided by mobile courts.<sup>518</sup> In the Fizi trial held in February 2011, one commander and eight of his subordinates were convicted for mass rapes committed in the attack on the village of Fizi, South Kivu, during the same year. The case established a major precedent as it was “the highest commanding officer ever tried and convicted for rape in the DRC.”<sup>519</sup> In December 2014, a lieutenant colonel was convicted in a military mobile session for crimes against humanity for his participation in the violence in South Kivu in 2005–2007.<sup>520</sup> Also in December 2014, the former commander of the Democratic Forces for the Liberation of Rwanda (FDLR), Kizima Lenine Sabin, was convicted for crimes against humanity.<sup>521</sup> In 2015 and 2016, mobile courts convicted and sentenced 22 military officers on charges of sexual violence.<sup>522</sup>

## Legacy

These legislative developments and the few prosecutions at the national level constitute an important step toward accountability in the DRC. Military courts directly applying the Rome Statute have created substantial jurisprudence.<sup>523</sup> However, despite some progress, the reach of proceedings is insufficient compared to the magnitude of the grave crimes that have been committed, including thousands of cases of murder, mutilation, rape, forced displacement, and pillaging.<sup>524</sup> The proceedings that have taken place have been plagued by violations of fair trial standards, deficient investigations and prosecutions, intimidation of victims and witnesses, the absence of proper defense, and, notably, the prosecution by military courts of crimes that should fall within the jurisdiction of ordinary courts. There has been political interference in sensitive cases, and there have been very few cases against senior officers or high-ranking officials. In addition, there are serious problems with the enforcement of judgments: the state does not have the budget or the will to pay for judicially ordered reparations, and when the accused is convicted, escapes are frequent. These shortcomings can be traced back to the serious lack of institutional capacity, but also to the absence of political will and genuine commitment to accountability.<sup>525</sup>

These factors have also caused an excessive dependence on foreign resources; the proceedings have often taken place in response to public and diplomatic pressure and been possible only because of significant international support. This seriously undermines public confidence in the justice system.<sup>526</sup> The recent Rome Statute domestication law represents significant progress, bringing the legislative framework on atrocity crimes closer to international standards. However, as of late 2017, its impact had been limited due to the absence of implementation.

## ***Mobile Courts***

Overall, mobile court programs have had significant successes. These programs have undeniably been successful in their purpose of bringing justice to areas where it is absent.<sup>527</sup> They have made it possible for people in remote areas to be exposed to a functioning justice system and demonstrated that “with good management, proper allocation of resources and adequate oversight, the Congolese justice system, even if not perfect, could effectively address the justice needs of its communities.”<sup>528</sup> In that sense, mobile courts have strengthened the rule of law in some communities and tackled the prevailing and widespread culture of impunity. In the words of Judge Mary Davis, who assessed the mobile courts implemented by ABA-ROLI, “The genius of the ABA-ROLI-supported gender mobile courts is that they have significantly transformed the prevailing discourse. ... Now, punishment is no longer theoretical.”<sup>529</sup> In addition, by operating through local justice actors, the programs have strengthened domestic capacity to tackle crimes, including sexual violence and international crimes, and a progressive transfer to national authorities seems to be taking place.<sup>530</sup> The prosecution of international crimes in mobile tribunals is also significant in terms of complementarity with the ICC.<sup>531</sup> Finally, mobile courts have also had a major impact on the issue of sexual and gender-based violence. The majority of cases in mobile courts have been related to SGBV; women and girls have been willing to speak out at mobile court sessions, and the prosecution of these cases helped spread awareness on the issue.<sup>532</sup>

The legacy of mobile courts, however, is seriously weakened by the lack of enforcement of sentences, with an enforcement rate of between four and eight percent.<sup>533</sup> The role of the police in the enforcement of judicial decisions is highly unpredictable.<sup>534</sup> Even though courts often award reparations, they are rarely implemented.<sup>535</sup> When the accused is convicted, prison conditions are grim and escapes frequent.<sup>536</sup> There have also been criticisms of the procedural aspects of mobile courts. Critics have decried mobile courts’ perverse effects on the independence of the judiciary because they generate pressure to convict and because NGOs make payments to judicial officials and play a role in the selection of cases. Further, the brevity of the sessions may impair the quality of proceedings, and this along with a frequent absence of defense counsel can result in abuses of fair trial rights. Finally, mobile courts have often lacked appropriate protection for victims and witnesses.<sup>537</sup> Development officials have raised doubts about the sustainability of these programs in view of their ad hoc implementation and significant international involvement combined with high costs and the absence of a coordinated national strategy.<sup>538</sup> Nevertheless, significant improvements have been observed since 2014, with a gradual transfer toward domestic judicial institutions,

progress in fair trial standards, and the harmonization of supplemental payments to participating officials.<sup>539</sup>

## **Financing**

Financing is a major constraint for domestic prosecutions. The budget allocated to the justice sector is minimal, representing 1.98 percent of the total national budget in 2015, and 1.79 percent in 2016.<sup>540</sup> These budget allocations do not reflect the real needs of the judiciary, which are immense considering the large backlog of pending and potential cases before civilian and military courts, in relation to atrocity crimes and ordinary crimes. Budgetary constraints create obstacles in all areas needed to conduct effective investigations and prosecutions, including basic infrastructure and equipment, salaries, training, security and policing, witness and victim protection, reparations, and detention. Donors have filled the gap in some areas. A number of donors, including the EU, USAID, national governments, and international organizations, have provided support, training, and infrastructure, even contributing to the salaries of ministry officials and magistrates.<sup>541</sup> This has created a dependency on foreign resources, which is not sustainable in the long-term.<sup>542</sup>

## ***Mobile Courts***

The cost of a mobile court session varies depending on the number of days and cases it hears. A typical two-week mobile court session hearing about 15 cases costs around US\$45,000 to US\$60,000, or US\$3,000 to US\$4,000 per case.<sup>543</sup> The majority of the budget is allocated to transportation costs, including for judges, lawyers, victims, and witnesses. Domestic judicial personnel in mobile courts are paid a government salary to fulfill their normal duties. Due to lack of funding for the justice sector, mobile courts have had to rely on foreign support to organize itinerant hearings, often in the form of logistics support granted by the UN or the EU through international NGOs.<sup>544</sup> National and international organizations, including MONUSCO's PSC program, provide daily supplements to mobile court staff on top of their official salaries, and additionally, they generally pay for the representation of victims and the accused. MONUSCO has also often covered security costs and provided transportation.<sup>545</sup> The EU has contributed a significant amount to the strengthening of justice in the DRC, with a total budget of five million euros for the PARJE project in collaboration with ASF from 2012 to 2016 (with contributions from Belgium and Sweden),<sup>546</sup> and eight million euros for the REJUSCO program from 2006 to 2011.<sup>547</sup> However, these projects aimed generally at justice-sector

strengthening, and only a portion was allocated to mobile court projects. Since 2013, the EU has also provided funding for MONUSCO's PSC program. The Open Society Foundations supported the ABA-ROLI mobile court initiative for three years. UNDP contributed US\$155,000 to the organization of mobile courts from 2011 to 2012.<sup>548</sup>

## **Oversight and Accountability**

In the civilian justice system, the Cour de Cassation has the right to review the decisions of the Court of Appeals, as well as the right of administrative surveillance and inspection.<sup>549</sup> Until the Cour de Cassation is created, the Supreme Court remains the highest instance in criminal matters.<sup>550</sup> The Organic Law of 2013 regulates the removal of civilian judges. Judges can be removed from specific proceedings upon the decision of a special bench in case of conflicts of interests. The prosecutor's office attached to each jurisdiction is accountable to the Ministry of Justice.<sup>551</sup> In the military justice system, the decisions of each court can be reviewed by the superior instance and, ultimately, by the Cour de Cassation. Military judges are appointed and may be removed by the DRC's president.<sup>552</sup>

### ***Mobile Courts***

Mobile court sessions are monitored through various mechanisms. Mobile tribunals may hear appeals, which are often re-hearings of the cases to address fair trial concerns. Judges sitting in mobile tribunals may be removed or recused according to the ordinary rules of procedure.

Partner organizations have also developed monitoring programs that provide informal means of oversight. ASF has trained teams of people in the communities to "observe the trials and to inquire on the satisfaction of those accessing the Courts,"<sup>553</sup> and the UNDP has organized court monitoring activities whereby teams employed by UNDP ensure that the trials are held in accordance with international standards.<sup>554</sup> However an assessment of MONUSCO's Prosecution Support Cell program highlighted a lack of adequate monitoring and analysis of proceedings as a significant gap. It found little readily available or accessible information regarding the quality of justice administered by the military justice system.<sup>555</sup>

## Mixed Chambers (proposed)

### Creation

Proposals for the creation of “specialized mixed chambers” with jurisdiction exclusively over atrocity crimes, to be integrated with existing court structures, have been repeatedly put forward and rejected over the past few years.<sup>556</sup> Local organizations from the Ituri district first proposed the establishment of specialized mixed chambers in 2004, during an EU-organized audit of the Congolese justice sector.<sup>557</sup> This proposal was put forward again in 2008 and 2009 by UN Special Rapporteurs, Congolese civil society organizations, and Human Rights Watch.<sup>558</sup> These calls finally gained traction and led to a draft legislative proposal in 2010 with the release of the OHCHR Mapping Exercise Report. In its proposals for transitional justice options, the Mapping Report especially recommended the establishment of a “mixed judicial mechanism” comprising national and international judicial personnel to try the perpetrators of grave crimes committed in the DRC between 1993 and 2003.<sup>559</sup> The Congolese legislature and Congolese civil society organizations, assisted by Human Rights Watch, Parliamentarians for Global Action, and other international organizations, were the main drivers behind subsequent specific proposals and consultations.

A draft bill creating “Specialized Chambers for the Prosecution of International Crimes” was introduced in parliament in 2011, together with the Rome Statute implementation bill. Lawmakers set aside both bills for further consideration. Many raised concerns about the bill with regard to: (1) the establishment of an entirely new set of courts, which would create two parallel court systems, with one (the mixed chambers) receiving more resources than the other; (2) the uncoordinated and disorganized way in which the government planned reforms of the justice sector, as the Ministry of Justice introduced separate bills with strong overlap for ordinary criminal justice, the implementation of the Rome Statute, and the proposal for mixed chambers; and (3) the integration of foreign judges in the chambers, which sparked concern about national sovereignty. With strong resistance to the bill within the Ministry of Justice, a senate committee rejected the bill before it could even get to a full vote by the senate.<sup>560</sup>

The government submitted a revised bill to parliament in 2014, which addressed the main concerns raised about the previous version. The revised bill proposed to amend the 2013 Organic Law and to create chambers fully integrated into existing

court structures, instead of establishing a separate court system based on a stand-alone law; and the involvement of foreign judges would be optional rather than mandatory.<sup>561</sup> Nevertheless, parliament rejected the new bill, citing procedural objections.<sup>562</sup> Parliamentarians claimed that an ordinary law could not amend an organic law and that several provisions of the bill violated constitutional principles on immunities and competence over the armed forces. In addition, legislators already skeptical of the proposal criticized the minister of justice for being ill-prepared to answer questions about it.

In 2015, the Congolese Parliament adopted the Rome Statute implementation bill initially proposed alongside the proposal for mixed chambers. An assessment of the justice system conducted by the Ministry of Justice in collaboration with other Congolese officials and civil society in 2015 included a recommendation to create mixed chambers, and a revised version of the proposal was under discussion in the Ministry in 2016.<sup>563</sup> As of late 2017, there were no public reports of further developments.

## **Legal Framework and Mandate**

The proposed specialized chambers were designed “to prosecute and punish international crimes efficiently” and address the prevailing impunity for the majority of atrocity crimes that have been committed in the DRC.<sup>564</sup> Accordingly, the material jurisdiction of the chambers was to include genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>565</sup> The 2011 bill also entailed jurisdiction over “smaller offenses” if the chamber could demonstrate “the seriousness of the facts,”<sup>566</sup> but this provision was removed from the 2014 bill due to its ambiguity and over-extension of jurisdictional reach. The territorial jurisdiction of the proposed chambers was to extend to all crimes committed in the territory of the DRC.<sup>567</sup> In terms of temporal jurisdiction, the 2011 bill included crimes committed since 1990. The 2014 bill advanced this date to 1993,<sup>568</sup> a “date which should respond to the expectations of the Congolese population.”<sup>569</sup> Critics questioned the choice of 1993, and it remained unclear what law would apply in the case of crimes committed before the Rome Statute’s entry into force.

The issue of personal jurisdiction in the proposed chambers also raised controversy. The competence of the chambers would extend to all perpetrators of international crimes, irrespective of immunities or privileges under national law.<sup>570</sup> However, members of parliament cited the unconstitutionality of this provision as a reason

to reject the bill: Article 91.3 gives jurisdiction to the chambers over beneficiaries of *privileges de juridiction* under the Constitution; and Article 91.7 creates competence over members of the armed forces, which is exclusively granted to military courts under the constitution. In addition, the lack of jurisdiction over military officials for acts committed in time of peace was also criticized. The draft legislation subjects “legal persons” to liability, a provision presumably aimed at “private companies that have benefited from the exploitation of natural resources, or arms sales.”<sup>571</sup> Applicable law for the chambers was to include “the entirety of the principles of international criminal law, international humanitarian law and, more generally, international law.”<sup>572</sup> The chambers would also apply the definitions of the crimes as specified in the Rome Statute, but they would employ Congolese rules of criminal procedure.<sup>573</sup> Some of the key elements of the specialized chambers bill and the Rome Statute implementation bill overlap, such as provisions on criminal definitions, modes of liability, available defenses, and the rights of the accused.

## **Location**

The draft bill foresaw establishment of three chambers of first instance, each attached to an existing Appellate Court, and an Appeals Chamber attached to the Cour de Cassation. The three chambers of first instance would be established at the seat of the Appeals Courts in Goma, Lubumbashi, and Mbadanka, with competence over the northeast, center and south, and west of the country, respectively.<sup>574</sup> The specialized Appeals Chamber would be established at the seat of the Cour de Cassation in Kinshasa, which as of late 2017 still had not been created.<sup>575</sup> The chambers were proposed to be close to the place where the crimes were perpetrated to facilitate the referral of cases, and they were envisioned as also being capable of holding mobile sessions.<sup>576</sup>

## **Structure and Composition**

The mapping report, and a follow-up study by Human Rights Watch, examined various hybrid structures that could be implemented in the DRC, ranging from a SCSL-like structure (involving an agreement between the DRC and the AU or the UN) to a chamber fully embedded within the domestic judicial system but with a mixed staff (more akin to the BiH WCC or the EAC in the courts of Senegal). Draft legislation introduced by the government and reviewed by civil society pursued the approach of creating a mixed chamber within the domestic judicial system.

The establishment of the specialized chambers was presented as an amendment to the 2013 Organic Law on the Organization, Functioning, and Competence of the Judiciary, integrating mixed chambers with jurisdiction exclusively over genocide, war crimes, crimes against humanity, and aggression within the existing court structure. Three chambers of first instance would be attached to the existing Court of Appeals, and one specialized Chamber of Appeals would be attached to the future Cour de Cassation.<sup>577</sup> A specialized Unit for Investigations and Prosecutions (UNEP) would be created inside the prosecution for each existing court, to investigate the crimes within the competence of the chambers.<sup>578</sup>

The composition of the chambers has been revised across the different proposals, especially as regards the nationality of their members. The last version submitted to parliament in 2014 provided for the inclusion of a president and judges in each chamber. The proposed Chambers of First Instance comprise five members, and the Appeals Chambers comprise seven members, three of whom may be international (replacing “should” be international in the previous version).<sup>579</sup> The president must be Congolese. Judges may be Congolese or international, but they may not come from one of the DRC’s bordering countries.<sup>580</sup> The Congolese presidents and judges are appointed by the DRC president upon proposal from the Superior Judiciary Council (*Conseil Supérieur de la Magistrature*).<sup>581</sup> The prime minister would appoint foreign judges, upon proposal from the minister of justice.<sup>582</sup> All judges would be appointed for a term of four years, renewable once for Congolese nationals, and renewable upon demand from the DRC for third-country nationals.<sup>583</sup> The 2011 bill and subsequent versions provided for the inclusion of military judges in cases involving suspects who are subject to military jurisdiction, but this provision was removed.<sup>584</sup> Representation of women will be taken into account in the choice of judges and presidents.<sup>585</sup> Each chamber receives the assistance of a Registry that would be created for each chamber.<sup>586</sup> The investigators of the specialized prosecution unit (UNEP) may be Congolese or international, and they must be specialists with the necessary knowledge to investigate grave violations of international law, sexual violence, and violence against children.<sup>587</sup> The government justifies the inclusion of international personnel by appealing to the “transmission of international experience” and “a useful distance for the judgment of these crimes.”<sup>588</sup> The chambers would thus constitute “national jurisdictions that may integrate an international element, as decided by the state,” rather than “internationalized jurisdictions.”<sup>589</sup>

The bill also would have established a Unit for the Protection of Victims and Witnesses (UNPROVIT) within the Registry in charge of assisting victims, witnesses, and informants implicated in the investigations.<sup>590</sup> The bill contained no provisions on outreach.

## Prosecutions

As of late 2017, mixed chambers had not been created, and there had been no proceedings.

## Legacy

Since the last rejection of the Specialized Chambers bill in 2014, the Rome Statute implementation bill was adopted, bringing the Congolese legislative framework into conformity with international standards. However, there may still be need for the establishment of mixed chambers, because as of late 2017, implementation of the Rome Statute bill had stalled. The establishment of specialized mixed chambers could allow the Congolese authorities to learn from the experience of international experts in the prosecution of atrocity crimes and help to reduce political interference in the implementation of justice.<sup>591</sup> Accordingly, the continuing need to create mixed chambers was included among the recommendations of the *Etats généraux de la justice* conducted in 2015.<sup>592</sup>

## Financing

The bill does not specify how the chambers would be funded. However, it states that the main personnel are entitled to receive monthly “special allowances” determined by decree of the prime minister upon proposal by the minister of justice.<sup>593</sup> It seems that the chambers would be funded by the state, which is highly problematic considering the serious budgetary constraints and the minimal budget that is allocated to the justice sector. Some organizations were concerned that the establishment of the chambers would draw resources away from other proceedings, including the regular court system and the mobile courts.<sup>594</sup>

## Oversight and Accountability

The chambers’ first-instance decisions would be subject to appeal by a specialized Appeals Chamber attached to the Cour de Cassation (which, as of late 2017, had not yet been established). Judges would be appointed by the DRC president upon proposal by the Superior Judiciary Council, with renewable mandates. Their mandate could end early in case of resignation, dismissal, “permanent impediment,” “incompatibilities,” or death.<sup>595</sup>

## **KENYA: PROPOSED SPECIAL TRIBUNAL**

### **Conflict Background and Political Context**

The promise of patronage for ethnic groups aligned with the country's leader and the fear of exclusion for groups out of power have characterized Kenya's post-independence politics. Leading politicians have accentuated the tribal stakes of elections in order to mobilize popular support, even as their patronage networks have only served in-group elites at the expense of the many Kenyans living in poverty. In the past, politicians' calls to tribal loyalty and their demonization of others have peaked around presidential elections. There was pre- and post-election violence around the multiparty elections of 1992 and 1997, and tensions mounted again ahead of the December 2007 presidential elections. When the election commission delayed the announcement of results, it aggravated suspicions of manipulation. The commission then declared incumbent President Mwai Kibaki of the Party of National Unity (PNU) the winner over Raila Odinga of the Orange Democratic Party (ODM). Violence erupted between their supporters, much of it spontaneous, but in some areas well planned and organized. Violence was especially intense in the Mt. Elgon and Rift Valley regions, where ODM supporters, incited in some cases by politicians and a popular radio show, targeted Kikuyus, Kisiis, and Kalenjins due to their suspected support for the PNU.<sup>596</sup> In turn, Kikuyus, including members of police and a militia close to Kikuyu politicians, targeted suspected ODM supporters, including many in Kisumu and Nairobi's large informal settlements.

By the time violence subsided in March 2008, there were 1,133 reported deaths, extensive rape and other forms of sexual violence, and at least 350,000 internally displaced persons.<sup>597</sup> The African Union (AU) and other international actors pressured the sides to halt the violence and resolve the political crisis.<sup>598</sup> A national unity government assumed office in April 2008, with Kibaki as president and Odinga as prime minister.<sup>599</sup> A national commission recommended the formation of a special mixed tribunal to prosecute those most responsible for the 2007–2008 post-election violence.<sup>600</sup> However, elite opposition across ethnic lines ultimately defeated the proposal and succeeded in helping to derail cases at the International Criminal Court (ICC). As of late 2017, this failure, together with the government's lack of follow-through on other domestic mechanisms for the investigation and prosecution of grave crimes, had left communities across Kenya that were affected by the post-election violence still waiting for accountability.

## **Existing Justice-Sector Capacity**

At the time of the 2007–2008 post-election violence, Kenya’s justice system boasted many skilled legal professionals but suffered from enormous case backlogs, minimal witness protection services, extensive corruption in its lower courts, politicized prosecution services, corrupt police, and capacity shortcomings in such areas as court management and language services.<sup>601</sup> However, furor over the post-election violence lent new momentum to legal reform. In 2009, legislators adopted an International Crimes Act that domesticated Rome Statute crimes. In 2010, Kenyans voted to adopt a new constitution, which among other major reforms, created new safeguards for the independence of the judiciary.<sup>602</sup> Nevertheless, implementation of justice-sector reforms has faced continuous challenge from entrenched interests. In Kenya, the obstacles to domestic justice for grave crimes “are more political than technical.”<sup>603</sup>

## **Existing Civil Society Capacity**

Civil society in Kenya has been described as “Africa’s bravest and most vocal,” a reputation gained through sustained conflict with successive governments.<sup>604</sup> Beyond effectively voicing criticism, civil society organizations have been adept in such areas as lending legal expertise to reform debates, providing assistance to victims of human rights abuses, documenting grave crimes, monitoring trials, and analyzing election irregularities. Engagement with the legal and judicial reform process mounted following the 2007–2008 post-election violence. Approximately 30 organizations formed a new coalition, called Kenyans for Peace, Truth, and Justice, as a platform to address the crisis and spur the reform agenda. This engagement strengthened civil society’s fluency in legal and transitional justice issues. The effectiveness of many civil society organizations and their willingness to challenge state authorities has resulted in fierce criticism, government accusations of national betrayal, and outright intimidation.<sup>605</sup>

## **Creation**

Despite domestic and international pressure and extensive debate, as of late 2017, the Special Tribunal for Kenya (STK) has not been created.

A national “Commission to Investigate Post-Election Violence” (called the “Waki Commission,” after its chairperson, Judge Philip Waki of the Kenyan Court of

Appeals) was formed in October 2008. Its final report recommended a temporary STK with exclusive jurisdiction over “persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections on Kenya.”<sup>606</sup> The Waki Commission handed over names of high-level suspected perpetrators to the African Union Panel of Eminent African Personalities, with instructions that if no Special Tribunal was created, the panel would disclose the list to the ICC prosecutor, which it did in July 2009.

The Waki Commission proposed a mixed tribunal comprising international and national judges, a head international prosecutor, and a head international investigator.<sup>607</sup> It recommended that both main political parties sign an agreement to adopt a statute for the tribunal. The four organs of the Special Tribunal—chambers, prosecution, Registry, and defense—would apply both Kenyan and international law. A three-judge Trial Chamber and a three-judge Appeals Chamber would both have a majority of international judges. The international judges, as well as the prosecutor, would be “non-Kenyans from Commonwealth countries, identified by the AU Panel of Eminent African Personalities,” and appointed by the president. The national judges would chair each chamber and would be appointed by the president, in consultation with the prime minister, with the advice of the chief justice. The head of investigations and at least three staff investigators would also be non-Kenyan.

In December 2008, President Kibaki and Prime Minister Odinga signed an agreement stating that a cabinet committee would draft a Special Tribunal bill. Instead, the minister of justice proposed a draft statute to parliament, outlining a domestic chamber of mixed composition to prosecute serious violations that occurred in the context of the elections.<sup>608</sup> In 2009, five attempts to pass a Special Tribunal bill in parliament all failed. Opponents of the bill, many of whom would later oppose ICC intervention as an exercise of “neo-colonialism,” argued against it by touting the ICC’s role, using the rallying cry, “Don’t be vague, go for The Hague.”<sup>609</sup> By November 2010, “a bill on the establishment of a Special Tribunal had been indefinitely shelved.”<sup>610</sup>

In rejecting both the ICC and the creation of a Special Tribunal, in mid-2010 the government declared that it would prefer a reconciliation approach, carried out by the long-stalled and scandal-plagued Truth, Justice, and Reconciliation Commission (TJRC).<sup>611</sup> In December 2010, after the ICC prosecutor revealed the names of the six individuals against whom his office was seeking to bring charges, the Kenyan Parliament passed a motion calling for Kenya’s withdrawal from the Rome Statute. In January 2012, following the confirmation of charges by the ICC (see text box), the

government announced its intention to establish a national mechanism.<sup>612</sup> President Kibaki also called for the transfer of the ICC cases to the African Court of Human Rights or East African Court of Justice, although both lacked any mandate to try such cases.<sup>613</sup> Much of civil society and the public saw the new push for domestic proceedings as a ploy to support an admissibility challenge to the ICC based on the principle of complementarity.<sup>614</sup> After ICC judges rejected admissibility challenges, critics viewed the government's continued statements in favor of domestic proceedings, in absence of genuine steps to implement them, as little more than talking points to justify non-cooperation with the ICC.

## **Legal Framework and Mandate**

The 2009 bill would have provided the Special Tribunal with a mandate to investigate, prosecute, and adjudicate cases involving “persons responsible for” a range of grave crimes. These included genocide, gross violations of human rights, “other crimes committed in Kenya in accordance with the provisions of this Statute,”<sup>615</sup> and related prior or subsequent offenses.<sup>616</sup> The bill granted the Special Tribunal exclusive jurisdiction over these crimes.<sup>617</sup> The bill relied heavily on the ICC in defining the elements of crimes<sup>618</sup> and modes of liability.<sup>619</sup>

## **Location**

The bill provided flexibility with regard to location, leaving decisions about the location of hearings to the discretion of the head of the Appellate Chamber.<sup>620</sup>

## **Structure and Composition**

The first draft statute of the STK considered in 2009 was introduced by then justice minister Martha Karua (and is the version described here). The Karua bill bore strong similarity to the Waki Commission's proposals in key areas: Trial and Appellate Chambers with majorities of international judges, an international prosecutor, and appointment procedures with international and African participation. However, unlike the Waki Commission's proposal, the 2009 bill did not address investigations. The bill foresaw a tribunal comprised of Trial and Appellate Chambers, a prosecutor's office, a Registry, and a defense office. It also would have established four “Special Magistrates Courts,” with panels of three national judges, to exercise jurisdiction over lower-level defendants.

## ***Chambers***

The bill foresaw a single Trial Chamber and a single Appellate Chamber. The president, with concurrence of the prime minister and AU Panel could create additional Trial Chambers if necessary.<sup>621</sup> The president, with the prime minister's agreement, could also expand on the four initial three-judge Special Magistrates Courts responsible for lower-level cases.<sup>622</sup>

The Trial Chamber was to consist of three judges: a Kenyan chair appointed by Kenya's president with concurrence of the prime minister and two international judges appointed by the same procedure following their nomination by the AU Panel of Eminent African Personalities.<sup>623</sup> The Appeals Chamber was to consist of five judges: a Kenyan chair and a second Kenyan judge appointed in accordance with the same procedures as the chair of the Trial Chamber, and three international judges appointed in accordance with the same procedures as international judges of the Trial Chamber.<sup>624</sup> All judges were to be appointed for terms of three years, with some flexibility to extend these terms.<sup>625</sup> Special magistrates would be appointed to a renewable, three-year term.<sup>626</sup>

The bill set forth qualifications for judges, requiring that they: (1) possess the qualifications required in their respective countries for appointment to the highest judicial offices; (2) have extensive experience in criminal law and practice; (3) be of recognized professional competence; (4) be of good character and integrity; and (5) be impartial.<sup>627</sup> It further required that the process take into account gender equality, as well as the judges' experience in criminal law, international criminal law, and international human rights law.<sup>628</sup>

## ***Prosecutor***

The bill tasked a prosecutor's office to investigate and prosecute cases against persons responsible for crimes falling within the tribunal's jurisdiction, based on its own information and that from other sources.<sup>629</sup> The prosecutor would be an international official appointed by Kenya's president with the agreement of the prime minister, based on a list of nominees submitted by the Panel of Eminent African Personalities.<sup>630</sup> The legislation required the prosecutor to meet the same qualifications as the tribunal's judges,<sup>631</sup> and once in office, to act with independence.<sup>632</sup> The bill specified that the prosecutor's office would consist of prosecution and investigation divisions.<sup>633</sup>

### ***The Registrar***

Under the bill, an international registrar would be responsible for the tribunal's administration and management. Kenya's president would appoint the registrar, who would be required to possess nearly the same qualifications as the prosecutor and judges,<sup>634</sup> following the same procedure as that for the prosecutor.<sup>635</sup> The president, with the prime minister's agreement, would also appoint a Kenyan deputy registrar from a list of individuals nominated by the Parliamentary Committee.<sup>636</sup> The legislation specifically tasked the registrar with establishing a victims and witnesses unit.<sup>637</sup>

### ***Defense Office***

The bill would have created a defense office led by a Kenyan chief defense counsel appointed through the same procedure as the prosecutor.<sup>638</sup> The head of office, assisted by a deputy,<sup>639</sup> would be required to meet qualifications similar to those of the registrar.<sup>640</sup> The defense office would be responsible for assuring protection of the rights of the accused and, more specifically, supporting defense counsel and indigent accused through providing legal research and advice, collecting evidence, and making appearances before judges for some matters.<sup>641</sup>

### **Prosecutions**

None.

### **Legacy**

The failure of the proposal to establish the STK, together with the collapse of the Kenya cases at the ICC (see text box) has meant that, as of late 2017, there had been almost no criminal accountability for the postelection violence. There had been no prosecutions at all of mid- or senior-level figures implicated in the crimes, and no prosecution of extensive crimes of sexual violence.<sup>642</sup> This impunity persisted even as Kenyan institutions developed laws and institutions ostensibly meant to end it.

At the end of 2008, parliament passed the International Crimes Act, which granted jurisdiction over Rome Statute crimes to the High Court.<sup>643</sup> However, it remained unclear whether the act could ever be applied retroactively to cover the period of the postelection violence.<sup>644</sup> In October 2013, lawmakers opposed to the ICC proposed repealing the act as part of their broader initiative to withdraw Kenya from the Rome Statute.<sup>645</sup>

On May 9, 2012, Kenya's Judicial Service Commission (JSC) set up a working committee mandated to study and make recommendations on the viability of establishing an International Crimes Division (ICD) in the High Court of Kenya. After visiting several countries to study various approaches to domestic prosecution of international crimes, the committee produced its first report in October 2012. The report acknowledged Kenya's obligations under the Rome Statute and noted that the ICC could not handle all postelection violence cases. In recommending the establishment of the ICD, it also took note of the failure to establish the STK.<sup>646</sup>

The JSC proposal suggested that the ICD have a mandate beyond the crimes defined in the International Crimes Act. Beyond genocide, war crimes, and crimes against humanity, the JSC proposed that the ICD mandate should also include such transnational crimes as terrorism, piracy, human trafficking, drug trafficking, money laundering, and cybercrime.<sup>647</sup> Kenyans for Peace and Truth with Justice criticized this proposed expansion, arguing that it would distract the ICD from dealing with Rome Statute crimes, thus giving "the illusion of movement in the search of justice for post-election violence crimes while in reality the situation would remain unchanged."<sup>648</sup> The JSC proposal included a call for the establishment of a special prosecution division for international crimes, independent of Kenya's director of public prosecutions (DPP), but the DPP questioned the constitutionality of such an action.<sup>649</sup> As of 2017, government officials continued to reference the creation of the ICD as a pending matter.<sup>650</sup>

In April 2012, the DPP established a "multi-agency task force," made up of officials from the DPP, the Attorney-General's Office, the police, and other government offices. The task force had a mandate to review all post-election violence cases and facilitate prosecutions.<sup>651</sup> In the course of its work, it reviewed 6,000 cases and identified 1,716 suspects and 420 potential witnesses. The cases included 150 files on sexual and gender-based violence. However, the task force's work ended with an announcement that the criminal files were being closed because there was insufficient evidence to support prosecution.<sup>652</sup> In sworn testimony in 2017, a senior Kenyan prosecutor testified that there was an active ICD within the DPP's office, but there remained no clear public indications of progress on post-election violence (PEV) cases.<sup>653</sup>

The prosecutor's testimony came in a constitutional reference case before Kenya's High Court brought by survivors of sexual violence challenging the failures of state officials and institutions to prevent or punish crimes committed during the post-election violence. Similar litigation before the High Court was being pursued in two other cases: on behalf of those internally displaced during the PEV and on behalf of police-shooting victims.<sup>654</sup>

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## The Kenya Cases at the International Criminal Court

In March 2010, ICC Prosecutor Luis Moreno Ocampo opened investigations into Kenya's post-election violence, and in December 2010, he announced that he sought summons against six high-profile individuals in Kenya: William Ruto, Henry Kosgey, and Joshua arap Sang (all of the ODM party); and Francis Muthaura, Uhuru Kenyatta, and Hussein Ali (all of the PNU party). The ICC Pre-trial Chamber confirmed charges against four of the suspects in January 2012, but dropped charges against Henry Kosgey and Hussein Ali.<sup>655</sup> In May 2012, the ICC rejected final admissibility challenges by the defendants, but the prosecutor dropped all charges against Muthaura after a key witness recanted his testimony.

Uhuru Kenyatta and William Ruto were elected as president and deputy president in April 2013, in a partnership variously seen as one of ethnic reconciliation or a pact born of shared opposition to the ICC. The election campaign was marked by attacks on the court as a neocolonialist institution. The joint trial of Ruto and Sang began in September 2013, while prosecutors sought delays to the start of the trial of Kenyatta, citing a lack of state cooperation. Prosecutor Fatou Bensouda ultimately withdrew charges against Kenyatta in 2014, and the court later dropped the case against Ruto and Sang in 2016, finding insufficient evidence to proceed. Prosecutors blamed the unwillingness of Kenyan authorities to cooperate and cited alleged government tampering and intimidation of witnesses. In 2013 and 2015, ICC judges approved warrants of arrest against a total of three Kenyan individuals for obstructing the administration of justice, but as of late 2017, Kenya had failed to enforce these warrants.

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## Financing

The 2009 legislation provided that the STK would be funded through appropriations from parliament, "such monies or assets as may accrue to the tribunal in the course of the exercise of its powers or the performance of its functions," and grants or donations from other sources, so long as they were not intended to influence the tribunal's work.<sup>656</sup>

## Oversight and Accountability

The bill did not provide for an oversight body for the STK. However, it did include procedures for removing and replacing judges in cases of misconduct, conviction, or infirmity.<sup>657</sup>

# **LIBERIA: PROPOSED EXTRAORDINARY CRIMINAL COURT**

## **Conflict Background and Political Context**

Liberia experienced two brutal civil wars between 1989 and 2003 that caused the deaths of some 250,000 Liberians and displaced over a third of the population. Armed conflict began in 1989 after decades of tension between the indigenous majority and the Americo-Liberian minority that had historically ruled the country. In 1990, the Independent National Patriotic Front of Liberia (INPFL), led by Prince Johnson, captured and killed President Samuel Doe, who had taken control of the government in a 1980 coup. Johnson's INPFL then began to fight the National Patriotic Front of Liberia (NPFL), led by Charles Taylor. These and other armed factions signed as many as 15 peace agreements in the following years, as they battled for control over natural resources and territory.<sup>658</sup> In 1997, following the 1996 Abuja Peace Agreement, Charles Taylor won presidential elections, amid chants from his supporters: "He killed my pa, he killed my ma, I'll vote for him."<sup>659</sup> A fragile peace held for two years, but fighting broke out again in 1998. New armed rebel movements, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), backed by Guinea and Côte d'Ivoire, respectively, put increasing pressure on the Taylor regime. In 2003, the Special Court for Sierra Leone (SCSL) charged Taylor with war crimes and crimes against humanity for his role in Sierra Leone's war. (See the separate profile on the Special Court for Sierra Leone, later in this annex.) In August 2013, mounting international pressure combined with armed opposition caused Taylor to agree to a comprehensive peace agreement with LURD and MODEL, resign the presidency, and go into exile in Nigeria.

Liberia held national elections in October 2005, bringing Ellen Johnson Sirleaf to power as Africa's first female president. She was re-elected in late 2011. UN peacekeeping forces (UNMIL) were deployed in 2003, and at the end of 2011, nearly 10,000 troops and personnel remained in Liberia. In 2006, Charles Taylor was arrested in Nigeria and transferred to the SCSL. Even after Taylor's departure and eventual conviction, however, many of his wartime allies and leaders of other factions implicated in war crimes and crimes against humanity maintained senior positions in the Liberian Senate, House of Representatives, and political parties. The joint self-interest in impunity across otherwise rival factions has made it politically difficult to gain momentum for any domestic prosecution mechanism for wartime atrocities.

Powerful elites from the civil war maintain their influence in Liberia. After serving two six-year terms in power—the constitutional limit—Johnson Sirleaf’s tenure ended in 2017. Twenty candidates ran for president in the 2017 elections. Jewell Howard Taylor, Charles Taylor’s ex-wife, was the running mate of leading candidate George Weah. In October 2017, Weah was headed to a run-off election against Liberian Vice President Joseph Boakai after no candidate was able to gain 50 percent of the vote in the October 10, 2017, election.<sup>660</sup> Charles Taylor, speaking from his prison in the United Kingdom, showed keen interest in the presidential elections, telling supporters to avoid people who would betray his party—which is in a coalition with George Weah’s Congress for Democratic Change.<sup>661</sup>

### **Existing Justice-Sector Capacity**

Liberia’s gutted justice sector has made significant capacity improvements since the end of the civil war, including mobile court projects, paralegal community resolution programs, constitutional reforms in 2011, and the establishment of an anticorruption judicial framework. The general infrastructure of the country remains limited, and the judicial sector is severely under capacity, especially outside the capital. A 2011 report found that “the justice sector suffers from a lack of public defenders, case backlogs, prolonged pretrial detention, and prison overcrowding. ... Security at correctional facilities is inadequate, and prison breaks are common.”<sup>662</sup> The current assessments call into question the capacity of the justice sector to effectively prosecute even lower-level perpetrators, as called for by the Truth and Reconciliation Commission (TRC).

### **Existing Civil Society Capacity**

Civil society was instrumental in establishing peace in Liberia. Some sections of civil society participated in peace talks in Accra. However, civil society faced many challenges in the immediate post-conflict period. In particular, there was a lack of leadership and organizational development capacity; gaps emerged when some civil society leaders joined the government; and there was a general lack of funding. Funding and skills were often focused on urban areas, leaving outer regions of the country underserved. Moreover, civil society work became funding-driven as groups competed for funding from international NGOs and donors. Organizations struggled to mature and increase their influence as they shifted from political advocacy to promoting citizen interests and ensuring government accountability.<sup>663</sup>

In the years since, civil society has adapted to support new challenges facing Liberia, such as prosecution for grave crimes and monitoring the extractive industry. Civil society has strongly advocated for the creation of a special tribunal to try grave crimes in Liberia. The Global Justice and Research Project has documented crimes committed during Liberia's civil wars and supported extraterritorial prosecutions in several cases, working together with the Geneva-based legal organization Civitas Maxima.<sup>664</sup>

Despite advancements, challenges for civil society persist, such as the rural-urban dichotomy and struggles for funding. Organizations based in the Monrovia still tend to have more access to funding and skilled staff, translating to more capacity for program implementation and monitoring and evaluation. Urban-based civil society organizations continue to rely on international donors for funding, putting them at a risk when international attention shifts away from Liberia.<sup>665</sup>

## **Creation**

The Truth and Reconciliation Commission (TRC, see text box) proposed in a draft statute that the Extraordinary Criminal Court for Liberia (ECCL) be created as a fully domestic legal body under Liberian law, composed of international and national judges and prosecutors (similar to the Extraordinary Chambers in the Courts of Cambodia, but without an underlying bilateral agreement between Liberia and the UN).<sup>666</sup>

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## **Truth and Reconciliation Commission**

The peace agreement called for the creation of a TRC, but wrangling over the appointment of commissioners, and funding delayed its implementation. A TRC selection panel, established by the TRC Act,<sup>667</sup> screened more than 150 candidates nominated by the Liberian public and generated a short list of 15 names. In February 2006, President Johnson Sirleaf appointed nine commissioners and inaugurated the commission. The TRC was mandated to investigate Liberia's conflict history from 1979 to 2003 and required to issue recommendations on prosecution mechanisms.<sup>668</sup> The authorizing TRC Act required the government to act on and implement the TRC's recommendations, stating that the president must "show cause" for noncompliance.<sup>669</sup>

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The TRC released its final report in December 2009, igniting a fierce debate in Liberian society and politics about the proper means to address the past.<sup>670</sup> The report recommended political leaders, including Senator Prince Johnson and President Ellen Johnson Sirleaf, be banned from holding public office for 30 years.<sup>671</sup> The government largely ignored the calls for lustration, and in January 2011, Liberia's Supreme Court ruled this recommendation unconstitutional.<sup>672</sup> The direct naming of key members of the ruling political class led some former warlords to publicly threaten a return to violence.<sup>673</sup>

The report named 116 perpetrators to be prosecuted for the violence. High-level prosecutions would be carried out by an Extraordinary Criminal Court for Liberia (the ECCL), a mixed chamber within Liberia, while domestic courts would try 58 lower-level perpetrators.<sup>674</sup> The TRC's report included a detailed draft statute for the mixed chamber.

Since Liberia's civil war, various civil society groups have advocated for a special war crimes court, but the TRC's recommendation was by far the most detailed and comprehensive call for one. Because the temporal and territorial jurisdiction of the SCSL did not cover international crimes committed by Charles Taylor (or anyone else) on the territory of Liberia, observers decried the impunity gap and called for the creation of a Special Court for Liberia, or alternatively, the expansion of the SCSL's jurisdiction.<sup>675</sup> The Liberian government postponed serious discussions about prosecutions until after the completion of the TRC's work (an approach shared by the TRC's chairman),<sup>676</sup> but has made little progress in seriously considering the TRC's recommendations.

The recommendations in the report met with mixed reactions from the public and the international community. A coalition of 36 Liberian civil society organizations voiced strong support for the accountability proposals and some groups called for the resignation of President Johnson Sirleaf and other government officials.<sup>677</sup> Other civil society actors were more circumspect, fearful that prosecutions would unravel Liberia's postwar economic development and political stability, and suspicious that calls for Johnson Sirleaf's resignation were motivated by political revisionism and opportunism among former Taylor supporters rather than genuine appeals for accountability.<sup>678</sup> A 2011 population-based survey on perceptions about transitional justice approaches found that a minority of Liberians supported criminal trials for perpetrators.<sup>679</sup> The fractious and politicized debate in civil society around the proposals for an international court mirrors the fractious nature of Liberian politics.

## **Legal Framework and Mandate**

The ECCL’s proposed subject matter jurisdiction included “gross violations of human rights, serious humanitarian law violations and egregious domestic crimes and any other relevant crimes.”<sup>680</sup> Existing domestic courts would prosecute crimes “lesser than” gross violations. The ECCL’s broad jurisdiction over such domestic crimes as “official oppression” and financial offenses could serve to expose the nexus between the perpetration of grave crimes and financial crimes and exploitation, but some observers noted that it could also overburden the prosecution.<sup>681</sup>

The ECCL would use international definitions of crimes, standards of proof, and modes of individual criminal liability. Definitions for domestic crimes within the ECCL’s mandate—including some forms of sexual violence—would be supplied by national law. Critics identified shortcomings in some of the criminal modes of liability and definitions in the proposed statute, as these were not in accordance with international norms, particularly provisions relating to sexual violence.<sup>682</sup>

The court’s temporal jurisdiction would encompass January 1979 to October 14, 2003. Personal jurisdiction excluded minors under 18 years of age. The ECCL would have concurrent and primacy jurisdiction with national courts, “except with respect to gross violations of human rights and serious humanitarian law violations,” and the ECCL would have the power to “remove and transfer proceedings to any national court in Liberia.”<sup>683</sup>

## **Location**

The court would be seated in the Liberian capital, Monrovia, and could “establish alternative sites to conduct hearings as it deems necessary.”<sup>684</sup>

## **Structure and Composition**

The ECCL would comprise three organs—a two-tiered chambers, a prosecution office, and a Registry.<sup>685</sup> Foreign attorneys could be admitted to practice before the court under special procedures established by the court’s internal rules of evidence and procedure.<sup>686</sup>

Each chamber would contain a majority of internationally appointed judges. The Appeals Chamber would have five judges—two appointed by the president of Liberia, and one each by the UN Secretary-General (UNSG), the president of the EU, and the chairman/president of the African Union (AU). The Trial Chamber would have three judges: one appointed by the president of Liberia and two by the Secretary-General (with two alternate Liberian judges). At least one-third of all judges were required to be women, and foreign judges would be granted full diplomatic privileges and immunities. All judges would be appointed for five-year terms and could only be removed from office by the Liberian legislature after a request “by the court itself.”<sup>687</sup> A majority of the judges would elect the court’s president and vice president.

The Liberian president, in consultation with the UNSG, would appoint the head prosecutor; prosecutorial staff would be international and national, with “special consideration” to the appointment of gender-crime and juvenile justice specialists. The registrar and two deputy registrars would be foreign nationals appointed by a majority of the judges. The registrar would be required to have “over 10 years of legal experience including work with international courts and/or internationalized domestic courts.”<sup>688</sup> Interpreters and transcribers would be required to be provided when requested by one of the parties. The TRC-proposed statute is unclear as to whether the ECCL would be mandated to appoint and retain defense counsel for indigent accused.

While the TRC report called for the enactment of a national witness protection statute, witness protection is not mentioned in the draft statute.<sup>689</sup> Nor does the draft statute envision a specific outreach or communications office; it only provides that the president would be responsible for “representing the court in its external relations with state bodies and organizations” (although such an office could be set up internally by the court).<sup>690</sup>

Two special features were included in the TRC’s draft statute. The court, in consultation with the president, would be authorized to enter into extradition agreements with foreign states (and allow for judgments in absentia); and the court could “conduct proceedings in foreign courts” in cases that posed national security risk as determined by the Liberian president and “with the consent” of the court’s president.

## Prosecutions

As of late 2017, the ECCL had not been created, and there had been no domestic prosecutions for grave crimes committed during Liberia's civil wars. The TRC report did, however, make recommendations with regard to prosecutions.

The TRC report premised prosecutions on conditional amnesties, at times inconsistently. While its draft statute expressly rejects amnesties, elsewhere the TRC report recommended that nearly 40 individuals, "though found to be responsible," not be prosecuted because "they cooperated with the TRC process, admitted to the crimes committed and spoke truthfully before the Commission and expressed remorse for their prior actions during the war."<sup>691</sup> This approach most resembles that of the South African TRC model, which granted partial immunity from criminal liability in exchange for full and truthful testimony. The report named 120 individuals for prosecution by the ECCL, including persons associated with all major warring factions.<sup>692</sup>

Human Rights Watch criticized this number of recommended prosecutions as being overly broad and unrealistic, recommending that any specialized tribunal target only a select number of high-level perpetrators and that the prosecutorial mandate allow for flexibility, given likely resource and capacity constraints.<sup>693</sup>

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## Procedimientos extraterritoriales para crímenes graves en Liberia

Despite a lack of prosecutions for grave crimes within Liberia, there have been some proceedings for crimes committed during Liberia's civil war in other domestic jurisdictions. The United States, the United Kingdom, Switzerland, Belgium, and the Netherlands have all sought prosecution of individuals suspected of committing grave crimes in Liberia.

In the Netherlands, legal proceedings began in 2005 against Guus Van Kouwenhoven, a Dutch businessman accused of selling arms to Liberia and being involved in war crimes committed there. In April 2017, after a protracted legal battle reaching all the way to the Supreme Court of the Netherlands (*de Hoge Raad*), a Dutch appeals court convicted and sentenced Van Kouwenhoven to 19 years in prison for his complicity in war crimes and his involvement in arms trafficking for Charles Taylor.<sup>694</sup>

In October 2017, Mohammed Jabbateh, aka “Jungle Jabbah,” stood trial in the United States on charges of immigration fraud and perjury.<sup>695</sup> A federal court in Philadelphia found him guilty on two counts of immigration fraud and two counts of perjury stemming from statements he made in connection with an application for asylum and permanent residence in the United States. According to the indictment, he provided false information about his wartime activities in Liberia. During the first civil war, Jabbateh was a commander in the United Liberation Movement for Democracy (ULIMO) and later ULIMO-K after the group split into two factions. He was accused of committing or ordering his troops to commit atrocity crimes but was never held to account for his role in Liberia’s civil war. Although the U.S. charges did not directly relate to these grave crimes, the prosecutor had to prove that he committed, ordered, or oversaw the commission of war crimes in order to establish that he committed fraud and perjury.

Similar charges were brought by U.S. prosecutors against former Liberian Defense Minister Jucontee Thomas Smith Woewiyu in 2014<sup>696</sup> and rebel leader George Boley in 2012.<sup>697</sup> U.S. prosecutors convicted Chuckie Taylor, Charles Taylor’s son, under the Alien Tort Statute for crimes he committed in Liberia. In 2009, a U.S. federal court sentenced Taylor to 97 years in prison for torture and summary executions committed while he was head of the Anti-Terrorist Services while his father was president of Liberia from 1997 to 2003.<sup>698</sup>

Other accused await trial in other jurisdictions:

- In June 2017, U.K. authorities arrested Agnes Reeves Taylor, former wife of Charles Taylor, for her alleged role in torture committed during Liberia’s first civil war. She allegedly committed torture while working with the NPFL.<sup>699</sup>
- In 2014, Swiss police arrested Alieu Kosiah and charged him with war crimes. Kosiah was a former commander of ULIMO and is being held on suspicion of having committed war crimes between 1993 and 1995. A group of nine Liberians filed a complaint against him with the Swiss prosecution.<sup>700</sup>
- Belgian authorities arrested Martina Johnson in 2014. Johnson was a commander in Taylor’s NPFL during Liberia’s first civil war. She is suspected of having participated in many different crimes, including in relation to the notorious “Operation Octopus” attack on Monrovia in 1992.<sup>701</sup>

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## Legacy

As of late 2017, Liberia had made almost no progress in implementing the recommendations of the TRC report, including with regard to the establishment

of a mixed international chamber in the domestic courts to prosecute serious crimes. Several commissioners distanced themselves from the report in the political firestorm following its release. In March 2010, President Johnson Sirleaf requested that the Ministry of Justice and the Law Reform Commission review the TRC report.<sup>702</sup> In May 2010, the International Center for Transitional Justice called for investigations to be carried out by an independent national commission and for an assessment mission to examine the readiness of the domestic judicial system for war crimes prosecutions.<sup>703</sup> A Universal Periodic Review of Liberia for the UN Human Rights Council in January 2011 reported, “Liberia stated that, owing to financial constraints, the final report of the Commission had yet to be broadly distributed and explained to the average citizen, and thus that any discussion regarding the establishment of an extraordinary criminal court might prove to be premature.”<sup>704</sup> In 2017, it appeared likely that for the foreseeable future, the only prosecutions for grave crimes in Liberia would continue to be in jurisdictions outside the country.

## **Financing**

The TRC recommended that the Liberian government fund the ECCL, supported by voluntary contributions from donor states, international institutions, NGOs, and individuals.<sup>705</sup> The court would institute a two-tiered remuneration system, with international staff salaries “commensurate with international standards as decided by the entirety of the Court and the President of the Republic of Liberia.”<sup>706</sup> For local staff, the “Registry will determine a salary scale ... commensurate with professional staff of the Supreme Court of Liberia or as otherwise determined by the President of the Court.”<sup>707</sup>

## **Oversight and Accountability**

The TRC-recommended statute included no explicit provisions on oversight or accountability mechanisms for the ECCL. The draft statute did provide for some oversight into the appointment of personnel. For example, the statute states that the ECCL prosecutor should be appointed “in consultation with” the UNSG, although this would not be sufficient to prevent an appointment based solely on political allegiance. The statute also provides that staff could be excluded from working at the ECCL on the basis of “public perception of involvement in abuses,” which is a relatively low threshold that could potentially lead to political abuse, as happened with the de-Baathification laws in the Iraq High Tribunal. (See the separate profile of the Iraqi High Tribunal in Annex 5.)

## RWANDA

The Rwandan genocide of 1994 resulted in the killing of up to one million people in around 100 days, as well as the rape and other forms of sexual violence against tens (or reportedly up to hundreds) of thousands of women and girls. This annex covers two of the main approaches to accountability for grave crimes in Rwanda. The first, established in 1994, is the United Nations International Criminal Tribunal for Rwanda (ICTR). The second is a more traditional, “grassroots” form of justice known in Rwanda as *Gacaca*. Common sections covering background on the conflict and the capacities of the domestic justice sector and civil society precede separate detail on each mechanism. Also included in the annex is an overview of proceedings for grave crimes in Rwanda’s national courts.

### Conflict Background and Political Context

On April 6, 1994, a plane carrying Rwandan President Juvénal Habyarimana and President Cyprien Ntaryamira of Burundi was shot down on its approach to Kigali airport, killing all onboard.<sup>708</sup> Following the deaths of the two presidents, widespread killings, marked by both political and ethnic dimensions, began in Kigali and spread to other parts of Rwanda.<sup>709</sup> Over the course of about 100 days, somewhere between 800,000 and one million men, women, and children—the vast majority of them of Tutsi ethnicity, or Hutus thought to be sympathetic toward Tutsis—were slaughtered. In 2006, the Appeals Chamber of the ICTR determined that during these 100 days there was a genocide in Rwanda against the Tutsi ethnic group, and that this fact is—from a legal perspective—one of common knowledge, such that it is beyond dispute.<sup>710</sup> Estimates put the percentage of Tutsis killed during the Rwandan genocide at about 75 percent of Rwanda’s Tutsi population at the time.<sup>711</sup>

Decades of intercommunal Tutsi-Hutu violence in Rwanda were exacerbated by colonial-era divide-and-rule tactics. By 1994, an extremist Hutu government was in power and actively stoking popular fears of a return to oppressive rule of the country by a privileged Tutsi minority. The attack on the plane carrying Habyarimana and Ntaryamira triggered implementation of the Rwandan government’s plans to exterminate Tutsis in the country.

The international community failed to halt the killings or to prevent the genocide.<sup>712</sup> A UN peacekeeping mission called the UN Assistance Mission for Rwanda (UNAMIR), led by Major-General Roméo A. Dallaire, had been in Rwanda since

October 1993 to monitor the implementation of the Arusha Peace Agreement.<sup>713</sup> The small UN force was ill equipped to halt the violence, and the UN Headquarters never responded to a request from Dallaire to allow the mission to use force in response to crimes against humanity and other abuses. The Security Council withdrew nearly all of its peacekeepers during the height of the violence.<sup>714</sup>

In May 1994, the Security Council increased the number of UNAMIR troops to 5,500 (“UNAMIR II”),<sup>715</sup> although it took almost six months for Member States to provide troops. UNAMIR II’s mandate expired in March 1996. Pending the arrival of UNAMIR II troops, France deployed its military in a UN Security Council-authorized operation (“Operation Turquoise”) to create a humanitarian assistance corridor.<sup>716</sup> Tutsi rebel forces, known as the Rwandan Patriotic Front (RPF) and led by Paul Kagame, made their way to the capital city of Kigali in early July 1994.

After the genocide, one to two million Rwandan Hutus fled across the border into the eastern Democratic Republic of Congo (DRC). The majority of the refugees were civilians, but interspersed among the population were thousands of armed members of the former Rwandan army (FAR) and security forces. Hutu paramilitaries known as *Interahamwe* and ex-FAR forces posed a serious threat to Rwanda’s new government and led to Rwanda’s invasion of eastern DRC in 1996.

Despite initially requesting the Security Council to establish an international criminal tribunal, the Rwandan government has had a sometimes-difficult relationship with the court. During negotiations to establish the tribunal, the Rwandan government objected to several points: the location in Tanzania (rather than in Rwanda), the limited temporal jurisdiction (the government wanted it to begin earlier to cover atrocities committed before 1994), the tribunal’s primacy over Rwandan courts, and its exclusion of the death penalty.<sup>717</sup> Relations were intermittently fraught, with the result that cooperation on the transfer of witnesses from Rwanda was sometimes interrupted. In April 1997, “relations with the Tribunal reached an all-time low when there was a demonstration in Kigali ... against the Tribunal by Rwandese organizations representing survivors and victims of the 1994 genocide.”<sup>718</sup> In 1999, the Rwandan government severed diplomatic relations with the tribunal, although later reinstated them. Relations improved somewhat after the court began transferring cases to Rwandan domestic courts for prosecution in 2011.

The most important bone of contention between the Rwandan government and the ICTR throughout the life of the tribunal regarded crimes alleged to have been committed by the RPF in the course of overthrowing the government to end the

genocide. President Paul Kagame's government consistently resisted attempts to investigate actions of the RPF in ending the genocide in 1994. In her memoir published in 2008, former ICTR Prosecutor Carla Del Ponte revealed that in 2000 she had opened an investigation into possible RPF crimes, which her office had initially conducted secretly, knowing the government would oppose it.<sup>719</sup> In 2003, the UN Security Council decided not to renew Del Ponte's appointment as chief prosecutor of the ICTR when her term expired,<sup>720</sup> though she continued as chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). Del Ponte viewed this as a forced exit due to pressure from the Rwandan government.<sup>721</sup> Her successor, Hassan Jallow, denied that investigations against RPF members had been delayed due to threat of noncooperation from Rwanda and maintained that work continued on those files. He asserted that his office dealt with those cases just like any other and decisions whether to indict were taken solely on the basis of evidence and the law and "not on extraneous considerations or feelings of maintaining 'balancing acts' by indicting 'all sides' to the Rwandan armed conflict."<sup>722</sup>

## **Existing Justice-Sector Capacity**

Many judges, lawyers, and other judicial staff were killed during the genocide, and much of the country's infrastructure was destroyed.<sup>723</sup> Nevertheless, from the late 1990s, the Rwandan authorities arrested thousands of people suspected of involvement in the genocide and beginning in 1996 started bringing them to trial. By 2001, more than 100,000 persons were still detained, as it proved impossible to conduct proceedings effectively while at the same time recruiting new staff and rebuilding the infrastructure of the judicial system.<sup>724</sup> The government sought to speed up trials by establishing the Gacaca courts (see below) and introducing streamlining and other reforms of the justice system. However, in 2008, Human Rights Watch assessed that despite improvements, judges were subject to pressure from the executive, and fair trial rights, equal access to justice, humane conditions of detention, and other basic conditions were not guaranteed.<sup>725</sup> Not until December 2011 did the ICTR agree to transfer the first case to Rwanda to face trial, determining for the first time that the Rwandan judiciary had the capacity and independence to conduct national prosecutions.<sup>726</sup> Some states followed suit, but as late as 2017, the tribunal refused to extradite four genocide suspects to Rwanda on the basis there was still a real risk they might suffer a flagrant breach of fair trial rights, citing concerns about independence of the judiciary and its vulnerability to political pressure as a key reason.<sup>727</sup>

## **Existing Civil Society Capacity**

Commentators have labeled Rwandan civil society as primarily focused on service delivery and characterized by heavy state dependency and lack of independence.<sup>728</sup> Human rights organizations, the media, and lawyers who criticize official actions or policy face intimidation and interference.<sup>729</sup> In 2008, Human Rights Watch reported that members of the Rwandan Human Rights League that monitored and reported on genocide trials and lawyers who defended persons accused of genocide in the Rwandan courts felt threatened in Rwanda, and several were forced to leave the country.<sup>730</sup>

## **International Criminal Tribunal for Rwanda**

### **Creation**

The UN Security Council (UNSC) adopted resolution 955 on November 8, 1994, creating the ICTR. It was the second instance where the UNSC invoked Chapter VII to create an ad hoc international criminal tribunal, imposing a binding obligation on all UN Member States to cooperate fully with the new entity.<sup>731</sup> Its creation grew from initiatives launched in the midst of the ongoing genocide.

After the failure of the international community to prevent the genocide, and amid its ongoing failure to halt it, the UN acted quickly to deploy two human rights and investigative missions. The UN Human Rights Commission appointed a Special Rapporteur in May 1994,<sup>732</sup> and the Secretary-General appointed a Committee of Experts four days before the RPF took Kigali. The UN High Commissioner for Human Rights Jose Lasso also visited Rwanda in May and produced a preliminary report.<sup>733</sup> As early as July 1994, the UN discussed creating an ad hoc tribunal on the model of the ICTY, with the United States using back-channel diplomatic engagement to convince the fledgling Rwandan government to issue a request to the UNSC.<sup>734</sup>

The UN gave its Commission of Experts on Rwanda four months to report, but the United States pressured the commission to issue an interim report “recommending the establishment of an international tribunal as soon as possible.”<sup>735</sup> The commission submitted its report to the Security Council in early October, recommending that the council amend the ICTY Statute to include the Rwandan conflict.<sup>736</sup>

The permanent five members of the Security Council initially proposed several structures for an international tribunal for Rwanda. Russia proposed creating a “separate international entity patterned on the Yugoslav court.”<sup>737</sup> The U.S. proposal was to “use the Statute, infrastructure, and staff of the Yugoslav court to initiate prosecutions of Rwandan war crimes.”<sup>738</sup> The resulting compromise, proposed by New Zealand, created “a separate entity but with ‘bridges’ between the Yugoslav and Rwandan Tribunals in a common appellate chamber and a common chief prosecutor.”<sup>739</sup> (In 2003, the UN appointed separate prosecutors for the ICTY and the ICTR.) Despite having initially signaled its support for an international criminal tribunal, Rwanda voted against Resolution 955, in part because of its opposition to the exclusion of the death penalty and the temporal mandate of the tribunal, which included the period after the RPF assumed control of the country in July 1994. Nevertheless, roughly six months after the genocide, the UNSC had established the ICTR.

In February 1995, the Security Council resolved that the tribunal would be located in Arusha, Tanzania, with a prosecutor’s office located in Kigali, Rwanda.<sup>740</sup> The first two years were marked by serious administrative problems and exceedingly slow preparations. The UN Security Council and General Assembly directly handled the appointments of judges and other personnel, contributing to lengthy delays. The court faced a one-year delay in occupying its premises in Arusha.<sup>741</sup> The General Assembly did not elect judges until May 1995, and by mid-1995, the UN had still not approved a budget. In addition, “the politically ideal locations—Arusha as a seat for the Tribunal and Kigali as the location of the Prosecutor’s office—had turned into administrative nightmares. ... Both lacked basic infrastructure, adequate buildings, computers, furniture, telephone services, and transport connections to the outside world. ... Conditions in both made it difficult to recruit competent staff.”<sup>742</sup> In 1996, the UN ordered an audit and investigation, which found major deficiencies and mismanagement in the ICTR’s Registry and Office of the Prosecutor.<sup>743</sup> The report triggered the resignation of the registrar and the deputy prosecutor as well as other personnel changes. Following the report, the UN redoubled efforts to operationalize the tribunal. In 1998, Amnesty International published a study noting ongoing deficiencies in the court’s operation, including long delays in commencing trials for detained suspects, a weak witness protection program, and poor outreach.<sup>744</sup>

The tribunal closed in December 2015, having delivered its final judgment on appeal the same month. It handed over its residual functions to the UN Mechanism for International Criminal Tribunals (MICT), established in 2010.<sup>745</sup> These functions include tracking remaining fugitives, conducting any further proceedings (such as

review, retrial, or appeal), referring cases to national jurisdictions, protecting victims and witnesses, and supervising enforcement of sentences.

## **Legal Framework and Mandate**

The tribunal exercised jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994.”<sup>746</sup> A plenary session of judges adopted Rules of Procedure and Evidence for the tribunal in June 1995, and the judges amended these numerous times until 2015.<sup>747</sup>

The Security Council established the ICTR under Chapter VII authority, obligating UN Member States to comply with the court’s orders. The Chapter VII authority gave the tribunal a powerful tool in obtaining cooperation from third party states,<sup>748</sup> but also meant that the administration of the tribunal was subject to onerous and bureaucratic UN rules and regulations.

The Security Council designed the ICTR’s temporal jurisdiction so that it would include the “planning stages” of the genocide. However, Rwandan authorities wanted the jurisdictional start date to begin in 1990, so as to include massacres in 1991, 1992, and 1993. The end date conveyed the council’s determination to include violations that reportedly continued after the RPF seized power in July 1994 (the Rwandan government, for the same reasons, opposed the jurisdictional end date). The ensuing compromise meant that the ICTR did not have an open-ended mandate like the ICTY. The territorial jurisdiction—including crimes committed outside of Rwanda—was most likely included “as a deterrent to activities of refugee camp leaders in neighboring countries or as a set up for the arrest and extradition of genocide planners.”<sup>749</sup>

The ICTR Statute expanded provisions of international humanitarian law by defining “crimes against humanity” in the Nuremberg Charter as applicable in times of peace, international armed conflict, and non-international armed conflict. In addition, by incorporating the “prohibited acts” under Common Article 3 and Protocol II of the Geneva Conventions into the Chapter VII-endowed statute, the Security Council arguably extended the reach of those provisions even to states that had not ratified Protocol II.

The UN Security Council adopted a statute for the MICT in 2010. The MICT was to comprise two branches, one for the ICTR, which commenced functioning on July 1, 2012, and the other for the ICTY. The statute provided that the mechanism will continue the material, territorial, temporal, and personal jurisdiction of the ICTR and ICTY.<sup>750</sup> Transitional provisions were included in Annex 2 to the Security Council resolution. The judges of the MICT adopted Rules of Procedure and Evidence for the mechanism on June 8, 2012.<sup>751</sup>

## **Location**

The Security Council established the seat of the tribunal in Arusha, Tanzania.<sup>752</sup> The Appeals Chamber, shared with the ICTY, sat in The Hague. The MICT has a branch in Arusha and another in The Hague.

The ICTR did not occupy its premises until November 1995. The facilities included four courtrooms equipped with modern technology and large public galleries that can accommodate up to 100 persons. Suspects were initially held in the ordinary Tanzanian prison in Arusha. A 56-cell United Nations Detention Facility (UNDF) within the Arusha prison was constructed to house ICTR detainees.

The choice of Arusha reflected a compromise between those arguing for proceedings to be located in The Hague, and the Rwandan government, which argued for the court to be located in Kigali. Arusha was chosen as an African seat and was thought to afford advantages based on close proximity to Kigali, which was hoped would lead to more resonance with victim communities. The Appeals Chamber of the ICTR was located in The Hague. An ICTR outreach office and information center was located in Kigali.

## **Structure and Composition**

The three main organs of the ICTR were chambers, prosecution, and Registry. A defense liaison unit was housed within the Registry. The ICTR shared an Appellate Chamber with the ICTY, and until 2003, shared a common chief prosecutor with the ICTY.<sup>753</sup> An internal coordination committee of the president, prosecutor, and registrar met regularly to discuss issues affecting the court. The permanent judges elected a president and vice president from among the judges.<sup>754</sup> The structure changed after the establishment of the MICT, which has a single president, prosecutor, and registrar.

## ***Chambers***

The tribunal had three Trial Chambers and one Hague-based Appeals Chamber.<sup>755</sup> The statute initially provided that chambers would have a maximum of 16 permanent judges and a maximum of nine *ad litem* judges.<sup>756</sup> (Between 2008 and 2009, the Security Council temporarily allowed 12 *ad litem* judges.)<sup>757</sup> No two judges in any chamber could be nationals of the same state, which ensured a broad diversity of nationalities among the ICTR's benches. Seven of the permanent judges were members of the Appeals Chamber.<sup>758</sup> The UN General Assembly elected 11 of the permanent judges and all of the *ad litem* judges.<sup>759</sup> In its early years, the tribunal faced difficulties in setting up operations, appointing judges, and commencing trials for accused in custody. The General Assembly did not elect the inaugural judges of the tribunal until May 1995. In May 2012, two permanent judges and eight *ad litem* judges served at the ICTR.<sup>760</sup>

Under the MICT Statute, chambers comprise a Trial Chamber for the former ICTR branch and one for the ICTY, with a common president. There is one common Appeals Chamber. The UN established a roster of 25 judges, including the president, from which judges can be appointed to compose a Trial or Appeals Chamber for either branch when needed. The president can also appoint a single judge to consider matters at first instance.

## ***Office of the Prosecutor***

The Security Council appointed the ICTR prosecutor on nomination by the Secretary-General, for renewable four-year terms.<sup>761</sup> The council intended the ICTR to share a common prosecutor with the ICTY as a resource- and time-saving measure, but over time the burgeoning caseloads of both tribunals made the arrangement untenable. Under the MICT Statute, the Security Council appoints a common prosecutor for both branches.

## ***Registry***

The UN Secretary-General appointed the ICTR registrar after consultation with the court's president.<sup>762</sup> The Registry maintained a head office in Arusha and a sub-office in Kigali. The Registry's two principal divisions handled judicial matters and administrative issues. The Court Management Section provided administrative, judicial, and logistical support to the chambers, which included maintaining judicial records and archives. Three teams supported each chamber of the court.

The registrar was responsible for negotiating bilateral agreements with countries regarding legal assistance, detention of convicted defendants, and other legal matters. The Registry was also responsible for promulgating certain internal rules of the tribunal, including directives on the assignment of defense counsel, codes of professional conduct for defense counsel, and directives for the Registry.<sup>763</sup> The negotiation of these bilateral agreements took significant time and effort on the part of principals in the Registry. The ICTR also encountered difficulties in relocating three acquitted defendants, prompting the court to plea in its annual report for the creation of a “formal mechanism to secure the support of Member States to accept these persons within their territories.”<sup>764</sup> There is now a common registrar for both branches of the MICT, still appointed by the Secretary-General. The registrar maintains a roster of qualified staff to allow rapid recruitment if required.

### ***Court Management Section***

The Court Management Section (CMS) provided administrative, judicial, and logistical support to the tribunal, including managing courtroom schedules and the parties’ document submissions. The ICTR CMS was divided into four teams, each one supporting a Trial Chamber and the Appeals Chamber.

### ***Defense Counsel & Detention Management Section***

The Defense Counsel and Detention Management Section (DCDMS), established within the registrar’s office, maintained a list of over 200 qualified defense counsel. At both the ICTR and the ICTY, the legal aid offices “serve to coordinate all the functions involving those lawyers appearing for the defense, but do not provide legal representation directly.”<sup>765</sup> Rather, the DCDMS acted as a liaison between the Registry and defense counsel teams.<sup>766</sup> Similarly, the MICT maintains a list of counsel fulfilling the required qualifications to practice before the mechanism.

Once counsel were chosen for the list, DCDMS conducted trainings on ICTR jurisdiction and rules.<sup>767</sup> The Registry promulgated a “Directive on the Assignment of Defense Counsel” in 1999, which was amended at least five times up until 2008:<sup>768</sup>

Originally, the accused could choose counsel from the entire list of lawyers who have requested to defend counsel. Then the accused was given no choice and the Registrar assigned a counsel of his choice. Later, a list of six counsel selected by the Registrar was being presented to the accused to choose from.<sup>769</sup>

In 2001, abuses of the legal aid system came to light, leading to changes in procedures. It emerged that several persons accused by the ICTR had entered so-called fee-splitting arrangements with their counsel, whereby the counsel had agreed to split the fee they received from the tribunal's legal aid funds with the accused or his family members. After several such cases were exposed in 2001, the registrar announced that his office was taking measures including investigating all such allegations, amending the Code of Conduct of Defense Counsel to specifically prohibit fee-splitting, and requesting a post of investigator in the next budget.<sup>770</sup> Following an investigation, the UN Office of Internal Oversight Services issued recommendations for structural changes and in 2002 stated that the ICTR and ICTY had implemented most of the safeguards it had recommended to prevent such abuse taking place.<sup>771</sup>

The procedure for the assignment of defense counsel for the ICTR and subsequently the MICT requires the registrar to determine whether the accused is indigent. The ICTR registrar assigned counsel to the accused, after consulting with an advisory panel.<sup>772</sup> ICTR counsel were remunerated either according to a fixed hourly rate, or a fixed lump sum fee. The MICT legal aid system harmonized and built on ICTR and ICTY practices, and is based on a lump-sum payment system. Provision is also made for legal support for accused persons who choose to represent themselves. In the ICTR, if counsel did not have independent offices, they could be provided with "reasonable facilities and equipment such as photocopiers, computer equipment, various types of office equipment, and telephone lines."<sup>773</sup>

### ***Witness and Victims Support Section***

The Witness and Victims Support Section (WVSS) of the ICTR had a main office in Arusha and a sub-office in Kigali. Its three main functions were to provide logistical support for witnesses appearing before the court, to assist prosecution and defense during trial phases, and to ensure witness safety in court and in the post-trial phase. The section was divided into two units, one for prosecution witnesses and the other for defense witnesses.

Initially, voluntary contributions covered costs relating to the protection of victims and witnesses, before staff posts were included in the regular annual budget. In its report on resource requirements for 2000, the tribunal highlighted the need for projects to assist victims and witnesses, including to help witnesses find their way through the complex processes at the tribunal, and an officer focused on gender-sensitive issues in this regard.<sup>774</sup> While it came in for much criticism early

on, the tribunal made significant improvements in both witness support and witness protection during its lifetime. In 1998, Amnesty International examined the tribunal's witness protection scheme and criticized the Victims and Witnesses Unit for, among other things, not having staff with experience in witness protection, and urged it to: negotiate better procedures with the Rwandan government to enable witnesses to travel to and from the tribunal without exposing their identities, relocate witnesses to other countries who would be at risk if returned to Rwanda, and improve security measures in Arusha and the courtroom.<sup>775</sup> By 2010, one commentator noted that while things had improved, inadequate funding and state cooperation meant assessment of threats and application of protective measures were often inadequate and greater psychological support for witnesses before, during, and after testimony was required.<sup>776</sup>

Under the MICT, each branch has an independent Witness Support and Protection Unit, which took over the functions of the WVSS, and the unit for the former ICTR based in Arusha assumed its functions in July 2012.

### ***Trust Fund for the Support Program for Witnesses***

The trust fund established a health clinic in Kigali to provide “physical and psychological care to witnesses residing in Rwanda, in particular those living with HIV/AIDs as a result of sexual violence suffered during the genocide.”<sup>777</sup> By mid-2011, the trust fund was nearly depleted, but was replenished through a voluntary contribution by the government of Spain.

### ***Outreach***

The ICTR initially established a small press and information unit but had no dedicated staff for outreach to affected communities. In 2000, five years after its launch, the ICTR opened an Information and Documentation Center in Kigali and subsequently opened at least 10 provincial information centers across Rwanda. The activities of these centers “are intensifying as part of the Tribunal’s completion strategy and legacy. ... The main centre in Kigali ... alone receives approximately 100 visitors per day.”<sup>778</sup> In 2014, the ICTR handed over these centers—containing libraries, documentary screening rooms, and internet access—to the Rwandan government.

The ICTR was heavily criticized for its slow start in developing outreach and public information programs, with a 1998 report by Amnesty International alleging, “There is a disturbingly and sometimes dangerous lack of competent or coherent

strategy for the dissemination of public information.”<sup>779</sup> A 2002 study found that more than half of Rwandans interviewed were “not well informed” about the tribunal.<sup>780</sup> Nonetheless, after early stumbles the ICTR placed significant emphasis on outreach programs, including developing a cartoon book, radio documentaries, traveling plays, youth education programs (begun in 2005), programs for prisoners, and community dialogues. In the spring of 2012, the court reported that “awareness-raising programmes for lessons learned from the genocide of 1994 were successfully conducted in 15 secondary schools with students totaling 12,000. ... The programme is planned to continue with the major prisons in Rwanda where about 20,000 inmates are to benefit from this activity.”<sup>781</sup> The ICTR sought voluntary contributions to support its outreach program.

The MICT Registry has recruited staff to develop public information and outreach campaigns and projects, and considers “disseminating information to the public” and increasing public awareness of the activities of the mechanism to be part of its external relations and communications functions.<sup>782</sup>

## **Prosecutions**

The ICTR issued indictments against 93 accused. As at October 2017, the ICTR had sentenced 62 individuals, acquitted 14 more, and referred 10 of those 93 indictments to national jurisdictions for trial. Three accused persons remain at large, two accused died prior to judgment, and two indictments were withdrawn before trial.<sup>783</sup> An especially high number of countries—over a dozen, mostly African states—have arrested and transferred suspects to the ICTR.

Judges confirmed the first indictments in November 1995. The first three ICTR detainees, Jean-Paul Akayesu, Georges Rutagana, and Clement Kayishema, were transferred to the ICTR in May 1996. The first trial, against Akayesu, began in January 1997 and appeals judges rendered their decision on June 1, 2001.<sup>784</sup> Initial delays in setting up the tribunal and initiating prosecutions—combined with high levels of cooperation from states in arresting and transferring suspects—led to lengthy detention of suspects before commencement of trial in the first several years. This issue continued throughout the course of the tribunal’s operations such that even some of those tried by the ICTR and acquitted on appeal had spent well in excess of a decade in detention. Further compounding this issue is that even those acquitted by the tribunal remain—still as of late 2017—in “safe houses” in Arusha, Tanzania, as the ICTR had significant problems finding states willing to accept them.

Some observers leveled extensive criticism at the ICTR for its inadequate inclusion of crimes of sexual and gender-based violence (SGBV) in its docket. This did result in the ICTR eventually turning more attention to these crimes, such that the prosecutor's later indictments tended to be more likely to include such crimes. The tribunal also took other steps to approach such investigations and prosecutions with specialized and sensitive resources. Nonetheless, there remained significant gaps in its prosecution record in this respect. Despite these gaps, the ICTR made groundbreaking jurisprudence in this area. Judges recognized rape as a constituent crime of genocide (in the case against Jean-Paul Akayesu). And they found that senior political leaders during the genocide were criminally liable—via extended form joint criminal enterprise theory—for crimes of sexual violence committed throughout the Rwandan territory.<sup>785</sup>

### ***Transfers to the Rwandan National Courts under Rule 11bis***

In December 2011, the ICTR confirmed on appeal the transfer of defendant Jean Uwinkindi to Rwanda to face trial, determining that the Rwandan judiciary had the capacity and independence to conduct national prosecutions.<sup>786</sup> This was the first case transferred to Rwanda under Rule 11bis, a rule change introduced in 2004 as part of the tribunal's completion strategy that allowed the tribunal to refer a case to a state that is willing to prosecute, if it has satisfied itself the accused will receive a fair trial. The ICTR transferred two other accused to Rwanda in 2012 and 2016. The ICTR transferred two further apprehended suspects to face trial in France under Rule 11bis.<sup>787</sup> In addition, the Office of the Prosecutor transferred around 55 case files to Rwanda of persons investigated but not indicted by the tribunal. The MICT statute has retained the option to refer a case to national jurisdictions.

Previous requests for transfer to Rwanda of four detainees were denied in 2007 due to concerns about fair trial capacity, independence of the judiciary, lack of witness protection, and sentencing provisions incompatible with international human rights law, including “life imprisonment in isolation,” which replaced the death penalty in Rwandan law. The completion strategy required the ICTR to appoint a regional organization to monitor Rule 11bis trials in Rwanda to ensure that its proceedings meet fair trial standards. Several international human rights organizations continued to express skepticism about the possibility of fair trials in Rwanda.

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## **Trials in Rwanda's National Courts**

In parallel with the ICTR proceedings and Gacaca hearings, Rwanda's national criminal justice system investigated and prosecuted genocide suspects from 1996 onward. Initially, progress was slow as the government worked to rebuild and reform the judicial system at the same time.<sup>788</sup> In the absence of sufficient numbers of defence lawyers, NGOs such as *Avocats Sans Frontières* provided legal assistance through a pool of lawyers, though it could not meet the demand. It was clear it would take decades to try all of the approximately 130,000 persons who had been detained by 1998. This provided the impetus for the creation of the Gacaca courts, to which most genocide cases were shifted by 2002. By that point, conventional courts had tried around 7,000 cases.<sup>789</sup> From then onward, the regular court system only tried top leaders and those referred to Rwanda from other jurisdictions.

The ICTR had the option to transfer genocide suspects to national courts for prosecution under Rule 11*bis* of its Rules of Procedure and Evidence as part of its completion strategy (see above). As the ICTR drew to a close, it considered this option more frequently. Several times, however, the ICTR denied requests to transfer suspects to Rwanda due to witness intimidation and fair trial concerns. Not until December 2011 did the ICTR agree to transfer the first case to Rwanda to face trial, determining for the first time that the Rwandan judiciary had the capacity and independence to conduct national prosecutions.<sup>790</sup> Reforms introduced by the Rwandan government included abolition of the death penalty in 2007.<sup>791</sup> Before it closed at the end of 2015, the ICTR transferred three indictees to the Rwandan courts under Rule 11*bis*. Courts in several other countries have also transferred genocide suspects to Rwanda after the ICTR and then the European Court of Human Rights both decided in 2011 that it was safe to transfer suspects for trial in Rwanda.<sup>792</sup> In 2017, however, a UK High Court upheld a decision of a senior district judge refusing extradition of four genocide suspects on the basis there was a real risk they might suffer a flagrant breach of fair trial rights, thus rejecting an appeal by the Rwandan government.<sup>793</sup> Some human rights organizations continued to express concerns about the opportunity for suspects to receive a fair trial in Rwandan domestic courts.<sup>794</sup>

Critics have expressed concern over political interference and the lack of independence of Rwandan courts, in particular with respect to trials of RPF suspects. The ICTR transferred files of RPF suspects to the Rwandan authorities from 2008. In 2008, domestic courts tried four RPF officers for war crimes for the 1994 killing of 15 civilians. Human rights organizations called the proceedings a “political whitewash and miscarriage of justice.”<sup>795</sup>

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## Legacy

### *Jurisprudence*

The jurisprudence and case law of the ICTR has been influential and groundbreaking. The ICTR, along with the ICTY and the International Criminal Court (ICC), has expended significant efforts to produce a publicly available, comprehensive judicial database to be used as a reference tool, enhancing the practical value of its extensive jurisprudence.<sup>796</sup> The conviction of three media personalities for direct and public incitement to genocide, conspiracy, and crimes against humanity was a landmark case in defining the scope of responsibility for grave crimes.<sup>797</sup> Additionally, in 1997 the prosecutor added charges of sexual violence to the indictment against Jean-Paul Akayesu<sup>798</sup> after a prosecution witness spontaneously testified to witnessing rape in the vicinity of the Taba commune office. The case established jurisprudence expanding the definition of rape as a crime against humanity under international law and represented the first application by an international court of the UN Convention on the Prevention and Punishment of the Crimes of Genocide.<sup>799</sup> The ICTR's focus on crimes of sexual violence would comprise one of its signature achievements in international criminal jurisprudence, including its conviction of a former head of state for such crimes and its conviction of a woman (Pauline Nyiramasuhuko) for the same.

### *Impact on Rwandan Society*

Criticisms of the ICTR center on the cost of the tribunal, the length of trials, the effectiveness and relevance of proceedings to ordinary Rwandans, and the lack of prosecution of crimes allegedly committed by the forces that ended the genocide and formed the new government. The latter could create a sense of impunity and victors' justice, as well as a feeling of persecution among Hutus. Nonetheless, one commentator compiled an impressive list of its accomplishments: the ICTR created a factual account of the genocide, confirmed the genocide against the Tutsi ethnic group in Rwanda, established individual—rather than group—criminal responsibility, put on trial almost the entire government of the genocide era, validated the experience and suffering of the victims, and promoted respect for human rights and the rule of law in Rwanda.<sup>800</sup> One study based on field research found that while ICTR outreach did increase the level of knowledge of the tribunal's activities among those surveyed, this did not create more positive perceptions of the tribunal or its role in promoting reconciliation.<sup>801</sup> Another study surveyed respondents on the tribunal's deterrent effect, finding mixed results. While respondents were less satisfied with the severity of punishment and speed of proceedings at the ICTR, they

viewed it as fairly successful in obtaining and prosecuting suspects, especially high profile leaders.<sup>802</sup>

The ICTR's perceived legitimacy has suffered among Hutu victims because it never prosecuted members of the RPF, despite findings by the UN Commission of Experts in 1994 and an Office of the High Commissioner for Human Rights Mapping Exercise in 2010 that the RPF had likely committed atrocity crimes in the eastern Democratic Republic of the Congo.<sup>803</sup> (See the annex on Democratic Republic of Congo for more detail.) In 1994, the ICTR prosecutor transferred the case of an RPF soldier for prosecution by Rwandan military courts.<sup>804</sup>

### ***Impact on the Rwandan Judicial System***

The tribunal's statute allowed for both concurrent and primacy jurisdiction over national courts. National courts in Europe have tried alleged perpetrators of the Rwandan genocide, but until 2011, the ICTR opposed the transfer of suspects to Rwandan national courts under Rule 11*bis*.

Recognizing the need to bolster national judicial capacity in light of transfers of cases under Rule 11*bis*, the ICTR increased capacity-building exercises and training activities during its last several years. These targeted national judicial authorities, including judges, law clerks, and witness protection officers. The ICTR also conducted trainings on witness protection issues for Tanzanian judicial authorities in 2010. Earlier training programs for Rwandan legal librarians in 2005 focused on research and library management skills on ICTR jurisprudence and case software. Capacity-building activities in 2011 and 2012 included training senior Rwandan prosecutors and holding workshops for Rwandan law students on "online legal research methodology, [and] learning how to access legal information and materials including the Tribunal's jurisprudence."<sup>805</sup>

### ***Completion Strategy***

The ICTR began holding formal planning meetings on completion strategy and the transfer of cases as early as 2004. The initial completion strategy called for a final closing date in 2010, which was extended until 2014. A study to devise an archiving plan for the ICTY and the ICTR was launched in 2007. The court developed a range of legacy projects, including two best practice manuals: one on the referral of cases to national jurisdictions for trial and one on the prosecution of sexual violence.

While the ICTR was slower to start planning and to implement its completion strategy than the ICTY, and the completion date did have to be postponed several times, the ICTR did nevertheless manage to complete its cases and hand over residual functions to the MICT by December 2015. The court's downsizing process began in 2008–2009 and accelerated dramatically. In 2006, the tribunal had over 800 staff members. In July 2011, the tribunal reported a total of 666 staff members; it proposed retention of just over 400 posts for 2012–2013. Steep staff attrition made it more difficult for the tribunal to complete its mandate.

After January 2012, the ICTR engaged in significant preparations for the residual mechanism in areas ranging from transfer of archives to staff recruitment.<sup>806</sup> Digitizing audiovisual recordings of over 16 years of trial proceedings was an enormous task. Between 2013 and 2016, the ICTR transferred all of its physical and digital records to the MICT.

## **Financing**

The Security Council mandated that the ICTR budget would not be drawn from voluntary contributions but from assessed contributions from UN Member States, as apportioned by the UN General Assembly.<sup>807</sup> Initial budgeting for the ICTR was assessed and split with the peacekeeping funds for UNAMIR.

The size of the ICTR budget has drawn criticism.<sup>808</sup> For the two-year period of 2012–2013, the ICTR submitted gross resource requirements of US\$174 million to the UN Secretary-General. In 2010–2011, the UN approved initial appropriations of US\$245 million. Failure of some member states to pay their assessed contributions on time ultimately led to staff freezes in 2003–2004; this led the UN's Advisory Committee on Administrative and Budgetary Questions to raise concerns of a negative impact on the completion strategy schedule.

Despite the Security Council's decision that the ICTR's core budget would be funded from assessed contributions, the ICTR did rely significantly on voluntary contributions and gratis personnel, particularly in its early years. In 1995, the UN General Assembly invited member states to make voluntary contributions through direct funding and in-kind services. These were to support activities then considered "extra budgetary," including training for national judicial authorities, witness support programs (including psychosocial services and medical care through a trust fund-supported program for witnesses), and outreach initiatives.

An External Relations and Strategic Planning Section of the tribunal was tasked with raising voluntary contributions. Key donors included the United States, France, Spain, the European Union, and the European Commission. A donor group called Friends of the ICTR, including representatives from Europe and the United States, periodically met with the ICTR and its members serve as interlocutors in wider fundraising activities. By the end of 1998, the Voluntary Trust Fund for the ICTR had received about US\$7.5 million in funds, and by October 2007, around US\$11 million. As the core budget of the tribunal increased, the proportion of funding coming from voluntary contributions decreased. Over time, functions including witness protection came to be covered by the core budget. According to an audit report linked to the completion, the ICTR had 18 projects under its general trust fund over its lifetime, of which the tribunal transferred two to MICT: one project on support to witnesses and another to monitor the transfer of a case to Rwandan national courts.<sup>809</sup>

## **Oversight and Accountability**

As a body established by the UN Security Council, the ICTR and subsequently the MICT have been subject to regular reporting to and scrutiny by the Security Council, including approval of budgets. The UN Office of Internal Oversight Services carried out a number of audits.

The ICTR has also been subject to external monitoring by civil society. Hirondelle, a news agency based in Arusha, monitored the ICTR throughout, including reporting on trial and institutional developments in French, English, Kinyarwanda, and Kiswahili, and was the only media outlet reporting regularly on the tribunal. International human rights organizations such as Amnesty International and Human Rights Watch as well as independent researchers and commentators conducted research on various aspects of the tribunal's operations.

## **Gacaca Courts (2002–2012)**

### **Creation**

Between 2002 and 2012, over 12,000 community-based Gacaca courts in Rwanda tried between 1.2 million and 2 million cases of genocide and other serious crimes.<sup>810</sup> Begun as a pilot program in 2002, the government implemented Gacaca nationally

in 2005. In 2010, the government closed Gacaca for new cases and announced that the process was completed, but soon reopened the process to handle appeals. Gacaca courts officially closed in June 2012.

Gacaca courts were “one of the most ambitious transitional justice experiments in history, blending local conflict-resolution traditions with a modern punitive legal system to deliver justice for the country’s 1994 genocide.”<sup>811</sup> They were not a formal criminal justice mechanism, but were overseen by a national criminal justice institution. Gacaca was Rwanda’s imperfect solution for handling hundreds of thousands of individual perpetrators, given the inability of domestic courts or the ICTR to prosecute such a caseload. The post-genocide situation in Rwanda presented overwhelming judicial challenges. More than half a million people had died in the genocide, and the judicial infrastructure lay in ruins.

After the genocide, Rwanda detained thousands of alleged perpetrators for prosecution within the formal criminal justice system, but the massive numbers of detainees—nearly 130,000 prisoners by 1998 housed in overcrowded prisons—caused policymakers to search for an alternative approach.

## **Legal Framework and Mandate**

While modeled on traditional reconciliation approaches, the government adapted and formalized modern Gacaca (Kinyarwanda for “a bed of soft green grass”), in part to address concerns that traditional rituals were not meant to address such grave offenses as genocide. The Rwandan government established an institution, the National Service of Gacaca Jurisdictions (SNJG), to oversee implementation of a series of laws. Traditional justice was thus “intimately linked to the state apparatus of prosecutions and incarceration.”<sup>812</sup> Gacaca courts followed written Rwandan law. Lawmakers amended the legal and statutory framework of Gacaca trials several times in an effort to build a process consonant with international fair trial standards, to achieve procedural conformity, and to place the model under the oversight of state institutions and the formal justice sector.

Initially, Gacaca courts exercised jurisdiction over genocide, crimes against humanity, and war crimes committed between October 1, 1990, and December 31, 1994. Parliament passed legislation in 2001 creating Gacaca courts and amended the law four times, “usually to simplify and accelerate the way in which the courts process cases.”<sup>813</sup> Parliament amended the statutory framework in 2004 to remove

war crimes from the courts' jurisdiction. The move was interpreted as intending to avoid classifying crimes committed by RPF soldiers as genocide or war crimes.

Rwanda's 1996 Genocide Law defined four categories of genocide perpetrators, from "planners" to those who committed "offences against property."<sup>814</sup> The categories were "repeatedly modified and Gacaca courts [were] charged with hearing increasingly serious types of crimes."<sup>815</sup> A 2008 amendment sought to alleviate genocide case backlogs in the formal courts, by transferring "category 1" and "category 2" genocide crimes to Gacaca courts. The same year, the government placed genocide-related rape cases under Gacaca jurisdiction, with special confidentiality provisions for victims. Beginning in 2007, Gacaca courts could impose punishments up to life imprisonment.

## **Location**

Gacaca hearings took place in public spaces in towns and villages throughout Rwanda.

## **Structure and Composition**

Communities elected over 250,000 lay judges to preside over Gacaca courts. Judges were required to be over 21 years of age, non-partisan, and non-participants in the genocide. Rwandan authorities conducted judicial trainings, often funded by international donors. In 2002, judges underwent an initial six-day training, followed by shorter trainings in 2006 and 2007. Rwandan authorities issued several editions of judges' manuals, which were unevenly applied. By 2008, the government had removed over 50,000 judges for incompetence or corruption.

Gacaca trials did not involve a prosecutor. In the pilot phase of Gacaca, victims or relatives of victims brought accusations before the judges, often in community meetings, and the community debated the accusations. In the revised national phase, an information-gathering stage was added, whereby the SNJG authorized local officials to "collect information ... by assembling small groups or by going door-to-door."<sup>816</sup> The officials then presented written accusations to the community for verification.

Community attendance and participation in the trials was initially quite high. However, for various reasons, attendance steadily decreased over the course of the process. The government used increasingly compulsory measures to ensure

attendance, including threatening community members with fines and sending militia members door-to-door in some villages.

Defense lawyers were excluded from Gacaca courts, as it was thought this would delay the process and create an imbalance between professional lawyers and lay judges. Proponents touted community participation in the proceedings as a limited guarantee against false accusations and unfair proceedings. However, there were numerous instances of community members abusing the process to settle personal scores.

## **Prosecutions**

Gacaca courts heard more than a million cases in as many as 12,000 jurisdictions across Rwanda. Although not prosecutions as such, government statistics indicate findings of guilt in 86 percent of the 1.9 million cases heard.<sup>817</sup> These cases fell into three categories: category one was planners, organizers, and those who committed rape or sexual torture; category two was perpetrators of murder, serious violence against individuals, and other acts of serious violence without the intention to kill; and category three was damage to property. According to government statistics, a Gacaca appeals court dealt with over 178,000 appeals (around nine percent of all cases), with findings of guilt in 74 percent of those. Property crimes were not subject to appeal.

## **Legacy**

Opinion is divided on the legacy of Gacaca. For supporters, the most significant achievement of Gacaca courts has been the widespread community participation in a justice process that exacted accountability, and the hearings brought significant benefits to Rwandans in the spheres of justice, truth, and democratic participation.<sup>818</sup> Gacaca represented a form of justice amidst extremely difficult post-conflict conditions.

Human rights organizations, which consistently opposed the use of Gacaca for genocide cases, highlighted significant flaws:

These courts have been given extensive decision-making and punitive powers, yet they are constituted by no legally trained judges or lawyers, and operate without reference to the rule of law. Defence rights are negligible and there is no protection for victims or witnesses. There are no rules of evidence and no guidance as to what is required in order to prove an offence.<sup>819</sup>

Gacaca courts also operated within an increasingly authoritarian political environment in Rwanda. The increasing politicization of Gacaca led to perceptions among some Rwandans that the Rwandan government used the process to promote selective justice and build a narrative about the genocide in which its own crimes were absent. The participation of local lay leaders and judges sometimes led to political bias, and certain design features, such as the lack of salary for judges, incentivized corruption.

In addition to the deficiencies in fair trial rights recounted by many observers, the Gacaca courts also had several design flaws that limited their ability to positively and sustainably influence the broader rule of law and domestic justice system, including:

- appellate procedures that were partially located within the formal criminal justice system, but did not strengthen the overall appellate court system;
- minimal opportunities for skills and capacity building that were transferable to the formal criminal justice system; and
- lack of attention to legacy planning, documentation activities, outreach, and public information sharing.

## **Financing**

International assistance, monitoring, and involvement in Gacaca courts were integral to the process. The largest international donors included Belgium, the Netherlands, the European Union, Austria, and Switzerland.<sup>820</sup> Several of the 2008 judicial trainings on sexual violence cases were conducted with the assistance of the Dutch-funded Institute for Legal Practice and Development.

## **Oversight and Accountability**

Avocats Sans Frontières, Penal Reform International, and Human Rights Watch conducted extensive trial monitoring of Gacaca courts and compiled case law. National NGOs also monitored the process, including the Human Rights League of the Great Lakes and the Rwandan League for the Promotion and Defense of Human Rights. Gacaca has been the subject of vigorous legal scholarship and debate. Human Rights Watch notes that international donors raised some concerns during the process, through local monitoring groups or embassy officials, but “rarely used their influence to address the more fundamental and systemic problems.”<sup>821</sup>

## **SENEGAL: EXTRAORDINARY AFRICAN CHAMBERS (IN RELATION TO CHAD)**

### **Conflict Background and Political Context**

Hissène Habré assumed power in Chad in 1982 and ruled until deposed by a coup in 1990. Supported by the Reagan administration through military aid, training, and political support, as part of a U.S. regional strategy for containing the power of Colonel Muammar Qaddafi of neighboring Libya, Habré's regime was responsible for "thousands of cases of political killings, torture, disappearances, and arbitrary detentions."<sup>822</sup> In the 1980s, Chad fought several wars with Libya, as well as against the Libyan-backed Transitional Government of National Unity (GUNT) rebels (largely members of the previous Chadian regime, led by former President Goukouni Oueddei). Inside Chad, Habré "persecuted different ethnic groups whose leaders he perceived as posing a threat to his regime."<sup>823</sup> He was ousted from office in 1990 and fled to Senegal, which granted him political asylum.<sup>824</sup> A 1992 Chadian Truth Commission estimated that Habré's regime carried out 40,000 political assassinations, often through a secret police group called the Documentation and Security Directorate (DDS), which instituted a pervasive climate of fear and surveillance, turning neighbors and family members against each other.<sup>825</sup> The DDS maintained a network of detention centers, where torture was a common tool of interrogation.<sup>826</sup>

Habré's successor, President Idriss Déby, wrested power from Habré in a coup and has ruled since 1990. He was a military general under Habré and retained institutional links to the former regime, appointing key security agency officials to posts within his administration. Many of these officials were allegedly implicated in the repressive policies of the Habré era.<sup>827</sup>

Beginning in the early 1990s, while Habré was living in Dakar, a coalition of victims' associations, human rights lawyers, and international NGOs, including Human Rights Watch, sought to find a forum to prosecute Hissène Habré. They brought complaints against Habré in Chad, Senegal, Belgium, and before the UN Committee Against Torture. The African Union (AU) appointed a special commission to examine the issue and passed several resolutions recommending venues for prosecuting Habré. The AU preference for an "African solution" preceded the development of significant African antipathy toward the International Criminal Court (ICC).<sup>828</sup> But in addition to attempting to provide a regional African justice

process for atrocity crimes committed by an African perpetrator, it may also have reflected a more general caution about external intervention on the continent. This long process culminated in the creation of the Extraordinary African Chambers (EAC) in Senegal in 2013 to try the crimes committed during Habré's rule, pursuant to an agreement between the AU and Senegal.<sup>829</sup>

The Habré case touched on multiple major issues of international criminal justice over the past decades: the use of universal jurisdiction; the role of national, regional, and international courts in prosecuting international crimes; the obligation to prosecute international crimes under customary international law; the AU preference for African-designed justice; and finally, the persistent, and politically inconvenient, demand for accountability by victims.

### **Existing Justice-Sector Capacity**

After Hissène Habré's fall, the 1992 Truth Commission recommended the prosecution of Habré and officials who participated in crimes under his rule.<sup>830</sup> A 1993 law provided for the creation of a special tribunal to judge them.<sup>831</sup> In 2000, a group of victims filed complaints against former DDS agents in Chad. However, the complaint stalled for many years, and the special tribunal was never established.<sup>832</sup> The judicial system in Chad was weak and corrupt, many leading officials of the Habré era retained important administrative and political positions, and investigating judges lacked the financial resources and protection required to carry out such politically sensitive investigations.<sup>833</sup> Nevertheless, the Chadian government supported international efforts to bring Habré to justice, as demonstrated by its full cooperation with Belgian authorities investigating the case and the waiver of Habré's immunity in 2002.<sup>834</sup> In 2013, a Chadian court sentenced Habré to death in absentia for war crimes and crimes against humanity; several rebel leaders were sentenced as well.<sup>835</sup> However, the government never sought Habré's extradition, and the trial was criticized for its unfairness and secrecy.<sup>836</sup> President Abdoulaye Wade of Senegal threatened to expel Habré to Chad in 2011, but he backtracked in the face of "an international outcry over the risk that Habré would be mistreated or even killed" in Chad.<sup>837</sup>

### **Existing Civil Society Capacity**

Victims and victims' associations played a crucial role in bringing Hissène Habré to justice. Their remarkable quest for justice has been widely acknowledged. It has

been said that “without his victims’ collection of evidence, testimony and relentless fight for justice, it is unlikely that the case would ever have made it to trial.”<sup>838</sup> After Habré’s fall in 1990, victims of his regime started to organize into associations, including the Chadian Association of Victims of Political Repression and Crime, the Chadian Association for the Promotion and Defense of Human Rights, the International Federation of Human Rights Leagues, and the Chadian League for Human Rights.<sup>839</sup> These associations collected evidence and gathered testimonies against Habré. In 1999, some groups sought the help of Human Rights Watch in their search for accountability and, inspired by the arrest of former Chilean President Augusto Pinochet in the United Kingdom, they filed a complaint in Senegal. After that, they had recourse to a multiplicity of national, regional, and international forums in their battle for accountability, which finally led to the creation of the EAC in 2013.

## Creation

The creation of the EAC was the outcome of a saga that involved multiple countries, regional and international organizations, and international judicial and quasi-judicial bodies. In January 2000, several Chadian nationals and an association of victims filed a complaint with a Senegalese judge in Dakar against Habré for the crimes committed during his presidency.<sup>840</sup> Habré was indicted and placed under house arrest, but the decision was overturned on appeal because while Senegalese law provided for universal jurisdiction, the law failed to designate which precise court within the Senegalese court system had jurisdiction over such matters.<sup>841</sup> Subsequently, in 2000 and 2001, a group of Chadians and dual Belgian–Chadian nationals filed a complaint against Habré with a Belgian investigating judge under the 1993/1999 Belgian law of universal jurisdiction and the Convention Against Torture, which had been ratified by both Belgium and Senegal.<sup>842</sup> The Belgian judge sent international rogatory letters to Chad and Senegal, and Chad declared that it officially lifted all immunity from the former president.<sup>843</sup> After several investigative steps, Belgium issued an international arrest warrant against Habré for crimes against humanity in 2005 and sent its first extradition request to Senegal.<sup>844</sup>

In 2005, a Senegalese court held that it was not competent to rule on Belgium’s extradition request,<sup>845</sup> and Senegal referred the issue to the AU. The AU created the Commission of Eminent African Jurists (CEAJ) to consider the most appropriate venue for trying Habré.<sup>846</sup> CEAJ’s 2006 report recommended an “African solution,” namely that Habré should be tried by an African state, with Senegal and Chad having first preference.<sup>847</sup> The commission also considered other options, including

the creation of a special ad hoc or mixed, AU-backed tribunal. In light of the CEAJ report, the AU Assembly passed a decision mandating Senegal to “prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese Court with guarantees of fair trial” and decided to provide Senegal with “the necessary assistance for the effective conduct of the trial.”<sup>848</sup>

Meanwhile, in April 2006 several Chadian victims sent a communication to the UN Committee Against Torture alleging violations by Senegal of the Convention Against Torture.<sup>849</sup> In its nonbinding decision, the committee found Senegal in violation of the convention for failing to prosecute or extradite Habré to Belgium.<sup>850</sup>

In 2007 and 2008, Senegal implemented a number of legislative reforms in order bring its domestic law into compliance with the Convention Against Torture and permit the prosecution of Habré in its domestic courts.<sup>851</sup> Following these reforms, several Chadian and Senegalese victims filed a complaint in Dakar accusing Habré anew of torture and crimes against humanity.<sup>852</sup> Nevertheless, the Economic Community of West African States (ECOWAS) Court of Justice issued an important decision in 2010 that would determine the nature of the future proceedings against Habré. Ruling on the application filed by Habré against Senegal following the legislative reforms, the court decided that Senegal was prohibited from prosecuting Habré based on the principle of nonretroactivity.<sup>853</sup> The court held that only an “ad hoc or special tribunal” could try Habré without breaching international obligations. As this decision was binding on Senegal, it effectively foreclosed national prosecutions and left two options for Senegal: (1) extradition to Belgium, or (2) negotiations with the AU to set up an ad hoc or special court. Senegal opted for the second option, and a long process of consultations began between Senegal and the AU on the establishment of a special court.<sup>854</sup>

Meanwhile, Belgium repeated its extradition requests. In 2009, after four extradition requests and no definitive answer from Senegal, Belgium issued proceedings against Senegal before the International Court of Justice, alleging violations of Senegal’s obligations under the Convention Against Torture. In 2012, the court ruled that Senegal violated its obligations under the Convention Against Torture by failing to prosecute Habré, and thus, Senegal “must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.”<sup>855</sup>

The negotiations between Senegal and the AU on the establishment of a special court were leading nowhere, despite efforts by the AU to press the Wade government.<sup>856</sup> It was not until the election of Macky Sall as president of Senegal

in 2012 that the AU and Senegal finally reached an agreement. The two parties signed the agreement creating the EAC in August 2012, and the court opened in February 2013.

## **Legal Framework and Mandate**

The EAC were established by agreement between the AU and Senegal to create a special court to try the crimes committed under the Habré presidency. The agreement and the statute were signed by the AU and Senegal, and Senegal adopted the necessary legislation to establish the EAC within its judicial system.<sup>857</sup> The purpose of the EAC was “to implement the decision of the AU concerning the Republic of Senegal’s prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with Senegal’s international commitments.”<sup>858</sup> As the ruling of the ECOWAS Court of Justice precluded purely domestic prosecutions, the agreement created a special ad hoc international jurisdiction embedded within the Senegalese judicial system to prosecute these crimes.<sup>859</sup> However, the EAC feature minimal international elements: their legal basis lies in Senegalese law, and there is little international involvement in personnel and oversight.<sup>860</sup> The EAC are governed by the founding statute, adopted on July 20, 2013, by Senegal and the AU, and the Senegalese Code of Criminal Procedure. The statute stipulates that the EAC shall apply primarily international law; however, “for cases not provided for in this Statute,” Senegalese procedural and substantive law will apply.<sup>861</sup> In that sense, the EAC is a hybrid court but it lies at the limit of that category of internationalized criminal tribunals: “It most closely resembles those courts established under national law, but with substantial international participation.”<sup>862</sup>

The EAC is also the first court of its kind to be based on universal jurisdiction, instead of territoriality or nationality.<sup>863</sup> The EAC has jurisdiction to “prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.”<sup>864</sup> Its powers are thus exclusively based on the serious nature of the crimes, although these were committed in Chad, by Chadian nationals, and against Chadian victims.

The material jurisdiction of the EAC includes war crimes, crimes against humanity, genocide, and torture.<sup>865</sup> Unlike other hybrid tribunals, it does not judge any ordinary or domestic crimes, but it applies Senegalese procedural law to resolve

any issues “not provided for in the Statute.”<sup>866</sup> Although he is the only accused to have been tried, the personal jurisdiction of the EAC extends beyond just Hissène Habré. Articles 3 stipulates that the chambers have the “power to prosecute and try the person or persons most responsible” for international crimes committed in Chad during Habré’s rule. The territorial jurisdiction of the EAC is limited to crimes committed in Chad, and its power is temporally limited to the period of Habré’s rule from June 7, 1982, until December 1, 1990.<sup>867</sup> Finally, once all judgments are final, the EAC will be dissolved.<sup>868</sup>

## **Location**

As the EAC are integrated within the Senegalese court structure in Dakar (see the *Structure and Composition* section, below), Hissène Habré’s trial took place in Dakar’s ordinary court facilities, using existing infrastructure and resources. Hearings were public, and measures were taken to guarantee access to all parties concerned, as well as press representatives, international and AU observers, and representatives of civil society.<sup>869</sup> The proceedings were recorded, streamed live on the internet, and broadcast on Chadian television.<sup>870</sup> Once the final decision on appeal was affirmed in April 2017, the chambers were dissolved, and the ordinary courts continued with their normal functioning.<sup>871</sup>

## **Structure and Composition**

The EAC were created inside the Senegalese court structure. As noted above, they resemble domestic courts established under national law with significant international participation more than they do an international tribunal. Accordingly, the main organs of the chambers are integrated into the existing court structure in Senegal.

### ***The Chambers***

The EAC consist of four levels, embedded within the Senegalese judicial system.<sup>872</sup> The EAC Investigative Chamber is integrated within the *Tribunal Regional Hors Classe de Dakar*, and it is composed of four Senegalese judges.<sup>873</sup> The EAC Indicting Chamber, the Trial Chamber, and the Appeals Chamber are all attached to the Dakar Court of Appeals.<sup>874</sup> The Indicting Chamber comprises three Senegalese judges. The Trial Chamber and the Appeals Chamber both consist of two Senegalese judges and a president from another AU member state, thereby integrating an international element into the composition of the EAC.<sup>875</sup> All

judges are nominated by the Senegalese minister of justice and appointed by the chairperson of the AU Commission.<sup>876</sup>

The appointment of international judges in international tribunals is generally intended to guarantee independence and impartiality, assist in the application of international law, and facilitate the development of national capacity through training and mentoring. However, none of these were pressing concerns in this context.<sup>877</sup> In addition, there was no international participation in other important aspects of the EAC, such as the Office of the Prosecutor or the Registry.

The comparative absence of international elements in the design of the EAC can be explained by various factors, including the willingness of the AU to enhance the legitimacy of the EAC and thereby deflect external intervention. However, the determining factor was certainly the decision of the ECOWAS Court, which was interpreted by the AU and Senegal as requiring some level of internationalization of the mechanism to avoid a violation of the principle of non-retroactivity. Since the jurisdictional basis of the EAC was to exercise universal jurisdiction, Senegal would traditionally not have been concerned with the introduction of international elements. Hence, the integration of international features into the design of the EAC was not driven by the usual concerns of ensuring independence and fostering national capacity, but rather by compliance with a binding judgment, however flawed it may have been.<sup>878</sup> It has been said: “In fact, until the decision of the ECOWAS Court, there was no expectation that Senegal should internationalize its national courts for the trial.”<sup>879</sup> The rationale for the appointment of non-Senegalese judges served to underscore the African nature of the court and its proceedings.

### ***Office of the Prosecutor***

The Office of the Prosecutor is the only body that can initiate prosecutions before the EAC.<sup>880</sup> Its powers are provided by the Senegalese Code of Criminal Procedure. The Office of the Prosecutor is represented by the chief prosecutor and three deputy prosecutors, all of Senegalese nationality. As with the judges, the prosecutors are nominated by the Senegalese minister of justice and appointed by the chairperson of the AU Commission.<sup>881</sup>

### ***Registry and Administration***

The administrative tasks of the EAC are conducted by the registrar and the administrator, both appointed by the minister of justice of Senegal. The Registry is composed of one or several clerks whose duties are determined by the Senegalese

Code of Criminal Procedure.<sup>882</sup> The EAC also include an administrator responsible for the nonjudicial aspects of the court's work. His/her functions include the management of human resources, public relations with the international community, directing the outreach program and awareness-raising, witness and victim protection and assistance, and judicial cooperation between Senegal and other countries.<sup>883</sup>

### ***Victim Participation and Witness Protection***

Victim participation in the proceedings of the EAC is governed by the general principles of participation as *parties civiles*, in accordance with the Senegalese Code of Criminal Procedure.<sup>884</sup> The code permits the appointment of lawyers registered at foreign bar associations, and foreign lawyers did participate in victim representation in the Habré case. The government of Senegal is responsible for the protection of all parties and witnesses during the entire duration of the proceedings.<sup>885</sup> Protection for the acts performed during the course of the proceedings is governed by the initial agreement between the AU and Senegal;<sup>886</sup> and the administrator is responsible for directing, assisting, and protecting the witnesses and victims who appear before the court.<sup>887</sup>

### ***The Trust Fund for Victims***

The Statute also establishes that the EAC may order reparations to victims, to be awarded by the intermediary of a trust fund.<sup>888</sup> The trust fund is established for the benefit of "victims of crimes within the jurisdiction of the EAC and of the beneficiaries of such victims," and it is financed by voluntary contributions.<sup>889</sup>

### ***Outreach***

The EAC's outreach program is viewed as particularly successful. Outreach activities and awareness-raising were recognized at the outset as an integral part of the EAC's work, and so included in the statute.<sup>890</sup> The importance given to the outreach program was unprecedented in the history of international justice, with 10 percent of the initial budget of the EAC devoted to outreach activities.<sup>891</sup>

The EAC benefited from prior engagement of civil society actors from Chad and Senegal around the Habré case. By the time the court was formed, there had already been extensive debate in both countries around the facts of the case, the individuals involved, the merit of prosecution, the role of Western actors, and the alleged crimes.

Nevertheless, following its creation, the EAC faced the challenge of reaching communities in distant Chad, as well as in Senegal itself. To address this, it developed a new, more decentralized approach to outreach that relied on organizations already rooted in those communities. The court's administrator, responsible for entering into necessary agreements to carry out outreach activities and awareness-raising, launched an international tender for the outreach campaign. A consortium of three organizations was selected: a Senegalese organization, a Chadian organization, and a Belgian organization with expertise on the rule of law.<sup>892</sup> The consortium trained journalists, organized public debates, created a website, and produced materials to explain the trials in both countries.<sup>893</sup> In addition, the trial was recorded in its entirety, streamed on the internet, and broadcast on Chadian television.<sup>894</sup> This model maximized the program's effectiveness, implementation, local credibility and proximity, and cost-effectiveness.<sup>895</sup> The outcome of the outreach efforts was even better than anticipated, benefitting from the field knowledge of the local organizations, combined with the monitoring of international experts.

## **Prosecutions**

The Indicting Chamber of the EAC charged Hissène Habré with the crimes against humanity of murder, summary executions, kidnapping followed by enforced disappearance, and torture; the crime of torture; and the war crimes of murder, unlawful transfer and unlawful confinement, and violence to life and physical well-being.<sup>896</sup> The chief prosecutor requested the indictment of five additional officials from Habré's regime, and international arrest warrants were issued against them in 2013, but none of them was brought to the court. Two of the five were convicted in Chad, and Chad refused to extradite them to Senegal; another two are subject to international arrest warrants issued both by Chad and the EAC, but their location remains unknown;<sup>897</sup> and the last one is reportedly in Chad but not in custody.<sup>898</sup>

Habré's trial began on July 20, 2015, and lasted for eight months, with 56 days of hearings. The Trial Chamber heard the testimony of 93 witnesses. Importantly, the powerful testimony of rape victims led the judges to amend the charges to include sexual and gender-based violence.<sup>899</sup> The trial closed on February 11, 2016. Habré was convicted for the crimes against humanity of rape, sexual slavery, murder, summary execution, and inhumane acts; torture; and the war crimes of murder, torture, inhumane treatment, unlawful detention, and cruel treatment.<sup>900</sup> He was sentenced to life imprisonment, to be served in Senegal or in another AU member

state, and he was ordered to pay substantial reparations to victims.<sup>901</sup> Although Habré was totally uncooperative and remained silent throughout the trial, he appealed the judgment in June 2016.<sup>902</sup> On April 17, 2017, the Appeals Chamber upheld the conviction for crimes against humanity, torture, and war crimes, but acquitted Habré of rape.<sup>903</sup>

## Legacy

Hissène Habré's trial is notable for its lengthy quest for justice involving multiple local, national, regional, and international actors, finally culminating in the successful and efficient prosecution of a former head of state through a unique international justice mechanism. Importantly, the EAC were a tailored solution to a particular problem, and their creation was influenced by the (much criticized) judgment of the ECOWAS Court.<sup>904</sup> Nevertheless, this model demonstrated significant successes and could set an important precedent for international criminal justice.

It is the first time that a former head of state was convicted for international crimes by the courts of another state (if one considers the EAC a Senegalese rather than an African court), constituting the first successful application of the Pinochet precedent.<sup>905</sup> In addition, the judgment is notable for its focus on sexual violence and the charging of a head of state with personally perpetrating rape while in office.<sup>906</sup> However, Habré's eventual acquittal on this charge has been criticized. Although the Appeals Chamber explained that the acquittal for rape was purely based on procedural grounds as the testimony had come too late, the decision is seen as reflecting deeper flaws in criminal justice with regard to the investigation of sexual violence. Legal processes do not encourage victims of sexual violence to come forward, and international tribunals still have not improved their practices to support them.<sup>907</sup>

The EAC was unprecedented in its grounding in universal jurisdiction. Hitherto, internationalized tribunals have always been based on territorial jurisdiction. The EAC, apart from being located outside the state in which the crimes were committed, relied upon the gravity of the crimes as its jurisdictional basis, irrespective of the territory in which they were committed or the nationality of the authors or victims.<sup>908</sup>

The EAC had a unique structure that made it an efficient, cost-effective, and valuable mechanism. The combination of its grounding in universal jurisdiction, its

integration into the ordinary court structure, and its minimal international elements, together with the involvement of the AU, allowed it to be established relatively easily and closer to the victims, while upholding fair trial rights and benefitting from the legitimacy of the international community.<sup>909</sup>

The EAC represents a historic instance of an African justice mechanism prosecuting international crimes. Since the early discussions in the AU, a recurring aim was to find an “African solution” for an African impunity problem.<sup>910</sup> Especially in the current context of animosity toward the ICC and a perception of bias against African states, for many this hybrid model offers an appealing alternative to fill the impunity gap.<sup>911</sup> In addition, this model could also be used to fill gaps in situations where the ICC does not have jurisdiction and where prosecution at the national level is not conceivable.

Finally, the judgment is a crucial achievement for the victims of Habré’s rule. After years of effort, they were rewarded with a historic conviction and substantial reparations, to be awarded both to direct and indirect victims and with special recognition of the victims of sexual violence.<sup>912</sup> Habré was ordered to pay reparations, and the EAC seized his assets, but it is unlikely that this will cover the full reparations order.<sup>913</sup> It is the role of the court’s trust fund to ensure the full implementation of the order and to work with international donors to ensure that all victims are fairly compensated.<sup>914</sup>

In sum, the EAC represents a “new mechanism in the toolbox of international justice, but it remains to be seen whether a tribunal of this specific nature can be used in the future.”<sup>915</sup>

## **Financing**

Funding was a contentious issue since the outset, as Senegal repeatedly claimed that the trial of Hissène Habré “require[d] substantial funds which Senegal cannot mobilize without the assistance of the international community” and that “the only impediment ... to the opening of Mr. Hissène Habré’s trial in Senegal [was] a financial one.”<sup>916</sup> Accordingly, a donors’ round table was held in Dakar in November 2010, involving a number of donor countries and international organizations. At the event, donors agreed to a budget of 8.6 million euros to cover the trial, with costs distributed according to the following: Republic of Chad 35.5%; European Union 23%; Kingdom of the Netherlands 12%; African Union 9%; United States 8%; Belgium 6%; French Republic 3.5%; Federal Republic of Germany 2%; Grand Duchy

of Luxembourg 1%.<sup>917</sup> In addition, the Netherlands provided additional funding for outreach, and technical assistance was provided by Canada, Switzerland, and the International Committee of the Red Cross.<sup>918</sup> The agreement between Senegal and the AU on the creation of the EAC, as well as the Statute of the EAC, state that the “Chambers shall be financed in accordance with the budget approved by the Donors’ Round Table held on 24 November 2010” and that additional supplementary financial resources can be sought at a suitable time if necessary.<sup>919</sup>

## **Oversight and Accountability**

The EAC’s statute states that appeals can be filed with the Appeals Chamber by persons convicted by the Trial Chamber, the prosecutor, or civil parties, pursuant to the Senegalese Code of Criminal Procedure. Appeals can be filed on a number of grounds: procedural error, an error concerning a material question of law invalidating the decision, and an error of fact which has occasioned a miscarriage of justice.<sup>920</sup> The decision of the Appeals Chamber is “final and unappealable to anybody, however exceptional.”<sup>921</sup>

As mentioned above, the judges and the prosecutor are nominated by the Senegalese minister of justice and appointed by the chairperson of the AU Commission, while the registrar and the administrator are directly appointed by the Senegalese minister of justice.<sup>922</sup> The accused and the victims may elect their own counsel and, “where the interests of justice so require” or when required by the Senegalese Code of Criminal Procedure, the EAC may appoint legal assistance for the accused.<sup>923</sup> A steering committee may extend the mandates of the judges and of the prosecutor.<sup>924</sup> According to the Senegalese Code of Criminal Procedure, judges can be removed by the minister of justice through the decision of a disciplinary council.<sup>925</sup>

The funds provided by the donors’ round table were managed by a management committee (*Comité de Gestion*), created pursuant to the Donor’s Round Table Final Document of November 2010, together with the United Nations Office for Project Services (UNOPS).<sup>926</sup> In addition, the Joint Financial Agreement signed by the AU, Chad, Senegal, and other partners created a steering committee (*Comité de Pilotage*) responsible for the financial oversight of the EAC. The steering committee receives and approves reports from the administrator, approves the budget, may extend the mandate of the judges and the prosecutor, and is responsible for the appointment of defense counsel.<sup>927</sup>

Finally, national and international NGOs played an important role of informal oversight through the monitoring of proceedings. Trust Africa supported a group of Senegalese law students to monitor the trial and provide an “independent platform of informed actors who can provide accurate and timely analysis of the proceedings, and share this information with a wide audience.”<sup>928</sup> Human Rights Watch also assumed an important role by supporting the victims in their demand for accountability and also by monitoring and communicating about the trial throughout the proceedings.<sup>929</sup>

# SIERRA LEONE: SPECIAL COURT FOR SIERRA LEONE

## Conflict Background and Political Context

Between 1991 and 2002, a brutal war in Sierra Leone ravaged the country and resulted in many thousands of deaths (by some estimates, 75,000) and displacement of at least a third of the population. Various factions perpetrated numerous grave crimes, including amputations and the mass recruitment and use of child soldiers.<sup>930</sup> A rebel group, the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, invaded northern Liberia in 1989 and overthrew President Samuel Doe. Two years later, in March 1991, the Revolutionary United Front (RUF), led by Foday Sankoh and backed by Charles Taylor, invaded Sierra Leone from Liberia. Civil Defense Force militias, dominated by the Kamajor militias of the Mende tribe, came to the support of the government. From about 1997 onward, the RUF was generally allied with the Armed Forces Revolutionary Council, which briefly came to power in a 1997 coup before being ousted by Nigerian-led West African forces. In 1999, the signing of the Lomé Peace Agreement,<sup>931</sup> led to an unsteady peace. Fighting resumed in 2000 and it was not until January 2002, following limited intervention by British forces, that the civil war in Sierra Leone officially ended. In October 1999, the UN deployed the United Nations Mission in Sierra Leone (UNAMSIL), which at its height in 2001 had a force strength of 17,500 military personnel. UNAMSIL's mandate expired in December 2005.<sup>932</sup>

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## The Special Court for Sierra Leone and the National Truth and Reconciliation Commission

The Lomé Peace Agreement of 1999 called for the creation of a Truth and Reconciliation Commission (TRC) for Sierra Leone.<sup>933</sup> A national statute creating the TRC was passed by parliament in February 2000, but it did not become fully operational until November 2002.<sup>934</sup> In October 2004, the TRC released its final report of over 5,000 pages, covering human rights violations beginning in 1991. The report includes the names of responsible individuals.<sup>935</sup> The TRC's mandate allowed it to investigate atrocities before 1996, unlike the Special Court for Sierra Leone (SCSL), and established "in a non-prosecutorial manner, the accountability of many of the 'small fry' perpetrators, while the Court plays a necessary punitive role with respect to the accountability of the 'big fish.'"<sup>936</sup>

There was no formal relationship between the SCSL and the TRC, despite the urgings from a UN Group of Experts, the UN's Office of the High Commissioner for Human Rights, and the United Nations Office of Legal Affairs that "the modalities of cooperation should be institutionalized in an agreement ... and where appropriate, also in their respective rules of procedure."<sup>937</sup> When the TRC began hearings in late 2002, "the SCSL Prosecutor had already given assurances he would not use evidence collected or heard by the TRC."<sup>938</sup> This de facto arrangement not to use TRC evidence was cemented by two realities: (1) the TRC's minuscule budget compared to the SCSL's meant it did not gather evidence unavailable to the prosecutor, and (2) testimony to the TRC was mostly given by victims, not perpetrators whose inside testimony would be a rarer commodity for prosecutors building a case.

Despite the prosecutor's assurances, the trial of defendant Sam Hinga Norman underscored the complications engendered by the lack of a formal agreement between the two institutions. Norman, facing trial before the SCSL, requested that he be allowed to testify before the TRC. The SCSL and the TRC drew up draft practice directions to deal with defendants who wished to testify before both institutions, but could not ultimately agree. The TRC believed that the policies in the practice directions "undermined the confidentiality ... for testimony and presented the risk of an Accused incriminating himself, because the registrar could forward testimony to the Prosecution."<sup>939</sup> A revised practice direction created by the registrar "allowed limited confidentiality and stipulated that the SCSL would grant requests [to testify before the TRC] if the detainee gave informed consent, and unless granting access would be against the 'interests of justice' or would denigrate 'the integrity of the proceedings of the SCSL.'" Ultimately, the SCSL Trial Chamber denied Norman's request on the grounds that it would be incompatible with his right to be presumed innocent. In affirming the decision, the Appeals Chamber found that testifying before the TRC was unnecessary and would create a "spectacle." A proposed compromise—that Norman submit his testimony to the TRC in the form of a legal affidavit—was not implemented before the TRC's mandate expired. A codified arrangement between the SCSL and the TRC—rather than a personality-driven process—may have clarified the accountability framework and improved the functioning of both institutions, avoiding the kind of legal proceedings that arose in the Norman case.

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## **Existing Justice-Sector Capacity**

After a ravaging civil war, the justice sector in Sierra Leone was in disrepair and rife with corruption.<sup>940</sup> Writing in 2001, one expert observed: "The judicial system is largely decimated as a result of the war."<sup>941</sup> Many lawyers, judges, magistrates, and

prosecutors fled during the conflict, and low salaries made the few that remained easy targets for corruption.<sup>942</sup> Much of the country's infrastructure was destroyed or suffered serious damage.<sup>943</sup> The High Court was the only functional court in Freetown, while many lower courts in the provinces had been shut down during the conflict.<sup>944</sup> In the courts that remained open, legal processes were cumbersome and open to corruption. These conditions led to lengthy delays, a huge backlog in cases, and many cases being dismissed or abandoned.<sup>945</sup> In addition, the blanket amnesty granted by the Lomé Agreement barred national courts from conducting prosecutions against any of the combatants for crimes committed during the conflict;<sup>946</sup> and prosecutions against the RUF were unlikely in many areas of the country where they retained control.<sup>947</sup> In these circumstances, accountability in the domestic legal system for the atrocities committed during the civil war was not possible without international assistance. There were efforts in early 2000 to prosecute rebel forces for crimes committed outside the period covered by the amnesty, but they failed due to the national justice system's lack of capacity.<sup>948</sup>

However, despite these deficiencies, the UN Secretary-General observed that the local system for the administration of justice was "perceived to be an administration capable of producing a fair trial," and some local resources could be used in the Special Court for Sierra Leone (SCSL)—for instance, there were enough local barristers to act as defense counsel.<sup>949</sup>

## **Existing Civil Society Capacity**

Sierra Leonean civil society played an important role in the peace process and in the establishment of the Special Court. NGOs participated in the peace talks and were behind the conception of the Truth and Reconciliation Commission as a counterbalance to the amnesty granted to all parties.<sup>950</sup> Civil society organizations, including the Campaign for Good Governance, also played a crucial role in calling for prosecutions after the conflict and urging the government to request United Nations assistance in establishing a hybrid tribunal.<sup>951</sup> Sierra Leonean organizations especially advocated for national ownership of the proposed tribunal, in light of the contributions it could make to post-conflict accountability efforts.<sup>952</sup> In the discussions with the Secretary-General on the establishment of the Special Court, the NGO community favored a national court with international assistance rather than an international tribunal.<sup>953</sup> They also strongly advocated for domestic prosecutions, and there were discussions among local lawyers about challenging the constitutionality of the amnesty law. However, fears of causing unrest in the country overtook these notions.<sup>954</sup>

Following the Special Court's establishment, a "proliferation of local human rights organizations" started to engage with the court's processes through its Interactive Forum and outreach initiatives, and they played an important part in sensitization and awareness-raising activities that helped to ensure the court's national relevance.<sup>955</sup>

## Creation

In May 2000, civil society organizations—among them labor organizations and women's rights organizations—marched to the home of RUF leader Foday Sankoh. His bodyguards shot and killed protestors in a chaotic scene in which Sankoh was captured.<sup>956</sup> In response to the events, the government of Sierra Leone under President Ahmad Tejan Kabbah formally requested the assistance of the United Nations in establishing a hybrid court in Sierra Leone to prosecute atrocities committed by the RUF and its allies.<sup>957</sup> Civil society in Sierra Leone, backed by the United States and the United Kingdom, strongly supported the creation of an international tribunal to hold those most responsible to account.<sup>958</sup> The United Nations Security Council considered creating an international ad hoc tribunal, but the option was rejected, in part due to President Kabbah's opposition.<sup>959</sup> In June 2000, the Security Council passed a resolution requesting the Secretary-General to negotiate an agreement with Sierra Leone's government to create a hybrid tribunal.<sup>960</sup> The Secretary-General sent a fact-finding mission to Sierra Leone to investigate the feasibility of creating a tribunal.<sup>961</sup> RUF leader Foday Sankoh had been taken into government custody, but the legal and political system was inadequate to prosecute serious crimes, and leading politicians feared retaliation and destabilization.<sup>962</sup> Consequently, the UN experts focused on technical issues that would arise in creating a hybrid or mixed court. In October 2000, the Secretary-General submitted a report to the Security Council recommending the creation of the SCSL.<sup>963</sup> Whereas the government had initially requested a court that would only deal with RUF crimes, the UN-recommended body would have no such restriction.

The agreement between the UN and Sierra Leone establishing the SCSL was signed in January 2002 and contained the SCSL Statute.<sup>964</sup> The agreement was subsequently ratified into the domestic law of Sierra Leone.<sup>965</sup> The SCSL was partially operational by August 2002 and fully operational by mid-2004, when the first two trials began. Based in Freetown, the SCSL was the first international criminal tribunal located within the country where the crimes had been committed, as well as the first hybrid court to be created by a bilateral treaty between the United Nations and the host country.

## Legal Framework and Mandate

The SCSL was mandated to prosecute persons who “bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>966</sup> The start date of temporal jurisdiction was chosen as a “non-politically biased date, which provided a time-frame that ensure[d] the Court would not be overburdened while it still addresses the most serious atrocities committed during the war.”<sup>967</sup> However, political compromises meant the territorial jurisdiction of the mandate left unpunished any crimes committed in Liberia by many of the same forces during the same period. This impunity gap has intermittently led to proposals for a hybrid or international criminal court to be established in Liberia. (See the separate profile on Liberia.) The court’s statute also limited personal jurisdiction to those bearing “the greatest responsibility” and expressly prohibited jurisdiction over those under the age of 15 at the time of the commission of the crime.<sup>968</sup>

The governing legal instruments of the SCSL were the agreement between the government and the UN, which contains the Statute and the Rules of Procedure and Evidence, drawn up by the judges and modeled on the rules of the International Criminal Tribunal for Rwanda (ICTR).<sup>969</sup> In addition, the legal framework included secondary instruments, such as bilateral detention agreements with states and codes of conduct for counsel.<sup>970</sup>

The SCSL was a treaty-based court, rather than a subsidiary organ of the UN, and not directly administered by the UN or the government of Sierra Leone. However, the SCSL had primacy and concurrent jurisdiction over national courts, which mostly have not exercised their jurisdiction over grave crimes (see *Prosecutions*, below, regarding domestic prosecutions).<sup>971</sup> The government of Sierra Leone, as a party to the court, is required to enforce and carry out the court’s decisions; and in fact, national authorities carried out arrest warrants and enforced orders. However, because the SCSL was not created under the UN Security Council’s Chapter VII powers, the SCSL lacked enforcement powers over third-party states.

Although the SCSL was mandated to have a hybrid legal jurisdiction, in practice, the court’s application of law was almost exclusively international. The statute and the Rules of Procedure and Evidence provided that the court be guided by international and domestic law in interpreting humanitarian law;<sup>972</sup> and guided by the decisions of

the Supreme Court of Sierra Leone in interpreting Sierra Leonean law. Additionally, judges should be guided by the Sierra Leone Criminal Procedure Act when amending the court's Rules of Procedure and Evidence.<sup>973</sup> However, in practice, the SCSL's jurisprudence only referred to international law. Similarly, although the court's mandate allowed for prosecution of "crimes under relevant Sierra Leonean law,"<sup>974</sup> the first SCSL prosecutor chose to apply only international law in drafting indictments.

## **Location**

By 2004, modern court facilities had been constructed in Freetown on a site provided by the government, including a detention center,<sup>975</sup> offices, and a library. Many of the facilities were "accommodated in a simple prefabricated block, with little scope for expansion."<sup>976</sup> All of the SCSL trials were held in Freetown except for the trial of Charles Taylor, which used courtrooms rented from the ICC and the Special Tribunal for Lebanon (STL) in The Hague, and detention space from the ICC.<sup>977</sup> The Appeals Chamber, for much of the court's lifespan, was located in The Hague, creating a "challenging and expensive ... logistical exercise in bringing all the judges together."<sup>978</sup>

In its early years, the Special Court faced extreme difficulties in putting in place basic operations and infrastructure, and expended significant efforts to attract qualified personnel, locate suitable housing for staff members, procure basic office supplies and functional communications systems, and set up the basic functions of a court. That in itself was a significant achievement in the context of post-war Freetown's gutted physical infrastructure.

However, the SCSL campus was criticized as being inaccessible, in part because of strict security measures. It was "widely reported that many residents of Sierra Leone were hesitant to visit the Special Court's facilities during the trials because they considered access to the court a cumbersome and intimidating process."<sup>979</sup>

## **Structure and Composition**

The SCSL comprised a Chambers, Registry, and Office of the Prosecutor. An external management committee engaged in fundraising and non-judicial policy formation. The Defense Office formed an unofficial "fourth pillar" of the court. The three core organs were staffed by national and international personnel. Even without formal requirements for a ratio of national to international personnel, the Special Court "managed to achieve a geographical representation across 37 countries over

and above its predominantly Sierra Leonean representation, albeit that many Sierra Leoneans were not necessarily in senior positions.”<sup>980</sup>

The Sierra Leonean government selected and appointed the national judges and deputy prosecutor. However, some critics charged that the court did not “embrace true hybridity at the highest level,” citing the lack of a requirement that the deputy prosecutor be Sierra Leonean.<sup>981</sup> Nonetheless, the court maintained a balance of mixed staff, even as it sharply downsized from about 350 at its height to around 80 by the end of 2011, divided between Freetown and The Hague. As early as 2005, the court drew up a personnel policy paper to address the need to downsize national and international staff.<sup>982</sup> In 2006, about 150 of 250 staff members were nationals; in March 2011, about half of the 100 staff members were nationals.<sup>983</sup> The court also instituted an internship program to recruit recent Sierra Leonean graduates and legal associates.

### ***Chambers***

The SCSL comprised two three-judge Trial Chambers and a five-judge Appeals Chamber. International judges, appointed by the Secretary-General, made up a majority of each chamber. National judges, a minority in each chamber, were appointed by the government of Sierra Leone. The president and vice president of the Special Court, as well as the presiding judge of the Appeals Chamber, were elected by a majority of the judges on the Appeals Chamber.<sup>984</sup> At the request of the court’s president, one alternate judge could be appointed by the government of Sierra Leone to each Trial or Appeals Chamber. Chambers were served by legal officers, assistant legal officers, and interns. The second Trial Chamber was added in January 2005 to provide for the commencement of the SCSL’s third trial in March 2005.

### ***Office of the Prosecutor***

The prosecutor was appointed by the Secretary-General in consultation with the government of Sierra Leone. The deputy prosecutor was to be Sierra Leonean and appointed by the government of Sierra Leone, in consultation with the Secretary-General. In practice, the deputy prosecutor was not always Sierra Leonean. The prosecution office was assisted by “Sierra Leonean and international staff as may be required.”<sup>985</sup>

### ***Registry***

The Registry housed a range of administrative and legal functions, including the Defense Office, outreach, public affairs, and Witnesses and Victim Support. A legal

unit within the Registry handled matters related to court management, detention of accused, personnel and staff, library and archiving, security, procurement, and other administrative functions. The court management section especially faced challenges in the language services unit, which had to contend with Sierra Leone's "23 different languages, a number of which are non-codified, standard languages that make it difficult to find interpreters who can interpret accurately."<sup>986</sup>

The registrar was a UN staff member appointed by the Secretary-General after consultation with the president of the Special Court.<sup>987</sup> The statute did not specify the nationality and appointment procedure for the deputy registrar, who from the beginning of the Taylor trial also served as the head of the office in The Hague. The Rules of Procedure and Evidence provided that the registrar appoints the deputy registrar and other staff as necessary.<sup>988</sup>

### ***Defense***

The Defense Office, headed by the principal defender, was located within the management structure of the Registry<sup>989</sup> but functioned independently. The arrangement was an "innovation in the structure of international courts ... [as] none previously was vested with a permanent internal institution entrusted with ensuring the rights of suspects and accused."<sup>990</sup> Defense counsel were required to have practiced criminal law for a minimum of five years and to be licensed by a state.<sup>991</sup> The principal defender was required to maintain a list of "duty counsel," who must have at least seven years' experience. Controversially, the SCSL used legal services contracts, which capped fees paid to defense attorneys, "beyond which payments ha[d] to be certified by the defense office in consultation with the lawyer(s) concerned."<sup>992</sup> The arrangement was meant to signal to lawyers that "assignment to a defendant did not result in a 'blank check.'"<sup>993</sup>

### ***Witnesses and Victims Section***

The duties of the Witnesses and Victims Section (WVS) were outlined in the SCSL Agreement, the SCSL Statute, and the Rules of Procedure and Evidence.<sup>994</sup> The WVS was established by the registrar. The statute required the WVS to include "experts in trauma, including trauma related to crimes of sexual violence and violence against children."<sup>995</sup> WVS also ran extensive witness protection and support programs, including a medical clinic on the court grounds, and provided psycho-social counseling. In 2007, "52 national staff and five international staff were employed in supervisory positions in the witness protection and victim support section ... [and] the arrangement worked well," notwithstanding security concerns, because "every

step was taken to gather information on potential staff members.”<sup>996</sup> Some tension arose between the WVS and the Office of the Prosecutor (OTP) after the latter created an internal Witness Management Unit that had some overlap in mandate with the WVS.

### ***Outreach***

The outreach program at the SCSL was widely regarded in the field of international justice to be well designed and run. The SCSL’s designers and leadership placed value on outreach, having seen the costs to the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR of failing to do so. However, the SCSL’s reliance on voluntary funding presented difficulties (see *Financing*, below). The outreach programs engaged a broad section of society. Innovations included interactive forums between the public and the SCSL (tapping into an established Sierra Leonean means of communication), weekly radio broadcasts summarizing proceedings, trainings for local media on producing audio and video materials, trainings for local government leaders, and video screenings in Liberia’s capital, Monrovia, as well as Freetown and towns in each of Sierra Leone’s districts, funded by the European Commission and the MacArthur Foundation. The outreach program established student Accountability Now clubs at high schools and tertiary institutions in Sierra Leone and Liberia, which are now generally self-sufficient and focus on broader issues of peace, justice, and accountability. The outreach program also carried out population-based surveys measuring perceptions of the court. During the Charles Taylor trial in The Hague, the outreach unit facilitated the travel of civil society representatives, local chiefs, parliamentarians, and members of the Sierra Leone judiciary to observe the trial.

### ***Special Court Interactive Forum***

The SCSL created an interactive forum to “provide civil society groups, international NGOs and other groups with the opportunity to meet regularly [monthly] with senior officials of the court to receive briefings on the court’s activities.” Participants were encouraged to “pose questions and put recommendations and concerns to high-level court officials,” which were then taken back to the court “with a commitment by the court to report back on any action promised.”<sup>997</sup> In addition, the court organized regional conferences to collect opinions and perceptions of its work. These empowered civil society groups to engage with the court.<sup>998</sup>

## Prosecutions

The SCSL completed three major trials in Freetown and a fourth trial against Charles Taylor, held in The Hague. A fifth trial, for contempt proceedings, was held in Freetown.<sup>999</sup> The court issued indictments against 13 high-level members of the RUF, the Armed Forces Revolutionary Council (AFRC), and the Civil Defense Forces. Nine accused persons were convicted, three died before trial or judgment, and the fate and location of former AFRC leader Johnny Paul Koroma are unknown.<sup>1000</sup> The court could refer Koroma's indictment to the Residual Court (see below) or to another national jurisdiction, as allowed for in Rule 11*bis* of the SCSL Statute.<sup>1001</sup>

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## Amnesty, National Prosecutions, and the Lomé Peace Accord

The Lomé Agreement of 1999 granted blanket amnesty to all fighters in order to secure the signature of RUF leader Foday Sankoh. However, the Special Representative of the UN Secretary-General appended a disclaimer to the agreement, and the Statute of the Special Court expressly rejected domestic amnesty for atrocity crimes.<sup>1002</sup> Despite the SCSL's success in prosecuting high-level perpetrators, "no national proceedings have been conducted for crimes committed by mid- and lower-level perpetrators during the conflict ... although there were efforts to prosecute rebel forces for crimes committed *outside* the period covered by the Lomé Amnesty."<sup>1003</sup> No legal challenges to the blanket amnesty in the Lomé Agreement have been mounted domestically, and the domestic judicial system retains significant capacity gaps.<sup>1004</sup> In those trials of low- and mid-level perpetrators, "many arrested persons were detained for long periods without trial, the government had problems gathering evidence, there were challenges in transporting detained persons to court, there were insufficient courtrooms to hold trials, and the detained persons themselves could not find legal representation."<sup>1005</sup> Calls from civil society for prosecutions, and discussions among lawyers about challenging the constitutionality of the amnesty, "have been overtaken by political considerations, because the government does not want to be seen as responsible for any backlash if such prosecutions cause unrest in the country."<sup>1006</sup>

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## *The Exile, Arrest, and Transfer of Charles Taylor*

When the SCSL prosecutor made public the indictment of Charles Taylor in June 2003, Taylor was attending peace talks in Ghana and subsequently fled to Liberia.

A “deal between the United Nations, the United States, the African Union, and ECOWAS (the Economic Community of West African States)” led to his exile in Nigeria.<sup>1007</sup> While in Nigeria, civil society groups and others challenged Taylor’s asylum, but it was not until 2006—following a formal request from newly elected Liberian President Ellen Johnson Sirleaf—that Nigerian President Olusegun Obasanjo stated Liberia was “free to take former President Charles Taylor into its custody.”<sup>1008</sup> Taylor fled, but was captured by Nigerian authorities in March 2006 while attempting to cross into Cameroon. He was transferred to Monrovia and handed over to the SCSL. Liberian President Johnson Sirleaf, fearing instability in Liberia and the region if Taylor’s trial were held in Sierra Leone, requested that his trial be moved to The Hague. Following Security Council Resolution 1688, passed on June 16, 2006, Taylor was transferred to The Hague. His trial began in January 2008 on the premises of the ICC and later moved to a courtroom at the STL. Despite security concerns, many civil society organizations in Sierra Leone were disappointed that his trial was moved out of the region.

On April 26, 2012, the Trial Chamber convicted Charles Taylor on all 11 counts in the indictment: aiding and abetting the commission of crimes against humanity and war crimes, including murder, rape, and use of child soldiers by RUF and AFRC rebels between 1999 and 2002. Taylor was also found guilty of planning rebel attacks against Freetown and two other towns in late 1998. He was sentenced to 50 years in prison. His sentence was confirmed on appeal in 2013. Taylor’s was the first conviction of a former head of state by an international criminal tribunal since the Nuremburg trials in 1946 convicted the titular head of state for the Third Reich, Admiral Karl Dönitz.<sup>1009</sup>

## Legacy

The legacy of the SCSL includes the establishment of a Residual Special Court, the establishment of a Peace Museum, and the development of capacity at the national level, including among Sierra Leonean professionals who worked at the court. In 2005, the SCSL registrar set up a Legacy Working Committee,<sup>1010</sup> focusing on five key areas:

- 1) developing the capacity of the national legal profession;
- 2) promoting the rule of law and accountability in Sierra Leone;
- 3) promoting human rights and international humanitarian law;
- 4) promoting the role of civil society in the justice sector; and

- 5) assisting the government of Sierra Leone in assessing possible uses for the site of the court beyond the lifespan of the trials.<sup>1011</sup>

### ***Impact of Jurisprudence on the National Legal System***

The SCSL has contributed to the development of novel jurisprudence in international law, including pronouncing forced marriage to be a crime under international humanitarian law. However, the court's jurisprudence has rarely been invoked and applied at the national level; the utility of the SCSL's jurisprudence to national courts has been limited.<sup>1012</sup> The Taylor appeal judgment provided "the opportunity for national Sierra Leonean law officers to meet on a peer-to-peer basis under the auspices of the national Bar Association, and with the assistance of former national SCSL staff, to conduct peer-to-peer sessions to identify strategies for utilizing SCSL jurisprudence in national cases."<sup>1013</sup>

### ***Trainings***

The Special Court has "continually offered trainings on a wide range of subjects, both internally for national staff of the SCSL and externally for members of the national legal system."<sup>1014</sup> These included trainings of national police on witness protection issues, training of local prosecutors by the OTP (nearly 100 trained between 2010 and mid-2011), and archive management training for national archival institutions.<sup>1015</sup>

However, the impact and value of the SCSL in building knowledge and practice in the national system has been limited, in part because of the "disparity in resources, the differences in the crimes prosecuted, and the enormous chasm between conditions of service at the national level and at the SCSL."<sup>1016</sup> The training scheme has been criticized for the lack of formalized interaction and training between international judges and prosecutors and their national counterparts. In a post-colonial context, poorly paid local legal professionals often resented receiving lectures from overpaid SCSL staff and judges who did not treat them as peers. One Sierra Leonean judge noted that "at the practitioner level, people don't want to be seen as being trained by the Special Court."<sup>1017</sup> This highlights the difficulties of holding trainings and underscores the need for well-designed information exchange.

### ***Sierra Leone Legal Information Institute (Sierra LII)***

In February 2009, the OTP of the SCSL developed the Sierra LII to "provide online access to Sierra Leone primary legal materials and related information," with seed money provided by the Open Society Foundations and the SCSL Legacy Program.<sup>1018</sup>

### ***International Prosecutor's Best Practices Project***

The project, funded by the Canadian government, brought together prosecutors from various international and hybrid tribunals, including the SCSL, the ICTR, the ICTY, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the STL, to “document the recommended practices from each of the offices for use of practitioners of international criminal and humanitarian law at the international level and by national prosecuting authorities.”<sup>1019</sup>

### ***Police Training***

In Sierra Leone, “extensive efforts were made to train the national police service at middle to senior management level. ... The aim was to make them understand their role and responsibility in ensuring that witnesses returning to the various districts were monitored, and action taken if there was any evidence that a witness or his or her family was under threat.”<sup>1020</sup> In 2011, the national police established a National Witness Protection and Assistance Unit, following engagement with the Special Court’s Registry. The unit provides support to SCSL witnesses after the completion of its mandate, as well as support for threatened witnesses in national cases involving corruption, gender-based violence, and organized crime.<sup>1021</sup> In 2011, security duties at the SCSL were handed over from a remnant Mongolian detachment of UNAMSIL peacekeepers to the Sierra Leone police.<sup>1022</sup>

### ***Archives Management***

The original archives of the SCSL were transferred to the Dutch National Archives in December 2010, while copies and electronic versions of the court’s archives were made available at the Peace Museum in Freetown.<sup>1023</sup> The court maintained that current facilities and procedures for upkeep in Sierra Leone are not adequate to provide for safe and secure storage.

### ***Transfer of Infrastructure***

The SCSL convened a coalition of national stakeholders to discuss possible uses of the SCSL facilities after the closure of the court. Initial proposals included using the facilities as the seat of the Sierra Leonean Supreme Court or an African regional court, as an international judicial training center, or as a memorial to the civil war. In 2012–2013, stakeholders agreed to the establishment of the Peace Museum, funded by the UN Peacebuilding Commission. It houses exhibition and memorial space, a law library for public research, and paper and electronic archives of the SCSL to “assist the national legal system to use the Court’s jurisprudence in

national cases.”<sup>1024</sup> The archives also house the records of the TRC and the National Commission for Demobilization, Disarmament, and Reintegration.

The SCSL’s modern detention facilities were no longer needed after transferring all convicted persons in the first three trials to Rwanda in October 2009. They were devolved into national prison authorities in May 2010 and now house female prisoners and children born in custody.

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## **Completion Strategy and the Residual Special Court for Sierra Leone**

In August 2010, the government of Sierra Leone signed an agreement with the United Nations, creating the Residual Special Court for Sierra Leone (RSCSL).<sup>1025</sup> The agreement was ratified by parliament in December 2011. The SCSL initially planned to complete its judicial mandate by mid-2012 and then transition to a residual mechanism. However, delays in the Charles Taylor trial postponed the completion strategy. The court closed down operations following the delivery of the appellate judgment in the Charles Taylor case in September 2013. In the final years of its operation, staff size at the SCSL was sharply reduced. The RSCSL’s primary seat is in the Netherlands and it also has a sub-office in Sierra Leone, focusing on witness protection. The RSCSL retained key posts of president, prosecutor, and registrar. The statute of the Residual Special Court states that the body will “maintain, preserve, and manage its archives, including the archives of the Special Court; provide for witnesses and victim protection and support; respond to requests for access to evidence by national prosecution authorities; supervise enforcement of sentences; review convictions and acquittals; conduct contempt of court proceedings; provide defense counsel and legal aid for the conduct of proceedings before the Residual Special Court; respond to requests from national authorities with respect to claims for compensation; and prevent double jeopardy.”<sup>1026</sup>

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## **Financing**

The SCSL was funded through voluntary contributions from governments. The court’s management committee, along with the UN Secretary-General, was responsible for raising funds. Although the SCSL received generous in-kind and cash contributions from over 40 states and several private foundations, the voluntary contribution model resulted in “constant financial shortfalls.”<sup>1027</sup> The largest

contributing countries to the court were the United States, the United Kingdom, Canada, the Netherlands, and Nigeria. The completion budget approved for the SCSL required just over US\$20 million (US\$16 million in 2011 and US\$4 million for 2012),<sup>1028</sup> and the court faced significant challenges in raising the funds necessary for a smooth transition to the residual court. Shortfalls resulting from the voluntary contribution model required the Special Court to seek and receive UN subvention grants in 2004, when the UN subvention grant of US\$33 million was desperately needed to fully operationalize the court in its incipient stages, as well as in 2011 and 2012.<sup>1029</sup> The General Assembly authorized the Secretary-General to provide nearly US\$10 million in supplementary funding to the court in 2011 and authorized a further subvention, if necessary, of US\$2.3 million for the 2012 budget.<sup>1030</sup>

Private foundations and international agencies played a significant role in funding non-core functions, such as outreach and judicial trainings. These included the Open Society Foundations, the European Commission, the UN Peace Building Fund, the Ford Foundation, the MacArthur Foundation, the Oak Foundation, the Rockefeller Foundation, and the Gordon Foundation. The silver lining of the voluntary funding arrangement was that it required the court to engage with and seek the ad hoc support of international NGOs, which assisted “in lobbying for financial or political support; providing opportunities to get the institution’s message across to a wider audience; partnerships in training and outreach programs, and so forth.”<sup>1031</sup>

The court’s library holdings, including the “vast majority of books, periodicals and other materials, ... were donated to the court by a variety of sources. ... Had that not been the case, the court would have had to work with an extremely limited library facility, as there was little funding available from the regular budget.”<sup>1032</sup> Legacy initiatives were not contemplated in the founding documents of the SCSL and therefore not included in the core budget.<sup>1033</sup>

The necessity of pursuing these targeted grants for non-core functions posed risks for the SCSL’s operation and its legacy. Outreach is a prime example. Even though “the need for an outreach capability was identified at an early stage, the [SCSL] could not fully use the opportunity afforded by its location in-country. ... Those monitoring the court’s budget were extremely reluctant to approve significant resources to that process. ... In addition, the limited funding allocated in the regular budget had to be significantly ‘topped up’ year by year by funding obtained from elsewhere other than the court’s main sources of funding.”<sup>1034</sup>

Although the voluntary contribution arrangement allowed for “more flexibility both in the budgetary process ... and the reporting or control mechanisms,”<sup>1035</sup> ultimately

the arrangement severely taxed the SCSL's resources, continuously threatened the smooth function of the court, and presented a significant challenge.<sup>1036</sup>

The RSCSL is also funded through voluntary contributions and does not have guaranteed UN funding. This raises concerns that the problems and difficulties faced by the Special Court will be repeated and exacerbated by the lack of dedicated personnel at the Residual Special Court with the time or mandate to engage in fundraising.<sup>1037</sup>

## **Oversight and Accountability**

The Management Committee consisted of representatives from the Sierra Leonean government, the Secretary-General, and "important contributors to the Special Court." The committee coordinated and sought funding for the court. It was chaired by a donor state representative and received a monthly written progress report from the registrar.<sup>1038</sup> The management committee "provide[d] advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested states."<sup>1039</sup>

## **SOUTH SUDAN: PROPOSED HYBRID COURT**

### **Conflict Background and Political Context**

South Sudan gained its independence following protracted civil wars within the state of Sudan from 1955 to 1972 and 1983 to 2005. Those wars generally pitted the northern Muslim and Arab government against a coalition of southern peoples who practiced traditional religions and Christianity, although alliances were often complicated and cross-confessional. In the course of fighting, fueled in part by competition for control of the south's oil resources, President Omar al Bashir and his predecessors encouraged infighting among southern rebels along tribal lines. Notably, his government provided support to Riek Machar, an ethnic Nuer, who split from the main Sudan People's Liberation Movement, led by a Dinka, John Garang. Under international pressure, the parties to the conflict signed a Comprehensive Peace Agreement in 2005, which granted broad autonomy to the south and included provision for a referendum on independence within six years.<sup>1040</sup>

South Sudanese voters opted for independence in a January 2011 referendum, and South Sudan became an independent country in July 2011. After two years of rising tension and regular and serious violent clashes, especially in rural areas, President Salva Kiir, an ethnic Dinka, accused Vice President Riek Machar of plotting to overthrow him.<sup>1041</sup> When Kiir dismissed Machar and arrested a number of his ministers in December 2013, clashes erupted in the capital, Juba.<sup>1042</sup> Fighting along ethnic lines has continued amidst broken ceasefire deals, power-sharing arrangements, and a proliferation of rebel factions. A UN peacekeeping mission, United Nations Mission in South Sudan (UNMISS), has faced criticism for failure to protect civilians.<sup>1043</sup>

Tens of thousands of people have been killed since the conflict began at the end of 2013; by 2016, estimates ranged from 50,000 to as many as 300,000.<sup>1044</sup> By the end of 2016, nearly two million South Sudanese were internally displaced or living as refugees.<sup>1045</sup> In February, the UN declared famine in parts of South Sudan, warning that "war and a collapsing economy have left some 100,000 people facing starvation [in South Sudan] and a further one million people are classified as being on the brink of famine."<sup>1046</sup>

There have been numerous reports of serious international crimes perpetrated during the course of the conflict. The combatting factions have perpetrated rape

and other sexual and gender-based violence on a massive scale.<sup>1047</sup> An African Union Commission of Inquiry in 2015 found cases of forced cannibalism, gang rapes, and death by burning.<sup>1048</sup> The report suggested that crimes against humanity had been perpetrated, finding “the existence of a state or organizational policy to launch attacks against civilians based on their ethnicity or political affiliation.”<sup>1049</sup> However, the commission stopped short of concluding that the crimes amounted to genocide.<sup>1050</sup> In November 2016, the UN Special Advisor on the Prevention of Genocide warned of a “potential for genocide” in South Sudan.<sup>1051</sup> In March 2017, the UN Commission on Human Rights in South Sudan concluded:

Warning signs and enablers for genocide and ethnic cleansing include the cover of an ongoing conflict to act as a “smoke screen,” several low-level and isolated acts of violence to start the process, the dehumanization of others through hate speech, economic volatility and instability, deliberate starvation, the bombardment of and attacks against civilians, forced displacement and the burning of villages. The targeting of civilians on the basis of their ethnic identity is unacceptable and amounts to ethnic cleansing.<sup>1052</sup>

In April 2017, the UK International Development Secretary described the ongoing interethnic violence as genocide.<sup>1053</sup>

## **Existing Justice-Sector Capacity**

The 2011 Transitional Constitution established South Sudan’s judicial structures.<sup>1054</sup> Customary courts form part of the system, alongside statutory courts.<sup>1055</sup> The Constitution stipulates that the judiciary is comprised of the Supreme Court, Courts of Appeal, High Courts, County Courts, and “other courts or tribunals as deemed necessary to be established in accordance with the provisions of this Constitution and the law.”<sup>1056</sup> Within the institutional structure of justice, traditional authorities and courts also play an important role, though the relation between both is characterized as complicated by public perceptions of the two systems.<sup>1057</sup> Customary courts are administered under 2009 Local Government Act, and as such, chiefs are primarily answerable to county commissioners.<sup>1058</sup>

Upon independence in 2011, South Sudan’s justice sector already lacked technical capacity across the board, and conditions only worsened with the outbreak of the large-scale conflict in 2013. An assessment by the American Bar Association Rule of Law Initiative in 2014 found unanimous views among interviewees that the national

justice system was incapable of holding proceedings for high-level perpetrators “in the current or near term.” Some of those interviewed for the assessment thought the national system also incapable of credible proceedings for low- and mid-level perpetrators, while others saw some capacity among military prosecutors.<sup>1059</sup> The assessment listed three main reasons for South Sudan’s current inability to deal with grave crimes: a lack of competence, a lack of judicial independence, and a lack of public trust. At the end of 2016, the chair of the Commission on Human Rights in South Sudan said, “Based on the interviews we have conducted, South Sudan’s legal system is currently in shambles.”<sup>1060</sup>

The U.S. government has provided extensive support for the justice sector. The U.S. State Department has provided training for law enforcement and the judiciary, and sought to build the capacity of prisons and correction institutions.<sup>1061</sup> USAID and UNDP have worked directly with the South Sudanese government to provide rule-of-law assistance.<sup>1062</sup> UNMISS, too, has provided justice-sector assistance.<sup>1063</sup>

## **Existing Civil Society Capacity**

Civil society groups in South Sudan face extraordinary danger in the context of ongoing war. Limited capacity, reliance on donors, and political division have also limited their effectiveness.<sup>1064</sup> Nevertheless, some groups have tried to bridge divides. A civil society platform in January 2014 appealed to the government and rebels to hold accountable the perpetrators of grave crimes under their command.<sup>1065</sup> Beginning in 2014, several South Sudanese human rights organizations formed the Transitional Justice Working Group “to promote understanding about the transitional justice process; to coordinate civil society support to the transitional justice mechanisms in the peace agreement; and to support victims and other persons affected by the conflict to have their voices heard.”<sup>1066</sup> Civil society organizations’ assertion of independence has led to attempts by the warring factions to exclude them from participation in the peace process.<sup>1067</sup> In 2016, a number of South Sudanese civil society organizations joined regional and international NGOs in urging the African Union (AU) to establish a hybrid court.<sup>1068</sup>

## **Creation**

Kiir and Machar entered into a peace agreement in 2015, pledging them to form a united transitional government.<sup>1069</sup> The section of the agreement on “Transitional Justice, Accountability, Reconciliation and Healing,” included the proposal for

a Hybrid Court for South Sudan (HCSS). The HCSS would have a mandate “to investigate and prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law,” in particular war crimes, crimes against humanity, and genocide.<sup>1070</sup>

In 2015, the AU’s Peace and Security Council met at the level of heads of state and government. It authorized the chairperson of the AU Commission “to take all necessary steps towards the establishment of the HCSS, including providing broad guidelines relating to the location of the HCSS, its infrastructure, funding and enforcement mechanisms, the applicable jurisprudence, the number and composition of judges, privileges and immunities of Court personnel and any other related matters.”<sup>1071</sup>

Although the agreement stipulated that the HCSS should be established within one year, the parties quickly distanced themselves from the proposal. An op-ed appearing in the *New York Times* in June 2016 bearing the byline of Kiir and Machar argued that peace and accountability should take precedence over the attempt at criminal accountability embodied in the HCSS proposal.<sup>1072</sup> Machar quickly denied any role in writing the article.<sup>1073</sup>

The United Nations has expressed support for the proposed court and a willingness to provide technical assistance in its establishment.<sup>1074</sup> In the face of repeated delays, at the end of 2016, the UN High Commissioner for Human Rights urged the AU to quickly establish the HCSS.<sup>1075</sup> Speaking before the Human Rights Council in March 2017, a member of the UN Commission on Human Rights in South Sudan criticized both South Sudan and the AU for failing to establish the court.<sup>1076</sup> In August 2017, officials from the AU Office of the Legal Counsel met with South Sudanese justice officials to agree on drafts of a memorandum of understanding (MoU) and statute for the hybrid court. The draft would need to be signed by South Sudan’s government and the AU Commission.<sup>1077</sup>

## **Legal Framework and Mandate**

The 2015 peace agreement states that the HCSS should have a mandate to “investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.”<sup>1078</sup> Its investigations could rely on findings of the AU Commission of Inquiry or documents from any

other body.<sup>1079</sup> The HCSS would have primacy over national courts.<sup>1080</sup> It would have jurisdiction over war crimes, crimes against humanity, and genocide, as well as “other serious crimes under international law and relevant laws of the Republic of South Sudan including gender-based crimes and sexual violence.”<sup>1081</sup>

With regard to these crimes, the HCSS would have personal jurisdiction over any person “who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime.”<sup>1082</sup> Immunities and amnesties, grants of pardon, or statutes of limitation would not apply at the HCSS.<sup>1083</sup>

The agreement specifies that the HCSS have a mandate to award reparation and compensation.<sup>1084</sup> The court would be empowered to order the forfeiture of the property, proceeds, and any assets acquired unlawfully or by criminal conduct for return to their rightful owner or the state.<sup>1085</sup>

## **Location**

Under the 2015 peace agreement, the chairperson of the AU Commission shall decide the seat of the HCSS. One commentator has argued that the premises of the Mechanism for International Criminal Tribunals in Arusha could be used as a permanent tribunal housing hybrid mechanisms, including the HCSS.<sup>1086</sup>

## **Structure and Composition**

The 2015 agreement provides limited details on the HCSS’s structure and composition. It states that the court shall be “independent and distinct from the national judiciary in its operations.”<sup>1087</sup> The agreement leaves it to the AU Commission to establish broad guidelines for many aspects of the HCSS’s design, including the “number and composition of judges.”<sup>1088</sup> Under the statute, a majority of judges on all panels, and the prosecutors, defense counsel, and registrar must all be from African states other than South Sudan. The judges would elect a court president from among their members.<sup>1089</sup> The agreement states that senior court officials shall be “persons of high moral character, impartiality and integrity, and should demonstrate expertise in criminal law and international law, including international humanitarian and human rights law.”<sup>1090</sup>

## **Prosecutions**

As of October 2017, the HCSS had not been established, and there had been no prosecutions.

## **Legacy**

The 2015 agreement states that the HCSS is intended to leave a permanent legacy for South Sudan,<sup>1091</sup> but it does not specify what kind of legacy is intended. A continued failure to establish the court could instead leave a legacy of further hollowing out a peace accord that has already failed to end the conflict.<sup>1092</sup>

## **Financing**

The 2015 agreement provides no detail on the financing of the HCSS, but notes that the AU Commission should issue broad guidelines on the matter.<sup>1093</sup>

## **Oversight and Accountability**

The chairperson of the African Union Commission would select and appoint the HCSS's judges, prosecutors, defense counsel, and the registrar.<sup>1094</sup> There is no mention of a process for removals. The agreement provides no other information on means of oversight or codes of ethics.

# **SUDAN: PROPOSED HYBRID COURT FOR DARFUR**

## **Conflict Background and Political Context**

Peoples in the Darfur region in western Sudan long coexisted in relative peace. Ecological degradation, increasing population, and chronic neglect from the government in Khartoum gradually led to increased tension between pastoralists and farmers over land use, leading to large-scale violence beginning in the 1980s.<sup>1095</sup> Conflict increasingly became defined by ethnicity, with Arab pastoralist groups forming loosely organized armed groups, which came to be known as “Janjaweed,” to take on settled, non-Arab groups.<sup>1096</sup>

In 2003, two insurgent groups, the Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) attacked the main military airbase in Al-Fashir, the capital city of North Darfur.<sup>1097</sup> The central government responded by mobilizing the Janjaweed and providing resources enabling them to attack civilians perceived as providing a support base for the rebels. The Janjaweed and Sudanese military forces attacked whole non-Arab villages in Darfur, killing many civilians and forcibly displacing entire communities. The fracturing of rebel groups complicated the conflict. From 2005 onward, armed groups have proliferated, split, merged, and taken various positions on negotiations with the government.<sup>1098</sup> In addition, well-armed Arab groups have increasingly fought each other.

The government increasingly integrated Janjaweed into various regular forces: first its Borders Intelligence Brigade<sup>1099</sup> and most recently the Rapid Support Forces (RSF). Together, the Sudanese security forces and Janjaweed have perpetrated extensive murder, sexual violence, mass forced displacement, and other grave crimes in Darfur.<sup>1100</sup>

African Union (AU) peacekeepers first deployed in 2004, and from 2007, the AU and UN have conducted joint peacekeeping through a hybrid force, the African Union United Nations Hybrid Operation in Darfur (UNAMID).<sup>1101</sup> However, throughout the conflict, peacekeepers have come under repeated attack, and affected populations, rebel groups, and human rights organizations have criticized UNAMID for its inability to protect the civilian population.<sup>1102</sup>

From the start of the conflict in 2003 until 2016, mortality rates have not been well established, but estimates suggest that perhaps 300,000 or more people have

been killed in Darfur.<sup>1103</sup> One observer calculates that direct and indirect deaths attributable to the conflict, as of late 2016, amounted to well over 500,000.<sup>1104</sup> As of April 2016, the UN High Commissioner for Refugees estimated that approximately 2.6 million Darfuris had been internally displaced within Sudan.<sup>1105</sup> Approximately 350,000 Darfuris had fled as refugees to Chad.<sup>1106</sup> Sexual violence has been a significant feature of the conflict, including documented cases of mass rape by Sudanese military forces.<sup>1107</sup> While rebel forces have also perpetrated grave crimes, the Sudanese government and Janjaweed have perpetrated the preponderance of crimes, explicitly targeting non-Arab civilian populations in villages across Darfur. Beginning early in the conflict, in 2004, some analysts and policymakers around the world began characterizing these crimes as a campaign of genocide.<sup>1108</sup>

In September 2004, the UN Security Council established a UN Commission of Inquiry in Darfur. The Council mandated it to “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.”<sup>1109</sup> In its January 2005 report, the commission found that the government of Sudan and the Janjaweed were responsible for “serious violations of international human rights and humanitarian law amounting to crimes under international law.”<sup>1110</sup> These included the killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and enforced displacement, throughout Darfur, against a number of ethnic groups,<sup>1111</sup> which may amount to crimes against humanity. The commission concluded that the government of Sudan had not “pursued a policy of genocide.”<sup>1112</sup> However, it identified a number of suspects and recommended that the Security Council refer the situation to the International Criminal Court (ICC).<sup>1113</sup>

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## **Darfur cases at the International Criminal Court**

The Security Council referred the Darfur situation to the ICC in March 2005.<sup>1114</sup> From 2007 through 2012, the prosecutor developed cases involving seven individuals. Judges approved charges against five, rejected charges against one, and charges against a seventh were withdrawn following credible reports of his death.<sup>1115</sup>

Most prominently, judges approved charges and issued an arrest warrant against Sudanese President Omar al-Bashir in March 2009 on charges of war crimes and crimes against humanity. In July 2010, they issued a second warrant to add charges

of genocide. The al-Bashir warrants followed arrest warrants in April 2007 against former Interior Minister Ahmad Harun and Janjaweed leader Ali Kushayb. In March 2012, the court issued an arrest against Sudanese Defense Minister Abdel Raheem Mohammad Hussein. As of October 2017, all four men remain at large.

In 2009, the court issued summonses to appear for three rebel leaders suspected of attacking AU peacekeepers: Bahar Idriss Abu Garda, Abdallah Banda, and Mohammed Jerbo. However, the Pre-trial Chamber ultimately rejected charges against Garda, citing a lack of evidence. Although it confirmed charges against Banda and Jerbo, the court later withdrew the case against Jerbo following evidence of his death. And, although he appeared voluntarily for hearings in 2010, Banda did not return to The Hague following the confirmation of charges against him in 2011. The court issued a warrant for his arrest in 2014, but as of October 2017, he remained at large.

Despite the warrant against him, and a binding obligation on all states to enforce the ICC warrants (because the Security Council referred the situation to the ICC under Chapter VII authority), Omar al-Bashir has remained in power in Sudan. The AU called on the Security Council to suspend investigations against al-Bashir under Article 16 of the Rome Statute and, in light of the refusal of the Security Council to do so, called on its member states not to cooperate with the arrest warrant. The Mbeki Report (for background on the report, see *Creation*, below) did not take a position on the AU's request for deferral. The warrant against him has limited al-Bashir's travel, but some states have allowed him to visit. This has led the ICC to issue several noncooperation findings against states.<sup>1116</sup>

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Multiple attempts at a negotiated settlement of the war in Darfur have failed. A UN-backed Darfur Peace Agreement negotiated in May 2006<sup>1117</sup> failed because it was rejected by two main rebel factions. The Doha Document for Peace in Darfur (DDPD),<sup>1118</sup> signed in July 2011, failed for similar reasons. Conflict and grave crimes have continued in the years since.<sup>1119</sup>

## **Existing Justice-Sector Capacity**

The Sudanese legal system was largely rooted in Common Law until 1986, when the government introduced Islamic law (*Sharia*) as a main source of legislation.<sup>1120</sup> In 2005, the UN Commission of Inquiry report noted concerns about executive interference in the judiciary, laws in contravention with human rights standards, insufficient definitions of international crimes in domestic criminal law, and a

lack of popular trust in impartial justice before Sudanese courts.<sup>1121</sup> The report acknowledged certain steps taken by the government, but stated that it constituted “window-dressing” rather than a “real and effective response to large scale criminality linked to the armed conflict.”<sup>1122</sup> Rebel groups had failed to “take any investigative or punitive action whatsoever.” Shortcomings in the Sudanese criminal justice system led the commission to recommend that other mechanisms were required for justice to be done. In 2009, Sudan incorporated definitions of war crimes, crimes against humanity, and genocide in its domestic criminal code; however, critics pointed to inconsistencies with Rome Statute definitions and the maintenance of problematic immunities and amnesties.<sup>1123</sup>

## **Existing Civil Society Capacity**

Civil society in Sudan operates under severe government restrictions, and groups within Darfur have little capacity and operate in dire security conditions.<sup>1124</sup> In response to the ICC’s application against President Omar al-Bashir, the government increased restrictions on civil society. In 2009, the government revoked the registration of three national NGOs and expelled 13 international NGOs.<sup>1125</sup> In the ensuing years, the government has banned more groups,<sup>1126</sup> while Sudanese activists who persisted have faced arrest, ill-treatment, and unfair trials.<sup>1127</sup> Civil society involvement in the development of the proposed hybrid court for Darfur was limited.

## **Creation**

In October 2009, a report by the African Union High-Level Panel on Darfur, led by former South African President Thabo Mbeki (the “Mbeki Report”), recommended creating a hybrid criminal court in Sudan to prosecute crimes committed in the Darfur region of Sudan, noting the absence of credible national prosecutions.<sup>1128</sup> The “Hybrid Court for Crimes in Darfur” would serve as a “complementary and intermediary tier between the domestic Sudanese judicial system ... traditional forms of Sudanese justice and dispute resolutions, and the International Criminal Court.”<sup>1129</sup>

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## **The Special Criminal Court on the Events in Darfur and Special Court for Darfur Crimes**

In 2004, the Sudanese government established a national Commission of Inquiry into the events in Darfur. The commission reportedly faced pressure from the government, and concluded its mission denying the existence of “widespread or systemic crimes.” In June 2005, the chief justice issued a decree for the establishment of the Special Criminal Court on the Events in Darfur (SCCED). The SCCED has jurisdiction over (1) acts that constitute crimes in accordance with the Sudanese Penal Code and other penal codes; and (2) any charges submitted to it by the committee that were established pursuant to the decision of the Minister of Justice No. 3/2005 of January 19, 2005, concerning investigations into the violations cited in the report of the Sudanese government’s Commission of Inquiry.<sup>1130</sup> An amendment later extended its jurisdiction to include violations of “international humanitarian law.”<sup>1131</sup> The SCCED had three permanent seats in Darfur.<sup>1132</sup>

In 2006, the ICC prosecutor noted that those courts “appear to remain relatively inaccessible, with judges performing other duties in Khartoum, awaiting the start of trials in Darfur. Limited resources and specialized expertise with reliance on existing infrastructure for investigations is also hampering progress.”<sup>1133</sup> Human Rights Watch has criticized the SCCED for its acceptance of immunities, absence of command responsibility as a mode of liability, the non-incorporation of international crimes in applicable laws, and its focus in practice on ordinary crimes and crimes committed by low-level perpetrators.<sup>1134</sup> For example, in May 2013, the SCCED sentenced three rebels to death by hanging and crucifixion after finding them guilty of murder and other charges.<sup>1135</sup>

In 2012, the government of Sudan and insurgent groups agreed to establish a Special Court for Darfur Crimes as part of the broader DDPD.<sup>1136</sup> The court would have “jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur, since February 2003.”<sup>1137</sup> Although the court would not have any direct international participation, the agreement included provision for observation by experts from the AU and UN.<sup>1138</sup> Critics point to problems at the Special Court for Darfur Crimes, including a lack of judicial independence, a low number of cases handled, poor observation of fair trial rights, application of the death penalty, and the fact that the court has not handled cases involving the most serious crimes within its mandate.<sup>1139</sup>

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The AU endorsed the Mbeki Report,<sup>1140</sup> and international human rights organizations, as well as a consortium of Sudanese political parties, supported the proposal.<sup>1141</sup> However, the 2004 UN Commission of Inquiry on Darfur had advised against establishing a mixed court in Sudan, recommending only the ICC as a venue for prosecution. Noting that hybrid courts elsewhere had mixed success, but nonetheless might be a viable alternative to fully international proceedings in certain contexts, the commission drew a distinction in Sudan. Its objections to a hybrid court in Darfur were fourfold: (1) the financial implications; (2) the inadequacy of Sudanese laws to prosecute international crimes; (3) the existence of the ICC, which could exercise jurisdiction in the Darfur situation (unlike pre-2002 situations addressed by other hybrid courts); and (4) the lack of independence in the Sudanese judiciary to properly investigate and prosecute senior leaders of the regime accused of crimes, including President Omar al-Bashir.<sup>1142</sup>

Sudan has resisted implementation of the Mbeki Report's broader recommendations and rejected outright the hybrid court proposal and "any proposal involving foreign experts."<sup>1143</sup> The AU appointed a High-Level Implementation Panel (AUHIP) to follow up on the Mbeki Report, again headed by Mbeki, but as of October 2017, there had been no further significant development relating to the establishment of a hybrid court.

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## **An International Criminal Tribunal for Darfur?**

In 2005, the United States suggested creating an ad hoc International Criminal Tribunal for Darfur, as an alternative to the UN Commission of Inquiry on Darfur's proposal for referral of the situation to the ICC.<sup>1144</sup> The United States proposed the tribunal be authorized by the UN Security Council; be based in Tanzania; be administered jointly by the UN and the AU; and share facilities, personnel, and infrastructure with the International Criminal Tribunal for Rwanda (ICTR). UN member states rejected this approach. The UN Commission of Inquiry had already recommended against using accountability mechanisms other than the ICC. The commission cited the lack of political will in the international community to finance an ad hoc international criminal tribunal, given the availability of the ICC and the unwieldiness of expanding jurisdiction and infrastructure at the ICTR.<sup>1145</sup>

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## Legal Framework and Mandate

The Mbeki Report proposed the establishment of a “Hybrid Criminal Court which shall exercise original and appellate jurisdiction over individuals who appear to bear particular responsibility for the gravest crimes committed during the conflict in Darfur and to be constituted by judges of Sudanese and other nationalities.”<sup>1146</sup> The court’s geographical scope would include the Darfur region. The proposal however did not define “gravest crimes.” However, it did urge that investigations “reflect the full pattern of crimes and abuses committed during the conflict in Darfur, and should pay attention to sexual crimes.”<sup>1147</sup>

Under the Mbeki Report’s proposal, the Hybrid Court for Darfur would serve as a “complementary and intermediary tier between the domestic Sudanese judicial system ... traditional forms of Sudanese justice and dispute resolutions, and the International Criminal Court.”<sup>1148</sup> It would apply national laws and, as far as possible, be integrated into the Sudanese system. In practice, this could have presented significant obstacles. Sudanese law has no provision on command responsibility. Further, under the Sudan Armed Forces Act 2007, it is not a crime if the act of an officer or soldier took place with good intention or while executing an order from a superior.<sup>1149</sup>

The proposal does not specify whether creation of the Hybrid Court would require AU resolution, government authorization, or both. The Sudanese system authorizes the chief justice to establish special courts as necessary, as was the case with the SCCED (see text box, above) and the Special Court in Darfur (see the section on *Legacy*, below). To facilitate international involvement, the Mbeki Report recommended that the government of Sudan pass legislation to allow non-nationals to serve in the judiciary.<sup>1150</sup>

## Location

The Mbeki Report does not specify the Hybrid Court’s location, but its emphasis on integration with the national system and criticism of the remoteness of ICC proceedings strongly suggests that the panel intended that the court be located within Sudan.

## Structure and Composition

The Mbeki Report's proposal is not highly detailed. The panel noted that during its consultations "few proponents of a hybrid court in Sudan spelt out in any detail what they hoped the new arrangement would look like, or how the labour would be divided between national and international actors. These are questions of detail, and it seemed to the Panel that the demand for a Hybrid Court was being driven by the deeply felt concern that the Sudanese national justice system would not, or could not, deal adequately with the crimes of Darfur."<sup>1151</sup>

The Mbeki Report recommended creating a body for "overseeing and coordinating comprehensive investigations relating to the entire conflict in Darfur ... to avoid duplication of investigations."<sup>1152</sup> This investigations body would be composed of mixed personnel, appointed by the AU.<sup>1153</sup> The hybrid court would consist of a "Hybrid Criminal Chamber, which should be composed of panels of highly qualified and suitable individuals of Sudanese and other nationalities," with the nomination and appointment procedures of judges, prosecutors, and investigators to be proposed by the AU.<sup>1154</sup> The court would be composed of prosecution, investigation, and registry units. International staff and legal personnel would be nominated by the AU and serve alongside Sudanese nationals. The panel urged the AU to create a transparent, consultative process to nominate qualified international jurists and personnel, and not to restrict nominations to Africans.<sup>1155</sup>

The Hybrid Court would "operate within the national criminal justice system of Sudan ... [and] ... its functions would be additional and linked to the system of special courts."<sup>1156</sup> The panel recommended that the "special courts" or panels (distinct from the "Hybrid Court") also comprise AU-appointed, non-Sudanese judges either as "observers or members of the bench."<sup>1157</sup>

## Prosecutions

As of October 2017, the Hybrid Court had not been created, and there were no prosecutions.

## Legacy

Soon after its unveiling, the proposal for a Hybrid Court for Darfur lost momentum.

Sudan's government quickly rejected the proposal. The Sudanese bar association, which is aligned with the ruling party, denounced the proposal as being unconstitutional.<sup>1158</sup> Already in late 2009, Thabo Mbeki himself suggested that there was a need to understand the Sudanese government's rejection of foreign judges sitting on trials related to Darfur.<sup>1159</sup> Mbeki's distancing from the proposal drew the ire of some in opposition and rebel groups.<sup>1160</sup> In the course of peace negotiations in 2011, a rebel faction revived the idea of a Hybrid Court, but the government rejected it out of hand as being unconstitutional.<sup>1161</sup>

However, the DDPD, signed in 2011, included a provision for a Special Court for Darfur (SCD) as part of a larger package on transitional justice. The agreement stated that the SCD "shall have jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur, since February 2003."<sup>1162</sup> Differentiating it from the previously created SCCED (see text box, above), the agreement provides for UN and AU experts "selected in consultation with the government of Sudan" to have an observer role in the SCD proceedings.<sup>1163</sup> Sudan's justice minister issued a decree appointing a special prosecutor for Darfur crimes in 2011.<sup>1164</sup> As of March 2016, it appeared that the special prosecutor had only pursued low-level cases and cases targeting rebels; there had been no prosecution of senior government or security officials.<sup>1165</sup>

## **Financing**

The Mbeki Report provided no detail on how the Hybrid Court for Darfur should be financed. It emphasized, however, that its creation should not bring about a two-tier justice system featuring an over-resourced hybrid court amidst an under-resourced justice system.<sup>1166</sup>

## **Oversight and Accountability**

The Mbeki Report provided no detail for oversight and accountability for the proposed Hybrid Court. It did note that the ICC would continue to have an external oversight role through the principle of complementarity enshrined in the Rome Statute: "Should Sudan make genuine efforts to address the crimes in Darfur, the judges of the ICC would be required to evaluate those steps to consider whether they meet the requirements of Article 17."<sup>1167</sup>

## UGANDA: INTERNATIONAL CRIMES DIVISION

### Conflict Background and Political Context

In 1986, President Yoweri Museveni assumed power after a civil war against President Milton Obote. Museveni and Obote had been former allies, launching an attack in 1979 from Tanzania against the brutal dictator Idi Amin. The mass killings and human rights abuses during Amin's rule from 1971 to 1979 remain largely unaddressed in Uganda, with the exception of two truth commissions, one appointed by Amin in 1974, and the second appointed by Museveni in 1986.<sup>1168</sup>

The fledgling government of Uganda immediately confronted several armed conflicts with rebel groups across the country, including a group of former army officers and Obote supporters in northern Uganda. The Lord's Resistance Army (LRA), led by Joseph Kony, initiated a brutal insurgency in northern Uganda in the late 1980s, committing atrocities against civilians in Uganda, the Democratic Republic of Congo, the Central African Republic, and South Sudan. The LRA is now absent from Uganda, but still active in the region. In 2000, Uganda passed an Amnesty Act, inducing thousands of rebels from the LRA and other armed groups to surrender. The act has been repeatedly extended; most recently, in May 2017, the minister for internal affairs extended it for another two years.<sup>1169</sup>

The development of an International Crimes Division (ICD) in Uganda traces back to the opening of investigations in the country by the International Criminal Court (ICC) in 2004. Uganda itself referred the situation to the ICC and, as of late 2017, ICC proceedings have exclusively concerned crimes committed by the LRA in northern Uganda. In 2005, the ICC issued arrest warrants for five of the LRA's leaders: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. Lukwiya, Otti, and Odhiambo are believed to be dead,<sup>1170</sup> while Ongwen was transferred to The Hague for trial in 2015. As of November 2017, only Kony remains at large.

Against the backdrop of the ICC's investigations, peace negotiations between Uganda and the LRA began in 2006; they led to a series of peace agreements, collectively known as the Juba Agreements. Although Kony refused to sign the final agreement on behalf of the LRA, the government nevertheless expressed its intention to sign and implement provisions of the accountability and reconciliation agreement, which had been signed in June 2007.<sup>1171</sup> An annex to the agreement

outlined a variety of accountability and reconciliation measures, including the creation of a specialized division of the High Court (now called the ICD).<sup>1172</sup> While other transitional justice measures were included in the framework agreement as well, the government has implemented these unevenly, if at all. As of September 2016, a draft transitional justice policy was before the cabinet for approval.<sup>1173</sup>

Uganda's political situation is characterized by a strong executive, a parliament firmly controlled by President Museveni's National Resistance Movement party (NRM), and a fractured and weak opposition movement. President Museveni has increasingly entrenched his grip on power, pushing through a constitutional amendment in 2005 that abolished presidential term limits; in 2016, he was elected to a fifth, five-year term in office. The national security forces and military have also been implicated in widespread use of torture and arbitrary detention, as well as serious human rights abuses committed against civilian populations during the fight against the LRA.<sup>1174</sup>

Despite the tightening of political freedoms, Uganda has experienced stability and significant economic growth in recent years, especially since the departure of the LRA from northern Uganda. The country is a strong military partner of the United States, which has used Uganda as a staging ground for military assistance in the regional effort against the LRA. Joint forces made up of Ugandan, U.S., and South Sudanese troops have, however, recently withdrawn from the Central African Republic, a move the UN fears may breed further regional insecurity by the LRA.<sup>1175</sup> Uganda receives significant international development aid and donor funding in all areas, including the judicial and transitional justice sectors.

## **Existing Justice-Sector Capacity**

A 2008 report by the UN's Office of the High Commissioner for Human Rights (OHCHR) on judicial independence found a generally high level of judicial independence, with corruption more prevalent among lower-level and magistrate judges, who are often politically appointed. The higher levels of the judiciary—comprising the High Court, the Constitutional Court, Court of Appeals, and the Supreme Court—are generally considered impartial and independent. The OHCHR report found that these upper branches acted “with professionalism and court proceedings usually respect fair trial requirements.”<sup>1176</sup> In recent years the higher courts have issued judgments cutting against the executive branch on issues regarding political freedoms, civil liberties, and interference in elections. There

have also been “instances of serious political interference in high-profile cases in Uganda’s higher courts, which observers say occur when Museveni has perceived that the proceedings affect his grip on power.”<sup>1177</sup>

In the fall of 2010, at the behest of the government, the Public International Law and Policy Group (PILPG) facilitated a needs-assessment of the domestic judicial sector in regards to war crimes prosecutions, led by independent experts. The assessment produced a comprehensive report and recommendations for the government of Uganda, covering all aspects of the ICD, including composition, rules of procedure, outreach structure, and fair trial rights.<sup>1178</sup> The assessment also recommended improvements to the legal aid system; the development of outreach initiatives; building a victim and witness protection framework; and training professional court interpreters, among other areas.<sup>1179</sup>

## **Existing Civil Society Capacity**

Ugandan civil society, while hardly monolithic, is strongly engaged on issues of transitional justice, international criminal law, and human rights issues. In part, this sophistication stems from the long-standing involvement of the ICC’s engagement and the contentious debate that followed within Ugandan society about accountability and reconciliation.<sup>1180</sup> Ugandan civil society organizations have worked closely with the ICD, including the Ugandan Coalition for the ICC, the Justice and Reconciliation Project (JRP), and the Refugee Law Project (RLP). However, substantive capacity gaps among civil society organizations remain, and their political space is increasingly constricted. The RLP and the JRP have been the lead Ugandan organizations monitoring the ICD’s trial of former LRA commander Thomas Kwoyelo and have released summaries and commentaries on the proceedings.

International nongovernmental organizations (NGOs) and development agencies also have a long-standing involvement with transitional justice and domestic judicial sector development in Uganda. The International Center for Transitional Justice (ICTJ) and *Avocats Sans Frontières* (ASF) maintain offices in Uganda and assist in civil society capacity-building and advocacy campaigns. ICTJ, ASF, and PILPG have also provided technical assistance, trainings, and advice to the ICD.

## Creation

In July 2008, a War Crimes Division of the High Court of Uganda (WCD) was created by judicial decree of the principal judge of the High Court.<sup>1181</sup> Official practice directions were later signed by the chief justice and gazetted, but not until May 2011.<sup>1182</sup> Those directions changed the name of the court to the International Crimes Division of the High Court of Uganda, and expanded the court's subject matter jurisdiction to include other international crimes such as terrorism, human trafficking, and piracy.<sup>1183</sup> As a specialized division of the High Court of Uganda, the ICD is a fully domestic tribunal; however, it has received significant technical assistance from international law organizations, and funding from a coordinated group of donor countries. This funding has been given both directly to the court and indirectly through the Justice Law and Order Sector (JLOS; more on JLOS below).

## Legal Framework and Mandate

The 2011 practice directions, promulgated by the judiciary under the authority of the chief justice, prescribe the ICD's mandate, general composition, and its rules of procedure. The ICD is mandated to prosecute genocide, war crimes, crimes against humanity, terrorism, human trafficking, piracy, and any other international crime defined in Uganda's 2010 International Criminal Court Act, 1964 Geneva Conventions Act, Penal Code Act, or any other (domestic) criminal law.<sup>1184</sup>

The court's personal jurisdiction is derived from general applicable law in Uganda and, therefore, is not specifically limited to any category of group or individual. This is important to many in Uganda, who seek prosecutions of military and government officials for alleged human rights abuses. In public statements, judicial officials underscore that the court may exercise jurisdiction over military officials, but have also argued these cases are best handled by military tribunals, which human rights organizations have criticized as inadequate and flawed.<sup>1185</sup>

The ICD was created through judicial decree, meaning that any Rules of Procedure and Evidence for the division cannot conflict with statutory law. Ugandan judges have thus approached the task of drawing up dedicated rules and procedures for the ICD cautiously and with deference to primary legislation, even though, as Human Rights Watch noted, "several aspects of Ugandan legal practice and procedure—which pose challenges for all criminal cases in the country—are ill-suited to serious crimes cases."<sup>1186</sup> These include certain fair trial guarantees, such as defense counsel selection and remuneration, procedures for victim and witness protection, and

operational and case management procedures (which are often governed by internal rules at international tribunals).

The 2011 practice directions provide that the ICD shall apply the Rules of Procedure and Evidence applicable to criminal trials in Uganda, but left an opening for the application of rules and procedures developed under unwritten law. The rules state that “where no express provision is made under any written law, the Court shall adopt such other procedure as it considers to be justifiable and appropriate in all the circumstances, taking into account relevant provisions of Ugandan law.”<sup>1187</sup> On management procedures, the practice directions also provide that the ICD may “from time to time adopt practice directions for the better management of cases and for the orderly and timely disposal of cases,” thus eliminating the cumbersome requirement that Uganda’s chief justice approve all revisions.<sup>1188</sup>

Special Rules of Procedure and Evidence have since been adopted to guide the handling of all matters and proceedings under the ICD’s jurisdiction. The rules have, among other things, introduced pretrial proceedings, an element of victim participation, general provisions on protective measures, and the award of reparations and compensation.

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## **Amnesty Act of 2000**

One issue that has confronted the ICD’s subject matter jurisdiction is the applicability of Uganda’s Amnesty Act. In September 2011, in a challenge brought in connection with the Kwoyelo proceedings (see *Prosecutions*, below), Uganda’s Constitutional Court upheld the constitutionality of the act, ruling that it did not offend Uganda’s international treaty obligations and that Kwoyelo—in having been denied amnesty—had been unfairly discriminated against. In April 2015, however, the Ugandan Supreme Court reversed the Constitutional Court’s decision, holding that the act only covers “crimes committed in furtherance of war or [armed] rebellion,” not attacks against civilian populations. The judgment specifically noted that crimes committed under Article 8(2)(e) of the Rome Statute and grave breaches under Article 147 of the Geneva Convention would not qualify under the Amnesty Act.<sup>1189</sup>

The Amnesty Act has been renewed for another two years, starting May 25, 2017.<sup>1190</sup> Although there has been no amendment to the act since this Supreme Court decision, according to an official of the Amnesty Commission, the Directorate of Public Prosecutions (DPP) now works very closely with the commission to ensure that persons who commit serious offenses do not receive amnesty.<sup>1191</sup>

## **Location**

The ICD staff and judges sit in a dedicated courthouse in Kololo, an upscale neighborhood in Uganda's capital city, Kampala. The ICD shares grounds with another specialized judicial division, the Anti-Corruption Division of the High Court, housed in a separate building. The ICD building has a small courtroom. However, the ICD, in accordance with provisions in practice directions, is allowed to sit where it deems necessary. Since July 2011, several preliminary hearings in the Kwoyelo case have been held at the High Court building in Gulu in northern Uganda. The main reason the ICD holds these sittings in Gulu is for better visibility and communication and, most importantly, the fact that affected communities have easier access to the court and can therefore attend the proceedings and also interact with the different parties working on the case.<sup>1192</sup>

## **Structure and Composition**

The ICD is staffed by Ugandan nationals; early suggestions to include international judicial staff were not pursued. ICD prosecutors, judges, investigators, and even judicial clerks are not dedicated staff, but maintain ongoing caseloads in the ordinary court system. The ICD has been significantly assisted by JLOS, a governmental body that coordinates justice-sector institutions and transitional justice policies, and channels donor input.<sup>1193</sup> JLOS staff have been significantly involved with the ICD, at times undertaking core staff functions, such as outreach (see below).

## ***Chambers***

At least three High Court judges must sit on the ICD.<sup>1194</sup> There is no formal requirement for experience in international criminal law (or the northern Uganda conflict). The head judge of the ICD, along with the registrar, is responsible for overall court administration. At the moment, three permanent judges handle cases at the ICD. The judges are supported by legal assistants who are recruited on a contract basis<sup>1195</sup> and also assist the judges with their High Court criminal dockets. These legal assistants often participate in various capacity-building and advocacy events organized by local and international organizations on international crimes. Occasionally, the ICD also recruits volunteers and interns from universities to support its work.<sup>1196</sup>

## ***Prosecutors and Investigators***

As of August 2017, about 10 prosecutors have been assigned to handle cases before the ICD. Five prosecutors (who do not ordinarily prosecute the types of crimes falling under the ICD) have been assigned to the ICD on special duty to handle the Kwoyelo case. These form the War Crimes Prosecutions Unit (WCPU), a specialized unit of the DPP, which is responsible for bringing cases before the ICD. In the WCPU, a senior DPP attorney supervises up to five prosecutors trying cases before the ICD. Given that cases involving war crimes are infrequent, these prosecutors also maintain a docket before the ordinary criminal courts.<sup>1197</sup>

The DPP/WCPU works closely with the War Crimes Investigation Unit, led by a senior police officer and deputy assisted by investigators from the police and the Criminal Investigations Directorate (CID). This unit plays an active role in investigating the cases brought before the ICD by the DPP and also participates in any JLOS/ICD-organized outreach events on the Kwoyelo case. The investigators maintain a high level of communication and coordination between the DPP and the CID. In assigning members to both the prosecution and investigations teams, gender is a serious consideration, particularly because female prosecutors and investigators are perceived to be better placed to interrogate witnesses on issues related to sexual and gender-based crimes.<sup>1198</sup>

## ***Defense***

Defendants in Ugandan courts have the right to appoint their own counsel, or to receive state-appointed counsel under the “state brief” system, which is severely underfunded.<sup>1199</sup> The ICD initially proposed that any privately retained counsel must be selected from a list of competent counsel maintained by the ICD, although this rule is not in effect, and the practice directions are silent on the selection of defense counsel.<sup>1200</sup> Thomas Kwoyelo’s current legal team is constituted by four lawyers (two lawyers on state brief and two privately appointed by Kwoyelo himself.)

Some of the challenges faced by the legal team include threats, a lack of funds to maintain guards, and the court’s failure to provide the team with funds to investigate, gather, and present witnesses and evidence for the accused as provided for by law.<sup>1201</sup>

## ***Victim Participation***

Although the new ICD Rules of Procedure and Evidence recognize the role and participation of victims, the text did not provide clear information on how this

will work in reality.<sup>1202</sup> This clarity was only provided in September 2016 when the ICD ruled in the Kwoyelo case that victims would be allowed to participate in the trial in a manner similar to how victims participate under the Rules of Procedure and Evidence at the ICC.<sup>1203</sup> The ICD directed victims to apply formally to the ICD registrar for participation and that each application could be considered on its own merit. The ICD also ruled that victims' lawyers could provide evidence to the prosecution and the defense, but the manner and extent of participation at different stages of the trial would be subject to determination by the Trial Chamber. This departs from the practice in ordinary courts in Uganda, which only allows victims to participate at the sentencing stage of a criminal trial.

### ***Registry***

The registrar manages “day to day operations of the Division.”<sup>1204</sup> In some matters, such as case management, personnel issues, and budgeting, the ICD registrar carries the same duties as registrars at ad hoc tribunals.

The registrar is also in charge of organizing outreach activities and, with the introduction of victim participation under the new Rules of Procedure and Evidence, is also tasked with undertaking a victim's mapping in coordination with the prosecution team, coordinating with NGOs that can link the court to victim representatives and also recruiting victims' counsel.<sup>1205</sup> As per the Pre-trial Chamber's September 2016 ruling, the ICD Registry is also responsible for determining the status of each victim that applies to participate in a trial.<sup>1206</sup> This will determine who participates in proceedings and eventually be entitled to reparations. It is, however, important to note that the ICD faces a serious human resource gap, and therefore, carrying out some of these tasks maybe an uphill challenge.<sup>1207</sup>

At the reparations' stage of the case, it is envisaged that the registrar will also take on the additional role of preparing a victim's index and implementing the court's reparation order.<sup>1208</sup>

Since its creation, the ICD has had five registrars. Early in its establishment, high turnover in ICD registrars—three between 2008 and 2011—caused a lack of long-term planning and poor coordination of support staff and legal assistants. Registrars rotated into the ICD and required training on international law and practice, and then were transferred to another court. Frequent rotation of core staff is common in Ugandan courts. The ICD registrars were often granted more time at the ICD than at a normal post. Additionally, the ICD's development coincided with an aggressive national plan to reduce case backlogs, and ICD registrars were seen to be more

useful elsewhere, especially as the ICD effectively only had one case. Nonetheless, the high turnover in registrars caused donors to be skeptical about funding trainings for ICD staff without assurances that those skills would stay within the ICD.

However the high turnover challenge is not only limited to the position of registrar but cuts across the ICD. The decision to transfer staff is at the discretion of the Judicial Service Commission and therefore the ICD is not in a position to exercise any control over the location of its staff.<sup>1209</sup> Such transfers are seen as an opportunity to curb corruption within the judiciary since any individual does not spend a long period of time at the same duty station.<sup>1210</sup>

### ***Outreach***

The practice and concept of “outreach” is relatively new to the Ugandan judiciary. No firm outreach unit or structure was in place by the opening of the Kwoyelo trial in July 2011. Ultimately, the ICD registrar and JLOS transitional justice officers undertook outreach activities. These officers conducted community meetings and disseminated informational materials in Kampala and northern Uganda. Certain outreach activities during the preliminary hearings were well executed and represented a significant advancement within the domestic judicial sector. The July 2011 court proceedings and several subsequent proceedings have been held in Gulu, allowing many of the affected population in northern Uganda (including Kwoyelo’s family) to attend. Approximately 100 members of the public attended the very first Kwoyelo proceeding in the courtroom, and an additional 100–150 viewed the proceeding outside the courthouse.<sup>1211</sup> It has now become common practice to fully equip the courtroom with court recording equipment and also provide for an overflow courtroom with video link for people outside the court to watch what is happening in the main courtroom.<sup>1212</sup> This is however not unique to the ICD; it has been applied in other select High Courts across the country.<sup>1213</sup>

### ***Interpreters***

Uganda’s judicial system has no formal interpretation program, although specialized trainings were held in mid-2011 for judicial interpreters and translators (in part, these trainings were held to fill the need at the ICD, although the trainings benefited the broader judicial system as well).

Interpreters have been available at each stage of the Kwoyelo trial. The court, however, relies on its own staff to assist with this role.<sup>1214</sup> These are usually court clerks who work with the judges. This is done because of the need to ensure the

accuracy of any information shared.<sup>1215</sup> The judiciary needs to rely on people who are exposed to everyday court work, court language, and court procedures.<sup>1216</sup> In the event that no court staff can provide interpretation, the court then relies on someone from the police, and thereafter, prisons.<sup>1217</sup>

### **Assessors**

Under Ugandan criminal procedure, all trials before divisions of the High Court must include two or more citizen “assessors,” appointed by the court<sup>1218</sup> and subject to limited *voir dire*. The duty to select assessors lies with the registrar who then shares their names with the trial parties.

At the conclusion of a criminal trial, assessors are required to state their opinion of the case, although these opinions are not binding on the judges. However, judges must state their reasons for departing from the opinion of the assessors. Assessors are a holdover from the British colonial era: they functioned to relay local customs and procedures to the court as a form of Common Law. This colonial legacy may explain why assessors cannot be members of professional classes (lawyers, military officers, police, or doctors).<sup>1219</sup> Despite the origins and the nonbinding role of the position, assessors are seen as a useful means to build citizen involvement with the ICD. During the ICD Kwoyelo hearings in Gulu in July 2011, the judges, prosecutor, and defense attorneys selected three assessors, all from northern Uganda, through a *voir dire* process.<sup>1220</sup>

### **Prosecutions**

The ICD is currently prosecuting a number of cases, including the one against Thomas Kwoyelo. Other cases currently being prosecuted before the court concern terrorism and human trafficking charges.<sup>1221</sup> In the near future, the DPP intends to bring other cases, including one against Caesar Achellam, a former LRA commander<sup>1222</sup> and another concerning trafficking of ivory.<sup>1223</sup>

On May 26, 2016, the court found guilty eight of 13 individuals accused of having masterminded the July 2010 Kampala bombings;<sup>1224</sup> the court sentenced five of these to life imprisonment.<sup>1225</sup>

A case involving the trafficking of Ugandan women to Iraq was initially brought before the ICD as well, but was subsequently transferred to another court.<sup>1226</sup> The ICD prosecutors have not fully developed an overall war crimes prosecutions

strategy. In part, this may reflect the uncertain legal context of war crimes cases in Uganda, and the small number of cases envisioned by the ICD prosecutors.

### ***The Case against Thomas Kwoyelo***

The DPP charged Kwoyelo with 12 counts of violations of the Geneva Conventions Act and 53 alternate counts of ordinary crimes, including murder and robbery, under Uganda's Penal Code Act.<sup>1227</sup> In March 2017, the ICD approved an amended version of Kwoyelo's indictment,<sup>1228</sup> which charged him with 93 counts of crimes, 59 of which are covered under customary international law. The remaining 34 charges fell under the Geneva Conventions Act or the Penal Code Act. Several sexual violence charges have also been included in the indictment. The acts were allegedly committed between 1993 and 2005 in northern Uganda. The case is the first war crimes prosecution in Uganda and the first prosecution of a former LRA member in any jurisdiction.

### **Legacy**

International assistance to the ICD can be seen to have strengthened the overall domestic judicial sector. Many reform initiatives were already being addressed as part of broader justice-sector assistance by donor countries, but the needs of the ICD lent urgency and a specific vehicle to drive implementation. For example, a long-standing plan to train professional judicial interpreters and translators was realized just before the first hearings in the Kwoyelo case. The Kwoyelo court proceedings have featured overflow seating, outdoor screens, microphones, mounted cameras, and recording devices. International organizations' attention to the ICD also contributed in less tangible ways to a shift in attitudes among Ugandan legal professionals toward more transparency and a view that public engagement was part and parcel of their work, as well as familiarization with the norms and practice of international criminal law.

The Kwoyelo Constitutional Court reference has clarified the legal position on amnesties in Uganda. The court clarified that persons who commit grave crimes are not entitled to amnesty.<sup>1229</sup> This has settled the national debate on amnesties and prosecutions. The Kwoyelo case has also pushed national reflection on the enactment of a witness protection bill, which is currently before the Ministry of Justice and Constitutional Affairs as well as the planned review of other criminal legislation, such as the Evidence Act, Trial on Indictments Act, and others.<sup>1230</sup>

## Financing

For the 2016–2017 fiscal year, the Judiciary received Shs116.55 billion for recurrent and capital expenditure.<sup>1231</sup> This compares favorably to Shs93.2 billion received in 2015–2016; Shs83.06 billion for 2014–2015; and Shs84.493 billion for 2013–2014.<sup>1232</sup>

The justice system in Uganda relies heavily on donor support. JLOS, which is tasked with supporting the ICD’s work, has a consortium of countries and agencies that provide financial support for its work, and these include Austria, Denmark, Germany, Ireland, the Netherlands, Norway, Sweden, UNDP, OHCHR, UNICEF, ICRC, UNWOMEN, UNFPA, and USAID.<sup>1233</sup> The United Kingdom and the European Union Delegation participate as noncontributing members.<sup>1234</sup>

In 2009–2010, donors provided around US\$41.5 million in sector budget support. In late 2011, the donor group underwent a significant reorganization into the “Democratic Governance Facility” (DGF), formed by Austria, Denmark, the European Union Delegation, Ireland, the Netherlands, Norway, Sweden, and the United Kingdom. Most, but not all, of the DGF members provide sector budget support, and some countries in the donor group have switched to sector support because of accountability concerns.<sup>1235</sup> In addition to direct support for the ICD, PILPG, ICTJ, OHCHR, and donor groups have facilitated numerous trainings and study trips for ICD judges, prosecutors, investigators, defense attorneys, and Registry staff on war crimes law and practice issues, outreach, victim and witness protection, and Registry management. PILPG also facilitated an expert workshop on international criminal law and amnesties for the judges of the Supreme Court, prior to its ruling on the constitutionality of the Amnesty Act. Although early trainings and study trips to international criminal tribunals were more generalized, later assistance has been increasingly specialized and targeted to specific capacity gaps within the ICD.<sup>1236</sup>

Although national NGOs have not provided funding to the court, they have supported the work of the ICD by linking it to victim communities, organizing advocacy events concerning the work of the court, and also providing recommendations on issues such as the development of effective ICD outreach strategies and the transitional justice policy more broadly.

Despite significant technical assistance from international NGOs and the coordination of justice-sector development among foreign donors, the development of the ICD has suffered from a lack of coordination within the overall justice-sector

framework and a lack of formalized linkages with other transitional justice mechanisms (such as the Amnesty Commission). This highlights the need for any domestic prosecutions framework for serious crimes to receive political priority from domestic and international actors, in addition to technical assistance. The ICD, however, also had some drawbacks on the overall justice sector; for such a small court with a small caseload, it consumed an outsized share of available time, resources, and funding. The challenge to both domestic and international professionals in Uganda remains in ensuring that the resources allocated to the ICD have a broader effect on the overall judiciary, when possible.

## **Oversight and Accountability**

Parties aggrieved by a decision of the ICD can appeal to the Court of Appeal.<sup>1237</sup>

The power to appoint judges to the High Court, including specialized divisions such as the ICD, lies with the president, who is advised by the Judicial Service Commission.<sup>1238</sup> According to the Ugandan Constitution, a judicial officer may only be removed from office for inability to perform the functions of his or her office arising from infirmity of body or mind, misbehavior or misconduct, or incompetence.<sup>1239</sup> Due process is followed prior to making the decision to remove a judge from office.<sup>1240</sup> In the course of executing their duties, judicial officers are guided by the Judicial Code of Conduct.<sup>1241</sup>

Prosecutors are assigned to particular divisions by the DPP, who is the head of office. The DPP will therefore determine the assignment and transfer of any prosecutor stationed at the ICD. The same applies to investigators and police officers assigned to the ICD; their placement and redeployment will be determined by the Inspector General of Police.<sup>1242</sup> A Disciplinary Code of Conduct highlighting the circumstances under which a police officer may be penalized for indiscipline and other infractions is annexed to the Police Act of Uganda.<sup>1243</sup>

Court staff appointed by the Public Service are subject to the Public Service Code of Conduct and Ethics, which lays down their duties and responsibilities.<sup>1244</sup> Some of the sanctions listed therein for misconduct include a warning or reprimand; suspension of increment; withholding or deferment of increment; stoppage of increment; surcharge or refund; making good of the loss or damage of public property/assets; interdiction from duty with half pay; reduction in rank; removal from the Public Service in public interest; and dismissal.<sup>1245</sup>

## ***Court Users' Committees***

The ICD practice directions establish a “court users’ committee,” an institution peculiar to Uganda’s judicial system and present in other specialized courts in Uganda. The committee is meant to act as an “advisory body” to the ICD.<sup>1246</sup> It is comprised of the president of the Uganda Law Society (the defense bar), ICD judges and registrar, and representatives from the offices of the police, attorney general, public prosecutions, and criminal investigations. Up to seven members of the public are appointed to the committee for three-year terms by the principal judge of the High Court and the head judge of the ICD. (At least three of these must be women.) This committee has, however, not met this stipulation to date, due to a lack of funding.<sup>1247</sup>

## **Notes**

161. African Commission on Human and People’s Rights, *African Charter on Human and Peoples’ Rights*, available at: [achpr.org/instruments/achpr/](http://achpr.org/instruments/achpr/).
162. African Commission on Human and People’s Rights, *About ACHPR*, available at: [achpr.org/about/](http://achpr.org/about/).
163. Don Deya, “Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes,” March 6, 2012, 22, available at: [osisa.org/openspace/regional/african-court-worth-wait](http://osisa.org/openspace/regional/african-court-worth-wait).
164. See Ademola Abass, “Historical and Political Background to the Malabo Protocol,” in *The African Criminal Court*, ed. Gerhard Werle and Moritz Vormbaum, International Criminal Justice Series 10 (New York: Springer, 2017), 14.
165. See Chacha Bhoke Murungu, “Towards a Criminal Chamber in the African Court of Justice and Human Rights,” *Journal of International Criminal Justice* 9, no. 5 (2011): 3–7.
166. African Charter on Democracy, Elections, and Governance, Article 25(5), available at: [achpr.org/files/instruments/charter-democracy/aumincom\\_instr\\_charter\\_democracy\\_2007\\_eng.pdf](http://achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf).
167. Deya, “Worth the Wait,” 22.
168. ICC, The States Parties to the Rome Statute, available at: [asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).
169. Charles Cherner Jalloh and Ilias Bantekas, eds., *The International Criminal Court and Africa* (Oxford: Oxford University Press, 2017), 2.
170. “15th AU Summit,” AU press release no. 104, July 29, 2010, available at: [reliefweb.int/sites/reliefweb.int/files/resources/8C9AD67BC84DB2BAC125777A0031D5F5-Full\\_report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/8C9AD67BC84DB2BAC125777A0031D5F5-Full_report.pdf).
171. The AU first made the request in 2008. See *Communique, Adopted during the 142nd Peace and Security Council Meeting in Addis Ababa, Ethiopia*, PSC/MIN/Comm(CXLII), July 21, 2008, para. 11(i), available at: [iccnow.org/documents/AU\\_142-communicue-](http://iccnow.org/documents/AU_142-communicue-)

eng.pdf. See also Charles Chernor Jalloh, Dapo Akande, and Max du Plessis, “Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court,” *African Journal of Legal Studies* 4 (April 27, 2011): 5–50; U. of Pittsburgh Legal Studies Research Paper No. 2011-14; Oxford Legal Studies Research Paper No. 6/2011; Florida International University Legal Studies Research Paper No. 17-31, available at: [ssrn.com/abstract=1698839](http://ssrn.com/abstract=1698839).

172. In 2009, the AU explicitly decided not to cooperate with the ICC in relation to the Al-Bashir warrant. In doing so, it cited Article 98 of the Rome Statute. While Article 27 of the Statute establishes the nonapplicability of immunities arising from official capacity, Article 98 states, “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” For the AU’s decision, see Assembly of the African Union Thirteenth Ordinary Session (July 1–3, 2009), Assembly/AU/Dec.245(XIII) Rev. 1, para. 10, available at: [au.int/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_o.pdf](http://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_o.pdf). See also Max du Plessis and Christopher Gevers, “Balancing Competing Obligations: The Rome Statute and AU Decisions,” Institute for Strategic Studies, Paper 225, October 2011, available at: [issafrica.s3.amazonaws.com/site/uploads/Paper225.pdf](http://issafrica.s3.amazonaws.com/site/uploads/Paper225.pdf).
173. Assembly of the African Union: Twenty-Sixth Ordinary Session (January 30–31, 2016), Assembly/AU/Dec.590 (XXVI), para. 10(iv), available at: [au.int/sites/default/files/decisions/29514-assembly\\_au\\_dec\\_588\\_-\\_604\\_xxvi\\_e.pdf](http://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf).
174. Following a leadership change in Gambia, its government reversed the decision, and a court in South Africa ruled that its withdrawal did not follow proper legal procedure. Burundi’s withdrawal took effect on October 27, 2017. See Manisuli Ssenyonjo, “State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia,” *Criminal Law Forum* (2017): 1–57, available at: [doi.org/10.1007/s10609-017-9321-z](https://doi.org/10.1007/s10609-017-9321-z).
175. See AU document dated January 12, 2017, and marked for restricted circulation, available at: [hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](http://hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf).
176. Matiangai Sirleaf, “The African Justice Cascade and the Malabo Protocol,” *International Journal of Transitional Justice* 11, no. 1 (2017): 78; also see Max du Plessis, Anoinette Louw, and Otilia Maunganidze, “African Efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions,” ISS Paper 241 (November 2012).
177. Ibid., Sirleaf 72.
178. Pan African Lawyers Union, *Policy Brief 5 International Criminal Justice in Africa*, July 17, 2013, 6, available at: [lawyersofafrica.org/wp-content/uploads/2014/07/Policy-Brief-5-International-Criminal-Justice-in-Africa.pdf](http://lawyersofafrica.org/wp-content/uploads/2014/07/Policy-Brief-5-International-Criminal-Justice-in-Africa.pdf).
179. See Coalition for the International Criminal Court, which reports on civil society activities in the fight for global justice in Kenya, Uganda, the DRC, and others, available at: [coalitionfortheicc.org/fight/voices-global-civil-society](http://coalitionfortheicc.org/fight/voices-global-civil-society).
180. See, for example, the recommendations of 24 experts meeting in October 2013 to discuss “Promoting Accountability for International Crimes in Africa,” in Pan African Lawyers Union, *Policy Brief 5: International Criminal Justice in Africa*, July 17, 2013,

- 1-2, available at: [lawyersofafrica.org/wp-content/uploads/2014/07/Policy-Brief-5-International-Criminal-Justice-in-Africa.pdf](http://lawyersofafrica.org/wp-content/uploads/2014/07/Policy-Brief-5-International-Criminal-Justice-in-Africa.pdf).
181. See, among others, Kenyans for Peace with Truth and Justice (KPTJ), *Seeking Justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court*, November 23, 2016, 18, available at: [kptj.africog.org/seeking-justice-or-shielding-suspects-an-analysis-of-the-malabo-protocol-on-the-african-court](http://kptj.africog.org/seeking-justice-or-shielding-suspects-an-analysis-of-the-malabo-protocol-on-the-african-court); Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, Institute for Security Studies, June 2012, available at: [issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf](http://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf); Deya, "Worth the Wait," 22, available at: [osisa.org/openspace/regional/african-court-worth-wait](http://osisa.org/openspace/regional/african-court-worth-wait).
  182. Human Rights Watch, *Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights*, May 3, 2012, available at: [www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties](http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties).
  183. See Richard Lee, *AU Must Promote Justice for International Crimes*, Open Society Initiative for Southern Africa, May 17, 2013, available at: [osisa.org/law/regional/au-must-promote-justice-international-crimes](http://osisa.org/law/regional/au-must-promote-justice-international-crimes); Amnesty International, *Open Letter to the Heads of State and Government of the African Union*, June 20, 2014, [amnesty.org/en/documents/afro1/012/2014/en/](http://amnesty.org/en/documents/afro1/012/2014/en/); and Human Rights Watch, *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, November 13, 2014, [hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice](http://hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice).
  184. Meeting in Nairobi, Kenya, the OAU's Heads of States and Government created the commission through adoption of the African Charter on Human and Peoples' Rights, which came into force on October 21, 1986. The African Charter is available at: [achpr.org/instruments/achpr](http://achpr.org/instruments/achpr).
  185. The protocol came into force following ratification by 15 Member States. As of July 2017, 30 AU member states had ratified it. See: [en.african-court.org/](http://en.african-court.org/). The protocol is available at: [en.african-court.org/images/Protocol-Host%20Agreement/africancourt-humanrights.pdf](http://en.african-court.org/images/Protocol-Host%20Agreement/africancourt-humanrights.pdf). The ACHPR has been headquartered in Arusha, Tanzania, since 2007; its final rules of procedure were adopted in June 2008. It is mainly an inter-governmental court, with jurisdiction over the African Charter and other pan-African human rights instruments. Member states of the AU can bring cases, as well as AU organs such as the African Commission. By ratification of a special protocol, five states lodged declarations granting standing to individuals and nongovernmental organizations to bring complaints. The court has been significantly underfunded and convenes four times a year. Only the president/chief judge serves full-time; the other 10 judges serve on a part-time basis. Judges are not required to have criminal law experience. The 2016 budget for the court was US\$10.3 million, an increase from the US\$9.8 million budget in 2015. Member states of the AU fund the court with significant support from European funding partners and private foundations, including the European Union, German International Cooperation, and the MacArthur Foundation. In 2010, the court saw significant developments, with the issuance of its first ruling (an order for provisional measures against Libya for human rights violations); the establishment of basic administrative and physical infrastructure; the installation of a library computer management system; and the hiring of full-time registry staff. For more information, see FIDH: International Federation for Human Rights, *Practical*

*Guide: African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights*, 2010, available at: [fidh.org/IMG/pdf/african\\_court\\_guide.pdf](http://fidh.org/IMG/pdf/african_court_guide.pdf);

South African Litigation Centre, *Justice for All: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights*, SALC Handbook Series (May 2014), available at: [southernafricalitigationcentre.org/2014/12/11/salc-handbook-justice-for-all-realising-the-promise-of-the-protocol-establishing-the-african-court-on-human-and-peoples-rights/](http://southernafricalitigationcentre.org/2014/12/11/salc-handbook-justice-for-all-realising-the-promise-of-the-protocol-establishing-the-african-court-on-human-and-peoples-rights/); Sonya Sceats, *Africa's New Human Rights Court: Whistling in the Wind?*, Chatham House Briefing Paper (March 2009); Anna Dolidze, "African Court on Human and Peoples' Rights: Response to the Situation in Libya," *ASIL Insights* 15, no. 20 (July 26, 2011); Coalition for an Effective African Court on Human and Peoples' Rights, *Implications of the African Court of Human and Peoples Rights Being Empowered to Try International Crimes Such as Genocide, Crimes Against Humanity and War Crimes*, December 17, 2009, submitted to the African Union by eight pan-African human rights organizations.

186. Protocol of the Court of Justice of the African Union, Adopted by the Second Ordinary Session of the African Union Assembly, July 1, 2003, Article 19, available at: [au.int/en/treaties/protocol-court-justice-african-union](http://au.int/en/treaties/protocol-court-justice-african-union).
187. Protocol on the Statute of the African Court of Justice and Human Rights, Adopted by the Eleventh Ordinary Session of the African Union Assembly (July 1, 2008), Article 28, available at: [au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights](http://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights).
188. Constitutive Act of the African Union, July 11, 2000, Articles 4(h) and 4(o), available at: [achpr.org/instruments/au-constitutive-act](http://achpr.org/instruments/au-constitutive-act).
189. See Lutz Oette, "Peace and Justice, or Neither: The Repercussions of the Al-Bashir Case for International Criminal Justice in Africa and Beyond," *Journal of International Criminal Justice* 8 (May 2010): 345; *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, submitted to the Assembly of the African Union, Ordinary Session, July 2006, available at [peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Reporo506.pdf](http://peacepalacelibrary.nl/ebooks/files/habreCEJA_Reporo506.pdf). The committee recommended that an African Court of Justice be established with the jurisdiction to try criminal cases. On the proposals to expand the jurisdiction of the East African Court of Justice, see John Eudes Ruhangisa (Registrar, EACJ), "The East African Court of Justice: Ten Years of Operation: Achievements and Challenges," Presentation Paper (November 2011), available at: [eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf](http://eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf). The court issued a decision in 2004 extending jurisdiction to human rights cases, but a draft protocol to that effect has not been adopted.
190. Assembly/AU/Dec. 213(XII), available at: [au.int/sites/default/files/decisions/9559-assembly\\_en\\_1\\_3\\_february\\_2009\\_auc\\_twelfth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion.pdf](http://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf). See also Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," *Journal of International Criminal Justice* 9, no. 5 (2011): 1.
191. *Ibid.*, Murungu; see also Deya, "Worth the Wait."
192. African Union, *List of Counties Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, available at: [au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights](http://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights).
193. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 28. Hereafter, Amended ACJHR Statute, available at: [au.int/](http://au.int/)

- en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.
194. Amended ACJHR Statute, Article 28(A), 1.
  195. Ibid., 2.
  196. Vincent O. Nmehielle, "Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?" *African Journal of Legal Studies* 7, no. 1 (2014): 30.
  197. Amended ACJHR Statute, Article 46C.
  198. Prosecutions of violations of international law by corporations have taken place before domestic courts, such as for example under the U.S. Alien Tort Statute and before regional human rights tribunals such as the European Court of Human Rights.
  199. Nmehielle, "Saddling the New African Regional Human Rights Court," 30–31. Also see Joanna Kyriakakis, "Article 46C: Corporate Criminal Liability at the African Criminal Court," in *The African Court of Justice and Human and Peoples' Rights*, ed. Kamari Clarke and Charles Jalloh (Cambridge: Cambridge University Press, forthcoming 2018).
  200. Amended ACJHR Statute, Article 46E and Article 46Ebis.
  201. Ibid., Article 46Abis.
  202. See, for example, Kenyans for Peace with Truth and Justice (KPTJ), *Seeking Justice or Shielding Suspects?*, 14–17; Parusha Naidoo and Tim Murithi, *The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the Political Dimensions of Concurrent Jurisdiction*, Institute for Justice and Reconciliation, October 2016, 5, available at: [ijr.org.za/home/wp-content/uploads/2016/11/IJR-Brief-No-20-web-ready.pdf](http://ijr.org.za/home/wp-content/uploads/2016/11/IJR-Brief-No-20-web-ready.pdf); Max du Plessis, *Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders*, Institute for Security Studies, November 2014, available at: [issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf](http://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf); Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, January 2016, 26–27, available at: [amnesty.org/en/documents/afro1/3063/2016/en](http://amnesty.org/en/documents/afro1/3063/2016/en); Human Rights Watch, *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, November 13, 2014, available at: [hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice](http://hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice); Human Rights Watch, *Call for African States to Reject Immunity for Serious Crimes by African Civil Society Organisations and International Organisations with a Presence in Africa*, August 14, 2014, available at: [hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society](http://hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society).
  203. Amended ACJHR Statute, Article 46H.
  204. Abass, "Historical and Political Background to the Malabo Protocol," 24–26.
  205. Rome Statute of the International Criminal Court, Article 17.
  206. Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, 28.
  207. Amended ACJHR Statute, Article 25.
  208. Ibid., Article 16.
  209. Ibid., Article 3, Article 16.
  210. Ibid., Article 21.
  211. Ibid., Article 7.

212. Ibid., Article 22.
213. Kenyans for Peace with Truth and Justice (KPTJ), *Seeking Justice or Shielding Suspects?*, 18. See also Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, 19–20.
214. Ibid., 25–26.
215. Amended ACJHR Statute, Article 22A (6).
216. Ibid., Article 22A (3)(4)(7)(9).
217. Ibid., Article 29.
218. Ibid., Article 30.
219. Ibid., Article 22B.
220. Ibid., Article 22C.
221. Kenyans for Peace with Truth and Justice (KPTJ), *Seeking Justice or Shielding Suspects?*, 11–12.
222. Amended ACJHR Statute, Article 22B (9)(a).
223. Ibid., Article 46M.
224. Thirty states have signed the 2008 Protocol on the ACJHR, and 10 states have signed the 2014 Malabo Protocol. See Protocol on the Statute of the African Court of Justice and Human Rights, Adopted by the Eleventh Ordinary Session of the African Union Assembly, Status List (EN), available at: [au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights](http://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights); and Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Status List (EN), available at: [au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights](http://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights).
225. Deya, “Worth the Wait,” 26.
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229. Bhoke Murungu, “Towards a Criminal Chamber,” 25.
230. Ibid., 24.
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666. The TRC's first draft called for equal representation of international and national judges in the Trial Chamber.
667. An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia (hereinafter: TRC Act), June 10, 2005, available at: [refworld.org/docid/473c6b3d2.html](http://refworld.org/docid/473c6b3d2.html).
668. TRC Act, Sections 26(j)(iv) and 44.
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671. The TRC also named 38 "perpetrators not recommended for prosecutions."
672. Supreme Court of the Republic of Liberia, *Archie Williams v. Christiana Tah et al.*, Decision of January 21, 2011, available at: [mediafire.com/?u1n6zkqoxl1zn30](http://mediafire.com/?u1n6zkqoxl1zn30).
673. "TRC Unites Archrivals," *New Democrat*, July 8, 2009, available at: [allafrica.com/stories/200907140457.html](http://allafrica.com/stories/200907140457.html).
674. See *TRC Final Report*, Section 12, *Recommendations on Accountability: Extraordinary Criminal Court*; and Annex 2: Draft Statute: Extraordinary Criminal Court. The report recommended these 58 individuals be tried by an existing domestic court in Montserrado County.

675. After the arrest of Charles Taylor in 2006, a civil society group, the “Forum for the Establishment of a War Crimes Court in Liberia,” was established, although its political motives were questioned. For a review of pre-TRC calls for a Liberian war crimes court, see Matiangai Sirleaf, “Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia,” *Fla. J. Int’l L.* 21 (2009): 209; Rena L. Scott, “Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions and Challenges,” *Int’l J. Legal Info* 33 (2005): 387–88; Franz Wild, “Liberians Call for Own War Crimes Court,” *VOA News*, April 12, 2006, available at: [voanews.com/english/archive/2006-04/Liberians-Call-for-Own-War-Crimes-Court.cfm](http://voanews.com/english/archive/2006-04/Liberians-Call-for-Own-War-Crimes-Court.cfm).
676. For an account of the transitional justice policy landscape and the Liberian government’s position, see Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, International Center for Transitional Justice, Center for Humanitarian Dialogue, 2007, 25 available at: [ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf](http://ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf). See also Sirleaf, “Regional Approach to Transitional Justice?” 239, quoting TRC Chairman Jerome Verdier that instituting criminal prosecutions before the completion of the TRC’s work would “undermine the reconciliation and peacebuilding process that the TRC is envisaged to undergo. ... With [Liberians’] input, monitoring and active participation, there will be a clear indication as to which way the country should go in terms of addressing impunity.”
677. Paul James-Allen, Aaron Weah, and Lizzie Goodfriend, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options on Liberia*, International Center for Transitional Justice, May 2010, available at: [ictj.org/publication/beyond-truth-and-reconciliation-commission-transitional-justice-options-liberia](http://ictj.org/publication/beyond-truth-and-reconciliation-commission-transitional-justice-options-liberia); see also Kwesi Aning and Thomas Jaye, “Liberia: A Briefing Paper on the TRC Report,” Kofi Annan International Peacekeeping Training Centre, Occasional Paper 33, April 2011, available at: [kaipctc.org/Publications/Occasional-Papers/Documents/Occasional-Paper-33-Jaye-and-Aning.aspx](http://kaipctc.org/Publications/Occasional-Papers/Documents/Occasional-Paper-33-Jaye-and-Aning.aspx).
678. The Forum for the Establishment of War Court in Liberia called for resignations, but its motives were questioned; see “War Crimes Group Hails TRC Report,” *The Inquirer*, 18, no. 114, July 6, 2009.
679. See *A Population Based Survey on Attitudes about Security, Dispute Resolution and Post-Conflict Reconstruction in Liberia*, University of California at Berkeley, June 2011. The study found that “holding trials to punish perpetrators of violence was *proposed* by less than 10% of the respondents as an acceptable measure to address the needs of victims” (emphasis added). However, when asked what should be done with those responsible, responses were “nearly even divided between individuals who said [perpetrators] should be forgiven (54%) and individuals who proposed a punitive approach (47%), including trials (27%), punishment (13%) and execution (3%).”
680. Liberia TRC Report, Annex 2, Draft Statute, Article 11(1).
681. See Human Rights Watch, *Justice for Liberia: The Truth and Reconciliation Commission’s Recommendation for an Internationalized Domestic War Crimes Court*, December 2009, 9–10, available at: [hrw.org/news/2009/12/11/liberia-trc](http://hrw.org/news/2009/12/11/liberia-trc) (hereinafter: *Justice for Liberia*).
682. *Justice for Liberia*. Human Rights Watch notes, inter alia: overbroad definition of terrorism; narrow definition for the use of child soldiers; and a domestic definition of sexual violence excluding marital rape, sexual assault, and same-sex rape. Additionally, the presumption of innocence afforded in the statute is complicated by the fact that the

TRC would refer some individuals to the ECCL, analogous to a pretrial confirmation of charges.

683. Liberia TRC Report, Annex 2, Draft Statute, Article 32.
684. *Ibid.*, Article 1(3).
685. *Ibid.*, Article 2(1). A defense office is not included as an “organ” of the court.
686. *Ibid.*, Article 10(1). Foreign attorneys would be required to be licensed to practice in any jurisdiction “with a recognized and functioning bar association that is recognized by the Court.” Article 8(1) states that Rules of Evidence and Procedure “will be established by a consensus of the Entirety of the Court. They must comport with international standards of due process and include minimum procedural safeguards.”
687. *Ibid.*, Article 5(1)(iv).
688. *Ibid.*, Article 21.
689. *TRC Final Report*, Section 12.6
690. Liberia TRC Report, Annex 2, Draft Statute, Article 23: “The court shall determine in respect of its staff the organizational structure in its Rules of Procedure and Evidence.”
691. *Ibid.*, Section 12.4.
692. *Ibid.*
693. *Justice for Liberia*, 4.
694. “Dutch Arms Trafficker to Liberia Given War Crimes Conviction,” *The Guardian*, April 22, 2017, available at: [theguardian.com/law/2017/apr/22/dutch-arms-trafficker-to-liberia-guus-kouwenhoven-given-war-crimes-conviction](http://theguardian.com/law/2017/apr/22/dutch-arms-trafficker-to-liberia-guus-kouwenhoven-given-war-crimes-conviction).
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696. “U.S. Charges Ex-Liberian Defense Minister with Lying in Citizenship Bid,” *Reuters*, May 13, 2014, available at: [reuters.com/article/us-usa-liberia-woewiyu/u-s-charges-ex-liberian-defense-minister-with-lying-in-citizenship-bid-idUSBREA4CoWJ20140513](http://reuters.com/article/us-usa-liberia-woewiyu/u-s-charges-ex-liberian-defense-minister-with-lying-in-citizenship-bid-idUSBREA4CoWJ20140513).
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699. “Ex-Wife of Former Liberian President Charged with Torture,” *The Guardian*, June 2, 2017, available at: [theguardian.com/world/2017/jun/02/ex-wife-of-former-liberian-president-charged-with-torture](http://theguardian.com/world/2017/jun/02/ex-wife-of-former-liberian-president-charged-with-torture).
700. “A Former Commander of Liberian Rebels Is Arrested in Switzerland,” *New York Times*, January 16, 2015, available at: [nytimes.com/2015/01/17/world/africa/a-former-commander-of-liberian-rebels-is-arrested-in-switzerland.html?\\_r=0](http://nytimes.com/2015/01/17/world/africa/a-former-commander-of-liberian-rebels-is-arrested-in-switzerland.html?_r=0).
701. Monica Mark, “Martina Johnson’s Liberian War Crimes Trial Is a Milestone in Quest for Justice,” *The Guardian*, October 7, 2014, available at: [theguardian.com/global-development/2014/oct/07/martina-johnson-liberia-war-crimes-trial](http://theguardian.com/global-development/2014/oct/07/martina-johnson-liberia-war-crimes-trial).
702. “Liberia’s President Sirleaf Submits First Report on TRC to Parliament,” *Voice of America*, March 24, 2010, available at: [voanews.com/a/butty-liberia-trc-report-president-mulbah-25march10-89088132/153853.html](http://voanews.com/a/butty-liberia-trc-report-president-mulbah-25march10-89088132/153853.html).

703. Paul James-Allen, Aaron Weah, and Lizzie Goodfriend, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options on Liberia*, International Center for Transitional Justice, May 2010.
704. *Report of the Working Group on the Universal Periodic Review: Liberia*, Human Rights Council, A/HRC/16/3, January 4, 2011. In the government of Liberia's submission to the Human Rights Council under Universal Periodic Review for 2011, no reference was made to the ECCL.
705. Liberia TRC Report, Annex 2, Draft Statute, Article 9(1)–(2). The ECCL would manage its own budget.
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707. *Ibid.*
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709. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), September 2, 1998, para. 1.
710. *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Appeal of Decision on Judicial Notice (Appeals Chamber), June 16, 2006, paras. 35 and 57.
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715. UN Security Council Resolution 918, May 17, 1994.
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754. ICTR Statute, Article 13; ICTR Rules of Procedure and Evidence, Rules 18 and 19.
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785. *Prosecutor v. Edouard Karemera et al*
786. Uwinkindi was physically transferred to Rwanda in April 2012. See *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012.

787. Defendants Munyeshyaka and Bucyibaruta were both transferred to France in November 2007. Some Rwandan genocidaires have been subject to national prosecutions in Canada, Switzerland, and Belgium. See Rule of Law in Armed Conflicts Project, Geneva Academy of International Humanitarian Law and Human Rights, “Rwanda: International Judicial Decisions,” available at: [geneva-academy.ch/RULAC/international\\_judicial\\_decisions.php?id\\_state=185](http://geneva-academy.ch/RULAC/international_judicial_decisions.php?id_state=185). In 2008, the Dutch Supreme Court ruled that the country’s courts lacked jurisdiction to try Rwandan Joseph Mpambara for genocide. The decision caused the ICTR to withdraw consideration of case referrals to the Netherlands. In January 2012, Canadian officials deported Leon Mugesera to Rwanda to face charges of incitement to genocide, ending a long extradition battle. In October 2011, a Chamber of the European Court of Human Rights dismissed the application by a Rwandan genocide suspect fighting extradition to Rwanda by Sweden, potentially opening the door for transfers from other European countries that had previously denied extradition requests from Rwanda. See Gregory Gordon, “Mugesera: Clarifying Rwanda Incitement Jurisprudence,” *JURIST*, February 8, 2012, available at: [jurist.org/forum/2012/02/gregory-gordon-incitement.php](http://jurist.org/forum/2012/02/gregory-gordon-incitement.php).
788. Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*, July 25, 2008.
789. Ibid.
790. See *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012.
791. In 1998, Rwanda carried out its last executions of 22 people convicted of genocide-related crimes. See [un.org/en/preventgenocide/rwanda/about/bgjustice.shtml](http://un.org/en/preventgenocide/rwanda/about/bgjustice.shtml).
792. The ECHR case concerned an extradition from Sweden. Suspects have also been extradited from Norway and Canada. Human Rights Watch, *Rwanda: Justice after Genocide, 20 Years On*, 3.
793. Judgment of the Administrative Court of the High Court of Justice, *Rwanda v. Ntezirayo and Others*, [2017] EWHC 1912 (Admin), July 28, 2017.
794. Human Rights Watch, *Rwanda: Justice after Genocide, 20 Years On*.
795. Human Rights Watch reported that testimony was only heard from witnesses who presented the killings as spontaneous reactions by soldiers overcome with grief for their fellow RPF officers who had lost relatives in the genocide rather than a planned military operation; two confessed and were finally given five-year sentences, two others were acquitted. Human Rights Watch, *Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF crimes*, May 26, 2009, available at: [reliefweb.int/report/rwanda/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf](http://reliefweb.int/report/rwanda/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf).
796. See [ictrcaselaw.org/](http://ictrcaselaw.org/). The case law of the ICTR has also been published in a topical digest by Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda*, 2010.
797. The “hate media trial” resulted in the conviction of Ferdinand Nahimana, Jean Bosco Baryagwiza, and Hassan Ngeze for genocide, incitement to genocide, and crimes against humanity. *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, December 3, 2003. See also Susan Benesch, “Inciting Genocide, Pleading Free Speech,” *World Policy Journal* (Summer 2004).
798. See Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda*; see also Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 16.

799. Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda*.
800. Timothy Gallimore, "The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda," *New Eng. J. of Int'l & Comp. L.* 14 (2008): 239, summarized in Dafna Gozani, "Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court," *Loy. L.A. Int'l & Comp. L. Rev.* 36 (2015): 356.
801. Philipp Schulz, "'Justice Seen Is Justice Done?': Assessing the Impact of Outreach Activities by the ICTR," available on De Gruyter online at: [degruyter.com/view/j/cirr.2015.21.issue-74/cirr-2015-0017/cirr-2015-0017.xml](http://degruyter.com/view/j/cirr.2015.21.issue-74/cirr-2015-0017/cirr-2015-0017.xml).
802. Mackline Ingabire, "Exploring the Boundaries of the Deterrence Effect of the ICTR," in *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, ed. Jennifer Schense and Linda Carter, 84-91.
803. For an examination of perceptions about the ICTR's legitimacy, see Barbara Oomen, *Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-Layered Justice Mechanisms*, Working Group on Development and Peace, 2007.
804. See *Kabgayi Case*, Human Rights Watch, *Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes*, August 14, 2009, available at: [hrw.org/news/2009/08/14/letter-ict-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime](http://hrw.org/news/2009/08/14/letter-ict-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime)).
805. *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, 84, May 22, 2012.
806. The May 2012 progress report of the ICTR noted that "since January 2012, the Tribunal has been working on the provision of a fully functional office space for the residual Mechanism within the Tribunal's current premises; has supported the Residual Mechanism in staff recruitment and finance/budgetary matters; and has assisted it in establishing initial relations with the host country. ... The Registry has also shared information and know-how in the areas of witness support and protection and enforcement of sentence to facilitate the smooth transfer of these functions to the Residual mechanism." Ibid.
807. The ICTR is funded through "expenses of the [UN] Organisation in accordance with Article 17 of the Charter of the United Nations." ICTR Statute Article 30. Article 17 of the Charter of the United Nations states that "the General Assembly shall consider and approve the budget of the Organization; the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."
808. See Ralph Zacklin, "The Failings of Ad Hoc International Tribunals," *J. Int'l Crim Just.* 2 (2004): 543. For a defense of the costs of the ICTY and the ICTR, see David Wippman, "The Costs of International Justice," *Am. J. Int'l L.* 100 (October 2006): 861, comparing costs of the ad hocs to national criminal prosecutions in the United States.
809. Office of Internal Oversight Services, *Internal Audit Division, Report 2016/072, Audit of liquidation activities at the ICTR*, June 27, 2016.
810. Estimates of the number of Gacaca cases vary. Prominent estimates include those from Human Rights Watch (almost 1.2 million) and the Rwandan government (almost two million).
811. The multitude of issues arising from Gacaca proceedings are not covered in this profile. For a comprehensive and thorough analysis of Gacaca, see Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community Based Gacaca Courts*, May 2011

- (hereinafter: *Justice Compromised*); and No Peace Without Justice, *Closing the Gap: The Role of Non-judicial Mechanisms in Addressing Impunity*, 2010.
812. *Justice Compromised*, 18.
  813. *Ibid.*
  814. See No Peace Without Justice, *Closing the Gap*, 206–7.
  815. *Ibid.*, 207.
  816. *Justice Compromised*, 22.
  817. See information including detailed statistics and the final *Administrative Report of the National Service of Gacaca Courts*, available at: [rwandapedia.rw/explore/Gacaca](http://rwandapedia.rw/explore/Gacaca).
  818. See, for example, Phil Clark, “How Rwanda Judged Its Genocide,” Africa Research Institute, 2012, available at: [africaresearchinstitute.org/newsite/publications/how-rwanda-judged-its-genocide-new/](http://africaresearchinstitute.org/newsite/publications/how-rwanda-judged-its-genocide-new/).
  819. No Peace Without Justice, *Closing the Gap*, 240.
  820. *Justice Compromised*, 127. Belgium gave around \$26 million between 2000 and 2008, mostly for training and logistical support. The Netherlands, Switzerland, and Austria gave over \$10 million through a basket fund, often for discrete purposes such as trial monitoring and documentation. The European Union gave \$4 million between 2002 and 2009 for training and public information. In 2010, the EU and several other donors moved to sector budget support.
  821. *Justice Compromised*.
  822. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, 2005. Available at: [hrw.org/report/2005/07/12/chad-victims-hissene-habre-still-awaiting-justice#page](http://hrw.org/report/2005/07/12/chad-victims-hissene-habre-still-awaiting-justice#page).
  823. *Ibid.*
  824. *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), *Judgment*, I.C.J. Reports 2012 (hereinafter: ICJ *Belgium v. Senegal*), para. 16.
  825. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*; See also Reed Brody, “The Prosecution of Hissène Habré: International Accountability, National Impunity,” in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena, 2006. *Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories*, May 1992 ,7, available at: [usip.org/files/file/resources/collections/commissions/Chad-Report.pdf](http://usip.org/files/file/resources/collections/commissions/Chad-Report.pdf). The Truth Commission operated with a minimal budget and under extremely unfavorable conditions. Nonetheless, it heard over 1,700 witnesses and produced a comprehensive report with extensive recommendations for memorialization, vetting of former DDS agents, and accountability measures, nearly all of which were ignored.
  826. In 2001, Human Rights Watch discovered a massive trove of documents in the abandoned DDS headquarters in N’Djamena, the capital of Chad. Chadian civil society and human rights organizations, including the Chadian Association of Victims of Political Repression and Crimes, were granted access by the Chadian government. The documents form the largest source of evidence of crimes committed by the regime.
  827. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*.
  828. The jurists the AU selected to report on the possibilities for prosecution specifically took account of the ICC, noting “that there is room in the Rome Statute for such a

development and that it would not be a duplication of the work of the International Criminal Court.” See *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, May 1, 2006, para. 35, available at: [peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Report0506.pdf](http://peacepalacelibrary.nl/ebooks/files/habreCEJA_Report0506.pdf).

829. *Accord Entre le Gouvernement de la République du Sénégal sur la Création de Chambres Africaines Extraordinaires au Sein des Juridictions Sénégalaises*, available at: [chambresafricaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf](http://chambresafricaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf).
830. *Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories*.
831. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*.
832. Ibid.
833. Ibid.
834. ICJ *Belgium v. Senegal*, para. 20.
835. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, available at: [hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal](http://hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal).
836. “Habré’s Legal Defence Dubs Chadian Court ‘Underground, Unfair’ over Death Sentence,” *Agence de Presse Africaine*, August 22, 2008.
837. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
838. Sofie A. E. Høgestøl, “The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight against Impunity,” *NJHR* 34, no. 3 (2016): 156; see articles in the *Toronto Globe and Mail*, the *New York Times*, and others mentioned in Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
839. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*.
840. *Plainte avec constitution de partie civile*, Doyen Des Juges d’Instruction près le Tribunal Régional hors classe de Dakar, January 25, 2000. Original document available at: [pantheon.hrw.org/legacy/french/themes/habre-plainte.html](http://pantheon.hrw.org/legacy/french/themes/habre-plainte.html).
841. ICJ *Belgium v. Senegal*, paras. 17–18; Decision of the Chambre d’Accusation of the Court of Appeal, July 4, 2000. Original document available at: [pantheon.hrw.org/legacy/french/themes/habre-decision.html](http://pantheon.hrw.org/legacy/french/themes/habre-decision.html).
842. See inter alia, *Complaint Filed against Hissène Habré Filed by Souleymane Abdoulaye*. Original document available at: [pantheon.hrw.org/legacy/french/themes/PlainteSouleymaneAbdoulaye.pdf](http://pantheon.hrw.org/legacy/french/themes/PlainteSouleymaneAbdoulaye.pdf).
843. *Letter of the Minister of Justice of Chad Concerning the Immunity of Hissène Habré*, October 7, 2002, available at: [pantheon.hrw.org/legacy/press/2002/tchad1205a.htm](http://pantheon.hrw.org/legacy/press/2002/tchad1205a.htm).
844. ICJ *Belgium v. Senegal*, para. 21.
845. *The Opinion of the Appeal Court of Dakar on the Extradition Request of Hissène Habré* (extracts), November 25, 2005, available at: [pantheon.hrw.org/legacy/french/docs/2005/11/26/chad12091.htm](http://pantheon.hrw.org/legacy/french/docs/2005/11/26/chad12091.htm).
846. African Union Assembly, Decision on the Trial of Hissène Habré and the African Union, January 24, 2006, available at: [pantheon.hrw.org/legacy/french/docs/2006/01/24/chad12558.htm](http://pantheon.hrw.org/legacy/french/docs/2006/01/24/chad12558.htm).

847. African Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, July 2, 2006, available at: [pantheon.hrw.org/legacy/french/themes/CEJA\\_Reporto506fr.pdf](http://pantheon.hrw.org/legacy/french/themes/CEJA_Reporto506fr.pdf).
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849. *Souleymane Guengueng et Autres c/ Sénégal*, communication presented before the Committee against Torture (Article 22 of the Convention), for violation of Articles 5 and 7 of the Convention, available at: [pantheon.hrw.org/legacy/french/themes/habre-cat.html](http://pantheon.hrw.org/legacy/french/themes/habre-cat.html).
850. UN Committee against Torture, *Decision on Communication No. 181/2001*, CAT/C/36/D/181/2001, May 18, 2006, available at: [pantheon.hrw.org/legacy/pub/2006/french/cato51806.pdf](http://pantheon.hrw.org/legacy/pub/2006/french/cato51806.pdf).
851. ICJ *Belgium v. Senegal*, paras. 28–31.
852. *Ibid.*, para. 32.
853. ECOWAS Court of Justice, *Hissein Habre v. Republic of Senegal*, Judgment No. ECW/CCJ/JUD/06/10, November 18, 2010, available at: [jurisafrika.org/html/pdf\\_ecowa.pdf](http://jurisafrika.org/html/pdf_ecowa.pdf).
854. Human Rights Watch, *Chronology of the Habré Case*, available at: [hrw.org/news/2015/04/27/chronology-habre-case](http://hrw.org/news/2015/04/27/chronology-habre-case).
855. ICJ *Belgium v. Senegal*, 422
856. Assembly of the African Union, 17th ordinary session, Assembly/AU/8(XVII), June 30–July 1, 2011. Progress report of the commission on the Hissène Habré case: “Acknowledging the ‘marginal progress made in the organization of the Hissène Habré trial since 2006,’ the AUC report also ‘looked at’ other accountability options, including the ‘(1) Establishment of Extraordinary Chambers in the Competent Court of Chad; (2) Establishment of Extraordinary Chambers in the Competent Court of any other AU Member State Party to the UN Convention against Torture willing to try Hissène Habré; (3) Extradition to Belgium and (4) Expeditious trial in Senegal in view of its legal responsibility under International Law.’ Surprisingly, the AUC report stated that ‘due to the difficulty to finding an African solution,’ extradition to Belgium ‘may have to be revisited’ as an option.”
857. Sarah Williams, “The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?” *JICJ* 11 (2013): 1144; *Loi n° 2012-29 modifiant l’article premier de la loi n° 84-19 du 2 février 1984 fixant l’organisation judiciaire*, available at: [ordresavocats.sn/statuts-des-chambres-africaines-extraordinaires-et-loi-fixant-lorganisation-judiciaire/](http://ordresavocats.sn/statuts-des-chambres-africaines-extraordinaires-et-loi-fixant-lorganisation-judiciaire/).
858. *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990* (unofficial translation by Human Rights Watch), Article 1, available at: [hrw.org/news/2013/09/02/statute-extraordinary-african-chambers](http://hrw.org/news/2013/09/02/statute-extraordinary-african-chambers) (hereinafter: EAC Statute).
859. Williams, “The Extraordinary African Chambers in the Senegalese Courts,” 1150.
860. *Ibid.*, 1146.
861. EAC Statute, Article 16.
862. Williams, “The Extraordinary African Chambers in the Senegalese Courts,” 1146.
863. *Ibid.*, 1151; Høgestøl, “The Habré Judgment at the Extraordinary African Chambers,” 152.

864. EAC Statute, Article 3.
865. Ibid., Article 4.
866. Ibid., Article 17; Williams, “The Extraordinary African Chambers in the Senegalese Courts,” 1146.
867. EAC Statute, Article 3.
868. Ibid., Article 37.
869. Ibid., Articles 22 and 33.
870. Ibid., Article 36; Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
871. EAC Statute, Article 37.
872. Ibid., Article 2.
873. Ibid., Article 11(1).
874. Ibid., Article 2.
875. Ibid., Article 11.
876. Ibid.
877. Williams, “The Extraordinary African Chambers in the Senegalese Courts,” 1145.
878. Ibid., 1150. Williams adds: “As the reasoning of the ECOWAS Court was in fact flawed, and there was no legal requirement for the tribunal to be of an international character, the failure to include more international features in the EAC is really insignificant.”
879. Ibid., 1150.
880. EAC Statute, Article 17(2).
881. Ibid., Article 12.
882. Ibid., Article 13.
883. Ibid., Article 15.
884. Ibid., Article 14.
885. Ibid., Article 34.
886. Ibid., Article 35.
887. Ibid., Article 15(4).
888. Ibid., Article 27.
889. Ibid., Article 28.
890. Ibid., Article 15.
891. Forum des Chambres Africaines, “Key Figures,” available at: [forumchambresafricaines.org/key-figures/?lang=en](http://forumchambresafricaines.org/key-figures/?lang=en).
892. Ibid., “Presentation,” available at: [forumchambresafricaines.org/presentation-2/?lang=en](http://forumchambresafricaines.org/presentation-2/?lang=en).
893. Ibid., “In Summary,” available at: <http://forumchambresafricaines.org/in-summary/?lang=en>.
894. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
895. Forum des Chambres Africaines, “Key Principles,” available at: [forumchambresafricaines.org/key-principles/?lang=en](http://forumchambresafricaines.org/key-principles/?lang=en).

896. *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assises*. EAC Indicting Chamber (RP N° 01/13), February 13, 2015, available at: [chambresafricaines.org/pdf/OrdonnanceRenvoi\\_CAE\\_13022015.pdf](http://chambresafricaines.org/pdf/OrdonnanceRenvoi_CAE_13022015.pdf).
897. Human Rights Watch, *Senegal: Chad's Inaction Won't Prevent Habré Trial*, October 22, 2014. [hrw.org/news/2014/10/22/senegal-chads-inaction-wont-prevent-habre-trial](http://hrw.org/news/2014/10/22/senegal-chads-inaction-wont-prevent-habre-trial).
898. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*; Forum des Chambres Africaines, "Suspects," available at: [forumchambresafricaines.org/the-suspects/?lang=en](http://forumchambresafricaines.org/the-suspects/?lang=en).
899. Høgestøl, "The Habré Judgment at the Extraordinary African Chambers," 151.
900. *Ministère Public c. Hissène Habré*, Jugement, EAC Trial Chamber, May 30, 2016, available at: [chambresafricaines.org/pdf/Jugement\\_complet.pdf](http://chambresafricaines.org/pdf/Jugement_complet.pdf).
901. Décision Civil Chambre Africaine Extraordinaire D'Assises (Reparations Judgment), July 29, 2016. Also, an annex at the end of the judgment is available at: [forumchambresafricaines.org/docs/JugementCAEd\\_Assises\\_Penal&Civil\\_.pdf](http://forumchambresafricaines.org/docs/JugementCAEd_Assises_Penal&Civil_.pdf).
902. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
903. *Le Procureur Général c. Hissène Habré*, EAC Appeal Chamber, April 27, 2017, available at: [chambresafricaines.org/pdf/Arr%C3%AAt\\_int%C3%A9gral.pdf](http://chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf).
904. Williams, "The Extraordinary African Chambers in the Senegalese Courts," 1160.
905. Høgestøl "The Habré Judgment at the Extraordinary African Chambers," 147.
906. Kim T. Seelinger, "The Landmark Trial against Dictator Hissène Habré," *Foreign Affairs*, New York, June 16, 2016, available at: [www.foreignaffairs.com/articles/chad/2016-06-16/landmark-trial-against-dictator-hiss-ne-habre](http://www.foreignaffairs.com/articles/chad/2016-06-16/landmark-trial-against-dictator-hiss-ne-habre).
907. Kim Thuy Seelinger. "Hissène Habré's Rape Acquittal Must Not Be Quietly Airbrushed from History," *The Guardian*, May 10, 2017, available at: [www.theguardian.com/global-development/2017/may/10/hissene-habre-acquittal-not-airbrushed-from-history-khadidja-zidane-kim-thuy-seelinger](http://www.theguardian.com/global-development/2017/may/10/hissene-habre-acquittal-not-airbrushed-from-history-khadidja-zidane-kim-thuy-seelinger).
908. Hogestol, "The Habré Judgment at the Extraordinary African Chambers," 152; Williams, "The Extraordinary African Chambers in the Senegalese Courts," 1151.
909. Hogestol, "The Habré Judgment at the Extraordinary African Chambers," 156; Williams, "The Extraordinary African Chambers in the Senegalese Courts," 1145.
910. See African Union Assembly, Decision on the Trial of Hissène Habré and the African Union, January 24, 2006, available at: [pantheon.hrw.org/legacy/french/docs/2006/01/24/chad12558.htm](http://pantheon.hrw.org/legacy/french/docs/2006/01/24/chad12558.htm).
911. Jason Burke, "Habré Trial Provides Model for International Justice," *The Guardian*, May 30, 2016.
912. See *Prosecutor c. Habré*, Décision Civil Chambre Africaine Extraordinaire D'Assises (Reparations Judgment), July 29, 2016.
913. Hogestol, "The Habré Judgment at the Extraordinary African Chambers," 154; African Union Executive Council, *Report of the Commission on the Trial of Hissène Habré*, EX.CL/986(XXIX), July 10–15, 2016, para. 29.
914. Amnesty International, *Chad: Hissène Habré Appeal Ruling Closes Dark Chapter for Victims*, April 27, 2017, available at: [amnesty.org/en/press-releases/2017/04/chad-hissene-habre-appeal-ruling-closes-dark-chapter-for-victims/](http://amnesty.org/en/press-releases/2017/04/chad-hissene-habre-appeal-ruling-closes-dark-chapter-for-victims/).

915. Hogestol, "The Habré Judgment at the Extraordinary African Chambers," 155.
916. ICJ *Belgium v. Senegal*, paras. 29 and 33.
917. Forum des Chambres Africaines, "Key Figures," available at: [forumchambresafricaines.org/key-figures/?lang=en](http://forumchambresafricaines.org/key-figures/?lang=en).
918. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.
919. EAC Statute, Article 32; *Accord Entre le Gouvernement de la République du Sénégal sur la Création de Chambres Africaines Extraordinaires au Sein des Juridictions Sénégalaises*, Article 3.
920. EAC Statute, Article 25 (1).
921. Ibid., Article 25(4) and 31(1)(b).
922. Ibid., Articles 11, 12, 13, and 15.
923. Ibid., Articles 14 and 21.
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931. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, July 7, 1999 (hereinafter: Lomé Agreement), available at: [sierra-leone.org/Loméaccord.html](http://sierra-leone.org/Loméaccord.html).
932. See United Nations Mission in Sierra Leone, available at: [un.org/en/peacekeeping/missions/past/unamsil/index.html](http://un.org/en/peacekeeping/missions/past/unamsil/index.html). A previous mission, the UN Observer Mission in Sierra Leone, had been deployed in June 1998, but was evacuated in December 1998 as rebels began an offensive against Freetown.
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934. The Truth and Reconciliation Act of 2000, February 22, 2000, available at: [usip.org/publications/truth-commission-sierra-leone](http://usip.org/publications/truth-commission-sierra-leone).
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  939. Sirleaf, "Regional Approach to Transitional Justice?" 258.
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  946. No Peace Without Justice, *Closing the Gap*, 152.
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  948. See Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 2011, 16: "Many arrested persons were detained for long periods without trial, the government had problems gathering evidence, there were challenges in transporting detained persons to court, there were insufficient courtrooms to hold trials, and the detained persons themselves could not find legal representation."
  949. The Secretary-General, *Fifth Report of the Secretary-General Delivered to the Security Council*, UN Doc. S/2000/751, July 31, 2000 (hereinafter: *Fifth Report on Sierra Leone*), para. 11.
  950. Human Rights Watch, *World Report 2003: Sierra Leone*, 61; *Fifth Report on Sierra Leone*, para. 5.
  951. Horowitz, "Transitional Criminal Justice in Sierra Leone," 46: "The Director of the local NGO 'Campaign for Good Governance' called for the establishment of an international tribunal to prosecute Sierra Leone's atrocities," *SL News Archives*, May 26, 2000; Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 2.
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956. Tejan-Cole, “The Special Court for Sierra Leone,” 107–8.
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958. Horowitz, “Transitional Criminal Justice in Sierra Leone,” 46.
959. See Dickinson, “The Promise of Hybrid Courts.”
960. UN Security Council Resolution 1315, S/RES/305, August 14, 2000. In the resolution, the Security Council recommended the subject matter jurisdiction, personal jurisdiction, and general structure of the Special Court.
961. See generally, The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, UN Doc. S/2000/915, October 4, 2000.
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963. *Fifth Report of the Secretary-General*, 9.
964. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, dated January 16, 2002 (hereinafter: Special Court Agreement).
965. Special Court Agreement (ratification) Act 2002, in accordance with section 40(4) of the Constitution of Sierra Leone (1991).
966. SCSL Statute, Article 1. The date of November 30, 1996 marks the signing of the peace agreement in Abidjan, Côte d’Ivoire. See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Abidjan, November 30, 1996, UN Doc. S/1996/1034 (Abidjan Accord).
967. Horowitz, “Transitional Criminal Justice in Sierra Leone,” 47.
968. Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the government of Sierra Leone, pursuant to Security Council Resolution 1315 (2000) of August 14, 2000, available at: [sierra-leone/documents-special-court.html](http://sierra-leone/documents-special-court.html) (hereinafter: SCSL Statute), Article 7. For those between 15 and 18 years of age, the statute provides that the court shall take into account “his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.” SCSL Statute, Article 7.1.
969. Modeling the Rules of Procedure and Evidence on the ICTR’s saved a “significant amount of time and effort and also built on earlier experience.” Robin Vincent, *Global Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, 120.
970. The code of conduct for counsel, approved by the SCSL judges “was the first unified code in an international criminal tribunal that covers both prosecution and defence.” Vincent, *Global Administrative Practices Manual*, 134.
971. SCSL Statute, Article 8.2. “The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence.”
972. See SCSL Statute, Article 5, “Crimes under Sierra Leonean Law,” including offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926; and offences relating to the wanton destruction of property under the Malicious

Damage Act, 1861. See Special Court for Sierra Leone, Rules of Procedure of Evidence, Amended 16 November 2011 (hereinafter: SCSL RPE), Rule 72*bis* (iii), stating the applicable laws of the Special Court include “general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.” See also Dickinson, “The Promise of Hybrid Courts,” 299–300.

973. SCSL Statute, Article 14.2, “The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.” See also Horowitz, “Transitional Criminal Justice in Sierra Leone,” 49.
974. Applicable crimes include laws relating to the prevention of cruelty to children and against the wanton destruction of property.
975. The location of the detention facility within the grounds of the court complex was unusual in international judicial institutions and had both advantages and disadvantages. On the one hand, the proximity to the court removed “significant security risk[s] involved in transferring detainees to the court” and “enable[d] far more effective access by defense attorneys to their clients.” On the other hand, locating the detention facility within the court complex placed “additional strains on an already stretched security capability” and made some court personnel uncomfortable. Vincent, *Global Administrative Practices Manual*, 75.
976. *Ibid.*, 43.
977. The Special Court may hold proceedings away from the “Seat” in Freetown, if authorized by the president. SCSL RPE, Rule 4.
978. Vincent, *Global Administrative Practices Manual*, 120.
979. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*. See also Horowitz, “Transitional Criminal Justice in Sierra Leone,” “Even Freetown residents are hesitant to attend trials, not only due to financial constraints but also in light of the intimidating number of armed security guards and barbed wire surrounding the Court’s site, which from the outside resembles a high security prison.”
980. Vincent, *Global Administrative Practices Manual*, 23.
981. Etelle R. Higgonnet, “Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform,” *Arizona Journal of International & Comparative Law* 23, no. 2 (2006): 387.
982. Vincent, *Global Administrative Practices Manual*, 31.
983. Horowitz, “Transitional Criminal Justice in Sierra Leone,” 57.
984. SCSL RPE, Rule 18.
985. SCSL Statute, Article 15.4.
986. Vincent, *Global Administrative Practices Manual*, 38.
987. SCSL Statute, Article 16. In February 2010, Binta Mansaray, a Sierra Leonean, was appointed as registrar; she previously served as deputy registrar and as head of the outreach section.
988. SCSL RPE, Rule 31.

989. Ibid., Rule 45.
990. Vincent, *Global Administrative Practices*, 127, noting also that although the office remains within the Registry, “but with as much autonomy as it is feasible.”
991. SCSL RPE, Rule 44(F). In “exceptional circumstances,” the principal defender may appoint cocounsel with less than five years admission to the bar of a state.
992. Vincent, *Global Administrative Practices Manual*, 133.
993. Ibid.
994. SCSL RPE, Rule 34. See also Rule 75 enumerating in-court measures for the protection of victims and witnesses.
995. SCSL Statute, Article 16.4.
996. Vincent, *Global Administrative Practices Manual*, 84.
997. Ibid., 89.
998. Ibid., 142.
999. In July 2012, RUF member Eric Koi Senessie was sentenced to two years for contempt of the Special Court. See SCSL press release, July 5, 2012, available at: [sc-sl.org/](http://sc-sl.org/).
1000. The “AFRC Trial” convicted Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, sentencing them to 50, 45, and 50 years, respectively. The “CDF Trial” convicted Moinina Fofana and Allieu Kondewa and sentenced them to 15 and 20 years, respectively. Samuel Hinga Norman died February 22, 2007, during trial. The “RUF” Trial convicted Issa Hassan Sesay, Morris Kallon, and Augustine Gbao and sentenced them to 52, 40, and 25 years imprisonment, respectively. Indictments against Foday Saybana Sankoh and Samuel Bockarie were withdrawn in 2003 due to the deaths of the accused. See Open Society Justice Initiative, [charlestaylortrial.org/trial-background/whos-who/#eight](http://charlestaylortrial.org/trial-background/whos-who/#eight).
1001. SCSL RPE, Rule 11bis: The court may transfer an indictment to “a State having jurisdiction and being willing and adequately prepared to accept such a case.”
1002. SCSL Statute, Article 10. The statute rejects domestic amnesty for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and of other serious violations of international humanitarian law. In addition, the Appeals Chamber of the SCSL has ruled that amnesties granted under domestic law for “grave international crimes in which there exists universal jurisdiction” does not deprive the SCSL of jurisdiction. See Prosecutor against Morris Kallon, Brima Bazzy Kamara (Case No. SCSL-2004-15-PT, Case No. SCSL-2004-16-PT), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty March 13, 2004, para. 67.
1003. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, *emphasis added*.
1004. No Peace Without Justice, *Closing the Gap*, 150.
1005. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*.
1006. Ibid.
1007. See Open Society Justice Initiative, [charlestaylortrial.org/trial-background/](http://charlestaylortrial.org/trial-background/).
1008. Ibid.
1009. See SCSL OTP press release, April 26, 2012, Prosecutor Hollis hails the historic conviction of Charles Taylor.

1010. In 2007, a civil society member was invited to join the committee.
1011. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 5; see also SCSL Legacy White Paper (September 26, 2005, on file with the Open Society Justice Initiative). The White Paper defines legacy as “activities that go beyond the boundaries of the courtroom and to contribute to efforts being made to address the root causes of the conflict, causes which continue to impede the administration of justice in Sierra Leone and which led to the creation of the Court in the first place.”
1012. See Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 14. “Although there are recent examples of lawyers making reference to fair trial precedents at the SCSL in support of arguments before national judges, in general there is a need to bring the international and national legal communities together on an equal footing.”
1013. *Ibid.*, 15.
1014. *Ibid.*, 14–15.
1015. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*. In 2009, the SCSL trained 38 national police officers in witness protection and support.
1016. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 15.
1017. *Ibid.*
1018. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*. See also [sierralii.org](http://sierralii.org).
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1020. Vincent, *Global Administrative Practices Manual*, 79.
1021. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*.
1022. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.
1023. See [rscsl.org/archives.html](http://rscsl.org/archives.html).
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1030. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.
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1035. *Ibid.*, 48.
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were broadcast on radio), and collected testimony from over 600 witnesses. The 720-page report, however, was met with muted response and was not widely distributed, although some of the recommendations have been credited with strengthening human rights provisions of Uganda's 1995 Constitution, including the constitutional anchoring of the Human Rights Commission.

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1172. Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007; Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, February 19, 2008. The annexure provided for the establishment of a "special division of the High Court of Uganda ... to try individuals who are alleged to have committed serious crimes during the conflict," and a specialized investigations and prosecutions unit dedicated to identifying and prosecuting "individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions."
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1178. Although a public document according to its terms of reference, the report was not widely distributed. See *Final Report and Recommendations of Needs-Assessment Mission Experts*, March 4, 2011 (hereinafter: NAM Report) on file with the Open Society Justice Initiative.
1179. NAM Report.
1180. For a summary of the cleavages caused by the debate around the ICC in Uganda, see International Refugee Rights Initiative, "A Poisoned Chalice? Local Civil Society and the International Criminal Court's Engagement in Uganda," Discussion Paper 1,

October 2011. It should be noted that the debate did not just involve contrasting views between international justice organizations and national NGOs supporting “local” or “traditional” forms of justice. Rather, the debate also reflected significant divisions within domestic civil society regarding approaches to justice, peace, and reconciliation.

1181. Justice James Ogoola, the principal judge of the High Court, established the WCD, pursuant to Article 141 of the Ugandan Constitution.
1182. The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, Legal Notices Supplement, *Uganda Gazette* 104, no. 38, May 31, 2011 (hereinafter: ICD Practice Directions).
1183. ICD Practice Directions, para. 6(1).
1184. Ibid.
1185. See, for example, Human Rights Watch, *Violence Instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit*.
1186. See Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, January 2012.
1187. ICD Practice Directions, Article 8(2). These relevant provisions cited in the practice directions are Section 141 of the Trial on Indictment Act, Cap. 23 and Section 39 of the Judicature Act, Cap. 13. The provision of the Trial on Indictments Act states that practice gaps in Ugandan law should be “assimilated as nearly as circumstances will admit to the practice of the High Court ... and of Courts of Oyer and Terminer and General Goal Delivery in England.” The provision of the Judicature Act states, “Where in any case no procedure is laid down for the High Court by any written law or by practice, the court may in its discretion, adopt a procedure justifiable by the circumstances of the case.” Thus, the ICD could adopt legal practice as incorporated by English courts, as well as unwritten law.
1188. Ibid., Article 8(3).
1189. For additional analysis of the Supreme Court decision, see [www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/](http://www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/).
1190. Amnesty Act (Extension of Expiry Period) Instrument, 2017 (SI No. 28 of 2017), May 22, 2017, available at: [ulii.org/node/27615](http://ulii.org/node/27615).
1191. Open Society Justice Initiative phone interview with Nathan Twinomugisha, August 9, 2017.
1192. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
1193. See Open Society Justice Initiative, *Putting Complementarity into Practice*, 80: “In the area of transitional justice, JLOS has taken the lead in articulating a vision and the requirements for fulfilling it. Donors then attempt to coordinate relevant assistance. Additionally, donors may make substantive suggestions, such as encouraging the government to engage more intensively in public consultations on transitional justice policy.”
1194. ICD Practice Directions, para. 4(1).
1195. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
1196. Ibid.
1197. Open Society Justice Initiative discussion with Kwoyelo Prosecutor Charles Kaamuli, August 15, 2017.

1198. Ibid.
1199. Email correspondence with Thomas Kwoyelo, defense counsel, August 9, 2017, describes facilitation for lawyers on state brief as being “paltry, irregular and untimely.”
1200. Regardless, the result would have likely been much the same, as the pool of qualified criminal defense lawyers in Uganda is limited. The defense team chosen by Kwoyelo (including Caleb Alaka and John Francis Onyango) were among those who had received specialized training from international organizations on international criminal and humanitarian law, prior to their involvement in the case.
1201. Email correspondence with Thomas Kwoyelo, defense counsel, August 9, 2017.
1202. See Rule 51 on the function of the registrar in relation to victims and witnesses.
1203. Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo, October 4, 2016, available at: [ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/](http://ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/).
1204. ICD Practice Directions, 4(3).
1205. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
1206. Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo, October 4, 2016, available at: [ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/](http://ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/).
1207. See <https://www.ijmonitor.org/2016/05/the-kwoyelo-case-at-the-icd-the-realities-of-complementarity-in-practice/>.
1208. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
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1213. Ibid.
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1215. Ibid.
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1218. Section 3, Trial on Indictments Act Cap. 23.
1219. See the Trial on Indictments Act of Uganda, Schedule Three and the Magistrate Courts Act of Uganda. For a discussion of jurisprudence in the East African Court of Justice on the role of assessors in Kenya, Tanzania, and Uganda, see Benjamin Odoki, *A Guide to Criminal Procedure in Uganda*, 3rd edition; and Francis J. Ayume, *Criminal Procedure and Law in Uganda*, 1986.
1220. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
1221. Open Society Justice Initiative discussion with Kwoyelo Prosecutor Charles Kaamuli, August 15, 2017.
1222. “Army Captures Kony’s Top General in Ambush, *Daily Monitor*,” May 14, 2012, available at: [monitor.co.ug/News/National/Army-captures-Kony-s-top-general-in-ambush/688334-1405294-mewvyez/index.html](http://monitor.co.ug/News/National/Army-captures-Kony-s-top-general-in-ambush/688334-1405294-mewvyez/index.html).

1223. “Shs1b Ivory Seized at Entebbe Airport,” *Daily Monitor*, January 25, 2015, available at: [monitor.co.ug/News/National/Shs1b-ivory-seized-at-Entebbe-airport/688334-2600982-yvcgdz/index.html](http://monitor.co.ug/News/National/Shs1b-ivory-seized-at-Entebbe-airport/688334-2600982-yvcgdz/index.html).
1224. See Barefootlaw, *A Legal Timeline of the Kampala 2010 Bombings*, available at: [barefootlaw.org/a-legal-timeline-of-the-kampala-2010-bombings-case](http://barefootlaw.org/a-legal-timeline-of-the-kampala-2010-bombings-case).
1225. See <http://www.africanews.com/2016/05/27/5-sentenced-to-life-imprisonment-over-2010-uganda-bombings/>.
1226. This case illustrated a certain lack of clarity about the division of authority at the ICD, whose judges are sitting High Court justices with non-ICD criminal dockets.
1227. The initial indictment filed by the Directorate of Public Prosecutions in August 2010 contained eleven charges of grave breach violations only under the Geneva Conventions Act. An amended indictment, filed at a preliminary hearing in July 2011, contained 65 charges. The amended indictment is structured to cover the original 11 grave breach charges, but each incident is “alternatively” charged as crimes under the Penal Code Act. For instance, Count 1 of the indictment charges Kwoyelo with willful killing as a grave breach of the Geneva Conventions Act. Count 1A charges Kwoyelo with murder under the Penal Code Act. It should be further noted that prosecutors did not charge Kwoyelo under the ICC Act because the act could only be applied prospective from its date of ratification on June 25, 2010. Despite the emerging norm in international law that atrocity crimes can be retroactively prosecuted under customary international law, the Ugandan judiciary would likely reject such an argument, based on the strict principle of legality in Ugandan law and practice. Regardless, the DPP brought charges against Kwoyelo for grave breaches of the Geneva Conventions, ratified into domestic law in the 1964 Geneva Conventions Act (GCA). The most significant challenge to prosecuting war crimes under the GCA is the requirement that prosecutors must prove the conflict was international in nature. Recognizing the difficulty of this hurdle, prosecutors added alternative counts as defined in the “ordinary” Ugandan Criminal Penal Code. All the indictments and court documents referred to are on file with the Open Society Justice Initiative.
1228. Open Society Justice Initiative discussion with Kwoyelo Prosecutor Charles Kaamuli, August 15, 2017, noted that the amended indictment will only be publicized once the pretrial stage is finalized.
1229. “Supreme Court of Uganda Rules on the Application of the Amnesty Act,” *International Justice Monitor*, April 16, 2015, available at: [ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act](http://ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act).
1230. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.
1231. Chief Justice’s New Law Year 2017 speech, available at: [judiciary.go.ug/files/publications/issue%208%20for%20print.pdf](http://judiciary.go.ug/files/publications/issue%208%20for%20print.pdf).
1232. Ibid.
1233. JLOS Development Partners, available at: [jlos.go.ug/index.php/about-jlos/development-partners](http://jlos.go.ug/index.php/about-jlos/development-partners).
1234. Ibid.
1235. Open Society Justice Initiative, *Putting Complementarity into Practice*, 79–80.
1236. Ibid.; see also NAM Report.
1237. See 1995 Constitution of Uganda, Article 134 (2). Also see Rule 53, ICD Rules of Procedure.

- 1238. See 1995 Constitution of Uganda, Articles 142 and 147.
- 1239. See *ibid.*, Article 144 (2).
- 1240. See *ibid.*, Article 144 (3)–(6).
- 1241. Uganda Code of Judicial Conduct, available at: [judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/JUDICIAL\\_ETHICS\\_OUGANDA.pdf](http://judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/JUDICIAL_ETHICS_OUGANDA.pdf).
- 1242. Police Act Cap. 303, Section 6, available at: [upf.go.ug/download/legal\\_mandate/The-Police-Act.pdf](http://upf.go.ug/download/legal_mandate/The-Police-Act.pdf).
- 1243. *Ibid.*, Schedule, available at: [upf.go.ug/download/legal\\_mandate/The-Police-Act.pdf](http://upf.go.ug/download/legal_mandate/The-Police-Act.pdf).
- 1244. Code of Conduct and Ethics for Uganda Public Service, available at: [publicservice.go.ug/mops\\_media/2017/06/Public-Service-Code-of-Conduct.pdf](http://publicservice.go.ug/mops_media/2017/06/Public-Service-Code-of-Conduct.pdf).
- 1245. *Ibid.*, para. 6.O. Also see 1995 Constitution of Uganda, Uganda Public Service Standing Orders, Article 166.
- 1246. ICD Practice Directions, para. 9(6).
- 1247. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.

# ANNEX 2: MECHANISM IN THE AMERICAS

## ARGENTINA

### Conflict Background and Political Context

In 1976, a military junta deposed President Isabel Perón, beginning a military dictatorship that lasted until 1983. The collapse of the economy, coupled with Argentina's military defeat by Great Britain in the Malvinas-Falklands War, led to democratic elections in 1983. During its rule, the military junta engaged in enforced disappearances, widespread killings, systematic torture, and abductions by death squads. These crimes were perpetrated within the larger context of *Operación Cóndor*, a coordinated effort implemented by the right-wing dictatorships of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay to combat alleged terrorists and subversives.

In the name of rooting out left-wing ideology among opposition groups, the military often gave abducted children, as well as children born to imprisoned women, to families with links to the military or security forces to raise as their own. The regime operated over 300 secret detention centers throughout the country; thousands of the disappeared have never been fully accounted for. A truth commission, the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP) investigated the atrocities committed between 1976 and 1983 during the military junta. In its report *Nunca Más*, it stated there were 8,960 reported disappearances but estimated the real numbers to be around 10,000 to 30,000 cases, attributing underreporting to fear of reprisal.<sup>1248</sup>

### Existing Justice-Sector Capacity

Argentina has a well-developed judicial system. At the federal level, it traditionally had an inquisitorial system of criminal prosecution. A 1991 reform introduced a mixed system, which combined an initial inquisitorial phase (in writing and before an investigating judge) followed by a trial phase (before an oral tribunal).<sup>1249</sup> In 2014, Argentina introduced a new fully accusatorial system,<sup>1250</sup> whose implementation has been gradual. Most of the crimes against humanity cases have followed the 1991 procedure.

Argentina fully relied on its existing justice-sector capacity to undertake crimes against humanity cases. However, the judicial system did not have experience investigating and prosecuting mass atrocities. For example, judicial operators and the system as a whole did not have experience in grouping multiple incidents for joint prosecution.

In addition, there is no prioritization of criminal prosecutions according to the Argentine legal tradition. Any attempt to select or prioritize cases would not have been well received by human rights activists and victims' associations who backed the cases. However, a strict application of the principle according to which all cases must be prosecuted (*ejercicio obligatorio de la acción penal*) has led to overlaps and a big backlog.

## Existing Civil Society Capacity

As early as 1977, civil society began reacting against the military dictatorship. Argentinian mothers trying to find their missing children formed the *Asociación Madres de Plaza de Mayo* (Mothers of Plaza de Mayo). These women, who have used public marches to bring attention to disappearances, outlasted the military dictatorship despite brutal suppression tactics. Another group, the *Asociación Civil Abuelas de Plaza de Mayo* (Grandmothers of Plaza de Mayo), was formed to track down illegally adopted children, and their efforts have seen the prosecution of kidnappers and complicit adoptive parents.<sup>1251</sup>

The Argentine nongovernmental organization Center for Legal and Social Studies (CELS) was created in 1979 and became active in the last years of the military dictatorship. Its goals of preserving memory, seeking prosecution, and increasing public awareness of the human rights violations committed in Argentina aligned with those of Mothers and Grandmothers of Plaza de Mayo. Both actively pushed for accountability and devoted resources to providing evidence. CELS was instrumental in the effort against the Full Stop (*Punto Final*) and Due Obedience (*Obediencia Debida*) laws, which were intended to shield junta members from criminal accountability, filing lawsuits that would help find them unconstitutional.<sup>1252</sup>

The violence in Argentina and reaction against it led to a paradigm shift within local human rights that carried through to seeking justice against the military governments (*juntas*) and had an international impact. In the 1960s and 1970s, international human rights organizations were concerned with immediate physical harm or rectifying imprisonment, influenced by the UN's division of rights between, on the one hand, the civil and political and, on the other, the economic, social, and

cultural spheres. Argentine organizations such as the Mothers of Plaza de Mayo felt that scope had to broaden to include truth, justice, and accountability. The rallying cry, *jucio y castigo a todos los culpables*, or “justice and punishment for all those culpable,” led to trials of junta members, and in the early 2000s, overturned the amnesty laws that thwarted accountability.<sup>1253</sup>

## Creation

Argentina did not create a separate structure to prosecute crimes committed during the 1976–1983 military dictatorship. Instead it used its existing judicial structure. The road to justice took over 30 years, partly due to the initial instability of the democratic governments that followed the military dictatorship and partly due to a series of legal measures (e.g., the amnesty laws) that were adopted in the early days of democracy that took a long time to overturn. Persistent advocacy by victims, victims’ associations, and human rights activists played a central role in making the trials possible.

After the fall of the military dictatorship in 1983, the democratic government proved unable to sustain prosecutions of crimes committed by the military junta.<sup>1254</sup> However, important prosecutions did take place, complemented by an innovative truth commission.

Three days after his inauguration, President Raúl Alfonsín issued a decree ordering the prosecution of nine top officials of the three juntas that governed the country between 1976 and 1983. The decree ordered trial for the crimes of murder, illegal detention, and ill-treatment.<sup>1255</sup> The trial began in the *Consejo Supremo Militar*, the military court, with provisions that, should it fail to come to a verdict within six months, either prosecution or defense could appeal to the *Cámara Federal*. The Cámara, a civilian court, could then either grant an extension or decide to try the case *de novo*. The military court found that all orders issued by the junta leaders were unobjectionable, so they could only be tried for their failure to control their subordinates. The Cámara subsequently took over the case and a landmark trial against key junta officials began 18 months after the fall of the regime. The “Trial of the Juntas” received intense national attention, and over 800 witnesses were presented.<sup>1256</sup> The defendants were charged with “various crimes, including torture, illegal detention, robbery, and murder, but not genocide or crimes against humanity.”<sup>1257</sup> Nine members of the military juntas were convicted of gross violations of human rights in 1985.<sup>1258</sup> Evidence for the prosecutions was

drawn in part from the investigations of a national truth commission, CONADEP, a quasijudicial body that was required to refer cases with sufficient judicial information to the courts for prosecution.<sup>1259</sup>

These early prosecutions provoked several military uprisings against President Alfonsín's democratic government. In 1986, Alfonsín issued a law imposing a deadline for bringing charges against military officers, known as the Full Stop law.<sup>1260</sup> In 1987, the president issued an amnesty, known as the Due Obedience law because it was "founded on the premise that personnel of the lower ranks were following orders" and therefore immune from prosecution.<sup>1261</sup> In 1989, the military leaders convicted in the Trial of the Juntas received presidential pardons from President Carlos Menem, "under the alleged need of pacification."<sup>1262</sup>

Throughout this turn away from accountability beginning in the mid-1980s, Argentinian human rights activists, jurists, and civil society organizations became increasingly sophisticated and coordinated at the national, regional, and international levels. When domestic politics stymied their efforts for accountability, they turned outward and brought actions before the Inter-American Commission of Human Rights (IACHR), which ruled in 1992 that the impunity laws and presidential pardons violated the American Convention on Human Rights.<sup>1263</sup> The ruling prompted Argentina's Congress to grant victims the right to reparations, leading to thousands of petitions in the early 1990s.<sup>1264</sup> In 1996, victims filed cases in Spanish courts under universal jurisdiction, leading to arrest warrants and extradition requests.<sup>1265</sup> (In 2012, Argentinian human rights lawyers reversed the roles and brought lawsuits in Argentinian courts, under universal jurisdiction laws, for crimes committed in Spain during the civil war and the 1939–1975 Franco dictatorship).<sup>1266</sup> Argentine rights groups also brought domestic actions in the 1990s regarding the military regime's abduction of children of imprisoned mothers<sup>1267</sup> and increasingly also directly challenged the Due Obedience and Full Stop laws. Argentinian federal courts conducted "truth trials" throughout the early 1990s, a "judicially created procedure to obtain official information about the fate of victims before criminal courts in the absence of the legal possibility to impose criminal sanctions."<sup>1268</sup>

## **Legal Framework and Mandate**

The development of international legal norms during this period, through regional human rights mechanisms and universal jurisdiction, "played an important role in enabling [Argentina] to overcome otherwise insurmountable barriers to

prosecution.”<sup>1269</sup> These efforts at the regional and domestic level slowly bore fruit. A lower federal court ruled in 2001 in the *Simon* case that the Full Stop and Due Obedience laws were unconstitutional.<sup>1270</sup> Congress annulled both laws in 2003.<sup>1271</sup> In 2005, federal judges struck down pardons issued by President Menem in 1989–1990 as unconstitutional, a decision upheld by the Appellate and Supreme Court in 2006 and 2007.<sup>1272</sup> The Supreme Court also upheld the *Simon* case in 2005, opening the door for the most recent wave of prosecutions, including some annulled cases that have been reactivated. In 2004, the Supreme Court, citing jurisprudence of the AICHR on the state’s responsibility to prosecute and punish serious human rights violations, ruled that the statute of limitations was inapplicable to crimes against humanity cases.<sup>1273</sup>

Political developments in the country also had an impact on enabling prosecutions. In 2003, Néstor Kirchner was elected president of Argentina and ruled from 2003 to 2007. His wife, Cristina Fernández de Kirchner, succeeded him and was the president between 2007 and 2015 (Néstor Kirchner died in 2010). The Kirchners actively promoted prosecution of crimes committed during the military dictatorship, as part of their progressive human rights policy.<sup>1274</sup> Since President Mauricio Macri took over the presidency in late 2015, he has been criticized for not providing such significant political support to the cases.<sup>1275</sup>

## Location

Federal District and Appellate Courts across Argentina have heard grave crimes cases.

## Structure and Composition

According to Argentina’s Constitution, the judiciary is composed of the Supreme Court and such other lower tribunals as established by law.<sup>1276</sup> The Supreme Court is composed of five judges appointed by the president.<sup>1277</sup> Other tribunals established by national law are “federal tribunals” and they have jurisdiction over matters concerning the constitution, federal laws, international law, relationships with other countries, and disputes between provinces.<sup>1278</sup> In addition to the federal tribunals, provinces can establish other (called “ordinary”) tribunals. The crimes against humanity cases fall under federal jurisdiction.

Since the higher court decisions between 2005 and 2007 paved the way for prosecutions, serious crimes have been prosecuted in ordinary criminal courts,

with support from specialized units created within the Attorney General's Office. Those included a unit for assistance on cases concerning human rights violations committed during the military dictatorship (created in 2004) and a unit for coordination and follow-up on human rights violation cases (created in 2007). The latter worked with federal prosecutors to "analyze strategic problems, propose general guidelines for advancing the cases and to ensure that links in connected cases are made"<sup>1279</sup> and was upgraded to a *procuraduría* (*Procuraduría de Crímenes de Lesa Humanidad*) in 2013.<sup>1280</sup> In addition, a special unit on child kidnapping (*Unidad especializada para casos de apropiación de niños durante el terrorismo de Estado*) was created in 2012.<sup>1281</sup> The Supreme Court established a "superintendence unit"<sup>1282</sup> and a commission to "coordinate policies with the other branches of government."<sup>1283</sup>

No specialized chamber has been granted jurisdiction over the prosecution of crimes during the military dictatorship; rather, the cases can be heard by any of Argentina's federal District or Appellate Courts.<sup>1284</sup> However, a specific federal court, the Federal Oral Criminal Tribunal No. 1 for La Plata, "has jurisdiction over a large number of ... cases because the military juntas conducted a disproportionate amount of their repressive activities in its [territorial] jurisdiction."<sup>1285</sup> This tribunal has conducted many of the proceedings and has played a significant role in developing atrocity crimes jurisprudence in Argentina, through specific cases discussed in the *Prosecutions* section, below. Cases have also been brought before tribunals in Mar del Plata (Buenos Aires), Rosario (Santa Fé), Paraná (Entre Ríos), Córdoba (Córdoba), and Tucumán (Tucumán), among other jurisdictions.<sup>1286</sup>

Granting general jurisdiction to ordinary courts, rather than forming a specialized tribunal or even a dedicated domestic chamber along the lines of, for example, the Bosnian War Crimes Chamber, has inevitably led to delays. The Argentine judiciary must keep up with advances on crimes against humanity cases from 1976 to 1983 at the same time as it carries out its functions with respect to any other cases within its jurisdiction. The dictatorship crimes caseload has outstripped the capacity of the judicial system, as a prosecutor within the specialized unit noted:

The justice process currently underway ... is very ambitious ... to prosecute an enormous quantity of crimes committed throughout the country. ... Furthermore, this is occurring in the same courts responsible for investigating other types of crimes. Argentina chose not to create special tribunals to judge these types of crimes, which has been important because it grants these trials unquestionable legitimacy; special tribunals can always be suspected of bias. But this also presupposes the additional difficulty of involving a large number of

legal figures in trials taking place all over the country; managing that is no simple task.<sup>1287</sup>

Argentina's legal system permits limited participation by autonomous victim-plaintiffs, or *querellantes*. This has allowed Argentine human rights organizations, as *querellante* lawyers, to push for the charges to be characterized as grave crimes, rather than ordinary crimes under the criminal code.<sup>1288</sup> *Querellantes* are represented by their own attorneys and may intervene in proceedings<sup>1289</sup> to "present their own witnesses, make motions, and cross-examine any witnesses presented by the defense."<sup>1290</sup>

## Prosecutions

A large number of cases and prosecutions have been brought before Argentine courts, although human rights and victims' organizations decry the slowness of the proceedings. In March 2017, the Procuraduría de Crímenes de Lesa Humanidad stated that 593 files had been opened for crimes committed during the military dictatorship: 175 (29%) had reached a judgment, 16 (3%) were at the trial phase, 118 (20%) had been committed to trial, and 284 (48%) were at the investigation phase.<sup>1291</sup> The same report informs that those cases concern 2,780 defendants, of whom 750 (27%) have been convicted and 77 (3%) acquitted. As of March 2017, 411 (14.5%) had been charged and 794 (28%) were facing trial.<sup>1292</sup>

Some argue that the prosecutorial strategy was articulated early on as seeking to "achieve the highest number of 'significant trials' in the shortest period of time possible."<sup>1293</sup> However, initial cases focused on specific incidents and perpetrators, and lacked a comprehensive approach to prosecution of mass atrocities, which has been one of the reasons for a significant caseload and delays.<sup>1294</sup>

Other reasons for delays included slow proceedings before Appeals and Cassation Courts, a problem which congress sought to address through a legal reform.<sup>1295</sup> The nature of the criminal proceedings in Argentina also explains slow progress on cases: a slow and extremely formal investigation process providing plenty of opportunities for delaying tactics.<sup>1296</sup> Finally, some have pointed to a shortage of judicial and prosecution staff possessing the specific expertise needed to deal with crimes against humanity cases.<sup>1297</sup>

In 2012, the head of the specialized prosecutions unit indicated that prosecutions would also proceed by grouping incidents at detention centers:

Our basic goal at the Attorney General's Unit is to concentrate the investigations by common denominators. For example, all the acts committed in the same detention center would be investigated in a single inquiry, and this inquiry would produce one trial. This method obviously has its strengths and weaknesses, and these trials showcase the best and the worst of the justice system.<sup>1298</sup>

More recently, cases for crimes committed in the same detention center have been grouped into *megacausas* (mega-cases).

In a document with instructions to prosecutors, the Procuraduría de Crímenes de Lesa Humanidad acknowledged a need to prioritize cases. In doing so, it recognized that the law might not favor any type of prioritization but that establishing priorities is necessary in practice, considering the huge number of facts and perpetrators and the broad temporal and geographical span. It also recalled that many of the defendants are aging and that some have died before cases reached a judgment. Initial lack of guidance in this respect led to some accused, who have been tried several times and sentenced to the maximum penalty, continuing to face other prosecutions, while other alleged perpetrators have not been investigated. Mindful of the need to maximize available resources, the Procuraduría offered some basic “rational criteria” to prioritize cases, namely: to prioritize cases against accused who have not been convicted, or who were not convicted to the maximum penalty; or against elderly accused who have not yet been tried; or relating to victims who have not yet accessed justice for the crimes they suffered (the Procuraduría keeps a registry of victims whose cases have been heard, which can be accessed by prosecutors for reference).<sup>1299</sup>

The convictions in 2006–2007 for crimes against humanity against police official Miguel Etchecolatz and priest Christian Von Wernich established important judicial precedents for the prosecution of other “Dirty War” criminals. The court stated *in dicta* that “these crimes were ‘committed in the context of genocide,’” but did not answer whether the Dirty War was in fact genocide.<sup>1300</sup> The judgments marked “a beginning of a shift in Argentine courts toward greater reliance on international law in prosecuting Dirty War crimes.”<sup>1301</sup> However, most of the judgments considered that the crimes were crimes against humanity, not genocide. Argentina did not have a provision covering crimes against humanity in its Criminal Code at the time of the commission of the crimes.<sup>1302</sup> The courts, therefore, tried the accused for ordinary crimes (kidnapping, torture, and murder) and relied on customary international law<sup>1303</sup> to establish that those had been committed as crimes against humanity.<sup>1304</sup>

Prosecutors have steadily expanded their scope to target not only military officers, but “civilians who contributed in diverse ways to the crimes, including priests, judges, and former ministers.”<sup>1305</sup> In March 2011, a federal court sentenced an army general to life imprisonment in the first case against participants in Operación Cóndor, suggesting a broader direction for prosecutions.<sup>1306</sup> In 2015, CELS presented a report on corporate responsibility for crimes committed during the military dictatorship.<sup>1307</sup> To date, there have been no prosecutions against corporate actors.<sup>1308</sup>

Crimes committed at a clandestine detention and torture center operating at the Navy Mechanics School (ESMA) received intense attention in Argentina and abroad.<sup>1309</sup> The ESMA mega-cases concern 12 investigations, which have been committed to trial in four parts. In November 2011, in the second ESMA case, a federal court convicted 16 of the officers of crimes against humanity after a two-year trial that included testimony from over 150 witnesses.<sup>1310</sup> Another prominent complex investigation involved crimes committed in Campo de Mayo,<sup>1311</sup> a military area 30km outside Buenos Aires that hosted the largest clandestine detention center. That investigation has been committed to trial in five parts.<sup>1312</sup>

An April 2010 conviction of former military president General Reynaldo Bignone for kidnapping and torture stands as one of the highest-profile cases against top leadership of the military juntas.<sup>1313</sup> Bignone has also been tried in other cases, including a significant one concerning Operación Cóndor, resulting in convictions.<sup>1314</sup> Jorge Rafael Videla, another top military commander and former president, was one of the co-accused in the same case, but he died before the case was completed. Videla had been convicted in other cases, including for systematic kidnapping of babies and children.<sup>1315</sup>

Matters related to fair trials and balancing the rights of the accused against the gravity of the crimes have also attracted significant attention. One such matter has been the right of the accused to home detention or home imprisonment due to advanced age or illness. Considering the time elapsed since the crimes were committed and age of the accused, the matter has given rise to a significant number of requests and reviews, including before the Supreme Court. The court has balanced two opposing arguments: the exceptional nature of crimes against humanity and nonapplicability of benefits afforded to those accused of ordinary crimes as opposed to equality before the law and humanitarian considerations for accused persons whose health conditions may deteriorate significantly if imprisoned. Some judgments have also considered the accused persons’ capacity to exert pressure on others despite their advanced age and the state’s international

obligations to ensure investigation, trial, and punishment of those accused of crimes against humanity and human rights violations.<sup>1316</sup>

In addition, there has been debate around the application of an old law that allowed convicted persons to have the time spent in pretrial detention count double for the purpose of sentence execution.<sup>1317</sup> This so-called “2-for-1” law had been passed in 1994 and was repealed in 2001. But in 2017, the Supreme Court ruled that the benefit was applicable to an individual who had been in detention since 2007 on grounds of application of the law most favorable to the defendant and equality before the law (no specific exception had been established in law for those convicted of crimes against humanity).<sup>1318</sup> The judgment brought society into turmoil, as it potentially opened the door for hundreds of convicted persons to apply to have their sentence significantly shortened, a benefit that some considered equal to a “virtual amnesty.”<sup>1319</sup> In the days following the judgment, activists and human rights organizations issued statements condemning application of the 2-for-1 benefit to those convicted of the most serious crimes.<sup>1320</sup> Hundreds of thousands of Argentines demonstrated against the judgment.<sup>1321</sup> After just two days of debates and only nine days after the judgment, congress almost unanimously passed a bill that barred application of the 2-for-1 benefit in any other grave crimes case.<sup>1322</sup>

## Legacy

Some observers have criticized Argentina’s court system for delays in processing the burgeoning atrocity crime caseload.<sup>1323</sup> In part, delays reflect a judicial under-capacity to handle the sheer number of cases, including, for example, a lack of courtrooms in Buenos Aires.<sup>1324</sup> While policymakers have taken measures to address delays and backlogs, problems persist due to the sheer number of crimes, victims, and perpetrators. In some respects, courts are racing against time to complete investigations.<sup>1325</sup> As of March 2017, over 450 people accused of crimes committed during the dictatorship had died before being brought to justice.<sup>1326</sup> Argentina can be commended for having handled cases through its existing judiciary mechanisms and without creating a separate structure, although it would have been important to consider establishing prioritization guidelines from an early stage. Some have also raised concerns about gaps in witness protection and security, noting, for example, the disappearance of a former torture victim before the final days of a trial.<sup>1327</sup>

Victims’ and advocates’ persistence in their quest for justice made the trials possible. The Mothers and Grandmothers of Plaza de Mayo played a central role, and their

legacy extends beyond Argentina. They are known and respected worldwide, and their actions have inspired movements in other parts of the globe. In addition, the Mothers of Plaza de Mayo association has been active on human rights issues other than those related to crimes committed during the military dictatorship.

Committed to find their grandchildren, the Grandmothers of Plaza de Mayo contributed to the creation of a National Genetic Data Bank in 1987. They have conducted impressive outreach campaigns to sensitize those who were abducted and given to other families. Victims abducted at such a young age may have been oblivious to their family background for several decades, as they grew up with a false identity. To date, more than 120 cases of stolen children have been resolved—most through DNA tests via the Genetic Bank—but several hundred remain unaccounted for.<sup>1328</sup>

Finally, CONADEP, the truth commission established very shortly after the military dictatorship, was one of the first of its kind. In addition to collecting and recording evidence used in trials 30 years later,<sup>1329</sup> and which might have otherwise been lost, it served as a reference for other truth commissions created in Latin America and around the world.

## **Financing**

Given the lack of a specific discrete structure, resources for the crimes against humanity cases were provided along with the other resources for the judiciary in the public sector budget. The material and human resources assigned to the cases have been insufficient to process a very large number of cases in a timely manner, as shown by delays and backlogs. Both the Attorney General's Office and the Supreme Court took targeted measures to address some of the structural shortcomings, including creation of specialized units, appointment of judicial officials and limited expansion in the number of staff. Other limitations included insufficient courtroom availability and limited digitalization of proceedings.<sup>1330</sup>

Donor funding has enabled civil society groups' involvement in the cases, including their provision of support and legal representation to victims, as well as in monitoring and advocacy.

## Oversight and Accountability

There have been two forms of oversight in Argentina: first, a formal oversight built into the country's judicial system, and second, an informal mechanism via domestic and international civil society and social pressure.

The Council of Magistrates (*Consejo de la Magistratura*),<sup>1331</sup> which is involved in the selection of judges, has oversight functions with regard to judges' performance and can undertake administrative proceedings for misconduct.

Cases have been heard in Trial and Appeals Courts. Access to an Appeals Court is granted through ordinary appeal proceedings and Appeals Courts can review both the determination on the facts and application of the law. In addition, the parties can apply to have proceedings reviewed by a Court of Cassation, which can be accessed only via extraordinary applications seeking an interpretation of the law. Finally, in even more limited circumstances, and after a ruling by the Court of Cassation, the parties may be granted access to the Supreme Court, Argentina's highest judicial body.

National and international civil society organizations have made a significant contribution to informal forms of oversight. CELS, in particular, has consistently conducted research, advocacy, and monitoring of proceedings related to crimes committed during the military dictatorship for almost 40 years.<sup>1332</sup> The Argentinian section of Amnesty International has also done research and conducted specific advocacy campaigns in relation to topics of interest.<sup>1333</sup> The International Center for Transitional Justice published a series of briefing papers between 2005 and 2009,<sup>1334</sup> and has regularly reported on the trials since 2011.<sup>1335</sup>

Finally, Mothers of Plaza de Mayo and Argentinian society have contributed to an informal system of checks and balances through peaceful demonstrations and social pressure.<sup>1336</sup>

## COLOMBIA

### Conflict Background and Political Context

Colombia has faced prolonged internal armed conflict among paramilitary groups, guerrilla groups, and the national army for over 50 years. The conflict has been marked by extreme violence committed by all parties, including massacres, torture, forced disappearance, forced displacement, sexual violence, and other grave crimes. In recent years, Colombia has adopted a transitional justice strategy to help bring an end to the conflict and provide justice for victims. In 2016, the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) signed a historic peace agreement, bringing a formal end to the conflict with that guerrilla group. As of October 2017, peace talks with another armed group, the National Liberation Army (*Ejército de Liberación Nacional*, or ELN), were ongoing.

The Colombian conflict originated in an era known as *La Violencia*, a violent struggle between liberals and conservatives during the 1950s. In 1958, in an attempt to resolve the conflict, Colombia established a power-sharing agreement called the National Front. However, far-left groups were excluded from the political process and formed small armies of guerrilla soldiers in remote regions of the country. The largest of these groups included the FARC and the ELN.<sup>1337</sup> In the 1970s, to protect their interests from expropriation by the guerrillas, wealthy landowners and drug lords formed their own private armies with the assistance of the government and military.<sup>1338</sup> Eventually, these paramilitary groups joined forces under the umbrella organization of the United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, or AUC).<sup>1339</sup>

The conflict evolved into a battle for land, money, and control over drug routes. Although all parties committed grave crimes, paramilitary groups—often working in close cooperation with the state and military—are responsible for a large majority of the human rights abuses committed during the conflict.<sup>1340</sup>

During the height of the conflict, the government inconsistently fluctuated between offers of amnesty and use of military power to fight the leftist guerrillas, with very limited success.<sup>1341</sup> Colombia signed the Rome Statute of the International Criminal Court (ICC) in December 1998 and deposited its instrument of ratification in August 2002, triggering its entry into force in November 2002. The state has been under

preliminary examination by the ICC Office of the Prosecutor since June 2004.<sup>1342</sup> Since then, the Colombian government has actively developed transitional justice legislation to pursue justice and has begun conducting national trials for grave crimes.

In spite of the various peace agreements signed by Colombia in recent years, violence and serious human rights abuses by state and nonstate armed groups remain a problem. “Successor” organized armed groups, known variously as *bandas criminales* (BACRIM), organized crime groups, or “post-demobilization paramilitary groups,” emerged following the demobilization of the AUC and FARC. They frequently target civilians and engage in narco- and human-trafficking, as well as other criminal activity.<sup>1343</sup>

A number of the recent developments in Colombian transitional justice legislation have been subject to intense political debate. In particular, the approach of President Juan Manuel Santos toward the peace process with the FARC has been widely criticized by his predecessor, former President Álvaro Uribe. Uribe has mobilized significant political power against Santos’s efforts, to the extent that a public referendum on the peace agreement failed in October 2016.

External pressure for accountability has come from the Inter-American system, the UN, and the ICC. For example, the Inter-American Commission of Human Rights (IACHR) has issued findings that security forces committed or collaborated in the commission of human rights violations, including torture, disappearances, and extrajudicial killings.<sup>1344</sup> The UN Commissioner for Human Rights and the ICC Office of the Prosecutor have characterized extrajudicial killings perpetrated by the Colombian security forces as possible crimes against humanity.<sup>1345</sup> The UN’s Office of the High Commissioner for Human Rights also has a monitoring and technical assistance program in Colombia and is closely involved in monitoring the FARC peace process.

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## **The Role of the United States in Colombia**

The United States has a long history of involvement in the Colombian conflict, from training counter-insurgents in the 1950s and 1960s to a massive military and counternarcotics program launched in 2000, called Plan Colombia. America invested some US\$10 billion in Plan Colombia over the course of 16 years and has proposed additional funding to help secure peace.<sup>1346</sup> Some credit Plan Colombia as marking a turning point in the conflict.<sup>1347</sup> The United States has been the largest

and most active donor to the domestic judicial system since the early 1990s. The U.S. Department of Justice has provided legal advisers, investigators, and prosecutors through the International Criminal Investigative Training Assistance Program (ICITAP) and the Office of Prosecutorial Development, Assistance and Training (OPDAT). These advisers also provided limited assistance on human rights prosecutions to the Human Rights Unit of the Colombian Prosecutor General's Office and the Prosecutor's Justice and Peace Unit.<sup>1348</sup> Top drug traffickers and paramilitary leaders are sometimes extradited to the United States, a controversial practice among Colombian jurists and civil society.<sup>1349</sup>

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## Existing Justice-Sector Capacity

Since the adoption of the 1991 constitution, the Colombian justice sector has undergone significant reforms, including the passage of a revised criminal procedure code in 2004. The 1991 constitution introduced important reforms to the institutional judicial framework, including creating a separate Public Prosecutor's Office with oversight over investigations and enshrining "the right to a subsidized defense, setting the basis for the creation of a Public Defender's Office."<sup>1350</sup> The rule of law and domestic judicial-sector capacity in Colombia is still weak overall, especially in conflict areas, but has made enormous improvements since the height of the insurgency in the 1990s. The judiciary is persistently overloaded, infamously slow, and historically underresourced and understaffed.<sup>1351</sup> In remote areas, which make up the large majority of the state, the judiciary has been weak and either unwilling or unable to enforce legal contracts.<sup>1352</sup> Judges, witnesses, and prosecutors have faced bribery, threats, and attacks. According to the World Justice Project's May 2016 Rule of Law Index, Colombia ranked 19th out of 30 countries in Latin America and the Caribbean, and 71st out of 113 countries globally. With respect to its criminal justice system, it ranked 20th of 30 in Latin America and the Caribbean, and 91st of 113 globally.<sup>1353</sup>

However, according to some, Colombians' "level of confidence in their justice system is among the highest in the region" and has been increasing in recent years.<sup>1354</sup> A 2010 USAID report noted that caseloads are "modest, if fairly unevenly distributed, but clearance and congestion rates remain poor."<sup>1355</sup> Colombia's Constitutional Court has gained a strong reputation around the world.<sup>1356</sup>

Nevertheless, the judiciary faces significant hurdles. Colombia's already strained judiciary faces an entrenched criminal nexus among drug traffickers, armed paramilitary groups, and corrupt political elements, all of which contribute to

widespread human rights abuses. In addition, Colombia still has thousands of internally displaced peoples from the decades of conflict. Colombia's legislature continues to pass laws and reforms to address the crimes committed during the conflict and provide some form of justice and restitution to victims. The judicial sector's willingness to tackle these interrelated problems and entrenched politico-criminal elements reflects its increasing independence and technical capacity, but the rule-of-law framework is severely stressed.

## Existing Civil Society Capacity

Colombia's civil society is strong and technically proficient on justice issues. Organizations have been active despite facing significant threats, including persecution by the state intelligence service. Especially when faced with political blockages in prosecuting military abuses, civil society organizations have engaged in domestic litigation and sought the opinion of the IACHR concerning Colombia's obligations under the American Convention on Human Rights.<sup>1357</sup> A number of civil society organizations closely monitor and conduct advocacy in relation to transitional justice issues in Colombia, including legislation and trials. The *Movimiento de Víctimas de Estado* (MOVICE) has been one of the organizations that has been effective in organizing victims.

Colombia has also received support from a number of international human rights organizations, who have applied pressure, written *amicus* briefs for the Constitutional Court, provided capacity building, and assisted in peace negotiations with the FARC.

## Creation

The complex legal framework for transitional justice in Colombia has developed in stages and is still evolving. Colombia's transitional justice efforts began in earnest with the demobilization of the paramilitaries and passage of the Justice and Peace Law (JPL) in 2005. In 2011, the Santos government passed comprehensive legislation on victims' reparations, the right to truth, and land restitution. The following year the government and FARC began peace talks, which culminated in the 2016 peace agreement and resulting transitional justice legislation. The peace agreement with the FARC added significant new elements, including the Special Jurisdiction for Peace (SJP). In October 2017, the Constitutional Court made a landmark decision guaranteeing the legal stability of the peace agreement until 2030 and approving the constitutionality of the resulting transitional justice legislation.<sup>1358</sup>

## ***Justice and Peace Law***

After a number of failed peace agreements, the Colombian government and the paramilitary groups signed the Santa Fe de Ralito Accord in 2003.<sup>1359</sup> In 2005, in an attempt to provide accountability for crimes committed by paramilitary leaders, the Colombian government passed Law 975 of 2005, also known as the Justice and Peace Law.<sup>1360</sup> The Constitutional Court modified the text of the law through a series of rulings, in particular Sentence C-370 of 2006. Congress reformed the law in 2012 with Law 1592.

The Ralito Accord provided for collective demobilization for the AUC as well as other armed groups. The JPL, in turn, established a legal framework for integrating combatants into civilian life and offered a reduced criminal sentence for those who disarmed and confessed to human rights abuses. According to the Colombian government, by 2016, approximately 58,161 combatants had demobilized.<sup>1361</sup> By 2015, some 4,410 paramilitaries had applied for benefits under the JPL.<sup>1362</sup>

Relatedly, Law 1424 of 2010 establishes the framework for reintegrating demobilized paramilitary members who were not covered by the JPL process. Under Law 1424, members of illegal armed groups accused of low-level crimes, such as simple or aggravated conspiracy or illegal possession of arms, receive judicial benefits, including suspension of arrest warrants and the conditional suspension of sentences, in exchange for contributing to the truth.<sup>1363</sup>

The process established by the JPL is ongoing. Members of paramilitary groups who have demobilized fall under the jurisdiction of the JPL or ordinary courts, and thus will not be subject to the jurisdiction of the SJP. However, the SJP will have jurisdiction over those who collaborated with or financed paramilitary groups.

## ***Accountability for Military and Other State Actors***

The JPL did not specifically provide accountability for military and state actors who committed or facilitated the commission of grave crimes related to the armed conflict. Colombia has made various attempts to reform the military justice system for crimes related to acts of military service and expand military jurisdiction.<sup>1364</sup> Some suggest that these attempted reforms aimed to transfer cases from civilian to military courts, although the language that would have allowed this was eventually removed from the proposed reform.<sup>1365</sup> The government passed a reform in 2015 modifying the constitution to specify that the investigation and prosecution of crimes committed by the armed forces in the context of an armed conflict would be

judged according to international humanitarian law.<sup>1366</sup> Accountability for members of the armed forces was also part of the peace agreement signed with the FARC and will be part of the new SJP.

### ***Victims' and Land Restitution Law***

In 2011, the Colombian government passed Law 1448, or the “Victims and Land Restitution Law,” a historic development for victims of the Colombian conflict. The law focuses on providing truth, justice, and reparations for victims.<sup>1367</sup> Under the law, victims of disappearances, murder, displacement, and other human rights violations can receive damages, restitution, social services, and legal protection. For those who have been displaced, the law created a special land restitution program.

Law 1448 also provides for the creation of a national day of memory and the collection of victim testimony. The Victims' Law in turn created the National Commission of Reparation and Reconciliation and the National Historic Memory Center. It also established the Victim Assistance and Reparations Unit, responsible for coordinating the National System for Assistance and Reparations for Victims as well as the Victims Registry, humanitarian aid efforts, victim compensation, and individual and collective reparations plans.

The Land Restitution Unit, which began work in January 2012, is charged with creating a registry of stolen or abandoned land, reviewing victims' claims for land restitution, and presenting their cases to a land judge. If restitution of land is not possible, the state will pay due compensation for land theft and displacement. In its first five years, the law provided for the compensation of 590,000 victims. However, the law has faced significant implementation challenges.<sup>1368</sup>

### ***Legal Framework for Peace***

In mid-2012, the Colombian government passed legislative Act 01 of 2012, the Legal Framework for Peace. This framework, included in a constitutional amendment, lays out various transitional justice measures, including the creation of extrajudicial justice mechanisms, as well as criteria for prioritizing and selecting cases, suspending sentences, and dropping cases, including those of state agents and guerrillas convicted of atrocities. Human rights groups widely condemned the framework as providing impunity for grave crimes.<sup>1369</sup> The prosecutor of the ICC also sent a letter to the Constitutional Court saying that suspending sentences for crimes within the ICC's jurisdiction would violate Colombia's international law obligations.<sup>1370</sup> The Constitutional Court altered the amendment in 2013,<sup>1371</sup> helping

to set the stage for an agreed approach to criminal justice mechanisms during peace negotiations with the FARC.

### ***Peace Negotiations with FARC and Other Guerrillas***

Peace negotiations with leftist guerrillas have been a contentious issue in Colombia. Talks with the FARC started in November 2012, and talks with the ELN began in February 2017. After nearly four years of negotiations with the FARC, the government and the FARC signed a comprehensive peace agreement on August 24, 2016. The agreement included terms for a bilateral ceasefire, a process for the FARC to lay down arms and integrate into society, and justice processes for victims of the conflict. It also included agreements on comprehensive rural reform, battling the illicit drug trade, and the political participation of the FARC. In particular, the agreement provided for the establishment of the Special Jurisdiction for Peace (SJP), a system designed to provide justice for the crimes committed during the conflict by guerrillas as well as members of the armed forces and others who financed or collaborated with armed groups.

After months of vehement protest from members of the political opposition, the agreement narrowly lost a nationwide plebiscite in October 2016. With only a 37 percent turnout for the vote, the “yes” vote lost by only one-half of one percent. The government and FARC renegotiated a new agreement, which was passed by congress at the end of November 2016. The new agreement included many proposals put forth by the opposition and significant revisions, including regarding the SJP. However, the new agreement lacks a stable political base, and in late 2017, it appeared that its implementation could depend on the results of presidential elections in 2018.

### ***Integral System of Truth, Justice, Reparation and Non-repetition***

In April 2017, as part of the fast-track legislation passed to implement the peace deal signed with the FARC, Colombia passed amendments to the constitution creating the Integral System of Truth, Justice, Reparation and Non-repetition (the “Integral System” framework).<sup>1372</sup> As of October 2017, the Constitutional Court was reviewing the legislation, and it was subject to change. Many national and international groups expressed criticism of the law and concerns about its implementation.<sup>1373</sup>

The framework is intended to focus less on retribution and more on establishing the truth about the past, creating mechanisms for victims’ reparations, and guaranteeing nonrepetition. It involves several components, including the SJP, the Unit for the

Search of Missing Persons, and a Truth Commission. It is innovative in that it incorporates both restorative and retributive goals, including penalties as well as repairing damage to victims caused by the conflict.<sup>1374</sup>

## Legal Framework and Mandate

### *Justice and Peace Law*

In 2002, President Álvaro Uribe's administration began negotiations with an umbrella group of paramilitary organizations, the AUC, in a process that culminated in the JPL of 2005. The JPL includes provisions for prosecuting international crimes with the possibility of reduced sentences within the domestic criminal system. Design flaws of the JPL, criticized by justice advocates as providing only partial justice, have been compounded by poor implementation and underfunding.

The JPL offers a range of legal immunities and benefits in exchange for surrender by individual members of armed groups. These immunities are conditioned on the individuals' contribution to national peace, collaboration with the justice system, reparation for victims, and the persons' adequate resocialization.<sup>1375</sup> In specially created JPL courts, magistrates hear voluntary confessions of demobilized paramilitaries (*postulados*). Other steps of this legal process include an indictment, investigations, formalizing charges, a reparations hearing, and reading the sentence against the accused. Those who are found guilty under a JPL prosecution receive full sentences, which are then suspended and substituted with reduced conditional sentences of between five and eight years.<sup>1376</sup> Everyone who participates in the JPL process is eligible for a reduced sentence; it is not predicated on the gravity, context, quantity, or scale of crimes committed nor on the rank or role of the accused.<sup>1377</sup>

Under the normal legal framework, sentences for similar crimes run from 50 to 60 years of imprisonment.<sup>1378</sup> The Colombian Constitutional Court has held that the large gap between "normal" and JPL sentences does not violate the right to justice and should not be considered an amnesty or pardon because the normal sentences are merely suspended, not replaced, by the reduced sentence.<sup>1379</sup> Although the JPL sentences are "less rigorous," the court noted that they depend on the cooperation of the accused with the justice system and victims, making the sentences conditional.<sup>1380</sup>

If individuals decide not to participate in the process of voluntary confessions, they may face full criminal charges. Prosecutions under ordinary criminal jurisdiction are brought under provisions of the Rome Statute, which were

domesticated in the Colombian criminal code in June 2002, but are procedurally conducted under the JPL.<sup>1381</sup>

The procedural features of prosecutions under the JPL law are significantly different from ordinary criminal proceedings in Colombian law.<sup>1382</sup> It is based on an inquisitorial model and relies on the confession of the accused. Under the JPL, investigations and prosecutions should focus on patterns of war crimes and crimes against humanity, structural and organizational aspects of the paramilitary groups, and external support provided to the paramilitaries. According to an October 2012 directive from the attorney general, investigators must prioritize investigations of crimes committed by large criminal organizations and individuals most responsible for the crimes.<sup>1383</sup>

A December 2012 reform of the JPL echoed the prioritization of investigating those “most responsible” for crimes,<sup>1384</sup> leading to an increase in investigations of paramilitary leaders.<sup>1385</sup> This reform also made it more difficult for demobilized paramilitaries to be released from jail. This reform provided that if the state determined that the accused had not told the complete truth, cooperated with the judicial system, or compensated their victims by 2014, their case would be transferred to the normal court system, where their conditional sentence could be lifted. This reform also required victims to seek reparations under the new Victims Law, rather than under the JPL.<sup>1386</sup>

The JPL also included provisions for victim participation and restitution. To participate, victims were granted the right to attend all stages of the criminal proceedings, to directly question the accused about crimes that affected them, and to demand reparations. Reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Decree 1290, which entered into effect in 2009, set out the administrative compensation for victims of illegal armed groups. Under this decree, some 18 million pesos have been awarded to victims of violations of the rights to life, physical integrity, physical and mental health, individual freedom, and sexual freedom. The decree does not provide compensation measures for victims of state agents.

### ***Integral System of Truth, Justice, Reparation, and Non-Repetition***

Part of the Integral System framework adopted in 2017 involves the establishment of the SJP. The SJP will have exclusive jurisdiction over those who have directly or indirectly participated in the armed conflict, including members of the FARC, state agents, and third parties who have financed or collaborated with armed groups, among others. Paramilitary fighters who have demobilized or participated in the JPL

process or whose cases are being heard in the ordinary judicial system are not within the jurisdiction of the SJP. The SJP will also have exclusive jurisdiction over crimes committed in relation to the armed conflict, especially crimes against humanity, genocide, and war crimes. It will have one Justice Chamber and one Tribunal for Peace. The SJP establishes three tracks: an amnesty for political crimes, judgment and reduced sentencing for those who confess, and trials for those who fail to confess. The SJP has a 10-year mandate, with a possible extension of five years.

The SJP includes the possibility of an amnesty or pardon for political or politically related crimes (such as rebellion, sedition, and illegal possession of arms or military uniforms).<sup>1387</sup> Military and state agents are not eligible to benefit from the amnesty. However, the peace agreement provides that all parties must receive comparable treatment, leaving open the possibility of commuted sentences for those who are ineligible for amnesty.

As of July 2017, some 7,400 former FARC members had received amnesty: 6,005 by decree and another 1,400 were released from jail by the judiciary.<sup>1388</sup> The amnesty is part of the process of reintegration for those who identify members of the organization; lay down their arms; sign an agreement that they will not rise up against the government and will comply with the Integral System; and are accredited by the Office of the High Commissioner for Peace. The accreditation is also necessary for these former combatants to benefit from other reintegration programs.

Those who confess their crimes are eligible for reduced sentences as long as they lay down their arms and reintegrate into civilian life (in the case of FARC combatants); recognize their responsibility; and contribute to victims' rights to truth, reparation, and nonrepetition. Those who confess early in the process will be eligible for reduced sentences involving a restriction of liberty for five to eight years in the most serious cases, or two to five years in other cases.<sup>1389</sup> This "restriction of liberty" requires residing in a designated demobilization zone, but not necessarily a prison. They may also face additional penalties including reparations to victims or restorative measures. Those who confess later during a trial, but before a final judgment is delivered, may be sentenced to five to eight years in prison. Those who fail to confess can be sentenced to 15–20 years in prison.

Individuals within the SJP jurisdiction cannot be subject to extradition for crimes within its jurisdiction. Being sanctioned by the SJP does not prohibit participation in Colombian politics, including while serving a sentence. (This had been a contentious issue during the peace negotiations.) The accused have the right to a defense and to appeal any decisions of the SJP.

The Office of the Prosecutor is currently tasked with collecting evidence to pass on to the SJP and is grouping potential cases according to gravity and symbolic value. Priority crimes include sexual violence, mass murder, displacement, enforced disappearances, use of child soldiers, and environmental crimes.<sup>1390</sup>

The Integral System law also provides measures for reparations. It creates explicit incentives for members of the FARC to declare their assets to the government to be used for reparations. Offenses related to any assets discovered later that were not declared by FARC combatants will be subject to normal criminal prosecution.

According to the Integral System, crimes committed by members of the armed forces will be subjected to a separate regime based largely on Colombian law. The Integral System rules are considered *lex specialis*. International observers have expressed concern about rules pertaining to military prosecutions, in particular about the Integral System's narrower definition of command responsibility than that provided for in Article 28 of the ICC Rome Statute.<sup>1391</sup> Some argue that under the Colombian construction of command responsibility it will be difficult, if not impossible, to convict commanders based in Bogotá for crimes committed by their subordinates on the ground in remote regions of the country.<sup>1392</sup>

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## **The Integral System's Other Transitional Justice Provisions**

### **Truth Commission**

The Truth Commission aims to contribute to the narrative of the conflict, including with a recognition of the victims and the responsibility of those who contributed to the conflict. It will be an extrajudicial body with a six-month preparation period and a three-year mandate. It will be tasked with holding public hearings throughout the country, where those impacted by the conflict can be heard, including those who participated or contributed to the conflict. The Truth Commission will create a final report and undertake outreach programs to distribute it. It will also create an oversight body to ensure its recommendations are implemented.

### **Unit for the Search for Disappeared Persons**

This is a high-level and independent extrajudicial unit charged with establishing the truth about what happened to persons disappeared during the conflict. It will present its findings to other units, including the Truth Commission and Tribunal for Peace, if requested. However, the information produced by this unit cannot be transferred to judicial authorities for the purpose of assigning responsibility or as evidence in trials.

## Peacebuilding and Reconciliation Measures

All parties to the conflict will participate in formal public acts that recognize their responsibility and apologize for crimes committed during the conflict. The FARC will also undertake infrastructure construction projects and programs including removing land mines, searching for missing persons, coca crop substitution programs, and reforestation programs. The Colombian government will also undertake rural development programs, collective reparation programs, measures for psychosocial rehabilitation, processes for the return of displaced persons, and the restitution of land and programs to help facilitate political participation for victims.

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## Location

The Higher Tribunals of Bogotá, Barranquilla, Bucaramanga, and Medellín have Justice and Peace courtrooms to implement the JPL legal framework. The military tribunal is located in Bogotá. As of October 2017, it was not yet clear where the SJP courtrooms would be located.

## Structure and Composition

Prosecutions are brought by a specialized Justice and Peace Unit within the Prosecutor General's Office, and another unit at the Attorney General's Office. The Justice and Peace Unit of the Attorney General's Office is responsible for investigating and charging demobilized paramilitaries. In 2012, the attorney general created a special unit for analysis and context (*Unidad de Análisis y Contexto*),<sup>1393</sup> whose primary purpose was to help build cases involving systemic and organized crime, but which has also been relevant to establishing the contextual elements of war crimes and crimes against humanity.<sup>1394</sup> The Justice and Peace section of the Inspector General's Office is tasked with representing society and ensuring the respect of fundamental constitutional rights. In addition, the National Ombudsman's Office's free legal aid section provides demobilized paramilitaries with public defenders and legal representation for victims. The sub-committee for the protection of victims and witnesses was charged with witness protection and support issues. This was eventually superseded by the creation of the National Protection Unit.<sup>1395</sup>

To help implement victims' rights, the JPL created the National Commission for Reparation and Reconciliation (CNRR). It was composed of government representatives, oversight bodies, and civil society organizations. Created in 2005,

it was tasked with designing and implementing a victims' reparation model. Under this mandate, it held workshops for victims on their rights and JPL procedures, published reports, and designed an outreach strategy. The CNRR closed in 2011 after passage of the Victims Law.

Related to the CNRR, the Historical Memory Group (HMG) was created in 2005 to develop a narrative of the Colombian conflict. Composed primarily of academics from Colombian universities, the HMG wrote several reports on how the conflict was experienced in various parts of the country. After the Victims Law was passed in 2011, the HMG's mandate was passed on to the National Historical Memory Center.

### ***Special Jurisdiction for Peace***

The SJP, adopted in 2017, will be composed of five judicial bodies and an Executive Secretariat:

1. The Chamber for the Recognition of Truth and Responsibility and Determination of Facts. This chamber will be responsible for receiving all information and confessions. It will decide whether the case is within the jurisdiction of the SJP, identify the most serious and representative cases, and present its findings to the other units.
2. The Chamber for Amnesty and Pardon. This unit manages the amnesty provisions of the Integral System law.
3. The Chamber for the Definition of Legal Situations. This chamber defines the legal status of those who are not subject to an amnesty or pardon or other SJP special processes. This chamber can decide to terminate proceedings or waive judicial action against these persons.
4. The Investigation and Indictment Unit. This unit investigates and charges those individuals who do not confess. It also decides on victim and witness protection measures. It will have a technical forensic research team and special investigation team for cases involving sexual violence.
5. The Tribunal for Peace, which will be composed of five sections:
  - (i) First-instance section for cases involving confessions;
  - (ii) First-instance section in the cases without confessions;
  - (iii) Appeal section;
  - (iv) Review section; and

- (v) Stability and efficacy section, which will follow up on cases and sentences upon the conclusion of Tribunal for Peace proceedings.

The Executive Secretariat will be in charge of the administration and management of the SJP under the guidance of the Presidency of the SJP.

The SJP will be staffed by primarily Colombian magistrates who are chosen through a comprehensive and public selection process.<sup>1396</sup>

## Prosecutions

According to the Colombian government, by 2015, some 4,410 paramilitaries had applied for benefits under the JPL.<sup>1397</sup> The JPL process resulted in 47 sentences condemning 195 accused, about eight percent of the paramilitaries who attempted to participate in the JPL process. The sentences deal with 5,401 criminal acts and 26,788 recognized victims, representing only 6.65 percent of the 82,114 crimes attributed to the paramilitaries and 12.7% of the 211,013 associated victims.<sup>1398</sup> Moreover, nearly all of the compensation ordered for victims was paid for from the national budget as opposed to the assets of the accused—a breach of the conditions of participating in the JPL process.

Overall, the special process for prosecutions under the JPL has yielded few convictions for human rights violators and war criminals, including those falling within the jurisdiction of the ICC. Between 2008 and 2009, 29 high-level paramilitary leaders were extradited to the United States on drug-related charges.<sup>1399</sup> This extradition came just after they had started to reveal close links between the paramilitaries and state agents, including elected officials.<sup>1400</sup> In 2014, some 400 former paramilitary members were released from detention without having gone through the JPL process because they had already been detained for longer than the maximum eight-year sentence.<sup>1401</sup> Indeed, the process suffered from a critical backlog of cases, which prosecutors tried to alleviate with collective confession hearings.<sup>1402</sup>

During confessions of some paramilitary leaders participating in the JPL process, details emerged of crimes committed by state agents. In what became known as the “parapolitics” scandal, congressional representatives, public officials, military, police, and private entities were implicated in colluding with paramilitary groups to commit grave crimes. The Supreme Court, which is empowered to investigate public officials, opened over 500 investigations.<sup>1403</sup> Courts convicted some public officials

on charges of committing violent crimes such as murder, enforced disappearances, kidnapping, and torture, and others on conspiracy charges related to their links with paramilitaries.<sup>1404</sup> As of early 2017, more than 60 members of congress had been convicted.<sup>1405</sup>

Other trials have proceeded against members of the military, in particular in relation to the “false positives” scandal. Between 2002 and 2008, members of the military killed civilians and counted them as combat deaths in exchange for rewards such as vacation time, medals, and promotions.<sup>1406</sup> These extrajudicial killings left over 4,000 victims.<sup>1407</sup> As of 2016, prosecutors had investigated over 2,000 cases of extrajudicial killings allegedly committed by military personnel and had convicted 961 members of the armed forces, most of them low-ranking soldiers.<sup>1408</sup>

However, human rights groups argue that there is significant evidence that senior military personnel were responsible for many killings.<sup>1409</sup> The ICC has reportedly warned the Colombian government that it must open cases against 29 military commanders—23 generals and six corporals—for the extrajudicial killing of over 1,200 civilians. If they are not tried by national authorities, the ICC could open its own investigations into the military leaders.<sup>1410</sup>

## Legacy

In practice, the JPL has meant that many former combatants have received low sentences (of between five and eight years) in low-security prisons, with little emphasis on full prosecution even for those who fail to confess fully and accurately, as required by the law.<sup>1411</sup>

Moreover, victim participation was generally low. As of November 2016, some 537,861 victims had submitted petitions under the JPL. However, participation in the judicial confession procedures was low, with only 94,461 victims able to participate, due in part to the difficulty of accessing the trials.<sup>1412</sup> Hundreds of thousands of victims who lived in remote areas of the country—where most victims are located—lacked the resources to travel to attend the trials and therefore could not participate in the *versiones libres* (the confession hearings under the JPL) and question the confessor.<sup>1413</sup>

According to a study done by the Contraloría of Colombia, the poor outcomes are the result of the limited capacity of the judicial system, which had no time to adequately prepare and adjust its investigation, trial, and judicial procedures for a

transitional justice model, especially considering the extremely high numbers of victims and criminal acts falling under the JPL process.<sup>1414</sup>

## **Financing**

In order to help reduce congestion and facilitate judicial processes related to the new transitional justice legislation, in 2017 the government transferred 5 billion pesos (approx. US\$1.7 million) to the judiciary budget, transferred some 110 civil servants to judicial offices, and announced additional training for judges and prosecutors.<sup>1415</sup>

Key donors have provided justice-sector assistance. Beginning in 2009, the Inter-American Development Bank funded three large projects to reorganize the Prosecutor's Office, modernize the Inspector General's Office, and improve court management at the high courts.<sup>1416</sup> The World Bank has also supported court administration projects, and the European Union runs a program for strengthening the rule of law, victim protection frameworks, and investigative capacity.<sup>1417</sup>

According to a study done by the Contraloría of Colombia, as of 2015 the JPL had cost \$11.1 billion pesos (approx. US\$2.9 million). The reparations fund for victims was also partially financed by recovering illegal assets and from donations from individuals. It is estimated that the SJP could cost as much as 2 billion pesos (approx. US\$667,000).<sup>1418</sup>

President Santos has said that he expects the international community to donate \$3.3 billion pesos to the peace process.<sup>1419</sup> The High Counselor for Post-Conflict, Human Rights and Security is hoping to create a fund for peace in Colombia to receive international donations to support the peace process. The largest donors to Colombia are Sweden, Switzerland, Spain, Canada, Germany, the EU, the United Kingdom, the World Bank, and the United States.<sup>1420</sup>

## **Oversight and Accountability**

The magistrates of the JPL courtrooms are elected by the Plenary Chamber of the Supreme Court of Justice. Lists of candidates are sent by the Administrative Chamber of the Superior Council of the Judiciary; a Constitutional Court decision from 2013 required that candidates be subject to a public and objective selection process based on their merits.<sup>1421</sup> The selection of magistrates for the SJP was

conducted through a public process wherein all sectors of society, including victims' organizations, were able to nominate candidates. A five-person selection committee evaluated these nominations and elected 51 magistrates. As with all judicial mechanisms in Colombia, the legal framework that shapes the JPL, and the SJP in Colombia is subject to oversight by the Constitutional Court.

There is also significant informal oversight on the work of the JPL tribunals and the SJP. Colombian civil society is very active in monitoring proceedings and developments, as are many international organizations. There is additional oversight from the UN and the IACHR. In addition, the ICC has actively overseen developments in Colombia's transitional justice legislation, including by highlighting crimes or prosecutions that remain unaddressed by the domestic judiciary, naming certain officials it considers should be investigated, and providing guidance on interpreting provisions of the Rome Statute.<sup>1422</sup>

# **GUATEMALA: INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA**

## **Conflict Background and Political Context**

Guatemala is an elite-dominated state that as of 2017 was more than 20 years into a process of political change. The economic and political elite's disproportionate control of economic resources and a regime of state discrimination against the indigenous population that makes up a majority of citizens were underlying causes of Guatemala's 36-year armed conflict (1960–1996).<sup>1423</sup> The armed forces backed the elites and reinforced the system by repressing dissident political forces. In a Cold War environment that instinctively labeled movements for political change as “communist” and “revolutionary,” the United States threw its support behind this systemic repression.<sup>1424</sup>

After a U.S.-supported coup ousted a democratically elected leftist government in 1954, a succession of right-wing military governments ruled Guatemala for more than 40 years. Civil war began following a failed leftist uprising in 1960, with military regimes seeking to crush armed leftist groups emerging from impoverished indigenous and peasant communities.<sup>1425</sup> By 1981, the conflict had escalated to an alarming degree, as the military systematically targeted entire indigenous communities, causing vast loss of life.<sup>1426</sup> The rule of General Efraín Ríos Montt from March 1982 to August 1983 marked the bloodiest period in Guatemala's history, resulting in thousands of civilian deaths, rampant sexual violence, and enforced disappearances. Overall, estimates indicate more than 200,000 civilians died during the conflict.<sup>1427</sup>

Following the Cold War's end, UN-led peace negotiations finally resulted in a peace accord in 1996. However, neither the end of armed conflict nor the efforts of the UN and donor organizations resulted in immediate amelioration of state weakness. Institution building proved difficult, and organized crime groups—many emerging from right-wing paramilitary organizations—expanded their already-extensive influence.

At the urging of Guatemalan human rights organizations, the UN responded to the renewed security crisis in 2003, when it proposed the creation of the International Commission against Illegal Groups and Clandestine Security Organizations (CICIACS). The proposal collapsed in 2004 as a result of widespread opposition in Guatemala and unfavorable constitutional review. However, CICIACS was reborn at the end of 2006 as the International Commission against Impunity in Guatemala (CICIG) with a more constitutionally and politically palatable model.

Guatemala remains a state of concern for its high-level corruption and violence, drug-trafficking, and street gangs.<sup>1428</sup> However, following its establishment, CICIG successfully conducted investigations that helped to establish its credibility, while also focusing on facilitating systemic reforms and strengthening the capacity of the Attorney General's Office.<sup>1429</sup> An empowered Attorney General's Office increasingly collaborated with CICIG on combating organized crime. Then in 2012, the Attorney General's Office brought genocide charges against Ríos Montt and his then-military chief of intelligence for atrocities committed in the early 1980s.<sup>1430</sup> This paved the way for additional grave crimes trials.

In 2015, under the leadership of Commissioner Iván Velásquez, CICIG's investigation into a multimillion-dollar customs fraud resulted in the arrests of some 200 people and brought down the government of then-President Otto Pérez Molina. Other high-profile cases have started to erode Guatemala's system of impunity and organized crime. Ongoing investigations have also implicated the brother and son of the current president, Jimmy Morales, who have been arrested and are awaiting trial on corruption charges.

CICIG's renewed vigor did not come without consequences.<sup>1431</sup> President Morales began a campaign to oust Velásquez and debilitate CICIG after Velásquez and Attorney General Thelma Aldana announced an investigation into illegal campaign contributions related to an opposition party. In August 2017, Morales complained to the UN that Velásquez was overstepping his mandate and should be investigating gang-related crimes instead of corruption. Morales then ordered Velásquez's expulsion from Guatemala. Citizens rallied in support of Velásquez, and the Constitutional Court ruled in favor of Velásquez, ordering state agencies to desist from attempts to remove him from the country.

At the same time, Velásquez and Aldana began efforts to lift Morales's presidential immunity in order to proceed with an investigation against him for illicit campaign contributions during the 2015 presidential campaign. Congress voted on two separate occasions against lifting his immunity. In September 2017, congress passed legislation altering the criminal code so that accountants, rather than general secretaries of political parties, are liable for illicit campaign contributions. The new legislation also commuted prison sentences for 400 different crimes, including extortion. Critics claimed that this was an attempt to legalize impunity in Guatemala. Massive citizen protests led congress to revoke the legislation the following day.

## **Existing Justice-Sector Capacity**

Alarming levels of corruption, violence, and clientelism dominated Guatemala's post-conflict justice system. Following the 1996 peace accords, the UN attempted to help rebuild and restructure the state. However, even the large donor endeavors proved futile: organized crime groups continued to expand their influence.<sup>1432</sup>

The commencement of CICIG's work brought a degree of hope for the country. After several years of struggling against entrenched impunity structures and corruption, CICIG has spurred significant progress within the justice sector. This has been critical to Guatemala's ability to conduct credible proceedings for grave crimes and grand corruption cases.<sup>1433</sup> First, CICIG helped to ensure a more credible process for the election of magistrates and the attorney general, which strengthened the independence of the justice system and the rule of law. Second, CICIG has strengthened the Attorney General's Office's independence and technical capacity to conduct complex investigations. Third, CICIG proposed the creation of a centralized system of high-risk courts to adjudicate especially sensitive cases related to organized crime and corruption in order to provide greater safety for magistrates and their families, as well as witnesses and the lawyers litigating these cases. All of these efforts have empowered reformers within Guatemala's justice institutions and given them the tools to tackle the illicit parallel power structures that have so long dominated the country.

## **Existing Civil Society Capacity**

Civil society actors have been actively engaged in the developments taking place in Guatemala. The initiation of peacebuilding activities commenced with NGOs publicizing military atrocities at the national and international level. Organizations such as the Myrna Mack Foundation, established shortly after the conflict, aimed to target impunity and lobby for social change; the conservative business lobby, called the Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF), has at times joined the effort to support CICIG in tackling entrenched corruption.<sup>1434</sup>

Civil society advocated for the creation of an investigatory commission, which ultimately resulted in CICIG's establishment. Additionally, civil society played a critical role in bringing Ríos Montt and his military intelligence director Mauricio Rodríguez Sánchez to trial. The Center for Legal Action on Human Rights in

Guatemala (CALDH), together with the Association for Justice and Reconciliation (AJR), a victims' group, were the first to press charges of genocide in the Guatemalan courts. These and many other legal and victim organizations have played key roles in advocacy and victim representation in relation to the grave crimes cases. Massive youth-led citizen protests helped bring down the Pérez Molina government in 2015 and push congress to revoke controversial legislation concerning campaign finance in 2017.

## Creation

In the years following the peace accords, Guatemala saw the number of reported threats and attacks against human rights defenders mushroom to 374 (including 49 killings); a period of intense political turmoil following the release of the truth commission reports; the failure of the 1999 peace accords referendum; and the election of a populist, anti-elite President Alfonso Portillo.<sup>1435</sup> In response, NGOs began to discuss the possibility of setting up an ad hoc investigatory commission, capable of investigating the structures menacing human rights defenders and threatening to capture the state. The NGOs persuaded the United States and other international embassies to support the initiative, which the Human Rights Ombudsman announced in January 2003. International pressure, corruption scandals, criminal violence, and an economic crisis eventually lead the Portillo government to support the proposal.<sup>1436</sup>

After evaluating the proposal, the UN concluded that it focused on a set of war-related dynamics (intelligence structures harassing NGOs) that had been superseded by a greater hazard to the state (political-criminal networks tied to transnational organized crime) and was too weak to effectively address the issues. Thus, the UN proposed the creation of an autonomous UN-run prosecutorial agency with the capacity to carry out investigations and prosecute cases in Guatemalan courts independent from the Guatemalan attorney general.<sup>1437</sup> The negotiations with the Portillo government ended in January 2004, and the parties signed an agreement to create the International Commission against Illegal Groups and Clandestine Security Organizations (CICIACS).<sup>1438</sup>

However, this process coincided with a period of political turmoil as well as both presidential and congressional elections. The newly elected president, Oscar Berger, and a majority of the conservative congressional parties were skeptical about CICIACS. Two congressional committees, Human Rights and Interior,

recommended its rejection on the basis that it unconstitutionally usurped the attorney general's authority in prosecuting crimes and undermined Guatemala's sovereignty. Then, the Constitutional Court—still controlled by appointees elected under the Portillo government—concluded in an advisory opinion that the agreement did not constitute a human rights treaty. Therefore, the court concluded, it would be unconstitutional to grant CICIACS independent investigative and prosecutorial powers and privileges or grant immunities to Guatemalan citizens.<sup>1439</sup>

In the end, ratification of the CICIACS failed for two substantial reasons.<sup>1440</sup> First, the agreement enjoyed only a narrow national support base of human rights NGOs, the Human Rights Ombudsman, a handful of deputies and administration ministers, and a few media outlets. Second, Guatemalan conservatives portrayed the involvement of the U.S. embassy and other international actors as another attempt to maintain international control over Guatemala, and this successfully entrenched opposition to CICIACS among Guatemalan elites.

In late 2005, the Berger administration initiated renewed talks about international assistance. Observing the scale and severity of political corruption and criminal violence, the government saw a definite need for international assistance.<sup>1441</sup> In December 2005, Vice President Eduardo Stein turned to the UN with a proposal to create a new model of CICIACS, taking account of the Constitutional Court's objections to that model. Discussions with the UN focused on four primary issues: (1) the ability of a new CICIACS to retain a prosecutorial role, even if modest or in support of the attorney general; (2) the inclusion of organized crime within the CICIACS mandate; (3) providing Guatemalan staff with privileges and immunities protections; and (4) the status of the commission as an independent or UN body. The parties agreed to the following: (1) allow a prosecutorial role and preserve a human rights-focused mandate; (2) include a government guarantee to protect Guatemalan staff but without privileges and immunities; and (3) create the commission as a UN body (although it ended up as a UN-backed independent entity).<sup>1442</sup> The parties called it the International Commission against Impunity in Guatemala (CICIG) and provided it with a budget fully financed by donors with a small, in-kind contribution from Guatemala.

On December 12, 2006, the United Nations and the government of Guatemala signed the Agreement to Establish the International Commission against Impunity in Guatemala.<sup>1443</sup> After the Constitutional Court issued a favorable advisory opinion in May 2007, congress ratified the agreement on August 1, 2007. As a result, CICIG was established as an independent, international body designed to support

the Attorney General's Office, the National Civil Police (PNC), and other state institutions in the investigation of crimes committed by members of illegal security forces and clandestine security structures.<sup>1444</sup>

The initial mandate of the commission entailed two years of work; however, the Secretary-General extended it four times at Guatemala's request. First, in March 2009, Guatemala's minister of foreign affairs requested, through a personal letter addressed to the Secretary-General, the extension of CICIG's mandate for an additional two years; the extension was confirmed on April 15, 2009. The second extension was granted by the Secretary-General on January 13, 2011, the third extension was granted in April 2015, and the fourth in February 2017. As of late 2017, CICIG's mandate was set to expire in September 2019.

## **Legal Framework and Mandate**

CICIG is a hybrid criminal justice mechanism created through a bilateral agreement between the UN Secretary-General and the government of Guatemala. The UN Secretary-General appoints the CICIG commissioner. However, the commission itself is not a UN body. Its general mandate entails promoting individual prosecutions and institutional reforms in Guatemala.<sup>1445</sup> The commission differs from UN hybrid tribunals through its mandate to dismantle organized crime and its ability to conduct criminal proceedings in national courts.<sup>1446</sup>

The objectives set out in the agreement include three categories of jurisdiction. First, CICIG should investigate the existence of illicit security forces and clandestine security organizations that commit crimes affecting the fundamental human rights of the citizens of Guatemala. It should identify the structures of these illegal groups as well as their activities, operating modalities, and sources of financing.

Second, CICIG should help the state to disband clandestine security structures and illegal security groups, and promote the investigation, criminal prosecution, and punishment of the crimes committed by the members of such groups.

Third, CICIG should make recommendations to the State of Guatemala regarding public policies to be adopted—including necessary judicial and institutional reforms—to eradicate and prevent the re-emergence of clandestine security structures and illegal security forces.

In order to implement these duties, CICIG can investigate any individual, official, or private entity. It is authorized to promote and carry out criminal investigations by filing criminal charges with the relevant authorities.

## **Location**

The CICIG office is located in Guatemala City; however, individuals willing to address the commission are expected to submit their application to the *Oficina de Atención Permanente del Ministerio Público* (Assistance Bureau of the Attorney General's Office).

## **Structure and Composition**

The first year of CICIG's work was completely dedicated to start-up tasks and challenges, namely, identifying and organizing the mission's organizational and management structures. The effort to install administrative systems, recruit staff, and obtain specialized equipment and supplies hit an unanticipated obstacle. Because CICIG had been formally established as a non-UN organ, the UN concluded that the Secretariat had no legal basis to provide security, administration, finance, or security resources for the start-up phase.<sup>1447</sup> Thus, CICIG was forced to build its administrative systems largely from scratch. However, by mid-2008 a functioning core of professional staff was in place, enabling the commission to commence its work.

CIGIG is composed of a commissioner, who is appointed by the UN Secretary-General and is the legal head and representative of the organization. The commissioner is also responsible for recruiting international and national personnel and submitting periodic reports of CICIG's activities to the Secretary-General.<sup>1448</sup>

The commission is structured around six functional units: Political Affairs; the Department of Investigations and Litigation, including police, legal, and financial investigation sections; the CICIG Department of Information and Analysis; the Department of Administration; the Department of Security and Safety; and the Press Office. The commission's secretary is in charge of everyday administrative and executive functions.<sup>1449</sup>

As of 2013, the commission was comprised of 162 national and international officials, 72 of whom performed substantive tasks (45%), 62 worked in security (38%), and 28 performed administrative duties (17%).<sup>1450</sup> In compliance with the commission's mandate, CICIG signed a bilateral cooperation agreement with the Attorney General's Office that created the Special Prosecutor's Office (originally known as the Special Prosecution Unit Assigned to CICIG, or UEFAC; now called the Special Anti-Impunity Prosecutor's Bureau, or FECI).<sup>1451</sup> FECI investigates high-impact cases selected by CICIG and the Attorney General's Office. Cases falling within CICIG's mandate are transferred to FECI by the attorney general, based on whether they fulfill the requirements in the CICIG mandate and the agreement of the attorney general. The office has four main functions: case investigation, coordination of prosecutors and auxiliary prosecutors' work and activity, institutional strengthening, and training.

### ***Case Investigation***

The initial case selection for transfer to FECI is conducted through a mutual agreement by the attorney general and CICIG's commissioner. FECI's main function is to support investigation on those preselected cases.<sup>1452</sup>

### ***Coordination of Prosecutors and Auxiliary Prosecutors***

FECI Coordinator's Office provides legal and logistical support to investigations carried out by FECI's prosecution offices. The Coordinator's Office is involved in monitoring personnel from the Attorney General's Office, the Criminal Investigation Office, and the National Civilian Police who serve within FECI.<sup>1453</sup>

### ***Institutional Strengthening***

The Coordinator's Office also cooperates with the Attorney General's Office in the development of special investigative methods to enable it to more effectively combat crimes, especially those committed by organized criminal organizations. This includes supporting the definition, implementation, training, launching, and assessment of the wiretap system and other special investigative methods.

### ***Training***

In this area, the FECI Coordinator's Office sets up trainings to strengthen criminal investigation and train staff in specific investigative tools, as well as establish a general normative and legal framework. FECI also participated in broader trainings provided for the Attorney General's Office, the National Civilian Police, judges,

and magistrates on issues ranging from wiretapping to the right to privacy and due process in criminal investigations.<sup>1454</sup>

## Prosecutions

The Agreement between the UN and the government of Guatemala leaves it up to the commission to determine the criteria for selection of cases with due regard to CICIG's general mandate. Selection criteria used early in CICIG's mandate included: the likelihood of links with illegal groups and clandestine security organizations; the short and long-term political impact of the case on the fight against impunity; and the probability of success in advancing the case in the criminal process.<sup>1455</sup> Initially, CICIG faced criticism for lacking a coherent case-selection strategy.<sup>1456</sup>

The first investigations included events only tangentially related to the mandate—a shootout between two narco-trafficking groups in Zacapa, a band of police extortionists (Mariachi Locos), the death of the child of a human rights defender, the drugs-related killing of 15 riders on a bus from Nicaragua, an epidemic of femicides—and much more relevant cases pointing to parallel security structures inside the PNC and Interior Ministry (Parlacen, Victor Rivera) and obstruction of justice in the Public Ministry (Matus).<sup>1457</sup>

From 2009, CICIG took on cases that were more prominent. That year, it solved the bizarre case involving the death of the high-profile lawyer Rodrigo Rosenberg Marzano, who left behind a YouTube video implicating the sitting president in his purported murder.<sup>1458</sup> CICIG established that Rosenberg had arranged for his own killing in order to bring down the government, and thus defused a major political crisis. Commissioner Carlos Castresana's public, detailed description of the forensic techniques used to solve the crime silenced most doubters, and CICIG's public profile grew.<sup>1459</sup>

On July 15, 2010, nine individuals were convicted of murder, illicit association, and possession of firearms. As a result of CICIG's work with the Attorney General's Office, two organized criminal networks were dismantled in Escuintla and Guatemala departments, composed of active and retired members of the PNC and ex-soldiers.<sup>1460</sup>

CICIG investigated former Guatemalan President Alfonso Portillo Cabrera for alleged corruption. Although Guatemalan trial and appeals courts acquitted Portillo of the charges,<sup>1461</sup> he was extradited to the United States, where he pled guilty to related charges and was sentenced to nearly six years in prison.<sup>1462</sup>

A CICIG investigation of 2006 killings at a prison resulted in allegations against former senior government officials who allegedly ran a parallel security structure within the Interior Ministry that carried out extrajudicial killings, “social cleansing” operations, money laundering, drug trafficking, extortion, and drug thefts.<sup>1463</sup> The case ultimately resulted in several acquittals, but also seven convictions in Guatemala, as well as the conviction and life sentence of former Guatemalan national police chief Erwin Sperisen, following his trial in Switzerland.<sup>1464</sup>

Despite these and other significant successes, some observers noted a lack of strategy in CICIG’s early cases.<sup>1465</sup> This changed significantly in 2015, when CICIG and the Attorney General’s Office announced bombshell accusations against officials including Guatemala’s sitting vice president, Roxana Baldetti, and the case grew to directly implicate the sitting president, Otto Pérez Molina. Known as the *La Linea* (“The Line”) case, the investigation revealed an enormous alleged corruption scheme in the Customs Service involving the tax administration and National Civil Police. CICIG, with the attorney general’s support, discovered a network of low-level “fixers” trading drastically reduced customs duties to importers in exchange for “commissions.” The CICIG investigation revealed a large, hierarchical structure reaching the vice president’s office. In August 2015, the public prosecutor announced that evidence showed that Pérez Molina and Baldetti were “without a doubt” the leaders of the scheme. When CICIG went public with the results of its investigation in early 2015, protests erupted calling for the resignation of the vice president and then the president. In May 2015, Baldetti resigned. Pérez Molina resigned on September 2, 2015, and was arrested, arraigned, and imprisoned the following day. Following extensive pretrial proceedings that included the presentation of evidence, in October 2017 a judge sent the case to trial.<sup>1466</sup>

The *La Linea* case was a watershed moment for CICIG and the Attorney General’s Office. The commission later brought allegations implicating many other senior administration officials, including the new president’s son-in-law, and ex-vice minister of energy, the former head of the tax administration, members of the PNC, and members of congress.<sup>1467</sup>

### ***CICIG and Domestic Grave Crimes Trials***

Beyond cases directly related to its mandate, CICIG has had a profound impact on Guatemala’s willingness and ability to pursue grave crimes cases related to the 36-year armed conflict. It has played a role in ensuring the appointment of conscientious attorneys general, emboldened and built the capacity of the Attorney General’s Office, and improved judicial independence through the creation of

“High Risk Courts” and the investigation of judicial corruption.<sup>1468</sup> (See further discussion under *Legacy*, below.)

### ***The Rios Montt Trial***

In January 2012, former head of the state Jose Efraín Rios Montt and his then chief of military intelligence Jose Mauricio Rodríguez Sánchez were charged with genocide and crimes against humanity allegedly committed during Rios Montt’s presidency during 1982 and 1983.<sup>1469</sup> The charges arose from systematic massacres of the country’s indigenous population carried out by Guatemalan troops and paramilitary forces during this phase of the country’s long and brutal civil war, as well as the related mass forced displacement. The first genocide charge against Rios Montt and Rodríguez Sánchez came in relation to 15 massacres against the Ixil population living in the Quiche region during his rule between March 1982 and August 1983. These charges allege that Rios Montt was the intellectual author of 1,771 deaths, the forced displacement of 29,000 people, sexual violence against at least eight women, and torture of at least 14 people. They allege that Rodríguez Sánchez implemented military plans responsible for the killing of civilians in the Ixil areas of Nebaj, Chajul, and San Juan Cotzal, in Quiche. In a second genocide charge, introduced in May 2012, Rios Montt was charged in relation to the deaths of 201 people in Dos Erres (Petén) in December 1982.<sup>1470</sup>

In May 2013, the judges in High Risk Tribunal A convicted Rios Montt and sentenced him to 80 years in prison for genocide and crimes against humanity. However, Rodríguez Sánchez was acquitted of both charges. The court’s judgment represented the first-ever domestic conviction of a former head of state for genocide. However, 10 days later the Constitutional Court annulled the verdict on procedural grounds in a confusing and contentious decision.<sup>1471</sup>

After several attempts to re-launch the case, a re-trial of Rios Montt and Rodríguez Sánchez for the Ixil genocide began in October 2017.<sup>1472</sup> Because Rios Montt suffers from dementia, his trial was being heard behind closed doors, and he would not be sentenced if found guilty. Rodríguez Sánchez was being tried publicly. He was also facing genocide and crimes against humanity charges in the Dos Erres case.

### ***Sepur Zarco Case***

In February 2016, High Risk Tribunal A found Lieutenant Colonel Esteelmer Reyes Girón, former commander of Sepur Zarco military base, and former military commissioner Heriberto Valdez Asig, guilty of crimes against humanity, sentencing

them to 120 and 240 years, respectively.<sup>1473</sup> The two were accused of crimes including sexual violence and sexual and domestic slavery against 14 women. The court also found Girón guilty of the murder of three women, and Asig guilty for the enforced disappearance of seven men who were husbands of the victims in this case. The High Risk Appellate Court upheld the judgment in July 2017. This was the first national case involving sexual violence related to Guatemala's 36-year civil war.

### ***Spanish Embassy Fire***

In January 2015, a High Risk Tribunal sentenced Pedro Garcia Arredondo, former head of a special investigations unit of the PNC, to 40 years in prison for murder and crimes against humanity committed in relation to the siege and fire at the Spanish Embassy in 1980.<sup>1474</sup> He was also convicted and sentenced to 50 years in prison for the killing of two students at the funeral for victims of the siege. Dozens of indigenous and student activists and diplomats were killed during the siege and fire at the Spanish Embassy, and this was the first time anyone had been tried for those crimes. The court found that Arredondo played a leadership role in the siege, noting that he let the protesters and hostages burn to death while preventing emergency intervention.

### ***CREOMPAZ***

Beginning in 2012, investigators from the Attorney General's Office and the Forensic Anthropology Foundation of Guatemala exhumed 565 bodies from 85 graves located within what is now called the CREOMPAZ military base.<sup>1475</sup> The base was used during the civil war as a center of military coordination and intelligence. Fourteen military officers were arrested on January 6, 2016, in relation to the case. In June 2016, a judge ruled that eight retired officers, including former army chief Benedicto Lucas Garcia, must face public trial for their role in the forced disappearances. Another accused, who has mental health issues, should face trial under special provisions, the judge found. The judge dropped the charges against two defendants. However, since then, the trial stalled. As of late 2017, the proceedings remain tied up in a series of appeals and other legal motions.

### ***Molina Theissen***

In 2017, five retired senior military officials went on trial charged with the enforced disappearance of 14-year-old Marco Antonio Molina Theissen and the illegal detention, torture, and rape of his sister Emma.<sup>1476</sup> Two of the accused are heavily decorated generals previously believed to be untouchable by the courts: Benedicto Lucas Garcia, former army chief of staff, and Manuel Callejas y Callejas, former head of military

intelligence and the presumed leader of the Cofradía organized crime syndicate. The other three accused include Francisco Luis Gordillo Martínez, commander of Military Zone No. 17 where Emma was detained in Quetzaltenango in 1981; Edilberto Letona Linares, former second commander of Military Zone No. 17; and Hugo Ramiro Zaldaña Rojas, former “S-2” intelligence official of the chief of staff. In October 2017, pretrial judges in High Risk Court C scheduled the trial to begin on March 1, 2018.

## Legacy

### *Impact on Political Change*

CICIG has had leeway to act as an independent protagonist within Guatemala’s political/legal framework, making it a new and experimental form of international justice mechanism.<sup>1477</sup> CICIG’s early difficulties were not a surprise; nor was it a surprise that its first commissioner, Carlos Castresana, resigned in frustration in 2010. For most of its existence, CICIG faced significant opposition from parts of Guatemalan society, including members of the justice sector, congress, economic elites, and many whose interests were threatened by the commission’s work. The commission struggled to make an impact, and occasionally strayed from its primary mission. However, even in its early years, CICIG saw some important victories, including the resolution of the Rosenberg case, which proved that President Álvaro Colom had not committed murder; its participation in the conviction of former President Alfonso Portillo for corruption; and its help in revealing an illegal security operation carrying out targeted killings run by President Óscar Berger’s interior minister, Carlos Vielmann. CICIG’s second commissioner, Francisco Dall’Anese, likewise faced resistance from the Guatemalan government—especially around the Ríos Montt trial—and he too resigned in frustration in 2013.

When Iván Velázquez took over as commissioner, it appeared that CICIG would close down soon and with few significant cases to its name. Under the leadership of Velázquez, however, CICIG returned to its core mission of targeting the relationship between political corruption and criminal activity in Guatemala’s state institutions. Under Velázquez, CICIG scored a number of important victories, including revealing the massive *La Linea* corruption scheme that helped bring down President Pérez Molina and Vice President Baldetti. The huge protests that forced out Pérez Molina and Baldetti upended the country’s political order, uniting the left with elements of the right for the first time in the country’s history and motivating a new generation of social activists. The protests may also have offered a glimpse of a future Guatemala that is less corrupt and truer to the rule of law.

CICIG ultimately has had a significant impact on Guatemalan government, justice, and society. It offers an important model for other countries struggling with endemic corruption, organized crime, and compromised state institutions. It has played a fundamental role in shaping and strengthening the country's justice system, empowering judicial operators, and building capacity in the Attorney General's Office. It has expanded prosecutorial capacity in corruption and organized crime cases, as well as grave crimes cases stemming from the civil war. This can be seen in the Rios Montt, Sepur Zarco, CREOMPAZ, Spanish Embassy, and Molina Theissen cases.

### ***Impact on Partners***

The early encounters between the commission and the Attorney General's Office were initially fraught.<sup>1478</sup> CICIG staff viewed national prosecutors as plodding through cases within a clientelistic and hierarchical culture, and responding to the whims of attorneys general, including sometimes closing cases for political reasons.<sup>1479</sup> In turn, Guatemalan prosecution officials claimed that the quality of CICIG's lawyers varied greatly, complained that internationals did not trust Guatemalan counterparts with confidential information in high-profile cases, and were unwilling (or unable to see the need) to learn the subtleties of local legal rules and judicial practices. Many legal setbacks in major cases, they suggested, were due to the failure to manage them properly, in line with Guatemalan practice.<sup>1480</sup>

The two institutions, however, managed to struggle through their differences. Guatemalan prosecutors learned from CICIG, gained access to technology, developed new forensic capabilities, and scored successes in cases in which CICIG was not a party. The nature of the relationship shifted, and the Attorney General's Office began to assert a leading role in selecting and managing CICIG-related cases. CICIG also supported the attorney general's efforts to strengthen institutions, helping to establish a new special unit to investigate human trafficking and violence against women in 2011, and transferring CICIG's Analysis Unit to the Attorney General's Office in 2012.

CICIG has had less success dealing with the Interior Ministry and police. Police officers, from directors to new recruits, had been accused and convicted of stealing drugs, running extortion rackets, moonlighting for organized crime cartels, acting as hired killers, or serving as the implements of "social cleansing." Officers are generally poorly educated, trained, supervised, and equipped.

The judiciary also created much of the trouble regarding CICIG's work: judges rejected crucial evidence without any legal basis or released defendants on

bail in inappropriate circumstances; weak case management was magnified by accomplished dilatory practices; and there were dysfunctional oversight and disciplinary procedures as well as a pervasive culture of informal clientelistic practices.

The commission's ongoing public battle with the judiciary, particularly over senior appointments, succeeded in exposing to public view the influence-peddling machinations hobbling the institution's independence and performance. Its highly visible role supported an unusually broad civil-society, multisector effort to reduce the influence of political and economic interests in judicial selections. The major umbrella organizations, *Convocatoria Ciudadana* and *Guatemala Visible*, have continued to function but have lost momentum in the absence of clear, pending institutional challenges, and have yet to demonstrate an ability to tackle issues surrounding the willingness of the country's elites to subject themselves to broader rule-of-law reforms.

CICIG significantly influenced the judicial sector in three ways. First, CICIG helped establish new election procedures for magistrates and the attorney general. This strengthened the independence of the justice system and facilitated the election of two independent and very competent attorneys general: Claudia Paz y Paz (2010–2014) and Thelma Aldana, who was elected in 2014 and, as of late 2017, still held that post. Both have dedicated themselves to accountability for grave crimes in Guatemala.

Second, CICIG strengthened the Attorney General's Office's independence and capacity for conducting complex investigations and prosecutions as well as building effective victim and witness protection programs. CICIG has built domestic capacity in part through extensive trainings and through joint investigations and criminal prosecutions. In addition, CICIG facilitated the creation of specialized units within the Attorney General's Office, including the Human Rights Violations Unit, the Analysis Unit for complex investigations, a special police force for criminal investigation, and a Police Information Platform, and it also strengthened the Special Investigation Methods Unit. Thanks to this institutional strengthening, the newly professionalized Attorney General's Office is able to take the lead role and conduct more solid investigations into networks of corruption and impunity.

Third, CICIG proposed the creation of a system of High Risk Courts to adjudicate sensitive cases related to organized crime and corruption in order to provide more safety for magistrates, witnesses, and lawyers involved in the cases.<sup>1481</sup> The courts only have competency to hear cases involving specific crimes such as genocide, torture, crimes against humanity, and crimes related to organized crime laws such as money laundering, drug trafficking, and the financing of terrorism.<sup>1482</sup> With more

security, judges can more easily assert their independence. The High Risk Courts are located in Guatemala City and have jurisdiction over the whole country. They have heard complex cases of organized crime, corruption, and serious violations of human rights. The success of this system has helped generate new popular confidence in legal institutions and the rule of law.

## **Financing**

Although CICIG began operations with borrowed funds, intense fundraising efforts in late 2007 and early 2008, assisted by the UN, produced commitments for 90 percent of CICIG's two-year budget by mid-2008.<sup>1483</sup> The initial budget, estimated at US\$10 million per year, quickly grew to US\$20 million by 2009 before financial crisis-induced reductions to US\$15 million near the end of 2011.

CICIG is a financially independent institution that receives funds from voluntary contributions from the international community, with the United Nations Development Programme managing a trust fund. Donations have come from Canada, Denmark, Spain, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Sweden, the United Kingdom, the United States, and the European Union. In-kind support, such as human resources, has come from Argentina, Chile, Colombia, France, Sweden, and Uruguay.<sup>1484</sup> The U.S. Department of State announced in June 2016 that the United States has invested US\$36 million in CICIG since 2008.<sup>1485</sup>

## **Oversight and Accountability**

### **Oversight and Accountability**

According to Article 5 of the agreement concluded between the UN and the government of Guatemala, the commissioner is only required to submit periodic reports to the Secretary-General of the United Nations. The legal status of CICIG as an international organization independent of the UN produced difficult management and oversight problems.<sup>1486</sup> Legally, the UN's only connection to CICIG was the appointment of the commissioner, which has resulted in CICIG's having relatively little interaction with UN headquarters in New York.

CICIG staff were barred from direct communications with the Secretariat. Thus, while the UN had no control over CICIG's activities, and almost no influence on

its work, it would have been held responsible for any scandal or management or operational failures.<sup>1487</sup>

CICIG's legal independence undoubtedly provides strong advantages: it is able to move creatively and quickly in an area distant from UN experience; use funds for intelligence purposes; work efficiently with other governments to share information; arrange for witness protection or procure arrests; and react nimbly and boldly to political developments. However, the Guatemala experience reinforces the need for oversight. The risks of leaving the CICIG's commissioner with unchecked authority over operations present a risk and affect central strategy issues, management of personnel and finances, and the relationships between the entity and state actors and criminal organizations.

## HAITI

### Conflict Background and Political Context

Jean-Claude “Baby Doc” Duvalier ruled Haiti as president from 1971 to 1986, succeeding his father, “Papa Doc” Duvalier, whose regime from 1957 to 1971 was notorious for its brutality. Jean-Claude’s regime was characterized by institutional violence and state-sponsored repression enforced by a network of security forces that answered directly to the president, including the brutal “Tontons Macoutes” (“Bogeymen”), a private armed group, in addition to the official military and police forces. Human rights organizations documented abuses including: disappearances and political killings; torture; and repression of the press and political dissent.<sup>1488</sup> A harsh prison system housed hundreds of political dissidents in long-term detention, often without trial, in which many died.<sup>1489</sup> Duvalier amassed a fortune and maintained a lavish lifestyle despite presiding over one of the poorest countries in the world.

Jean-Claude Duvalier went into exile in France in 1986 after months of unrest and protests over economic conditions and political repression. The new government established a commission to investigate financial corruption under Duvalier and later instituted criminal proceedings against Duvalier and other members of his government for financial crimes and for crimes against persons. When Duvalier returned to Haiti two-and-a-half decades later, in January 2011, these proceedings were immediately reinstituted, and within two days, he was being investigated for both financial crimes and human rights abuses.<sup>1490</sup> Rights groups called for accountability.<sup>1491</sup> Outgoing Haitian President René Préval displayed limited support for the case. During presidential elections in May 2011 between Préval and Michel Martelly, both made public statements about the case fraught with political implication. President Préval, however, accepted the offer by the UN’s Office of the High Commissioner for Human Rights (OHCHR) to assist and share expertise with Haitian judicial authorities in the months after Duvalier’s return.<sup>1492</sup> Until early 2012, Duvalier appeared at official events, social events, and public memorials for earthquake victims, flouting a judicial order in early 2011 placing him under limited house arrest. These ambiguous political signals, especially during the election season, may have dissuaded some witnesses and victims from emerging at the preliminary investigations stage. Such concerns also highlighted the need for an independent judicial process and the development of a victim and witness protection program. After winning the election, President Martelly appointed

many Duvalier supporters and former officials to his administration, suggesting the deep involvement of Haiti's political class in the crimes of the Duvalier regime. Powerful political elements of the government were averse to pursuing genuine accountability, preferring not to uncover old networks.

Following the dismissal of the human rights charges by Investigative Magistrate Carves Jean in January 2012, some steps were taken to facilitate accountability. The Haitian judiciary accepted a visit by U.S. lawyers to advise on regional and international human rights and accountability frameworks in February 2012, and the attorney general signaled his intention to contest the dismissal of the human rights charges. The OHCHR, the UN independent human rights expert, and the Secretary-General all publicly supported accountability for Duvalier and facilitated limited technical assistance behind the scenes. The UN made these efforts in the context of its wider post-earthquake reconstruction role, led by the UN Stabilization Mission in Haiti (MINUSTAH), under the Secretary-General.<sup>1493</sup>

### **Existing Justice-Sector Capacity**

Haiti has “a weak, under-funded judiciary that is neither independent nor accountable to the Haitian people.”<sup>1494</sup> The judiciary has no literature on jurisprudence, most judges lack legal texts, and underpaid judges are frequently unaware of changes to laws or the existence of relevant treaty law.<sup>1495</sup> Haiti lacks a legal framework or structures for the protection of victims and witnesses.<sup>1496</sup> The combination of extensive executive and elite control over judicial matters and a broad range of technical deficiencies has created problems across the board: from the fair and effective enforcement of judicial orders to respect for fair trial rights.<sup>1497</sup> The state routinely fails to investigate and prosecute major crimes.<sup>1498</sup>

### **Existing Civil Society Capacity**

Haitian human rights organizations, lawyers, and activists have long been active in bringing complaints to the UN human rights bodies and the Inter-American Commission on Human Rights (IACHR), as well as domestic criminal cases including the judicial proceedings against Duvalier. For instance, they lodged complaints with the state prosecutor on behalf of Duvalier-era victims that formed the basis of instructions to investigating judges.<sup>1499</sup> A civil society organization, the Citizen's Collective for Prosecuting Duvalier, aimed at increasing public awareness

of the case. However, those involved in cases considered politically sensitive—including the cases against Duvalier—reported receiving threats and intimidation throughout the period of the Duvalier proceedings.<sup>1500</sup> Attorneys involved in legal challenges to corruption felt the need to request protective measures from the IACHR.<sup>1501</sup>

## Creation

Human Rights Watch suggested in 2011 that the international community, in addition to funding “behind the scenes” international assistance for proceedings against Duvalier, could consider “funding or seconding a temporary complement of international staff to work alongside Haitian staff,”<sup>1502</sup> acknowledging the limited technical expertise of the Haitian judiciary regarding international criminal law and the potential for political interference. International experts took on no formal role in the justice system, but alongside local advocates, international bodies and civil society organizations nevertheless played important roles in the proceedings.

In May 2011, the IACHR issued a statement responding to petitions by a coalition of plaintiffs and human rights advocates. It noted that “as a State Party to the American Convention, the Republic of Haiti has an international obligation to investigate and where necessary, punish those responsible for the gross human rights violations committed during the regime of Jean-Claude Duvalier.”<sup>1503</sup> The statement cited rulings from the International Court of Human Rights that statutes of limitations cannot bar prosecution for serious human rights violations.<sup>1504</sup> Justice advocates saw the IACHR’s 2011 statement as a useful tool, but also one that revealed the judiciary’s weak understanding of and unwillingness to enforce its obligations as a member of the IACHR. International human rights organizations, including Human Rights Watch, the Open Society Justice Initiative, the International Center for Transitional Justice, Amnesty International, and the Boston-based Institute for Justice and Democracy in Haiti (IJDH) assisted a coalition of national groups in filing briefs to the IACHR and petitions before the Haitian court on the case, and generally supported legal and advocacy efforts.<sup>1505</sup> The Justice Initiative filed an *amicus curiae* brief, and IJDH submitted draft questions to the *juge d’instruction*.<sup>1506</sup>

Following the investigative judge’s decision in January 2012 not to pursue charges of serious human rights violations against Duvalier (see *Prosecutions*, below), the IACHR released a statement expressing concern over the declaration of the statute of limitations, signaling it would remain involved.<sup>1507</sup>

## **Legal Framework and Mandate**

Haiti is a former French colony, and its judicial system is based largely on the civil law system used in France.

When Jean-Claude Duvalier returned to Haiti in January 2011, the minister of justice and the national prosecutor announced that the charging instruments would include “crimes against persons,” as well as financial crimes.<sup>1508</sup> Under Haiti’s Penal Code, “crimes against persons” comprise murder, torture, enforced disappearances, and “sequestration” (analogous to false imprisonment).

A coalition of national and international organizations organized a multipronged campaign to advocate that Duvalier be held accountable. At least 22 individuals filed criminal complaints in relation to the human rights charges, and other victims filed civil charges.<sup>1509</sup> Under Haiti’s civil law system, the matter passed through several investigative and prosecutorial offices. The technicality of the proceedings, the limited understanding among local judicial personnel of Haiti’s international legal obligations, and Haiti’s inadequate legal framework for atrocity crimes made it more difficult for rights groups to intervene.<sup>1510</sup> Rights groups criticized the investigation and noted instances of intimidation of victims who came forward to testify.<sup>1511</sup>

## **Location**

The proceedings against Duvalier and other members of his government were ordered by the state prosecutor in Port-au-Prince, Haiti’s capital.

## **Structure and Composition**

The state prosecutor instituted the Duvalier proceedings, and the prosecutor appointed investigating judges to carry out investigations of financial crimes and crimes against the person. The proceedings went through the regular criminal courts and the Appellate Court in Port-au-Prince.

## **Prosecutions**

In January 2012, after a yearlong investigation, the investigating judge ruled that Duvalier would only face trial on corruption and embezzlement charges, not for

rights abuses. The judge found the legal grounds to include human rights charges and crimes against humanity insufficient, citing the statute of limitations under Haitian law barring prosecutions. Observers and activists criticized the ruling for not taking into account IACHR jurisprudence.<sup>1512</sup> Both Duvalier and victims who had been accepted as civil parties appealed the ruling. The appeal hearings began in February 2013 in the Court of Appeal and concluded in May 2013. Duvalier and eight victims gave testimony. In January 2014, Amnesty International and Human Rights Watch claimed that the proceedings had stalled and that the Haitian authorities displayed no intention of carrying out thorough investigations into abuses from the Duvalier era.<sup>1513</sup>

On February 21, 2014, the Appeals Court of Port-au-Prince issued its decision, overturning the judgment and declaring that the acts of which Duvalier was accused constituted crimes against humanity. The court found that these crimes are not subject to any statute of limitations and ordered a new investigation to establish whether he should be prosecuted.<sup>1514</sup>

Later the same year, on October 4, 2014, Duvalier died suddenly of a heart attack, aged 63, in Port-au-Prince. Human rights groups called for the legal process to continue, on the basis that complaints were not aimed solely at Duvalier and that there were thousands of victims who deserved justice.<sup>1515</sup> The proceedings appear to have stalled, however. In March 2017, the UN Independent Expert on Haiti, Gustavo Gallon, expressed concerns regarding the lack of progress in the trial of Duvalier's associates. Gallon stated that there would need to be new resources and political support to realize victims' right to justice for serious crimes committed during the Duvalier dictatorship.<sup>1516</sup>

## Legacy

Duvalier's sudden death frustrated victims who wished to see accountability for crimes during his regime. Victims and civil society organizations called for the continued prosecution of Duvalier associates and even the establishment of a truth commission.<sup>1517</sup> As of late 2017, there were no apparent further significant developments with regard to criminal accountability or other transitional justice measures in relation to the Duvalier era.

The effort to prosecute Duvalier included the provision of technical assistance to justice sector officials and civil society organizations, perhaps boosting

domestic capacity to prosecute grave crimes. The OHCHR, the IACHR, and other international organizations offered specialized trainings and technical assistance to domestic judicial personnel.<sup>1518</sup> In August 2011, MINUSTAH reported that it had “worked with State authorities to advance efforts in response to long-standing cases of violations, including those committed during the regime of Jean-Claude Duvalier.”<sup>1519</sup> The OHCHR, the UN Secretary-General, and the UN Independent Expert on Human Rights in Haiti also offered to facilitate limited technical assistance to Haitian prosecutors, investigators, and other judicial authorities.<sup>1520</sup> The UN Independent Expert publicly supported efforts by victim groups to appeal the January 2012 ruling.<sup>1521</sup> The U.S. State Department also coordinated technical assistance and, in February 2012, dispatched a team of international legal experts to meet with members of the Haitian judiciary.<sup>1522</sup>

## **Financing**

The proceedings were financed as a regular part of the domestic criminal justice system, supported by technical assistance from the outside.

## **Oversight and Accountability**

The justice sector in Haiti “lacks oversight capacity.”<sup>1523</sup> Critics charge that a Superior Council of Judicial Power established in 2012 to professionalize the judiciary has become just another instrument of executive control.<sup>1524</sup>

Monitoring by the IACHR and other international and civil society organizations appears to have been significant in bolstering the government’s willingness to pursue the case against Duvalier. The IACHR conducted several public hearings during the course of the proceedings. In May 2011, it issued a “Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed during the Regime of Jean-Claude Duvalier” following a public hearing on impunity for human rights during the Duvalier dictatorship.<sup>1525</sup> In May 2014, the IACHR again intervened, welcoming the Haitian Court of Appeals to reopen the investigation on the grounds that statutes of limitations did not apply to crimes against humanity, later calling on Haiti and other states to release official documents that could serve as evidence of the violations committed under Duvalier.<sup>1526</sup>

## MEXICO: INTERDISCIPLINARY GROUP OF INDEPENDENT EXPERTS

### Conflict Background and Political Context

On September 26, 2014, in the Mexican state of Guerrero, armed men attacked a group of more than 100 students from Raúl Isidro Burgos Rural Teachers' School (*Escuela Normal Rural Raúl Isidro Burgos*) of Ayotzinapa. The attackers intercepted the students as they attempted to leave the small city of Iguala in commandeered buses to attend protests in Mexico City. In a series of incidents, the attackers, who included local police, opened fire, leaving six civilians killed and dozens more injured. The tortured body of one of the students, Julio César Mondragon, was found in the street hours later. Another 43 students were rounded up, arrested, and disappeared. For 10 days, the federal government refused to open a criminal investigation, stating that it was a matter for Guerrero state authorities.

Within Mexico and internationally, the case and the government's reaction sparked intense public outrage, leading to massive protests and diplomatic pressure. The incident occurred in the context of a wave of atrocities in Mexico that began in 2005, when the federal government deployed the military domestically on a large scale to combat organized crime. The Ayotzinapa disappearances illustrated the shocking severity of Mexico's crisis of atrocity and impunity, and it followed other high-profile scandals that had eroded the credibility and reputation of the federal government and that of the state of Guerrero.<sup>1527</sup>

As the pressure mounted, in November 2014 the federal government announced that it had reached an agreement with the Inter-American Commission on Human Rights (IACHR) and the families of the missing students to invite an Interdisciplinary Group of Independent Experts (*Grupo Interdisciplinario de Expertos y Expertas Independientes*, GIEI) selected by the IACHR to bring technical assistance to the investigation.

Before the GIEI took up its work in March 2015, Mexican Attorney General Jesús Murillo Karam called a press conference to reveal the results of the federal investigation: what he termed "the historical truth" about what happened to the students. According to this, local police launched the attack on the orders of the Iguala mayor and turned over the disappeared 43 to the *Guerreros Unidos* crime organization, with which the mayor and police were colluding. The 43 students had been executed at a garbage dump outside a nearby town, and their bodies had been incinerated and ashes dumped in a river.

The families of the disappeared students rejected this story, and over the following months, the GIEI's work and that of other outside experts cast severe doubt on its veracity. The outcome of the GIEI's technical assistance revealed a federal investigation marred by incompetence, planted and manipulated evidence, claims of fire that were forensically disproved, a failure to pursue significant leads, and the torture of scores of detainees to support the government's official narrative of the crime.

## **Existing Justice-Sector Capacity**

Mexico's federal judiciary is a three-tiered system with a Supreme Court, circuit courts, and district courts; criminal activity in Mexico falls under either federal or state jurisdiction. While the Mexican judiciary is reasonably independent at the federal level, one significant difficulty with the system is that many jurisdictions have inadequate definitions of crimes or none at all.<sup>1528</sup> Federal and state officials have also exploited the lack of clarity in the laws establishing jurisdiction to manipulate the treatment of cases, obstruct investigations, and avoid the prosecutions of serious crimes.<sup>1529</sup> Official victimization surveys routinely show that over 90 percent of crimes in the country were not investigated or reported to authorities, and less than 10 percent of criminal investigations end in a conviction.<sup>1530</sup>

In 2008, the Mexican Congress amended the country's constitution to establish a new criminal justice system that would scrap the "inquisitorial" approach heavily based on written evidence presented by a prosecutor, in favor of a more transparent "adversarial" model where lawyers argue their cases orally before a judge.<sup>1531</sup> The new system would also incorporate the presumption of innocence and establish other basic rights for defendants.<sup>1532</sup> Mexico remains several years away from fully implementing the adversarial model, which has been heralded as a needed step to counter the entrenched problems of corruption and to put an end to the use of poor and abusive investigative methods. However, cases related to organized crime are excepted from this transition. And even for other cases, those started in the old system will continue to be processed under the "inquisitorial" model, and even where the new model is in force, judges often continue to admit evidence obtained through torture. Meanwhile, the Mexican military has continued to exercise de facto control over some of the most egregious cases of civilian killings, creating parallel investigations in civilian and military courts, which are often more politicized.<sup>1533</sup>

## Existing Civil Society Capacity

Mexico has an active civil society working to expose and end corruption and impunity in the country. International NGOs are supporting the efforts of local NGOs and other civil society groups challenging the Mexican government's failed war against organized crime. Groups involved in promoting and contributing to the national discourse include well-established academic institutions, independent research centers, human rights organizations, public interest law firms, victims' groups, and students, as well as international NGOs operating locally within Mexico. In 2017, 20 Mexican organizations, three international organizations, and over 50 individual human rights advocates joined efforts toward shared goals with the creation of a unified Platform Against Impunity and Corruption (*Plataforma Contra La Impunidad y Corrupción*).<sup>1534</sup>

Among the most influential human rights entities in Mexico is the Miguel Agustín Juárez Human Rights Center in Mexico City (known as Centro Prodh), which has worked since its inception in 1988 to demand justice for gross human rights violations and promote higher standards in public security, accountability, and criminal justice reform.<sup>1535</sup> It has represented witnesses and survivors of abuse in cases raising constitutional challenges against the federal government. In the case of Ayotzinapa, Centro Prodh has collaborated closely with the Guerrero-based Tlachinollan Human Rights Center, and both organizations have represented victims.

The lives of human rights advocates and journalists have come under frequent threat. Mexico is considered one of the most dangerous places in the world to be a journalist.<sup>1536</sup> Since 2000, at least 104 journalists have been murdered while 25 others have disappeared. Out of more than 800 serious cases of harassment, assault, or homicide against members of the media in the last six years, the government has only convicted two suspects.<sup>1537</sup>

## Creation

The GIEI was created on November 12, 2014, through an agreement between the IACHR, the Mexican government, and the representatives of the disappeared students from Ayotzinapa following the issuance of IACHR precautionary measures for the families and their representatives.<sup>1538</sup> The president of the IACHR not only viewed the historic agreement as a mechanism for directly addressing the case of the disappeared 43 students, but also stressed that its creation represented

“a key opportunity to advance in solving a structural issue that Mexico has been experiencing for years.”<sup>1539</sup> Rising domestic and international pressure for an adequate response to the Ayotzinapa disappearances within the context of thousands more cases of disappearances likely facilitated the Mexican government’s agreement to allow an international body within its jurisdiction for additional support and oversight. As part of its investigation surrounding the Ayotzinapa disappearances, many expected the GIEI’s efforts would lead to steps that would resolve the underlying structural problems giving rise to widespread disappearances in the country.

The Memorandum of Agreement (MoA) made official an oral agreement reached on October 29, 2014, at a meeting of the students’ families with President Enrique Peña Nieto.<sup>1540</sup> The parties established that Mexico would receive IACHR technical assistance for the investigation of the events of September 26 and 27, including the search for the missing 43 students. The MoA originally set the GIEI’s mandate for a six-month period, but foresaw the possibility of granting extensions for the completion of its objectives with the agreement of the IACHR and the parties. Under the MoA, Mexico accepted technical assistance from an interdisciplinary group of independent experts selected by the IACHR. The objective of the technical assistance offered by the GIEI would be to determine the whereabouts of the 43 students with the aim of finding them alive. It further tasked the group of experts with investigating the victimization of other civilians and students involved in the events and ensuring that measures were in place for their protection. More generally, the MoA tasked the GIEI with making policy recommendations regarding disappearances in Mexico. This included recommendations for Mexico to conform to international standards of forensic investigations and best practices. The MoA also empowered the GIEI to advance lines of investigation and to determine criminal liability for the perpetrators. Finally, the MoA tasked the GIEI with providing technical analysis of the Mexican government’s assistance to victims of the September 26 and 27 attacks.

Under the MoA, Mexico agreed to several obligations to facilitate the work of the GIEI. These included granting the GIEI access to investigation files, case documents, and other public information retained by the government. Mexico agreed to grant the GIEI the necessary resources and logistical accommodations to carry out its mandate. Mexican authorities were furthermore obligated to designate a high-level, cross-institutional group of officials with the capacity to work with the GIEI and implement its final recommendations. Finally, under the MoA, Mexico agreed to cover all the costs incurred from the GIEI’s operation.

The IACHR selected five individual experts to form the GIEI on January 18, 2015. The GIEI held its first meeting at the IACHR on February 11–12, 2015, to discuss its internal norms and procedures and to adopt an action plan for the fulfilment of its mission.<sup>1541</sup>

## Legal Framework and Mandate

The stated purpose of the agreement to establish the GIEI was four-fold: (1) to provide Mexico with an independent body of experts for a period of six months to address structural problems contributing to enforced disappearances in Mexico generally; (2) more specifically, to advance leads for the search of the disappeared 43 students with the assumption that they are still alive; (3) to provide technical expertise in the investigation surrounding their disappearance and determine any criminal liability; and (4) to lend technical analysis on the government’s “Plan for the Attention to the Victims of the September 26 and 27 Events.”<sup>1542</sup>

The GIEI operated from February 2015 to April 2016. It held its first meeting in February 2015 and began its formal activities on March 2, 2015.<sup>1543</sup> It was initially expected to conclude its mandate in October 2015, but after interim results of the investigation were obtained, the IACHR extended the GIEI’s mandate for six months at the request of the families of the victims.<sup>1544</sup> The GIEI presented its final findings in late April 2016 and ended its mandate at the end of that month.

During the course of its mandate, the GIEI issued a total of 14 monthly progress reports and two major reports on its findings. The first major report, released on September 6, 2015, was titled, “Ayotzinapa Report: Research and initial conclusions of the disappearances and homicides of the *normalistas* of Ayotzinapa.” The second report, released on April 24, 2016, was titled: “II Ayotzinapa Report: Progress and new conclusions about the investigation, search, and attention to the victims.”

On April 16, 2016, the IACHR announced that it would not renew the GIEI’s mandate because of the Mexican government’s refusal to allow the group to continue its work.<sup>1545</sup> Despite the valuable contributions and advances it made in the investigation of the case, Mexico’s refusal to extend the GIEI’s mandate left the ultimate objective of its mission unfulfilled. While the IACHR and the representatives of the victims’ families advocated for the work of the GIEI to continue until the case was solved, Mexico’s consent was required under the terms of the MoA. In light of this, on July 29, 2016, the commission established a special

monitoring mechanism to follow-up on Mexico's progress with the implementation of the recommendations made in the two reports.<sup>1546</sup> For its part, the Mexican government affirmed that it would continue with its investigation and ensure that those responsible would be sanctioned.

Under the legal framework of the MoA and the follow-up mechanism, the ultimate responsibility for delivering justice to the victims has always rested with the Mexican government.

## **Location**

The GIEI first convened in Washington, D.C., where the Organization of American States (OAS) is currently headquartered, and also met there thereafter.<sup>1547</sup> It undertook its mandate through a series of in situ visits to Mexico and the state of Guerrero between March 1, 2015, and April 30, 2016, and maintained permanent representation in Mexico throughout its mandate.

## **Structure and Composition**

The IACHR selected the GIEI's five independent experts from a list of recommendations made by the Mexican government and the representatives of the missing students. The selected experts formed a diverse group of professionals distinguished for their years of work in advancing independent human rights work: Carlos Martín Beristain, a national of Spain and a doctor of medicine and psychology; Angela Buitrago, a Colombian lawyer with a specialization in criminal law and criminology; Francisco Cox Vial, a Chilean lawyer and professor of constitutional law; Claudia Paz y Paz, Guatemala's first female attorney general and a former judge; and Alejandro Valencia Villa, a Colombian human rights lawyer and professor of human rights, humanitarian law, and transnational justice.<sup>1548</sup>

## **Prosecutions**

The GIEI itself did not have a prosecutorial mandate. But its investigations shed light on the events in Iguala, as well as indications of a federal investigation featuring criminality, incompetence, and the manipulation of evidence.

The GIEI's work was essential in disproving the so-called "historic truth" that the Mexican government attempted to impose on the investigation just four months after the disappearance of the students. The Mexican government's assertion that the students were killed and cremated at a trash dump contradicted facts uncovered in the GIEI's investigation, as well as the scientific studies of a world-renowned fire expert and the internationally recognized Argentine Forensic Anthropology Team (*Equipo Argentino de Antropología Forense*, EAAF). Both forensic studies concluded that there was no scientific basis to support the government's theory. They found that multiple fires had occurred at the trash site, but none large enough to incinerate 43 bodies, and no evidence that a fire took place at all on the night the students were supposedly killed and cremated. The studies found the charred remains of 19 individuals, but none that matched the DNA of the missing 43 students; rather, some of the remains definitively were not those of any of the disappeared students.<sup>1549</sup>

The experts helped advance other more credible lines of investigation, including a possible motive for a large-scale attack against the students. They concluded that on the night of the attack, the students commandeered a fifth bus, which was intercepted by federal police who offloaded the students and escorted the bus away from Iguala. The federal government omitted this bus from its investigation despite testimony from students regarding its existence, video footage of the bus, and its inclusion in an initial investigation handled by Guerrero state authorities. The bus that authorities later presented to the GIEI to examine did not match the bus seen on the surveillance video and described by students. The experts hypothesized that the missing bus could have contained hidden drugs or money belonging to the *Guerreros Unidos* criminal organization. Lending strong support to the experts' hypothesis, another U.S. Department of Justice case concerning drug distribution in the United States found that individuals working on behalf of the *Guerreros Unidos* used commercial passenger buses to conceal and transport drugs from Guerrero, Mexico, to Chicago, Illinois.<sup>1550</sup>

The GIEI's investigation also revealed strong evidence that implicated several Mexican authorities. The experts concluded that security forces from all three levels of government were present during different attacks on the students, including municipal, state, and federal police. It found that the military was also aware of the attacks on the students and present at some of the crime scenes. According to testimonies, a group of soldiers entered the police station and searched the cells where the students were supposedly detained. The experts noted that in spite of the awareness of the prolonged attacks against the students, no security force intervened to protect them. Yet military agents reported their observations over the government's C-4 communication system and took photos and video on a

mobile phone. The military refused to collaborate fully with the group of experts by denying them access to the phone video and the C-4 communications from the specific periods during the night of the attacks. In addition, Mexican authorities repeatedly denied the GIEI's access to the soldiers based in Iguala, who likely witnessed all stages of the attack leading to the disappearance of the students. The GIEI concluded that the operation against the students had to have been centrally coordinated, given its sustained nature and the involvement of several patrols from at least two jurisdictions (Iguala and Cocula).

The group of experts faced a number of obstacles in carrying out their mandate that stemmed from the government's unwillingness to collaborate fully with the investigation, including possible obstruction of justice and attempts to undermine or discredit its work and findings. Although the group of experts were able to directly interview federal, state, and municipal authorities, they were not allowed to interview soldiers directly, through surrogates, or be present when the federal prosecutors conducted the interviews with soldiers. In addition, the GIEI complained in both reports that the government frequently did not provide requested information necessary for carrying out its mandate in a timely manner.

The GIEI's findings indicate that government authorities obstructed justice during the course of the investigation. Their findings revealed that nearly 80 percent of suspects detained by authorities had injuries indicative of torture or mistreatment.<sup>1551</sup> The experts analyzed the cases of 17 of the detainees whose testimonies aligned with the government's theory and found signs that all had been tortured.<sup>1552</sup> The allegations include abuses of men and women subjected to sexual violence, electrical shocks to the genitals, penetration, beatings, asphyxiation, and threats of physical harm to their close family members.<sup>1553</sup> The GIEI concluded that there is a high likelihood most confessions obtained by authorities were coerced in order to align with its own version. In addition, the coerced confessions may have been part of a calculated misinformation campaign. Part of detainees' testimonies supporting the government's "historic truth" about the trash dump were suspiciously leaked to the media at a time when the government's theory was being scientifically disproven.<sup>1554</sup> Further, some of the leaks did not correspond with what was actually said in testimonies. The GIEI pressed the government in its reports to conduct internal investigations into sources of the leaked information and possible crimes committed against detainees.

More evidence of possible obstruction of justice by authorities arose with the government's tampering of evidence at the San Juan River crime scene, where the government supposedly uncovered trash bags containing charred remains of

some of the missing students. The government falsified the date in which the bags of remains were officially recovered, made apparent only after photo and video evidence provided by journalists from Guerrero revealed that federal investigators from the federal Office of the General Prosecutor (*Procurador General de la República*, PGR) had been at the scene a full day prior. The head of the Agency for Criminal Investigations was there himself, together with an accused suspect who subsequently showed signs of torture. The group of independent forensic experts from Argentina working on the case were not informed when the government uncovered the bags, and none of the activity from the day before the bags were officially reported as found, including the suspect's presence, was documented in the government's case files.

Even after the findings of the GIEI and those of the group of independent forensic experts both disproved the government's theory of the case, Mexican authorities refused to abandon their version of events and continued to resist new lines of investigation advanced by the GIEI. Beginning in September 2015, the group of experts pressed Mexican authorities to open lines of dialogue with U.S. authorities to investigate the use of Mexican buses traveling from Guerrero to Chicago to carry narcotics across the border. The PGR moved slowly, initiating those contacts several months later, in February 2016. The experts found that contrary to the Mexican government's assertions, the students' cell phones showed activity in the hours and days after they disappeared. The experts urged the Mexican authorities to investigate cell phone data of the missing students and of suspected perpetrators to track their movements on the night of the attack. The government failed to explore these additional lines of investigation while the GIEI remained in operation.

Another matter complicating the work of the GIEI occurred in mid-March 2016, when a criminal complaint was filed in the PGR against Emilio Álvarez Icaza Longoria, the executive secretary of the IACHR, for the alleged crime of fraud related to US\$2 million—the same amount the Mexican government paid the IACHR to cover the costs of the GIEI investigation. The complaint attacked the GIEI's integrity and demanded an immediate end to its work. The complaint echoed a media campaign attacking the reputation of three individual members of the GIEI.<sup>1555</sup> The IACHR categorically rejected this as a smear campaign and expressed its dismay that the PGR opened a preliminary inquiry based on a complaint it found “reckless and unfounded” and which “does not contain any fact that would constitute a crime.”<sup>1556</sup> The PGR announced in April 2016 that it would not pursue any criminal action against Icaza.

## Legacy

On January 27, 2015, Attorney General Jesús Murillo Karam stood in front of television cameras and declared that the government had concluded its investigation into the case of the missing 43 students from Ayotzinapa. Four months had lapsed since the night of their attack. Over a year later, the government had still not located the disappeared students, and the experts had uncovered numerous inconsistencies, investigative failures, and institutional deficiencies in the federal government's investigation. In the process of searching for the missing students, by mid-2015, over 60 clandestine graves in the state of Guerrero containing dozens of bodies and human body parts were discovered.<sup>1557</sup> The results of the GIEI's investigations were not only a judgment on the government's false conclusions about the Ayotzinapa case, but on the state's failure in bringing justice to thousands of disappeared civilians over the past decade. On the day that the group of experts presented their final report to the public, the representatives of the Mexican government were notably absent from the front row that had been reserved for them.<sup>1558</sup>

Hours after the GIEI presented its final report, the PGR issued a public statement that both affirmed the work of the experts while simultaneously rebutting every recommendation identified in the report. The PGR claimed to have allowed the group of experts full access to the information they requested, declared that it had carried out their requests in pursuing the new lines of investigation, or directly challenged the experts' findings by asserting it found no evidence relevant to the case. The PGR effectively shut down a line of investigation linking the attacks to a possible transnational drug trafficking operation by claiming it had examined the fifth bus, found no irregularities, and that the bus's route was limited to travel between Guerrero and a neighboring state.

In its statement, the PGR attempted to revive its theory that the students had been killed and incinerated at the dump site by releasing the results of a third forensic study. The additional study took place at the government's insistence and under a signed formal agreement with the GIEI on the conditions of the analysis. The government broke the terms of its agreement by holding a press conference on April 1, 2016, to release preliminary findings that appeared to support its theory of a large fire in the dump site. In reality, the stated evidence did not add to or disprove the original findings of the first two scientific studies. The study failed to link evidence of a fire to the night of the attack and failed to match the remains of the 19 people found at the trash site.

The PGR's statement was an attempt to both justify and emphasize its own role in the investigation while making no mention of the multiple flaws in how it handled the case. It cited as one of the major benchmarks of its success the arrest and detention of 123 people allegedly linked to the students' disappearance. The remarks positioned the Mexican government to later reject the continuation of the GIEI's work.

On July 29, 2016, the Inter-American Commission implemented a Follow-up Mechanism after it became clear that further international supervision would be necessary to protect the families of Ayotzinapa victims and to monitor the implementation of the GIEI's recommendations. Although the mechanism will not participate directly in the case's investigation, its specific objectives outlined in its work plan are as follows: (1) monitor the progress of the investigation; (2) provide advisory assistance and support to the process to search for the disappeared; (3) ensure that comprehensive attention is given to victims and their relatives; and (4) promote any structural measures that may be appropriate to resolve this matter and ensure that such an event does not happen again.<sup>1559</sup> The mechanism would authorize four official visits and four technical visits in coordination with Mexican authorities from November 9, 2016, through November 2017. Official visits are led by the coordinator to the Follow-up Mechanism and the rapporteur for Mexico and accompanied by technical staff assigned by the IACHR Executive Secretariat. Technical visits are carried out by staff of the Executive Secretariat in order to compile any information and documents necessary to meet the objectives of the mechanism. The mechanism allows for specialists from other disciplines to accompany the staff as needed. In addition, the Follow-up Mechanism authorizes the IACHR to meet with relatives of the 43 disappeared students and other victims, hold meetings with other international bodies and civil society organizations to shed light on the case, hold high-level meetings and roundtables with representatives of state institutions, hold working meetings to implement the precautionary measures, and hold public hearings on the objectives of the Follow-up Mechanism during IACHR sessions. Through the mechanism, the IACHR is empowered to submit any requests for information and may issue preliminary observations, reports, and/or press releases on its findings.

As of September 2017, the IACHR had conducted a total of three official visits, three technical visits, and two public hearings since the start of the Follow-up Mechanism. In the first public hearing in March 2017, over a year after the GIEI's presentation and final report, the Mexican authorities continued to defend their "historical truth."<sup>1560</sup> During the IACHR's second official visit in April 2017, members expressed "concern about the slow pace in coming to conclusions, both in the

search activities and in the effective clarification of the various lines of investigation indicated by the Inter-Disciplinary Group.”<sup>1561</sup> The IACHR recognized that among many of the concrete recommendations made by the GIEI for moving forward with the investigation, Mexican authorities had taken administrative steps to contract Light Imaging Detection and Ranging (LIDAR) technology for the search of mass graves and had made progress with the investigation of telephone communication. Following its third visit in August 2017, the IACHR reported little progress and noted that the government’s insistence on one version of events, “which has already been ruled out by the GIEI, places a hurdle between the victims and their family members and jeopardizes the quest for truth and justice in this case.”<sup>1562</sup>

In June 2017, the IACHR held its second public hearing during its 163rd session, where civil society representatives noted the state’s continued lack of progress.<sup>1563</sup> The commission expressed its concern over explosive allegations that implicated the state in acts of espionage against representatives of the relatives of the students and members of the GIEI using Pegasus spyware. The spyware, used to threaten journalists and human rights activists, potentially added to the disruption of the GIEI’s efforts during the critical span of its mandate.<sup>1564</sup>

In the months following the GIEI’s mandate, more evidence has surfaced that Mexican authorities withheld key evidence from the group of experts. Evidence in a case against a gang leader suggested that the head of state’s Criminal Investigation Agency had ties to the *Guerreros Unidos* criminal organization.<sup>1565</sup> The case further revealed that the military had detained another suspected leader of the crime group a few months prior to the attack against the students. The military was aware in that operation that the *Guerreros Unidos* had a practice of using commercial passenger buses to transport drugs to the United States, and a book seized from a drug trafficker linked to the case contained phone numbers of various authorities—information and documents that were deliberately withheld from the GIEI.

As of September 2017, Mexican authorities had arrested 131 people in connection with the case, although some of these were charged with organized crime offenses and kidnapping not directly tied to the students. A majority of the arrests were of municipal police officers and alleged cartel members. Many of those being prosecuted have alleged they were tortured by officials. Other arrests include that of the former mayor of Iguala and his wife. It is unclear whether the PGR has followed through with the GIEI’s recommendation that it investigate officials responsible for leaking information to the media during its mandate. When an internal investigation appeared to be preparing criminal charges in relation to manipulation of evidence

in the case, the PGR's inspector general was removed from office. The head of the Agency for Criminal Investigation, who was personally suspected of evidence tampering, resigned, but was swiftly appointed by President Peña Nieto to a position on the powerful National Security Council.

Although the GIEI was unable to locate the disappeared students, it represented an unprecedented model of international cooperation in Mexico and demonstrated that an independent body of technical experts could shine new light on a complex case, even amidst a system plagued by corruption, torture, and politicization. The GIEI's work sustained domestic and international attention on an important case and expanded the circle of Mexicans who believe that further international involvement could help to address the country's broader crisis of atrocity and impunity.

## **Financing**

The Mexican government funded the GIEI's operational costs for a total contribution of US\$2 million by its Foreign Ministry to the IACHR.<sup>1566</sup> Mexico disbursed its first US\$1 million contribution in November 2014 and made a second series of disbursements totaling another US\$1 million by March 2016.<sup>1567</sup> The financial support was considered a voluntary contribution from Mexico to the IACHR and administered by the OAS. The IACHR depends on funding by OAS member states and others through regular contributions. For the years in which Mexico contributed funds for the operational costs of the GIEI, it did not make additional contributions for the daily operation of the IACHR.

## **Oversight and Accountability**

The GIEI was an independent body created by agreement between the IACHR—an autonomous organ of the OAS—and the Mexican government. The agreement established an oversight role for the IACHR over the adoption of precautionary measures related to the Ayotzinapa case and the GIEI's recommendations. Members of the GIEI were to enjoy “privileges and immunities as are necessary for the exercise of its functions” under the agreement, in accordance with international standards.<sup>1568</sup> Similar to the immunities enjoyed by representatives of member states under OAS procedures, the members of the GIEI were to enjoy immunity from personal arrest or detention and from seizure of their personal baggage. With respect to words spoken or written and all acts done in their official capacity, the

GIEI was given immunity from legal process of every kind. In addition, all papers and documents belonging to the GIEI were to receive the privilege of inviolability.

## Notes

1248. CONADEP, *NUNCA MÁS* 209, 1984.
1249. Code of Criminal Procedure, Congress Law 23,984, August 1991.
1250. Code of Criminal Procedure, Congress Law 27,063, December 2014.
1251. Marc Becker, “2 Madres de la Plaza de Mayo,” *The Oxford International Encyclopedia of Peace*, 655–56, available at: [www.yachana.org/research/plazamayo.pdf](http://www.yachana.org/research/plazamayo.pdf).
1252. See [www.cels.org.ar/web/en/presentacion/](http://www.cels.org.ar/web/en/presentacion/).
1253. Karen Ann Faulk, *supra* at 47.
1254. See Diane F. Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency,” *The International Journal of Transitional Justice*, 1 (2007): 10–22. Orentlicher uses the term to describe several Latin American countries that underwent cycles of impunity and accountability after military regimes in the 1970s and 1980s.
1255. Presidential Decree No. 158, December 13, 1983.
1256. Leonardo Filippini, *Criminal Prosecutions for Human Rights Violations in Argentina*, International Center for Transitional Justice Briefing Paper, November 2009, 2.
1257. Margarita K. O’Donnell, “New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations,” *NYU Law Rev.* 84, (2009): 346–47. Before relinquishing power, the military granted itself immunity from prosecution and decreed the destruction of documents. Kathryn Sikkink and Carrie Booth Walling, “Argentina’s Contribution to Global Trends in Transitional Justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena 2006).
1258. Leonardo Filippini, *Criminal Prosecutions for Human Rights Violations in Argentina*, 1, ICTJ Briefing Paper, November 2009 (hereinafter: ICTJ Briefing Paper).
1259. For a full discussion of CONADEP, see No Peace Without Justice, *Closing the Gap: The Role of Non-judicial Mechanisms in Addressing Impunity*, 2010, 103–7.
1260. Full Stop Law of 1986, Law No. 23492, Dec. 24, 1986, [1986-B] A.L.J.A. 1100, available at: [www.nuncamas.org/document/nacional/ley23492.htm](http://www.nuncamas.org/document/nacional/ley23492.htm).
1261. Due Obedience Law of 1987, Law No. 23521, June 8, 1987, [1987-A] A.L.J.A. 260, available at: [derechos.org/ddhh/arg/ley/ley23521.txt](http://derechos.org/ddhh/arg/ley/ley23521.txt); No Peace Without Justice, *Closing the Gap*, 102. The law “created an affirmative defense and irrebuttable presumption that military and police officers acted under orders that they were unable to question.” O’Donnell, “New Dirty War Judgments in Argentina,” 348.
1262. ICTJ Briefing Paper.
1263. IACHR Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.390, 10.311, October 2, 1992, available at: [www1.umn.edu/humanrts/cases/28%5E92arg.pdf](http://www1.umn.edu/humanrts/cases/28%5E92arg.pdf).
1264. ICTJ Briefing Paper.
1265. No Peace Without Justice, *Closing the Gap*, 100–110.

1266. Marcela Valente, "Argentine Court Forges Ahead in Franco-Era Human Rights Crimes Cases," *Inter Press Service*, April 10, 2012, available at: <http://www.ipsnews.net/news.asp?idnews=107382>.
1267. The Full Stop and Due Obedience laws did not cover child abduction.
1268. ICTJ Briefing Paper. These trials were criticized by some victims' groups who sought full justice, and opposed by defendants who viewed them as contrary to the immunity laws.
1269. Orentlicher, "'Settling Accounts' Revisited," 10–22.
1270. ICTJ Briefing Paper.
1271. ICTJ Briefing Paper; Congress Law 25,779, August 2003.
1272. ICTJ Briefing Paper. See also Human Rights Watch, *World Report 2012: Argentina Country Summary*, January 2012.
1273. Argentine Supreme Court, Case No. 259, "Arancibia Clavel," Judgment, August 24, 2004.
1274. "Qué ganó y qué perdió la Argentina durante el Kichnerismo," *BBC*, October 27, 2015, available at: [https://www.bbc.com/mundo/noticias/2015/10/151022\\_elecciones\\_argentina\\_kirchnerismo\\_vs](https://www.bbc.com/mundo/noticias/2015/10/151022_elecciones_argentina_kirchnerismo_vs).
1275. Proceso, "Con Macri, perdón y olvido a los crímenes de la dictadura," August 25, 2016 available at: [proceso.com.mx/452375/macri-perdon-olvido-a-los-crimenes-la-dictadura](http://proceso.com.mx/452375/macri-perdon-olvido-a-los-crimenes-la-dictadura).
1276. Argentine Constitution, Article 108.
1277. The appointment by the president requires agreement of at least two-thirds of the present Senate members in a session convened for that purpose. *Ibid.*, Article 99(4).
1278. *Ibid.*, Article 116.
1279. This unit has been described using various nomenclature. Pablo Parenti is a senior attorney with the Attorney General's Unit for Coordination and Monitoring Cases Involving Violations of Human Rights during the Argentine dictatorship. ICTJ, Interview with Pablo Parenti, published January 2012 (hereinafter: Parenti Interview), available at: [ictj.org/news/interview-pablo-parenti-esma-trials-argentina](http://ictj.org/news/interview-pablo-parenti-esma-trials-argentina). Filippini describes it as a "coordination unit." ICTJ Briefing Paper.
1280. Argentine Attorney General's Office, Resolution 1442/13.
1281. Argentine Attorney General's Office, Resolution 435/12.
1282. Argentine Supreme Court, Directive 42/2008.
1283. ICTJ Briefing Paper.
1284. As per Article 118 of the Argentine Constitution, which establishes that matters that concern international law must be heard in federal courts.
1285. O'Donnell, "New Dirty War Judgments in Argentina," 350.
1286. Procuraduría de Crímenes de Lesa Humanidad, *El Estado de las Causas por Crímenes de Lesa Humanidad en Argentina—Informe Estadístico*, March 2007 (en adelante "Informe Estadístico 2017"), available at: [fiscales.gob.ar/wp-content/uploads/2017/03/LH\\_Informe-Estadistico\\_2017.pdf](http://fiscales.gob.ar/wp-content/uploads/2017/03/LH_Informe-Estadistico_2017.pdf).
1287. Parenti Interview.
1288. O'Donnell, "New Dirty War Judgments in Argentina," 251.
1289. This was made possible following a complaint lodged by Grandmothers of Plaza de Mayo at the Inter-American Commission of Human Rights arguing a violation of their right to access justice. Argentina accepted a friendly settlement in the case and committed to introduce new legislation to enable more effective participation in

- proceedings by victims and organizations supporting them. See Presidential Decree No. 1800, November 19, 2009.
1290. O'Donnell, "New Dirty War Judgments in Argentina," 351.
  1291. Informe Estadístico 2017.
  1292. Ibid.
  1293. ICTJ Briefing Paper, quoting the general prosecutor.
  1294. FIDH, *Argentina: Avances y obstáculos en los procesos en contra de responsables de crímenes contra la humanidad durante la dictadura*, May 2009 (hereinafter: FIDH Report), at 43-46.
  1295. Congress Law 26,374, May 2008.
  1296. As recognized by the Argentine Supreme Court in its Directive 42/2008.
  1297. FIDH Report, 38.
  1298. Parenti Interview.
  1299. Procuraduría de Crímenes de Lesa Humanidad, *Pautas para la actuación de los y las fiscales en la investigación de crímenes de lesa humanidad*, April 2016, 38-39.
  1300. O'Donnell notes that the court applied a definition of genocide "out of conformity" with international law, in that it included "political groups." O'Donnell, "New Dirty War Judgments in Argentina," 334.
  1301. Ibid., 350.
  1302. Crimes against humanity provisions were introduced in 2007 through legislation that implemented the Rome Statute, Law 26,200, December 2006.
  1303. Relying on ordinary crimes provisions and considering crimes to have been committed "in the context of crimes against humanity" has been common practice in some Latin American courts. For a study on this matter ("Subsunción de conductas en derecho internacional y nacional"), see Due Process of Law Foundation, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, vol. 1, 178-90.
  1304. In *Arancibia Clavel*, the Supreme Court stated that ordinary crimes could be considered as crimes against humanity because they affect international law. Case No. 259, *Arancibia Clavel*, Judgment, August 24, 2004, considerando 16.
  1305. ICTJ Briefing Paper. Filippini also suggests that prosecutors have begun to investigate crimes committed before the 1976 coup.
  1306. Human Rights Watch, *World Report 2012: Argentina Country Summary*.
  1307. CELS, *Nuevo informe: Responsabilidad empresarial en crímenes de lesa humanidad en la Argentina*, December 14, 2015, available at: [cels.org.ar/web/2015/12/nuevo-informe-responsabilidad-empresarial-en-crimenes-de-lesa-humanidad-en-la-argentina/](http://cels.org.ar/web/2015/12/nuevo-informe-responsabilidad-empresarial-en-crimenes-de-lesa-humanidad-en-la-argentina/).
  1308. Argentine law does not recognize the criminal liability of corporations. Natural persons responsible for the acts of the corporation could be prosecuted.
  1309. See Parenti Interview. An estimated 5,000 people were detained at ESMA.
  1310. "Guilty: Argentina Dirty War Commanders," *International Justice Tribune*, November 7, 2011.
  1311. European Center for Constitutional Rights, *On-going Trials in Argentina: Campo de Mayo*, available at: [www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/argentina/articles/update-on-on-going-trials-in-argentina-iii.html](http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/argentina/articles/update-on-on-going-trials-in-argentina-iii.html).

1312. Comisión Juicio Campo de Mayo, Causa Área 400, April 4, 2013, available at: [www.comisionjuiciocampodemayo.wordpress.com/juicio/causa-area-400/](http://www.comisionjuiciocampodemayo.wordpress.com/juicio/causa-area-400/).
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1314. Amnesty International, *Argentina: Historic Ruling on Operation Condor a Great Step Forward for Truth and Justice*, May 27, 2016, available at: [www.amnesty.org/en/latest/news/2016/05/argentina-historic-ruling-on-operation-condor-a-great-step-forward-for-truth-and-justice/](http://www.amnesty.org/en/latest/news/2016/05/argentina-historic-ruling-on-operation-condor-a-great-step-forward-for-truth-and-justice/).
1315. "Murió Jorge Rafael Videla, símbolo de la dictadura militar," *La Nación*, May 17, 2013, available at: [www.lanacion.com.ar/1582853-murio-jorge-rafael-videla-simbolo-de-la-dictadura-militar](http://www.lanacion.com.ar/1582853-murio-jorge-rafael-videla-simbolo-de-la-dictadura-militar).
1316. See, inter alia, Argentine Supreme Court, Case No. 10,919, *Vigo*, Judgment, September 14, 2010; Case No. 14,217 *Alespeiti*, Judgment, April 18, 2017. "Corte Suprema otorgó el arresto domiciliario a un militar condenado por crímenes de lesa humanidad," *La Nación*, April 18, 2017, available at: [lanacion.com.ar/2012979-la-corte-suprema-otorgo-el-arresto-domiciliario-a-un-militar-condenado-por-crmenes-de-lesa-humanidad](http://lanacion.com.ar/2012979-la-corte-suprema-otorgo-el-arresto-domiciliario-a-un-militar-condenado-por-crmenes-de-lesa-humanidad). "Cambio de época: Corte benefició con prisión domiciliaria a represor condenado," *Minuto Uno*, April 18, 2017, available at: [minutouno.com/notas/1547016-cambio-epoca-corte-beneficio-la-prision-domiciliaria-represor-condenado](http://minutouno.com/notas/1547016-cambio-epoca-corte-beneficio-la-prision-domiciliaria-represor-condenado). "En 2016 ya otorgaron la prisión domiciliaria a unos 50 militares," *Clarín*, July 14, 2016, available at [clarin.com/politica/otorgaron-prision-domiciliaria-militares\\_o\\_ryise8Z\\_.html](http://clarin.com/politica/otorgaron-prision-domiciliaria-militares_o_ryise8Z_.html).
1317. "Argentina: la violencia de la ley," *New York Times Español*, May 6, 2017, available at [www.nytimes.com/es/2017/05/06/la-violencia-de-la-ley-en-argentina/](http://www.nytimes.com/es/2017/05/06/la-violencia-de-la-ley-en-argentina/).
1318. Argentine Supreme Court, Case No. 1574, *Muiña*, Judgment, May 3, 2017. See also Council on Hemispheric Affairs, *Argentina's Supreme Court Resurrects Repealed Law to Reduce Sentence for Dictatorship-Era Enforcer*, May 9, 2017, available at: [coha.org/argentinas-supreme-court-resurrects-repealed-law-to-reduce-sentence-for-dictatorship-era-enforcer/](http://coha.org/argentinas-supreme-court-resurrects-repealed-law-to-reduce-sentence-for-dictatorship-era-enforcer/); "Delitos de lesa humanidad: La Corte aplicó el 2 x 1 a un condenado," *La Nación*, May 4, 2017, available at: [www.lanacion.com.ar//2020319-delitos-de-lesa-humanidad-la-corte-aplico-el-2-x-1-a-un-condenado](http://www.lanacion.com.ar//2020319-delitos-de-lesa-humanidad-la-corte-aplico-el-2-x-1-a-un-condenado).
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1509. For an explanation of the complex procedures under Haiti's civil law, see the web page on the case maintained by the Institute for Justice and Democracy in Haiti, available at [ijdh.org/projects/jean-claude-duvalier](http://ijdh.org/projects/jean-claude-duvalier). IJDH notes that individual civil complainants can join a criminal case once it has been brought by the government prosecutor. IJDH assisted in enjoining civil plaintiffs to the criminal case.
1510. Haiti's legal framework presents difficulties in prosecuting the human rights abuses as international crimes because Haiti's Penal Code does not contain a definition of crimes against humanity. Amnesty International argues forcefully that crimes against humanity are recognized under international customary law, and even though such crimes are not defined under Haiti's penal code, "Haiti nevertheless has an obligation to investigate and prosecute these violations." Amnesty International, *"You Cannot Kill the Truth."* Notwithstanding, the Open Society Justice Initiative and Human Rights Watch have offered other legal arguments for accountability under Haiti's Penal Code. The Justice Initiative argued in an *amicus curiae* that Haiti's inquisitorial system presented an opportunity for the prosecutor to become "seized" of facts proving the widespread and systematic nature of the crimes, which "although ... [they] may not alter the formal legal nature of the offenses ... [they] would ensure that the facts which demonstrate the particularly serious nature of these offenses, as crimes against humanity, are part of the case and can be considered in [prosecution and sentencing]." Amicus Curiae for the Assistance of the Judicial Authorities, Open Society Justice Initiative, *The Prosecution of Jean-Claude Duvalier*, December 14, 2011, available at: [opensocietyfoundations.org/litigation/jean-claude-duvalier](http://opensocietyfoundations.org/litigation/jean-claude-duvalier). Human Rights Watch argues that Duvalier could be investigated under the customary international law doctrine of command responsibility, noting that a variant of the doctrine—"crime by omission"—has been previously applied in Haitian criminal law. Human Rights Watch, *Haiti's Rendezvous with History*.
1511. International Center for Transitional Justice, *No Justice for Duvalier Survivors*, January 31, 2012, available at: [ictj.org/news/no-justice-duvalier-survivors](http://ictj.org/news/no-justice-duvalier-survivors); see also "Rights Groups Blast Haiti Judge on Duvalier Case," *Associated Press*, January 30, 2012, available at: [cbsnews.com/8301-505245\\_162-57368740/rights-groups-blast-haiti-judge-on-duvalier-case/](http://cbsnews.com/8301-505245_162-57368740/rights-groups-blast-haiti-judge-on-duvalier-case/). The AP article quotes allegations from Mario Joseph, a Haitian lawyer for some of the victims, that the investigating judge improperly disregarded testimony from victims and improperly applied the statute of limitations.
1512. The official judgment was not initially released, and an English translation is not publicly available. See "Baby Doc Avoids Human Rights Abuse Charges in Haiti," *The Guardian*, January 30, 2012, available at: [guardian.co.uk/world/2012/jan/31/baby-doc-duvalier-charges-haiti](http://guardian.co.uk/world/2012/jan/31/baby-doc-duvalier-charges-haiti); see also ICTJ, *No Justice for Duvalier Survivors*.
1513. Amnesty International and Human Rights Watch, *Three Years on, Duvalier Prosecution Stalled*, January 15, 2014, available at: [hrw.org/news/2014/01/15/haiti-three-years-duvalier-prosecution-stalled](http://hrw.org/news/2014/01/15/haiti-three-years-duvalier-prosecution-stalled).
1514. Decision of the Court of Appeals of Port-au-Prince, February 20, 2014, French and unofficial English translation, available at: [cja.org/cja/downloads/Duvalier%20Decision%20of%20the%20Court%20of%20Appeals%20of%20Port-au-Prince.pdf](http://cja.org/cja/downloads/Duvalier%20Decision%20of%20the%20Court%20of%20Appeals%20of%20Port-au-Prince.pdf).

1515. Amnesty International, *Haiti: The Truth Must Not Die with Jean-Claude Duvalier*, October 7, 2014, available at: [amnesty.org/en/press-releases/2014/10/haiti-truth-must-not-die-jean-claude-duvalier/](http://amnesty.org/en/press-releases/2014/10/haiti-truth-must-not-die-jean-claude-duvalier/).
1516. Press conference following mission of the UN Independent Expert on Haiti, March 9, 2017, website of the UN High Commission for Human Rights, [ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21341&LangID=F](http://ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21341&LangID=F).
1517. "After Death of Jean-Claude 'Baby Doc' Duvalier, Calls for Justice Remain in Haiti," *Miami Herald*, October 4, 2014.
1518. See Inter-American Commission on Human Rights, *Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed During the Regime of Jean-Claude Duvalier*, May 17, 2011, available at: [cidh.oas.org/pronunciamientocidhhaitimayo2011.en.htm](http://cidh.oas.org/pronunciamientocidhhaitimayo2011.en.htm).
1519. United Nations Security Council, *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, S/2011/540, August 25, 2011, para. 35.
1520. See Human Rights Council, *Report of the Independent Expert on the Situation of Human Rights in Haiti*, A/HRC/17/42, April 4, 2011; see also OHCHR, *UN Human Rights Chief Offers Haitian Authorities Assistance in Duvalier Case*, February 1, 2011, available at: [ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10696&LangID=E](http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10696&LangID=E); see also United Nations Security Council, *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, S/2011/183, 24 March 2011, para. 82; see also "UN Independent Human Rights Expert Urges Support for Justice in Haiti," *UN News Centre*, January 19, 2011, available at: [ijdh.org/archives/16882](http://ijdh.org/archives/16882). The Independent Expert's report notes that other UN mandate-holders would provide support as necessary, including the Special Rapporteur on torture and the Special Rapporteur on extrajudicial killings.
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1524. Morris A. Ratner, "Judicial Ethical Integrity: Challenges and Solutions," *Hastings Int'l & Comp. L. Rev.*, 39 (2016): 158, available at: [repository.uchastings.edu/faculty\\_scholarship/1422](http://repository.uchastings.edu/faculty_scholarship/1422)
1525. The statement can be found at [oas.org/en/iachr/docs/other/Haiti2011.asp](http://oas.org/en/iachr/docs/other/Haiti2011.asp).
1526. Organization of American States, May 5, 2014, [ijdh.org/2014/05/topics/law-justice/iachr-calls-on-member-states-to-open-their-archives-on-the-human-rights-violations-committed-under-the-regime-of-jean-claude-duvalier/](http://ijdh.org/2014/05/topics/law-justice/iachr-calls-on-member-states-to-open-their-archives-on-the-human-rights-violations-committed-under-the-regime-of-jean-claude-duvalier/).
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1528. Open Society Justice Initiative, *Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico*, June 2016, 15.
1529. *Ibid.*, 18.
1530. Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública (ENVIPE) 2015.
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1538. Acuerdo para la incorporación de asistencia técnica internacional desde la perspectiva de los derechos humanos en la investigación de la desaparición forzada de 43 estudiantes de la normal rural Raúl Isidro Burgos de Ayotzinapa, Guerrero, dentro de las medidas cautelares MC/409/14 y en el marco de las facultades de monitoreo que la CIDH ejerce sobre la situación de los derechos humanos en la región, available at: [oas.org/es/cidh/mandato/docs/Acuerdo-Addendum-Mexico-CIDH.pdf](http://oas.org/es/cidh/mandato/docs/Acuerdo-Addendum-Mexico-CIDH.pdf). For more information on the formation of the GIEI and the implementation of its mandate, see Carlos M. Beristain et al., *Metodologías de investigación, búsqueda y atención a las víctimas*, FLACSO, 2016, available at: [flacso.edu.mx/agenda/Metodologias-de-investigacion-busqueda-y-atencion-las-victimas-Del-caso-Ayotzinapa-nuevos](http://flacso.edu.mx/agenda/Metodologias-de-investigacion-busqueda-y-atencion-las-victimas-Del-caso-Ayotzinapa-nuevos).
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1550. See “Eight Defendants Charged with Distributing Heroin in Chicago Area on Behalf of Guerrero Unidos Mexican Drug Cartel,” press release, available at: [www.justice.gov/usao-ndil/pr/eight-defendants-charged-distributing-heroin-chicago-area-behalf-guerrero-unidos](http://www.justice.gov/usao-ndil/pr/eight-defendants-charged-distributing-heroin-chicago-area-behalf-guerrero-unidos).
1551. See Informe Ayotzinapa II, 11 available at: <https://drive.google.com/file/d/oB3wuz7S3S9urNFFlZUNMSldQUlk/view>.
1552. Ibid.
1553. See “Mexican Attorney General’s Office Accused of Torture, Bribes, to Manipulate Ayotzinapa Investigation,” available at: [www.univision.com/univision-news/latin-america/mexican-attorney-generals-office-accused-of-torture-bribes-to-manipulate-ayotzinapa-investigation](http://www.univision.com/univision-news/latin-america/mexican-attorney-generals-office-accused-of-torture-bribes-to-manipulate-ayotzinapa-investigation).
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1561. See “Follow-Up Mechanism to Ayotzinapa Case Makes Second Visit,” press release, available at: [oas.org/en/iachr/media\\_center/PReleases/2017/049.asp?utm\\_source=WOLA+Mailing+List&utm\\_campaign=a026092a13-EMAIL\\_CAMPAIGN\\_2017\\_04\\_26&utm\\_medium=email&utm\\_term=0\\_54f161a431-a026092a13-](https://oas.org/en/iachr/media_center/PReleases/2017/049.asp?utm_source=WOLA+Mailing+List&utm_campaign=a026092a13-EMAIL_CAMPAIGN_2017_04_26&utm_medium=email&utm_term=0_54f161a431-a026092a13-)
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1567. See 2011–2016 IACHR Budget, available at: [www.oas.org/en/iachr/mandate/financial\\_resources.asp](https://www.oas.org/en/iachr/mandate/financial_resources.asp).
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# ANNEX 3: MECHANISMS IN ASIA

## BANGLADESH: INTERNATIONAL CRIMINAL TRIBUNAL

### Conflict Background and Political Context

Bangladesh's independence from Pakistan came at great cost. In 1971, the Pakistani army invaded what was then East Pakistan to quell the Bengali independence movement. Although there is no reliable data, estimates are that up to three million people were killed between March and December 1971, accompanied by widespread torture and the rape of hundreds of thousands of women. The minority Hindu population also paid a huge price in the conflict. Millions of people were displaced to India, which eventually intervened militarily to end the Bangladesh Liberation War. Soon after the conflict, calls for justice arose, but an agreement among India, Pakistan, and Bangladesh essentially granted a general amnesty for all Pakistani participants in the violence.<sup>1569</sup> However, some domestic prosecutions took place, pursuant to a 1973 international crimes statute.<sup>1570</sup> In 1975, a military coup overthrew the postwar Awami League government and assassinated Prime Minister Sheikh Mujibur Rahman. A successor government, led by General Ziaur Rahman, halted all trials.

Military rule continued in the 1980s, and democracy was only restored in 1991. In 2009, Prime Minister Sheikh Hasina—daughter of Sheikh Rahman—was elected in a landslide victory, bringing to supermajority power the long-term opposition party, the Bangladesh Awami League. The new government quickly lived up to its election promise to prosecute serious crimes committed in 1971, dusting off and amending the 1973 International Criminal (Tribunals) Act and establishing a domestic tribunal for the prosecution of war crimes. The International Crimes Tribunal (ICT) operates in a polarized political environment and has “deepened already considerable divisions within the Bangladeshi political elite.”<sup>1571</sup> While perceived as a welcome accountability tool among the general population, the political opposition and international observers have widely criticized the tribunal for its lack of international fair trial standards and of judicial independence, as well as its one-sided application of justice.

## Existing Justice-Sector Capacity

At the time of the ICT's creation in 2010, the justice sector in Bangladesh faced several constraints in delivering timely and effective justice to its citizens, even beyond the immense challenge for investigators and prosecutors in assembling evidence of crimes four decades after the fact. The United Nations Development Program (UNDP) assessed in 2012 that problems included a backlog of approximately two million cases, outdated laws, the absence of sufficient infrastructure and facilities, lack of access to justice for the majority of the population, and a lack of coordination and cooperation among the key justice delivery agencies as well as (international) nongovernmental organizations involved in the justice sector.<sup>1572</sup>

In the 39 years following the war, Bangladeshi governments and the international community showed very little interest in bringing to justice the perpetrators of grave crimes during the independence war. Neither the military leaders in the 1980s nor the Bangladesh Nationalist Party (BNP) elected in 1991 sought to prosecute wartime crimes, undoubtedly because of the involvement of several of their leaders. In a 2009 report, Human Rights Watch concluded that “there has been a lack of political will under successive governments to hold accountable those responsible for human rights violations. Of the thousands of killings of individuals in the custody of the security forces since independence in 1971 ... very few cases have resulted in a criminal conviction.”<sup>1573</sup>

## Existing Civil Society Capacity

Bangladesh has one of the world's largest civil society sectors and has a tradition of civil society advocacy and activism dating back to Pakistani rule. In a country that has been battered by natural disasters throughout its history, NGOs have traditionally focused on rural development, relief, and rehabilitation. In 1972, the Bangladesh Rural Advancement Committee (BRAC) formed with the goal of resettling returning wartime refugees. Since the end of the war, civil society has increasingly focused its attention on social and economic development, and has increasingly become involved in addressing legal and political issues, including judicial and legal reforms.<sup>1574</sup> NGOs playing an important role in the advancement of human rights and the development of the justice sector include Odhikar (“rights” in Bengali), Ain o Salish Kendra (ASK), and Hotline Bangladesh.

Since the country's return to civilian rule in 1991, domestic civil society groups have led an unrelenting struggle for accountability for crimes committed during the 1971 war.<sup>1575</sup> A Peoples' Tribunal for war crimes trials was held in 1992 in Dhaka, symbolically prosecuting both Pakistani and Bangladeshi perpetrators for crimes against humanity. A People's Inquiry Commission, which investigated war crimes, and a National Coordinating Committee for Realization of Bangladesh Liberation War Ideals and Trial of Bangladesh War Criminals of 1971—a civil society-led movement that has worked on gathering evidence, collecting witness statements, and advocating for war crimes trials—were also created during that time.<sup>1576</sup>

The creation of the ICT saw increased government repression of voices critical of the tribunal's functioning amid a general shrinking space for civil society groups. ICT prosecutors have brought contempt cases against critics of the tribunal. (For further examination, see the *Prosecutions* section, below.) In an environment of growing hostility to criticism of government of any kind,<sup>1577</sup> some NGOs nevertheless remain involved in monitoring the tribunal's work.

## Creation

Almost immediately after the end of the War of Independence, the Sheik Mujibur Rahman government passed the 1972 Collaborators Order,<sup>1578</sup> which led to the arrest of thousands of Bengali war crimes suspects. Proceedings were initiated against 2,849 individuals, and some 750 people were eventually convicted. In 1973 the government additionally passed an Indemnity Order,<sup>1579</sup> granting immunity from prosecution to anyone who had fought “in the service of the Republic” and for any acts committed during the independence struggle, thereby effectively sparing Awami League affiliates from prosecution.<sup>1580</sup> In December 1973, on the celebration of the second “Victory Day” of the war, a presidential order limited further trials by declaring a general amnesty for wartime collaborators against whom proceedings had not yet been initiated, with the exception of rape, murder, and arson cases. Between 1972 and 1974, a total of 37,400 persons were arrested and investigated, and about 11,000 perpetrators faced trial under the Collaborators Order.<sup>1581</sup>

In 1972, the International Commission of Jurists (ICJ) published a legal study on wartime events and concluded that “it would be preferable if those considered principally responsible for these offences were tried under international law before an international tribunal.”<sup>1582</sup> It argued that a United Nations hybrid tribunal with international judges would be better able to ensure fair trials. However, the

international community showed little interest, and the Awami League government opposed the idea, so an international tribunal was never created. Instead, the ICJ consulted with the Bangladeshi government on the creation of a domestic mechanism for the prosecution of international crimes, which resulted in the adoption of the International Crimes (Tribunals) Act in 1973. At the time, no war crimes trials were held under the ICT Act.<sup>1583</sup>

After the 1975 assassination of Sheikh Rahman and overthrow of the Awami League government, the new military government repealed the Collaborators Order, ended all war crimes proceedings, annulled several judgments, and released all suspects. The new administration even installed some of those previously convicted in high-level government positions. When military rule ended in 1991, the interest in accountability reemerged, and the National Committee for the Realization of the Bangladesh Liberation War Ideals and Trials of Bangladeshi War Criminals of 1971 was set up and started gathering evidence, conducting interviews with witnesses of war crimes, and advocating for prosecutions.<sup>1584</sup> Other initiatives included the Peoples' Tribunal established in 1992, which held mock trials of several high-level suspects (including some who would later stand accused before the ICT), and a People's Inquiry Commission, which investigated war crimes. The Bangladesh Liberation War Museum, established in 1996, contributed to the push to deal with the past by organizing two Genocide and Justice Conferences in the 2000s.<sup>1585</sup>

The Awami League won the 2008 elections, following a campaign in which it promised to hold war crimes trials. The new government amended the 1973 ICT Act in 2009,<sup>1586</sup> and the International Crimes Tribunal of Bangladesh (ICT) was established on March 25, 2010, on the anniversary of the war's beginning in 1971. A second war crimes chamber—the International Crimes Tribunal of Bangladesh-2 (ICT-2)—started operations in March 2012, but was later shuttered. While they coexisted, both tribunals operated under the 1973 act and shared the same prosecutorial and investigative teams, but the ICT-2 developed its own Rules of Procedure and Evidence.<sup>1587</sup>

## **Legal Framework and Mandate**

The ICT Act was adopted in 1973 “to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.”<sup>1588</sup> The ICT's founding statute was one of the first attempts at international law prosecutions since the Nuremberg and Tokyo trials,

and many legal experts regard it as a progressive piece of legislation for its time. However, by the time of the ICT's creation, 39 years after the commission of the crimes and 37 years after the law's adoption, the field of international criminal law had advanced immensely and the 1973 law had become outdated.<sup>1589</sup> In 2009 and 2012, the government adopted minimal amendments to the statute, while rejecting recommendations from many outside experts. According to many observers, the amendments were insufficient to bring the law in line with basic international standards.<sup>1590</sup>

The ICT's mandate covers three core international crimes—genocide, war crimes, crimes against humanity—as well as crimes against peace, committed in Bangladesh “before or after the commencement” of the 1973 act.<sup>1591</sup> The elements of the crimes are defined as follows:

- (a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;
- (b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent Births within the group; (v) forcibly transferring children of the group to another group;
- (d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

- (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;
- (f) any other crimes under international law.<sup>1592</sup>

The three core international crimes in the statute are largely based on the Nuremberg International Military Tribunal (IMT) Charter and on customary international law at the time of its writing. As such, they do not reflect developments in modern international criminal law through the creation and jurisprudence of the ad hoc international tribunals for Yugoslavia and Rwanda (ICTY and ICTR, respectively), the Special Court for Sierra Leone (SCSC), or the International Criminal Court (ICC). This includes contemporary Rules of Procedure and Evidence, and international standards of fairness.<sup>1593</sup> There are several other problems arising from the application of an outdated legal framework relating to the legality and retroactivity principles in international law. Namely, Bangladesh is applying the Genocide Convention although it was not signatory to the 1949 Convention at the time;<sup>1594</sup> it has defined war crimes based on the IMT Charter, which concerned an armed conflict of international character, while the independence war was an internal conflict; and it includes the vague term “other crimes under international law.”<sup>1595</sup>

The ICT Act was originally designed foremost for the prosecution of members of the Pakistan Armed Forces, affiliated Bengali militias, and other forces that had collaborated with the Pakistani army during the conflict. Initially, the personal jurisdiction of the ICT was limited to individuals or groups of individuals who were members of the armed or defense forces, including paramilitary groups, who committed crimes on the territory of Bangladesh; this was later amended to include non-military personnel.<sup>1596</sup> After the 1974 Delhi agreement among India, Pakistan, and Bangladesh, it became technically impossible for the ICT to prosecute Pakistanis because the statute only allows the ICT to hear cases related to persons on the territory of Bangladesh. Beyond individual criminal responsibility, the ICT Act recognizes command responsibility for crimes under the statute, which is by now a customary norm of international law, but wasn’t established as such at the time of its adoption. Article 5(1) of the ICT Act sets out that official capacity is no bar to prosecution or the mitigation of punishment before the tribunal, meaning that state officials do not necessarily enjoy immunity from criminal proceedings for crimes they committed during their time in office.<sup>1597</sup>

Beyond the prosecution of international crimes, the ICT may bring contempt charges against “any person, who obstructs or abuses its process or disobeys any of

its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine[s] which may extend to Taka five thousand [about US\$60 in 2017], or with both.”<sup>1598</sup> The tribunal has convicted several local and international media and civil society representatives under this provision, with no right to appeal.

International observers decry several provisions of the ICT Statute as being inadequate and resulting in unfair trials. This includes an article stating that the Criminal Procedure Code and Evidence Act are not applicable to any proceedings of the tribunal, the approval of trials in absentia with a final judgment, the removal of the right against self-incrimination, and the absence of a provision requiring adequate time for preparation of the defense case.<sup>1599</sup> The application of the death penalty under Article 20(2) is perhaps the most controversial aspect of the ICT Statute, especially because its use has become the standard rather than the exception and because the application of death sentences has not been done in accordance with international law.<sup>1600</sup> The International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a signatory, determines that the death penalty may only be applied in limited circumstances and that the convicted must be given a right to appeal and an opportunity to ask for mercy. Despite a theoretical right to appeal death sentences, neither of the ICCPR’s conditions have been followed in practice before the ICT.<sup>1601</sup>

In 1972, the government amended Article 47 and 47(A) of the Constitution of Bangladesh to allow for the speedy prosecution of Pakistani army generals, and critics argue that this contributes to unfairness. Article 47 states: “Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces ... or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful.”<sup>1602</sup> Additionally Article 47(A) further denies war crimes suspects the right to appeal to the Supreme Court in case of violations of their rights under the Constitution. This results in a complete absence of constitutional protections for the accused before the ICT, as well as an absence of the ability to enforce their fundamental constitutional rights in court.”<sup>1603</sup>

In addition to the ICT Act, in 2010 the ICT adopted the International Crimes Tribunal Rules of Procedure. These set out the powers and functions of the tribunal,

the Investigating Authority (a designated agency for investigations into crimes under the statute created under Article 8 of the ICT Act), the prosecutor, and the registrar. They also define the rights of the accused and rules of evidence.<sup>1604</sup>

## **Location**

The ICT is located in Dhaka, Bangladesh's capital, and is composed of two separate tribunals: ICT-1 and ICT-2. According to the in 2012 amended Article 11(A) of the ICT Act, "At any stage of a case, a Tribunal may, on its own motion or on the application of the Chief Prosecutor, by an order in writing, transfer the case to another Tribunal, whenever it considers such transfer to be just, expedient and convenient for the proper dispensation of justice and expeditious disposal of such cases."<sup>1605</sup> Thus far, the tribunal has not made use of this provision. The tribunal is housed in a historic building, formerly used as the premises of the East Pakistan High Court. Upon its creation, the building was completely refurbished, and a public gallery and designated media area were created, as well as rooms with large video screens to allow overflow audiences to view the proceedings.<sup>1606</sup>

## **Structure and Composition**

The ICT is comprised of one chamber (previously two), an Investigation Agency, and a Registry. Apart from the involvement of international defense counsel (who have been prevented from appearing in court), the ICT's judges, prosecutors, and court staff are Bangladeshi nationals.

## ***Chambers***

The ICT is comprised of one three-judge chamber, the ICT-1, which started operations in 2010. A second chamber, ICT-2, was created in March 2012 but has not been active since September 2015.<sup>1607</sup> The Appellate Division of the Bangladesh Supreme Court hears appeals from the ICT.<sup>1608</sup> Under the 2010 amendment of the ICT Act, all judges must be civilian, and military judges are not eligible for appointment. Any person who is a judge, is qualified to be a judge, or has been a judge of the Supreme Court of Bangladesh is eligible for appointment as a chairman or member of a tribunal. The government of Bangladesh appoints ICT judges and may at any time in the proceedings, whether due to illness of a judge or "any other reason," declare a judge's seat vacant and appoint another.<sup>1609</sup> Judicial replacements have been a much-used practice before the tribunal, leading to criticism of political

interference and unfair trials. In some cases, the government replaced the full bench of judges over the course of the trial, resulting in a verdict rendered by judges who had only heard part of the evidence.<sup>1610</sup>

### ***Investigative Authority***

The ICT Act sets out as follows: “The Government may establish an Agency for the purposes of investigation into crimes [under the jurisdiction of the Tribunal]; and any officer belonging to the Agency shall have the right to assist the prosecution during the trial.”<sup>1611</sup> The staff of the Investigative Agency is appointed by the government and is tasked with the investigation of cases; when there is sufficient reason to believe that a crime under the statute has been committed, the agency may take steps to arrest the accused.<sup>1612</sup> After completion of an investigation, the Investigative Authority submits a report and all evidence to the chief prosecutor, who brings formal charges against the accused.<sup>1613</sup> The Investigative Authority’s reports are not provided to the defense.<sup>1614</sup> The government of Bangladesh also appoints the chief prosecutor and other prosecutors.<sup>1615</sup>

### ***Office of the Tribunal***

The Office of the Tribunal, which is equal to the Registry in other courts, is responsible for all administrative and secretarial services of the ICT, maintaining external relations, and serving as its channel of communication.<sup>1616</sup> The office is composed of a registrar and a deputy registrar.<sup>1617</sup> The office may control the entry of persons to the public gallery of the courtrooms, and the Rules of Procedure specifically state that “for ensuring orderly and disciplined state of affairs inside the court-room of the Tribunal, no counsel, journalist, media person or other people shall be allowed to enter the court room without having an ‘entry pass’ issued by the Registrar.”<sup>1618</sup>

### ***Structural Limitations of the ICT***

According to international observers, flaws in the composition and structure of the ICT include: the lack of an internal Appeals Chamber, the prohibition of any challenge to the composition of the tribunal or the appointment of judges, the absence of offices dedicated to ensuring defense rights, the absence of structures for the protection and support of victims and witnesses, and the absence of an outreach office.<sup>1619</sup> Under the Rules of Procedure and Evidence, the tribunal “may pass necessary orders directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential and the other side will not be notified.”<sup>1620</sup> However, to date,

the protective and security measures in place remain limited, and there have been reports of witness intimidation, interference, and disappearance.<sup>1621</sup>

## Prosecutions

The ICT arrested its first suspects in June and July 2010,<sup>1622</sup> and the first trial commenced in October 2011.<sup>1623</sup> As of 2017, the ICT-1 and ICT-2 Chambers combined have delivered 28 judgments against a total of 56 accused.<sup>1624</sup> The majority of the defendants are senior leaders in Bangladesh's main opposition parties, the Jamaat-e-Islami (JI) and the Bangladeshi National Party (BNP). As of October 2017, there have been no ICT defendants who have been acquitted of all charges brought against them. At least 20 suspects have been tried in absentia, several in group trials.<sup>1625</sup> Most defendants are charged with crimes against humanity, while some are also charged with political crimes.<sup>1626</sup> While there was hope that proceedings at the ICT would shed light on the widespread rape and other sexual violence targeting Bengali women during the conflict, there have been only a few cases resulting in judgments for rape and other crimes of sexual violence.<sup>1627</sup>

In addition to grave crimes cases, the tribunal has been involved in a range of contempt proceedings against national and international media and human rights organizations, cases which may be brought to the court under Article 11(4) of the statute. *The Economist*, the local newspaper *Amar Desh*, Human Rights Watch, and British journalist David Bergman have all been subject to such proceedings in relation to critical reporting on the tribunal.<sup>1628</sup> This included reporting based on hacked correspondence that exposed clear evidence of judges being under political influence.<sup>1629</sup> Within Bangladesh, room for debate about the effectiveness and functioning of the ICT is severely limited.<sup>1630</sup>

Many observers regard the trials conducted before the ICT as fundamentally unfair, not in accordance with Bangladeshi or international law standards, and as a political instrument for the current Awami League government to exact revenge on opponents. Critics have also noted that Bangladesh lacks the legal infrastructure and technical capacity on the prosecution and defense sides to deal with complex international crimes trials.<sup>1631</sup> English barrister Geoffrey Robertson, who wrote an extensive report on the ICT's functioning in 2015, has stated: "I am sorry to say this, for I think the exercise itself laudable and necessary, and many of its participants have been doing their best to make it work, but the evidence set out in this report drives me to the conclusion that this trial process is calibrated to send defendants—all from the Jamaat or the BNP—to the gallows."<sup>1632</sup>

The arrest, detention, and charging of defendants has been murky, with defendants alleging they were held without being informed of the charges against them; some defendants were not initially held under ICT warrants. In December 2011 and November 2012, the UN Working Group on Arbitrary Detention concluded that the ICT breached international law by detaining defendants without charge.<sup>1633</sup>

ICT judgments have on occasion led to violent protests between opposing political groups, instead of the long-sought reconciliation. In February 2013, the death sentence against a popular Jamaat leader, Delwar Hossain Sayeedi, led to mass demonstrations by supporters, while a life sentence judgment delivered in the same month against Abdul Quader Molla caused the “the biggest mass demonstration in the country ... in 20 years” by opponents calling for the application of the death penalty.<sup>1634</sup> During riots against the eventual execution of Molla in December 2013, about 200 people were killed.<sup>1635</sup> By the beginning of 2015, about 500 people had been killed in demonstrations following the declaration or execution of death penalties.<sup>1636</sup>

## Legacy

The 1973 ICT Act intended to hold accountable the individuals responsible for genocide, war crimes, crimes against humanity, and other crimes under international law committed during the Bangladesh Liberation War. While the tribunal may be said to have held to account several perpetrators of the 1971 war, shoddy trials taint the credibility of its findings, and it has completely ignored atrocities by the pro-independence movement. There have been no prosecutions for crimes committed against the Bihari minority, which was extensively targeted during and after the war. The tribunal could have been an important opportunity for justice and reconciliation 40 years after the end of the independence war, but concerns over the fairness and independence of the proceedings have marred its legitimacy.<sup>1637</sup>

Beth Van Schaack, scholar and former deputy ambassador to the U.S. Office for Global Criminal Justice, has described the legacy of the ICT as follows:

Proceedings underway before the [B]ICT pervert the values and goals of transitional justice, insult the victims who deserve a more legitimate accountability process, and threaten to leave a lasting stain on both the Bangladeshi legal system and the system of international justice writ large. Many of the defendants may in fact be guilty of the crimes of which they are charged. But because the proceedings are so profoundly unfair, and the defendants are subject to the death penalty, we will never

know for certain. Once hailed as a courageous and important exercise in historical justice, the BICT has become an object lesson for how international criminal law can be manipulated for political ends.<sup>1638</sup>

### ***Impact on Society***

Despite international criticism, the tribunal has undoubtedly engaged the Bangladeshi population and has generally received public support. An April 2013 opinion poll by a global marketing research firm showed that although almost two-thirds of the population thought that the war crimes trials are unfair, the ICT is seen by 86 percent of the population as a positive step made by the government.<sup>1639</sup> However, widespread demonstrations by both ICT opponents and supporters have often followed the tribunal's sentencing decisions, strongly suggesting that this flawed form of domestic justice has exacerbated existing social division.

### ***Dealing with the Past***

Upon its creation, supporters touted the ICT as an opportunity to deal with the legacy of the war and repair some of the harm done to society. ICT proceedings held out the prospect of ending a culture of impunity that had persisted since the end of the war and of establishing the truth about what happened. The tribunal has doubtless shed some light on the "scale and the bestiality of the murders and rapes in East Pakistan in 1971."<sup>1640</sup> However, due to the unfairness of proceedings and the one-sided application of justice, Bangladeshis remain unable to openly debate the events of 1971, and the Awami League government appears to be using the ICT as tool for vengeance rather than national reconciliation, "while denying others the right to challenge its account for fear of retribution."<sup>1641</sup>

### **Financing**

In 2011, the International Center for Transitional Justice reported that a budget of about US\$1.44 million had been set aside for the ICT by the government of Bangladesh for the entirety of its proceedings.<sup>1642</sup> Although the ICT is a completely domestic mechanism financed through the regular state budget, the Ministry of Law, Justice and Parliamentary Affairs does not report on its annual budget. International financial support for the tribunal has been almost completely absent, because of the possibility for the application of the death penalty in the ICT's sentencing.<sup>1643</sup>

## Oversight and Accountability

The ICT lacks an internal independent monitoring mechanism to assess the quality of proceedings and appointment of judges and prosecutors. Because the government is responsible for appointments, and may replace judges at any point in the proceedings, the absence of objective criteria for judicial performance creates greater space for arbitrary decisions.

Due to the severe restrictions on domestic criticism of the ICT, informal forms of oversight have mostly been international. International human rights organizations and international law bodies initially welcomed the creation of the ICT and offered assistance and advice. The Office of Global Criminal Justice at the U.S. State Department has furnished technical and legal advice on the structure and jurisdiction of the ICT, and former U.S. Ambassador-at-Large for War Crimes Issues Stephen Rapp visited Bangladesh on multiple occasions while in that position.<sup>1644</sup> Upon the ICT's creation, Human Rights Watch and the International Bar Association conducted substantive legal reviews and offered suggestions for amending the ICT's rules of procedure. While international observers continue to monitor and comment on the ICT's proceedings, their involvement and interaction with the Tribunal has diminished over the years. Those who have been critical of the ICT's functioning, including *The Economist*, Human Rights Watch, and journalist David Bergman, have found themselves charged with "scandalization" offenses.

Sustained and cohesive international and civil society involvement in the ICT is lacking, which is partially due to the limited space for criticism of the tribunal. A public, unbiased clearinghouse of information about the ICT is unavailable, making it difficult to collect basic information.<sup>1645</sup> Until the end of 2013, the Bangladesh Trial Observer, an initiative by the Asian International Justice Initiative in cooperation with the Berkeley War Crimes Studies Center and East-West Center, offered "independent, objective coverage of trial proceedings at the International Crimes Tribunal in Bangladesh," by producing daily trial monitoring reports.<sup>1646</sup>

# **CAMBODIA: EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

## **Conflict Background and Political Context**

The Khmer Rouge, formally known as the Communist Party of Kampuchea, assumed power in Cambodia in April 1975. Led by Pol Pot, the Khmer Rouge ruled until January 1979 and implemented ruinous and brutal policies that led to deaths on a massive scale, with estimates ranging from 1.7 to 3 million dead. The Khmer Rouge's policy of forced migration from cities into the countryside led to countless deaths, and a campaign of political oppression against the Cambodian population included the curtailment of nearly all basic rights, campaigns of forced labor, executions of hundreds of thousands, and the establishment of vast prison systems. In the most notorious prison in Cambodia, known as S-21, only about 12 prisoners out of 14,000 reportedly survived.<sup>1647</sup> In 1979, Vietnamese troops captured Phnom Penh, Cambodia's capital, and the Khmer Rouge leaders fled to Thailand, where they continued to carry out military campaigns. Until 1990, the United Nations recognized the Khmer Rouge as the legitimate representative government of Cambodia. The Paris Agreement of October 1991 achieved a comprehensive settlement with the Khmer Rouge, which continued to exist until 1999, when nearly all of the former leaders had "defected to the Royal Government of Cambodia, been arrested, or had died."<sup>1648</sup>

Although the country has democratic institutions on paper, longtime Prime Minister Hun Sen's Cambodia is an authoritarian state with a reputation for widespread corruption. The government was party to the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC) but has demonstrated limited tolerance for letting it operate independently in a way that could raise popular expectations for accountability more generally. Beyond broad criticism of corruption within the judicial system, there have been accusations of executive interference by the Cambodian government in the selection and appointment of national judges at the ECCC.<sup>1649</sup> National investigative judges may also have been politically motivated in blocking investigations in two of the court's four cases.<sup>1650</sup>

## **Existing Justice-Sector Capacity**

The Khmer Rouge reign left few legal practitioners and scholars remaining in Cambodia; most were killed or fled the country. At the time the ECCC was

negotiated and created, beginning in the late 1990s, there was no culture of judicial independence; practitioners lacked basic competencies; the system had poor infrastructure, including courthouses and jails; and exceedingly low pay fueled widespread corruption. Trials targeting security-sector officials were also routinely prone to disruption or termination by government entities.<sup>1651</sup>

## **Existing Civil Society Capacity**

The targeting of intellectuals under the Khmer Rouge meant that civil society organizations were decimated under its rule. Civil society organizations, heavily dependent on foreign assistance and thus prone to government attack, only began to re-emerge after the 1991 signing of the Paris Peace Accords.<sup>1652</sup> The Documentation Center of Cambodia (DC-Cam), which spun off from a Yale University research project in 1997, has been the leading organization documenting the atrocities of the Khmer Rouge era. Especially for a court challenged to scrutinize events now decades in the past, DC-Cam's massive catalogue of information has proved invaluable to the ECCC's work. As the court has spurred national conversations about the past, various civil society organizations have become more involved. For example, the court's refusal to reopen investigations into Case 003 led to vocal protests by Cambodian civil society in May 2011.<sup>1653</sup>

## **Creation**

The initiative for the creation of a mechanism to prosecute atrocity crimes committed by the Khmer Rouge regime stretches back to the early 1980s. Cold war politics and geopolitical maneuverings by the United States blocked initiatives for accountability measures. The United States opposed an early proposal for an international tribunal put forward by Australian Foreign Minister Bill Hayden in 1986. Although a UN Special Rapporteur labeled the regime's acts as genocide in 1986, the UN General Assembly avoided use of the term. In 1990, DC-Cam called for an international court to be established, with little traction. In 1997, the co-prime ministers of Cambodia requested the assistance of the UN and the international community in instituting an accountability mechanism. However, the Cambodian government's desire for accountability was not unqualified or consistent; in September 1996, it granted amnesty to Ieng Sary (who later became a defendant before the ECCC).

For the United Nations, the challenge was to gain agreement on a mechanism that would be able to operate with Cambodian participation, but with sufficient independence. Specifically, the UN and others in the international community were concerned about a lack of judicial independence and capacity in Cambodia, as well as suspicion that the Hun Sen government would try to control who would be investigated, prosecuted, and tried.

The Cambodian government, which includes some former members of the Khmer Rouge, steadfastly opposed any court that would be composed of a majority of international judges or an international prosecutor, and in 2001 the Cambodian legislature passed a domestic law providing for the creation of specialized domestic chambers.<sup>1654</sup> During the negotiations to establish this judicial body, the UN General Assembly passed resolution 57/228,<sup>1655</sup> which essentially requested that UN negotiators accept the creation of a national court that would receive international assistance.<sup>1656</sup> Despite this resolution, the UN Secretary-General sent a draft “Framework Agreement” to the UN General Assembly. This Framework Agreement proposed the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC), but also included a strong warning about serious flaws in the ECCC’s proposed design. The General Assembly approved the draft with no changes on May 13, 2003, and it was signed on June 6, 2003.<sup>1657</sup> The ECCC had a weakened structure from the start, watered down after extensive negotiations and compromise between the international community and the Cambodian government. Although the agreement was finalized in 2003, the ECCC did not officially start work until February 2006<sup>1658</sup> and has since issued indictments in only two cases against five individuals (one defendant, Ieng Thirith, was found mentally unfit for trial; another, Ieng Sary, died).

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## **The UN Group of Experts for Cambodia and Proposals for an *Ad Hoc* International Criminal Tribunal**

In 1998, the UN Secretary-General empanelled a “Group of Experts” to explore prosecution options and to assess Cambodian judicial capacity. After a 10-day visit to Cambodia in November 1998, that included little evidence-gathering or fact-finding, the Group of Experts issued a brief report surveying and evaluating politically feasible options for prosecutions.<sup>1659</sup> The Group of Experts recommended that prosecutions be conducted for those most responsible for serious crimes, but found severe deficiencies in Cambodia’s judicial system. The group considered

and rejected proposals for a “mixed or foreign court established by Cambodia,” concerned that “such a process would be subject to manipulation by political forces in Cambodia.”<sup>1660</sup> In a prescient passage, given ongoing political difficulties in establishing such a tribunal, the group noted: “Possibilities for undue influence are manifold, including in the content of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and on prosecutorial, defense and investigative staffs. A Cambodian court and prosecutorial system, even with significant international personnel, would still need the Government’s permission to undertake most of its tasks and could lose independence at critical junctures.”<sup>1661</sup>

Instead, the Group of Experts recommended the UN Security Council exercise Chapter VII powers to create an ad hoc international tribunal, with a single international prosecutor.<sup>1662</sup> This proposal was rejected by the Cambodian government, and the UN balked. Intense negotiations between the UN and Cambodia began in the spring of 1999 on the design of a mixed international criminal tribunal, with the Cambodian government at times proposing fully domestic trials with international technical assistance.

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## **Legal Framework and Mandate**

The ECCC is an independent institution within the Cambodian judiciary, created by a statute that incorporates the Framework Agreement between the Cambodian government and the UN. The ECCC, which is staffed by both Cambodian and international employees, has adopted internal rules and practice directions within the framework of domestic law, noting that international rules of procedure may be taken into account to fill gaps or to ensure that international standards are met.

The ECCC has jurisdiction over “senior leaders of Democratic Kampuchea ... [or] those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia ... committed during the period April 17, 1975[,] to January 6, 1979.”<sup>1663</sup> ECCC prosecutors are obligated under the internal rules to investigate any crimes they have “reason to believe” fall within the jurisdiction of the ECCC.<sup>1664</sup> With respect to two cases before the ECCC (known as Cases 003 and 004), the national (Cambodian) co-investigating judge and one international co-investigating judge—as well as the government of Cambodia—have been accused of manipulating the case files and investigations to “create the illusion of ... genuine investigation[s]”

so that cases that the government wishes to prevent from going forward are dismissed.<sup>1665</sup>

The ECCC uses an amalgam of civil and common law. Civil party victims are represented by counsel as civil parties and have limited rights to reparations. The co-prosecutors undertake preliminary investigations and trigger judicial investigations by filing submissions with the Office of Co-Investigating Judges (OCIJ, comprising one national and one international judge). The co-investigating judges, or one of them acting alone, conducts judicial investigations and issues closing orders with the decision to indict the charged person or dismiss the charges.<sup>1666</sup>

### ***The Super Majority Rule***

The negotiated compromise between the UN and Cambodia produced a court with a majority of Cambodian judges in each chamber and a dual administrative system run by domestic authorities and the United Nations.<sup>1667</sup> Chambers consist of joint panels of international and Cambodian judges, which make decisions by a “super majority” vote: four out of five judges at the Pre-Trial and Trial Chambers, and five out of seven judges at the Supreme Court Chamber. The super-majority rule is designed to check and guard the independence of the court by “ensuring no significant decision is made without the concurrence of at least one international judge.”<sup>1668</sup> For example, when the co-investigative judges or co-prosecutors disagree about whether to proceed with an investigation or the submission of charges, the Pre-Trial Chamber resolves the dispute. A supermajority decision is required to block the legal proceedings from continuing. This procedure was invoked in Cases 003 and 004 (discussed in detail, below), when the international prosecutor sought to send the cases to the co-investigating judges for investigations, in disagreement with the national prosecutor. The dispute was submitted to the Pre-Trial Chamber, which split along international and national lines as to whether the investigations should proceed (three national judges against; two in favor). However, because the supermajority rule requires four judges to quash an investigation, the case proceeded to the investigation stage.

Victims can participate formally at the ECCC in two ways: submit complaints to the co-prosecutor, or petition to participate as civil parties, thus recognized as parties to the proceedings and allowed to claim collective and moral reparations.<sup>1669</sup>

This structure appeared to open a groundbreaking opportunity for legal participation of victims. However, the jurisprudence developed in the first trial and subsequent changes in the internal rules significantly diminished the rights of victims’ civil

lawyers to participate in proceedings, and the balance may have shifted so that there is minimal difference between the rights of victims at the ECCC and other international or hybrid tribunals.<sup>1670</sup> This jurisprudential narrowing of the role of victims-complainants and civil parties may reflect, in part, an understanding by the ECCC that the court could not logistically or financially handle the full number of civil party applicants. In Case 001, there were a total of 94 applicants; while for Case 002, about 3,850 were admitted.

The ECCC, in theory, wields a novel power allowing civil parties to seek “collective and moral reparations,” which prior generations of international hybrid criminal courts did not have.<sup>1671</sup> Of the 36 forms of reparations requested by civil parties in the *Duch* trial, only two were granted: the inclusion of immediate victims and civil party names in the final judgment, and the compilation and publication of apologetic statements made by Duch during the trial. Among other reparations requests denied by the court were the establishment of a victims’ trust fund to finance temples and memorials, the preservation of atrocity crimes sites, and the declaration of a national memorial day.<sup>1672</sup> The Trial Chamber refused to allow symbolic or moral repartitions that required funding or involved ordering the government of Cambodia to take any actions. Following the *Duch* case, it was clear that reparations would have to be funded from the assets of convicted persons (who claimed indigence) or from donor funds.

## Location

The ECCC is located in the Cambodian capital of Phnom Penh. It was not always clear that the mechanism created to deal with the crimes of the Khmer Rouge would be located in-country. The UN Group of Experts for Cambodia (see text box, below), which in 1999 proposed the creation of an ad hoc tribunal along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), weighed three potential locations for a court: Cambodia, The Hague, or elsewhere.<sup>1673</sup> Although recognizing the advantages of a court accessible to witnesses, Cambodian media, and the general public, the group recommended against locating the mechanism in-country because it felt that this would jeopardize security and make the institution too prone to political pressures. It rejected the option of The Hague (including possible co-location with the ICTY) as too distant and recommended a location “somewhere in the Asia-Pacific region.”<sup>1674</sup> From the Cambodian government’s response to that report and throughout the ensuing negotiations, it was clear that any mechanism brought into existence would have to be located in Phnom Penh.

## **Structure and Composition**

The ECCC is comprised of the Office of the Co-Investigating Judges, headed by one Cambodian and one international judge; Chambers (composed of the Pre-Trial, Trial, and Supreme Court divisions); the Office of the Co-Prosecutors (OCP) headed by one Cambodian and one international prosecutor; and the Office of Administration (with a Cambodian director, and an international deputy). Reserve national and international judges and a reserve national and international prosecutor are appointed in each of these offices. Effectively, the court is split into national and international sides, with the idea that those sides cooperate (though as discussed below, this idea has remained unrealized for a certain portion of the court's caseload).

While the ECCC's framework is intended to include domestic and international members equally, "overall personnel changes continue to reinforce the court's national representation while failing to fill gaps on the court's international side in administration, victims' support and defense."<sup>1675</sup> The hybrid staffing structure was intended, in part, to facilitate capacity building and skills exchanges between national and international judicial personnel. Without formalized programs, however, such exchanges have been left to occur organically and depend on the particular unit and personalities involved.<sup>1676</sup>

### ***Chambers***

The ECCC is the only hybrid tribunal with a majority of national judges at both the trial and appellate levels. The UN Secretary-General nominates international judges to the tribunal. The Supreme Council of the Magistracy, a national body that appoints Cambodian judges to the ECCC, also determines whether international judges will sit in a reserve or full capacity. This has effectively given the Cambodian government an unintended authority over the appointment of international judges. In the Pre-Trial Chamber and the Trial Chamber, two international judges sit alongside three national judges. The Supreme Court Chamber is comprised of four Cambodian and three international judges.<sup>1677</sup>

### ***The Office of Administration***

The Office of Administration handles functions most associated with the Office of the Registry at other international tribunals, including defense support, victim support, court management, public affairs, outreach, and general staffing issues.

### ***Defense Support Section***

Each accused is entitled to both a Cambodian and international lawyer who can be selected from a roster of lawyers maintained by the Defense Support Section. Defense teams are provided with full office facilities as well as legal and administrative support, including legal research.

### ***Outreach: Public Affairs Section and Victim Support Services***

A 2011 population-based survey found that the main vehicles for disseminating information about the ECCC were media-based.<sup>1678</sup> The ECCC's Public Affairs Section (PAS) usually executes the outreach function. Outreach has at times been unevenly implemented because of the ECCC's dual (national and international) administrative offices. The unit has not been immune to politics: key national staff have shown little interest in conducting outreach on controversial Cases 003 and 004. Due to underfunding, the ECCC strongly relies on NGOs to implement outreach activities. Approximately "15 different NGOs have been directly involved in outreach activities in connection with the court since its inception, implementing a wide range of programs and contributing significantly to reaching out to rural communities."<sup>1679</sup> Along with producing media broadcasts and disseminating written information, NGOs have implemented interactive activities, including "community meetings, public forums, visits to the court, attendance at the first trial hearings and community screenings of the first trial hearings."<sup>1680</sup> The reliance on NGOs to conduct outreach has led to criticisms about lack of consistent messaging and concerns that NGOs "often produce their own messages," creating a risk that "understandings of victims' participation differ in the community."<sup>1681</sup>

PAS outreach activities during the *Duch* trial included "organizing public visits, live video feeds, assisting in production of weekly TV shows, uploading transcripts of the daily proceedings on the ECCC website, and holding weekly press briefings."<sup>1682</sup> The PAS facilitated over 27,000 individuals to attend the trial.<sup>1683</sup> PAS also produced general informational materials, and developed a one-day "Study Tour" program bringing Cambodians to the ECCC and the Tuol Sleng Museum. Over 30,000 individuals participated in this program in 2010.<sup>1684</sup> Cambodian television broadcast the *Duch* trial live, and it was widely watched, but this was not repeated for the Case 002 trials.

The Victim Support Section (VSS) coordinates assistance to civil parties at the court, which in practice means it undertakes many tasks normally handled by an outreach unit.<sup>1685</sup> The overlapping roles of the PAS and the VSS has "contributed to a broad

differentiation of audiences in terms of outreach,” with PAS having a broader focus on the general public, and the VSS having a more targeted focus on “one-to-one support to complainants and civil parties.”<sup>1686</sup> By 2012, the VSS was “all but entirely nationalized.”<sup>1687</sup> The VSS initially faced a “difficult start due to lack of funding and resources,”<sup>1688</sup> but increased its outreach activities during the *Duch* trial, organizing regional forums with civil party applicants and civil parties.

### ***UN Special Envoy***

The ECCC does not have a registrar or president, unlike other international tribunals; this has at times led to organizational difficulties because a registrar or president is usually the person designated to gather the principals of a court’s various offices to meet and discuss administrative matters.<sup>1689</sup> Following a corruption scandal at the court, the UN Secretary-General appointed a special envoy in April 2008 to fill some of the ambassadorial functions of a court president, including raising funds and representing the court’s interests to the international community. The special envoy’s position reflects the need for attention to the troubled political relationship between the UN and the Cambodian government. David Scheffer, the Special Expert to the Secretary-General on the United Nations Assistance to the Khmer Rouge Tribunal, assumed the position in January 2012, succeeding Clint Williamson and David Tolbert.

### **Prosecutions**

As of late 2017, the ECCC had fully completed two trials through final appeal, and a judgment was pending in a third case.

The first trial, known as Case 001, was against one accused person, Kaing Guek Eav, alias Duch. Duch, the former head of the infamous S-21 Prison, was convicted in July 2010 of crimes against humanity and grave breaches of the 1949 Geneva Conventions (he did not face genocide charges). The trial lasted 17 months, and an appeal was heard by the Supreme Court Chamber in 2011. In February 2012, the ECCC’s Supreme Court Chambers issued a final verdict in the *Duch* case, increasing the 30-year sentence imposed by the Trial Chamber to life imprisonment.<sup>1690</sup>

Case 002 began in November 2011 against four accused (Nuon Chea, known as “Brother Number Two,” Ieng Sary, Ieng Thirith, and Khieu Samphan). Ieng Thirith was found unfit to stand trial before the actual trial began.<sup>1691</sup> Ieng Sary died in

March 2013, 16 months after the trial began. Given concerns about the defendants' advanced ages, the ECCC issued a severance order so that the case would be sequenced in multiple segments.<sup>1692</sup> The defendants were charged with genocide, crimes against humanity, and grave breaches of the Geneva Conventions.

A September 2011 order by the Trial Chamber directed that the first stage of the trial (Case 002/1) would handle allegations of “population movement” (forced transfer of population) and crimes against humanity.<sup>1693</sup> Other parts of the original Closing Order (synonymous with “indictment”), including allegations of genocide and war crimes, were deferred to later phases of the case (Case 002/2). In Case 002/1, the Trial Chamber issued guilty verdicts against Nuon Chea and Khieu Samphan in August 2014. In November 2016, the Supreme Court Chamber upheld this ruling and the life sentences for the two convicted men, but was sharply critical of some of the Trial Chamber's legal reasoning.<sup>1694</sup> The parties in Case 002/2 against Nuon Chea and Khieu Samphan concluded their closing arguments in June 2017,<sup>1695</sup> and Trial Chamber judges were still deliberating as of October 2017.

As of late 2017, Cases 003 and 004 were underway, with charges against one accused (Im Chaem) dismissed. Investigations regarding three further accused—Meas Muth (Case 003), and Ao An and Yim Tith (Case 004)—were awaiting a decision by the international co-prosecutor on whether to refer the accused for trial. The Cambodian government, the Cambodian co-prosecutor, and the Cambodian co-investigating judge all opposed the prosecution of Cases 003 and 004.<sup>1696</sup> As the Pre-Trial Chamber could not reach a supermajority decision when the dispute between the co-prosecutors was raised, the rules dictated an outcome favoring the forwarding of the allegations to the co-investigating judges for judicial investigation in September 2009. However, the international co-investigating judge handled the subsequent judicial investigation with no assistance or cooperation from the national co-investigating judge. It remained uncertain how the standoff between the national and international officials on these cases would ultimately be resolved.

## Legacy

Ordinary Cambodians closely followed the initial trial and indictment of former high-ranking officials. While perceptions of the court are difficult to measure, indications are encouraging.<sup>1697</sup> Surveys show that a large majority of the Cambodian population are aware of the trials and support the ECCC.<sup>1698</sup> Civil party representation and well-attended hearings provided victims and the broader

population with extensive information about past events that had been disputed, or more often, taboo. Beyond the court's legal proceedings, memorialization projects and documentation centers have carried out activities related to the proceedings, including genocide education programs and the construction of victim memorials. The court's biggest success has arguably been its ability to foster discussions among Cambodians about the crimes of the past and their causes.

The ECCC's impact on the legal system has been more doubtful. On the positive side, many Cambodian staff at the court gained capacity by working on complex cases, often alongside experienced international experts. The UN's Office of the High Commissioner for Human Rights and the Cambodian Human Rights Action Committee have facilitated meetings between judicial personnel of the ECCC and national judges in the ordinary Cambodian courts to share experiences and transfer knowledge and skills.<sup>1699</sup> However, concerns about the integrity, capacity, and independence of the domestic judicial sector have increased during the court's tenure, and despite the mixed structure of the court, it has contributed little in terms of capacity development of the broader domestic judicial system. The justice sector, obliterated during Khmer Rouge rule, remains prone to political influence and corruption, is largely staffed by judges and lawyers of limited technical capacity, and above all, is resistant to change due to the political leadership's lack of political will to embrace the rule of law, including the concepts of judicial independence and fair trial rights.<sup>1700</sup> Against this backdrop, it would always be a challenge for the ECCC to influence domestic judicial capacity and culture absent broader political change.<sup>1701</sup>

Given concerns about the lack of independence in the Cambodian judiciary, international donors and UN officials recommended that the ECCC complete all four cases rather than transferring any of them to fully domestic Trial Chambers. Indeed, because the ECCC Agreement, law, and internal rules have no equivalent to the Rule 11*bis* of the ICTY and the ICTR, any devolution of cases to national jurisdiction would likely require amendments to the statutory framework.

## **Financing**

Under the ECCC Agreement, Cambodia is to provide—at its expense—the premises for the co-investigating judges, the Prosecutor's Office, the Extraordinary Chambers, the Pre-Trial Chamber, and the Office of Administration (Art. 14). It is also to cover the salaries of Cambodian judges and personnel (Art. 15). Meanwhile, the UN is to cover the salaries of personnel recruited by it, including international judges and the international co-prosecutor (Art. 16). Article 17 of the Agreement outlines

other forms of UN financial assistance to the ECCC, including the remuneration of defense counsel. Additionally, the Agreement stipulates a “phased-in approach” for the purposes of ensuring “efficiency and cost-effectiveness” (Art. 27). These provisions are reinforced by the relevant provisions in the ECCC Law (Art. 44, new).<sup>1702</sup>

The cost of the ECCC, compared to its small number of prosecutions and political difficulties, has drawn criticism, which has intensified with the court’s political gridlock. Between 2006 and 2014, ECCC expenditures were in excess of US\$200 million (of which approximately 25 percent was spent by the Cambodian side of the court).<sup>1703</sup> While the ECCC’s annual budget was smaller in its early years (until the court became fully operational), annual operational costs in the years 2010–2015 ranged from US\$27 to 35 million.<sup>1704</sup> As of 2015, the ECCC’s largest donor was Japan, contributing 35 percent of the total operating costs for the court, followed by the United States (11 percent), Australia (10 percent), and Cambodia (8 percent).<sup>1705</sup> The European Union (4 percent), and various EU countries (Germany [6 percent], the United Kingdom [5 percent], France, Sweden and Norway [3 percent each]) have collectively contributed about 25 percent of the court’s funding. Some states “fund both international and national sides, while others earmark funding for either the national or international side ... [and] ... some states prefer to mark funding for particular sections of the court’s operations.”<sup>1706</sup>

During its lifespan, the ECCC has faced a number of funding crises.<sup>1707</sup> The court entered into a deepening crisis in 2012–2013, when shortfalls in national funding led to Cambodian staff going for months without pay and striking in protest. The funding crises at the ECCC have had a disproportionate effect on national staff.<sup>1708</sup> Although the ECCC Agreement stipulates that the expenses and salaries of Cambodia officials, staff, and judges be borne by the “Cambodian national budget,” it has contributed only 31 percent of these monies, much of which has been obtained by seeking voluntary contributions from the court’s main donors. The Open Society Justice Initiative has noted that the voluntary contribution model—and significant budget shortfalls—raise the danger that financial concerns at the court could drive judicial decision-making.<sup>1709</sup>

## **Oversight and Accountability**

The ECCC operates formally as an independent institution within the Cambodian justice system, but by nature of its hybrid staffing, elements of oversight and accountability are bifurcated, with nationals accountable to the national system

and internationals accountable to the United Nations. The Agreement between Cambodia and the United Nations establishes privileges and immunities for national and international staff and counsel.<sup>1710</sup>

Persistent allegations of corruption at the ECCC led to the Agreement to Establish an Independent Counselor at the ECCC in August 2009. The independent counselor (IC), required to be independent of the UN, ECCC, and the Cambodian government, was tasked with investigating corruption allegations within the ECCC.<sup>1711</sup> However, the IC's reports on corruption at the ECCC have not been publicly disclosed.<sup>1712</sup>

Beyond issues of corruption, the handling of the investigations of Cases 003 and 004 has led to questions over whether agreed lines of authority have been respected in practice. Judge Laurent Kasper-Ansermet was appointed as international reserve co-investigating judge in February 2011 and assumed his duties as full co-investigating judge in December 2011, following the resignation of Judge Siegfried Blunk. The Cambodian government failed to provide formal approval for the appointment. The United Nations considered this failure a breach of the Agreement between the Cambodian government and the UN. Under the Agreement, the Supreme Council of Magistracy (SCM) in Cambodia was “required to replace a resigning international CIJ [co-investigating judge] with the reserve international CIJ, and leaves no room for deliberation.”<sup>1713</sup> Despite this, the SCM rejected Judge Kasper-Ansermet in January 2012. After several months in limbo, Judge Kasper-Ansermet resigned in March, and the Secretary-General called on the Cambodian government to “promptly appoint” new international judges. Beyond the accusations of personal conflicts of interest in judicial appointments—national CIJ Bunleng was staunchly opposed to Kasper-Ansermet's appointment and also sits on the SCM—the appointment gridlock points to the “UN's apparent inability to effectively influence a decision regarding an agreement to which it is a party,” and the “fundamental lack of any internal mechanism [at the ECCC] to resolve disputes concerning judicial appointments.”<sup>1714</sup> These structural deficiencies have led to several proposed remedies, including the call by the former UN Special Expert on the Khmer Rouge Trials, David Tolbert, for a judicial review mechanism as well as calls by the Open Society Justice Initiative for an independent, international panel of expert judges to conduct an inquiry into the stalled investigations in cases 003 and 004. In the wake of the scandal over Judge Kasper-Ansermet's failed appointment, Cambodian human rights activist Theary Seng “called upon the UN to invoke Article 28 of the Agreement and withdraw cooperation” and cease to provide assistance.<sup>1715</sup> Thus, the scandal came to threaten the very existence of the ECCC itself.

Civil society has provided a measure of informal accountability. In addition to the domestic work of the Documentation Center of Cambodia, two main international NGOs have been heavily involved in monitoring and reporting on the ECCC: the Open Society Justice Initiative and the Asian International Justice Initiative.

## **EAST TIMOR / TIMOR LESTE**

### **Conflict Background and Political Context**

In 1999, after 24 years of Indonesian military occupation, the people of East Timor<sup>1716</sup> voted for independence in a UN-sponsored referendum. The referendum process was met by widespread human rights abuses and widespread violence carried out by the Indonesian military and military-supported irregular armed groups against the civilian population. A national truth and reconciliation commission, the Commission for Reception, Truth and Reconciliation (CAVR), later estimated that over 100,000 civilians died as a result of the conflict, and the physical infrastructure of the country lay in ruins, with nearly 70 percent of all buildings, homes, and schools destroyed. An estimated 75 percent of the population was displaced.<sup>1717</sup>

An international peacekeeping force, INTERFET, arrived to restore order, and the UN assumed administration and sovereignty beginning in October 1999, through the United Nations Transitional Administration in East Timor (UNTAET), until 2002. Under the UNTAET mandate, the UN established special panels in district courts, called Special Panels for Serious Crimes in East Timor (SPSC). The SPSC, staffed by a mix of internationals and nationals, was tasked with investigating and prosecuting atrocity crimes. Following the UN transference of sovereignty in 2002, this international investigations unit closed in May 2005. The transfer of sovereignty back to Timorese authorities in 2002 left UN-appointed personnel largely in place but complicated issues of shared authority over the process between the UN and the East Timorese. An agreement by the UN to provide international assistance to the Office of the Prosecutor General on atrocity crimes investigations and pretrial legal drafting led to the creation of Special Crimes Investigation Teams (SCIT, see text box) under the UNMIT (UN Integrated Mission in Timor-Leste) mandate in 2006. SCIT did not begin its work until early 2008, when a formal agreement took effect between the UN and the government of East Timor. The SCIT was shut down in 2012 when the UNMIT mandate ended before it could complete its investigations. Incomplete investigations were handed over to the Timor-Leste prosecutor general.<sup>1718</sup>

Through late 2017, the serious crimes process has been beset by a series of internal and external political obstacles. Externally, Indonesia's lack of cooperation has been a consistent obstacle. Many of the high-level perpetrators of atrocity crimes in Indonesia were out of the territorial jurisdiction of the Special Panels, having fled

either to Indonesia or Indonesian-controlled West Timor. Indonesia has consistently refused to cooperate with arrest warrants or to hand over indicted suspects, despite having signed an agreement with the UNTAET on a range of mutual assistance measures, including arrest warrant enforcement and transfer of indicted persons for prosecutions.<sup>1719</sup> Indonesian ad hoc trials of atrocity crimes and human rights violations have been largely denounced as a sham.<sup>1720</sup>

Internally, serious crimes proceedings suffered from poor organization and a lack of commitment by the United Nations, including a failure to support demands for cooperation from Indonesia. Following the transfer of sovereignty in 2002, the governments of Timor-Leste have increasingly sought to “move beyond the past,” and thus signal an intention to close down serious crimes prosecutions in order to pursue friendly relations with their powerful neighbor.

### **Existing Justice-Sector Capacity**

The scorched-earth campaign by Indonesian forces devastated East Timor, nearly destroying all political and institutional capacity. Physical judicial infrastructure, which was minimal even before the conflict, was looted and reduced to rubble. The systematic exclusion of East Timorese from government and judicial posts during the years of Indonesian rule and occupation led to a severe shortage of qualified judges and trained lawyers. Only a small number of Timorese were allowed to obtain legal qualifications during the Indonesian occupation, and most Indonesian justice-sector professionals left East Timor in the post-conflict period. While advances have been made since 1999, the Timorese judicial sector is still marked by an absence of qualified judicial personnel and a considerable criminal case backlog.<sup>1721</sup> Even after Timor-Leste gained sovereignty in 2002, some foreign judges and judicial officers, mostly from Portuguese-speaking countries, remained embedded in the system. This remained the case until the Timor-Leste Parliament voted to expel all foreigners from the justice sector in 2014, in response to a series of tax cases brought against foreign oil companies operating in the Timor Sea.<sup>1722</sup> Although not the explicit target of the parliament’s actions, grave crimes proceedings also suffered following the dismissal of all foreign judicial personnel.<sup>1723</sup>

### **Existing Civil Society Capacity**

Civil and political freedoms in East Timor during Indonesian rule were severely curtailed. The country emerged in 1999 with a weak and politicized civil society.

Catholic Church organizations such as Caritas Dili and the Justice and Peace Commission maintained their longstanding presence even during the occupation and have focused on reconciliation initiatives in the post-conflict era. The post-conflict period saw the proliferation of local nongovernmental organizations (NGOs, over 300 registered with an umbrella NGO Forum by 2006), clustered around issues of peacebuilding, youth, humanitarian assistance, gender justice, and voter education. During the period of UN-led transitional government, these NGOs raised concerns about their lack of participation in governance and exclusion. Involvement by NGOs in the CAVR provided a platform and catalyst for many NGOs to gain knowledge and proficiency in transitional justice issues.<sup>1724</sup>

## Creation

The United Nations created the Special Panels and associated special units not through a planned and integrated process, but through a series of ad hoc responses to East Timor's crisis. Shortly after the Indonesian military withdrew in 1999, a UN fact-finding mission and a subsequent International Commission of Inquiry established by the UN Human Rights Commission recommended the establishment of an international criminal tribunal. However, the UN Security Council was unwilling to mount such a direct challenge to the Indonesian military regime, and donor countries were wary of the costs and duration of trials associated with the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>1725</sup>

UNTAET established the Special Panels in accordance with its general mandate to re-establish law and order, based on the initiative of international staff who considered it to be a "moral imperative" for the UN to create an accountability mechanism.<sup>1726</sup> Because the UN had assumed sovereignty in East Timor in 1999, it was not possible for the Special Panels to be created through a bilateral agreement between the UN and the national government (as with the Special Court for Sierra Leone), or to be fully located within the domestic judicial system. The resulting structure was a complicated and shifting collection of units, with varying and shifting degrees of subordination to international and national institutions. Due to a lack of substantial consultations before the establishment of the Special Panels in 2000, Timorese judges (who were initially expected to handle the cases themselves) and civil society reacted negatively.<sup>1727</sup>

## **Legal Framework and Mandate**

The Special Panels of the Dili District Court had jurisdiction over genocide, war crimes, crimes against humanity committed at any time, and murder, sexual offenses, and torture committed between January 1 and October 25, 1999. Under the UNTAET Regulation, the Special Panels were empowered to apply Timorese and international law.<sup>1728</sup> All the charges before the Special Panels involved crimes against humanity or serious offenses under domestic law; genocide and war crimes were not charged. While the temporal jurisdiction included the pre-1999 period, the large number of crimes committed during Indonesian occupation between 1975 and 1998 were not investigated or prosecuted. There were multiple reasons for this: a Timorese government still wary of its former occupier lacked the political will to pursue these cases, the Prosecutor's Office interpreted the applicable law narrowly, the case-selection strategy targeted high-level perpetrators, and there were resource constraints. The Special Panels were granted primary jurisdiction over national courts for the serious offenses within their jurisdiction. The definitions of international crimes, modes of liability, and defenses were drawn nearly verbatim from the Rome Statue of the International Criminal Court (ICC). Definitions for national crimes were drawn from the Indonesian Penal Code, and the criminal procedure code was promulgated by UNTAET, combining civil law, common law, and elements from the ICC's statute and rules of procedure. The "application of these relatively complex and unfamiliar procedures caused major difficulties in practice,"<sup>1729</sup> and were ill-fitted to the local criminal justice system. Timor-Leste's government promulgated a new criminal procedure code in January 2006.

## **Location**

The Special Panels within the Dili District Court and a Court of Appeal to deal with serious crimes were located in Dili, the capital of East Timor/Timor-Leste.

## **Structure and Composition**

The constituent parts of the Special Panels process included internationalized Special Panels (courts) at the district, appeals, and superior court levels; the Serious Crimes Unit (SCU) of investigators and prosecutors; the Deputy General Prosecutor for Serious Crimes (DGPSC), housed within the UN-created Office of the General Prosecutor (OGP), broadly under the Public Prosecution Service for East Timor; and the Defense Lawyers Unit (DLU).

UNTAET created Special Panels of the District Courts and the Court of Appeals in June 2000, with each panel composed of one national and two international judges. The UN transitional government made these appointments with little to no local involvement. The Dili District Court was granted exclusive jurisdiction over serious criminal offenses. Difficulties and delays in the recruitment and appointment of international judges caused the Court of Appeals to be non-operational for more than a year and a half during 2001–2003. A severe shortage of judicial and administrative support staff hampered the work of the Special Panels; judges often “had to do their own research, drafting, editing, and administration.”<sup>1730</sup>

For its part, the DGPSC office was severely hampered by high staff turnover, short-term staff contracts, and nearly a year without a head. The unit only became fully functional by the end of 2003, a few months before it began the process of downsizing and closing.

The SCU operated from 2000 until May 2005 and was staffed predominantly by UN-appointed internationals. By the time the unit was fully staffed, it began downsizing in anticipation of closeout. In 2003, the unit had 124 staff members made up of 33 UN prosecutors, investigators, forensic specialists, and support staff; 32 UN police investigators; 40 national staff; and five national police investigators. By its closure in May 2005, the unit had 88 staff members (split about evenly among national and internationals). During the handover process in 2005, the unit hired 37 translators and 13 trainees embedded within prosecution and informational technology sections. Between 2001 and 2005, five individuals held the position of head international prosecutor. Recruitment and appointments were carried out by UNTAET, but the office reported to the Timorese general prosecutor and attorney general. When the DGPSC’s office issued a high-profile arrest warrant against General Wiranto, this weak institutional arrangement provided cover for both UN and Timorese authorities to disavow ownership of the prosecutor’s efforts.

No provisions were made for defense of accused persons before the Special Panels until September 2002. The UN Mission of Support in East Timor (UNMISSET; replacing UNTAET) created the DLU, composed of international staff who provided defense services to defendants before the Special Panels. This early gap marked a serious deficiency within the special crimes process. One analyst observed: “In the first fourteen trials ... not a single defense witness appeared.”<sup>1731</sup> Because the DLU employed only international staff, it did not improve the capacity of local defense attorneys. At its conclusion, the DLU employed seven international defense lawyers, in addition to three assistants, and approximately seven interpreters and administrative and logistical staff.

The special crimes process lacked witness protection and support structures. The SCU had a small witness management unit to organize witness testimony, and it managed to obtain a few protective measures for a small number of witnesses in rape cases, but all other witnesses were left to care for their own security.<sup>1732</sup> The panels and the DLU had no witness protection system at all.

## **Prosecutions**

A prosecutorial strategy emerged in the Special Panels in late 2001, focusing on 10 priority cases and indictments for crimes against humanity. This early strategy was criticized for under-utilizing mapping exercises and commissions of inquiry (national and international) that had laid out the systematic nature of the violations.

In February 2003, the SCU issued its most high-profile indictments to date against General Wiranto, six senior Indonesian military members, and the former governor of East Timor. At the time, General Wiranto was a candidate for the presidency of Indonesia. Observers wrote that “the Wiranto case proved to be the breaking point in the relationship between the Timorese political leadership and the serious crimes regime. To the discredit of the UN and the Timor-Leste government, both bodies disassociated themselves from the Wiranto arrest warrant. In so doing, they signaled to senior perpetrators that the serious crimes process did not enjoy the committed support of the international community or the national authorities.”<sup>1733</sup>

By the time the Special Panels closed in May 2005, they had tried 87 defendants in 55 trials, 85 of whom were found guilty.<sup>1734</sup> A significant number of the indictees were officers in the Indonesian military, and all were low-level perpetrators. More than 300 remained at large, most in Indonesia, and incomplete cases were left for the SCIT, which was not in place until 2008.<sup>1735</sup>

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## **Links between Truth-Telling and Criminal Prosecutions in East Timor**

The Commission for Reception, Truth and Reconciliation (CAVR) was set up in 2001 by a UNTAET regulation to address non-atrocity crimes such as theft, arson, and killing of livestock through a Community Reconciliation Process (CRP).<sup>1736</sup> An UNTAET regulation<sup>1737</sup> and an agreement with the OGP<sup>1738</sup> required the CAVR to refer cases involving serious crimes to the Serious Crimes Unit.

The intersection of CAVR's mandate with the Special Crimes process yielded important examples of linking transitional justice mechanisms, and it has been cited as an example where "serious thought was given to the relationship between the disclosure process and prosecutions."<sup>1739</sup> The legal agreements and arrangements between the CAVR and the serious crimes prosecution process are an unusual example of a codified institutional arrangement between punitive and reconciliatory mechanisms. While the execution of the policy underlying the arrangement was problematic, the provisions of the UNTAET regulation were interpreted by CAVR to reflect "a policy decision that the work of the prosecution service should not be compromised by the truth-seeking function of the Commission."<sup>1740</sup>

However, because the SCU did not have the resources to prosecute large numbers of alleged serious crime offenders, the referral arrangement resulted in an impunity gap, with certain offenders ineligible either for participation in the reconciliation procedures or for prosecution. Amendment of UNTAET directives in 2002 increased prosecutorial discretion on CRP eligibility, but did not fully resolve the situation. Delayed sequencing of the initiatives—CAVR was established a year after the Special Crimes Prosecutions and Investigation Unit—caused difficulties in the planning and execution of their respective mandates.

Because CAVR was required to refer cases involving possible grave crimes to prosecutors, some lower-level offenders may have avoided the reconciliation process altogether. This was compounded during the early stages of the proceedings, when the prosecution strategy was less clearly formed and communicated. The legal arrangement between the CAVR and the OGP allowed testifying witnesses privileges against self-incrimination. While the OGP was allowed access to any statements recorded by the CAVR (compelling the CAVR to release information received confidentially), the OGP undertook not to initiate an investigation based solely on CAVR evidence. One study estimated that about eight percent of cases handled by the CAVR were vetted by the SCU or suspended during proceedings as possible serious crimes.<sup>1741</sup>

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## Legacy

At least in theory, locating the special crimes prosecutions in situ intended to make justice accessible and meaningful. This impact has been hard to measure and has had mixed results. The inability to prosecute high-level Indonesian perpetrators who fled to Indonesia, coupled with prosecutions of lower-level perpetrators and East Timorese, may actually have contributed to cynicism about the process among the

local population. Further, the Timorese government and general prosecutor proved unwilling to proceed with investigations against former East Timorese independence fighters.

Throughout its existence, the prosecution and investigation unit faced criticism for a number of weaknesses, including: lack of a coherent prosecutorial strategy; lack of basic facilities; weak jurisprudence and quality of judgments; inadequate legal defense representation; inadequate outreach; lack of political support from the UN transitional government and the Timorese government; a difficult and bureaucratic recruitment, appointment, and staffing process; and frequent changes of leadership.

The Special Panels have also been criticized for failing to have a substantive, positive effect on the domestic judicial system. There was limited interaction between judges of the Special Panels and judges of the ordinary national court. Training programs, skills transfer, and capacity development were uneven, poorly coordinated, and delayed. Local observers complained that international judges were not properly trained on the intricacies of the national legal system and unqualified on international criminal and humanitarian law (judges were appointed under standard UN peacekeeping mission rules, which did not call for targeted advertising of vacancy notices). Not until 2002 was a training program initiated and funding secured for the salaries of trainees.

The arrival of international defense lawyers in 2003 improved some of the glaring fair trial deficiencies, but the DLU had “little or no collaboration or interaction with Timorese defense lawyers,”<sup>1742</sup> and Timorese defense attorneys gradually and nearly completely withdrew from serious crimes cases. Poor-quality jurisprudence, lack of standardization, and long gaps in the functioning of the Appeals Court minimized the long-term effect of the Special Panels process on East Timorese jurisprudence and the domestic judicial system. During the premature closeout phase in early 2005, the SCU spent much of its time archiving files into a searchable database and working to close unfinished investigations and draft transfer documents to national prosecutors, in the hopes that the process would be resumed. These files and cases lay largely untouched until the resumption of serious crimes investigations in 2008 with the support of the SCIT.

The SPSC appears to have created little momentum for continued pursuit of grave crimes cases related to the conflict. Beyond the clear shortcomings of the model and its implementation, this can be explained by Timor-Leste’s dependence on Indonesia for investment, educational opportunities, communications, affordable

goods and services, as well their military and other forms of cooperation. This dependence has caused the government to seek to move “beyond accountability” and prioritize good relations with Jakarta.<sup>1743</sup> In 2005, the two countries created a Commission of Truth and Friendship (CTF), widely interpreted as a political signal to end the accountability process. Political interference in the serious crimes process has taken multiple forms, including the 2008 presidential commutation of sentences for those convicted by the Special Panels. In 2009, the president of Timor-Leste called for the closure of serious crimes investigations, and in 2014, all foreign judges, prosecutors, and other judicial officers were expelled from the country, further threatening the prosecution of atrocity crimes.<sup>1744</sup>

As of late 2017, the recommendations of the CAVR and the CTF for justice and reparations had still not been implemented. Bills establishing a Commission for Disappeared Persons, a national reparation program, and a public memory institute were submitted to parliament in 2010, but debate of the draft laws had been continually postponed.<sup>1745</sup>

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## **Special Crimes Investigation Team (SCIT) (2008–2012)**

In 2008, the UN Integrated Mission in Timor-Leste (UNMIT) mandated a Special Crimes Investigation Team (SCIT) to resume the investigative functions of the SCU and assist the Office of the Prosecutor General (OPG) with outstanding cases of serious human rights violations.<sup>1746</sup> The SCIT’s role was to investigate cases and submit the file to the OPG with a recommendation to either close the case or proceed with prosecution. SCIT had no prosecutorial powers itself and, unlike the Special Panels, its temporal mandate did not cover crimes committed before 1999. SCIT lacked outreach and public information staff, and outreach activities were mostly conducted under broader UNMIT transitional justice programs. A team of international investigators, legal coordination officers (including gender specialists), and forensics and administrative staff assisted the OPG in investigations and also prepared drafts of legal documents, indictments, and arrest warrants. A shortage of national legal officers caused communications difficulties with victims and witnesses. SCIT was funded by assessed contributions<sup>1747</sup> through a special account maintained for UNMIT by the UN Department of Peacekeeping Operations.

Because SCIT lacked the power to initiate prosecutions, reliance on a reluctant and underresourced OPG made it unlikely that many cases would be brought to trial. While SCIT was an international mechanism, the agreement leading to its creation made it formally and operationally subordinate to the OPG. The arrangement has

been described as an unusual “role reversal” where “prosecutors [have a] lack of involvement in serious crimes investigations, [while] investigators develop the strategy and framework for the inquiry, as well as conducting the investigation, with the OPG provid[ing] approval for procedural steps as required.”<sup>1748</sup> Cooperation between the SCIT and the OPG was minimal, seriously undermining the impact of the team on capacity building within the OPG. However, cooperation improved when a new prosecutor general assumed office in March 2009, for instance through weekly meetings and operational contacts. Institutional cooperation could have better been ensured through stronger agreements and a stronger mandate. SCIT’s physical location—offices were housed in the UN building in Dili, with three small regional outposts—contributed to a lack of integration with the OPG’s separate office and minimized the ability of the SCIT process to sustainably benefit the domestic justice sector.

The nearly three-year gap between the closure of the SCU and the operationalization of SCIT in early 2008 caused a lack of continuity and a loss of institutional knowledge and staff, as well as reflected a lack of sustained focus on the part of the UN on accountability measures in East Timor. From the time of the SCU’s closure, at least three cases of atrocity crimes were brought to trial. These include: the *Mau Buti* case, with a verdict by the Appeals Court issued in June 2010;<sup>1749</sup> the conviction of three former Nesi Merah Putih militia members for crimes against humanity in December 2012; and the sentence on appeal of a former AHI militia member in August 2014.<sup>1750</sup> When the SCIT closed in 2012, it had completed 311 investigations and handed over 60 incomplete investigations to the prosecutor general.<sup>1751</sup> The 2014 expulsion of foreign judges called into question the continuation of grave crimes trials, as the UNTAET regulation stipulating that trials for serious crimes of 1999 require two international judges and one Timorese judge remained applicable.<sup>1752</sup>

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## Financing

UNMISSET funded both the SCU and the Special Panels through assessed and voluntary contributions. The total operating cost of the serious crimes process for the period 2003–2005 was US\$14,358,600, which was around five percent of the overall assessed contributions to UNMISSET. Voluntary contributions during this period amounted to approximately US\$120,000.<sup>1753</sup> There was a significant overall underinvestment in the system, as well as poor resource allocation between the two, with an “overemphasis on only the investigatory and prosecutorial arm of the process.”<sup>1754</sup> The SCU resource problems were eventually addressed. However, the Special Panels were severely underfunded throughout. In 2002, for example,

only US\$600,000 was spent on the Special Panels, whereas the SCU spent almost US\$6 million—out of a total budget for UNMISSET of more than US\$200 million.<sup>1755</sup> The SCU also benefited from the support of governments including Australia and Norway, as well as the U.S.-funded work of such international NGOs as the Coalition for International Justice.<sup>1756</sup> Special Panels (with the exception of salaries for international judges) benefited from legal capacity assistance on international criminal law in 2002–2003 by the American University’s Washington College of Law, which covered its own expenditure.<sup>1757</sup>

An assessment by the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999 concluded that “the level of funding provided to the judicial process in Timor-Leste has been insufficient to meet the minimum requirements of the mandates of the above-mentioned institutions [SPSC, SCU, and DLU]”<sup>1758</sup> and was “a major impediment to their work.”<sup>1759</sup>

## Oversight and Accountability

An independent organization created in 2001, the Judicial System Monitoring Program (JSMP), monitored trials before the Special Panels. Composed of national and international staff, JSMP also conducted outreach efforts in response to popular demands for information on the panels’ work.<sup>1760</sup> The organization generated a detailed record of the decisions of the Special Panels and published monitoring reports analyzing their work.<sup>1761</sup> When the panels closed, JSMP became a nonprofit organization working to improve the judicial and legislative systems in Timor-Leste.<sup>1762</sup>

## Notes

1569. The Delhi Agreement was signed in 1974 by India, Pakistan, and Bangladesh. Under political pressure from its allies, Bangladesh agreed upon the release and repatriation of 195 Pakistani army officials who had been held in Indian custody since the end of the war. See A. Dirk Moses, “The United Nations, Humanitarianism & Human Rights: War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971–4,” in *Human Rights in the Twentieth Century*, ed. SL Hoffman, (Cambridge: Cambridge University Press, 2013).
1570. The International Crimes (Tribunals) Act, Act No. 19 of 1973, July 20, 1973, available at: [bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=435](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435) (hereinafter: The ICT Act).
1571. See Briefing Paper to the British House of Commons, prepared by Jon Lunn and Arabella Thorp, *Bangladesh: The International Crimes Tribunal*, May 3, 2012, available

- at: [parliament.uk/briefing-papers/SNO6318](http://parliament.uk/briefing-papers/SNO6318). See also Human Rights Watch, *Letter to the Bangladesh Prime Minister Regarding the International Crimes (Tribunals) Act*, May 18, 2011, available at: [hrw.org/node/98995](http://hrw.org/node/98995); Human Rights Watch, *Bangladesh: Guarantee Fair Trials for Independence-Era Crimes*, July 11, 2011, available at: [hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes](http://hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes); International Bar Association-War Crimes Committee, *Legislative Review of the ICT Act for the United Kingdom Parliament Human Rights Group*, December 29, 2009, available at: [corporateaccountability.org/dl/1971/standards/ibareportdeco9.pdf](http://corporateaccountability.org/dl/1971/standards/ibareportdeco9.pdf).
1572. See UNDP, *Justice Sector Facility Project Document*, 2012, available at: [bd.undp.org/content/bangladesh/en/home/operations/projects/democratic\\_governance/justice-sector-facility/what-we-do.html](http://bd.undp.org/content/bangladesh/en/home/operations/projects/democratic_governance/justice-sector-facility/what-we-do.html).
  1573. Human Rights Watch, *Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces*, May 2009, 2, available at: [hrw.org/sites/default/files/reports/bangladesh0509web.pdf](http://hrw.org/sites/default/files/reports/bangladesh0509web.pdf).
  1574. Asian Development Bank, *Overview of NGOs and Civil Society: Bangladesh*, August 2008, available at: [adb.org/publications/overview-ngos-and-civil-society-bangladesh](http://adb.org/publications/overview-ngos-and-civil-society-bangladesh); and David Lewis, *Is Civil Society in Trouble in Bangladesh*, London School of Economics, July 13, 2015, available at: [blogs.lse.ac.uk/southasia/2015/07/13/is-civil-society-in-trouble-in-bangladesh/](http://blogs.lse.ac.uk/southasia/2015/07/13/is-civil-society-in-trouble-in-bangladesh/).
  1575. Bina D'Costa and Sara Hossain, "Redress for Sexual Violence before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future," *Criminal Law Forum* 21, no. 2 (2010): 338; and Human Rights Committee of England and Wales, *Independent Report by Geoffrey Robertson QC into the Proceedings of the International Crimes Tribunal in Bangladesh*, February 6, 2015, 51, available at: [barhumanrights.org.uk/independent-report-by-geoffrey-robertson-qc-into-the-proceedings-of-the-international-crimes-tribunal-in-bangladesh/](http://barhumanrights.org.uk/independent-report-by-geoffrey-robertson-qc-into-the-proceedings-of-the-international-crimes-tribunal-in-bangladesh/) (hereinafter: Robertson Report).
  1576. *Ibid.*, 355.
  1577. International Crisis Group, *Political Conflict, Extremism and Criminal Justice in Bangladesh*, April 11, 2016, available at: [d2o71andvipowj.cloudfront.net/277-political-conflict-extremism-and-criminal-justice-in-bangladesh.pdf](http://d2o71andvipowj.cloudfront.net/277-political-conflict-extremism-and-criminal-justice-in-bangladesh.pdf).
  1578. *Bangladesh Collaborators (Special Tribunals) Order*, January 24, 1972, available at: [icrfoundation.org/home/bangladesh-collaborators-special-tribunals-order-1972/](http://icrfoundation.org/home/bangladesh-collaborators-special-tribunals-order-1972/).
  1579. *Bangladesh National Liberation Struggle (Indemnity) Order*, February 28, 1973), available at: [bdlaws.minlaw.gov.bd/pdf\\_part.php?id=450](http://bdlaws.minlaw.gov.bd/pdf_part.php?id=450).
  1580. Robertson Report.
  1581. International Center for Transitional Justice, "Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971," ICTJ Briefing Paper, May 2011, 3, available at: [ictj.org/publication/fighting-past-impunity-bangladesh-national-tribunal-crimes-1971](http://ictj.org/publication/fighting-past-impunity-bangladesh-national-tribunal-crimes-1971) (hereinafter: ICTJ Briefing Paper).
  1582. See International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study*, June 1, 1972, [icj.org/the-events-in-east-pakistan-1971-a-legal-study/](http://icj.org/the-events-in-east-pakistan-1971-a-legal-study/).
  1583. Suzannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation," *Int. Criminal Law Forum* 21, no. 2 (2010): 208.
  1584. Robertson Report, 51.
  1585. ICTJ Briefing Paper, 4.

1586. The International Crimes (Tribunals) (Amendment) Act, Act No. 55 of 2009, July 24, 2009, available at: [parliament.gov.bd/14%20July%202009\(5699-5701\)\(2\).pdf](http://parliament.gov.bd/14%20July%202009(5699-5701)(2).pdf) (hereinafter: ICT Act). For an analysis of the revisions, see International Review of the Red Cross, *National Implementation of International Humanitarian Law: Biannual Update, January–June 2010*, 92, no. 879 (September 2010).
1587. International Crimes Tribunal-1, *Bangladesh*, available at: [ict-bd.org/ict1/indexdetails.php](http://ict-bd.org/ict1/indexdetails.php) (assessed October 4, 2017). See “Second War Tribunal by This Month,” *Daily Star*, March 18, 2012, available at: [thedailystar.net/newDesign/news-details.php?nid=226766](http://thedailystar.net/newDesign/news-details.php?nid=226766). The second chamber shared one judge, Justice ATM Fazle Kabir, who heard the case against Delewar Hossain Sayedee in the ICT first chamber. See Steven Kay, *The Moving Judge and the Replacement Judge: Bangladesh International Crimes Tribunal and Interference by the Government with the Legal Process*, blog post, April 23, 2012, available at: [internationallawbureau.com/blog/?p=4616](http://internationallawbureau.com/blog/?p=4616).
1588. ICT Act, Preamble.
1589. Linton, “Completing the Circle,” 209.
1590. *Ibid.*, 210.
1591. ICT Act, Article 3(1).
1592. ICT Act, Article 3(2).
1593. Robertson Report, 54.
1594. For a discussion on the crime of genocide before the ICT, see Sarmila Bose, “The Question of Genocide and the Quest for Justice in the 1971 War,” *Journal of Genocide Research* 13, no. 4 (2011): 393–419; Morten Bergsmo and Elisa Novic. “Justice after Decades in Bangladesh: National Trials for International Crimes,” *Journal of Genocide Research* 13, no. 4 (2011): 503–10.
1595. For an extensive discussion on the Subject Matter Jurisdiction of the ICT, see Linton, “Completing the Circle,” 191–311.
1596. ICT Act, Article 3(1).
1597. ICT Act, Article 5(1).
1598. ICT Act, Article 4.
1599. Robertson Report, 55–58.
1600. Article 20 (2) of the ICT Act states, “Upon conviction of an accused person, the tribunal shall award sentence of death, or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.” Article 6 of the ICCPR regarding the right to life states, “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court,” and also, “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”
1601. Robertson Report, 71–80; also see Amnesty International, *Bangladesh Must Overturn All Death Sentences*, October 1, 2013, available at: [amnesty.org/en/latest/news/2013/10/bangladesh-mp-war-crimes-death-penalty](http://amnesty.org/en/latest/news/2013/10/bangladesh-mp-war-crimes-death-penalty).

1602. Constitution of the People's Republic of Bangladesh, December 16, 1972, available at: [bdlaws.minlaw.gov.bd/pdf\\_part.php?id=367](http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367).
1603. Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment," *Journal of Genocide Research* 17, no. 2015) 2).
1604. Rules of Procedure for International Crimes Tribunal, Bangladesh, June 28, 2011, available at: [ictbdwatch.files.wordpress.com/2011/12/final\\_consolidated\\_ictbd\\_rop\\_28\\_june\\_2011.docx](http://ictbdwatch.files.wordpress.com/2011/12/final_consolidated_ictbd_rop_28_june_2011.docx) (hereinafter: ICT Rules of Procedure).
1605. ICT Act, Article 11(A).
1606. ICTJ Briefing Paper, 5.
1607. See International Crimes Tribunal-2, *Bangladesh*, available at: [ict-bd.org/ict2/judgments.php](http://ict-bd.org/ict2/judgments.php).
1608. ICT Act, Article 21. For example, judicial replacements occurred in the Delowar Hossain Sayeedi case, the Motiur Rahman Nizami case, and the Ghulam Azam case.
1609. ICT Act, Article 6.
1610. Robertson Report, 57.
1611. ICT Act, Article 8(1).
1612. ICT Rules of Procedure, Chapter 2, "Powers and Functions of the Investigation Agency."
1613. Ibid., Article 17.
1614. Open Society Justice Initiative correspondence with former counsel before the ICT, November 2017.
1615. ICT ACT, Article 7.
1616. ICT Rules of Procedure, Article 60.
1617. ICT Rules of Procedure, Article 59.
1618. ICT Rules of Procedure, Article 62.
1619. See Human Rights Watch, *Letter to the Bangladesh Prime Minister regarding the International Crimes (Tribunals) Act*, May 18, 2011; also see self-published article by British defense counsel Steven Kay, QC, *Bangladesh: Its Constitution and The International Crimes (Tribunals) (Amendment) Act 2009*, October 2013, available at: [internationallawbureau.com/blog/wp-content/.../Bangladesh\\_ICTAA\\_2009.pdf](http://internationallawbureau.com/blog/wp-content/.../Bangladesh_ICTAA_2009.pdf).
1620. ICT Rules of Procedure, Article 58(A).
1621. Human Rights Watch, *Bangladesh: Investigate Killing of Witness. Need to Protect Participants in War Crimes Court*, December 23, 2016, available at: [hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness](http://hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness); and International Forum for Democracy and Human Rights, *Defence Statement to the Media on the International Crimes Tribunal, Bangladesh*, July 13, 2013, available at: [ifdhr.org/2013/07/defence-statement-to-the-media-on-the-international-crimes-tribunal-bangladesh/](http://ifdhr.org/2013/07/defence-statement-to-the-media-on-the-international-crimes-tribunal-bangladesh/).
1622. The arrestees were Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Ahsan Mohammad Mujahid, and Delewar Hossain Sayedee. Most of the defendants were not initially held under warrants issued by the ICT.
1623. "Bangladesh War Crimes: First Charges Filed," *BBC*, October 3, 2011, available at: [bbc.com/news/world-south-asia-15147098](http://bbc.com/news/world-south-asia-15147098) and "Bangladesh Profile Timeline," *BBC*, available at: [bbc.com/news/world-south-asia-12651483](http://bbc.com/news/world-south-asia-12651483).

1624. International Crimes Tribunal-1, *Bangladesh, Judgments*, available at: [ict-bd.org/ict1/judgments.php](http://ict-bd.org/ict1/judgments.php) and International Crimes Tribunal-2, *Bangladesh, Judgments*, available at: [ict-bd.org/ict2/judgments.php](http://ict-bd.org/ict2/judgments.php). Note that the ICT-2 only operated within the period from March 2013 until October 2015.
1625. ICT-1 and ICT-2, *Bangladesh, Judgments*.
1626. *Letter from US Ambassador-at-Large for War Crimes Issues Stephen Rapp to the Government of Bangladesh*, March 11, 2011.
1627. See D'Costa and Hossain, "Redress for Sexual Violence."
1628. Robertson Report, 65–68.
1629. "Trying War Crimes in Bangladesh: The Trial of the Birth of a Nation," *The Economist*, December 15, 2012, available at: [economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain](http://economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain).
1630. Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment."
1631. Human Rights Watch, *Bangladesh: Guarantee Fair Trials for Independence-Era Crimes. Amendments to Tribunal's Rules Fall Short of International Standards*, July 11, 2016.
1632. Robertson Report, 124.
1633. UN Working Group on Arbitrary Detention, Opinion No. 66/2011 (Bangladesh) December 26, 2011; and UN Working Group on Arbitrary Detention, Opinion No. 66/2012 (Bangladesh) November 23, 2012, available at: [ap.ohchr.org/documents/alldocs.aspx?doc\\_id=22020](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=22020).
1634. International Crisis Group, *Mapping Bangladesh's Political Crisis*, Asia Report No. 264 (February 9, 2015), available at: [crisisgroup.org/asia/south-asia/bangladesh/mapping-bangladesh-s-political-crisis](http://crisisgroup.org/asia/south-asia/bangladesh/mapping-bangladesh-s-political-crisis); and Asian Centre for Human Rights, *Bangladesh: Polarisation, Political Violence and an Undeclared Civil War* (New Delhi: Asian Centre for Human Rights, 2015), available at: [achrweb.org/reports/bangla/Bangladesh2015-01.pdf](http://achrweb.org/reports/bangla/Bangladesh2015-01.pdf).
1635. Robertson Report, 13.
1636. *Ibid.*, 107.
1637. ICG, *Mapping Bangladesh's Political Crisis*, 17.
1638. Beth van Schaak, *The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad*, October 8, 2014, available at: [ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/](http://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/).
1639. "Bangladesh's War-crimes Trials: Final Sentence," *The Economist*, September 17, 2013, available at: [economist.com/blogs/banyan/2013/09/bangladesh-s-war-crimes-trials](http://economist.com/blogs/banyan/2013/09/bangladesh-s-war-crimes-trials).
1640. Robertson Report, 121.
1641. International Crisis Group, *Mapping Bangladesh's Political Crisis*, 19.
1642. ICTJ Briefing Paper, 4. Also see Richard Rogers, "International Crimes and the Tribunal in Bangladesh," *Forum*, 6, no. 2 (May 2012), available at: [archive.thedailystar.net/forum/2012/May/international.htm](http://archive.thedailystar.net/forum/2012/May/international.htm).
1643. Robertson Report, 118.
1644. The Ambassador-at-Large for War Crimes Issues of the U.S. State Department, Stephen Rapp, visited Bangladesh in January 2011, meeting with ICT and government officials. A March 2011 letter from Ambassador Rapp to the Bangladeshi justice authorities, with detailed recommendations for remedying procedural and structural deficiencies of the ICT, was leaked to the press and is widely quoted by human rights organizations and

- court monitors. See *Letter from US Ambassador-at-Large for War Crimes Issues Stephen Rapp to the Government of Bangladesh*, March 21, 2011 (on file).
1645. A blog maintained by David Bergman is the best source of information about the ICT, but is not comprehensive or always up-to-date. See *Bangladesh War Crimes Tribunal*, available at: [bangladeshwarcrimes.blogspot.co.uk/](http://bangladeshwarcrimes.blogspot.co.uk/).
  1646. See *The Bangladesh Trial Observer*, available at: [bangladeshtrialobserver.org/category/daily-summaries/](http://bangladeshtrialobserver.org/category/daily-summaries/).
  1647. See Cambodia Tribunal Monitor, *Historical Overview of the Khmer Rouge*, available at: [cambodiatribunal.org/history/khmer-rouge-history](http://cambodiatribunal.org/history/khmer-rouge-history). The history is drawn upon contributions from the Documentation Center of Cambodia (DC-Cam), including *A History of Democratic Kampuchea (1975-1979)*, by Khamboly Dy.
  1648. See Cambodia Tribunal Monitor, *Historical Overview of the Khmer Rouge*.
  1649. Mark Ellis, *The ECCC: A Failure of Credibility*, International Bar Association, February 2012.
  1650. The Open Society Justice Initiative has called for an international Commission of Inquiry to investigate allegations of judicial misconduct against the OCIJ for failing to properly investigate Cases 003 and 004. In October 2011, international co-investigating Judge Siegfried Blunk left the ECCC amidst “allegations of misconduct, centered on the lack of independence, judicial misconduct and incompetence in failure ... to properly investigate the cases of five former Khmer Rouge figures in the tribunal’s Cases 003 and 004.” Judge Blunk’s resignation followed the June 2011 resignation of several of the judge’s international staff, in protest over the closure of Case 003 investigations. See Open Society Justice Initiative, *Recent Developments at the ECCC*, November 2011. The international judges of the PTC, writing a minority opinion in a decision split along national and international lines, criticized the Case 003 investigations and suggested that the co-investigating judges engaged in judicial misconduct. See *Considerations of the Pre-Trial Chamber* regarding the appeal against order on the admissibility of civil party application, Robert Hamill, Document Number: D11/2/4/4, Opinion of Judges Lahuis and Downing, October 25, 2011, available at: [www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11\\_2\\_4\\_4\\_Redacted\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_4_Redacted_EN.PDF).
  1651. *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, paras. 126–30, UN Doc. S/1999/231, A/53/850.
  1652. See Kaustuv Kanti Bandyopadhyay and Thida Khus, *Changing Civil Society in Cambodia: In Search of Relevance*, Society for Participatory Research in Asia, 2013, available at: [pria.org/docs/Changing-Civil-Society\\_Cambodia.pdf](http://pria.org/docs/Changing-Civil-Society_Cambodia.pdf).
  1653. See Asian Human Rights Commission, *Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out*, May 20, 2011, available at: [www.humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011](http://www.humanrights.asia/news/forwarded-news/AHRC-FPR-025-2011).
  1654. The law was amended in 2004, following the Framework Agreement with the UN. See, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea Article 1, NS/RKM/1004/006, as amended October 27, 2004 (hereinafter: ECCC Law).
  1655. Resolution Adopted by the General Assembly, February 27, 2003, A/RES/57/228.
  1656. Mark Ellis of the International Bar Association writes that “the deficiencies of the ECCC began with a failure of leadership on the part of the international community, best exemplified by the General Assembly’s Resolution favoring a quicker conclusion of

the Khmer Rouge court negotiations over the principles of fair and independent trials. In the Cambodia negotiations the Secretary-General specifically noted that rather than a mandate to pursue international standards, there was a mandate to quickly establish a court under the framework of the ECCC Law passed by the Cambodian government in 2001. The problems associated with the ECCC did not arise from a failure of ideas. Rather these problems are a result of a failure of the international community to ensure that the Court meets international standards of fairness.” Mark Ellis, *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, International Bar Association, September 2011, 45, available at: <http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20%28Sept%202011%29.pdf>.

1657. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, Article 2, June 6, 2003, available at: [eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio](http://eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio) (hereinafter: Framework Agreement).
1658. The interim period involved the drafting of the Internal Rules. The first Introductory Submissions from the co-prosecutors were forwarded in July, 2007, at which point the defendants were considered to be “charged” in the parlance of international criminal law.
1659. See Christopher M. Rassi, “Lessons Learned from the Iraqi High Tribunal: The Need for an International Independent Investigation,” *Case W. Res. J. Int’l L.* 39 (2006): 215.
1660. Report of the Group of Experts for Cambodia *Established Pursuant to General Assembly Resolution 52/135*, para. 137, UN Doc. S/1999/231, A/53/850.
1661. *Ibid.*
1662. Alternately, the Group of Experts recommended the UN Security Council use authority under Chapter VI and IV to create an ad hoc tribunal. The proposed tribunal would have a majority of international judges, with at least one Cambodian judge. See *ibid.*
1663. ECCC Law.
1664. Internal Rules of the ECCC (Rev. 9, August 2011), Article 53(1).
1665. Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011*, 13, available at: [opensocietyfoundations.org/sites/default/files/eccc-developments-20111114.pdf](http://opensocietyfoundations.org/sites/default/files/eccc-developments-20111114.pdf).
1666. Internal Rules of the ECCC (Rev. 9, January 2015), Rule 67.
1667. The international component is administered by the United Nations Assistance to the Khmer Rouge Tribunal.
1668. Open Society Justice Initiative, *The Duch Trial at the Extraordinary Chambers in the Courts of Cambodia*, March 2009.
1669. See ECCC, Victims Support UNIT, available at: [eccc.gov.kh/en/victims-support](http://eccc.gov.kh/en/victims-support).
1670. See Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, noting that the judges, for determinations in civil party applications in Cases 003 and 004, used erroneous standards that are at times inconsistent with their own prior rulings on who qualifies to be represented as a victim and granted civil party status: “The judges’ erroneous decision-making led them to question the credibility of victim complaints without any justification and advance new theories of victimhood that have no precedent in international criminal law or

in the civil law tradition. ... If applied to the *Duch* case, these new “theories” would [have] result[ed] in the exclusion of up to 95% of those granted civil party status by the trial chamber. ... The co-investigating judges also neglected to recognize lawyers representing civil party applicants, and either refused to grant the lawyers access to the case files, or systematically ignored their requests for same.” *Ibid.*, 17.

1671. See Internal Rule 23 *quiniqies* in the *Duch* trial, the ECCC used a March 2009 version of the Internal Rules. Reparations provisions were broadened in a September 2010 revision and have since been revised again in August 2011. For more on reparations at the ECCC, see also Ruben Carranza, *Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill Its Reparations Mandate*, International Center for Transitional Justice, November 10, 2009.
1672. See *Duch* Judgment (Trial Chamber), Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 667–75, July 26, 2010, available at: [eccc.gov.kh/english/cabinet/courtDoc/635/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).
1673. *Report of the Group of Experts for Cambodia*, paras. 165–75.
1674. *Ibid.*, para. 171.
1675. Open Society Justice Initiative, *Recent Developments at the ECCC*, June 2011, 37.
1676. See Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia,” 13, JAD-PbP Working Paper Series No. 7, May 2010; published as “The Impact of Hybrid Tribunals: Current Practice in Bosnia and Herzegovina and Cambodia,” in *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience*, ed. Michael Reed and Amanda Lyons, 230–59 (Bogota: International Center for Transitional Justice, 2011).
1677. Under the super-majority rule, four judges must sign off on each decision for it to be valid.
1678. UC Berkeley Human Rights Center, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the ECCC*, June 2011, finding that “of those who had heard about the ECCC at least occasionally, the main sources of information were television ... and radio.”
1679. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies in International and Hybrid Courts*, Phnom Pen, April 2010.
1680. UC Berkeley Human Rights Center, *After the First Trial*.
1681. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies*.
1682. *Ibid.*
1683. UC Berkeley Human Rights Center, *After the First Trial*.
1684. *Ibid.*
1685. Such tasks include providing information to victims and explaining the legal structure of the court to public audiences.
1686. ICTJ, *Report of the ICTJ-ECCC Workshop on Outreach Strategies*.
1687. Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012.
1688. UC Berkeley Human Rights Center, *After the First Trial*.
1689. Interview with Clair Duffy, trial monitor for the Open Society Justice Initiative. Meetings between the international coprosecutor, the head international judge, and the deputy director of administration to coordinate administrative matters were alleged to be improper (or appear improper) by the defense, which filed a motion for the disqualification of the judge. The motion was rejected, but highlighted the gap

in the legal framework of the ECCC—a gap normally filled in the statutes of other international criminal tribunals, through the roles of a president or registrar.

1690. The full appeal judgment is available on the ECCC website, available at: [eccc.gov.kh](http://eccc.gov.kh).
1691. In response to an appeal from that finding, the Trial Chamber ordered Ieng Thirith to be placed on a treatment plan, pending review to determine whether her fitness to stand trial has improved.
1692. Under Internal Rule 89ter, adopted in February 2011, the ECCC allowed for the “separation of proceedings in relation to one or several accused and concerning part of the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.”
1693. Severance Order Pursuant to Internal Rule 89ter, September 22, 2011, available at: [eccc.gov.kh/sites/default/files/documents/courtdoc/E124\\_EN.PDF](http://eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF). See also “Press Release: Severance of Proceedings Ordered in Case 002,” September 22, 2011, available at: [eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf](http://eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf). See also Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012.
1694. Open Society Justice Initiative, *Recent Developments at the ECCC: A Critical Supreme Court Affirms Life Sentences*, November 2016, available at: [opensocietyfoundations.org/sites/default/files/recent-developments-eccc-december-2016-20161201.pdf](http://opensocietyfoundations.org/sites/default/files/recent-developments-eccc-december-2016-20161201.pdf).
1695. “Closing Statements in Case 002/2 Conclude,” ECCC press release, June 23, 2017, available at: [eccc.gov.kh/en/articles/closing-statements-case-00202-conclude](http://eccc.gov.kh/en/articles/closing-statements-case-00202-conclude).
1696. Top Cambodian government officials, including Prime Minister Hun Sen, a former Khmer Rouge official, have publicly stated that Cases 003 and 004 will not proceed. In October 2010, Prime Minister Hun Sen said that “Case 003 will not be allowed. ... The Court will try the four senior leaders successfully and then finish with Case 002. “Hun Sen to Ban Ki-Moon: Case 002 Last Trial at ECCC,” *The Phnom Penh Post*, October 27, 2010.
1697. See Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, 2016.
1698. See UC Berkeley Human Rights Center, *After the First Trial*; see also UC Berkeley Human Rights Center, *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the ECCC* (January 2009). See also *International Republican Institute: Survey on Cambodian Public Opinion*, July 31–August 26, 2009. The 2011 report found that “attitudes toward the ECCC remained positive and had become more favorable [since 2009] on certain indicators. A vast majority of respondents believed the Court would respond to the crimes committed by the Khmer Rouge (84%); help rebuild trust in Cambodia (82%); help promote national reconciliation (81%); and bring justice to the victims of the Khmer Rouge regime (76%).”
1699. See United Nations Office of the High Commissioner for Human Rights, *International Justice and Human Rights: Supporting the Legacy of Cambodia’s Extraordinary Chambers*, available at: [cambodia.ohchr.org/EN/PagesFiles/ECCC\\_legacy\\_program.htm](http://cambodia.ohchr.org/EN/PagesFiles/ECCC_legacy_program.htm). For an incomplete overview of legacy initiatives at the ECCC, see Tessa Bialek, *Legacy at the Extraordinary Chambers in the Courts of Cambodia*, DC-CAM, Summer 2011, available at: [d.dccam.org/Abouts/Intern/Tessa\\_Bialek\\_Legacy\\_FINAL.pdf](http://d.dccam.org/Abouts/Intern/Tessa_Bialek_Legacy_FINAL.pdf). A handbook for legal practitioners, intended to transfer knowledge of ECCC law and practice to national courts, is under development by the East-West Management Institute Legacy Project on Cambodian Criminal Procedure.

1700. See S. Linton, “Putting Cambodia’s Extraordinary Chambers into Context,” *Singapore Year Book of International Law* 11, no. 195 (2007): 205–7, for the view that training has not successfully developed capacity of the national system, available at: [law.nus.edu.sg/sybil/downloads/articles/SYBIL-2007/SYBIL-2007-195.pdf](http://law.nus.edu.sg/sybil/downloads/articles/SYBIL-2007/SYBIL-2007-195.pdf).
1701. Open Society Justice Initiative, *Performance and Perception*, 101.
1702. “The expenses and salaries of the Extraordinary Chambers shall be as follows:
  1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges [etc.] shall be borne by the Cambodian national budget;
  2. The expenses of the foreign [officials, staff, and judges] ... shall be borne by the United Nations;
  3. The defence counsel may receive fees for mounting the defence;
  4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.”
1703. *ECCC Financial Outlook as at 31 January 2015*, available at: [eccc.gov.kh/sites/default/files/Financial\\_Outlook\\_31%20\\_January\\_%202015.pdf](http://eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf).
1704. 2010—US\$30.7 million; 2011—US\$32 million; 2012—US\$34.3 million; 2013—US\$35.4 million; 2014—US\$27.8 million; 2015—US\$33.7 million. See *ECCC Expenditures as at 30 September 2013*, available at: [eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2030%20Sept%202013%20FINAL.pdf](http://eccc.gov.kh/sites/default/files/Financial%20Outlook%20-%2030%20Sept%202013%20FINAL.pdf).
1705. *ECCC Financial Outlook as at 31 January 2015*.
1706. Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012. For example, Japan has made significant contributions to both national and international sides of the court, but the United States has only provided funding to the international side. In addition, Germany has earmarked funding, for example, to support the Victims’ Support Section. See *ECCC Financial Outlook as at 31 January 2015*, available at: [eccc.gov.kh/sites/default/files/Financial\\_Outlook\\_31%20\\_January\\_%202015.pdf](http://eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf).
1707. See, for example, FIDH, *The ECCC Funding Crisis Must Be Swiftly Resolved*, September 20, 2013, available at: [fidh.org/International-Federation-for-Human-Rights/asia/cambodia/eccc/the-eccc-funding-crisis-must-be-swiftly-resolved-13961](http://fidh.org/International-Federation-for-Human-Rights/asia/cambodia/eccc/the-eccc-funding-crisis-must-be-swiftly-resolved-13961).
1708. See UN Deputy Secretary-General, “Cambodia, Partners Must Address Chronic Financial Crisis Affecting Extraordinary Chambers, Deputy Secretary-General Tells Pledging Conference,” press release, November 7, 2013, available at: [un.org/press/en/2013/dsgsm723.doc.htm](http://un.org/press/en/2013/dsgsm723.doc.htm). See, for example, David Scheffer, “No Way to Fund a War Crimes Tribunal,” *New York Times*, August 28, 2012, “This is no way to fund a major war-crimes tribunal with a historic mandate to achieve accountability, finally, for one of the 20th century’s worst slaughters of innocent civilians. Voluntary government assistance for war crimes tribunals is a speculative venture at best, and depends on so many unpredictable variables as years roll by that the original objective is sometimes forgotten.”
1709. Open Society Justice Initiative, *Recent Developments at the ECCC*, June 2011.
1710. Framework Agreement, Articles 19–21.
1711. Ellis, *The ECCC: A Failure of Credibility*.

1712. Ibid.
1713. Ibid.
1714. Ibid.
1715. Open Society Justice Initiative, *Recent Developments at the ECCC*, February 2012, 25.
1716. This report uses the term “East Timor,” to refer to the country prior to sovereign independence in 2002, and “Timor-Leste” when referencing events clearly occurring after this time.
1717. World Bank, *Timor-Leste Overview*, available at: [web.worldbank.org](http://web.worldbank.org).
1718. Amnesty International, *Timor-Leste: Submission to the UN Committee on the Elimination of Discrimination against Women*, 2015.
1719. Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, April 5–6, 2000, Section. 1.2, s. 2 (c) and s. 9.
1720. Megan Hirst and Howard Varney, *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, 11–12, ICTJ, 2005.
1721. See *Freedom House: Freedom in the World Report, East Timor 2011*, available at: [freedomhouse.org/report/freedom-world/2011/east-timor](http://freedomhouse.org/report/freedom-world/2011/east-timor).
1722. Michael Leach, “Concerns over Judicial Independence in Timor-Leste,” *East Asia Forum*, October 31, 2014, available at: [eastasiaforum.org/2014/10/31/concerns-over-judicial-independence-in-timor-leste/](http://eastasiaforum.org/2014/10/31/concerns-over-judicial-independence-in-timor-leste/).
1723. Amnesty International, *Timor-Leste: Still No Justice for Past Human Rights Violations. Amnesty International Submission to the UN Universal Periodic Review*, November 2016, 4.
1724. See UNDP, *Situation Analysis of Civil Society Organizations in East Timor*, 2002; Helder Da Costa, *East Timor: The Role of Civil Society in Conflict Prevention and Peacebuilding*, European Center for Conflict Prevention, 2005, available at: [conflict-prevention.net](http://conflict-prevention.net); Janet Hunt, “Building a New Society: NGOs in East Timor,” *New Community Quarterly*, 2, no. 1 (2004).
1725. See Caitlin Reiger, “Hybrid Attempts at Accountability for Serious Crimes in Timor-Leste,” in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge, Cambridge University Press, 2006), 146. Reiger writes, “Indonesia’s fragile democratic development after the fall of the Suharto regime was still dependent on the support of the powerful military, whose actions would have been directly challenged by the establishment of an international tribunal, a risk that the Security Council was not prepared to take.” It should be noted that UN Regulation 2000/15 explicitly noted that the creation of the Dili Panels would “not preclude the jurisdiction of an international tribunal for East Timor ... once such a tribunal is established.”
1726. Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICTJ, March 2006, 12.
1727. Ibid.
1728. UNTAET Regulation No. 2000/15.
1729. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 24.
1730. Hirst and Varney, *Justice Abandoned*, 21.

1731. Reiger, *Hybrid Attempts at Accountability*, 158.
1732. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 39.
1733. Hirst and Varney, *Justice Abandoned*, 10.
1734. UN Security Council, *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, S/2006/580, July 26, 2006, 3.
1735. One hundred and eighty-six cases had been investigated but no one had been indicted, and over 400 murder cases had yet to be investigated. See Amnesty International, *Timor-Leste: Submission to the UN Committee on the Elimination of Discrimination Against Women*, 7.
1736. UNTAET Regulation 2001/10 of 13 July 2001.
1737. Ibid.
1738. Memorandum of Understanding between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working Relationship and Exchange of Information between the Two Institutions, signed by Longuinhos Monteiro, the general prosecutor, and Aniceto Guterres Lopes, chairperson of the Commission for Reception, Truth and Reconciliation, on June 4, 2002.
1739. No Peace Without Justice, *Closing the Gap: The Role of Non-Judicial Mechanisms in Addressing Impunity*, 2010, 81.
1740. Chega: The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste. Part 2: The Mandate of the Commission, 6, available at: [www.cavr-timorleste.org/en/chegaReport.htm](http://www.cavr-timorleste.org/en/chegaReport.htm).
1741. No Peace Without Justice, *Closing the Gap*, 169.
1742. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 27.
1743. International Center for Transitional Justice, *After 10 Years, CAVR Report Still Resonates in Timor-Leste and around the World*, February 23, 2016, available at: [ictj.org/news/10-years-cavr-report-timor-leste-truth](http://ictj.org/news/10-years-cavr-report-timor-leste-truth).
1744. Amnesty International, *Timor-Leste: Still No Justice for Past Human Rights Violations*, November 2016, 6.
1745. Ibid., 3.
1746. SCIT was created by Security Council Resolution 1704 (2006), extending the UN Integrated Mission in Timor-Leste (UNMIT), ahead of 2007 elections. Para 4(i) requested UNMIT “to assist the Office of the Prosecutor-General of Timor-Leste, through the provision of a team of experienced investigative personnel, to resume investigative functions of the former Serious Crimes Unit, with a view to completing investigations into outstanding cases of serious human rights violations committed in the country in 1999.”
1747. As opposed to voluntary contributions made at the discretion of member states, assessed contributions are payments made as part of obligations that members undertake when signing treaties. At the UN, the scale of assessment is determined every third year. See [betterworldcampaign.org/issues/funding/the-un-budget-process.html](http://betterworldcampaign.org/issues/funding/the-un-budget-process.html) and also [globalpolicy.org/un-finance/tables-and-charts-on-un-finance/member-states-assessed-share-of-the-un-budget.html](http://globalpolicy.org/un-finance/tables-and-charts-on-un-finance/member-states-assessed-share-of-the-un-budget.html).
1748. James Kirk and Carlito da Costa Boba, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?*, ICTJ, 2010, 20.

1749. ICTJ, *Prosecutions of Crimes against Humanity in Timor-Leste: A Case Analysis*, June 2011.
1750. Amnesty International, *Timor-Leste: Still No Justice for Past Human Rights Violations*, 6.
1751. *Ibid.*
1752. *Ibid.*
1753. *Report to the Secretary-General of the Commissions of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999*, May 26, 2005, 23, para. 99.
1754. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 30.
1755. David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" *Asia Pacific Issues* 61, no. 1 (2002).
1756. See Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 30, see also [ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf](http://ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf).
1757. *Ibid.*
1758. *Report to the Secretary-General of the Commissions of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999*, May 26, 2005, para. 104.
1759. *Ibid.*, para. 93.
1760. Reiger and Wierda, *The Serious Crimes Process in Timor-Leste*, 31.
1761. International Bar Association, "Special Panel for Serious Crimes (East Timor)," available at: [ibanet.org/Committees/WCC\\_EastTimor.aspx](http://ibanet.org/Committees/WCC_EastTimor.aspx).
1762. See JSMP website, [jsmp.tl/en/about-jsmp/](http://jsmp.tl/en/about-jsmp/).

# ANNEX 4: MECHANISMS IN EUROPE

## INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

### Conflict Background and Political Context

The Socialist Federal Republic of Yugoslavia (SFRY) emerged from World War II as a communist country under the rule of President Josip Broz Tito. The new state brought Serbs, Croats, Bosnian Muslims, Albanians, Macedonians, Montenegrins, and Slovenes into a federation of six separate republics (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia) and two autonomous provinces of Serbia (Kosovo and Vojvodina).

Ten years after Tito's death in 1980, the country was in economic crisis and the mechanisms he had designed to both repress and balance ethnic demands in the SFRY were under severe strain. Slobodan Milošević had harnessed the power of nationalism to consolidate his power as president of Serbia. The League of Communists of Yugoslavia dissolved in January 1990, and the first multiparty elections were held in all Yugoslav republics, carrying nationalist parties to power in Bosnia, Croatia, Slovenia, and Macedonia.<sup>1763</sup> Meanwhile, Milošević and his political allies asserted control in Kosovo, Vojvodina, and Montenegro, giving Serbia's president de facto control over four of the eight votes in the federal state's collective presidency. This and the consolidation of Serbian control over the Yugoslav People's Army (YPA) heightened fears and played into ascendant nationalist feelings in other parts of the country.

Declarations of independence by Croatia and Slovenia on June 25, 1991, brought matters to a head. Largely homogenous Slovenia succeeded in defending itself through a 10-day conflict that year against the Serb-dominated federal army, but Milošević was more determined to contest the independence of republics with sizeable ethnic Serb populations. There followed a series of large-scale armed conflicts in Croatia (1991–1995); Bosnia and Herzegovina (1992–1995); and Kosovo (1998–1999).<sup>1764</sup> Between 1991 and 1999 an estimated 140,000 people were killed, almost 40,000 persons went missing, and over three million persons were displaced internally and abroad, in what became known as the worst conflict in Europe since the end of World War II.<sup>1765</sup>

In Croatia, clashes between Croatian government forces and forces opposed to succession—including Serb rebel groups and paramilitaries backed by the Serbian YPA and the Serbian Ministry of Internal Affairs (MUP)—led to bloody battles, notably in Vukovar. In March 1992, Bosnia and Herzegovina’s declaration of independence, which was widely supported by Bosnian Muslims and Croats, led to a reaction from Serb military forces. Local militias with strong backing from Belgrade took control of Serb populated areas, targeting Bosniaks (Bosnian Muslims) and Croats in campaigns of murder, torture, sexual violence, and expulsion that became known as “ethnic cleansing.” Serb forces laid siege to the capital city of Sarajevo and declared a separate state within the borders of Bosnia and Herzegovina. Majority Croat areas of the country sought to break away from Bosnia and Herzegovina, and Zagreb-backed militias engaged in campaigns of “ethnic cleansing” targeting Serbs and Bosniaks. Between 1992 and 1995, the war in Bosnia led to the deaths of around 100,000 people and the displacement of hundreds of thousands more. A “blizzard of resolutions” were adopted by the United Nations Security Council, addressing the raging conflict in Yugoslavia,<sup>1766</sup> most notably, Security Council’s resolutions 713 (1991), 764 (1992), 771 (1992), 780 (1992), 808 (1993),<sup>1767</sup> and finally resolution 827 (1993), which established the International Criminal Tribunal for the former Yugoslavia (ICTY).

Resolution 827 (1993), adopted by the UN Security Council on May 25, 1993, expressed “alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia.” Finding these to be a threat to international peace and security, the Security Council invoked Chapter VII of the UN Charter to create an ad hoc criminal tribunal with the purpose of “prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.”<sup>1768</sup>

While it was hoped that the creation of an international war crimes tribunal would contribute to ending atrocities and restoring peace, the ICTY was not the end of the Yugoslav wars. In July 1995, over just 10 days, the Bosnian Serb Army executed approximately 8,000 Bosniak boys and men seized in the UN “safe area” of Srebrenica, under the eyes of Dutch UN peacekeepers.<sup>1769</sup> The massacre and ongoing shelling of Sarajevo finally prompted limited NATO military strikes against Bosnian Serb positions and increased Western leverage over the parties, allowing a negotiated end to the conflicts. In December 1995, the leaders of Bosnia and Herzegovina, Croatia, and Serbia signed the Dayton Peace Accords, creating separate Bosniak/Croat and Serb majority entities within the Bosnian federation.

The Dayton Peace Accords ended the war in Bosnia but did not address the situation in Kosovo. Belgrade's increasing repression of majority Albanian demands for independence over the course of 1997–1998 ultimately led to large-scale conflict between Serbian police and military forces and the Kosovo Liberation Army (KLA). NATO airstrikes from March–June 1999 finally ended the Yugoslav wars.

For more detailed background on each of the individual conflicts, please see the separate profiles of the mechanisms for Bosnia and Herzegovina, Croatia, and Kosovo, below.

## **Existing Justice-Sector Capacity**

At the time of the ICTY's creation, the former Yugoslav republics were unwilling or otherwise unable to prosecute those responsible for atrocity crimes. Thus, the UN Security Council supported the creation of an independent criminal tribunal with a seat in The Hague, which would be able to prosecute crimes committed by all parties in the conflict. A 1995 Human Rights Watch report on the limitations of domestic war crimes prosecutions in Croatia, Bosnia, and Serbia confirms the importance of the involvement of the ICTY, especially in the prosecution of high-ranking perpetrators. The report found that the ability of the local justice system to prosecute war crimes was not in line with international standards. According to Human Rights Watch, the judiciaries were highly politicized and lacked independence, courts often failed to ensure respect for due process rights, and authorities failed to prosecute members of their own forces.<sup>1770</sup>

In 1993, the UN Security Council adopted supplementary resolutions to the ICTY statute, one of which stated that the “strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR [International Criminal Tribunal for Rwanda] Completion Strategies in particular.”<sup>1771</sup> The Security Council thus extended the tribunal's mandate beyond prosecutions, to include serving as a catalyst for national prosecutions of war crimes.<sup>1772</sup>

## **Existing Civil Society Capacity**

Countries in the former Yugoslavia do not have a strong civil society tradition.<sup>1773</sup> Although some groups engaged in antiwar activism during the conflict, civil society organizations played little to no role in the creation of the ICTY. International news

coverage of grave crimes and the work of international human rights organizations, however, contributed to focusing worldwide attention on events in the Balkans during the 1990s and were instrumental in pushing for the creation of an international tribunal. Human Rights Watch published numerous reports on human rights and serious violations of humanitarian law throughout the Yugoslav wars. It investigated human rights violations of Serb minorities in Croatia before the start of the conflict, violations of the laws of war by Serb insurgent forces and the Yugoslav Army during the Croatian War of Independence,<sup>1774</sup> war crimes that occurred during Bosnia's war,<sup>1775</sup> and human rights abuses by Serbs against Kosovo Albanians.<sup>1776</sup>

Local civil society organizations evolved over the course of the Yugoslav conflicts. According to the Council of Europe Commission on Human Rights, "A vibrant civil society in the region of the former Yugoslavia with groups of professionals and victims ... ha[s] been working for more than a decade gathering information, revealing evidence, co-operating with national and international institutions, organizing educational campaigns, giving support to victims and promoting accountability and reconciliation."<sup>1777</sup> Nongovernmental organizations have played an instrumental role in pushing for domestic prosecutions of wartime atrocities and investigations that are representative of the crimes committed and for the creation of other methods to address Yugoslavia's violent past, despite operating in a climate that is often hostile to civil society.<sup>1778</sup> The Research and Documentation Center (Bosnia), the Humanitarian Law Center (Serbia and Kosovo), and the Documenta-Center (Croatia) have been some of the key actors in this process.<sup>1779</sup>

## Creation

In response to reports of continued violations of human rights in the former Yugoslavia, the United Nations Security Council unanimously adopted Resolution 780 (1992), which called for the creation of "an impartial Commission of Experts to examine and analyze ... grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of former Yugoslavia."<sup>1780</sup> In the "blizzard of resolutions"<sup>1781</sup> addressing the raging conflict that followed, it slowly became clear to the international community that they were dealing with the largest conflict on European soil since the end of World War II. The expert commission faced a number of difficulties in carrying out its investigations, most notably a lack of resources and absence of state cooperation, but produced a report that recommended the establishment of an international tribunal to put an end to such crimes and restore peace and security.<sup>1782</sup> In Resolution 808

(1993), the Security Council recognized the need for the creation of an international tribunal “to end ... crimes and take effective measures to bring to justice the persons who are responsible for them,” and further directed the Secretary-General to submit a proposal for constituting the court.<sup>1783</sup>

In the context of the international community’s confusion and deadlock over how to effectively address the wars raging in Croatia and Bosnia, the UN Security Council did come to agreement on Resolution 827 of May 25, 1993, establishing an ad hoc international tribunal “for the prosecution of persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>1784</sup> The resolution contained the ICTY Statute, which determined the court’s jurisdiction and organizational structure, as well as its criminal procedure in general terms.<sup>1785</sup> The creation of the ICTY under Chapter VII of the UN charter, concerning the United Nations powers for the maintenance of peace, raised high expectations for the tribunal as a means of peacebuilding. The ICTY’s founders also intended the court to create a reliable historical record of what happened for future generations in order to avoid “dangerous misinterpretations and myths.”<sup>1786</sup> It remains disputed whether the tribunal was indeed an effective tool for the deterrence of further violence in the region, or for providing an official record of events.<sup>1787</sup>

## **Legal Framework and Mandate**

The UN Security Council created the ICTY as an extraordinary measure under Chapter VII of the UN Charter to restore international peace and security and to prosecute those (most) responsible for violations of international humanitarian law in the territory of the former Yugoslavia.<sup>1788</sup> The subject matter jurisdiction of the tribunal includes war crimes, crimes against humanity, and genocide.<sup>1789</sup> War crimes are defined as grave breaches of the 1948 Geneva Conventions and violations of the law or customs of war (violations of customary international humanitarian law). The ICTY Statute incorporates the exact definition of genocide from Articles 2 and 3 of the 1949 Genocide Convention, and it defines crimes against humanity in accordance with similar crimes within the charter and judgments of the post-World War II Nuremberg and Tokyo tribunals. The tribunal’s territorial jurisdiction is limited to the former Yugoslavia republics, and its temporal jurisdiction covers crimes committed after January 1, 1991.<sup>1790</sup> At the time of the ICTY’s creation, the wars in Bosnia and Croatia were still ongoing, and therefore, its temporal jurisdiction was left open-ended. The ICTY has jurisdiction over individual persons, and the statute specifically provides that the tribunal may prosecute heads

of state or government.<sup>1791</sup> The ICTY was the first international criminal court of its kind to include such a provision limiting head-of-state immunity.<sup>1792</sup>

The governing legal instruments of the tribunal are the ICTY Statute and the Rules of Procedure and Evidence, which the court's judges adopted on February 11, 1994.<sup>1793</sup> Secondary legal instruments were developed over time, including agreements on the enforcement of sentences with third states, the headquarters agreement between the UN and the Netherlands, and a variety of rules governing such matters as detention and a code of conduct for the defense.<sup>1794</sup>

The ICTY has concurrent jurisdiction and primacy over national courts. Early on in its existence, many already believed the tribunal should focus on prosecutions of those most responsible for crimes under the statute. Article 19 of the ICTY Statute dictates that the tribunal may at any point in the proceedings defer cases to national authorities; the court applied this concept extensively following the adoption of a completion strategy for operation (see annexes on Bosnia, Croatia, and Serbia).<sup>1795</sup> The tribunal relied on states and international organizations to carry out arrest warrants and other requests for assistance. Therefore, Article 29 of the statute sets forth the obligation of all states to cooperate with the tribunal's investigations and prosecutions.<sup>1796</sup> In practice, and especially during its first years, obtaining state cooperation proved difficult for a pioneering tribunal operating in a region where there was little political support for its work and where conflicts were ongoing. From the end of the 1990s onward, under pressure from the international community and after filing numerous reports of non-cooperation, the situation temporarily improved.<sup>1797</sup>

## **Location**

The ICTY premises are located in The Hague, the Netherlands.<sup>1798</sup> However, the tribunal may sit elsewhere if its president deems it to be in the interest of justice.<sup>1799</sup> Upon creation of the tribunal, the United Nations decided that because of the ongoing conflict in the former Yugoslavia, and lack of political will and support for the ICTY in the region, the mechanism had to be seated elsewhere. Throughout its existence, the ICTY has had to contend with the distance between it and its constituents in the region: the victims and communities affected by the crimes within its mandate.

Accused persons arrested and transferred to The Hague are held in the United Nations Detention Unit (UNDU) in the Scheveningen area of The Hague. Persons convicted of a crime before the ICTY do not serve their sentence in The Hague

but must be transferred to a prison in a third country with which the tribunal has a sentencing agreement.<sup>1800</sup>

## **Structure and Composition**

The ICTY is composed of three main branches: the Chambers, the Office of the Prosecutor (OTP), and the Registry. In line with the UN Charter, geographical representation is considered in hiring, and both national and international personnel staff these core organs.

### ***Chambers***

The ICTY's Chambers are composed of three Trial Chambers and one Appeals Chamber, assisted in their work by the Chambers Legal Support Teams. Each Trial Chamber has three permanent judges and a maximum of six *ad litem* judges appointed by the UN Secretary-General for a term of four years. Both permanent and *ad litem* judges are eligible for reelection after their first term. Each case must have a permanent judge among those assigned to hear a case and must conduct such hearings in line with the tribunal's Rules of Procedure and Evidence. The Appeals Chamber consists of seven permanent judges, five of whom are permanent judges of the ICTY and two who are permanent judges of the ICTR. Each appeal must be heard by a bench of five judges. The judges elect a president who presides over the Appeals Chamber and assigns judges to cases at the Appeals and Trial Chambers, performs diplomatic and political functions related to the tribunal's work, supervises the registrar, and submits an annual report to the General Assembly and a biannual assessment to the Security Council. The judges also elect a vice president who performs the president's functions in his or her absence. ICTY judges come from a variety of legal systems; they are expected to be persons of high moral character, impartiality, and integrity.<sup>1801</sup>

### ***The Office of the Prosecutor***

The UN Security Council appoints the prosecutor upon nomination by the Secretary-General for a four-year renewable term. A deputy prosecutor (also appointed by the Secretary-General) and other prosecutors, legal officers, and investigators supports the prosecutor's work. The OTP, which unlike at other international tribunals is not included in the statute as such, may investigate and prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia after January 1, 1991, and operates separately

from the tribunal's other two organs.<sup>1802</sup> Since 2004, the OTP has focused mostly on prosecution of existing cases, as it issued its final indictments that year. In line with the tribunal's completion strategy, the prosecutor was involved in the scrutiny of cases with the aim of prioritizing them for prosecution, as well as handing over the rest of the cases to the national prosecutors.<sup>1803</sup>

### ***The Registry***

The Registry serves as the “engine room” of the tribunal, providing essential court management and administrative support for the Chambers and Office of the Prosecutor, and serves as the channel of communication between the ICTY and the outside world.<sup>1804</sup> The Registry consists of four divisions: the Division of Judicial Support Services, the Immediate Office of the Registrar, the Chambers Legal Support Section, and the Administrative Division. These are responsible for, among others, courtroom operations, court records and filings, witness support and assistance, legal support to Chambers, process requests for legal aid by accused persons, trial interpretation and translation of documents, supervision of the UNDU, and outreach and public information. The Registry also plays an important role, alongside other organs, in maintaining external relations and ensuring state cooperation with the court. The Registry is headed by the registrar, whom the Secretary-General appoints upon recommendation by the judges to a four-year renewable term.<sup>1805</sup>

### ***Victims and Witnesses Section***

The statute dictates that the ICTY shall provide for the protection of victims and witnesses.<sup>1806</sup> The Victims and Witnesses Section (VWS) within the Registry consists of the Witness Support and Operations Unit (WSOU) and Witness Protection Unit (WPU). Together, these two units are responsible for the safe appearance of witnesses before the tribunal in The Hague, including the logistical arrangements, psycho-social support, and security measures which may be needed throughout and after the process.<sup>1807</sup> According to the Rules of Procedure and Evidence, the ICTY's judges may order a range of protective measures for witnesses testifying before the ICTY to make sure that their identity is not disclosed to the media or public.<sup>1808</sup>

### ***Defense***

While the ICTY does not have a designated defense office, the Registry is responsible for dealing with defense matters. The Office for Legal Aid and Defense Matters within the Division of Judicial Support Services is responsible

for the ICTY's legal aid scheme. Over the years, the Registry has prepared various documents that regulate and support the work of defense counsel practicing before the ICTY, including a Directive on Assignment of Defense Counsel and a Code of Professional Conduct for Defense Counsel Appearing before the International Tribunal. Since 2002, defense counsel are organized in the Association of Defense Counsel practicing before the ICTY (ADC-ICTY).<sup>1809</sup> Although not formally part of the tribunal's structure, the ADC-ICTY was often involved by the Registry in the determination of policies concerning the defense.

### ***Outreach***

An ICTY outreach program was established in 1999, six years after the tribunal's creation.<sup>1810</sup> Then-President Gabrielle Kirk McDonald came to realize that "if the ICTY were to accomplish the UN-mandated goal of helping to bring about international peace and security, the people of the region must come to know and appreciate the Tribunal as being fair," and outreach was seen as key to achieving that goal.<sup>1811</sup> Activities carried out by the outreach program included capacity building of national judiciaries and legal professionals, awareness-raising among younger generations, grassroots community outreach, media outreach, organized visits to the tribunal, and production of information materials. The court created liaison offices in Belgrade, Sarajevo, Zagreb, and Pristina. These activities align with the program's mandate of bridging the divide between the ICTY in The Hague and local communities in the various countries of the former Yugoslavia.<sup>1812</sup> However, in part due to its very late start in organizing outreach, the ICTY has struggled with the inherently daunting task of explaining its mandate and complex proceedings in the face of misinformation campaigns. Despite the outreach program's development, the tribunal never overcame the sense of remoteness from the Balkan region for which it was established.<sup>1813</sup>

### **Prosecutions**

As of late 2017, the ICTY has concluded proceedings for 154 accused persons (19 acquitted, 83 sentenced, 13 were referred to national jurisdictions, 20 individuals had their indictments withdrawn, 10 died before transfer to the tribunal, and seven died while in custody). In total, the tribunal indicted 161 persons. As of late 2017, 10 remained in custody at the UN ICTY Detention Unit, while there were seven ongoing proceedings (one at the trial stage and six at the appeals stage).<sup>1814</sup>

In its first two years, the ICTY issued 34 indictments, but struggled to bring suspects to The Hague.<sup>1815</sup> Trials only started in 1996, and the first judgment was delivered on November 29, 1996: a sentence of 10 years' imprisonment for crimes against humanity committed in Srebrenica for Drazen Erdemović, a Bosnian Croat soldier in the Serbian army.<sup>1816</sup> Initially, the Office of the Prosecutor lacked a consistent case selection strategy, and investigations focused on crimes committed in the Bosnian war, since this is where the UN Commission of Experts had already collected evidence. Many of the first investigations concerned lower-level, direct perpetrators, and not the high-ranking political and military leaders who orchestrated crimes, and who were well known within Yugoslavia.<sup>1817</sup> The indictment of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić for genocide and other charges in November 1995<sup>1818</sup> and the indictment of Serbian President Slobodan Milošević on May 22, 1999,<sup>1819</sup> were of much greater significance to the region and have helped shape perceptions of the tribunal.

The ICTY has played a pioneering role in the prosecution of and development of jurisprudence on sexual and gender-based violence in armed conflict.<sup>1820</sup> In total, almost 50 percent of the tribunal's indictments included sexual violence charges, and 32 individuals were eventually convicted under Article 7 of the ICTY Statute.<sup>1821</sup> The prosecutor's first case, *Prosecutor v. Duško Tadić*, was also the first international war crimes trial to include sexual violence charges in its indictment, including sexual violence against men.<sup>1822</sup> Other judgments included convictions for aiding and abetting rape as a war crime, which is not included in the ICTY Statute as such;<sup>1823</sup> rape as torture under customary international law;<sup>1824</sup> and sexual enslavement as a crime against humanity.<sup>1825</sup>

Although the prosecution achieved convictions of high-level perpetrators of the wars in the former Yugoslavia, its struggles with some high-profile cases have also affected regional perceptions of the court's work. Prominent acquittals included those of Croatian General Ante Gotovina,<sup>1826</sup> leading suspects of the KLA,<sup>1827</sup> Vojislav Šešelj,<sup>1828</sup> and Momčilo Perišić.<sup>1829</sup> In the former Yugoslavia, the fact that a majority of ICTY indictments and convictions were against Serbs and Bosnian Serbs is varyingly seen as an accurate reflection of atrocities perpetrated during the Yugoslav conflicts, or as confirmation that the tribunal was a biased institution, established to punish Serbs.<sup>1830</sup>

## Legacy

The UN resolution creating the ICTY expressed an expectation that through its proceedings, it would contribute to the restoration and maintenance of international peace and security.<sup>1831</sup> However, the tribunal's legacy extends beyond the areas of its formal mandate.<sup>1832</sup> Beyond the conviction of over 161 individuals for war crimes, crimes against humanity, and genocide committed in the former Yugoslavia, the ICTY itself has claimed impact in various areas: the creation of an accurate historical record of the conflicts, the general development of international humanitarian law and international justice, strengthening of the rule of law in its target countries, and bringing justice to victims of atrocity crimes.<sup>1833</sup>

### *The Deterrent Effect of the ICTY*

When the ICTY was created, at the height of the Yugoslav wars, it was hoped that the creation of a war crimes tribunal would have a deterrent effect on the commitment of future crimes. It is clear to all that the ICTY was no panacea, since the worst of the Bosnian war was yet to come, and the Kosovo war commenced five years after the tribunal came into existence. Scholars disagree on the ICTY's deterrent effect. Some claim that the tribunal has had, at best, a limited deterrent impact on mass violence in the former Yugoslavia.<sup>1834</sup> Others argue that while the ICTY's creation and its focus on the atrocities in the region did not immediately end the violence, near the end of the war and in its aftermath, the court was instrumental in altering the politics of violence, violent behavior, and the culture of impunity in Yugoslavia.<sup>1835</sup> Especially the indictments of Bosnian Serb commanders Radovan Karadžić and Ratko Mladić, whose indictments excluded them from the Dayton peace negotiations, and the later indictment of Serbian President Slobodan Milošević, who was ousted from power not long thereafter, have been described as being instrumental to guiding the region back toward peace.

### *Telling the Story of What Happened*

The ICTY has created the most complete documented history of crimes committed in the former Yugoslavia.<sup>1836</sup> Its cases have proven key in the determination of the facts of crimes committed in Yugoslavia. Academic Marko Milanović writes of the court: "The detail in which the ICTY's judgements describe the crimes and the involvement of those convicted make it impossible for anyone to dispute the reality of the horrors that took place in and around Bratunac, Brčko, Čelebići, Dubrovnik, Foča, Prijedor, Sarajevo, Srebrenica and Zvornik, to name but a few."<sup>1837</sup> The *Kvočka et al.* case, for example, was important in establishing the crimes that occurred in

Prijedor, Bosnia and Herzegovina.<sup>1838</sup> Perpetrators in *Prosecutor v. Dragan Nikolić* disclosed information on the location of mass graves near the Sušica Detention Camp in Bosnia and Herzegovina, so that the victims' families could finally locate and properly bury their dead.<sup>1839</sup>

### ***Development of International Law***

The ICTY's proceedings have made a significant contribution to international criminal law as well as international humanitarian law, which at the time of the tribunal's creation was still in its infancy.<sup>1840</sup> In the *Tadić Jurisdiction Decision*, for example, the Appeals Chamber, in defining an armed conflict, held that "an armed conflict exists whenever there is a resort to armed force between armed states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>1841</sup> In addition, the ICTY has been able to shape jurisprudence on genocide,<sup>1842</sup> crimes against humanity, command (superior) responsibility,<sup>1843</sup> protected persons, and taking the first steps toward the formation of the notion of joint criminal enterprise as a mode of liability.<sup>1844</sup>

### ***Strengthening Domestic Capacity***

At the time of the ICTY's creation in 1993, it was assumed that local courts in the former Yugoslavia were unable or unwilling to bring perpetrators of atrocities to justice, let alone prosecute their own. Neither was there an expectation that the tribunal in The Hague would strengthen the capacity of national courts in the former Yugoslavia.<sup>1845</sup> Over the course of its existence, perceptions started to change regarding the relationship between the ICTY and national courts. In 2003, the Secretary-General endorsed a plan of ICTY judges, which would become known as the ICTY "completion strategy." This proposed that national courts in Bosnia, Croatia, and Serbia would be invited to assist the ICTY in the completion of its mandate. The completion strategy granted the tribunal an ability to transfer cases involving mid- and lower-level perpetrators to competent national jurisdictions in the former Yugoslavia, while continuing to monitor proceedings ongoing at the national level because of remaining concerns over the capacity of national jurisdictions to process complex war crimes cases.<sup>1846</sup>

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## The ICTY and National Courts: Three Phases

**Primacy (1993–1996):** During the ICTY’s early years, atrocities in the former Yugoslavia were ongoing. Domestic prosecutions, if they happened at all, were not considered credible or adequate. While the ICTY noted that “national courts” could play an important role at the time, this was “likely directed at Western European countries that were capable of prosecuting fugitives from justice rather than courts in the Balkans.”<sup>1847</sup>

**Supervisory (1996–2002):** In 1996, the ICTY drew up an agreement with countries in the former Yugoslavia to ensure that national prosecutions met international legal standards. The ICTY retained the power to review national investigations and decide whether domestic courts could issue indictments.<sup>1848</sup> While this supervisory arrangement may have been necessary to safeguard the rights of the accused, it was ultimately disempowering for national justice systems and caused tension between the ICTY and national legal professionals. The ICTY did not view national courts as credible partners for justice, in part because of their weak capacity.<sup>1849</sup> This phase “did little to promote domestic development or to enhance the capacity of national institutions in the region” and may have caused a “chilling effect.”<sup>1850</sup>

**Spurring National Capacity (2002–Present):** In 2002, the ICTY revised its approach and drew up a new framework, emphasizing the transfer of cases to domestic courts in line with a comprehensive completion strategy.<sup>1851</sup> The ICTY created several working groups with international administrators in Bosnia (the Office of the High Representative) to shape the design of Bosnia’s War Crimes Chamber and Special Division for War Crimes in the national prosecutor’s office.<sup>1852</sup> The shift was driven in part by a practical and operational imperative to devolve cases in anticipation of the closure of the ICTY; it also reflected a shift in emphasis toward building domestic judicial capacity, more akin to a complementarity framework. While some contend the ICTY could have acted sooner and done more to strengthen domestic capacity, others insist that domestic courts were not genuinely established until 2005.<sup>1853</sup> Under the completion strategy, the ICTY amended its rules to transfer Rule 11*bis* cases and cases which had not reached the indictment stage at the ICTY (“Category II cases”), and it also returned files on suspects that had been sent to the ICTY.<sup>1854</sup> Most of these cases involved low- and mid-level defendants. This complementarity phase had varying success in different countries in the region, but spurred local capacity in three key ways: it (1) promoted transfer of information and evidence to local courts; (2) strengthened institutional and professional links in concrete ways around specific cases; (3) and shifted resources for war crimes prosecutions to the national level.

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Overall, many observers agree that the ICTY promoted domestic capacity to prosecute war crimes after the implementation of the completion strategy. Specialized war crimes chambers were created in Croatia (in 2003), in Bosnia (in 2005), and in Serbia (in 2005). (For more detail, please see the separate mechanism profiles.) While trials in all countries showed numerous shortcomings—signs of ethnic-bias, ineffective witness protection, lack of capacity of police forces to conduct war crimes investigations, and sometimes poor quality of the judgments<sup>1855</sup>—there is an overall consensus that the situation would have been much worse without the ICTY’s involvement. Without the cooperation between the ICTY and national jurisdictions, the prosecution of war crimes cases would not have taken place, would have been politicized and failed to respect fair trial rights, or would have only started years later. Additionally, the array of activities undertaken by the ICTY and other international organizations to further strengthen the judiciary—such as the organization of trainings and study visits to promote the transfer of skills from ICTY to national judges and prosecutors—has generally improved the capacity of domestic judicial systems in the former Yugoslavia.<sup>1856</sup>

### ***Bringing Justice to Victims***

Many have regarded the ICTY as an institution that failed to bridge the gap between The Hague and the victims and victim communities. This is partly due to the late start of its outreach program and the failure to adequately fund the program once it was launched.<sup>1857</sup> Even so, the court has had a lasting impact on victims in the region. First, many victims have traveled to The Hague to testify before the court. This contributed to a sense of recognition of what happened to them and may help create a feeling for them that justice has been served.<sup>1858</sup> As Diane Orentlicher has observed with regard to the ICTY’s impact in Bosnia: “After all kinds of war crimes and genocide, the people need some sort of satisfaction ... that someone guilty be punished.”<sup>1859</sup> She concludes that for victims, Bosnians and Serbs alike, victims felt effectively redressed by the ICTY because those responsible for atrocity crimes were punished.<sup>1860</sup>

### ***A Lasting Impact on the Region***

As mentioned above, with the adoption of Security Council Resolution 1503 in 2003, the UN endorsed a strategy for the completion of ICTY investigations. The three-phased completion strategy determined that the tribunal was to complete all investigations by the end of 2004, complete all first-instance trials by the end of 2008, and close its doors by the end of 2010.<sup>1861</sup> However, due to delays in securing state cooperation to enforce outstanding arrest warrants and extended

proceedings because of complexity of certain cases, the ICTY was unable to meet these deadlines. In late 2017, the tribunal was still in the process of completing its final cases and preparing to transfer all of its remaining functions to a newly created mechanism: The Mechanism for International Criminal Tribunals (MICT).

The United Nations Security Council created the MICT (formally, the International Residual Mechanism for Criminal Tribunals) in 2010 to continue essential functions originally performed by the ad hoc international tribunals for Yugoslavia and Rwanda.<sup>1862</sup> UNSC Resolution 1966 (2010) determined that the MICT, after its predecessors' dissolution, "shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR."<sup>1863</sup> The residual mechanism is competent to arrest and prosecute remaining fugitives, refer cases to national prosecutions, handle appeal proceedings, review proceedings or retrials after the ad hoc tribunals' closure, as well as supervise the enforcement of sentences, the protection of victims and witnesses, and the management and preservation of the former tribunals' archives.<sup>1864</sup> MICT started operations on July 1, 2013, in The Hague, the Netherlands,<sup>1865</sup> and has the same organizational structure as the ICTY.<sup>1866</sup>

The residual mechanism may not issue new indictments under the ICTY Statute, but it is mandated to continue the work that the ICTY (and ICTR) started.<sup>1867</sup> MICT has been playing and will continue to play an active role in monitoring and assisting national jurisdictions in the investigation or prosecution of war crimes, crimes against humanity, or genocide.<sup>1868</sup> Additionally, the MICT is in charge of the preservation and management of the ICTY's archives—unique records containing information on indictments, court proceedings, testimonies, judgments—which tell the story of the tribunal and its accomplishments.<sup>1869</sup>

## **Financing**

The ICTY is funded through the regular budget of the United Nations, in accordance with Article 17<sup>1870</sup> of the UN Charter, as stipulated under Article 32 of the Statute. In recent years, the ICTY's annual expenditures have been approximately US\$140 million (each for the years 2010 and 2011), US\$125 million (2012, 2013), and US\$90 million (2014, 2015).<sup>1871</sup> The downward trend in annual operating costs reflects the winding up of the tribunal and its movement into the "residual mechanism" phase. As a point of comparison, the ICTY's annual budget in 2000 was \$90 million.<sup>1872</sup> Through 2007, the court had received over US\$1.2 billion in funding.<sup>1873</sup>

The Registry reports that the court's legal aid system accounts for about 11 percent of the total annual budget.<sup>1874</sup> The language section, responsible for interpretation and translation services, also accounts for a significant portion of the tribunal's budget, since all trials require interpretation and transitional into three languages. A 2006 article put the cost of language services at 10 percent of overall Registry costs and put the Registry's costs at 69 percent of the annual operating costs of the ICTY as a whole.<sup>1875</sup>

In addition to the regular budget, the ICTY has received donations and other forms of nonfinancial support from states and other agencies. Donations, although accounting for only one percent of the tribunal's budget, have been vital for the court's operations; they have been used to fund activities including the exhumation of mass graves and outreach.<sup>1876</sup> The Registry's outreach program, which is not integrated into the court's regular budget, has relied heavily on contributions to the ICTY Outreach Program Trust Fund. Major donors have been the European Union, the United Kingdom, Luxembourg, the United States, Finland, Denmark, Norway, and the Netherlands.<sup>1877</sup> As of July 31, 2015, the voluntary fund had received approximately US\$53.4 million in donations since the ICTY's creation.<sup>1878</sup> In 2016, the EU confirmed that it would continue funding the outreach program until the tribunal's closing.<sup>1879</sup>

Many have regarded UN-created ad hoc tribunals as too expensive for the value they deliver.<sup>1880</sup> For the ICTY, this perception contributed to the development of an exit strategy by the UN Security Council. Various factors beyond judicial or staff salaries and expenses have driven the high cost of ICTY cases. These "include the length and complexity of international criminal trials; the inclusion of investigation, detention unit, and other non-judicial costs in the ICTY budget; translation and travel expenses necessitated by the international character of the tribunal and its location; unusual witness relocation costs [etc.]."<sup>1881</sup> Failures of state cooperation, including Serbian institutions' involvement in protecting fugitive Ratko Mladić from arrest, meant some trials that could have been merged had to be conducted separately, and thus started later.

The ability of the ICTY (and ICTR) to rely on assessed rather than voluntary funding has provided greater budget certainty. This funding model has also helped to protect the court from accusations it serves the interests of donors who may be biased.

## Oversight and Accountability

Because the UN Security Council created the ICTY as an ad hoc body under Chapter VII of the UN Charter, the UN has closely monitored its work. Article 34 of the ICTY Statute provides that “the President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.”<sup>1882</sup> However, the ICTY lacks an international oversight mechanism “mandated to review the activities of the ICTY and either legislate to revise the Tribunal’s operational imperfections or present the Security Council with options and recommendations for this purpose.”<sup>1883</sup> Because the statute does not provide guidance on indicators for the measurement of the tribunal’s performance, some observers have concluded that it has operated without meaningful oversight.<sup>1884</sup>

National and international NGOs working on justice issues in the former Yugoslavia have played a significant role by monitoring the ICTY’s proceedings. Important domestic actors include the Humanitarian Law Center, Fractal, and Youth Initiative for Human Rights (YIHR) in Serbia; YIHR, Documenta: Center for Facing the Past, and Center for Human Rights in Croatia; the Humanitarian Law Center-Kosovo in Pristina; and the Nansen Dialogue Centre in Bosnia. International NGOs that have closely followed the proceedings include Human Rights Watch, the International Center for Transitional Justice, and the Coalition for International Justice.

## **BOSNIA: WAR CRIMES CHAMBER AND SPECIAL DIVISION FOR WAR CRIMES IN THE PROSECUTOR'S OFFICE**

### **Conflict Background and Political Context**

*For the broader context of the war in Bosnia and Herzegovina, see the profile of the International Criminal Tribunal for the former Yugoslavia.*

Between 1992 and 1995, around 100,000 people were killed during the war in Bosnia and Herzegovina (BiH).<sup>1885</sup> The war displaced many more Bosnians internally and abroad as they fled violence and grave crimes that included widespread sexual violence and the targeted destruction of cultural heritage. Following NATO's intervention, the Dayton Peace Accords of November 1996 formally ended the war and created a new constitution for a nominally unified country. However, the Dayton agreement solidified the country's division into two strong entities: The Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). State-level institutions were weak from the outset, as a majority of Serbs (concentrated in the RS) and many Croats (concentrated in the FBiH) rejected the state itself. Government officials in neighboring Serbia and, decreasingly over time, in Croatia continued to call into question the viability of a Bosnian state. Dayton created an international Office of the High Representative (OHR), which later gained powers to remove obstructionist officials and impose legislation.<sup>1886</sup> OHR played a central role in the creation of the State Court of Bosnia and Herzegovina and its special War Crimes Chamber (WCC), as well as the Prosecutor's Office of Bosnia and Herzegovina (POBiH) and its Special Division for War Crimes (SDWC).

The Bosnian state remains fragile. Populations remain largely segregated by ethnicity, and the Dayton constitution, negotiated by nationalist leaders, established an election system that rewards candidates running for office who play on ethnic fears and promise protection for "their" people. Milorad Dodik, who has been the president of the Republika Srpska since 2010, has led sustained political attacks on state-level institutions, including the State Court. He called for the expulsion of international prosecutors,<sup>1887</sup> and since 2015 he has pushed for a referendum to challenge the State Court's authority over Serbs.<sup>1888</sup> As centripetal forces tear at the state, the international community has grown weary of making a broken system work, but also has shown little interest in tackling the structural dysfunction of the electoral system created at Dayton. Against this backdrop, and despite their notable achievements, the State Court and POBiH will only be as viable as the state itself.

## **Existing Justice-Sector Capacity**

The complex structure of government institutions resulting from the Dayton Peace Accords was a key initial challenge in the creation of an impartial and effective legal system and in the improvement of judicial sector capacity.<sup>1889</sup> Prior to the WCC's establishment, some local courts handled war crimes cases referred from the International Criminal Tribunal for the former Yugoslavia (ICTY) under the 1996 Rules of the Road Agreement (see text box, below).<sup>1890</sup> Local prosecutions were mostly ineffective, suffering from lack of coordination, resources, and specialized war crimes prosecutors and investigators.<sup>1891</sup> Additionally, prosecutions in local courts often reflected the ethnic composition of the local communities and were perceived as "ill-suited to render impartial justice."<sup>1892</sup>

Even as the ICTY suggested the transfer of its caseload to national jurisdictions, it raised concerns over the ability of these countries to fairly and efficiently tackle the cases, given widespread concerns about the safety of witnesses, judges, and prosecutors, as well as continued ethnic bias allegations and the overall weak capacity of the legal system.<sup>1893</sup>

## **Existing Civil Society Capacity**

In the early 1990s, civil society in the former Yugoslavia was in a nascent state, still emerging from the incomplete transition from the post-World War II authoritarian rule of Josip Broz Tito. The war further weakened these fragile institutions, as many intellectual leaders fled. Further, the war left many civil society organizations polarized along ethnic grounds. Even multiethnic organizations with an ethos of tolerance found it difficult to attempt to influence the Byzantine state structures created at Dayton, especially as its election system was primed to respond to ethnic fearmongering rather than the type of advocacy typically used by NGOs.<sup>1894</sup> As a result, even domestic civil society actors who favored the creation of a State Court and its special divisions for war crimes and organized crime had minor roles in its realization. While there were NGOs that advocated for the creation of a domestic mechanism for the prosecution of war crimes in the aftermath of the war, civil society and victims' groups were barely consulted on the establishment of the WCC.<sup>1895</sup>

## Creation

In September 2001, the ICTY's Office of the Prosecutor presented the idea of establishing a special war crimes court in Sarajevo. The OHR had commissioned a group of experts headed by a former head of investigations for the ICTY to write a report on the need for such a court.<sup>1896</sup> The WCC was created in the context of the ICTY's completion strategy and as a direct result of a 2003 agreement between the OHR and the ICTY.<sup>1897</sup> Following the creation of the State Court of Bosnia and Herzegovina in 2002 and as part of a wholesale restructuring of its judiciary, the OHR planned for the establishment of the WCC by adopting a series of laws—among them a new criminal code and criminal procedure code in 2003<sup>1898</sup>—which the national parliament later ratified. These processes were catalyzed by the ICTY's completion strategy. The high representative made extensive use of his executive powers (known as the Bonn Powers) in creating the State Court, the Prosecutor's Office of Bosnia and Herzegovina (POBiH), and its special divisions for dealing with war crimes and corruption.<sup>1899</sup> The SDWC within the POBiH was created in January 2005, and the WCC was inaugurated in May of that year.<sup>1900</sup>

## Legal Framework and Mandate

The WCC is a domestic chamber in Sarajevo that has jurisdiction over war crimes, crimes against humanity, and genocide committed during the 1992–1995 conflict. The WCC applies domestic Bosnian law and handles cases referred to it from the ICTY and cases brought by SDWC prosecutors. For a period of time, the WCC had a mixed national-international composition, but as of 2012, the WCC is comprised of 48 local judges only.<sup>1901</sup>

As stated above, in 2003, a new criminal code and criminal procedure code were approved by the national parliament. The new legislative framework substantially departed from the previous inquisitorial system. It abolished the investigative judge and placed prosecutors in charge of investigations. It also introduced the adversarial trial practices of direct and cross-examination and the concept of plea bargaining, as well as reducing the role of the judges in questioning witnesses. Despite these new elements, substantial aspects of old Yugoslav civil law remained in the 2003 criminal procedure code. For example, Bosnia still has no system of binding precedent or rules of evidence. The new code created substantial room for disagreement over how it should be interpreted.<sup>1902</sup>

Bosnia signed the 1998 Rome Statute of the International Criminal Court on July 17, 2000, and ratified it on April 11, 2002. The 2003 criminal code catalogues and issues sentencing guidelines for international crimes. These include genocide; crimes against humanity; war crimes against civilians; war crimes against the wounded and sick; war crimes against prisoners of war; organizing a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes; unlawful killing or wounding of the enemy; marauding the killed and wounded at the battlefield; violating the laws and practices of warfare; unjustified delay in the repatriation of prisoners of war; and destruction of cultural, historical, and religious monuments.<sup>1903</sup> The criminal code includes the notion of command responsibility for violations of international humanitarian law.<sup>1904</sup> The Prosecutor's Office used this code in all of its prosecutions, even though it was not in effect during the conflict. In July 2013, the Grand Chamber of the European Court of Human Rights unanimously found that Bosnia's retroactive application of the 2003 code violated the human rights of two convicted persons because heavier penalties were available under that code (the 1976 Yugoslav code) than under the code in effect at the times the crimes occurred.<sup>1905</sup> The ruling applied to sentencing provisions and crimes that were defined in the 1976 code. The court noted that the 1976 code left crimes against humanity undefined, so prosecutors could still apply the 2003 code in those matters, as the offenses were defined under international law at the time of the events.<sup>1906</sup>

In 2004, the state-level parliament adopted a law to regulate the receipt of cases from the ICTY.<sup>1907</sup> It states that for cases transferred to BiH under ICTY Rule 11*bis*, "the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY" and adapt the indictment to Bosnian law.<sup>1908</sup> Further, it provides for the possibility that the Bosnian prosecutor could add new charges to the adapted ICTY indictment in accordance with the Bosnian criminal procedure code.<sup>1909</sup> Finally, the law also mandates that the Bosnian prosecutor pursue criminal proceedings in what have come to be known as Category II cases: pre-indictment cases that the ICTY prosecutor sends to the Bosnian prosecutor, and which do not, unlike Rule 11*bis* cases, require the approval of ICTY judges.<sup>1910</sup>

Even as war crimes investigations and prosecutions increase across the region, mutual legal assistance frameworks on extradition, information sharing, and execution of sentences are weak and politically fraught.

### ***Witness Protection***

In January 2003, the international high representative for Bosnia imposed the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses.<sup>1911</sup> That law specifies

that the court, the prosecutor, and other parties in the proceedings are to advise potentially threatened or vulnerable witnesses about available protection measures.<sup>1912</sup>

The criminal procedural code itself contains a general provision obligating judges to protect witnesses from in-court insults, threats, and attacks; in these events, they have the option to warn, issue fines, or even order arrests and prosecutions.<sup>1913</sup> The Law on Protection of Witnesses further mandates judges to determine whether videoconference testimony should be used<sup>1914</sup> and allows them to remove the accused from the courtroom “where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly,” in which case the accused is provided with access to live video of the trial.<sup>1915</sup> Under “exceptional circumstances,” witnesses under severe threat may testify in anonymity. Less exceptional, the law allows judges to delay disclosure of witness identity to the defense.<sup>1916</sup> Officials found to have compromised witness protection measures face prosecution.<sup>1917</sup> In September 2004, the Bosnian Parliament amended the criminal code to include penalties not only for officials, but for anyone involved in revealing the identity of a protected witness.<sup>1918</sup>

Both the criminal procedural code and the Law on Protection of Witnesses contain provisions on in-court protection for vulnerable witnesses. Victims of sexual violence are not allowed to be questioned on their past sexual behavior or predisposition.<sup>1919</sup> Judges are required to “exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is examined, particularly to protect the witness from harassment and confusion.”<sup>1920</sup> In exceptional circumstances, the judges can pose questions to the witness on behalf of the parties and defense counsel, if these consent to the procedure.<sup>1921</sup>

Also in 2004, parliament approved the creation of a Witness Protection Department within the State Investigation and Protection Agency (SIPA), to which it gave the responsibility of conducting witness risk assessments.<sup>1922</sup> The head of the Witness Protection Department is charged with protecting the witnesses under threat “during and after criminal proceedings.”<sup>1923</sup> The program has the authority to provide protected witnesses with temporary cover identities and documents.<sup>1924</sup> In 2015, local NGOs and various UN entities working in Bosnia reported that the Witness Protection Department had been closed.<sup>1925</sup>

Shortcomings in witness protection experience and capacity led to the adoption of a Memorandum of Understanding between SIPA and the Registry of the State Court in February 2005. Although the WCC has been slow to develop witness protection

procedures, it has made significant gains after the adoption of a National Strategy for Processing of War Crimes Cases (National War Crimes Strategy) in December 2008,<sup>1926</sup> and through ad hoc procedures drawn up by judges. A national Witness Protection Program Law, which had been debated since 2008, was adopted in April 2014.<sup>1927</sup> However, the law is far from being inclusive, since the law applies only to witnesses testifying before the State Court and not to war crimes trials in District Courts in the Republika Srpska and other lower courts throughout the country.

### ***Concurrent Jurisdiction with District and Cantonal Courts***

The WCC shares concurrent jurisdiction over atrocity crimes with 16 District and 10 Cantonal Courts throughout Bosnia's Republika Srpska and Bosnian Federation entities, respectively known as "local courts."<sup>1928</sup>

Bosnia's judicial system does not provide a strict hierarchy between the State Court and the courts within the two entities, and therefore the WCC is not formally superior in jurisdiction.<sup>1929</sup> This lack of clarity has prevented the development of national war crimes jurisprudence, as Cantonal and District Courts are not required to follow the WCC's jurisprudence.<sup>1930</sup> Decisions by the WCC are not identified by author, and dissenting opinions are not public (under national law), further limiting the impact of the WCC's opinions.<sup>1931</sup> However, the WCC has applied international humanitarian law (IHL) in a sophisticated, although at times inaccessible, manner, including on international criminal modes of liability such as joint criminal enterprise and command responsibility. The presence of international judges and prosecutors from the ICTY at the WCC and SDWC bolstered the WCC's sophisticated application of IHL.

Upon the establishment of the WCC and SDWC, prosecutors of the latter loosely followed a case strategy by sending "highly sensitive" cases to the WCC and "sensitive" cases to local courts. Since the adoption of the National War Crimes Strategy in 2008 by the Council of Ministers of BiH, cases have been sorted based on "complexity criteria," taking into account "the gravity of the criminal offence, the capacity and role of the perpetrator, and other relevant miscellaneous considerations."<sup>1932</sup> The criteria did not provide clear guidance defining "most complex" and "less complex."

The 2008 strategy, which sought to "ensure a functional mechanism of the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities," partially improved the division of tasks

between jurisdictions.<sup>1933</sup> Yet, since its creation, implementation of the plan has been “complex, fraught with difficulty, and slow.”<sup>1934</sup> One significant achievement was a comprehensive case-mapping project carried out in 2009 and 2010, which allowed the POBiH to report approximately 1,381 war crime case files on over 8,000 suspects across all jurisdictions.<sup>1935</sup> However, a study on the implementation of the strategy in 2016 showed that since the adoption of the strategy “the prosecution did not process the most complex war-crime cases to a sufficient extent” and that it was still working on 346 cases.<sup>1936</sup> Since the strategy set the deadlines for completing the most complex cases by 2015, and all remaining war crimes cases by 2023, the study also concluded that while the transfer of cases has increased over time, it remains unsatisfactory.

## **Location**

The WCC’s location just outside of Sarajevo’s city center makes it accessible to the local population, although attendance at trials has been limited.<sup>1937</sup> The modern facilities of the court, including its audio-visual equipment, are used by other specialized divisions and will remain a permanent asset to the judiciary.<sup>1938</sup> The premises include six courtrooms for war crimes trials. Defense attorneys have some designated offices in the court, although the main defense assistance office is located in a separate building. There is a real danger that the court is seen as a “Sarajevo” institution—mitigated somewhat by cantonal and district-level war crimes prosecutions. Most national court employees are Bosnian Muslims, a sign of their predominance in Sarajevo’s population and perhaps a sign of their greater acceptance of state-level institutions. Some have suggested that offering additional financial incentives could attract a more ethno-religiously diverse staff from different regions of the country.<sup>1939</sup>

## **Structure and Composition**

WCC organs comprise Chambers (trial and appellate divisions) and the Registry (housing outreach, witness protection, and public information divisions, and until 2009 the Odsjek Krivične Odbrane [OKO], a defense assistance section). The SDWC, which is responsible for bringing cases before the WCC, resides within the POBiH. Apart from a designated war crimes chamber, the State Court of Bosnia and Herzegovina contains other specialized chambers, and the POBiH contains other prosecution units to try complex crimes including organized crime, corruption, and high-level criminal cases.<sup>1940</sup>

Throughout the years of its existence, the organs within the State Court have made a shift from being internationally led to becoming fully functioning national institutions. The WCC and SDWC began with mixed composition in Chambers, the Prosecutor's Office, the Registry, and the OKO, which is the defense support office. Many international staff and judges moved from the ICTY to the WCC and SDWC, bringing a wealth of experience and strengthening institutional ties.<sup>1941</sup> International involvement was designed to enhance local capacity, transfer skills and knowledge, and blunt charges of ethnic bias in case selection and prosecution.<sup>1942</sup> However, these goals were hindered from the beginning by a lack of "strategic vision to maximize the benefits of international staff."<sup>1943</sup> Capacity building "has not worked by simple mentoring or 'by example.'"<sup>1944</sup> (For more on this, please see the *Legacy* section, below.) Many international judges came from civil law backgrounds, while international prosecutors came from common law backgrounds, compounding the difficulties the WCC faced in harmonizing practices under the new adversarial code of criminal procedure.<sup>1945</sup>

The pivotal period for the WCC was 2008–2009. A raft of reports and assessments of the WCC's and SDWC's achievements and shortcomings fed into a major restructuring of the court.<sup>1946</sup> According to the OSCE and the EU, the court emerged stronger as a result of the reform initiatives and assessments.<sup>1947</sup>

Domestic implementing legislation, agreements, and transition plans envisioned a six-phase exit of international personnel within five years, by December 14, 2009.<sup>1948</sup> At the end of 2009, OHR issued a decision to extend the presence of international judges, prosecutors, and other personnel because of concerns about the national capacity to deal with war crimes cases without international assistance.<sup>1949</sup> The Registry, which was initially an internationally led adjunct body outside of the WCC, had a fixed end date. It began phasing out international staff in 2006, earlier than the Prosecutor's Office or Chambers, which both conditioned the phasing out of international staff upon the respective offices meeting certain benchmarks.<sup>1950</sup> These benchmarks included not just the number of cases that had been dispensed with, "but their complexity and the position of the defendant, whether there is a functioning witness protection program a prosecutorial strategy for handling cases that is consistently implemented, standardized judicial practice in routine areas, and finally an assessment of the political climate's conduciveness to the ongoing accountability processes by evaluating public statements made by public figures and media reports of trials involving atrocity crimes."<sup>1951</sup> The existence of an underlying strategy to transition to a fully national court was commendable, although overly aggressive, and allowed too short of a timeframe for the impact of an international presence, given the complexity of the cases and political hostility toward the court.<sup>1952</sup>

## ***Chambers***

Three judges sit on trial court panels, and five on appeals panels. There were initially six of the former and two of the latter. The appellate structure and overbroad grounds of appeal under the criminal procedure code (including the lack of clarity in written judgments) has led to a high rate of vacancies of judgments and retrials. Initially, international judges comprised a majority on both panels, with national judges presiding as heads. In January 2008, the composition reversed. Before their withdrawal entirely at the end of 2012, international judges only sat on Appeals Panels. International judges were first seconded by their home government but were later selected through a competitive process administered by the Registry and salaried through a donor basket fund.<sup>1953</sup> The High Judicial Prosecutorial Council (HJPC) formally appointed the international judges. International judges were initially not required to have extensive experience in criminal law (although many carried that experience from previous tenure at the ICTY), but later, international judges were required to have eight years' experience in complex criminal matters (the same as national judges).<sup>1954</sup>

### ***Prosecutions: Special Department for War Crimes of the Prosecutor's Office (SDWC/POBiH)***

The SDWC is responsible for the prosecution of war crimes cases emerging from the 1992–1995 conflict.<sup>1955</sup> Prosecutors are tasked with bringing “highly sensitive” cases before the WCC, while leaving “sensitive” cases to local jurisdictions. In practice, the SDWC prosecutors were slow to prioritize cases.<sup>1956</sup> The prosecutorial strategy was not fully articulated until 2009 and has been “unclear, and in any event ... not applied consistently or predictably.”<sup>1957</sup> The Prosecutor's Office clumsily communicated its prosecutions strategy to the public, sowing confusion about the role of ethnicity in case selection and prosecution.<sup>1958</sup> The SDWC's initial prosecutions and prosecutorial strategy drew heavily upon conflict mapping information gathered by the ICTY. As national prosecutors developed cases, however, they needed a comprehensive mapping strategy keyed to national prosecutorial strategy. In response, various needs-assessments and mapping processes were carried out to assist the prosecution.<sup>1959</sup>

The identification of thousands of war crimes cases at the investigative stage resulted in a backlog in prosecutions. Some of this backlog, beyond the inherently massive challenge of dealing with crimes perpetrated on such a large scale, and a poorly executed prosecutorial strategy, must also be attributed to overall weakness of the judiciary and the fragmentation of war crimes proceedings.<sup>1960</sup>

Since 2008, prosecutors increasingly used plea bargaining, an alien practice prior to the 2003 criminal procedure code. The strategic usefulness of plea bargaining vis-à-vis the goals of case backlog reduction efforts will need to be carefully weighed by prosecutors.<sup>1961</sup>

By June 2008, six international prosecutors and thirteen national prosecutors were split into six teams, organized by region, in the war crimes prosecution section (with one international appointed per team). The mixed teams did not lead to extensive skills-sharing, as was hoped. International prosecutors were perceived to be more capable of tackling complex and politically sensitive cases (including in the State Court's specialized anticorruption division) and handled most Rule 11*bis* cases. This generated some backlash: local prosecutors complained of exclusion from work that they felt capable of handling. On all except the Srebrenica prosecution team, international and national prosecutors did not work closely together on the same cases, which minimized interaction between international and national prosecutors. International prosecutors were paired with international legal assistants and vice versa. A 2007 plan by the international head prosecutor to standardize practice, improve communication, and develop institutional arrangements for information-sharing was not fully implemented. In June 2011, four international prosecutors still remained at the WCC. International involvement ended at the end of 2012.

### ***Registry for the State Courts of BiH and the Special Departments***

The Registry handles administrative affairs, case management, and outreach functions, and coordinates witness protection with a state agency.<sup>1962</sup> Initially, the Registry housed the defense assistance office (OKO), which is now an independent institution. The Registry was created by an agreement between the OHR and POBiH in December 2004, and the OHR appointed an international as the initial registrar. By March 2006, the international registrar and deputy were replaced by nationals, and in the same year, the Registry was “split” into two offices in the WCC and the POBiH. By 2007, the POBiH registrar position was held by a national, and by 2009, most Registry staff in both offices were nationals. The existence of two Registries caused confusion as to authority over administrative issues, exacerbated by a lack of clarity about the overlapping role of a “Management Committee,” which was tasked with administrative, personnel, and budgetary matters.<sup>1963</sup> The POBiH Registry was generally considered to be less effective, more bureaucratic, and redundant.

### ***Outreach: Public Information and Outreach Section of the War Crimes Chamber Registry (PIOS)***

A lack of comprehensive outreach programs or strategy has been a key weakness of the WCC. Although no public information and outreach program can be expected to fully protect against political attacks and misinformation, weakness in this area made the court unable to mount a vigorous response to political attacks and perceptions of ethnic bias within Bosnia. The problem was particularly acute at the outset.<sup>1964</sup> The outreach unit has, however, engaged in initiatives and steadily bolstered capacity over the years. A short-lived “Court Support Network” of NGOs carried information about the court to local communities between 2006 and 2007 but closed because of lack of funds.<sup>1965</sup> The United Kingdom funded the creation of a comprehensive public information and outreach strategy for the POBiH and the court, which was adopted by the judges in late 2008. Subsequent efforts included visits by victims to the court, media campaigns, and educational campaigns.

### ***Witness and Victim Support***

The Witness Support Section within the SIPA Witness Protection Department and the Witness Support Office within the WCC Registry (WVS) provide thorough in-court witness support services to both prosecution and defense witnesses.<sup>1966</sup> Such in-court measures include transport and logistical assistance, sophisticated technology for voice distortion and video link, modest remuneration for travel, pretrial explanation of court procedures, use of closed sessions and private waiting rooms, and limited psychosocial support (at times subcontracted through NGOs). Post-testimony follow-up services are limited: the WVS staff includes professional psychologists and social workers, who are available through a 24-hour telephone hotline. Early international staff, including the first WVS director, came from the ICTY’s Victim and Witnesses Section, bringing a sense of the importance of witness protection and lessons-learned from early missteps at the ICTY. A criminal code provision allowing courts to assign legal representation to victim-witnesses under limited circumstances has not been applied since 2007 because of a lack of resources. Victims are also entitled to seek direct compensation claims from the WCC, but in practice they are instructed to use the criminal verdict to seek compensation through civil action.<sup>1967</sup>

Out-of-court witness protection services are provided by a state agency, SIPA’s Witness Protection Unit. Early on, the Registry provided an international adviser, supported by a donor government, to facilitate the relationship between SIPA and the WCC. SIPA’s witness services have been limited due to a lack of resources and a weak national legislative framework for witness protection.<sup>1968</sup>

Prosecutions rely heavily on testimony from victims and witnesses, although the courts have failed systematically to ensure their protection and continued participation. In some cases, inadvertent disclosure of the identities of protected witnesses by the parties and the judges has raised serious concerns. In 2008, victim and witness protection frameworks were significantly strengthened through two documents: internal rules and procedures created by an ad hoc working group of judges, and a national strategy for war crimes processing. The state court failed to successfully implement the witness protection provisions called for in the National War Crimes Strategy. A long-discussed national witness protection law was adopted in April 2014. Many victims and witnesses have been called to testify numerous times at the WCC, the ICTY, and the entity courts, leading to “witness fatigue,” compounded by weak coordination between courts. Because of the law, victim and witness support increased before the State Court, and gradually improved at entity-level courts.<sup>1969</sup>

***Defense: Criminal Defense Support Section—Odsjek Krivične Odbrane (OKO)***

The Registry initially housed the OKO, which is now an independent institution and generally regarded as a good example of mixed-staffing structure. Initially, an international director and deputy headed OKO, which was staffed by nationals. International staff at times supplemented the national staff, including fellows and short-term international lawyers. In May 2007, a national lawyer replaced the international director as part of its transition to a fully national institution. OKO provides legal research, support, and assistance to national defense counsel, including translation services and training on law and practice issues.<sup>1970</sup> The American Bar Association’s Central and Eastern European Law Initiative (ABA-CEELI) initially funded and assisted OKO.<sup>1971</sup>

Accused are represented by privately retained national counsel and remunerated by the court, if justified by the defendant’s financial status. National defense counsel vary widely in quality. In most cases, the WCC appoints an additional ex officio defense attorney. OKO staff cannot directly represent accused, but often receive power of attorney from defense counsel, entitling them to review case files and attend closed sessions. While through 2012 there were international prosecutors, there were only international defense attorneys under rare circumstances. This lack of congruity raised procedural fairness concerns, especially as national defense attorneys initially lacked experience in conducting defense investigations. OKO maintains a list of counsel eligible to take cases at the WCC, and to be listed, most counsel are required to participate in its trainings. Over time, this has improved the quality of defense before the WCC. In response to concerns over defense

counsel's limited access to ICTY evidence, the ICTY amended its rules to facilitate easier access to documents by all outside parties (the Rule 75H process). OKO's international staff initially served as crucial intermediaries between national defense attorneys and the ICTY.<sup>1972</sup>

## Prosecutions

By 2017, the WCC had issued 96 war crimes verdicts.<sup>1973</sup> According to statistics from the OSCE War Crimes Processing Project—a project focused on expediting the fair and effective processing of war crimes cases in Bosnia—as of March 2013, 214 war crimes cases were completed in BiH (roughly evenly split between the WCC and the Cantonal and District Courts); a total of 235 persons were convicted and sentenced; and approximately 1,315 war crimes cases remained to be prosecuted.<sup>1974</sup> By 2017, the War Crimes Map of the OSCE listed 410 war crimes cases that were adjudicated throughout BiH since the end of the war.<sup>1975</sup> The ICTY transferred six cases involving 10 defendants to the court under Rule 11*bis*, and motions to transfer cases were either denied or withdrawn in five other cases.<sup>1976</sup>

Although a significant number of WCC cases included charges of sexual violence as either war crimes or crimes against humanity,<sup>1977</sup> the overall number of sexual violence cases before the Bosnian courts remains low in comparison to the occurrence of such crimes during the 1992–1995 conflict. The OSCE reported in 2015, “Over the last decade, more than 170 war crimes cases against over 260 defendants have been concluded at the entity level and Brčko District BiH courts. Of these cases, 35 involved allegations of sexual violence against 45 defendants, wherein 34 perpetrators were convicted in 27 cases—representing a conviction rate of around 75 percent. At the end of December 2014, proceedings in 20 cases involving allegations of sexual violence were ongoing before the courts, while many more such cases were under investigation.”<sup>1978</sup> In 2017, Amnesty International estimated that less than one percent of the total number of rape and sexual violence victims have come before the courts.<sup>1979</sup>

The 2008 National Strategy for War Crime Cases set the goal to complete the most complex and highest priority war crimes cases by 2015, and all other cases by 2023. In the beginning of 2016, 346 cases against 3,383 individuals were still being processed by the Bosnian courts, which is not even half of the cases that need to be considered, according to the 2009–2010 case-mapping project.<sup>1980</sup> This leads us to believe that it will be difficult—if not impossible—for the Bosnian courts to complete war crimes prosecutions before the set deadlines.

## Legacy

The work of the WCC and SDWC—together with the work of the ICTY—has undoubtedly had an impact on the judicial system and Bosnian society as a whole, and has at least theoretically paved the way for truth-telling and reconciliation. A few years into the courts' creation, Mirsad Tokaca, the director of the local NGO Research and Documentation Centre, stated: "While the ICTJ [International Center for Transitional Justice], the OSCE Mission to BiH, and others have identified a number of concerns relating to the BWCC [Bosnian War Crimes Chamber], it has generally received high marks for its overall performance and is now seen as a model form of hybrid court."<sup>1981</sup>

### *Impact on Society*

Although "public appetite for justice in Bosnia as dispensed by the [WCC] has shrunk over time,"<sup>1982</sup> the court engaged the population and implemented a genuine and sustainable process for war crimes prosecutions. OSCE surveys and measurements of public perception of the WCC and the other divisions of the State Court show that "public confidence in war crimes processing is fragile and widespread distrust in the institutions is still a feature in BiH society."<sup>1983</sup> A 2015 survey by the UN Resident Coordinator's Office in BiH showed a slight increase in public support for work of the WCC and other local courts. While 29.1 percent of the population showed confidence in the work of the Bosnian courts in 2013, this number increased to 42.1 in 2015.<sup>1984</sup> The study also showed that while the vast majority of the population has little or no experience with war crimes proceedings, of those who had, only half recognized its relevance, while the other half held a neutral position toward the work of local courts.<sup>1985</sup>

A 2010 study on the perceptions on war crimes trials in Prijedor, a region northwest of Bosnia that suffered from brutal and widespread violence during the war, concludes: "However, the apathy and indifference towards the war crimes trials among victims betray a sense of hopelessness and utter lack of expectations that such trials will change much when it comes to their current status and relations in their communities. Victims' expectations now appear to be solidly focused on individual perpetrators being removed from their midst. The dominant perception among Prijedor victims is, however, that a comprehensive, transformative, sort of justice is beyond reach and that war crimes trials cannot deliver on such promises in the present political and communal climate."<sup>1986</sup>

Ethnicity continues to play a major role in perceptions of wartime suffering. A UN survey in 2013 observed: “Bosniaks are convinced that their ethnic group suffered the most during the war. Croats believe that everyone suffered during the war but not equally, whereas Serbs believe that everyone suffered equally. The majority of citizens state that people from their ethnic groups were not responsible for the war crimes, and Bosniaks are more convinced in this than Serbs and Croats.”<sup>1987</sup> Overall, many members of all ethnic groups remain unwilling “to face their own crimes or victims.”<sup>1988</sup> And until today, persons who have been convicted or charged with war crimes remain in political power and sustain public support from their own ethnic group.<sup>1989</sup>

Twenty-five years after the end of the war, ethnic tensions remain engrained in the Bosnian society, and reconciliation between Bosniaks, Serbs, and Croats is largely absent, which is partially due to the far-reaching ethnic separation cemented in Bosnia’s state structure and perpetrated through its election system. A 2014 report on the effects of the WCC on the reconciliation process in BiH concludes that while both victims and perpetrators of war crimes express that war crimes proceedings will contribute to truth-telling and prevention of further crimes in the future, they do not believe that war crimes trials in BiH have supported reconciliation.<sup>1990</sup> Others also see that the State Court only remains a “potential path to reconciliation.”<sup>1991</sup>

Finally, the Nuhanovic Foundation Center for War Reparations reported in 2014 that while the right to reparation is recognized under Bosnian laws, “the path to a successful claim for compensation or other forms of satisfaction in Bosnia and Herzegovina is an extremely arduous one and claimants are routinely thwarted by problems that are inherent in the post-war system of government.”<sup>1992</sup> Legal victories by sexual violence survivors in 2015 opened up new prospects for reparation in their cases.<sup>1993</sup>

### ***Impact on Legal Reform***

The introduction of new criminal code and criminal procedural code in 2003 was designed to facilitate war crimes prosecutions and transfers of cases and evidence from the ICTY,<sup>1994</sup> and it managed to avoid some of the jurisdictional inadequacies facing other domestic war crimes courts.<sup>1995</sup> However, a compromise agreement fragmented the judiciary, and entity courts are not required to follow the jurisprudence of the WCC. Local legal professionals experienced difficulties in implementing and shifting to the new system. The reforms were drafted mostly by foreign lawyers, creating some tension with local legal professionals, who felt the foreign lawyers did not adequately understand, appreciate, or adapt to the local legal context.<sup>1996</sup>

Before the WCC and the creation of a specialized war crimes prosecutions unit, there was little sustained involvement or investigations by District and Cantonal Courts into war crimes cases. Developing local capacity “became a concern only as a result of the need to close down the [ICTY].”<sup>1997</sup> In mid-2010, survey and mapping exercises conducted with local and SDWC prosecutors of investigative stages of war crimes proceedings improved the situation.<sup>1998</sup> Cantonal and district-level prosecutions are often tried under the Criminal Code of the former Yugoslavia, which does not foresee crimes against humanity (in contrast to the 2003 BiH Criminal Code applied by the WCC), hindering the full application of international humanitarian law at the local level.<sup>1999</sup> Many District and Cantonal Courts do not have specialized war crimes prosecution and investigation units.<sup>2000</sup> While there are many recommendations for how the process could have maximized coordination with local courts and generated a broader spill-over effect, the WCC, SDWC, and the 2008 National War Crimes Strategy generally improved capacity at the entity level, although inconsistently.<sup>2001</sup>

As of 2012, both the WCC and SDWC are operating as independent institutions. According to many, despite all the remaining challenges and the continued involvement of a range of international actors, “it can be considered a successful example of phasing out international staff and assumption of the full ownership of national staff.”<sup>2002</sup> While the performance of the State Court and other courts to address war crimes cases remains far from perfect, the EU continues to report improvements in the capacity to address the backlog of war crimes cases; a positive trend in the prosecution of war crimes cases involving sexual violence; and an increase in the use of victims and witness support and protection structures.<sup>2003</sup>

### ***Training and Skills-Sharing***

The WCC and SDWC lacked a focused and specialized training program or strategy to facilitate knowledge transfer between international and national personnel. Skills-sharing has been largely ad hoc and personality-driven. Numerous “study visits” by WCC judges and SDWC prosecutors to the ICTY helped form professional and institutional relationships between individuals, but yielded little transfer of operational “know-how.”<sup>2004</sup> When conducted in the context of a specific case or investigation, however, study visits were fruitful, because “there were concrete concerns to discuss and practical outcomes that were sought.”<sup>2005</sup> Outside groups conducted numerous trainings for personnel on international law and practice issues. In its early years, the court indiscriminately accepted training offers. As a result, many training courses were redundant and not responsive to the actual legal and

practical needs of the court, especially in management skills. Trainings yielded mixed results and led to “training fatigue.” Local legal professionals noted that trainers often were not well versed in Bosnia’s legal system—and international personnel noted they had not been properly trained themselves on local law and practice.

The WCC and the broader judiciary formalized several initiatives, including:

- *Witness Protection*: In the early phase of the WCC, an international advisor on witness protection coordinated procedures between the court and the state witness protection agency. OSCE facilitated several high-level roundtables on witness protection guidelines.
- *ICTY Legacy Initiatives*: Includes study trips and seminars led by ICTY staff for national counterparts, internships for junior prosecutors from the Balkans at the ICTY, and the publication of a “developed practices” guide.<sup>2006</sup>
- *Judicial Education*: Since 2007, a Judicial Education Committee, chaired by an international judge, “assess[es] offers of training and select[s] appropriate topics based on existing needs.”<sup>2007</sup>
- *Judicial and Prosecutorial Training Centers (JPTC)*: Since 2002, JPTC’s have operated across the FBiH and Republika Srpska entities. JPTCs offer crucial trainings for prosecutors and judges across the judiciary.<sup>2008</sup>

## Financing

According to Article 5 of the *Law on Court of Bosnia and Herzegovina*, the court has its own budget, “which shall be included in the budget of Bosnia and Herzegovina” and includes separate items for the work of Section I (for war crimes) and Section II (for organized crime, etc.).<sup>2009</sup>

The cost of the WCC project was estimated (in June 2006) at EUR 46.7 million. Figures from 2007 put the figure at EUR 48.5 million.<sup>2010</sup> In the past, the funding came from contributions from international donors. Salaries for international personnel were funded directly by states and managed separately from the WCC’s budget. International donors also provided contributions toward the WCC’s operational costs. From 2006 onward, the Registry commenced a process of transferring staff (and associated costs) and assets to the court proper, to be contained in the future within the budget funded by BiH.<sup>2011</sup> By 2007, the proportion

of international to national funds had “shifted from almost double to almost even.”<sup>2012</sup> While there were some difficulties in generating the requisite funding early on in the chamber’s lifespan (for example, at the 2006 donor conference) generally its funding has been sustainable.

The WCC Transition Strategy transferred budgetary management from the Registry to national authorities. International funding was channeled through and managed by the Registry, and overseen further by the Transitional Council and ad hoc coalitions of donor countries. Because contributions to the WCC and SDWC were voluntary and independent of the UN, the Registry expended considerable effort in raising sufficient funds from a broad range of donor countries.<sup>2013</sup> Generally, strong donor commitments from the outset sustained the WCC’s and SDWC’s financial situation. One exception was in the area of outreach, where a lack of initial support led to delays. The UK eventually funded a comprehensive public information and outreach strategy. As national funding increased, donors also viewed the court as a cost-effective, long-term investment. It was expected that the budget of the WCC and SDWC would be entirely funded from the national budget by 2010, and while this is formally the case,<sup>2014</sup> Bosnia continues to receive financial support for war crimes proceedings from international donors such as the EU.<sup>2015</sup>

The BWCC and the SDWC of the Prosecutor’s Office “have operated as cost-effective institutions, and their funding basis has been solid.”<sup>2016</sup> As noted in the 2008 analysis of the WCC and SDWC by the ICTJ, the “trials at the BWCC [were] far less costly than those of international tribunals. ... From 1994 to 2005 the average cost of each first-instance ICTY judgment by accused was 15 million euros; at the International Criminal Tribunal for Rwanda (ICTR) it was 26.2 million. At the State Court the average cost was around 955,000 euros in 2006, around 680,000 euros in 2007, and the estimated cost for 2008 is a little less than 400,000 euros.”<sup>2017</sup> Nonetheless, ICTJ’s review also notes some of the reasons why such comparisons are imperfect, for example, not reflecting the vast body of adjudicated facts (from the ICTY’s findings) admitted into evidence before the WCC, which significantly reduced the length of trials. The use of courts to try political and military leaders in relation to a large number of acts is also much more complex than the trial of an individual perpetrator.

## **Oversight and Accountability**

Oversight over the independence and accountability of the judiciary is in the hands of the High Judicial Prosecutorial Council of Bosnia and Herzegovina (HJPC), which was created in 2004. The HJPC appoints and supervises judges and prosecutors of

the State Court and local courts, drafts and oversees the courts' budgets, and plays an important role in steering judicial and legal reforms.<sup>2018</sup> From 2005 until 2012, the HJPC was formally responsible for the appointment of international judges. The appointment process steadily increased the quality of international judges, who brought "credibility and public trust to the court but much less in terms of capacity or skills building than might have been expected."<sup>2019</sup> Criticisms of the design of the role of international judges include the following: (1) The one-year appointment periods for some international judges did not allow judges to develop familiarity with the Bosnian legal system and the complex cases, and created unequal caseloads. (2) The selection process and criteria did not always yield judges with relevant criminal law experience or technical knowledge. (3) Information transfer and capacity building between international and national judges were not institutionalized, but occurred on a mostly ad hoc basis.<sup>2020</sup>

The OSCE monitors trials as required under ICTY rules.<sup>2021</sup> The OSCE's long-term presence significantly contributed to building domestic judicial capacity in a number of areas beyond monitoring. Other local and international organizations, including the OHR and the UN Committee for Human Rights, also monitor trials and provide technical assistance to Bosnia's judiciary. The EU monitors judiciary reform and the implementation of the National Strategy for War Crimes in the light of Bosnia's future EU accession.<sup>2022</sup>

In 2005, the Balkan Investigative Reporting Network (BIRN), launched a "Justice Series" on war crimes trials in Bosnia and continues publishing daily reports on war crimes cases before the State Court and local courts today.<sup>2023</sup>

Early in the process, the ICTY had a direct role in oversight of Bosnian prosecutions: the so-called "Rules of the Road" procedure. The procedure, agreed to in Rome in 1996, was created in response to concerns about the state of local trials: that they were being used as tools of ethnic revenge; that there was a lack of due process; and that there was a lack of coordination in handling war crimes case files among local courts and with the ICTY. The Rules of the Road procedure allowed the ICTY to review prosecutions undertaken by the authorities in BiH to prevent arbitrary arrests and unfair trials.<sup>2024</sup> Under the arrangement, it was agreed that the ICTY's Office of the Prosecutor would review case files of those suspected of committing international crimes during the conflict to determine whether the files contained sufficient and credible evidence to support the issue of an arrest warrant. The ICTY performed this function from 1996 to 2004, reviewing 1,419 cases against 4,985 persons, with approval given for 989 persons to be arrested on war crimes charges.<sup>2025</sup>

## CROATIA

### Conflict Background and Political Context

The Croatian nationalist party declared independence from the Socialist Federalist Republic of Yugoslavia (SFRY) on June 25, 1991, which led to the Croatian War of Independence—also known in Croatia as the “homeland war.” Local Serb military forces, backed by the Yugoslav People’s Army (JNA), and Croatian government forces fought the war between July 1991 and November 1995. Ethnic Serbs organized local militia groups fiercely opposed to independence and declared their own independent Republic of Serbian Krajina (RSK) after claiming almost a third of Croatian territory and attempting to create an all-Serb state within Yugoslavia. In October 1991, the JNA began a seven-month siege of the southern Croatian city of Dubrovnik. Serb militia and JNA forces likewise besieged Vukovar, leading to the city’s complete destruction and a large-scale “ethnic cleansing” campaign against ethnic Croats.

After the establishment of a UN ceasefire in 1992, and the European Union’s recognition of Croatia, the United Nations Security Council established an international peacekeeping force in Croatia, the United Nations Protection Force (UNPROFOR).<sup>2026</sup> In the following years, violence abated, but there was no settlement of the war. In an attempt to end the war and reconquer lost territory, Croatian forces launched military operations Flash and Storm in 1995, which led to widespread killings and disappearances, and caused some 200,000 Serbs to leave the country.<sup>2027</sup> The war effectively ended in 1995, and after two years of transitional administration under the auspices of the United Nations, Croatia regained control over Serb-held territories in 1998.<sup>2028</sup>

During the Croatia’s War of Independence, Croatian and Serb forces committed grave crimes, including war crimes. Over twenty years after the war, there was still “no reliable, verifiable and undisputable number of victims of war, killed or missing on the territory of the Republic of Croatia.”<sup>2029</sup> According to Amnesty International, approximately 20,000 people were killed, hundreds of thousands of people were internally displaced, and an estimated 300,000 to 350,000 Croatian Serbs left the country during and in the aftermath of the war.<sup>2030</sup>

## Existing Justice-Sector Capacity

Domestic courts have prosecuted war crimes cases since the start of the Croatian war in 1991, but international monitors have generally regarded local courts as incapable and ineffective in dealing with these cases. Concerns include the limited number of finalized cases; a disproportionate number of prosecutions and convictions of Serb perpetrators; the failure to investigate senior Croatian political and military leaders; and the absence of adequate witness protection mechanisms.<sup>2031</sup>

In 2004, Human Rights Watch concluded that the courts in Croatia were ill-equipped to hear politically sensitive and legally complex war crimes cases, and observed a general absence of political will and public support for war crimes prosecutions against ethnic Croats.<sup>2032</sup> The Organization for Security and Cooperation in Europe (OSCE), which has monitored war crimes trials since 1996, has expressed concern about basic fair trial guarantees, collective in absentia trials against Serb perpetrators, and a discrepancy in the application of sentencing between Croats and Serbs.<sup>2033</sup> Furthermore, in a 2010 report, Amnesty International raised concerns that the domestic legal framework still remained unsuited to the prosecution of international crimes in accordance with international standards.<sup>2034</sup>

## Existing Civil Society Capacity

Since the war's end, three local organizations in particular—Documenta: Center for Dealing with the Past; the Centre for Peace, Non-Violence and Human Rights in Osijek; and the Civic Committee for Human Rights—have played an important role in the monitoring of war crimes trials alongside international organizations such as the OSCE. Additionally, the Civic Committee for Human Rights (CCHR), established during the war, organized searches for missing and displaced people, set up the first legal aid systems in war-affected areas, and has monitored war crimes proceedings with an emphasis on cases in which there is fear of ethnic bias.<sup>2035</sup> The Documenta: Center for Dealing with the Past engages in “documenting and investigating prewar, wartime and postwar events” by organizing public debates, managing a database on wartime human losses, and monitoring war crimes at local and regional levels.<sup>2036</sup> After 2000, local civil society groups and international pressure in the context of Croatia's accession to the European Union were able to influence the implementation of judicial reforms and improvements in domestic war crimes prosecutions.<sup>2037</sup>

## Creation

War crimes proceedings first began during the war in Croatia. All county courts have jurisdiction to prosecute war crimes, but amendments to the Croatian Criminal Code in 2000 allowed for the transfer of complex war crimes cases to country courts in Zagreb, Osijek, Rijeka, and Split: Croatia's four largest cities, and the locations of the largest State Attorney's Offices.<sup>2038</sup> In 2001, the United Nations Human Rights Committee (UNHRC) observed that while war crimes investigations and prosecutions were ongoing, national courts only had a limited capacity to finalize proceedings and suspected crimes committed by Croats (including those committed during Operation Storm) were not being investigated. Consequently, the UNHRC recommended that Croatia proceed "with the enactment of the draft law on the establishment of specialized trial chambers within the major county courts, specialized investigative departments, and a separate department within the Office of the Public Prosecutor for dealing specifically with the prosecution of war crimes."<sup>2039</sup>

The United Nations Security Council adopted the completion strategy of the International Criminal Tribunal of the former Yugoslavia (ICTY) in 2003, which recommended the deferral of ICTY cases against mid- and lower-level perpetrators to competent courts in the former Yugoslavia.<sup>2040</sup> During this period, the European Union was pressing Croatia to comply with international legal standards and effectively deal with its violent past. In October 2003, Croatia's Parliament adopted the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts against the International Law of War and International Humanitarian Law (Law on Crimes against International Law).<sup>2041</sup> The parliament also adopted a Law on Witness Protection.<sup>2042</sup> This legislation allowed for the creation of a strengthened structure for the investigation and prosecution of international crimes, including four new Specialized War Crimes Courts in the regular court system of Croatia. The first war crimes case was transferred to the Zagreb county court in December 2005,<sup>2043</sup> but it was not until the beginning of 2011 that the War Crimes Chambers were fully functional.<sup>2044</sup>

## Legal Framework and Mandate

There are two aspects to the legal framework in Croatia for the prosecution of international crimes committed during the disintegration of the former Yugoslavia. The first concerns investigations originating in Croatia and prosecuted under Croatian law, and the second pertains to cases transferred to Croatia from the

ICTY, pursuant to Rule 11*bis* of the ICTY's Rules of Procedure and Evidence. The 21 Croatian county courts apply domestic law and handle cases brought by country prosecutors or the State Attorney's Office (SAO) and, on an occasional basis, cases transferred to national courts by the ICTY.

### ***Domestic Legal Framework***

During and after the war, Croatia continued to use the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC). However, the SFRY CC did not include provisions on command responsibility and crimes against humanity, and did not clearly define war crimes. Although the Croatian Parliament adopted a "basic" criminal code in 1993 and a new criminal code in 1997, which somewhat expanded the definition of war crimes in comparison to the SFRY CC, many regarded this new code as insufficient for the prosecution of wartime crimes.<sup>2045</sup>

In October 2003, Croatia adopted the Law on Crimes Against International Law, which allowed for the prosecution of "crimes against international law of war and humanitarian law under Croatian law and other crimes within the jurisdiction of international criminal courts." In 2004, the parliament amended the 1997 Croatian Criminal Code to define a wide array of international crimes, including genocide, the crime of aggression, crimes against humanity, war crimes against the civilian population, war crimes against the wounded or sick, war crimes against prisoners of war, torture, and other cruel or inhumane treatment. The amended code also includes the concept of command responsibility for crimes under international humanitarian law.<sup>2046</sup> The Law on Crimes Against International Law assigns competence for the prosecution of these crimes to the county courts of Osijek, Rijeka, Split, and Zagreb,<sup>2047</sup> and envisages that investigations will be conducted by specialist investigative units within the four county courts.

The 2003 Law on Witness Protection established a structure and procedures for the protection and support of witnesses in criminal proceedings, and a new Law on International Legal Assistance, International and Bilateral Agreements regulated regional and international legal cooperation.<sup>2048</sup>

The Council of Europe Commissioner for Human Rights concluded in 2010 that Croatia has an "adequate legal framework relating to the prosecution of war-related crimes."<sup>2049</sup> However, judges continued to apply the SFRY CC or 1993 criminal code in war crimes cases.<sup>2050</sup> Since the adoption of a Strategy for the Investigation and Prosecution of War Crimes by the State Attorney's Office in 2011, a subsequent

implementation plan, and additional changes to the Croatian Criminal Code in 2013, specialized war crimes courts have made progress in applying more recent codes and laws in war crimes trials.<sup>2051</sup>

### ***Referral of ICTY Cases***

In 2000 the UN Security Council adopted the ICTY Completion Strategy, thereby recognizing the role of domestic jurisdictions in the prosecution of international crimes committed during the war in the former Yugoslavia. Pursuant to the ICTY's Rule 11*bis* of the Rules of Procedure and Evidence, amended in 2002, the ICTY may decide to transfer cases to other courts, including those "in whose territory the crime was committed; in which the accused was arrested; or having jurisdiction and being willing and adequately prepared to accept such a case."<sup>2052</sup> Previously, concerns over fair trial standards, lack of capacity, and possible ethnically biased judiciaries barred the transfer of cases to Bosnia and Croatia.<sup>2053</sup> The ICTY "referral bench" sent eight cases against 13 mid- and low-level accused to national jurisdictions.<sup>2054</sup> The ICTY remained involved in the cases, keeping the authority to order victim protection measures and to monitor cases until their conclusion. At any time prior to judgment at the national level, the referral bench could order the case to be recalled to The Hague.<sup>2055</sup>

### **Location**

War crimes cases can be heard by any of the 21 Croatian county courts throughout the country. The 2003 Law on Crimes Against International Law leaves intact the jurisdiction of all country courts but allows for prosecution of war crimes in four specialized war crimes chambers in Osijek, Rijeka, Split, and Zagreb.<sup>2056</sup>

The majority of proceedings in Croatia have taken place in courts situated in areas most affected by the 1991-1995 conflict.<sup>2057</sup> In 2002, the OSCE reported that while over three-quarters of Croatia's courts were involved in war crimes proceedings, the majority of trials were initiated in the courts of Osijek and Vukovar, as had been the case in previous years.<sup>2058</sup> The advantage of this is that the trials are accessible to local audiences. However, regular county courthouses are not designed for war crimes trials, and this increases the risk of witness intimidation and judicial impartiality. A lack of separate entrances or waiting rooms for victims or witnesses leads to interactions between victims and defendants.

## **Structure and Composition**

### ***Specialized War Crimes Chambers***

Croatia has a tripartite judicial system consisting of 67 municipal and 21 county courts, the Supreme Court, and the High Court of Croatia.<sup>2059</sup> War crimes prosecutions take place within this structure. The 2003 Law on Crimes Against International Law created specialized war crimes chambers in four of Croatia's county courts as well as centers for the investigation of international crimes.<sup>2060</sup> However, it was not until 2011 that the war crimes sections became fully operational and received the first cases transferred from regular county courts.<sup>2061</sup>

### ***Specialized War Crimes Prosecution***

The State Attorney's Office of the Republic of Croatia is composed of a principal State Attorney's Office in Zagreb, and municipal- and county-level State Attorney's Offices.<sup>2062</sup> The 2003 Law on Crimes Against International Law established specialized prosecution offices within the Office of the Public Prosecutor, alongside the four specialized war crimes courts in Osijek, Rijeka, Split, and Zagreb. In the same manner as the specialized courts, the specialist prosecutors' offices only started operations after the implementation of the 2011 action plan on the implementation of the Strategy for the Investigation and Prosecution of War Crimes. In 2015, the UN Human Rights Council reported that the specialized war crimes offices were now working in accordance with the 2011 action plan, and that "efficacy is increased in the work in cases against known perpetrators, and also in cases in which the perpetrators have not yet been found."<sup>2063</sup> The State Attorney's Offices have a limited capacity to deal with war crimes cases. In 2017, the Zagreb prosecutor's office had two officials working on war crimes.<sup>2064</sup>

### ***Witness Protection and Support***

The 2003 Law on Witness Protection created a Witness Protection Unit within the Ministry of Interior which "carries out and organizes the Protection scheme, carries out and organizes urgent measures and performs all other duties connected to protection of endangered persons, unless this Act provides to the contrary. Protection Unit is responsible for implementation of the Protection scheme."<sup>2065</sup> Additionally, a specialized Witness Support Unit was established within the Croatian Ministry of Justice in 2005.<sup>2066</sup>

In 2008, with support of the United Nations Development Program, the first four witness support offices were introduced in the Vukovar, Osijek, Zadar, and Zagreb county courts, followed by the opening of three additional offices in Rijeka, Sisak, and Split in 2011.<sup>2067</sup> In total, the seven offices are staffed by 14 personnel and 200 volunteers. The program aims to ensure adequate witness protection in war crimes and other types of cases. The offices also provide free psychosociological support for witnesses in the preparation for and during trials, as well as provide general information to witnesses and victims about their roles and rights in trials. The witness support offices also take responsibility for nationwide awareness raising campaigns and “liaising with NGOs and public institutions, managing the witnesses/victims database, and documenting witness and victim support activities.”<sup>2068</sup>

### ***Public Information on War Crimes Trials***

No outreach or public information program on war crimes prosecutions exists within the Croatian judicial system. On the contrary, there is very little information available on the events of the 1991–1995 war, and civil society organizations are convinced that the Croatian government is “purposefully withholding the information about the actions of members of Croatian forces in relation to commitment of war crimes.”<sup>2069</sup> From 2000 to 2010, the ICTY maintained a field office in Zagreb through which it conducted outreach activities.<sup>2070</sup> As of 2017, the ICTY continued to organize limited outreach activities in Croatia. Upon the ICTY’s closure, the Mechanism for International Criminal Tribunals (MICT) is supposed to take over these responsibilities.<sup>2071</sup>

## **Prosecutions**

### ***Domestic War Crimes Prosecutions***

According to the State Attorney’s Office, by December 2014, prosecutors had initiated war crimes proceedings against 3,553 persons and achieved convictions against 589. Of these, 44 were from Croatian military forces. First-instance criminal proceedings against 642 persons and investigations of 220 persons were still ongoing.<sup>2072</sup> In a 2016 review of war crimes trials before the Croatian courts, the Croatian NGO Documenta noted that “the Croatian judiciary is still faced with a large number of unprocessed war crimes, [and] the percentage of completely resolved crimes is very low.” As of late 2017, Croatia had delivered a total of 141 war crimes verdicts, which was the highest figure of all countries in the former Yugoslavia.<sup>2073</sup>

The practice of in absentia trials within Croatian courts explains the discrepancy between the total number of war crimes verdicts and the number of persons convicted. International observers have found that “in the period from 1992 to 2000, 578 persons were convicted by Croatian courts for war crimes, out of whom 497 were in absentia ... [which amounts to] 86% of the defendants.”<sup>2074</sup> In 2016, this had shifted: only one-third of the trials before the four specialized war crimes chambers were in absentia.<sup>2075</sup> Following the transfer of early in absentia cases to specialized chambers, these and the Supreme Court ultimately overturned many verdicts.

There have been few prosecutions before the specialized war crimes chambers. In 2010, Amnesty International reported that since the 2003 adoption of the Law on Crimes Against International Law, only two cases had been transferred to and prosecuted by the special war crimes chamber, and both at the county court in Zagreb.<sup>2076</sup> In late 2011 and the beginning of 2012, regular county courts transferred 15 cases to the four specialized chambers, and several of these were then suspended out of concerns over in absentia trials.<sup>2077</sup> During 2016, the specialized State Attorney’s Offices in Rijeka, Split, and Zagreb issued 12 indictments against 84 persons (the specialized State Attorney’s Office in Osijek issued none); there were judgments for 21 persons during the year.<sup>2078</sup>

Several important wartime events remain uninvestigated. As of 2014, there had been no convictions for war crimes during Operation Storm, an operation that reportedly killed over 650 and destroyed over 20,000 buildings. While the State Attorney’s Office of Croatia has registered 167 victims and 27 war crimes related to Operation Storm in its database, the perpetrators of 23 of the crimes remain unknown.<sup>2079</sup> Crimes committed during the 1991 siege of Vukovar have only been partially investigated and prosecuted.<sup>2080</sup>

### ***Rule 11bis Cases***

As of 2016, “verdicts of the ICTY with final judgments, as well as one case referred to Croatia under the terms of Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence, prompted [the] Croatian judiciary to initiate only a few criminal proceedings based on established facts about the crimes committed.”<sup>2081</sup> Since the adoption of the completion strategy, the ICTY has transferred one war crimes case involving two defendants—the Croatian generals Rahim Ademi and Mirko Norac—to Croatian courts. The Zagreb county court delivered a first-instance judgment in May 2008, finding Norac guilty of war crimes against civilians and acquitting Ademi of all charges. In November 2009, the Supreme Court of Croatia upheld the initial

judgment, and Norac was sentenced to six years imprisonment.<sup>2082</sup> In February 2005, the ICTY referral bench requested the referral of a second case to the Croatian courts, but the request to transfer the “Vukovar three” was eventually withdrawn and the accused judged before the ICTY.<sup>2083</sup>

## **Legacy**

Over the past twenty years, Croatia has improved the handling of domestic war crimes cases, but fair and effective justice for victims of the 1991–1995 war remains elusive.

### ***Domestic Capacity for War Crimes Prosecutions***

In 2010 Amnesty International concluded that since the end of the war in Croatia, and seven years after the ICTY started transferring cases to the Croatian courts, “only a very limited number of perpetrators have been brought to justice before the Croatian courts, and these proceedings have in majority not been in accordance with international criminal law and international fair trial standards.”<sup>2084</sup>

However, since the adoption of a strategy for war crimes prosecutions and investigation and State Attorney’s offices and ministries action plans in 2011, as well as the 2010 and 2012 strategies for the development of the judiciary,<sup>2085</sup> the overall competence of the Croatian judiciary and the prosecution of war crimes have been enhanced. Improvements include the commencement of the usage of specialized war crimes courts in Osijek, Rijeka, Split, and Zagreb; the opening of State Attorney’s Offices dedicated to war crimes prosecutions in the four specialized war crimes courts; the creation of an electronic database on all war crimes committed on the territory of Croatia; better witness protection and support services in certain county courts; and the adoption of a strategy for the revision of trials conducted in absentia.<sup>2086</sup>

Throughout the years, domestic war crimes trials have been marred by ethnic bias. The majority of prosecutions—by 2009, over 80 percent—have been against Croatian Serbs for crimes committed against Croats, leading to allegations of ethnic bias in prosecutions and sentencing practices.<sup>2087</sup> Since 2001, the OSCE “continued to observe a trend toward increased efforts by the Croatian authorities ... to pursue all individuals responsible for war crimes, regardless of the national origin of perpetrators and the victims.”<sup>2088</sup> In 2008, the State Attorney’s Office issued instructions aimed at addressing the prosecution bias against Serbs.<sup>2089</sup>

Additionally, civil society raised concerns over in absentia proceedings, which generally violated international fair trial standards.<sup>2090</sup> Despite the adoption of a state attorney's strategy on in absentia trials in 2016, these types of trials continue to make up one-third of the total. "Before the Osijek County Court all the trials are held in absentia, more than a half of trials before the Rijeka CC, and one fourth before the Zagreb CC."<sup>2091</sup>

### ***Witness Protection and Support***

Local trials lacked effective witness protection and support procedures as well as infrastructure until 2009, which allowed witness interference and intimidation in trials.<sup>2092</sup> Basic security procedures, such as separate entrances for witnesses and accused, are often not in place.<sup>2093</sup> With the assistance of the UN Development Program, basic witness protection and support units were established at seven out of 21 county courts in Croatia. In 2016, the Commissioner for Human Rights of the Council of Europe reported that "even though a legislative and institutional framework has been put in place ... additional efforts are needed to ensure effective witness protection and to encourage more people to disclose information, including information related to possible burial places, mass graves and potential perpetrators. [And] the laws and programs pertaining to the support and protection of witnesses needed to be strengthened and systematized."<sup>2094</sup>

### ***Specialized War Crimes Chambers***

Since the adoption of the 2003 Law on Crimes Against International Law, only a limited number of war crimes cases have been processed in the four specialized war crimes chambers in Zagreb, Osijek, Rijeka, and Split. In 2010, Amnesty International reported that only two war crimes cases had been brought before the War Crimes Chambers, and that a majority of proceedings continue to take place before county courts that lack experience and resources to effectively and independently prosecute international crimes.<sup>2095</sup> In 2016, a total of 18 trials were underway before specialized war crimes chambers, and judgments in 13 cases against 26 defendants were issued.<sup>2096</sup> According to the Croatian NGO Documenta, trials before specialized war crimes chambers were "marked by seldom-scheduled major hearings, lengthy procedures, frequent repetitions, absence of the defendant, and low prison sentences."<sup>2097</sup>

### ***Impact on Society***

"In general, dealing with the past, which includes ...war crimes trials aimed at establishing the facts, bringing justice, acknowledging victims' suffering and

recovering affected and vulnerable groups, as well as society as a whole, was almost completely absent [in Croatia].”<sup>2098</sup> Limited information remains available on crimes committed during the war. Reconciliation between countries within the former Yugoslavia and between ethnic groups within the countries is still in its infancy. Moreover, the political will to prosecute Croatian political and military leadership for crimes committed during the war remains limited. The ICTY acquittal of Croatian generals Ante Gotovina, Mladen Markač, and Ivan Čermak—all of whom received a warm welcome upon their return to Croatia—for war crimes during Operation Storm in November 2012 was representative of this sentiment.<sup>2099</sup>

A 2010 study titled “Dealing with the Past in Croatia: Attitudes and Opinions of Post-War Actors and Public” shows that the majority of the Croatian population has not come to terms with its violent past. There is a widespread public understanding that the crimes committed during the Croatian war of independence were legitimate and necessary for regaining control over Croatian territory.<sup>2100</sup> The study shows that 52 percent of the Croatian population thought that ethnic Croats were the only victims of the war, 31 percent believed that the majority of the wartime victims were ethnic Croats, and none of the interviewees thought that the majority of victims had been Serbs. Furthermore, while almost 100 percent of the study’s respondents had heard of crimes committed in the city of Vukovar, only 68 percent had heard of Serb casualties during Operation Storm.<sup>2101</sup>

## **Financing**

Domestic war crimes prosecutions in Croatia are financed through the regular state budget of the Republic of Croatia and initially received financial and in-kind contributions from international donors. Furthermore, the Law on Witness Protection sets out that the funds that witness protection and information measures will be included as a special budgetary item in the regular state budget.<sup>2102</sup>

In 2011, the annual budget for the judiciary in Croatia was about €368 million.<sup>2103</sup> In the years thereafter, the budget slightly decreased to approximately €313 million for 2013.<sup>2104</sup> In that same year, €1.7 million had been allocated to the judicial academy for the training of judges and prosecutors.<sup>2105</sup> According to the World Bank, with 43 judges per 100,000 inhabitants, Croatia has one of the largest court systems in Europe and expends 0.7 percent of its GDP for the judiciary.<sup>2106</sup>

## Oversight and Accountability

The domestic system in Croatia includes several checks and balances for the independence and impartiality of the judicial system. The Croatian Supreme Court ensures “the uniform application of laws and equal protection under the law” and therefore may review all final judicial decisions.<sup>2107</sup> In 2005, the OSCE reported that the Supreme Court overturned 65 percent of appeals judgments.<sup>2108</sup> As a result of the EU accession preparations, Croatia adopted legal changes in 2011 and consequently strengthened its State Judicial Council and State Prosecutorial Council, which are responsible for overseeing the appointment and evaluation of the work of judges and prosecutors.<sup>2109</sup> The Croatian Ombudsman, which maintains offices in Zagreb, Rijeka, Osijek, and Split, may hear complaints of human rights violations and discrimination.<sup>2110</sup>

The OSCE Mission to Croatia monitored domestic and Rule 11*bis* war crimes proceedings and published annual reports on domestic war crimes trials until the end of 2007.<sup>2111</sup> A variety of other international monitoring bodies, including the European Commission, the Council of Europe Commissioner of Human Rights, and the UN Human Rights Council, have continued monitoring the Croatian judiciary ever since—some in the light of assessing Croatia’s readiness for EU accession.

At present, domestic civil society groups, including the Documenta: Center for Dealing with the Past, continue to publish annual reports on domestic war crimes trials.<sup>2112</sup>

## KOSOVO

This annex covers three approaches to international justice in Kosovo since the end of the 1998–1999 war: (1) Regulation 64 Panels under the United Nations Interim Administration Mission in Kosovo (UNMIK); (2) war crimes trials under the European Union Rule of Law Mission in Kosovo (EULEX); and (3) the Kosovo Specialist Chambers and Specialist Prosecutor’s Office. Common sections covering background on the conflict and the capacities of the domestic justice sector and civil society precede separate detail on each mechanism.

### Conflict Background and Political Context

Under Joseph Tito’s Socialist Federal Republic of Yugoslavia (SFRY), Kosovo had the status of an autonomous province within Serbia. While the region had no equal standing with the six republics of the Yugoslav federation, it and another autonomous region (Vojvodina) had the right to create its own constitution and some government institutions. Despite this limited autonomy, Serbian dominance—and neglect—of Kosovo created an impoverished country with weak institutions dominated by minority ethnic Serbs.<sup>2113</sup> Kosovo Albanians, treated as second-class citizens, increasingly agitated for status as a full Yugoslav republic. Widely supported non-violent protests began in the early 1980s. Slobodan Milosevic, president of Serbia, revoked Kosovo’s autonomy in 1989. In response, Kosovar Albanians created their own parallel government institutions and called for independence from the SFRY. For the next two years, Serbia “systematically suppressed Kosovo Albanians and suspended their institutions, shut down the education and health care system and expelled some 150,000 Albanians from their jobs in police, education, [and] state companies.”<sup>2114</sup>

The Kosovo Liberation Army (KLA) have initiated scattered armed violence against the Serbian authorities since 1997, having been disillusioned by the exclusion of the “Kosovo question” from the Dayton peace negotiations on Bosnia and Herzegovina in 1995. The Serbian government’s heavy-handed response targeted civilians as well as militants, which created broader support for the KLA within the Kosovo Albanian population. The violence in Kosovo reached its apogee between March and June 1999. State-sponsored Serb forces committed mass atrocities and ethnic cleansing of the majority ethnic Albanian population. The KLA also committed significant violations of international humanitarian law. In March, Serbian police and the military of the rump-Yugoslavia (Serbia and Montenegro) launched a military

offensive in Kosovo in a “methodically planned and well-implemented campaign” that expelled nearly 80 percent of the entire population of Kosovo from their homes, including more than 850,000 ethnic Albanians from Kosovo.<sup>2115</sup> NATO’s air campaign, Operation Allied Force, between March 24 and June 10, 1999, ended the conflict, but not before inflicting large-scale damage.

In the war’s aftermath, the United Nations Security Council passed Resolution 1244 (1999), handing jurisdiction of Kosovo to the UN, which created the United Nations Interim Administration Mission in Kosovo (UNMIK). UNMIK had a mandate to provide Kosovo with a “transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”<sup>2116</sup> Together with the Organization for Security and Cooperation in Europe (OSCE), the UN shared responsibility for rebuilding the rule of law in Kosovo. At the end of 2008, the UN handed over overall rule of law assistance, including war crimes prosecution, to the European Union Rule of Law Mission in Kosovo (EULEX).

Kosovo declared its independence from Serbia on February 17, 2008, but Serbia continues to claim Kosovo as an autonomous region. However, on April 19, 2013, the prime ministers of Kosovo and Serbia signed the Brussels agreement, with the aim of normalizing relations.<sup>2117</sup> As of September 2017, 113 countries had recognized Kosovo.<sup>2118</sup> The EU considers Kosovo to be a potential candidate for European Union membership but abstains from taking a position on Kosovo’s statehood claim.<sup>2119</sup> Negotiations on the final status of Kosovo continue under the EU auspices.

In January 2017, the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSC)—also known as the Kosovo Relocated Specialist Judicial Institution (KRSJI)—was created alongside EULEX. This Netherlands-based mechanism was tasked with the mandate to prosecute war crimes and crimes against humanity that were not addressed by UNMIK or EULEX, nor by the International Tribunal for the former Yugoslavia (ICTY).

## **Existing Justice-Sector Capacity**

After decades of instability and tensions between ethnic Albanians and Serbs, as well as a devastating civil war, Kosovo’s state institutions had completely collapsed. The conflict gutted the country’s physical infrastructure and judicial system, creating an “accountability and justice crisis.”<sup>2120</sup> Beyond the absence of or severe damage to the

physical infrastructure of the judicial system—including court buildings, equipment, law libraries, and prisons—there was an “extreme lack in capacity.”<sup>2121</sup> The absence of qualified judges, lawyers, and prosecutors, and significant ethnic imbalances among those legal professionals who remained in Kosovo after the war, cast a shadow over the legitimacy of the courts in the eyes of the local Serbian population. Kosovo’s majority Albanian population, following exclusion from participation in judicial functions under Serbian rule, had no public confidence in the legal system as a whole.<sup>2122</sup>

The UN Secretary-General observed that there was “an urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary.”<sup>2123</sup> By late 1999, prisons were overcrowded with detainees awaiting trial for atrocity crimes committed during the conflict. In response to these immediate justice demands, UNMIK established an international judiciary on the domestic administration of law, although the internationalization of the judiciary came in several phases, as described below.<sup>2124</sup>

## **Existing Civil Society Capacity**

### ***Civil Society after the War***

In the 1990s, civil society started to organize alongside the Albanian parallel government structures in Kosovo, but due to Serbian repression, it struggled to mature.<sup>2125</sup> Civil society organizations began reorganizing themselves in the aftermath of the war and started recording human rights violations. One of UNMIK’s first actions was to pass legislation regulating NGO registration and operation, which paved the way for the formation of many new organizations.<sup>2126</sup> Throughout the years, domestic organizations have played an important role in holding war criminals accountable for their actions through trial monitoring, collection of evidence for trials, promoting public awareness, and keeping accountability on the agenda of policymakers.

The Humanitarian Law Center-Kosovo (HLC), which opened an office in Pristina in 1996, published numerous reports on killings and disappearances of Albanians, as well as reports on KLA-perpetrated crimes against Serbs and other minorities.<sup>2127</sup> International human rights organizations such as Human Rights Watch cooperated with, among others, the Center for the Protection of Women and Children, the Mother Theresa Society, and the Kosovo Helsinki Committee in the collection of evidence.<sup>2128</sup> The Council for the Defense of Human Rights and Freedoms (CDHRF),

an organization that had been forced to stop its human rights work during the war, played an important role in the exhumation of graves all over Kosovo, sometimes working directly with the ICTY. Civil society pressure led UNMIK to first start exploring the idea of a war crimes tribunal (see text box on the Proposed Kosovo War and Ethnic Crimes Court [KWECC], below).<sup>2129</sup>

### ***Civil Society after Independence***

Civil society grew rapidly following Kosovo's declaration of independence in 2008. The majority of new organizations were devoted to reconstructing the nation, easing ethnic tensions, and promoting reconciliation.<sup>2130</sup> International donors gave generously, enabling the sector's growth.<sup>2131</sup> However, this dependence on outside funding became a weakness; international funding has diminished in recent years, making it challenging for civil society organizations to sustain themselves. Of the more than 7,000 NGOs registered in 2013, fewer than 10 percent were estimated to be still active in 2017.<sup>2132</sup> Since the political agenda in Kosovo has been overwhelmingly focused on pressing issues such as encouraging the international community to officially recognize Kosovo as a state, it has been challenging for civil society organizations to push their own agendas.<sup>2133</sup> However, some organizations continue to play a role in influencing public policy, and several local groups, including Medica Kosova<sup>2134</sup> and the Humanitarian Law Center of Kosovo, continue to push for accountability for grave crimes.

## **UN Regulation 64 Panels (2000–2008)**

### **Creation**

Immediately after the Kosovo war ended, the UN Secretary-General established the United Nations Interim Administration Mission in Kosovo (UNMIK) under Resolution 1244. UNMIK acted as the sovereign entity in Kosovo, administering the country as a UN protectorate until Kosovo's independence. UNMIK engaged in building state institutions at the national and local levels, and the Special Representative of the Secretary-General (SRSG) executed UNMIK's mandate to exercise "all legislative and executive authority with respect to Kosovo."<sup>2135</sup> UNMIK shared a mandate with the Organization for Security and Co-operation in Europe (OSCE) to reconstruct the rule of law, and this was supported by a number of fledgling Kosovo governmental and nongovernmental bodies.<sup>2136</sup>

To step into the vacuum of a *nonexistent* judicial system, UNMIK established a civilian police force (CIVPOL) and an emergency justice system (EJS) compromising local judges and prosecutors.<sup>2137</sup> From the start, concerns were raised over ethnic bias and lack of capacity among legal professionals to deal with war crimes cases so soon after the war's end. In late 1999, UN administrators considered several options for establishing judicial accountability mechanisms for atrocity crimes, including a proposed ad hoc tribunal, called the Kosovo War and Ethnic Crimes Court (see text box, below).<sup>2138</sup>

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### **Proposed Kosovo War and Ethnic Crimes Court (KWECC)**

In late 1999, UNMIK, UN Member States, and officials from the national judiciary began negotiations for a stand-alone, ad hoc, international-led tribunal that would sit in Kosovo, modeled on the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>2139</sup> The negotiations reached advanced planning stages.<sup>2140</sup> The KWECC expected to begin operations in mid-2000: the Special Representative of the Secretary-General, Bernard Kouchner, signed an establishing regulation; appointment procedures for international and local judges had begun; and a chief international prosecutor, Fernando Castanon, had already been appointed and had arrived in Kosovo.<sup>2141</sup>

The proposed court would have “concurrent, primary jurisdiction with domestic courts of Kosovo” over violations of international humanitarian law, as well as war crimes, genocide, and crimes against humanity committed since January 1, 1998.<sup>2142</sup> The court would have simultaneous jurisdiction with the ICTY, with KWECC designed to prosecute lower-profile offenders not tried by the ICTY.<sup>2143</sup> The court would consist of panels composed of international and local judges, prosecutors, and staff.<sup>2144</sup> The proposal included plans for a witness protection unit and defense office. The proposed court was ultimately abandoned for numerous reasons, and plans were fully put to rest as the Regulation 64 Panels began full operations in the fall of 2000. Reasons included:

- concerns from UN and international policymakers about replicating the costly ad hoc international criminal tribunals;
- political obstacles arising from disagreement between the United States and the UN over reaching agreements for security arrangements;
- concerns from the United States that the court would investigate alleged war crimes committed by NATO forces;

- opposition among Kosovo Albanian legal professionals concerned about potential resource drains to the judicial system;
  - fears that the KWECC would be “too independent” and exacerbate ethnic tensions by prosecuting ethnic Albanians; and
  - a lack of consultation with civil society.
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After a flare-up of violence in February 2000 in the divided northern city of Mitrovicë/Mitrovica and a hunger strike by Kosovo Serb detainees awaiting trials in May, the judicial crisis came to a head. UNMIK realized that there was a need for non-biased judges and proceeded, through trial and error, to internationalize the judiciary in three successive phases.

First, in February 2000, the SRSG issued UNMIK Regulation 2000/6, allowing for the appointment of an international judge and international prosecutor (collectively IJP) in the Mitrovica region. Usually, these judges were minorities on three-judge panels. Second, in May, the SRSG issued UNMIK Regulation 2000/34, extending the power to appoint IJPs to all five judicial districts in Kosovo, including one on the Supreme Court.<sup>2145</sup> However, IJPs under Regulation 2000/34 were still a minority on judicial panels, meaning they were “not only consistently outvoted by the locals, but they were outvoted on the most significant inter-ethnic cases, which then permitted the Albanian judges to ‘overcharge’ the convicted Serbs in the sentencing phase.”<sup>2146</sup>

The third phase created judicial panels with majority international judges. In Regulation 2000/64 of December 2000, prosecutors, the accused, or defense counsel (as well as UNMIK, of its own accord) were granted the right to petition UNMIK for the assignment of international judges and prosecutors to ad hoc panels. These became known as Regulation 64 Panels.<sup>2147</sup> This trigger mechanism for international panels in Regulation 64 was initially flawed, containing a procedural loophole about the transfer of cases to international panels and leading to reversals of several cases before the Supreme Court.<sup>2148</sup> A subsequent regulation fixed the loophole, requiring local prosecutors who abandoned a case to notify an IJP, who could then file for the case’s transfer.<sup>2149</sup>

In 2008, Regulation 64 Panels wound down, and the UN transferred responsibility to prosecute war crimes cases to a European Rule of Law Mission in Kosovo (EULEX), which was to “assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella,” in accordance with UN Security Council Resolution 1244 (1999).<sup>2150</sup>

## Legal Framework and Mandate

UNMIK authorized Regulation 64 Panels to exercise jurisdiction within domestic courts, trying crimes defined under domestic law. However, the definition of applicable domestic law was contested. UNMIK, acting as sovereign administrator, initially determined that applicable law comprised the criminal code prior to the March 1999 NATO intervention: the law of the Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC), with some modifications. UNMIK made this decision with little consultation with local authorities, prompting early resentment of UNMIK's judicial projects.<sup>2151</sup> In response, UNMIK "issued new resolutions describing the applicable law to be the law in force in Kosovo on March 22, 1989, but like the initial decision, the applicable law was to be a hybrid of pre-existing local law and international standards. ... Local law was only applicable to the extent that it did not conflict with international human rights norms."<sup>2152</sup>

In 2003, UNMIK enacted a Provisional Criminal Code of Kosovo, but determining the applicable law in the "network of laws" remained difficult for both local and international judges.<sup>2153</sup> The new code formed the basis of criminal law in Kosovo, incorporating criminal offenses under international law and shifting the Kosovo legal system toward a more common law design. The confusion and shifts of the applicable law (as well as previously mentioned procedural loopholes in Regulation 64) had severe and negative consequences for the effective and expeditious prosecution of war crimes cases and led the Supreme Court of Kosovo to overturn several cases or send them back for retrial.

The confusion over which law should be applied in war crimes cases, especially in the early years after the conflict, has contributed to the high number of retrials in war crimes cases. These negative trends led to mistakes resulting in subsequent reversals by the Supreme Court, which sent the cases back for retrial. This problem has been exacerbated by the frequent change of international actors in the judicial system, coming from different judicial systems and having different interpretations of the law, which could be influenced by their own jurisdictions.<sup>2154</sup>

The 2003 Provisional Criminal Code and the SFRY CC of 1997 had a different scope and definition of crimes under international law. The Provisional Criminal Code includes genocide, crimes against humanity, and war crimes (as defined under customary international law and the Geneva conventions),<sup>2155</sup> while the SFRY CC only encompasses genocide and war crimes.<sup>2156</sup> In practice, the international crimes trials in which IJPs were involved focused primarily on war crimes.<sup>2157</sup>

Although the ICTY maintained concurrent and primary jurisdiction over national courts concerning atrocity crimes, the ICTY prosecutors focused only on the most senior perpetrators. Based on the experience elsewhere in the former Yugoslavia, UNMIK recognized the need for international involvement in domestic war crimes prosecutions to try and to prosecute lower-level perpetrators. UNMIK justice sector officials “have described the relationship with the ICTY as collaborative and complementary, noting that UNMIK regularly assists the ICTY with its investigations.”<sup>2158</sup> However, in creating the Regulation 64 Panels, UNMIK set up a separate framework for the prosecution of international crimes that did not take full account of the experience of the UN ad hoc tribunals for Yugoslavia and Rwanda.

## **Location**

The Regulation 64 Panels were part of the regular court system in Kosovo, and international judges and prosecutors could be placed in courts throughout the country. For the most part, IJPs used pre-existing buildings, with the exception of a single high-security courthouse built for the proceedings. The offices of international judges and prosecutors were often in separate buildings from their national counterparts, limiting interaction with the legal system and between national and international judges.<sup>2159</sup> This limited the exposure of national judges to international legal practices and ran counter to hopes that international involvement would build capacity in the national judiciary.

## **Structure and Composition**

### ***Appointment of International Judges and Prosecutors***

Regulation 64 Panels could be appointed on the motion of the SRSG or upon request by prosecutors, the accused, or defense counsel, where “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”<sup>2160</sup> Regulation 64 did not contain clear criteria for the appointment of international judges or prosecutors, but “in practice the primary reasons for relying on [special panels] are either fears about perception of bias or concerns about intimidation of local judges,” and IJPs were appointed “mainly in cases involving interethnic conflict.”<sup>2161</sup> UNMIK, responsible for the administration of the entire justice sector, often constituted international panels to handle non-atrocity crimes cases. IJPs in Kosovo heard a range of cases from “serious humanitarian crimes to

traffic accidents and illegal woodcutting.” The use of the panels at times appeared “arbitrary and ad hoc” and the panels suffered from a legitimacy problem.<sup>2162</sup>

### ***Registry and Judicial Support***

The International Judicial Support Section (IJSS) was established within the Kosovo Department of Justice (DOJ) to support international prosecutors and judges. It also provided legal support and Registry functions. In March 2003, a Criminal Division answerable to the DOJ provided support to the chief international judge (a position created in 2005) and prosecutor, and monitored developments in the cases.<sup>2163</sup>

### ***Judges***

The total number of international judges in the panels varied. By 2001, 17 international judges were assigned, declining to 14 by 2005. The short-term appointment contracts (six months) discouraged applications from sitting judges in Western Europe and the United States. At times, international judges left before cases were fully adjudicated, meaning that at times “the main trial must start from the beginning, which may include re-administration of evidence.”<sup>2164</sup> Almost none of the judges had experience in international humanitarian or international criminal law, and some did not have backgrounds in any form of criminal law. Many international judges were only superficially trained on the features of Kosovo’s legal system. International judges were located in the capital, Pristina, limiting their interaction with the legal system in the provinces, even if they were assigned to cases in other parts of the country. International law experts generally regard the jurisprudential quality of the decisions as poor, with little reference made to decisions under international law or jurisprudence beyond the UNMIK Regulations.

### ***Prosecutors***

By December 2000, three international prosecutors had been appointed, a number that eventually grew to 11 before shrinking back to nine by 2005. The quality of international prosecutors was generally considered to be quite good, but most had little experience with complex international humanitarian or criminal law cases. The interaction with national prosecutors was minimal: “International prosecutors tended to work alone, and cases are not shared between local and international prosecutors, and also because IPs are not required to take on a mentoring role. Many feel that joint teams of national and international prosecutors would have been a good idea, but time constraints and security concerns have been held to prohibit this.”<sup>2165</sup>

In 2005, steps were undertaken to establish a Special Prosecutor's Office for the prosecution of high-profile war crimes cases, but such an office never came into existence under UNMIK. The idea was that the office would be staffed by national prosecutors, with transitional assistance by international prosecutors, and the idea was eventually implemented by EULEX.<sup>2166</sup> (See Special Prosecution Office under EULEX *Structure and Composition*, below).

### ***Defense***

Defense counsel before the special prosecutors were often Kosovar, with many Albanian and Serb defense lawyers. Senior defendants—often members of the Kosovo Liberation Army (KLA)—usually retained private defense counsel. The Department of Judicial Administration under the Ministry of Public Services remunerated court-appointed counsel, paying them in lump sums (which some observers noted was a disincentive to work more hours). Respect for the rights of the accused before Regulation 64 Panels remained a significant concern throughout the process, but improved somewhat through training and support provided by an NGO funded by the Kosovo Criminal Defense Resource Centre and the Kosovo Chamber of Advocates.<sup>2167</sup>

### ***Witness Protection***

A specialized police unit provided witness protection services. UNMIK regulations allowed witnesses to remain anonymous in certain circumstances, in light of the frequent threats and reprisals against witnesses. UNMIK incorporated victim and witness protection regulations into the provisional criminal code, but a law on witness protection only passed after UNMIK transferred responsibility for grave crimes cases to EULEX. (See EULEX profile, below.)

### ***Translators and Interpreters***

The Regulation 64 Panels faced severe understaffing of legal translators and interpreters, in part because the UN was reluctant to hire nationals, based on security concerns.<sup>2168</sup>

### ***Outreach***

UNMIK did not have an outreach program to support the work of the international judges' panels. Simultaneous prosecutions of Kosovo-related cases at the ICTY complicated public information campaigns. The ICTY established an outreach office in Pristina in 2001 that continued activities throughout Kosovo until the end of 2012.<sup>2169</sup>

## ***Training***

The Kosovo Judicial Institute (KJI) coordinated judicial training, including study visits to the ICTY and war crimes law seminars. Shortly after the end of the deployment of the Regulation 64 Panels, the capacity of the domestic justice sector to adequately try war crimes cases remained low. Local justice-sector professionals received inadequate training in war crimes law and practice. A 2010 review by the OSCE of war crimes trials under UNMIK found that “throughout the reporting period there has been a lack of expertise in dealing with war crimes cases on the part of judges, prosecutors, defense counsel and investigators.”<sup>2170</sup> Placing international judges with local judges on mixed panels was done in part to allay concerns about biased judges, as well as to institute knowledge-sharing and skills transfer. However, without institutionalized programs in place, little capacity transfer occurred between international and national staff.

## **Prosecutions**

Initially, IJPs handled war crimes cases against Serbs, inheriting over 40 cases that ethnic Albanian judges had adjudicated before the creation of the Regulation 64 Panels. Beginning in 2006, IJPs increasingly focused on organized crime and corruption cases. Difficulties in securing extradition of suspects from Serbia led to a decrease in prosecutions against Serbs, causing a perception that prosecutions were disproportionately focused against Kosovo Albanians.<sup>2171</sup>

By the end of 2001, IJPs were handling around 80 ongoing court cases. The number of cases reached a plateau at 92 in mid-2004. In late 2003, the first verdict against Kosovo Albanians for war crimes committed within Kosovo was delivered in the *Llapi Group* case, which attracted widespread public attention. By 2004, the Criminal Division had begun proceedings in over 300 cases, including 83 war crimes cases. At the beginning of 2006, war crimes constituted approximately 10 percent of the cases initiated by international prosecutors.<sup>2172</sup> The OSCE estimated that by the end of 2009, 37 individuals had been tried for war crimes in Kosovo.<sup>2173</sup> Half of these were pre-2000 war crimes cases against Kosovo Serbs, which Regulation 64 Panels retried out of concern over ethnic bias.<sup>2174</sup> In December 2008, UNMIK handed over 1,000 war crimes cases to its successor, the EU-led rule-of-law mission (EULEX). The EULEX War Crimes Investigation Unit conducted a review of nearly 900 of these cases by early 2010 and began a mapping and case selection process.<sup>2175</sup>

Transferring cases from local to international prosecutors required a reworking of the investigative file, the indictment, and at times, new translation of documents—

all of which caused significant delays.<sup>2176</sup> Even once cases were fully transferred to international prosecutors, cases were often delayed at the trial and appellate stages, due to an understaffed and under-resourced international judiciary. International judges and prosecutors had difficulty in securing appearances by witnesses and defendants not in detention (many of whom had fled to Serbia). Witnesses, fearing personal reprisals and a general return to ethno-political violence, were reluctant to appear before the international panels. The police and national prosecutors also may have deprioritized war crimes cases, focusing on immediate ordinary crimes and the deteriorating security context.<sup>2177</sup>

UNMIK made only limited progress toward investigating and prosecuting war crimes. By 2008, 250 complaints had been lodged against UNMIK by families whose relatives had gone missing during the conflict.<sup>2178</sup> These complaints alleged that UNMIK had not made any effort to investigate the abductions of their loved ones. The UNMIK Human Rights Advisory Panel investigated these claims and found that UNMIK had systematically failed to collect evidence and conduct thorough investigations into these cases.<sup>2179</sup> UNMIK's involvement with the Kosovo judiciary ended in November 2008. In UNMIK's decade of running Kosovo's legal system, it completed just over 40 war crimes trials, leaving over 1,000 others waiting to be heard.<sup>2180</sup>

## Legacy

In a joint review of the ten years of UN-led efforts to prosecute war crimes in Kosovo, the OSCE and UNMIK noted that it faced “difficulties in obtaining reliable statistics of war crimes cases ... due to the number of different authorities and institutions engaged in this area,” and also admitted “there has been a systemic failure to adjudicate war crimes cases.”<sup>2181</sup>

The Regulation 64 Panels had no formal mentorship or training program between internationals and their domestic counterparts, disappointing policymakers and observers, and forming one of a myriad criticisms levied at the panels.<sup>2182</sup> However, it is unclear whether UNMIK intended the Regulation 64 Panels to deliver sustainable and long-term rule-of-law capacity building. Rather, UNMIK may have created the panels as a necessary response to a biased and inadequate judiciary—in part because of the role thrust upon the UN as sovereign administrator of Kosovo—including the responsibility to administer a judicial system. As with other hybrid courts, the Regulation 64 Panels held potential for long-term and sustained benefits, but some have suggested that the international panels were “initiated in

reaction to pressing security and justice needs, not designed around a long-term vision of the system's legacy.”<sup>2183</sup>

Evaluating the “success” of the panels is difficult, then, as different actors held different expectations and conceptions about the panels’ purpose. Their legacy is best measured by their achievements in context, rather than their shortcomings compared to an ideal hybrid court:

Clint Williamson, Justice Department Director of Kosovo from October 2001 to November 2002, assessed the 64 Panels as a mixed success. He pointed out that despite some inadequately qualified international judges and prosecutors, some intimidation of local staff by perpetrators on the ground, and occasional local abdication of responsibility to internationals in high-risk trials, the [64] Panels proved a very valuable tool in Kosovo. While he encountered widespread resentment against the ICTY as an imposition by outsiders, he believed that local and international staff maintained very collegial relations within the hybrid structure, which received local buy-in. An OSCE report endorsed the Kosovo hybrid experiment overall, lending credence to arguments that despite significant flaws, Kosovo represents an improvement on the hybrid model over the East Timor Process.<sup>2184</sup>

## **Financing**

The financing for the Regulation 64 Panels was mostly provided through the UNMIK budget (based on assessed contributions by UN Member States, handled by the Department of Peacekeeping Operations) and the Kosovo Consolidated Budget. The Panels faced severe budget shortfalls throughout their existence, and a sharp cutback in the overall UNMIK budget in 2001 decreased funding for judicial and rule-of-law programs in Kosovo. The total amount budgeted for Kosovo’s legal system was around 17.3 million euros in 2004, comprising some 2 percent of the total UNMIK budget.<sup>2185</sup>

## **Oversight and Accountability**

The primary international monitor of the Kosovo judicial system during the operation of the Regulation 64 Panels—and still as of late 2017—is the OSCE.<sup>2186</sup> The Legal System Monitoring Section (LSMS) of the OSCE mission in Kosovo has been

monitoring criminal and civil trials in Kosovo since 1999.<sup>2187</sup> It shares its observations and recommendations with major actors of the judicial system and with the KJI, which the OSCE established to train domestic judges and prosecutors.<sup>2188</sup>

Both UNMIK as a whole and its judges' panels have been starkly criticized for lacking internal oversight and accountability mechanisms. International observers, such as the OSCE and the EU, questioned the excessive executive powers of the SRSG in the appointment and oversight of IJPs. IJPs were not, like their local peers, subject to the scrutiny of the Kosovo Judicial and Prosecutorial Council (KJPC), and UNMIK never created an independent monitoring body.<sup>2189</sup> In an effort to counter criticism, UNMIK started creating various internal and domestic oversight bodies—the Ombudsperson Institution, Claims Committee, and Human Rights Advisory Panel within the UNMIK structures—and it supported the creation of an impartial judicial council. However, according to Human Rights Watch, the internal oversight mechanisms were “either dormant or improperly constituted,” and the Kosovo Judicial and Prosecutorial Council was never realized under UNMIK.<sup>2190</sup>

## **Grave Crimes Proceedings under EULEX (2008–present)**

### **Creation**

In 2006, during final negotiations over Kosovo's future status, the Secretary-General's Special Envoy on Kosovo recommended, given the weakness of Kosovo's judiciary, that international judges and prosecutors be kept in place to handle atrocity crime trials, as well as prosecution of organized crime, corruption, and inter-ethnic cases.<sup>2191</sup> In preparation for its increased involvement in Kosovo, in 2006 the EU established the EU Planning Team (EUPT Kosovo) for the establishment of a crisis management operation in Kosovo in the field of rule of law and possibly other areas.”<sup>2192</sup> Pursuant to the work of the planning team, in December 2007 the EU expressed that it would be eager to “play a leading role in strengthening stability in the region in line with its European perspective and in implementing a settlement defining Kosovo's future status.”<sup>2193</sup>

On February 4, 2008, the European Union released Council Joint Action 2008.124. CFSP,<sup>2194</sup> forming the European Union Rule of Law Mission in Kosovo (EULEX). Not coincidentally, Kosovo declared its independence two weeks later, and the United Nations Security Council (UNSC) announced that the United Nations Interim

Administration Mission in Kosovo (UNMIK) would reconfigure its international civilian presence in Kosovo and that the EU would be taking over its rule-of-law responsibilities.<sup>2195</sup> To fulfill this mandate, EULEX is tasked with ensuring

Cases of war crimes, terrorism, organized crime, corruption, interethnic crimes, financial/economic crimes, and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities.<sup>2196</sup>

The support of EULEX in building the rule of law in Kosovo encompasses a large number of areas and institutions, including police, justice, and customs. This includes, among others, improving the performance and capacity of the Kosovo Police (KP), the Special Prosecution Office of the Republic of Kosovo (SPRK), the Special Chamber of the Supreme Court (SCSC), the Kosovo Judicial Council (KJC), the Kosovo Prosecutorial Council (KPC), and the Joint Rule of Law Coordination Board.<sup>2197</sup> EULEX also took over responsibility for the UNMIK Office of Missing Persons and Forensics (OMPF), which later became the Department of Forensic Medicine (DFM) within Kosovo's Ministry of Justice.

EULEX assumed the responsibilities laid out in UN Resolution 1244 in December 2008 and reached full operational capacity in April 2009. After 2008, EULEX's mandate was renewed every two years, and as of late 2017, its most recent extension was due to expire in June 2018.<sup>2198</sup>

## **Legal Framework and Mandate**

EULEX has a mandate to assist Kosovo's authorities in the development of a sustainable and accountable justice free from political interference and ethnic bias. As described above, the EU rule-of-law mission aims to investigate and prosecute war crimes, organized crime, and other serious crimes.<sup>2199</sup> The 2008 Council Joint Action additionally sets out a Monitoring, Mentoring, and Advising (MMA) objective to strengthen the justice sector and enhance the capacity of local judges and prosecutors.<sup>2200</sup> EULEX judges may intervene in any case pursued by the SPRK, but have primary jurisdiction over war crimes, terrorism, organized crime, inter-ethnic violence, or other serious crimes listed in Article 3(d) of the Council Joint Action.<sup>2201</sup>

War crimes trials in Kosovo take place through the ordinary court system and are heard by mixed panels of international EULEX judges and Kosovo judges. The Law on Courts dictates that war crimes cases should be heard by the Serious Crimes Division of the Basic Court.<sup>2202</sup> The Serious Crimes Division hears cases with a panel of three judges, one of whom is designated as the presiding judge. When hearing war crimes, the panels are presided over by a EULEX judge, and a majority of the seats on each panel are filled by EULEX judges. These panels have jurisdiction over cases prosecuted by the Special Prosecution Office, which is responsible for investigating and prosecuting the most serious criminal offenses, including international criminal offenses, genocide, war crimes, organized crimes, and crimes against humanity.

Although the Kosovo criminal procedure code states that domestic law should apply in war crimes cases, judges must determine *which* domestic law is applicable: the Criminal Code of the Federal Republic of Yugoslavia (SFRY CC), or the heavily revised, post-independence criminal code (KCPC).<sup>2203</sup> The choice of legal code places EULEX judges (from countries with differing positions on Kosovo's status) in the position of taking a stance on the recognition of Kosovo's institutions, and thus the territory's independence.

All crimes under international law have been prosecuted under article 142 of the SFRY CC (war crimes against the civilian population).<sup>2204</sup> There are significant differences between the SFRY CC and the KCPC's codification of international crimes. The SFRY CC has limited treatment of international crimes. It includes genocide (Article 141) and several articles on war crimes (Articles 142–144).<sup>2205</sup> The KCPC is more in line with modern international standards and includes crimes against humanity (Article 149) and command responsibility (Article 161).<sup>2206</sup> Since EULEX has only prosecuted crimes under the SFRY CC, there have been no prosecutions for crimes against humanity. There are consequences for not prosecuting crimes under crimes against humanity. Should a crime not fit within the definition of a “war crime,” it will be prosecuted under normal criminal law and subject to a statute of limitations.<sup>2207</sup> With a massive backlog of crimes from the conflict with Serbia, it is likely that many victims will not receive justice because the statute of limitations will expire before their case is prosecuted. Kosovo's constitution states that exceptions to the principal of legality should be made for crimes against humanity: “No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.”<sup>2208</sup>

The EU rule-of-law mission consisted of two operational phases. From 2008–2012, EULEX was organized around three pillars set out in the 2008 Council Joint Action: police, judiciary, and customs. Following a strategic review of the mission’s performance, from 2012 onward EULEX was rearranged to work according to a new structure made up of an Executive Division, through which EULEX continues to exercise its executive mandate within the area of the police, customs, and judiciary, as well as a Strengthening Division, through which it implements its MMA program.<sup>2209</sup>

Since 2012, there have been two concurrently operating witness protection programs in Kosovo: the EULEX Witness Protection Program and the new Kosovo Witness Protection Program. The EULEX Program has been in operation since assuming responsibility from UNMIK in 2008 and will continue to operate residually until the end of EULEX operations. The Kosovo Witness Protection Program began in 2012 and is now the prevailing protection program. The legal foundation for witness protection measures in Kosovo is the Law on Witness Protection, passed in July 2011.<sup>2210</sup> (See *Witness and victim protection and support*, below.)

Kosovo’s supervised independence formally ended in September 2012, which triggered the transfer of authority over the police and judicial institutions from EULEX to the government of Kosovo. While EULEX continued heading investigations and adjudicating complex and highly sensitive criminal cases—including war crimes, terrorism, interethnic crimes, organized crime, and corruption<sup>2211</sup>—this meant limiting the work of international judges and prosecutors to ongoing cases.<sup>2212</sup>

## Location

Since war crimes cases are heard through the regular criminal court system in Kosovo, they are first tried in regional basic courts in locations throughout the country. This has the advantage of making war crimes trials easily accessible to the public. However, a major drawback is that there is no courthouse that is specifically designated for war crimes trials. The basic court buildings are not structured to protect vulnerable witnesses. There are no separate entrances or waiting rooms for witnesses, making it possible for witnesses to be confronted by defendants. Often witnesses must wait in the halls of the courthouses before they testify, standing alongside defendants’ supporters.<sup>2213</sup> Another disadvantage is that a single war crimes trial may have many defendants and many victims, which can be hard to accommodate in a regular courtroom.

## Structure and Composition

The courts in which EULEX prosecutors and judges operate are the same as those in which UNMIK authorities operated (Municipal Courts, District Courts, Basic Courts, Court of Appeals, and the Supreme Court). War crimes cases are tried at one of the five District Courts of Kosovo.<sup>2214</sup> There is no distinct War Crimes Chamber charged to hear these cases. Rather, at the height of EULEX's involvement, war crimes cases were heard in front of a mixed panel of judges, with a majority of these judges being international EULEX judges.

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### Lack of Designated War Crimes Chamber

Kosovo does not have any special procedures or court structures for hearing war crimes trials. War crimes trials are heard through the normal criminal court system by mixed panels, in the same manner as all other "serious" crimes. The absence of a designated War Crimes Chamber has resulted in a very small number of war crimes making it to trial, judicial incompetence, and inadequate protection for judges and witnesses.

First, by using the domestic criminal courts system, war crimes cases do not have priority over other criminal cases, which results in very few war crimes cases making it to trial each year.<sup>2215</sup> This problem is particularly serious in light of a massive backlog of war crimes cases. Without prioritization of these cases, it will take many years for all of them to come to trial. War crimes cases are time sensitive because, as years pass, fewer witnesses will be alive to testify and accurate evidence will be more difficult to come by. Also, hearing war crimes trials through the criminal court system means that domestic judges with no experience with international criminal law are assigned to these sensitive and complex cases.<sup>2216</sup> Finally, local judges have often sought to avoid placement on panels hearing war crimes trials.<sup>2217</sup> The Organization for Security and Cooperation in Europe (OSCE) has found that many Kosovo judges report being threatened, and a number are the victims of physical acts of violence each year.<sup>2218</sup> A situation of threats and intimidation of judges involved in war crimes cases continues to exist in 2017.<sup>2219</sup>

The OSCE has noted that the creation of a specialized War Crimes Chamber would address many of these problems. War crimes cases would be prioritized and heard in a timely fashion.<sup>2220</sup> Local judges sitting in the War Crimes Chamber would become familiar with international criminal law and the nuances of war crimes cases. Finally, measures could be taken to enhance the protection of judges and prosecutors working for the War Crimes Chamber. Supporters of the current system

argue that the creation of a War Crimes Chamber would drain needed resources away from regular Kosovo courts.<sup>2221</sup>

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From 2008 to 2014, a combination of EULEX and Kosovo government departments made up the domestic response to war crimes trials. Since the end of Kosovo's supervised independence in 2012, EULEX phased out its involvement in domestic war crimes prosecutions and started transferring its powers to domestic institutions. As of 2017, EULEX judges and prosecutors "continue to be embedded in Kosovo institutions and serve in accordance with Kosovo law until the complete transition of functions to the competent Kosovo's authorities."<sup>2222</sup> Cases transferred to the Kosovo institutions continue to be monitored by EULEX's Strengthening Division.

All war crimes prosecutions are handled by the SPRK, which is partly composed of EULEX prosecutors. The EULEX Police War Crimes Investigation Unit was established to investigate war crimes claims, with support from the DFM. EULEX supported the creation of the Kosovo Police War Crimes Investigation Unit (KPWCIU), which started operations in 2014. Initially, witnesses were assisted and protected by the EULEX Witness Protection Program and from 2012 onward by the Kosovo Witness Protection Program.

### ***Internationalized Judiciary***

From 2008 onward, mixed panels of judges heard war crimes cases. The panels are composed of a majority of international EULEX judges and are presided over by a EULEX judge. As of 2014, despite concerns about the readiness of local judges to handle war crimes cases by themselves, EULEX involvement in the judiciary has diminished. Today, the distribution of judges has shifted toward panels with a majority of or exclusively comprised of domestic judges,<sup>2223</sup> except for "selected highly sensitive criminal cases" and cases before the Mitrovica Basic Court.<sup>2224</sup>

The responsibilities of EULEX judges extends beyond hearing war crimes cases. These judges have an expansive role with two focuses: mentoring and exercising judicial power under the MMA component of the mission.<sup>2225</sup> Judges are assigned to local courts throughout Kosovo. While embedded in these courts, they assist the local judicial authorities with establishing judicial framework and best practices.<sup>2226</sup> EULEX judges also sit on mixed panels with Kosovo judges to address specific cases. Within their primary competence are all SPRK-investigated or prosecuted cases. These cases include the most serious criminal cases, such as war crimes, genocide, and crimes against humanity, as well as organized crimes and terrorism, corruption,

and economic crimes. In 2012, only four of the 50 international EULEX judges were assigned to war crimes trials.<sup>2227</sup> This limited the number of war crimes cases that may be heard at any one time.<sup>2228</sup> In certain circumstances, EULEX judges have subsidiary competence to take over cases not prosecuted by the SPRK. For criminal cases, these circumstances included situations where the local judge has been threatened, crimes that are ethnically motivated, and crimes of great sensitivity or complexity.<sup>2229</sup> Subsidiary competence was limited for civil cases, but EULEX judges may take over cases where there is a suspicion of impartiality or an inability of the Kosovo judges to hear the case in a fair manner.<sup>2230</sup>

The panels in which EULEX judges exercised their jurisdiction were typically “of mixed composition with a majority of EULEX judges and presided over by a EULEX judge.”<sup>2231</sup> However, Article 3 of the Law on Jurisdiction allows the president of the Assembly of EULEX Judges (AEJ) to decide “for grounded reasons” that panels in a criminal case should be composed of a majority of Kosovo judges. The president of the AEJ also has authority to decide that panels be “fully composed of Kosovo judges or not to assign EULEX judges at particular stages of the criminal proceeding.”<sup>2232</sup> After 2012, this mechanism was exercised more frequently. In several instances, mixed panels were composed of a majority of local rather than EULEX judges.<sup>2233</sup> From 2010 to 2014, international judges were most active in criminal proceedings before the Supreme Court, the Court of Appeals, and courts of Mitrovica.<sup>2234</sup> Between 2012 and 2014, EULEX judges were also assigned civil cases related to property disputes resulting from the 1998–1999 conflict.<sup>2235</sup>

EULEX judges are hired either through secondment or by contracting. Seconded judges are selected and funded entirely by their home nations. Contracted international judges apply directly to EULEX. Once hired, EULEX pays their salaries. All EULEX judges sign one-year contracts with the possibility of renewal.<sup>2236</sup> EULEX judges have criticized the contracts for being too short to allow judges hailing from different legal cultures to familiarize themselves with the Kosovo legal system.<sup>2237</sup> In 2012, the OSCE observed that the process for the selection of international judges had improved in comparison with UNMIK, because judges can now be dismissed or sanctioned when they underperform.<sup>2238</sup>

Together the EULEX judges make up the self-governing body of the AEJ, which meets a minimum of four times a year to make resolutions that are necessary to carry out the work of the EULEX judiciary.<sup>2239</sup> If necessary, it divides into small working groups to discuss and address any issues the judges face.<sup>2240</sup> The AEJ is also responsible for making disciplinary decisions regarding misconduct of EULEX judges.<sup>2241</sup>

### ***Special Prosecution Office***

War crimes prosecutions are under the exclusive competence of the SPRK. The SPRK is a specialized office that operates within the Office of the State Prosecutor of Kosovo. Throughout the duration of EULEX's mission in Kosovo, EULEX prosecutors will be heavily involved in the operations of the SPRK.<sup>2242</sup> As of June 2011, the office was composed of 11 EULEX prosecutors, 10 Kosovo prosecutors, 60 support staff members, and five financial experts assigned to the Anti-Corruption Task Force.<sup>2243</sup> The SPRK has the authority to request additional support from other divisions of the Office of the State Prosecutor of Kosovo.<sup>2244</sup> The SPRK is presided over by the head of the SPRK, an office which was long held by an international EULEX prosecutor, and the deputy head of the SPRK, a domestic prosecutor.<sup>2245</sup> By 2015, the office was led by a local prosecutor.<sup>2246</sup>

The SPRK has exclusive competence over the most serious crimes, leaving less sensitive cases to local prosecutors. Crimes that are exclusively investigated and prosecuted by the SPRK include terrorism, organized crime, genocide, war crimes, and any case that is referred to Kosovo from the ICTY.<sup>2247</sup> SPRK also has subsidiary competence over crimes typically investigated by the state prosecutor of Kosovo. It may exercise this competence in situations where the crime is “threatening the stability of the state” or is part of a larger transnational conspiracy.<sup>2248</sup>

The SPRK is in the challenging position of handling a large workload of both recent criminal cases and past war crimes cases. When EULEX and SPRK became responsible for prosecuting war crimes in 2008, they inherited UNMIK's snarled backlog of open war crimes investigations. UNMIK transferred 179 open cases to EULEX, of which 63 were war crimes cases.<sup>2249</sup> In addition, EULEX received 1,049 war crimes police reports that UNMIK prosecution had never investigated.<sup>2250</sup> A thorough review of these reports was conducted, which resulted in around 500 cases being closed or dismissed due to lack of evidence.<sup>2251</sup> Many of the viable inherited cases proved to have incomplete files. In some cases, evidence was intentionally “misplaced” or disappeared.<sup>2252</sup> The need for thorough re-investigation has limited the number of indictments that SPRK is able to make each year.

Although SPRK has made some progress with prosecuting war crimes, the number of war crimes cases that adjudicated each year is very low. By March 2012, four years after EULEX involvement began, the SPRK had prosecuted only 20 war crimes cases.<sup>2253</sup> Appeals or retrials of cases that UNMIK had opened largely made up the first wave of cases EULEX handled.<sup>2254</sup> In 2015, a representative from the SPRK stated that there were about 300 cases of war crimes on the list of the prosecutor's

office, of which 84 cases with 335 accused were under investigation at that time.<sup>2255</sup> Hundreds of war crimes remained to be investigated and prosecuted, and the rate of adjudications strongly suggested that the SPRK lacks the operational capacity to sufficiently address these. It was also unclear whether SPRK and EULEX had mapped out crimes and developed a cohesive prosecution strategy.<sup>2256</sup>

SPRK and EULEX have not hesitated to prosecute Kosovo Albanians for their role in atrocities. This has turned public opinion in Kosovo against them.<sup>2257</sup> The public is unaware that SPRK and EULEX have also cooperated with the Belgrade Special War Crimes Chamber to prosecute Serbs.<sup>2258</sup> War crimes prosecutors, like judges, are the victims of threats and intimidation from the public, which can severely inhibit prosecutorial freedom.<sup>2259</sup> In some cases, prosecutors have been physically attacked.<sup>2260</sup> Prosecutors have stated that they do not feel that the security system currently in place provides adequate protection.<sup>2261</sup>

In addition to the backlogs of war crimes cases inherited from UNMIK, there are many other war crimes that took place in Kosovo that have not been reported or sufficiently investigated. SPRK's small staff has been unable to devote attention to these crimes. In 2011, Swiss senator Dick Marty released a report alleging that former Kosovo Liberation Army (KLA) leaders were involved in an organized crime ring that engaged in abductions, murder, and organ trafficking.<sup>2262</sup> Under concerns that the SPRK would be unable to conduct an impartial, credible investigation into these claims, EULEX launched the internationally staffed EU Special Investigative Task Force to further investigate these crimes (see text box discussion of Special Investigative Task Force, below).<sup>2263</sup> In 2016, the Kosovo government and European Union established a War Crimes Chamber based in the Netherlands and presided over by international judges to hear these cases.<sup>2264</sup> (See *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, below.)

### ***EULEX Judges and Prosecutors***

At its height, the justice component of EULEX was composed of more than 50 judges and around 30 prosecutors.<sup>2265</sup> However, the number of EULEX personnel dedicated to the investigation and prosecution of war crimes appears to have been inadequate in light of the current number of outstanding cases.<sup>2266</sup> Only four international judges regularly adjudicated war crimes cases and only two international prosecutors worked on war crimes cases.<sup>2267</sup> From 2012 onward, EULEX judges also started to work on property-related civil proceedings in the Special Chamber of the Supreme Court (SCSC). In 2014, eight EULEX judges were assigned to this chamber.<sup>2268</sup>

In 2011, the SPRK was comprised of 11 international prosecutors and 10 local Kosovo prosecutors. However, only two international prosecutors and two local Kosovo prosecutors worked within the War Crimes Investigation Unit (WCIU).<sup>2269</sup> By contrast, five international prosecutors and three local prosecutors worked within the Special Anti-Corruption Department or Task Force (ACTF).<sup>2270</sup> In 2017, the SPRK was comprised of eight prosecutors and 30 support staff, and it continues to work with a number of EULEX prosecutors.<sup>2271</sup>

### ***EULEX Police War Crimes Investigation Unit***

The WCIU is a team of EULEX police officers, which in 2012 had a staff of 29 people.<sup>2272</sup> WCIU works in partnership with the SPRK to conduct thorough investigations into war crimes and is mostly assisting with exhumations and preliminary interviews. Like the SPRK, the WCIU has been confronted with the challenge of working through the backlog of unorganized and incomplete cases left by UNMIK.<sup>2273</sup> SPRK has made steady but slow progress with investigations. In 2012, the unit had the capacity to conclude two to three investigations each year.<sup>2274</sup> Subsequently, they decided to prioritize cases with multiple victims.<sup>2275</sup> In addition to domestic investigations, WCIU cooperates across borders with the Serbian Office of the War Crimes Prosecutor by providing them with evidence and helping witnesses who live in Kosovo to testify in Serbian trials.<sup>2276</sup> In 2014, EULEX started transferring responsibilities to the KPWCUI,<sup>2277</sup> which will ultimately take over the responsibilities of the EULEX WCIU.

### ***Department of Forensic Medicine***

While initially a EULEX institution, the DFM was transferred into the responsibility of the Kosovo Department of Justice in 2010, with continued mentorship from EULEX.<sup>2278</sup> The DFM has a mandate “to clarify the fate of missing persons” and has “competence in forensic medicine and in forensic examinations related to ongoing criminal investigation.”<sup>2279</sup> Accordingly, it plays an important role in providing evidence for the prosecution of war crimes, alongside the WCIU.<sup>2280</sup> As of 2017, over 1,600 persons remained missing.<sup>2281</sup> The infrastructure of the DFM has improved in the past few years with new equipment, thanks to outside donors.<sup>2282</sup> The DFM’s major weakness is that there are no local forensic anthropologists or archeologists assigned to the department.<sup>2283</sup> Without skilled locals on the team, they will struggle to continue their work when EULEX support is completely removed from the program. EULEX claims that the unit is a victim of “political interference and poor management” by the Department of Justice.<sup>2284</sup> There is little governmental support for recovering the bodies of the missing, and the government has provided the DFM with insufficient funds to carry out its work.<sup>2285</sup>

A full transfer of the responsibilities of the DFM from EULEX to the Ministry of Justice of Kosovo was envisioned to take place in 2012. However, a report published by Amnesty International in 2012 recommended delaying the transfer due to insufficient local capacity to carry out case investigations.<sup>2286</sup> In April 2016, the new Law on Forensic Medicine finally came into force, paving the way for the DFM to become a fully operational independent agency.<sup>2287</sup>

## ***Outreach***

EULEX has an active Press and Public Information Office (PPIO). The PPIO represents all of EULEX, not just EULEX involvement in the Kosovo court system. At the height of operations, the PPIO had a spokesperson on-call 24 hours a day in order to support PPIO's policy of taking "a pro-active approach with full transparency on mission objectives and a timely response to enquiries."<sup>2288</sup> The PPIO has a diverse approach to public information, using methods such as billboards and commercials to ensure that the public is aware of the work of EULEX. The PPIO also makes extensive use of social media. All information posted to these pages, as well as to the EULEX website, is provided in Albanian, Serbian, and English.

With regard to war crimes trials, the EULEX website features an archive of court opinions presided over by EULEX judges.<sup>2289</sup> However, there are no recently updated statistics available that show how many war crimes trials have been completed and how many have yet to be heard, and it is impossible to determine if the online archives are up-to-date. Until the end of 2014, the PPIO kept individuals informed on war crimes trials by posting frequent updates to its social media pages and website, as well as publishing press releases.<sup>2290</sup> PPIO also engaged in outreach by bringing EULEX staff members into the community to educate and increase awareness.<sup>2291</sup> In the past, EULEX prosecutors led a class on war crimes trials for students at a Kosovo law school. Similar outreach efforts have included facilitating presentations at high schools throughout Kosovo. SPRK does not have a stand-alone public outreach office, but the PPIO publicizes the work of EULEX prosecutors.

In the beginning of 2015, the Kosovo Judicial Council and Kosovo Prosecutorial Council formally took over the public communications role of EULEX on court and prosecution cases. Since then, the SPRK and State Prosecution have their own spokesperson. However, EULEX continues to support the Kosovo institutions in their outreach and public information duties.<sup>2292</sup>

## ***Witness and Victim Protection and Support***

Witness and victim protection and support in Kosovo is the responsibility of the EULEX Witness Protection Program and the Kosovo Witness Protection Program. The competency of these programs is critical to ensuring the success of war crimes trials. In Kosovo, many witnesses are reluctant to testify against suspected war criminals, either out of fear of retaliation or out of respect for defendants' roles in the conflict.<sup>2293</sup> In order for witnesses to feel comfortable testifying, they must feel that they will be adequately protected from harm. Fears of retaliation are compounded due to the small size of Kosovo, where relocation within the national borders is typically insufficient to protect the individual. Witness intimidation is a serious problem that EULEX has not dealt with. On the topic of witness intimidation, Special Investigative Task Force Prosecutor Clint Williamson asserted, "There is probably no single thing that poses more of a threat to rule of law in Kosovo and of its progress toward a European future than this pervasive practice."<sup>2294</sup>

Under the Law on Witness Protection, endangered witnesses to specific crimes may be eligible for protection measures. These crimes include criminal offenses against Kosovo or its citizens, international law, or the economy, and any other criminal offenses that are punishable by imprisonment of five or more years.<sup>2295</sup> Protection measures available to these witnesses include basic measures, such as temporary relocation to a safe house, physical protection, and sealing identifying documents, as well as more extreme measures, such as a permanent change of identity, relocation inside or outside of Kosovo, and minor plastic surgery.<sup>2296</sup> Financial support is available for witnesses for up to 12 months for witnesses unable to support themselves while under protection.<sup>2297</sup> Additionally, the law offers witnesses social and legal support to "guarantee their security and his or her welfare as well as minimum living standard."<sup>2298</sup> Although the Law on Witness Protection has strengthened the support offered to many vulnerable witnesses in Kosovo, it fails to include specific measures of protection for the victims of war crimes or sexual offenses.

Although there are in-court methods to protect witnesses, Kosovo's judges and prosecutors rarely invoke these protections, leaving the identity of witnesses exposed and the witnesses vulnerable to threats and harassment.<sup>2299</sup> Additionally, when a witness arrives at a courthouse to testify, there is no support or protection, leaving them at risk of intimidation and re-traumatization. As mentioned above, Kosovar courthouses generally lack designated waiting rooms for witnesses, leaving witnesses to stand in the halls alongside defendants' supporters and occasionally leading to confrontations.<sup>2300</sup>

The EULEX Witness Protection Program was solely responsible for witness protection until the Kosovo Witness Protection Program was formed in 2012. Critics decried the witness program as understaffed and ineffective throughout its tenure. Failures of protection slowed investigations and prosecutions.<sup>2301</sup> According to an Amnesty International report in 2012, a SPRK prosecutor stated that under EULEX there is “no witness protection or support available in the court system for victims of war crimes.”<sup>2302</sup> Criticism of EULEX mounted following the 2011 suicide of Agim Zogaj, a war crime witness reportedly under EULEX protection.<sup>2303</sup> According to Zogaj’s suicide note and a complaint his family lodged against EULEX, Zogaj was under intense stress and had received death threats.<sup>2304</sup> His death prompted some diplomats to condemn EULEX for failing to recruit qualified candidates to the Witness Protection Program and for failing to implement the existing protections for vulnerable witnesses.<sup>2305</sup>

EULEX has struggled to protect witnesses requiring international relocation. The international community has been reticent to accept witnesses from Kosovo, who often have large families to support and do not speak a Western European language. Additionally, these countries hesitate because of lingering uncertainty over Kosovo’s statehood status. In 2011, the Council of Europe called upon its member states to support witness protection in the Balkans by accepting witnesses from Kosovo.<sup>2306</sup>

In 2012, EULEX started setting up the Kosovo Department of Witness Protection with the support of the EU-funded Witness Protection in the Fight against Serious Crime and Terrorism II (WINPRO II) Project,<sup>2307</sup> although it was not until June 2014 that EULEX reported that the department had become fit for operations.<sup>2308</sup> Although Kosovo has made progress in the establishment of a legal infrastructure and institutions for the protection of witnesses in war crimes trials, witness intimidation remains problematic.<sup>2309</sup> Remaining challenges include “international cooperation, education and awareness raising of the responsible actors, social, cultural and geographical factors as well as in the logistics aspect for financing witness protection programs.”<sup>2310</sup>

## ***Defense***

The Kosovo Criminal Procedure Code (KCPC) gives all defendants the right to assistance by a defense council throughout all criminal proceedings.<sup>2311</sup> In cases of “mandatory defense,” for individuals who are unable to afford a private defense attorney, a pretrial judge can assign a defense council paid for by the public. Cases of mandatory defense are cases where the defendant is disabled in a way that would

impair their ability to defend themselves, cases that are being heard on remand, and cases where the defendant plans to plead guilty.<sup>2312</sup> In addition to the mandatory defense cases, a defendant may be assigned defense council at public expense if he is indicted for an offense with a sentence of eight years or more.<sup>2313</sup> Finally, regardless of sentence length, a publicly funded defense council may be appointed “in the interest of justice ... if [the defendant] is financially unable to pay the cost of his or her defense.”<sup>2314</sup>

The Kosovo Chamber of Advocates (KCA) maintains a list of advocates who have volunteered to serve as ex officio defense council. It is the responsibility of the judge or the prosecutor to call the KCA and request an advocate if the defendant requires one. However, an insufficient number of attorneys have volunteered to be on this list, and some are underqualified for the cases in question. There is no specific list of attorneys that specialize in war crimes defense. Additionally, according to the American Bar Association, placing this responsibility in the hands of the judge or prosecutor can result in selecting “an advocate who will only do the bare minimum and will not challenge the prosecutor in any way.” A more recent pilot program revamps this system. With the new system, there is no volunteer list. KCA employees directly contact licensed advocates in the area, asking them to provide services.<sup>2315</sup>

While the state should pay defense attorneys, this is not always the case. There have been reports of defense attorneys asking for pay and being refused.<sup>2316</sup> Without a guarantee of fair compensation, defense attorneys are less likely to take on ex officio representation.

### ***The Kosovo Judicial Council***

EULEX recognized the importance of “independent, professional and impartial” oversight with the creation of the KJC in 2011.<sup>2317</sup> To achieve this mandate, the KJC is tasked with selecting and proposing candidates for appointment and reappointment to judicial office”<sup>2318</sup> as well as overseeing “disciplinary proceeding of judges” and the general management of judicial reform.<sup>2319</sup> The KJC is also responsible for implementing the budget of the judiciary with the assistance of EULEX advisors. EULEX advisors consist of “two international advisors, a national legal advisor and a national language assistant.”<sup>2320</sup> Membership of the KJC cannot contain members of the executive branch of government.<sup>2321</sup> However, the composition of the KJC does not satisfy European standards. While European standards require that all members of a judicial council be elected by their peers (the judiciary), the Constitution of Kosovo only requires five of the thirteen members be elected by their peers.<sup>2322</sup> The eight remaining judges are appointed by government bodies.<sup>2323</sup>

### ***The Kosovo Prosecutorial Council***

The KPC is an independent institution responsible for “recruiting, proposing, transferring, reappointing and disciplining prosecutors.”<sup>2324</sup> It is chaired by the chief state prosecutor and consists of an “advisor, a national legal advisor and an admin/language assistant” with members from “the prosecution offices (experts) and from other parts of the civil society.”<sup>2325</sup>

### ***Joint Rule of Law Coordination Board***

In 2008, EULEX established the Joint Rule of Law Coordination Board (JRCB), composed of the EULEX head of mission, the deputy prime minister of Kosovo, and representatives of the KJC and KPC, with the aim of coordinating efforts to build the rule of law in Kosovo and ensure capacity building of local institutions.<sup>2326</sup> At the end of 2012, the JRCB also became responsible for monitoring the implementation of the “Compact” agreement between the Kosovo Ministry of Justice, the EU special representative, and the head of EULEX.<sup>2327</sup>

### ***The Assembly of the EULEX Judges***

The AEJ is comprised of judges appointed by the head of mission to play the role of “watchdog of judicial independence.”<sup>2328</sup> The AEJ is tasked with endorsing the method of case selection and case allocation. It also has competence to assist with other issues that relate to judicial independence, including training of judges, ruling on appeals from disciplinary decisions, and electing members of a Disciplinary Board.

## **Prosecutions**

EULEX inherited over 1,000 war crimes cases not previously investigated by UNMIK.<sup>2329</sup> In 2010, the EULEX WCIU began a review of these cases and implemented a case selection process.<sup>2330</sup> The Council of Europe found that the war files, especially dealing with suspected KLA perpetrators, “were turned over by UNMIK in a deplorable condition (misleading evidence and witness statements, long time lapses in following up on incomplete investigative steps).”<sup>2331</sup>

In 2012, Amnesty International judged that EULEX had made progress in the investigation of war crimes cases, but has not done enough to overcome the backlog of the UNMIK legacy. Under EULEX, the WCIU was only able to conclude, on average, two or three cases per year because the prosecution of war crimes was

only one of several EULEX priorities.<sup>2332</sup> According to Bernard Rabatel, deputy head of the EULEX justice component, the prosecution of organized crime and corruption cases was EULEX's top priority.<sup>2333</sup> In 2015 the Humanitarian Law Centre-Kosovo estimated that in 17 years of war crimes prosecutions under UNMIK and EULEX, only 44 cases had been completed. This included 20 cases involving 63 Albanians and 22 cases involving 43 Serbs.<sup>2334</sup> If compared to OSCE calculations that 37 individuals had been tried for war crimes by the end of 2009,<sup>2335</sup> it appears that under EULEX 69 individuals had been tried from 2010 to 2015. In January 2017, Human Rights Watch reported that EULEX judges had been involved in 38 war crimes verdicts since the mission's establishment in 2008.<sup>2336</sup> As of 2017, prosecution of war crimes and other serious crimes continued under EULEX auspices, but as the mission continued to transfer rule-of-law responsibilities to Kosovo's domestic authorities, after 2014, new cases were only to be instigated by national judges.<sup>2337</sup> In 2015, for the first time since the transfer of authority, local prosecutors filed a war crimes indictment, which in 2017 was under consideration by local judges.<sup>2338</sup>

Beyond the modest number of prosecutions, progress in the investigation of missing Kosovo Albanians by Serb forces under EULEX has been slow,<sup>2339</sup> and investigations into the fate of Serbs allegedly abducted by KLA members have been almost nonexistent or ineffective. The Klecka case is an excellent example of the difficulties Kosovo prosecutors face in bringing cases against former KLA commanders. In 2012, the Supreme Court—consisting of a panel of two international and one local judge—ordered the acquittal of Fatmir Limaj and nine other ex-KLA fighters for detention, torture, and murder of Serbs and Albanians in Klecka, Limaj, and three others.<sup>2340</sup> The SPRK appealed the judgment and ordered a retrial, but Limaj was acquitted again in 2017.<sup>2341</sup> Prosecutors viewed Limaj's acquittal, as well as his previous acquittal for alleged crimes against humanity and war crimes in the Lapušnik Prison Camp (near Klecka), as the result of witness interference. After a key witness was found dead in Germany in 2012, the evidence was deemed first inadmissible and then unreliable.<sup>2342</sup> Eventually, the difficulties in witness protection in the prosecution of former KLA leaders was a key reason for the creation of the Kosovo Specialist Chambers outside the territory of Kosovo.

A disproportionate percentage of Serbs, Roma, and other minorities—450 out of 499—remain unaccounted for.<sup>2343</sup> The lack of proper investigation into missing minorities is likely the result of a lack of political will to investigate these crimes by government authorities in Kosovo.<sup>2344</sup> Authorities in Albania and Kosovo have not been cooperative in efforts to locate Serbs or Kosovo Albanians thought to have fallen victim to crimes committed by members of the KLA.<sup>2345</sup> However, since

a 2011 Council of Europe report affirmed allegations of organ trafficking by KLA forces, authorities in Kosovo and Albania have demonstrated greater willingness to facilitate investigations of missing Serbs.

## **Legacy**

After 10 years of EU involvement in the development of the rule of law in Kosovo, a tremendous amount of legislation has been passed and new institutions created that have contributed to the rule of law in Kosovo. However, according to former EULEX judge James Hargreaves, a culture of impunity persists.<sup>2346</sup> Judges and prosecutors continue to work in a highly politicized and ethnically polarized environment, and problems with the implementation of witness protection remains a problem.<sup>2347</sup>

By 2017 one observer described EULEX's results as "mixed at best and a debacle at worst."<sup>2348</sup> The "judicial system remains a mess. Despite limited achievements, the mission has struggled to make a substantial improvement to the Kosovo's rule of law, and has not met the expectation to bring justice to key perpetrators of war crimes and corruption."<sup>2349</sup> The decision to establish the Kosovo Specialist Chambers in The Hague is an "implicit recognition of the failure of both UNMIK and EULEX to investigate and try ... sensitive [war crimes] cases."<sup>2350</sup>

### ***Phaseout of International Personnel and Transition to a National Institution***

On June 14, 2016, the Council of the European Union approved an extension of the EULEX mission to June 2018.<sup>2351</sup> The EU granted this extension in order to give EULEX more time to strengthen the rule of law. While EULEX anticipates successfully completing the transition by the appointed end date, it reserves the right to request an additional extension or to otherwise "modify their engagement" should they believe it necessary.<sup>2352</sup>

The EULEX mandate extension ushers in a period of transition where EULEX will gradually phase out international engagement in Kosovo institutions. The focus of this period will be capacity building and security.<sup>2353</sup> EULEX prosecutors will continue existing work, but will not take on new cases.<sup>2354</sup> Similarly, EULEX judges will continue to preside over continuing cases and appeals of cases that are already open, but will not hear new cases.<sup>2355</sup> The composition of mixed panels will shift, making a majority of the judges local Kosovo judges.<sup>2356</sup> EULEX judges will remain on the mixed panels until the end of the mandate. EULEX judges and prosecutors will continue their role of mentoring and advising Kosovo rule-of-law institutions

throughout the transition.<sup>2357</sup> There will be a sizable reduction in EULEX staff members in proportion to their reduced role in Kosovo.

### ***Impact on Legal Reform***

EULEX came into Kosovo with the intention of strengthening rule of law. Their mission has involved mentoring, monitoring, and advising alongside their exercise of executive authority. However, after years of involvement in Kosovo, EULEX has struggled to build capacity and empower local judicial institutions. Prior to 2014, critics argued that EULEX's lead in justice matters failed to allow Kosovo legal professionals to take ownership of the judiciary.<sup>2358</sup> Since EULEX formally transferred all rule of law responsibilities to the domestic institutions in 2014, the rate of war crimes proceedings has fallen, suggesting that the judiciary is unprepared to stand on its own feet.<sup>2359</sup> More broadly, critics say that EULEX has failed to build the rule of law and improve the local judiciary.<sup>2360</sup>

The Kosovo judiciary remains weak, and it will continue to face many challenges after EULEX's departure. The greatest risks to domestic war crimes trials are security and lack of experience. Kosovo judges adjudicating sensitive cases, including war crimes cases, face threats and intimidation from the political elite and the public.<sup>2361</sup>

### ***Impact on Society***

Public approval of EULEX is very low; as of 2013, only 22 percent of the population reported satisfaction with the mission.<sup>2362</sup> EULEX officially takes a neutral stance on Kosovo statehood. For many Kosovo Albanians, a neutral stance is tantamount to aligning with Serbia.<sup>2363</sup> The Kosovo Foundation for Open Society asserts that "no international rule of law mission can be successful in winning over public support in Kosovo if it does not clearly recognize Kosovo's independence and statehood."<sup>2364</sup>

Little information exists on public perception of domestic war crimes trials. Amnesty International reported in 2012 that there was a public impression that EULEX was targeting Kosovo Albanians for war trials.<sup>2365</sup> This has resulted in low support for the current domestic war crimes trials mechanism.

## **Financing**

EULEX receives its funding from the member states of the European Union. The Council of the European Union approves the annual proposed budget.<sup>2366</sup> In 2014,

the EULEX annual operating budget was 111 million euros.<sup>2367</sup> This amount covered operations for all branches of EULEX—policing, judiciary, and customs. EULEX pays the salary of EULEX judges.<sup>2368</sup> EULEX is financed by 26 EU member states (all member states except Cyprus)<sup>2369</sup> through the Common Foreign and Security Policy (CFSP) budget and by participating non-EU states, which include Canada, Croatia, Norway, Switzerland, Turkey, and the United States.<sup>2370</sup> While general information on the financing of EULEX is available,<sup>2371</sup> EULEX does not disclose information relating to the salaries of international judges.<sup>2372</sup> Funding for Kosovo’s domestic institutions, such as the SPRK, the witness protection program, and the judiciary, comes from the Kosovo national budget. The budget is set by the Committee for Budget and Finance of the Kosovo Assembly.<sup>2373</sup> Many of these institutions, most notably the witness protection program, struggle due to insufficient funding.<sup>2374</sup>

A report by the American Bar Association published in 2010 found that Kosovo judges had been underpaid for several years. Prior to 2011, no law protected judicial salaries in Kosovo, and the salaries of local judges and prosecutors had not increased since 2002, despite a considerable increase in the cost of living.<sup>2375</sup> District Court judges earned “less than 18 Euro per day (550 Euro per month gross).”<sup>2376</sup> Lay judges did not receive regular salaries but rather a “modest per-case-fee.”<sup>2377</sup> Judicial personnel and their international partners expressed that “a fully independent and strong judiciary is only possible with respectable salaries for judges ... and the dire situation with judicial salaries has existed for so long in the face of such uniform and persistent criticism due to a deliberate attempt by other branches of government to keep the judiciary subservient and ineffective.”<sup>2378</sup> The situation improved in January 2011 when provisions within the Law of Courts came into effect and tied judicial salaries to equivalent positions in the executive branch of Kosovo’s government. For example, the salary of the Supreme Court president now matches that of the prime minister.<sup>2379</sup> Under this scheme, a judge’s salary depends on the level of court they preside over. For certain judges in high-level courts, this new scheme resulted in a 60 percent increase over their 2010 salary.<sup>2380</sup>

There have been problems with underpayment of the Kosovo Police, which according to Amnesty International is “not enough to encourage impartiality.”<sup>2381</sup> Similarly, the staff of the DFM are underpaid considering the qualifications required for their work. This poses a serious challenge to investigating allegations of organized crime against KLA forces.<sup>2382</sup>

In accordance with Article 9(2) of the Council Joint Action of February 4, 2008, on the European Union Rule of Law Mission in Kosovo, EULEX consists primarily

of staff seconded by EU member states or EU institutions.<sup>2383</sup> EULEX does not disclose information relating to the salaries of international judges.<sup>2384</sup> As mentioned above, member states and EU institutions bear the costs associated with the staff they second to EULEX. These costs include “travel expenses to and from the place of deployment, salaries, medical coverage and allowances other than daily allowances and applicable risks and hardship allowances.”<sup>2385</sup> EULEX may also recruit international and local staff on a contractual basis.<sup>2386</sup> While non-EU states participating in the mission may second staff to EULEX, nationals from non-EU states are recruited on a contractual basis only, and exceptionally where no qualified applications from member states are available.<sup>2387</sup>

## **Oversight and Accountability**

EULEX is not accountable to Kosovo’s Parliament, Ombudsman, or Anti-Corruption Agency,<sup>2388</sup> but the mission has created several internal accountability mechanisms within its structures. The Human Rights and Legal Office (HRLO) is an advisory and policy body responsible for ensuring that all EULEX’s activities are in line with international human rights standards.<sup>2389</sup> The Human Rights Review Panel (HRRP), which has been operational since June 2010, addresses human rights violations that have been committed within the execution of the EULEX mandate. The HRRP panel is composed of four members, including one EULEX judge and international experts in human rights law. Since 2010, it has registered 188 complaints, out of which 24 cases were deemed violations.<sup>2390</sup>

At the end of 2014, the Kosovo daily newspaper *Koha Ditore* published an article accusing EULEX officials and international judges and prosecutors of corruption, including taking bribes.<sup>2391</sup> The EU High Representative for Foreign Affairs and Security Policy Federica Mogherini appointed an independent expert to investigate the allegations; the expert published a report on the matter in March 2015.<sup>2392</sup> The report concluded that the allegations were unfounded, but that EULEX should have opened an international investigation at the time and highlighted several weaknesses in the mission’s management and structure. These allegations, in addition to general critiques of the effectiveness of the rule of law mission, have damaged the credibility of EULEX in Kosovo.

The creation of the KJC, KPC, and AEJ as independent oversight mechanisms within the domestic structure of Kosovo are a positive step forward in the establishment of an impartial and independent judicial system in Kosovo. While under UNMIK,

the SRSG appointed local judges and prosecutors, but appointments are now made through independent mechanisms.

Domestically, the Humanitarian Law Center-Kosovo (HLC) has been monitoring war crimes trials in Kosovo since 2000, providing a measure of informal oversight.<sup>2393</sup> HLC writes and publishes annual reports that analyze all war crimes trials heard in Kosovo as well as the work of EULEX and the SPRK.<sup>2394</sup>

## **Kosovo Specialist Chambers and Specialist Prosecutor's Office**

### **Creation**

In April 2008, the former Chief Prosecutor of the International Tribunal for the Former Yugoslavia (ICTY) Carla Del Ponte published her memoirs, in which she claims that Kosovo Liberation Army (KLA) fighters kidnapped several hundred persons, mostly ethnic Serbs, and took them to prison facilities in Kosovo and northern Albania where they suffered further serious abuse. The book alleged that crimes against these abductees included illegal organ removal, organ trafficking, torture, and murder.<sup>2395</sup> Under pressure from international media and civil society,<sup>2396</sup> the European Union Rule of Law Mission in Kosovo (EULEX) reluctantly opened what it called a preliminary examination into the crimes committed in the “Yellow House” in Drenica, Albania, in the aftermath of the war. A year later, the EU mission reported that it found no evidence of torture and murder in northern Albania, and was thus closing the case.

Simultaneously, the Parliamentary Assembly of the Council of Europe started an investigation into Del Ponte’s allegations. In 2011, the Swiss rapporteur of the Committee on Legal Affairs and Human Rights presented a report titled “Inhuman treatment of people and illicit trafficking in human organs in Kosovo.” The report discussed war crimes and crimes against humanity against Serbs and Kosovar Albanians, with a focus on torture, inhumane and degrading treatment, and disappearances in detention centers under KLA control during and following the Kosovo war (see text box for *Council of Europe Report*).<sup>2397</sup>

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## **Council of Europe Report on Inhuman Treatment of People and Trafficking in Human Organs in Kosovo**

Following the allegations made by former ICTY Prosecutor Carla Del Ponte, in 2008 the Council of Europe launched a formal inquiry into organized crime, including human organ trafficking, by KLA forces. The inquiry led by Human Rights Rapporteur Dick Marty culminated in a report published in 2010: “Inhuman treatment of people and illicit trafficking in human organs in Kosovo” (also known as the “Marty report”).<sup>2398</sup>

The Marty report concluded that a “number of indications” appeared to confirm that organs were removed from a subset of Serb captives held at a clinic in Albania and trafficked abroad. Evidence suggested that these captives were “initially kept alive, fed well and allowed to sleep, and treated with relative restraint by KLA guards ... moved through at least two transitory detention facilities, or ‘way stations’ before being delivered to the operating clinic.” KLA forces—specifically, affiliates of the Drenica Group—allegedly controlled these “way stations” in Dicaj, Burrel, Rripe, and Fushe-Kruje. Marty’s report found that the ICTY’s exploratory mission in Albania had been superficial, with a standard of professionalism prompting “bewilderment.” Moreover, the ICTY’s jurisdiction was limited to exploring crimes committed up to June 1999, and it had no authority to conduct investigations in Albania, except with the consent of Albanian authorities. However, organ trafficking by the KLA was “alleged to have occurred from the summer of 1999 onwards,” after Serbian forces had left Kosovo and NATO’s international forces were starting to establish themselves: a period of transition and chaos.<sup>2399</sup>

In addition to crimes committed by KLA forces in the context of the Kosovo conflict, the Marty report found information related to suspected involvement of KLA leaders and international affiliates in the trafficking of organs through the Medicus Clinic in Pristina. The report stated that the “information appears to depict a broader, more complex organized criminal conspiracy to source human organs for illicit transplant, involving co-conspirators in at least three different foreign countries besides Kosovo, enduring over more than a decade.”<sup>2400</sup>

The Marty report recommended:

- that additional funds be allocated to EULEX for complex war crimes and organized crime investigations and prosecutions;
- that EULEX dedicate special attention to the crimes of organ trafficking, corruption, and organized crime; and

- that Kosovo authorities break the “glass ceiling of accountability” and cooperate with investigations into allegation of crimes committed by KLA forces in northern Albania.<sup>2401</sup>
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In response to the publication of the Council of Europe, the EU established, along with EULEX, a Special Investigative Task Force (SITF) in 2011 to investigate “possible abductions, detentions, mistreatment and killings ... as well as any other crimes related to the allegations in the [EU] report.”<sup>2402</sup> John Clint Williamson, lead prosecutor of the SITF, held meetings with judicial authorities as well as the diplomatic community in Pristina, Belgrade, and Tirana to discuss their cooperation with the investigation.<sup>2403</sup> Kosovo’s President Atifete Jahjaga and other authorities in Kosovo pledged their full support for and cooperation with the investigation. Serbia’s then-President Tadic and Albania’s Prime Minister Berisha also committed to cooperate with the investigation. Moreover, in May 2012, the Albanian government passed a bill providing the task force access to Albanian territory for the purpose of investigating allegations of organ trafficking<sup>2404</sup> as well as the authority to call witnesses and search premises through requests of mutual legal assistance.<sup>2405</sup>

Under pressure from the EU, the United States, and the UN Security Council, the parliament of Kosovo agreed to the creation of a special mechanism.<sup>2406</sup> On August 3, 2015, the Kosovo Assembly adopted constitutional amendments and legislation allowing for the prosecution of crimes under domestic law by a mechanism placed outside Kosovo: the Kosovo Specialist Chambers and Specialist Prosecutor’s Office.<sup>2407</sup> In September 2016, the mandate and staff of the SITF were transferred from the auspices of EULEX to the newly established Kosovo Specialist Chambers in The Hague. While the appointment of a registrar in April 2016 marked the commencement of the work, the court only became fully operational following the appointment of the specialist prosecutor on September 1, 2016, and the appointment of nineteen international judges in February 2017.<sup>2408</sup> In July 2017, President Ekaterina Trendafilova announced that with the judges’ adoption of Rules of Procedure and Evidence for the Specialist Chambers, there “are no [longer any] legal impediments to receiving any filings or indictments.”<sup>2409</sup>

## **Legal Framework and Mandate**

The Kosovo Specialist Chambers and Specialist Prosecutor’s Office were established to prosecute under Kosovo law any war crimes, crimes against humanity, and other crimes committed between January 1, 1998, and December 31, 2000. The

Law on the Specialist Chambers and the Specialist Prosecutor's Office dictates a specific material jurisdiction to the mechanism, in relation to allegations of grave trans-boundary and international crimes "which related to those reported in the Council of Europe Parliamentary Assembly Report ... and which have been the subject of criminal investigation by the [SITF]." <sup>2410</sup> Beyond the prosecution of war crimes and crimes against humanity, such as torture or inhuman treatment, hostage taking, murder, and enforced disappearances, investigations are likely to focus on transnational crimes, such as illegal organ transplantation and trafficking, which are defined under Kosovo law. The court's territorial jurisdiction extends to both crimes committed and commenced within Kosovo, given that many of the crimes described in the Marty report are alleged to have taken place in northern Albania. <sup>2411</sup>

The Specialist Chambers has jurisdiction over crimes under international and national law. The Constitution of Kosovo prescribes that customary international law has primacy over domestic law and certain international human rights treaties. Specialist Chamber judges may thus directly apply international law and apply jurisprudence from international criminal tribunals. However, Kosovo law will determine sentencing. Judges must take into account the prevailing punishment under Kosovo law at the time crimes were committed. <sup>2412</sup>

The Law on the Specialist Chambers and Specialist Prosecutor's Office and the Rules of Procedure and Evidence, adopted by the judges in August 2017, constitute the mechanism's governing legal framework. The Host State Agreement between the Kingdom of the Netherlands and the Republic of Kosovo determines that the Host State shall only allow the temporary detention of suspects and witnesses, and that sentences of convicted persons shall not be served in the Netherlands. <sup>2413</sup> Therefore it can be expected that the KSC will enter into bilateral detention agreements with other states.

The KSC is a court under national law that administers justice outside of Kosovo. The Specialist Chambers are attached to each level of the court system in Kosovo, including the Basic Court of Pristina, the Court of Appeals, the Supreme Court, and the Constitutional Court, but operates completely independent of the courts of Kosovo and has primacy over all other courts. <sup>2414</sup> In principle, the relation between the Specialist Chambers and national courts is nonexistent, except that the prosecutor may order the transfer of proceedings from any of the other courts in Kosovo. <sup>2415</sup> In its composition, the Specialist Chambers is a new species among existing hybrid tribunals. It is the first among internationalized courts that does not employ staff from the region <sup>2416</sup> since, according to a Kosovo law (ratifying an exchange of letters between the president of Kosovo and the EU high representative

for foreign affairs and security policy), the chambers must only be staffed with and operated by international staff and judges.<sup>2417</sup> Scholars have questioned whether the mechanism should be considered an international court or internationalized (domestic) court. While its structure and personnel are international, legally it is a domestic mechanism because it is a court based on Kosovo law.<sup>2418</sup>

## Location

The Specialist Chambers are an integral part of the Kosovar judicial system and have a seat in both Kosovo and The Hague, the Netherlands. The Host State Agreement between the Netherlands and the Republic of Kosovo on the Relocated Specialist Judicial Institution (the name that is used to refer to both the Specialist Chambers and the Specialist Prosecutor's Office in the Host State Agreement) determines that the court will be hosted for the duration of its work. When necessary, and when it is in the interest of the mechanism's administration or in the interests of justice, the Specialist Chambers may reside elsewhere.<sup>2419</sup>

From the start of the discussions on the creation of the Specialist Chambers, it was evident that the mechanism needed to be located outside of Kosovo to secure independence and security of trials. Since the end of the war, the ICTY, the United Nations Interim Administration Mission in Kosovo (UNMIK), and EULEX courts have attempted to investigate KLA crimes, but all had limited success.<sup>2420</sup> This has everything to do with the challenging climate for investigations in Kosovo. The ICTY had to drop almost all but one of its cases against KLA commanders because of lack of evidence.<sup>2421</sup> Several cases showed signs of systematic and widespread witness interference and intimidation. In the *Haradinaj et al.* case, for example, it was reported that nine potential witnesses were killed while investigations were ongoing.<sup>2422</sup> A second reason why it was decided to prosecute crimes within The Hague was the favorable climate for former KLA commanders, who continue to be regarded as heroic liberation fighters by many Kosovar Albanians. Popular support for KLA leaders was evident at the large-scale protests in Pristina in January 2017 to demand the release of former Prime Minister Ramush Haradinaj who was detained in France based on a Serbian arrest warrant.<sup>2423</sup> The first SITF report of July 2014 concluded that conditions for conducting an investigation remained "extremely challenging," among others because of a climate of intimidation that undermines the investigation of KLA crimes. Therefore, the EU, Kosovar, and Dutch authorities agreed that the protection of victims and witnesses could be better ensured by seating the mechanism in The Hague.<sup>2424</sup>

At the time the mechanism began operations at the end of 2016, the court's building was still under construction. According to the municipality of The Hague, the premises will be finalized in April 2018.

## **Structure and Composition**

The Kosovo Specialist Chambers and Specialist Prosecutor's Office (at times referred to as the Kosovo Relocated Specialist Judicial Institution or the Kosovo Specialist Court) consist of the Specialist Chambers proper (made up of four chambers and the Registry, which houses among other units, the Defense Office, Victims' Participation Office, Witness Protection and Support Office, Detention Management Office, and Ombudsperson's Office) and the Specialist Prosecutor's Office as a distinct entity.<sup>2425</sup> While legally part of the judicial system of Kosovo, the Hague-based court is a temporary construct for the period of investigations of crimes under the Law on Specialist Chambers.

### ***Chambers***

The Specialist Chambers is made up of a Trial Chamber, Appeals Chamber, Supreme Court Chamber, and a Constitutional Court Chamber, each composed of three judges. A single judge performs the functions of a pretrial chamber.<sup>2426</sup> The head of the EU Common Security and Defense Policy Mission in Kosovo (the head of EULEX) appoints judges to a roster of independent international judges upon the recommendation of an independent selection panel composed of at least two international judges.<sup>2427</sup> The same process is used to select the Specialist Chambers' president and vice president from among the judges.

The president is the only judge who serves the court on a full-time basis.<sup>2428</sup> The judges on the roster will only be present at The Hague when the work so requires and as required by the president. Judicial functions may be exercised remotely, in part to contain costs.<sup>2429</sup>

The head of EULEX appointed the KSC's first president, Ekaterina Trendafilova (a former judge at the International Criminal Court), on December 14, 2016,<sup>2430</sup> and then appointed a roster of 19 international judges originating from Europe and the United States of America on February 17, 2017.<sup>2431</sup> According to Articles 25 and 33 on the Law on the Specialist Chambers, the president will assign judges to the various chambers, or panels, only once the special prosecutor files an indictment in the Specialist Chambers or upon other required judicial activity.<sup>2432</sup>

## ***Office of the Prosecutor***

The specialist prosecutor has the authority to investigate and prosecute persons who have committed crimes within the jurisdiction of the Specialist Chambers. Unlike in many international or internationalized hybrid tribunals, but similar to domestic institutions, the prosecutor's office acts independently of the other entities within the Specialist Chambers, as well as from other prosecution authorities in Kosovo.<sup>2433</sup> To ensure continuity of the work of the EU's SITF, the last SITF prosecutor, David Schwendiman, was appointed as the first specialist prosecutor in September 2016.<sup>2434</sup> The head of EULEX appoints the prosecutor for a four-year term, and the prosecutor may be subject to reappointment.<sup>2435</sup> The chief prosecutor is supported in his work by other prosecutors and can make use of the Kosovo police forces and other domestic law enforcement authorities, to the same extent as Kosovar prosecutors.<sup>2436</sup>

Since the Specialist Chambers are part of the domestic system of courts in Kosovo, there is no bar to the prosecutor investigating crimes within the territory of Kosovo.<sup>2437</sup> The status of the Office of the Specialist Prosecutor within Kosovo's formal justice system may enhance cooperation between Pristina and The Hague.

## ***Registry***

The Registry is responsible for the administration and servicing of the Specialist Chambers and the registrar is responsible for the budget of both the Specialist Chambers and the Specialist Prosecutor's Office. The head of EULEX appoints the registrar for a four-year term. Beyond the Victims' Participation Office, Defense Office, Witness Protection and Support Office, and Detention Management Office, the Registry houses the Ombudsperson's Office. The creation of the function of an ombudsman mirrors domestic Kosovo institutions and is another feature that distinguishes the Specialist Chambers from international tribunals. The Office of the Ombudsperson will act as an independent oversight mechanism which will "monitor, defend and protect the fundamental rights and freedoms enshrined in Chapter II of the Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor's Office." The ombudsperson can receive and investigate complaints, but "shall not intervene in cases or other legal proceedings before the Specialist Chambers, except in instances of unreasonable delays."<sup>2438</sup> The Registry, like the Office of the Prosecutor, can avail itself of domestic authorities such as the Kosovo police, and has the same authority as the Kosovo police under Kosovo law.<sup>2439</sup>

## ***Witness Protection and Support Office***

The Law on the Specialist Chambers and the Rules of Procedure and Evidence set out a comprehensive system of witness protection in the Kosovo Specialist Chambers. The Witness Protection and Support Office (WPSO) is “responsible for protecting witnesses, victims participating in the proceedings and, where appropriate, others at risk on account of testimony given by witnesses.” It is the role of the WPSO to set out adequate protection measures for victims and witnesses, and to provide administrative, logistical, as well as psychological assistance to those participating in proceedings. Victims will participate in proceedings as a group and may be represented by a victims’ counsel who is appointed by the Registry.<sup>2440</sup> Victims may be awarded individual or collective reparations through an order against a convicted person, either by a Kosovo (civil) court or by a KSC panel.<sup>2441</sup>

## ***Outreach***

The Registry is responsible for communications from the Specialist Chambers to the general public.<sup>2442</sup> Early in its existence, the court recognized the importance of explaining its mandate and responsibilities, because of the difficult political climate in which it operates. The president, prosecutor, and registrar have regularly engaged with the media and civil society, encouraged visits to the court, and held press conferences to inform the public about important developments. Officials visited Pristina and Belgrade in its first year in a bid to foster cooperation with the court. Once proceedings begin, hearings will be live-streamed in English, Albanian, and Serbian, which will allow people in the region to follow the proceedings closely.<sup>2443</sup>

## **Prosecutions**

As of late 2017, the prosecutor had not issued any indictments. The mechanism’s mandate makes explicit reference to alleged crimes included in the 2011 Council of Europe report. In July 2014, then-Chief Prosecutor of the SITF Clint Williamson stated that three years of investigations throughout Europe had led to compelling evidence of war crimes and crimes against humanity committed by top KLA leaders. He stated that KLA officials “bear responsibility for a campaign of persecution that was directed against ethnic Serbs, Roma and other minority populations of Kosovo,” citing evidence of crimes including unlawful killings, abductions, enforced disappearances, illegal detention, sexual violence, and inhumane treatment.<sup>2444</sup> The Specialist Prosecutor’s investigations might concern high-level government officials and politicians. The Martyr report made specific mention of former Drenica

group member Hashim Thaçi, who currently serves as the president of Kosovo.<sup>2445</sup> Those under previous ICTY indictment in the *Haradinaj et al.* case, including current Prime Minister Ramush Haradinaj, could also be suspects.

## **Legacy**

As of late 2017, the KSC was just getting underway, and it was too early to assess its legacy. The mechanism could provide a new opportunity for the people of Kosovo to deal with a violent past and to take a much-needed step in addressing a persistent culture of impunity.<sup>2446</sup> If it provides accountability for KLA-perpetrated grave crimes, KSC proceedings could provide a sense of justice to the victims and contribute to a more complete understanding of crimes perpetrated during the Kosovo war. However, if the KSC is unable to overcome the challenges faced by previous mechanisms (including the ICTY) when investigating and prosecuting suspected KLA perpetrators, it could underscore impunity and have negative effects on the “stable” peace and progress that Kosovo has made since its declaration of independence in 2008.<sup>2447</sup>

## **Financing**

The Specialist Chambers are financed by a grant to the KSC registrar through the budget of the Common Foreign and Security Policy (CFSP) of the European Union. The European Commission first approved the budget for the mechanism at US\$29.1 million in 2016 and allocated US\$41.3 million to the mechanism for the period from June 15, 2017, to June 14, 2018.<sup>2448</sup> Beyond EU support, the mechanism has received financial contributions from third parties, including Canada, Norway, Switzerland, Turkey, and the United States of America.<sup>2449</sup>

## **Oversight and Accountability**

The EULEX in Kosovo, under the EU CFSP, is responsible for the appointment of the Kosovo Specialist Chambers president, judges, prosecutor, and registrar. The EU, the Organization for Security and Cooperation in Europe (OSCE), and the UN, who have been involved in building the rule of law in Kosovo since the end of the war, will play an important role in monitoring the proceedings of the Kosovo Specialist Chambers.

Within the Registry of the Specialist Chambers, an Ombudsperson's Office has been created to "defend and protect the fundamental rights and freedoms enshrined in Chapter II of the [Kosovo] Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor's Office in accordance with the Law and the Rules." The ombudsperson may investigate complaints of misconduct by either the chambers or Specialist Prosecutor's Office.<sup>2450</sup>

For years, national and international NGOs have played an important role in the collection of evidence and pushing for accountability of crimes committed during the Kosovo war. Such organizations such as the Humanitarian Law Center—Kosovo, Human Rights Watch, Amnesty International, and other civil society groups may continue to provide informal oversight by monitoring and reporting on the Specialist Chambers' proceedings.

## SERBIA

### Conflict Background and Political Context

The Socialist Federal Republic of Yugoslavia (SFRY), and later the Federal Republic of Yugoslavia (FRY) consisting of the remaining republics of Serbia and Montenegro, spent the majority of the 1990s embroiled in wars in Croatia, Bosnia, and its then province of Kosovo.

For an overview of the dissolution of the SFRY and resulting conflicts, see the profile mechanism for the International Criminal Tribunal for the former Yugoslavia. For greater detail on the conflicts in Croatia, Bosnia, and Kosovo, see the separate mechanism profiles for each.

Following the wars, Serbia continued to be politically tense. In the postwar years the country weathered the dissolution of the rump Federal Republic of Yugoslavia, when Montenegro ended its union with Serbia in 2006; in 2008, the province of Kosovo declared independence. While a majority of the world's countries recognizes Kosovo as an independent state, Serbia does not, and it maintains strong influence in majority Serb enclaves within Kosovo.<sup>2451</sup> Serbia has also endured changes in political leadership, assassinations, and territorial disputes. Ethnic nationalists have remained powerful, including within security institutions. Nationalists have encouraged obstruction of the ICTY and continued to question the sovereign integrity of Bosnia and Herzegovina.<sup>2452</sup>

Nevertheless, international pressure, has compelled the Serbian government to take actions at odds with often-prevailing nationalist sentiment. After years of resisting cooperation with the ICTY, Serbia arrested and handed over former President Slobodan Milošević to the court under threat of a U.S. aid suspension in 2001. In 2003, Serbia became a potential candidate for European Union membership,<sup>2453</sup> and in the face of Dutch and Belgian insistence on conditionality attached to advancement through the stages of EU accession, Belgrade ultimately made a grudging series of arrests and transfers to the ICTY. These included the most prominent remaining fugitives: former Bosnian Serb political leader Radovan Karadžić in 2008 and, finally in 2011, his erstwhile military general Ratko Mladić.<sup>2454</sup> Additionally, Serbia has agreed to take steps to improve its relationship with Kosovo. To that end, the Brussels Agreement was signed in 2013, normalizing relations between Serbia and Kosovo. Serbia was granted official EU candidate status in 2012.<sup>2455</sup>

## **Existing Justice-Sector Capacity**

While the ICTY was formed to prosecute suspected war criminals, it was never intended to be the only method of prosecuting international crimes committed in the former Yugoslavia. All countries involved were expected to deal with lower-profile war crimes domestically. Nominally, Serbia conducted war crimes cases through its criminal court system.<sup>2456</sup> From 1995 to 2003—a period when Serbia was ruled by the nationalists Milošević and then Vojislav Koštunica—Serbia remained especially reluctant to prosecute individuals domestically. Despite the Serbian Ministry of the Interior collecting records of several hundred criminal acts, few investigations were opened and a mere seven cases made it to trial.<sup>2457</sup> Prosecutors were far from impartial, primarily investigating crimes attributed to Kosovo Liberation Army soldiers. In several instances, Serbian police were investigated for war crimes, but these investigations were only instigated when there was publicity surrounding the cases.<sup>2458</sup>

In January 2012, a new criminal procedure code also went into effect that has significantly changed the Serbian judicial system, transforming it from an inquisitorial system into a more adversarial system. All preliminary proceedings and investigations are now the responsibility of the prosecution.<sup>2459</sup> Investigative judges have been reassigned to play a passive role at preliminary proceedings.<sup>2460</sup> Courts are no longer required to establish the “material proof”; they will only examine evidence presented to them in motions from the parties. The new criminal procedure code has also introduced cross-examination.<sup>2461</sup> Both parties are still given an equal opportunity to present their side of the case.<sup>2462</sup> Ultimately, these procedural changes are designed to encourage prosecutors to prepare cases more thoroughly.

## **Existing Civil Society Capacity**

While some human rights organizations operated in Serbia in the 1990s and early 2000s, they faced an unsupportive government and “violent intimidation” from nationalist organizations.<sup>2463</sup> An additional barrier to civil society engagement around post-conflict accountability was public sentiment, encouraged by Milošević, that Serbs had been the most victimized ethnic group in the armed conflicts.<sup>2464</sup> This resulted in widespread popular rejection of war crimes trials.<sup>2465</sup> Nevertheless, there are a small number of NGOs operating in Serbia that have played an important role in supporting and monitoring both the ICTY’s work as well as domestic trials in Serbia. Chief among these are the Humanitarian Law Center, the Helsinki Committee for Human Rights in Serbia, the Youth Initiative for Human Rights, and Women in

Black. These organizations have challenged dominant nationalist narratives through activities including advocacy, documentation of crimes, and victim representation.

## **Creation**

In July 2003, the Serbian National Assembly passed the Law on Organization and Competence of State Bodies in the Proceedings against War Crimes Perpetrators. This law established the Special War Crimes Chamber (WCC) within the District Court of Belgrade and also created the Office of the War Crimes Prosecutor (OWCP), which would devote itself solely to investigating and prosecuting those suspected of war crimes.<sup>2466</sup> In 2009, the WCC was renamed the Department of War Crimes (WCD), within the Higher Court of Belgrade.

The 2003 law also created several auxiliary departments in order to help carry out the work of the OWCP and WCC/WCD: a War Crimes Investigation Service, a Special Detention Unit, and a Witness Protection Unit.<sup>2467</sup> Additionally, the law established several procedural innovations, including the ability for witnesses to testify via video and mandatory audio recording and written transcripts of all trials.<sup>2468</sup>

The impetus for the WCC/WCD's creation appears to have largely been driven by ICTY prosecution of Serbs, which helped push Serbia to create a domestic method for trying war crimes. Furthermore, as transfer of war crimes cases to domestic courts became part of the ICTY's completion strategy, this provided a useful framework in which Serbia could show that it was capable of handling war crimes prosecutions locally.<sup>2469</sup> Outside parties, including the Organization for Security and Cooperation in Europe (OSCE), also helped Serbia establish this new system. The OSCE played an instrumental role in drafting the legislation and developing the court;<sup>2470</sup> the ICTY helped train WCC judges and prosecutors;<sup>2471</sup> and the United States helped finance training for court staff and also funded the construction of WCC/WCD courtrooms.<sup>2472</sup> The first trial held in the WCC began in March 2004.<sup>2473</sup>

## **Legal Framework and Mandate**

The WCC/WCD's jurisdiction formally encompasses crimes against humanity and violations of international humanitarian law committed within the territory of the former Yugoslavia since 1991. The court applies Serbian law and hears cases referred to it by the Serbian Office of the War Crimes Prosecutor.

In 2005, parliament amended the Law on Organization and Competence of Government Authorities in War Crimes Proceedings (Law on War Crimes Proceedings) to reflect changes to the WCC's jurisdiction per the revised Serbian Criminal Code, which came into force on January 1, 2006.<sup>2474</sup> The amended Criminal Code gave the WCC jurisdiction over genocide, crimes against humanity, and war crimes.<sup>2475</sup> Rather than use the revised code, however, the OWCP has continued prosecutions under the 1976 SFRY Basic Criminal Code, because that was the code in force when the crimes were committed.<sup>2476</sup> Human rights organizations have criticized this interpretation of the legality principle. In practice, it means that, unlike in Bosnia, Croatia, and Kosovo, Serbia's war crimes prosecutor has never brought charges of crimes against humanity.

The legislation that created the WCC and the OWCP also laid out guidelines to regulate the transfer of cases from the ICTY to the WCC/WCD. Once transferred to Serbia, the case is heard under domestic law but can continue to be prosecuted based upon the facts that were the foundation of the ICTY indictment.<sup>2477</sup> Additionally, the OWCP may prosecute using evidence that was collected by the ICTY.<sup>2478</sup> Finally, representatives of the ICTY have the right to attend any stage of the proceedings or request information about the developments of the case.<sup>2479</sup>

The authorities of the WCC in the District Court of Belgrade and Supreme Court of Serbia were transferred to the Department for War Crimes of the Higher Court and Department for War Crimes of the Court of Appeal in Belgrade after the implementation of judicial reforms in 2009.<sup>2480</sup>

In February 2016, the Serbian Parliament adopted a long-awaited National Strategy for the Prosecution of War Crimes in Serbia (National War Crimes Strategy)<sup>2481</sup> with the aim "to significantly improve the efficiency of the investigation and prosecution of war crimes in the Republic of Serbia."<sup>2482</sup> The strategy sets out that this can be achieved by prosecution of higher-level perpetrators, increased regional cooperation, harmonization of jurisprudence, and an improved mechanism for victims and witness protection.<sup>2483</sup>

## **Location**

The WCD is located in the Serbian capital of Belgrade. Although the WCC was a department of the Belgrade District Court, trials were not held at ordinary district courthouses but at a specialized courthouse, later also used by the WCD.<sup>2484</sup> In

addition to housing the WCD, the Special Court building houses the Office of the War Crime Prosecutor, the Chamber for Organized Crime, and the Special Prosecutor for Organized Crime.<sup>2485</sup> In 2006, the Victim and Witness Support Unit was given an office in the courthouse to accommodate victims and witnesses before and after they are called to testify.<sup>2486</sup> While the WCD's location in Belgrade has helped the court become accessible to the local population, it has also had the effect of alienating non-Serb victims and witnesses. The WCD has sought to mitigate this by offering the option of off-site interviews with Serbian prosecutors, coordinated through the Prosecuting Office of the witnesses' home country.<sup>2487</sup> On several occasions, the WCD has also permitted live video testimony during trials, though most of the witnesses are expected to testify at the courthouse.<sup>2488</sup>

## **Structure and Composition**

The WCC was not established as a free-standing court, but rather it was built into the court system of Serbia as one of a dozen departments within the Belgrade District Court (later the Higher Court of Belgrade).<sup>2489</sup> Despite being at the same level as other District Courts, the WCC/WCD has several unique features, discussed below. The WCD includes the War Crimes Panels, an outreach department, and the Witness Assistance and Support Unit.<sup>2490</sup> Two additional organs complete the Serbian domestic response to judicial accountability for war crimes: the Witness Protection Unit and the War Crimes Investigation Unit, both of which fall under the authority of the Ministry of the Interior.<sup>2491</sup>

### ***Chambers***

The Department of War Crimes of the Higher Court of Belgrade (WCD, formerly in the Belgrade District Court) has six judges, who hear war crimes cases in two Trial Chambers of three judges each.<sup>2492</sup> In addition to these six judges, there is one judge for preliminary proceedings. Until the criminal procedure code was revised in 2012, these judges served as investigative judges. As investigative judges, they played an active role in gathering evidence and determining whether the case should be brought to trial.<sup>2493</sup> With the changes to the criminal procedure code, they now fill a monitoring role at the preparatory hearing.<sup>2494</sup> These hearings help establish which facts are not in dispute and do not need to be brought into evidence; also, the judges make determinations on detention time or bail amounts, and order searches and exhumations. The Higher Court president chooses WCD judges from among the bench of judges within the Higher Court.<sup>2495</sup>

WCD judges generally do not have experience in the field of international criminal and humanitarian law, and neither are they accustomed to using foreign literature and jurisprudence, largely because they do not have knowledge of English.<sup>2496</sup> Throughout the years, judges have received training from the ICTY, OSCE, and local NGOs on substantive international criminal law and practical skills, and groups of WCD judges have visited the chambers of the ICTY in person.<sup>2497</sup> Since the end of a long-term OSCE project on strengthening the capacities of judicial institution in Serbia in 2011, no consequent training of the judiciary has taken place, and there has been significant turnover.<sup>2498</sup>

The Department of War Crimes of the Court of Appeals in Belgrade (formerly the Supreme Court of Serbia) is the appellate body responsible for war crimes prosecutions. The WCD within the Court of Appeal consists of a single Trial Chamber with five judges, which are assisted by six judicial assistants.<sup>2499</sup> According to a 2015 report of the Humanitarian Law Center: “The work of the Higher Court Department and the Appeals Court Department may generally be considered appropriate, professional and successful. However, certain aspects of these departments are subject to criticism. These include mild penal policies, particularly with regard to the implementation of the mitigating circumstances, a number of politically motivated judgments and a complete absence of the public relations program.”<sup>2500</sup>

### ***Prosecutions***

The OWCP includes the war crimes prosecutor, deputy prosecutors, a secretary, and other supporting staff members. The number of deputy prosecutors has changed over time, ranging from five in 2003 to nine in 2013.<sup>2501</sup> It initially had a designated spokesperson, but in recent years, that has no longer been the case, and a deputy prosecutor takes up this role.<sup>2502</sup> It has the same rights and responsibilities as other public prosecutor’s offices in Serbia; thus, all Serbian laws governing public prosecution apply to the office.<sup>2503</sup> The prosecutor is elected by the National Assembly and is responsible for appointing the deputies, who are subsequently approved by the republic public prosecutor. Both the prosecutor and deputies are appointed for a four-year term, with the possibility of reappointment.<sup>2504</sup> After the mandate of chief prosecutor Vladimir Vukčević expired on December 31, 2015, the position of war crimes prosecutor was left vacant for a year and a half.<sup>2505</sup>

Like the WCD judges, prosecutors generally do not have experience in international criminal law, but the majority of the office’s associates and investigators are former ICTY employees and thus bring professional capacity to the institution. According to international observers, the OWCP has increased its professional capacity as a result of participation in trainings from the OSCE and other organizations.<sup>2506</sup>

The OWCP maintains a substantial backlog of uninvestigated cases from the 1990s onward.<sup>2507</sup> Due to resource constraints, it currently relies heavily on authorities in Croatia as well as Bosnia and Herzegovina to make evidence available to it before the decision to initiate an investigation is made.<sup>2508</sup> There are regional agreements for cooperation in criminal matters among Bosnia, Croatia, Serbia, and Montenegro, and bilateral agreements among the prosecutors of Serbia, Croatia, and Bosnia.<sup>2509</sup> There are also memoranda of understanding that allow evidence to be shared between prosecutor's offices in Serbia and Croatia, and Serbia and Bosnia under certain circumstances.<sup>2510</sup> The OSCE has also collaborated with the prosecutor's offices in Croatia and Bosnia to conduct joint investigations.<sup>2511</sup>

Despite these advancements, the OWCP has been criticized for its reluctance to take on command responsibility cases, as well as other cases involving high-ranking officials. The Humanitarian Law Center, a leading human rights organization in Serbia, contends that the OWCP has attempted "to conceal evidence of the involvement in war crimes of the institutions of the Republic of Serbia and the Federal Republic of Yugoslavia and of the individuals who hold important positions in these institutions."<sup>2512</sup> The relationship between the OWCP and UNMIK/EULEX in Kosovo has also been difficult. As Serbia considers Kosovo to be part of its territory, this led to disputes with UNMIK and the European Union over jurisdiction, and it is challenging for the two justice systems to develop cooperation agreements.<sup>2513</sup> The OWCP and UNMIK/EULEX have, however, worked together on several occasions.<sup>2514</sup>

### ***War Crimes Investigative Service***

The legislation that created the WCC also established the War Crimes Investigation Service (WCIS), a predecessor of a war crimes unit that was created in 2001 in response to the discovery of mass graves of Kosovo Albanians in Serbia.<sup>2515</sup> A branch of the Ministry of Interior, the WCIS is a specialized office of the Serbian police that is responsible for investigating war crimes, searching for missing persons, and cooperating with the ICTY.<sup>2516</sup> In 2015, the WCIS had 49 employees, including 16 investigators, 10 analysts, and nine officers in charge of international legal assistance requests from the ICTY and countries in the region.<sup>2517</sup>

From the beginning, the WCIS has failed to initiate investigations into war crimes and is only reacting to investigation requests from the OWCP. The OWCP has complained of a general lack of commitment of the WCIS to investigate crimes, and therefore it has lobbied to have the WCIS removed from the Interior Ministry Police and placed under its command to improve cooperation between the departments.<sup>2518</sup>

Many police officers consider a position on the WCIS to be undesirable because it is dangerous and could be perceived to be unpatriotic.<sup>2519</sup> Serbian police forces have been widely implicated in the perpetration of grave crimes.<sup>2520</sup> Despite these challenges, the WCIS has played a critical role in locating missing persons and arresting suspects in several WCD cases.<sup>2521</sup>

### ***Outreach***

The OWCP initially had an outreach department established in 2003, consisting of one spokesperson and an OSCE-funded public information coordinator.<sup>2522</sup> The department's main goal was to help sensitize Serbian journalists to war crimes issues and inform them that non-Serbs were being prosecuted for their crimes.<sup>2523</sup> Some of these efforts were successful, while others faltered. The WCC attempted to hold biweekly press briefings in late 2004 and early 2005, but stopped these events because of poor attendance.<sup>2524</sup> Media reporting on WCD trials generally remains minimal. A December 2006 OSCE public interest survey indicated that 72 percent of respondents believed that domestic coverage of the WCC was inadequate.<sup>2525</sup> Since financial assistance by the OSCE Mission in Serbia declined after 2011, the WCD stopped doing outreach altogether, and the Belgrade Higher Court merely issued press releases to announce judgments in cases.<sup>2526</sup>

### ***Victim and Witness Support Unit***

The Law on Organization and Competence of Government Authorities in War Crimes briefly touched upon witness protection and support: the legislation called for a "Special Department" that would be responsible for "tasks relating to witness and victim protection." However, it was not until 2006 that the WCC president established a Victim and Witness Support Unit (VWSU). The unit is small, with only three staff members since 2010, and is housed in an office in the WCC/WCD building.<sup>2527</sup> The main tasks of the VWSU are to interact with witnesses, make arrangements for travel and accommodations, and offer explanations about trial procedures.<sup>2528</sup> Another task of the VWSU is to provide psychological support. The staff members were trained by OSCE and have attended victim support conferences organized by the ICTY in The Hague.<sup>2529</sup> The unit also works closely with the Humanitarian Law Center, which provides representation for witnesses. The VWSU had no state-provided budget and was reliant on modest donor funds.<sup>2530</sup> In the past, the United States provided the unit with US\$17,000 to cover travel and accommodation for witnesses.<sup>2531</sup> More recently, funds for witness travel and accommodation have come out of the presiding judge's budget.<sup>2532</sup>

While the legal framework for witness protection is in line with international standards, the witness protection program has had problems in implementation.<sup>2533</sup> These relate to the security of witnesses, as well as VWSU and court staff being unprepared and not properly trained to deal with vulnerable witnesses.<sup>2534</sup> The Humanitarian Law Center also notes an absence of a psychological support system for victims, with this task being outsourced to external agencies or specialized NGOs. Witnesses coming from Bosnia, Croatia, and Kosovo are expected to request support in their own countries.<sup>2535</sup>

### ***Witness Protection Unit***

The WPU was established in 2006 and is part of the Ministry of the Interior. The Law on the Program to Protect Parties in Criminal Proceedings establishes that the WPU's mission is to provide the "economic, psychological, social, and legal assistance" necessary to protect the life and property of witnesses.<sup>2536</sup> Under Article 106 of the Criminal Procedural Code, special protective measures apply if the prosecutor determines that the "life, health or freedom of the witness or a person close to him is threatened to such an extent that it justifies restricting the right to defense."<sup>2537</sup> Identity protection measures include: denying any questions that might reveal the individual's identity, using a pseudonym, altering or erasing identifying data from the record, conducting examinations from a separate room using distortion of the witness's voice, and conducting examinations using a device that alters sound and image.<sup>2538</sup> The Law on Organization and Competence of Government Authorities in War Crimes adds additional protections for witnesses and victims who testify in the WCD, including allowing victims or witnesses to testify via videoconference link.<sup>2539</sup> Additionally, the court may choose to protect personal information of a witness, should there be a compelling reason to do so.<sup>2540</sup>

However, the WPU has suffered from underfunding.<sup>2541</sup> Although the unit was once seen as a successful model of witness protection for the region, its main shortcoming is a lack of vetting for new staff, or accountability mechanisms for misconduct.<sup>2542</sup> It has faced allegations of unprofessionalism and incompetence, including intimidation and witness harassment.<sup>2543</sup> This has been an issue particularly when the witness is a current or former police officer, seen as an "insider" witness. There have also been reports that certain officers employed by the WPU have themselves committed war crimes.<sup>2544</sup>

### ***Criminal Defense Support***

While defendants have the option of hiring a private defense attorney, those who are indigent can request appointment of counsel through the District Court in

Belgrade.<sup>2545</sup> The District Court is responsible for paying the defense counsel, who is typically a contracted private attorney.<sup>2546</sup> Defense attorneys receive the same wages for their work at the WCD as they would receive in the normal District Court, but this fee is approximately half of what a privately hired defense attorney would receive for the same work.<sup>2547</sup> Low levels of compensation have the potential to affect the quality of the defense, including discouraging defense attorneys from conducting their own investigations. Furthermore, there is no structure in place to ensure that lawyers wishing to represent war crimes defendants have knowledge of international criminal law or human rights law, or are provided with training in these and other relevant areas.<sup>2548</sup>

## **Prosecutions**

By November 2017, after almost fifteen years in operation, the WCC/WCD had adjudicated 66 cases, resulting in the conviction of 83 individuals, the acquittal of 49 suspects, and the suspension of eight cases involving 13 others.<sup>2549</sup> A further 13 cases involving 43 accused were at the trial stage and six cases remained before the Appellate Court.<sup>2550</sup> According to the OWCP, investigative proceedings were underway for 14 cases.<sup>2551</sup> The number of annual indictments peaked in 2010 (with nine) and has steadily declined.<sup>2552</sup> To date, most prosecutions have been against low-ranking military officers or police from the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia for war crimes against the civilian population that were committed in Kosovo, Croatia, and Bosnia and Herzegovina.<sup>2553</sup> Several additional prosecutions have been brought against Kosovo Albanians. The ICTY transferred one case to the WCC: that of Vladimir Kovačević, a former officer of the Yugoslav People's Army.<sup>2554</sup> The overall sentiment among victims, lawyers, and human rights organizations is that the number of cases adjudicated has been too low.<sup>2555</sup>

## **Legacy**

The WCD and the OWCP continue to operate in a hostile political context, and their legacy in terms of public knowledge and acceptance in Serbia remains as yet uncertain. Nevertheless, in terms of knowledge transfer and capacity building, the court has had a positive impact: Serbian judges and staff have all reported that their knowledge of international criminal law and international humanitarian law has improved as a result of the chamber's creation. Judges also reported that their

engagements with ICTY and other judicial counterparts played an important role in the learning process.<sup>2556</sup> In terms of the country's legal framework, the WCC also partially led to the 2005 revision of the domestic criminal code, which codified international crimes.<sup>2557</sup> Whereas the previous version of the code listed only two violations of international humanitarian law, the new code has sixteen articles covering such crimes as genocide and destroying cultural heritage. Other revisions to the criminal procedure code in 2006 also included the addition of witness protection provisions modeled after procedures of the ICTY.<sup>2558</sup> Notably, these provisions apply not just to war crimes cases but also those of organized crime.

## **Financing**

The Serbian government is responsible for funding the OWCP and the WCC; however, early on, these departments received significant financial support from outside entities.<sup>2559</sup> The most significant donors have been the embassies of the United States, the Netherlands, and Norway, as well as the OSCE.<sup>2560</sup> This outside financial assistance has dwindled over the years, and the OWCP has struggled to meet its costs. From the time of the change of the criminal procedure code that put the OWCP in charge of grave crimes cases until at least 2016, there had been no increase in the OWCP budget. In the past, the office has been forced to rely on assistance from the United States and the OSCE to pay for international investigative trips.<sup>2561</sup> The OWCP has also struggled because it cannot afford to hire legal support staff that could enable them to conduct broad investigations.<sup>2562</sup> Neither do they have the “continuity and sustainability of the budget” to afford training of staff.<sup>2563</sup> As discussed above, the VWSU has also faced serious financial struggles.

## **Oversight and Accountability**

The president of the Belgrade Higher Court assigns WCD judges from the preexisting judges of that court.<sup>2564</sup> Judges currently sitting on other Serbian courts may also be seconded to serve a term on the War Crimes Panel.<sup>2565</sup> This framework has raised questions about the WCD's independence, particularly as Freedom House's 2014 report on Serbia described the country's judiciary as “inefficient and vulnerable to political interference.”<sup>2566</sup>

WCD judges serve a six-year term that is meant to allow the judges to develop expertise and commitment to international criminal justice.<sup>2567</sup> However, in 2014

an experienced WCD judge was removed by the president of the Higher Court after only four years appointment, without explanation.<sup>2568</sup> WCD judges are paid a salary that is twice that of the District Court judges and benefit from an accelerated pension scheme, where 12 months of work for the WCD is equivalent to 16 months of regular employment.<sup>2569</sup>

The OSCE Mission to Serbia monitors war crimes trials held in Serbia and has noted that the WCD has, on occasion, yielded to political pressure, for instance, pursuing cases involving Serbian victims even in the absence of solid evidence.<sup>2570</sup> The OSCE and the prosecutor's office communicate regularly in order to ensure that OSCE is able to carry out its responsibilities. Other NGOs, both local and international, monitor the trials of the WCC, preparing and disseminating reports that analyze their observations.<sup>2571</sup> The ICTY has also sent representatives to observe the WCD.<sup>2572</sup>

## Notes

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1764. Issue Paper by the Council of Europe Commissioner for Human Rights, "Post-War Justice and Durable Peace in the Former Yugoslavia," February 2012, 9. Note that beyond the wars in Bosnia, Croatia, and Kosovo, smaller wars occurred in Slovenia (Ten-Day War in 1991) and in the Former Yugoslav Republic of Macedonia (an armed conflict between the FYROM and Albanian National Liberation Army in 2001).
1765. *Ibid.*, 20.
1766. See Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 11, available at: [www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf).
1767. This resolution was important because unlike previous ones, it was the first where the Security Council actually decided that the ICTY "shall be established" and further directed the UN Secretary-General to submit a proposal for constituting the court.
1768. UN Security Council Resolution 827, S/RES/827, May 25, 1993.
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1770. Human Rights Watch, *Former Yugoslavia: War Crimes Trials in the Former Yugoslavia*, Vol. 7, No. 10, June 1995, available at: [hrw.org/legacy/reports/1995/yugoslavia/](http://hrw.org/legacy/reports/1995/yugoslavia/).
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1777. Council of Europe, "Post-war Justice and Durable Peace in the Former Yugoslavia," Issue Paper by the Council of Europe Commissioner for Human Rights, February 2012, 37.
1778. *Ibid.*, 29.
1779. *Ibid.*, 27; and Fischer, *Civil Society in Conflict Transformation*, 300.
1780. UN Security Council Resolution 780, S/RES/780, October 6, 1992, 2.
1781. See Orentlicher, *That Someone Guilty Be Punished*, 11, available at: [ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf). Most notably UN Security Council Resolutions 713, 1991; 764, 1992; 771, 1992; 780, 1992; 808, 1993; and 827, 1993.
1782. Andrea Birdsall, "The International Criminal Tribunal for the Former Yugoslavia: Towards a More Just Order?" *Peace Conflict & Development*, no. 8 (January 2006): 7.
1783. UN Security Council Resolution 808, S/RES/808, February 22, 1993, 2.
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1785. ICTY, *The Tribunal: Establishment*, available at: [icty.org/en/about/tribunal/establishment](http://icty.org/en/about/tribunal/establishment).
1786. Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication," *Fordham International Law Journal* 23, no. 2 (1999): 446.
1787. See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities," *Am. J. Int'l L.* 95 (2001): 31, and Diane Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Justice Initiative, 2008).
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1886. See Office of the High Representative, available at: [ohr.int](http://ohr.int).
1887. Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina*, March 2012, 37, available at: [hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia](http://hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia).
1888. "Bosnian Serb Seeks Court Referendum in Fresh Challenge to Bosnian State," *Reuters*, July 14, 2015, [reuters.com/article/us-bosnia-court-referendum/bosnian-serb-seeks-court-referendum-in-fresh-challenge-to-bosnian-state-idUSKCN0Po1EL20150714](http://reuters.com/article/us-bosnia-court-referendum/bosnian-serb-seeks-court-referendum-in-fresh-challenge-to-bosnian-state-idUSKCN0Po1EL20150714); and "Serbs Express Outrage at Naser Oric Acquittal," *Balkan Insight*, October 9, 2017, available at: [balkaninsight.com/en/article/serbs-express-outrage-at-naser-oric-acquittal-10-09-2017](http://balkaninsight.com/en/article/serbs-express-outrage-at-naser-oric-acquittal-10-09-2017).
1889. Lilian A. Barria and Steven D. Roper, "Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform beyond the Completion Strategy of the ICTY," *Hum Rights Rev.* (2008): 3. DOI 10.1007/s12142-007-0052-0.

1890. For a comprehensive assessment of domestic prosecution of war crimes at the local level prior to the WCC, see OSCE, *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles*, March 2005.
1891. Alejandro Chehtman, “Developing Bosnia & Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a ‘Success Story,’” *J. Int’l Crim. Just.* 9 (2011): 563–64; Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004; Human Rights Watch, *Justice for Atrocity Crimes*, 9.
1892. Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 109, available at: [www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf).
1893. OSCE Mission of Bosnia and Herzegovina, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing From 2005–2010*, May 2011, 12–13.
1894. See Martina Fisher, *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton*, Berghof Foundation, 2006; Bedrudin Brljavac, “Civil Society in Bosnia: Obstacle or Opportunity?” *Transconflict*, November 4, 2011, available at: [transconflict.com/2011/11/civil-society-in-bosnia-obstacle-opportunity-411/](http://transconflict.com/2011/11/civil-society-in-bosnia-obstacle-opportunity-411/).
1895. Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, 6.
1896. Speech of the Court of BiH President Meddzida Kreso at the inauguration of the War Crimes Chamber, Sarajevo, March 9, 2005; Refik Hodzik, “Bosnia and Herzegovina: Legitimacy in Transition Expert Paper,” Paper for the Building a Future on Peace and Justice Nuremberg, June 25–27, 2007, Workshop. See the advisory report: *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina*, a consultants’ report to the OHR, submitted by John Ralston, Peter Bach, Kjell Björnberg, and Almir Rodrigues, May 2002.
1897. The agreement was endorsed by the United Nations Security Council and the Peace Implementation Council (an international body mandated to implement the Dayton Peace Agreement), and adopted into law by Bosnia. See Human Rights Watch, *Justice for Atrocity Crimes*, 9.
1898. See Criminal Code of the Federation of Bosnia and Herzegovina (2003), and Criminal Procedure Code of the Federation of Bosnia and Herzegovina (2003), available at: [legislationline.org/documents/section/criminal-codes/country/40](http://legislationline.org/documents/section/criminal-codes/country/40).
1899. See High Representative Decision on Law Establishing the State Court of Bosnia and Herzegovina No. 50/00, *Official Gazette of Bosnia and Herzegovina*, November 29, 2000; and High Representative Decision Enacting the Law on Amendments to the Law on Court of Bosnia and Herzegovina No. 13/02, *Official Gazette of Bosnia and Herzegovina*, August 29, 2002, available at the OHR website: [ohr.int/?page\\_id=68243](http://ohr.int/?page_id=68243); and Law on the Prosecutor’s Office of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, and 61/04, available at: [advokat-prnjavorac.com/legislation/Law-on-The-Prosecutors-Office-of-BH.pdf](http://advokat-prnjavorac.com/legislation/Law-on-The-Prosecutors-Office-of-BH.pdf).
1900. Olga Martin-Ortega, “Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina,” *Int’l Crim. L. Rev.* 12 (2012): 590.
1901. Human Rights Watch, *Justice for Atrocity Crimes*. See the Court of Bosnia and Herzegovina, Judges, available at: [sudbih.gov.ba/sudija/svi/1](http://sudbih.gov.ba/sudija/svi/1).
1902. See OSCE Mission to BiH, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina*, December 2004.

1903. Criminal Code of BiH, Articles 171–83.
1904. Ibid., Article 180.
1905. European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment, July 18, 2013, available at: [hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716#{\"itemid\":\[\"001-122716\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716#{\).
1906. Ibid., para. 55.
1907. Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, *Official Gazette of BiH* 61/04 (hereinafter: Law on the Transfer of Cases).
1908. Law on the Transfer of Cases, Article 2(1).
1909. Ibid., Article 2(2).
1910. Ibid., Article 2(6), as amended.
1911. Decision of the High Representative Enacting the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, January 24, 2003. The BiH parliament subsequently adopted the law on June 27, 2003, available at: [ohr.int/?p=65967](http://ohr.int/?p=65967).
1912. Law on Protection of Witnesses, Article 5.
1913. BiH CPC, Article 267.
1914. Law on Protection of Witnesses, Article 9.
1915. Ibid., Article 10.
1916. Ibid., Article 12.
1917. Ibid., Article 24.
1918. BiH CC, Article 240, as amended.
1919. BiH CPC, Article 264(1).
1920. Law on Protection of Witnesses, Article 8(1).
1921. Ibid., Article 8(2).
1922. Ibid., Article 3(1).
1923. Ibid., Article 4(1).
1924. Ibid., Article 7.
1925. The Association of Women Victims of War: Sarajevo, *Follow-up Report on the Implementation by Bosnia and Herzegovina’s of the Recommendations Issued by the Committee on the Elimination of Discrimination against Women in July 2013*, July 26, 2015; also see report of the UN Office of the High Commissioner for Human Rights, May 13, 2016, available at: [tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BIH/INT\\_CEDAW\\_FUL\\_BIH\\_23895\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BIH/INT_CEDAW_FUL_BIH_23895_E.pdf).
1926. The strategy was drawn up by a working group comprising representatives of the State Court, the HJPC, the Bosnian justice ministry, and representatives from the justice and finance ministries from the Federation and Republika Srpska. Ministry of Justice, *National Strategy for Processing of War Crimes Cases Adopted*, December 2008, available at: [mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US](http://mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US).
1927. Law on Witness Protection Program in Bosnia and Herzegovina, *Official Gazette of BiH*, No. 36/14.
1928. Ten cantonal courts in the Federation entity of Bosnia and Herzegovina, five district courts in the Republic of Srpska entity, and a district court in Brčko.

1929. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 30: “In practice the [State Court of BiH] is not a superior jurisdiction to the courts in the Federation of BiH and Republika Srpska, and its jurisprudence is not binding on the cantonal and district courts. The three systems have acted independently of one another and differ in important ways, particularly in terms of the applicable law.” The State Court uses the 2003 Criminal Code and Procedure; the entity courts apply the SFRY Criminal Code.
1930. This institutional gap means that district courts “have little incentive to even read the key decisions by the Court of BiH, let alone to use them as grounds for their own decisions.” Chehtman, “Developing Bosnia and Herzegovina’s Capacity,” 563–64; see also Human Rights Watch, *Justice for Atrocity Crimes*, 43.
1931. David Tolbert and Aleksandar Kontic, *Final Report of the ICLS Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina in 2009* (ICLS, December 2008), 29; See also OSCE, *Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices*, December 2009, 30–32. Dissenting opinions are placed in a sealed envelope in case the judgment is reviewed on appeal.
1932. See National Strategy for War Crimes Processing, adopted by the BiH Council of Ministers on December 29, 2008; in local language, *Državna Strategija za Rad na Predmetima Ratnih Zlocina*, available at: [oscebih.org/documents/osce\\_bih\\_doc\\_2010122314375593bos.pdf](http://oscebih.org/documents/osce_bih_doc_2010122314375593bos.pdf); and in English, [adh-geneva.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf); quoted in OSCE, *Delivering Justice in Bosnia and Herzegovina*, 25.
1933. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 25.
1934. *Ibid.*, 20.
1935. *Ibid.*, 21.
1936. “Bosnian War Crimes Case Strategy ‘Failing,’” *Balkan Insight*, January 29, 2016, <http://www.balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016>.
1937. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 20.
1938. *Ibid.*, 8.
1939. *Ibid.*, 34.
1940. The Criminal Division for the State Court contains Section I for War Crimes, Section II for Organized Crime, and Section III for General Crimes. The Appellate Division is similarly structured. See [sudbih.gov.ba/](http://sudbih.gov.ba/). Most WCC analyses do not fully situate their recommendations or discussion of the court in the broader context of these other chambers. An exception is a report by ICLS experts conducted on behalf of the court, which assessed the transition strategy of the State Court as a whole, focusing on the War Crimes Section and the Organized Crimes Section. See Tolbert and Kontic, *Final Report of the ICLS Experts*. Since national prosecutions of war crimes often exist alongside other specialized chambers for complex crimes, such analyses yield useful insights as to structure, design, and impact.
1941. Orentlicher, *That Someone Guilty Be Punished*, 124, noting that in 2009 three of the international judges at the WCC were previously ICTY prosecutors, and one international judge was previously a judge at the ICTY.
1942. Human Rights Watch, *Justice for Atrocity Crimes*, 11: “Given that many of the crimes during the war were committed along ethnic lines, the presence of international judges

and prosecutors has proven to be important to support the institution's actual and perceived impartiality." ICTJ notes that "the perceived or real flaws in the work of the [WCC] and the Prosecutor's Office may not reflect ethnic bias. The predominance of cases concerning crimes against Bosniaks mirrors the fact that Bosniaks constituted the majority of victims during the war." Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 34.

1943. Human Rights Watch, *Justice for Atrocity Crimes*, 1.
1944. Chehtman, "Developing Bosnia & Herzegovina's Capacity," 565.
1945. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 13.
1946. As discussed in this annex, these included the establishment of a National Strategy for War Crimes prosecutions, the compilation of war crimes database/registry for war crimes, and the implementation of stronger witness protection rules.
1947. See OSCE, *Delivering Justice in Bosnia and Herzegovina*; and EU Bosnia and Herzegovina Progress Report 2005-2016, available at: [ec.europa.eu/neighbourhood-enlargement/countries/package\\_en](http://ec.europa.eu/neighbourhood-enlargement/countries/package_en).
1948. Guidelines for the exit plan were contained in a 2006 agreement between the OHR and the Bosnian authorities, and overseen by a Transition Council, comprising WCC officials, state ministers, representatives of the High Judicial and Prosecutorial Council, and donor country representatives. The Registry's separate "Transition Strategy," was evaluated and amended after review by the International Criminal Law Services in late 2008. Tolbert and Kontic, *Final Report of the ICLS Experts*, 8. See Decision on Ratification of the Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption, of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex Thereto, *Official Gazette of Bosnia and Herzegovina*, International Agreements 3/07, April 11, 2007 ("Second Registry Agreement").
1949. Martin-Ortega, "Prosecuting War Crimes at Home," 595.
1950. Ibid., and Human Rights Watch, *Justice for Atrocity Crimes*, 32.
1951. Human Rights Watch, *Justice for Atrocity Crimes*, 34.
1952. Chehtman, "Developing Bosnia and Herzegovina's Capacity," 568; Human Rights Watch, *Justice for Atrocity Crimes*, 11 and 33.
1953. Human Rights Watch, *Justice for Atrocity Crimes*, 12.
1954. Ibid., 13.
1955. The Prosecutor's Office of Bosnia and Herzegovina, Department I (Special Department for War Crimes, available at: [tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e](http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e)).
1956. Human Rights Watch, *Justice for Atrocity Crimes*, 26: "This approach encourages prosecutors [to] look broadly at situations that occurred during the Bosnian war and then examine more narrowly events that took place within a situation to identify criminal acts and actors."
1957. Ibid., 25.

1958. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 89. For example, in 2008 the prosecutor distributed a pamphlet to local communities explaining the case selection criteria, which noted the number of victims by ethnic categories, but mistakenly omitted Bosnian Muslims as a category.
1959. National mapping exercises were conducted in 2008 and again in 2010. See Human Rights Watch, *Justice for Atrocity Crimes*, 27. To compare assessments carried out by national and international institutions, see HJPC, *Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies in BiH for Processing War Crimes Cases*, June 2006; and UNDP, *Solving War Crimes Cases in Bosnia and Herzegovina: Report on the Capacities of Courts and Prosecutor Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases*, 2008.
1960. Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze, and Gorana Zagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (FICHL, 2009).
1961. Plea bargaining at the WCC often has taken the form of "charge bargaining." OSCE, *Delivering Justice in Bosnia and Herzegovina*, 55: "The current practice in plea agreements would certainly benefit, in terms of transparency and clarity of the law, from an amendment to the current provisions." Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 14: "The trial proceedings have demonstrated uncertainty and the risk of inconsistency in application of the law and procedure in the use of plea agreements." Plea bargaining was used in two of the Rule 11bis cases handled by the WCC—*Mejakić et al.* and *Pasko Ljubčić*. Agreements in both cases were offered more than a year into the main trial. OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina: Reflections on Findings from Five Years of OSCE Monitoring*, January 2010, 22–24.
1962. Court of Bosnia and Herzegovina, Registry Office, available at: [sudbih.gov.ba/stranica/47/pregled](http://sudbih.gov.ba/stranica/47/pregled).
1963. Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, February 2006.
1964. Ibid.
1965. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 89.
1966. SIPA signed an MoU with the WCC Registry in March 2005 determining that, in the absence of sufficient resources for witness protection within SIPA, the Registry would be temporarily taking over the assistance mandate of SIPA. See Human Rights Watch, *Looking for Justice*.
1967. Ibid.
1968. Ibid.
1969. Amnesty International, *Bosnia and Herzegovina: Submission to the United Nations Committee Against Torture, 62nd Session, 6 November–6 December 2017*, 4n3, available at: [amnesty.org/download/Documents/EUR6372192017ENGLISH.PDF](http://amnesty.org/download/Documents/EUR6372192017ENGLISH.PDF).
1970. Human Rights Watch, *Justice for Atrocity Crimes*, 14–15.
1971. Human Rights Watch, *Looking for Justice*.
1972. Human Rights Watch, *Justice for Atrocity Crimes*, 15.
1973. "War Crime Verdicts Map," *Balkan Insight*, available at: [balkaninsight.com/en/page/war-crimes-verdict-map#content12\\_2710](http://balkaninsight.com/en/page/war-crimes-verdict-map#content12_2710).
1974. OSCE, *War Crimes Processing Project Fact Sheet* (May 8, 2013), available at: [osce.org/bih/106868](http://osce.org/bih/106868). According to the information contained in the fact sheet, as of March 2013,

it was anticipated that it would take a further three years to complete the more serious and complex trials, while all outstanding war crimes cases would be processed within 10 years. Also see BIRN, *Time for Truth: Review of the Work of the War Crimes Chamber of the Court of BiH 2005-2010* (Sarajevo, 2010), available at: [detektor.ba/en/birn-publications/](http://detektor.ba/en/birn-publications/).

1975. OSCE, *BiH War Crimes Case Map*, available at: [warcrimesmap.ba/](http://warcrimesmap.ba/). The database provides an overview of both first-instance and second-instance cases, and lists information on acquittal, conviction, and sentencing.
1976. ICTY, *Status of Transferred Cases*, available at: [icty.org/en/cases/transfer-of-cases/status-of-transferred-cases](http://icty.org/en/cases/transfer-of-cases/status-of-transferred-cases). Also see Tolbert and Kontic, *Final Report of the ICLS Experts*, 6. Rule 11bis of the ICTY Rules of Procedure and Evidence provided conditions for transfers. The ICTY retained the power to withdraw the cases from the national jurisdiction if the trial was not proceeding in a fair and diligent manner. Under an agreement with the ICTY, the OSCE was tasked with monitoring and reporting on trials, and submitted a total of 55 periodic case reports to the ICTY. The OSCE most frequently identified concerns in 10 areas: “The transfer and processing of Rule 11bis cases; custody; witness protection and support; transparency of proceedings; injured party compensation claims; plea bargaining; use of evidence from the ICTY; effectiveness of defence; clarity of judgments; and methodology of training and knowledge transfer.” OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, 12.
1977. Claire Garbett, “Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina,” *Hum. Rts. L. Rev.* 10 (2010): 567.
1978. OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges: An Analysis of Criminal Proceedings before the Courts of the Federation of Bosnia and Herzegovina*, 2004-2014, 5.
1979. See Amnesty International, *We Need Support, Not Pity: Last Chance for Justice for Bosnia’s Wartime Rape Survivors*, September 12, 2017, available at: [amnesty.org/en/documents/eur63/6679/2017/en/](http://amnesty.org/en/documents/eur63/6679/2017/en/).
1980. “Bosnian War Crimes Case Strategy ‘Failing,’” *Balkan Insight*, January 29, 2016, [balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016](http://balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016); and Marija Tausan, *Huge War Crimes Case Backlog Overwhelms Bosnia*, BIRN BiH, October 23, 2015, available at: [justice-report.com/en/articles/huge-war-crimes-case-backlog-overwhelms-bosnia](http://justice-report.com/en/articles/huge-war-crimes-case-backlog-overwhelms-bosnia).
1981. Orentlicher, *That Someone Guilty Be Punished*, 118. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 118.
1982. Human Rights Watch, *Justice for Atrocity Crimes*, 1.
1983. For an early report on public perception, see Prism Research, *Public Perception of the Work of the Court and Prosecutor’s Office of B&H*, Sarajevo, July 2008, available at: [prismresearch.ba](http://prismresearch.ba). In public opinion surveys conducted by OSCE in 2007, 2008, and 2009, a representative sample of BiH citizens had an alarmingly negative perception of the institutions carrying out war crimes prosecutions: “On average, nearly 60% of all respondents did not have any faith in the Court of BiH to try the war crimes and produce a fair and just result. The Serb respondents expressed particularly low confidence in the Court of BiH, with only 25% of respondents indicating they had ‘some trust’ in its impartiality. Respondents across all ethnic groups had slightly higher

- confidence in the entity courts, but the trends were still disappointingly low.” OSCE, *Delivering Justice in Bosnia and Herzegovina*, 90.
1984. In comparison to the confidence in the work of the ICTY (23.4 percent in 2013 and 27.3 percent in 2015), the Bosnian Courts scored higher. See United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2015, available at: [undp.org/content/dam/unct/bih/PDFs/Prism%20Research%20for%20UN%20RCO\\_Report.pdf](http://undp.org/content/dam/unct/bih/PDFs/Prism%20Research%20for%20UN%20RCO_Report.pdf).
  1985. United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2013, available at: [media.ba/sites/default/files/prism\\_research\\_for\\_un\\_rco\\_statistical\\_report\\_1.pdf](http://media.ba/sites/default/files/prism_research_for_un_rco_statistical_report_1.pdf).
  1986. Refik Hodzik, “Living the Legacy of Mass Atrocities,” *J. Int’l Crim. Just.* 8 (2010): 133.
  1987. United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2013.
  1988. Orentlicher, *That Someone Guilty Be Punished*, 40.
  1989. “Balkan War Crime Suspects Maintain Political Influence,” *Balkan Insight*, December 7, 2016, available at: [balkaninsight.com/en/article/balkan-war-crime-suspects-maintain-political-influence-12-02-2016](http://balkaninsight.com/en/article/balkan-war-crime-suspects-maintain-political-influence-12-02-2016); also see Orentlicher, *That Someone Guilty Be Punished*, 19.
  1990. Dzevad Mahmutovic and Vedad Gurda, “The Effects of War Crime Processing before Domestic Courts on the Reconciliation Process in Bosnia and Herzegovina,” *Soc. Persp.—J. Legal Theory & Prac.* 1 (2014): 28.
  1991. Janine Natalya Clark, “The State Court of Bosnia and Hercegovina: A Path to Reconciliation?” *Cont. Justice Review* 13 (October 15, 2010).
  1992. Nuhanovic Foundation, *War Reparations and Litigation: The Case of Bosnia*, 2014, available at: [http://www.nuhanovicfoundation.org/user/file/war\\_reparation\\_and\\_litigation\\_-\\_bosnia-report\\_version\\_5\\_march\\_2015.pdf](http://www.nuhanovicfoundation.org/user/file/war_reparation_and_litigation_-_bosnia-report_version_5_march_2015.pdf).
  1993. “Bosnia Rape Victims May Claim Compensation for First Time,” *The Guardian*, June 30, 2015, available at: [theguardian.com/world/2015/jun/30/bosnia-victims-compensation-landmark-ruling](http://theguardian.com/world/2015/jun/30/bosnia-victims-compensation-landmark-ruling).
  1994. See BiH Law on Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts of BiH, 61/04, 46/06, 53/06, 76/06 (“Law on Transfer”). The evidentiary alignment between the ICTY and national systems was not without complications, especially language/translation issues (ICTY evidence is in English or French). Further, the introduction of ICTY evidence has been hindered by the “lack of domestic experience in applying the doctrine of judicial notice,” including by other courts within Bosnia. While the WCC has usually recognized ICTY adjudicated facts, the entity courts rarely do, except for “notorious” facts such as the existence of armed conflict. A major project by international organizations facilitated the translation of English-language evidence from the ICTY to national courts in local languages in 2010–2011 (OSCE–ODIHR/ICTY/UNICRI). OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, 25–27.
  1995. See William W. Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina,” *Colum. J. Transnat’l L.* 46 (2008).
  1996. Chehtman, *Developing Bosnia and Herzegovina’s Capacity*, 565: “The perception was that the local traditions were regarded with contempt by international institutions,

and not properly understood. Put differently, the main problem with the new criminal procedure code was what has been termed the ‘blueprint’ approach to capacity development, that is, capacities were presented as coming from the outside and applied a set ‘fix’ to solve certain problems instead of trying to work within local rules.” As a counter, the Council of Europe hired local practitioners trained in the continental system to draft the commentaries for the criminal procedure code.

1997. Chehtman, *Developing Bosnia and Herzegovina’s Capacity*, 555.
1998. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 15.
1999. Ibid. For instance, it is controversial as to whether the SFRY Criminal Code foresees the application of command responsibility.
2000. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 31.
2001. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 62. Major areas of OSCE review at the entity level include inconsistent progress at the entity level, lack of cooperation with SIPA witness protection services, lack of investigative and prosecutorial resources and cooperation with the WCC, problems in applying IHL law, and equality-of arms issues.
2002. Martin-Ortega, “Prosecuting War Crimes at Home,” 625.
2003. See European Commission, *Bosnia and Herzegovina 2015 Report*, November 10, 2015; and European Commission, *Bosnia and Herzegovina 2016 Report*, November 9, 2016.
2004. Orentlicher, *That Someone Guilty Be Punished*, 123.
2005. Chehtman, *Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases*, 553.
2006. Orentlicher, *That Someone Guilty Be Punished*, 123.
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2008. See [hjpc.ba/edu/Template.aspx?cid=2370,1,1](http://hjpc.ba/edu/Template.aspx?cid=2370,1,1); and OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*.
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2144. International staff would be provided by donor countries and national staff would be seconded from the Department of Judicial Affairs.
2145. UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and Prosecutors*, February 15, 2000; UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, May 29, 2000. International judges appointed by the SRSG under 2000/6 were limited to Mitrovica District and had the authority to “select and take responsibility for new and pending” criminal cases. UNMIK/REG/2000/6, para. 1.2.
2146. Day, “No Exit without Judiciary,” 188.
2147. UNMIK Regulation 2000/64, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*, December 15, 2000, 15. The regulation was initially enacted for a 12-month period and was subsequently extended by UNMIK Regulations 2001/34 and 2002/20. The UNMIK “Administrative Department of Justice” could also request an international panel on its own accord.

2148. The regulation stipulated that a 64 Panel had to be in place before a trial started, which meant that the 64 Panels were “easily circumvented by bringing a case quickly in front of a local set of judges. According the regulation, a 64 Panel had to be in place before the trial started. Therefore, failure to provide notice to the parties, or abandonment of the case before an International Judge or Prosecutor was selected, would make it make it impossible to resurrect the possibility of a 64 Panel.” Day, “No Exit without Judiciary,” 185.
2149. UNMIK/REG/2001/2, Amending UNMIK Regulation No. 2000/6, as amended, on the Appointment and Removal From office of International Judges and International Prosecutors, January 12, 2001.
2150. See *Report of the Secretary-General of the United Nations Interim Administration Mission in Kosovo*, S/2008/692, November 24, 2008, para. 23; see also OSCE, *Kosovo’s War Crimes Trials*. EULEX officially began operations in December 2008 but was not fully operational until April 2009.
2151. See Day, “No Exit without Judiciary,” 185–87, noting that this was part of wider criticism levied against UNMIK in the administration of the legal system. See also, David Marshall and Shelley Inglis, “The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo,” *Harv. Hum Rts. J.* 16 (2003): 96, writing that “critical laws that introduced international judges and prosecutors and expanded domestic law were not adequately explained to local legal actors, and once promulgated, no attempt was made to engage the local population with the reasoning behind such decisions.”
2152. Dickinson, “The Relationship Between Hybrid Courts and International Courts,” 1063.
2153. OSCE, *Kosovo’s War Crimes Trials*, 9.
2154. The Supreme Court has sent some of the Regulation 64 Panels cases for retrial by panels composed of majority EULEX judges. OSCE, *Kosovo’s War Crimes Trials*, 22.
2155. UNMIK Regulation 2003/25, *Provisional Criminal Code of Kosovo*, July 6, 2003, available at: [unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003\\_25\\_CCintranet.pdf](http://unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003_25_CCintranet.pdf).
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2157. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 22.
2158. *Ibid.*, 29.
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2161. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 14.
2162. Andrew Hudson and Alexandra W. Taylor, “The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms,” *J. Int’l. Crim. J.* 8 (2010): 53, noting similar problems with ad hoc approaches to case selection and jurisdiction at other hybrid mechanisms.
2163. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 14.
2164. OSCE, *Kosovo’s War Crimes Trials*, 21. Also see quarterly reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo.

2165. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 18.
2166. Ibid., 21.
2167. Ibid., 24–25.
2168. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 17–22.
2169. See ICTY, *Outreach: 15 Years of Outreach at the ICTY*, 2016; and the ICTY website, Outreach Program, available at [icty.org/en/outreach/outreach-programme](http://icty.org/en/outreach/outreach-programme).
2170. OSCE, *Kosovo's War Crimes Trials*, 23. In the *Llapi* group case, the local judge on a majority, three-judge panel, was a civil judge with “no background in dealing with war crimes cases and thus did not possess the competence to sit on such a case.” While some war crimes training was provided, including study visits to the ICTY, OSCE noted that the larger failure was the lack of a “long-term intensive war crimes training strategy.” OSCE, *Kosovo's War Crimes Trials*, 24.
2171. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 19.
2172. Ibid., 22.
2173. OSCE (2012), p. 8.
2174. Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, 2012, 12.
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2176. OSCE, *Kosovo's War Crimes Trials*, 16.
2177. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*.
2178. Amnesty International, *UNMIK's Legacy: The Failure to Deliver Justice and Reparation to the Relatives of the Abducted*, 2013, 9.
2179. Ibid., 10.
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2181. OSCE, *Kosovo's War Crimes Trials*, 6.
2182. See Sylvia de Betodano, “Current Developments in Internationalized Courts,” *J. Int'l Crim. Just.* 1 (2003).
2183. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 32.
2184. Higonnet, “Restructuring Hybrid Courts,” 383–84.
2185. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 28.
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  2191. See *Letter dated Oct. 7, 2005, from the Secretary-General addressed to the President of the Security Council*, S/2005/635, appending “A Comprehensive Review of the Situation in Kosovo,” paras. 35, 40.
  2192. Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, 15.
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# ANNEX 5: MECHANISMS IN THE MIDDLE EAST

## IRAQ: IRAQ HIGH TRIBUNAL

### Conflict Background and Political Context

Iraq emerged from the Ottoman Empire with a British-installed monarchy that in 1921 secured minority Sunni Arab rule in a country with a Shia majority, a large Sunni Kurdish minority, and a multitude of smaller ethnic, religious, and linguistic minorities.<sup>2573</sup> A military coup in 1958 ultimately resulted in rule by the Pan-Arabist Ba'ath Party in 1968. The powerful vice president of the new government, Saddam Hussein, became president in 1979. Hussein tolerated no dissent in an increasingly totalitarian state and further narrowed control of the regime to trusted family and friends from his home village of Tikrit.

Iraq invaded Iran in 1980, resulting in a disastrous war of attrition that only ended eight years later, after the United States threw its support to Hussein and Iran assented to a ceasefire agreement.<sup>2574</sup> Hussein had used chemical weapons against Iranian forces, and in the “Anfal Campaign” of 1988, he had turned them against the restive Kurdish population of northern Iraq. The genocidal campaign resulted in the deaths of an estimated 50,000–100,000 Kurds.<sup>2575</sup>

Despite the Anfal Campaign and continued severe repression of the majority Shia population and minority groups, Saddam Hussein maintained Western support until Iraqi forces invaded and annexed Kuwait in August 1990. The United Nations Security Council passed a series of resolutions demanding Iraq's withdrawal from Kuwait, and the United States formed a large international coalition to evict Iraqi forces.<sup>2576</sup> By the end of February 1991, the coalition had driven Iraqi forces out of Kuwait, but the First Gulf War left Hussein in power.

Hussein retaliated with brutality against southern Shias who had risen up against him—partly in response to U.S. instigation—during the First Gulf War. Kurds were partially protected from the regime's reprisals through the imposition of a no-fly zone in the north. Western states ensured that sanctions against Iraq remained in place throughout the 1990s, punctuated by periodic U.S.-led military strikes against Iraqi forces meant to enforce Iraqi cooperation with UN weapons inspectors.<sup>2577</sup>

Following the September 11, 2001, terrorist attacks on the United States, the U.S. and U.K. governments began to make claims of Iraqi involvement in the attacks. The two governments manipulated intelligence information to support this false claim, as well as false claims that Saddam Hussein maintained significant stockpiles of chemical and biological weapons of mass destruction.<sup>2578</sup>

In March 2003, the United States and United Kingdom led an invasion of Iraq without explicit prior authorization from the UN Security Council. The Second Gulf War had declared their aims to “disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”<sup>2579</sup> Many international law experts viewed the invasion as illegal.<sup>2580</sup>

Baghdad fell in April 2003, and a U.S.-dominated provisional administration took formal control of the country. The Coalition Provisional Authority (CPA), led by a U.S. ambassador, struggled to administrate a country it was ill equipped to govern.<sup>2581</sup> The CPA and the CPA-appointed Iraqi Governing Council (IGC) launched a disastrous “de-Ba’athification” process that fed a growing Sunni Arab insurgency.<sup>2582</sup> Sectarian violence mounted. In 2004, emerging evidence that U.S. forces tortured, sexually abused, and committed other grave violations against Iraqi prisoners held in the Abu Ghraib prison outside Baghdad further undermined the legitimacy of the U.S. presence.<sup>2583</sup> In this context, the Iraqi High Tribunal (IHT), created by the CPA and IGC in December 2003, faced immense questions of legitimacy from the start.

## **Existing Justice-Sector Capacity**

Under Saddam Hussein, Iraq’s legal framework was inadequate and outdated, lacking in transparency and accountability provisions as well as human rights. The judiciary lacked independence,<sup>2584</sup> although the Hussein regime often relied on parallel court structures—including the Revolutionary Court, the Ministry of Interior Court, and military courts—to target its opponents rather than the ordinary courts falling under the Ministry of Justice.<sup>2585</sup> Hussein manipulated and corrupted the judicial system to serve political goals and marginalized key legal actors such as prosecutors and public defenders. Many vulnerable groups lacked access to justice.<sup>2586</sup> The use of confessions obtained through torture further compromised the system.<sup>2587</sup> Due to the large number of parallel courts, Iraq had relatively few jurists within the normal justice system. While many judges and prosecutors within the normal judicial system were not Ba’ath Party members, the process of de-Ba’athification further depleted the ranks of the normal justice system, leaving an

insufficient number of jurists to handle the new volume of post-transition cases.<sup>2588</sup> There was also significant damage to infrastructure—approximately 75 percent of the courts in Iraq were destroyed during the war, including 90 percent of the courts in Baghdad. Most had been left as burned-out shells devoid of even electrical lines or water pipes, including the Ministry of Justice building in Baghdad.<sup>2589</sup> Court records and files likewise were destroyed.

Early on, the CPA focused on transferring justice matters to the Iraqi Ministry of Justice, including the supervision over prisons in order to prevent abuses. By 2004, the CPA had vetted judges, dismissing those thought to be corrupt or guilty of human rights abuses and reappointing others who had been dismissed by Hussein.<sup>2590</sup> Primarily, efforts to rebuild the national judiciary were spearheaded through re-establishing the Council of Judges. The council is structurally separated from the ministry and given authority over court budgets, personnel, security, and property.<sup>2591</sup> The council then evolved into the Higher Judicial Council pursuant to Article 45 of the Transitional Administrative Law (TAL) and CPA Order 100, section 3(13). The CPA also established the Central Criminal Court of Iraq in 2004 with nationwide jurisdiction and a mandate to concentrate on the more serious crimes that other courts were often reluctant to deal with, including terrorism and organized crime.<sup>2592</sup> One of the challenges the CPA faced in taking these early steps was the weakness of the investigative agencies and intimidation, especially targeted at judges.<sup>2593</sup>

The current constitution was approved by a referendum that took place on October 15, 2005. Members of the Iraqi Constitution Drafting Committee drafted a constitution to replace the TAL.<sup>2594</sup> The constitution provided for the Higher Judicial Council, which manages and supervises the affairs of the federal judiciary. It oversees the affairs of the various judicial committees; nominates the chief justice and members of the Court of Cassation, the chief public prosecutor, and the chief justice of the Judiciary Oversight Commission; and drafts the budget of the judiciary.<sup>2595</sup> Article 90 of the constitution provides for the Iraqi Supreme Court, an independent judicial body that interprets the constitution and determines the constitutionality of laws and regulations. It acts as a final court of appeals.<sup>2596</sup> Despite the constitutional protection for human rights and freedoms, Iraqi activists and human rights organizations have repeatedly expressed concern about several violations by the government including unfair trials, arbitrary detention, and torture.<sup>2597</sup>

Several trainings for IHT judges and prosecutors were conducted between 2004 and 2006 by the United States Institute of Peace, the International Bar Association, the Institute for International Criminal Investigations, the Department of Justice/U.K.

Foreign Office, the International Institute for Higher Studies in Criminal Science, the Global Justice Center, and the International Human Rights Law Institute. Many institutions and individuals involved in such trainings opposed the IHT's provision for the death penalty, even though there was broad support for this in Iraqi society. Some of the internationals involved in training drew a distinction between training and institutional support; for them, training did not constitute an endorsement of the IHT as an institution, but provided an opening to improve fair trial standards and international human rights norms, including with regard to the death penalty.<sup>2598</sup>

## **Existing Civil Society Capacity**

Hussein's regime repressed civil society. It brought civil society groups under control through intimidation and by rewarding loyal organizations. It created new organizations under the umbrella of the Ba'ath Party and repressed organizations that failed to support the regime.<sup>2599</sup> Throughout this era, nearly every civic institution that existed was affiliated with the Ba'ath Party.<sup>2600</sup>

Iraqi civic space witnessed major opening after the fall of Hussein's regime, and thousands of organizations were established and registered under the CPA's authority.<sup>2601</sup> However, many civil society actors lacked knowledge and skills in human rights, community development, outreach services, and other areas.<sup>2602</sup> Most early organizations were dedicated to humanitarian and relief efforts, but they have since begun to focus on human rights and democratic development, including elections and constitutional reform.<sup>2603</sup>

Civil society also struggled to maintain independence from political actors and many therefore lack credibility and legitimacy. Since 2003, many political parties created local NGOs that align with or promote their agendas. Only a small fraction of NGOs are considered to be impartial, non-religious, or non-political.<sup>2604</sup> Many Iraqis perceive new NGOs to be Western-funded and a reminder of subjugation.<sup>2605</sup> NGOs and civil society organizations still face many obstacles in Iraq, including bureaucratic delays in registering, threats from ISIS and terrorist groups, and limits on their activities.<sup>2606</sup>

## **Creation**

The creation of the Iraqi High Tribunal, sometimes called the Iraqi Special Tribunal,<sup>2607</sup> was intertwined with the American-led invasion of Iraq in March 2003.

Beginning in 1991, the United States, the United Nations, and the Arab League had discussed inchoate proposals to prosecute senior members of the Saddam Hussein's Ba'athist regime in Iraq.<sup>2608</sup> In the wake of the 2003 invasion of Iraq, the Bush administration, Iraqi exiles, the UN, and international NGOs considered various prosecutorial mechanisms, including an ad hoc international tribunal and a mixed/hybrid tribunal similar to the Special Court for Sierra Leone. These suggestions, though favored by a coalition of international NGOs, were rejected by the U.S. administration. A post-invasion draft plan to prosecute higher-level perpetrators at the IHT, while sending lower-level perpetrators to ordinary national courts, was rendered untenable by the disarray of Iraq's judicial institutions and the country's descent into violent chaos between 2004 and 2006.<sup>2609</sup>

In December 2003, the CPA delegated authority to the Iraqi Governing Council to establish the IHT; the CPA order included the IHT Statute and set out four conditions for the IGC to observe in creating the court:<sup>2610</sup>

1. The IGC would establish elements of the crimes under IHT jurisdiction consistent with international law and Iraqi law (as amended by the CPA);
2. The IGC should ensure that the IHT operate in conformity with international standards;
3. CPA rulings would prevail over any conflicting IGC or IHT ruling or judgment prior to the transfer of sovereignty to Iraqi authorities; and
4. The IHT must allow for the appointment of foreign judges.<sup>2611</sup>

The IGC ordered establishment of the IHT by decree on December 10, 2003.<sup>2612</sup> U.S. forces captured Saddam Hussein three days later.

Following the transfer of sovereignty to Iraqi authorities in 2005, the Iraqi Transitional National Assembly passed an amended statute establishing the IHT into law in October 2005.<sup>2613</sup> The IHT was created with the aim of "bringing personal accountability to those Ba'athists who were responsible for depriving Iraqis of their human rights."<sup>2614</sup> Iraq adopted a new constitution in 2005 that makes explicit mention of the IHT.<sup>2615</sup> One day following the IHT's formal creation in October 2005, the *Dujail* trial began. (See the *Prosecutions* section, below.) The IHT operated until its dissolution in 2011–2012.<sup>2616</sup>

## Legal Framework and Mandate

The CPA order and subsequent Iraqi legislation granted the IHT jurisdiction over genocide, crimes against humanity, war crimes, and other crimes under Iraqi law committed between July 17, 1968, and May 2003 (the period of rule by Saddam Hussein).<sup>2617</sup> The IHT has personal jurisdiction over Iraqi citizens for crimes committed inside or outside of Iraq.<sup>2618</sup> The tribunal has primacy over other Iraqi courts for the serious crimes within its jurisdiction.

The initial statute was poorly drafted, and the structure of the IHT contained many features alien to Iraqi law and contrary to international human rights norms. American drafters failed to incorporate civil law elements of the Iraqi legal system, such as the differing roles of investigative judges and prosecutors in the evidence-gathering stage and at the trial stage.<sup>2619</sup> The 2005 law, in contrast to the previous CPA order, instructed the tribunal to follow the 1971 Iraqi Code of Criminal Procedure. The CPA, prior to the establishment of the IHT, had issued Order No. 7 to amend the Iraqi Criminal Code in order to bring it in conformity with international law.<sup>2620</sup> The IHT promulgated separate Rules of Procedure and Evidence, but conducted its first trial mainly within the general Iraqi legal framework.<sup>2621</sup> Some observers noted the inadequacy of the national criminal procedure laws for prosecution of complex serious crimes cases,<sup>2622</sup> while other observers argued that Iraq's legal system does not recognize court-fashioned rules, and instead, praised the use of the national rules.<sup>2623</sup>

The substantive provisions of the IHT statute on international crimes, genocide (Article 11), crimes against humanity (Article 12), and war crimes (Article 13), were modeled on the Rome Statute. Article 14 of the statute presented a number of violations that preexisted under Iraqi law, such as “the wastage and squandering of national resources, pursuant to Article 2(g) of the Punishment of Conspirators against Public Safety and Corrupters of the System of Governance Law 7 of 1958.”

## Location

The IHT was based in the capital, Baghdad. Although it never happened, the statute provided that upon the recommendation of the IHT president, the tribunal could also sit “in any other Governorate in Iraq as determined by the Governing Council or the Successor Government.”<sup>2624</sup>

## Structure and Composition

Iraqis staffed the IHT, assisted by some internationals, almost all of whom were Americans. The IHT president (not a sitting judge) was originally Salem Chalabi, a prominent Iraqi exile, appointed by the United States. His appointment was controversial and furthered skepticism about the IHT's genuine political independence.<sup>2625</sup>

The IHT comprised three Trial Chambers and a Cassation (Appeals) Chamber, with appeals regulated by the Rules of Procedure and Evidence.<sup>2626</sup> The staff was entirely Iraqi, although the IHT statute allowed for the appointment of foreign judges, investigative judges, and prosecutors.<sup>2627</sup> The statute required the appointment of foreign nationals "to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber."<sup>2628</sup>

The IHT's Defense Office provided funding for defense counsel, and an international defense adviser was appointed in the midst of the *Dujail* trial. For security reasons, the identities of the judges were not disclosed.

Despite intense national and global interest, the IHT conducted almost no outreach or public relations apart from televising partial proceedings of the Saddam Hussein trial.

Direct staff assistance by internationals was almost exclusively provided by Americans. The U.S. Regime Crimes Liaison Office (RCLO), staffed by prosecutors and investigators from the U.S. Department of Justice, "assumed the responsibility for setting a prosecutorial strategy, training the judges and prosecutors, providing resources and personnel for investigations, evidence gathering, and establishing the IHT's infrastructure."<sup>2629</sup> Very little other foreign assistance existed. One international expert assisted the defense, and a British expert assisted the judges of the Trial Chamber. Gradually, American involvement lessened and Iraqi ownership of the tribunal increased. While observers generally considered the American assistance to be professional and sound, "the role of the RCLO had a chilling effect both on the Iraqi desire to seek other external advice, and on the willingness of other international experts to participate."<sup>2630</sup> U.S. assistance dropped dramatically following the execution of Saddam Hussein in December 2006; by 2008, only four American legal advisors remained.<sup>2631</sup> In addition, the application of the death penalty by the IHT meant that many European Union member states and most international NGOs were unwilling to offer technical assistance.

## Prosecutions

*Dujail Trial:* The IHT held its first trial (known as the *Dujail* trial) against Saddam Hussein and eight co-accused for crimes against humanity committed in the town of Dujail between 1982 and 1984. Several senior defendants were accused of crimes against humanity and executed in early 2007,<sup>2632</sup> and several lesser defendants were accused of aiding and abetting crimes against humanity (two were convicted).<sup>2633</sup> The trial began on October 19, 2005. On November 2006, the Trial Chamber released its judgment, and the Cassation Chamber issued its judgment on December 2006. Saddam Hussein was executed on December 30, 2006, in a hanging that drew widespread international condemnation.<sup>2634</sup> Serious evidentiary gaps led to criticisms of the Trial Chamber's factual findings, and of lack of serious appellate review, including failure to present evidence fully meeting the evidentiary standard of proof and *mens rea*. For the lesser defendants, almost no evidence was presented to establish their level of knowledge, but rather, knowledge was assumed through their status as Ba'ath party members, not proven through actual or constructive knowledge. The standards of proof required for the taking of such overbroad judicial notice were not articulated. In addition, the filings and investigations of the prosecution and the investigative judges did not illuminate the patterns and schemes of repression during the long Ba'athist regime—a major disappointment to victims and advocates.<sup>2635</sup>

*Anfal Trial:* A second trial, this one against Saddam Hussein, Ali Hassan al-Majid, and five other codefendants, began on August 21, 2006. (After the execution of Saddam on December 30, 2006, his case was withdrawn from the trial.) The defendants were charged with genocide, crimes against humanity, and war crimes, in reference to the planning and executing a series of attacks in 1988 against Kurds in northern Iraq, using chemical weapons and killing up to 182,000 civilians.<sup>2636</sup> On June 24, 2007, in a 963-page judgment, the IHT delivered a guilty verdict against five defendants and dismissed charges against one defendant.<sup>2637</sup> The Cassation Chamber affirmed the verdict on September 4, 2007, in a decision criticized for a lack of “serious legal review” and a mere 30-day appellate review period—inadequate given the complexity of the case and charges.<sup>2638</sup>

*Subsequent Trials:* Little has been written about the IHT's subsequent atrocity crimes prosecutions. A third case (known as the *Merchants Case*), based on charges stemming from the 1992 executions of 42 merchants by the Ba'athist regime, began in November 2008 and resulted in guilty verdicts on March 11, 2009, for eight codefendants.<sup>2639</sup> The trial was described as “politically significant” because

the victims were Sunni, and the tribunal hoped it would help to counter Sunni perceptions that the IHT is a tool of Shia and Kurdish vengeance.<sup>2640</sup> At the time of the tribunal's dissolution in July 2011, there had been a total of 175 convictions and 133 acquittals.<sup>2641</sup> Cases involving other states, in particular Kuwait and Iran, were never heard.<sup>2642</sup>

## Legacy

The IHT's lack of legitimacy and procedural shortcomings have limited the possibility for it to leave a positive legacy in Iraq. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions cited "glaring flaws" in the trial of Saddam Hussain, noting that the legal rights of the defendants had been "impeded."<sup>2643</sup> The Human Rights Council's working group on arbitrary detention concluded that the trial failed to meet the basic fair trial standards.<sup>2644</sup> International human rights organizations came to similar conclusions. Human Rights Watch cited numerous problems in the *Dujail* trial, including with regard to the IHT's independence and impartiality, its protection of defense rights, and "evidentiary gaps" that impeded "the accuracy of many of the trial judgment's factual findings, in particular concerning the knowledge and intent of the defendants."<sup>2645</sup> Amnesty International raised similar concerns about the IHT's flaws and failures in the course of the *Dujail* trial.<sup>2646</sup>

Extensive trainings in matters of international criminal law and legal procedure surely enhanced the capacity of some Iraqi judges, prosecutors, and other officials. Interaction with (mostly American) lawyers in the Regime Crimes Liaison Office surely also added value. However, without adequate safeguards to ensure the protection of basic fair trial and other international standards, it is doubtful that the IHT made a substantial positive contribution to rule-of-law development in Iraq. As Human Rights Watch noted, "The hope that the [*Dujail*] trial might have served as a model of impartial justice for a 'new era' Iraq, by upholding international human rights law and enforcing international criminal law, remains unfulfilled."<sup>2647</sup>

Furthermore, the IHT appears to have contributed to divisions in Iraqi society. The tribunal lacked legitimacy with broad swathes of the population. Not only was it created by an occupying power despised by many Iraqis, but it lacked autonomy from the U.S. government and Iraq's then Shia-dominated government. For many Sunnis watching the swift trial and execution of Saddam Hussein, which was accompanied by executioners chanting pro-Shia militia slogans,<sup>2648</sup> proceedings at

the IHT looked more like another front in mounting sectarian warfare rather than any kind of new exercise in impartial justice.<sup>2649</sup> Many Kurds looking forward to the IHT pronouncing a verdict on Saddam Hussein's responsibility for the Anfal massacres had their hopes for justice and redress dashed by Hussein's execution prior to the end of the trial, following his conviction in the *Dujail* trial.<sup>2650</sup> To the extent that the IHT was introducing new concepts into Iraqi law, poor public communications and an absence of outreach inhibited its ability to make these understood by the broader population.

## **Financing**

Shortly after its establishment, CPA Administrator Paul Bremer announced that the United States would contribute \$75 million to the IHT.<sup>2651</sup> By July 2007, the annual U.S. contribution specifically to support trials for international crimes had climbed to \$128 million, with significant additional funds in support of such related expenses as judicial security and facilities, a witness protection program, and detention facility infrastructure.<sup>2652</sup> Other estimates put the annual budget of the tribunal—whose establishing statute provides that its funding and costs will be borne by the Iraqi state budget—at \$138 million.<sup>2653</sup>

The funding was meant to support—among other things—the work of the Regime Crimes Liaison Office, whose staff played a leading role in supporting tribunal investigations and operations; the provision of security to both court personnel and defense lawyers; the exhumation of mass graves; upgrading facilities for storing and handling evidence; the building of courtrooms; the conduct of investigations, including interrogations; and the training of staff.<sup>2654</sup>

## **Oversight and Accountability**

The IHT's Rules of Procedure and Evidence included principles for judicial independence and impartiality.<sup>2655</sup> However, in practice, the appointment process for IHT judges and prosecutors created at least the appearance of political influence.

The CPA made the initial appointments and issued procedures for the IHT, leading to criticism that the IHT lacked independence from American administrators. Even after the transfer to Iraqi authorities in 2005, however, appointment procedures were highly problematic and jeopardized the IHT's independence. Judges and prosecutors

were nominated by the Supreme Juridical Council and approved by the Council of Ministers (up to 20 tribunal investigating judges could be appointed under the statute). The Council of Ministers (a political body) was empowered under the IHT statute to transfer judges to another court for any reason.<sup>2656</sup> In addition, as part of a national de-Ba'athification process, no member of the staff (including judges) could have been a member of the Ba'ath party. Officials involved in the de-Ba'athification process wielded it as a political weapon against IHT judges, who were removed or threatened with removal. An internal de-Ba'athification committee for the IHT was created in 2006, in an attempt to prevent further political intimidation of the judges, but instead "consolidated a new power elite inside the Tribunal."<sup>2657</sup> The tribunal suffered from high turnover rates among judges, even within single trials; only one original judge from the *Dujail* Trial Chamber was present at the final hearing, after six substitutions and three changes of presiding judge.

The Iraqi government also held sway over the judiciary in other ways. Amid ongoing violence in Baghdad, the Iraqi prime minister controlled funds for protection allowances and travel to the fortified International Zone, a crucial measure for a tribunal in which at least five staff members and three defense lawyers were killed during the first trial.

Informal means of oversight were limited at the IHT. The International Center for Transitional Justice and Human Rights Watch were the only public organizations permitted to formally observe the *Dujail* trial throughout. While NGO and media attention to the tribunal shed light on its many shortcomings, this attention all but disappeared following Saddam Hussein's execution. According to some observers, the near-complete withdrawal of the media together with the pullout of U.S. advisors following Saddam's execution may have fueled greater dysfunction in subsequent proceedings.<sup>2658</sup> There were reports of greater political interference, not only from the Iraqi government but also from the U.S. side. For example, the United States, which at the time was courting Sunni allies for the fight against Al-Qaeda, reportedly pressured the Iraqi Presidential Council to stop the execution of three Sunni defendants convicted in the *Anfal* trial.<sup>2659</sup>

## LEBANON: SPECIAL TRIBUNAL FOR LEBANON

### Conflict Background and Political Context

On February 14, 2005, an explosion in downtown Beirut killed 22 people: former Prime Minister Rafik Bahaa-Edine Hariri, nine members of his convoy, and 13 civilians who were nearby. An additional 226 people were injured. Hariri's assassination took place "in a political and security context marked by acute polarization around the Syrian influence in Lebanon and the failure of the Lebanese State to provide adequate protection for its citizens."<sup>2660</sup>

At least in part due to its location, bordering both Syria and Israel, Lebanon has repeatedly served as a battleground for the parties to the Arab-Israeli conflict.<sup>2661</sup> The political history of Lebanon includes a tragic, protracted civil war (1975-1990), Syrian military presence (1976-2005), and significant Syrian influence over Lebanese affairs.<sup>2662</sup> Following the withdrawal of Israeli forces from Lebanon in 2000 (which coincided with Hariri's 2000-2004 term as prime minister), some political figures began to call for the reduction of the Syrian presence in Lebanon. This led to conflict between Hariri and Lebanese President Émile Lahoud.<sup>2663</sup> This division culminated in a dispute over the amendment of the presidential constitutional term—which for Lahoud was due to expire in 2004.

A string of political assassinations and bombings occurred in 2004 and 2005, including Hariri's February 2005 assassination. A network of Syrian agents and intelligence agencies, deeply linked to Lebanese politics, was widely suspected to be behind the assassinations. Following the assassinations, international pressure mounted on Syria to withdraw its troops from Lebanon, following a 29-year presence there; the last Syrian troops left the country in April 2005.<sup>2664</sup>

Lebanese politics are driven by sectarianism, nationalism, and Syria's involvement. The increasing electoral domination of the Syrian-backed political wing of Hezbollah means a strong reluctance, and at times resistance, to adequately investigate political crimes, including the assassination and attempted assassination of politicians in 2004 and 2005. Political divisions deepened in 2011, a year of political paralysis in Lebanon. In January, the coalition government, led by Prime Minister Saad Hariri (son of the assassinated prime minister), collapsed. Najib Mikati replaced Saad Hariri as prime minister, raising fears of a deal with Hezbollah political leaders to end cooperation with the Special Tribunal for Lebanon (STL)

in order to preserve a fragile minority government coalition.<sup>2665</sup> Lebanon lacked a stable government until June 2011, when the political wing of Hezbollah formed a majority government, again led by Najib Mikati.<sup>2666</sup> The Hezbollah political wing maintains deep ties with Syria and strongly opposes the STL. Over the course of 2012, the escalating anti-government revolt in Syria placed increasing pressure on Hezbollah's ties to Syria.

After the STL announced four indictments of Hezbollah members in June 2011, leading Hezbollah politicians stated that the country would not contribute its required assessment to the court. They eventually relented in November 2011, but Hezbollah political leaders have vowed that the suspects in the Hariri case would not be arrested and handed over to the STL.

### **Existing Justice-Sector Capacity**

Lebanon's justice sector suffered greatly from the 1975–1990 civil war, and in a 2005 assessment, the World Bank observed that the sector had yet to recover.<sup>2667</sup> The judiciary is prone to political influence, there is a lack of technical capacity in multiple areas, and the Lebanese public seems to lack confidence in the sector. An assessment by the UN Development Programme in 2016 noted these and additional problems, including inadequate resources for the national judiciary and prosecutors, and inadequate protection for fair trial rights.<sup>2668</sup>

A UN fact-finding mission to Lebanon following the Hariri assassination referenced many of these same problems with regard to the domestic investigation into the assassination: the justice system exhibited a lack of coordination, professionalism, technical skill, and requisite equipment.<sup>2669</sup> The mission concluded that “the local investigation has neither the capacity nor the commitment to succeed. It also lacks the confidence of the population necessary for its results to be accepted.”<sup>2670</sup>

### **Existing Civil Society Capacity**

Civil society in Lebanon must navigate religious and sectarian division, while operating in a difficult security environment.<sup>2671</sup> Nongovernmental organizations also struggle to influence policymaking in part because of the opacity of Lebanon's Byzantine political structures.<sup>2672</sup> Following the 2005 Syrian withdrawal, there was a surge in the number of registered NGOs, making Lebanon one of the more vibrant countries for civil society in the region.<sup>2673</sup> Nevertheless, despite engagement with

the court through meetings and outreach events, civil society organizations have had a limited role in commenting on STL matters in Lebanese media, and their involvement in transitional justice issues has been largely donor-driven.<sup>2674</sup>

## **Creation**

In April 2005, following a request by the Lebanese government and discussions with the UN Secretary-General, the Security Council established the UN International Independent Investigation Commission (UNIIIC). The Security Council mandated it “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices.”<sup>2675</sup> The commission was preceded by a brief one-month UN fact-finding mission dispatched by the Secretary-General.<sup>2676</sup>

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## **The UN International Independent Investigation Commission (2005–2009)**

The Security Council created UNIIIC to assist Lebanese authorities in investigating the Hariri assassination, and extended and expanded its mandate several times. UNIIIC was a hybrid investigative mechanism: international in mandate and composition but integrated with national authorities. Its backers viewed it as a necessary bulwark against political interference into investigations and a means to ensure cooperation from neighboring states.

Unlike other investigative commissions, which were seen as distinct precursors to prosecution mechanisms—for example, in the former Yugoslavia and Rwanda— UNIIIC effectively became the investigative component of the subsequently created STL’s Office of the Prosecutor. It operated while negotiations were underway for the STL’s creation, and when its mandate expired in February 2009, the commissioner, Daniel Bellemare, was named the first STL prosecutor.<sup>2677</sup> UNIIIC was based in Lebanon (except for a temporary relocation to Cyprus for several months in 2006) and increased operations in The Hague in the run-up to the handover of its files to the STL.

UNIIIC played a critical role in collecting evidence, including conducting a full-scale examination of the crime scene. UNIIIC investigated a multinational and powerful network, based in Syria, which had carried out a string of political assassinations in Lebanon, including allegedly that of Prime Minister Rafik Hariri.<sup>2678</sup>

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As killings and bombings continued even after the December 2005 creation of UNIIIC, the government of Lebanon expressed its desire to the UN “to establish a tribunal of an international character.”<sup>2679</sup> The Security Council tasked the Secretary-General with exploring options, and in March 2006, it requested that he consult with the Lebanese government on the creation of a tribunal.<sup>2680</sup> Eight months later, the Secretary-General issued a report to the Security Council that outlined the design of what would become the STL.<sup>2681</sup> The Security Council and government of Lebanon signed an agreement to create the STL in January and February 2007.<sup>2682</sup> However, after a four-month deadlock in the Lebanese Parliament prevented the agreement’s ratification, a majority of the parliament’s members wrote to the Secretary-General to request that the Security Council use its Chapter VII authority to create the tribunal.<sup>2683</sup> The Security Council did so in May 2007.<sup>2684</sup> The STL commenced operations in March 2009 with an initial three-year mandate, which the Secretary-General extended for a further three years in 2012<sup>2685</sup> and again in 2015.<sup>2686</sup>

## Legal Framework and Mandate

The STL’s mandate is to prosecute Hariri’s assassination and any other connected criminal acts in Lebanon between October 1, 2004, and December 12, 2005, of similar nature and gravity; investigation of later acts is also possible if agreed upon by the UN and Lebanon, with Security Council consent.<sup>2687</sup> It has primary and concurrent jurisdiction over Lebanese national courts.<sup>2688</sup> The STL has asserted its primary jurisdiction through communications from the Pre-Trial Chamber to the Lebanese prosecutors, ordering them to defer proceedings to the tribunal.<sup>2689</sup>

The applicable law at the STL is the Lebanese Criminal Code.<sup>2690</sup> An Appeals Chamber ruling stated that the STL is bound to follow domestic law “unless unreasonable ... or not consonant with international principles and rules binding on Lebanon.”<sup>2691</sup> In practice, this means the STL “read[s] Lebanese law in the context of ‘international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.’”<sup>2692</sup> The interplay between Lebanese and international law at the STL (in essence, an international tribunal applying domestic law) causes some legal confusion. Additionally, legal scholars and observers note that the STL’s jurisdictional structure reflects the steady “internationalization” of law; and that through due process norms and concepts, it is “embedding international standards in a domestic jurisdiction.”<sup>2693</sup>

The STL Appeals Chamber made a landmark jurisprudential contribution toward defining the crime of terrorism under international law, marking “the first time that an international tribunal has authoritatively confirmed a general definition of terrorism under international law.”<sup>2694</sup> While emerging international norms may prohibit granting immunity to heads of state for atrocity crimes, the norm against sovereign immunity for terrorism is not considered to be crystallized.<sup>2695</sup>

The STL Statute outlines modes of responsibility recognized in Lebanese law and in international criminal law. In case of conflict, the legal regime more favorable to the accused will apply.<sup>2696</sup> The judges of the tribunal adopted the Rules of Procedure and Evidence in March 2009, as required by the statute.<sup>2697</sup>

The statute is silent regarding sovereign immunity but states that any amnesty granted shall not be a bar to prosecution.<sup>2698</sup> The statute recognizes evidence collected by UNIIIC, a UN body that investigated the Hariri assassination and led to the creation of the STL.<sup>2699</sup> The statute explicitly allows trials in absentia if proper steps have been taken to seek custody of the accused.<sup>2700</sup> In case of conviction in absentia, the accused has the right to be retried. The STL statute also mandates legal representation of the accused when tried in absentia.<sup>2701</sup>

## **Location**

The STL sits in Leidschendam, a suburb of The Hague in the Netherlands. The agreement between the UN and Lebanon mandates that the STL have its seat outside of Lebanon and also that an investigations and public relations office be established in Lebanon, subject to arrangements with the government.<sup>2702</sup> The office in Beirut has also facilitated cooperation and outreach initiatives.

## **Structure and Composition**

In its structural features, the STL resembles a hybrid tribunal: it applies Lebanese and international law, retains concurrent and primary jurisdiction over Lebanese courts, and employs mixed national/international judges and staff. But the STL contains several structural innovations: (1) a predecessor international investigations body that essentially became the Office of the Prosecutor (OTP); (2) participation of victims in the proceedings, using elements of civil law; and (3) the establishment of a defense office as an independent organ of the court, outside of the Registry. Thus the STL has four organs: Chambers, the OTP, the Defense Office, and the Registry.

## ***Chambers***

The Pre-Trial Chamber consists of one international investigative judge according to the inquisitorial model. The investigating judge collects evidence, reviews indictments, and can revise charges proposed by the prosecutor. Two international judges and one Lebanese judge sit on the Trial Chamber. Two alternate judges (Lebanese and international) sit in reserve. A second Trial Chamber can be created upon request of the STL president or the Secretary-General.<sup>2703</sup> Two Lebanese and three international judges sit on the Appeals Chamber. The STL uses an appointment method similar to the Khmer Rouge Tribunal in Cambodia (the only two international tribunals to do so).<sup>2704</sup> The UN Secretary-General appoints international judges and prosecutors recommended by a “selection panel.”<sup>2705</sup> Lebanese judges are nominated by the Lebanese Supreme Council of the Judiciary and appointed by the UN Secretary-General.<sup>2706</sup> The Secretary-General is required to consult with the government of Lebanon on all judicial and prosecutorial appointments.

## ***Prosecutor***

The Secretary-General appoints the international prosecutor, upon the recommendation of the selection panel, for a three-year term. The Secretary-General also appoints a Lebanese deputy prosecutor to a three-year term, but the agreement does not require the deputy prosecutor’s nomination by the selection committee. The STL’s first prosecutor had served as the commissioner of the UNIIIC, ensuring continuity in operations between the two legally distinct bodies.

## ***Defense Office***

The Defense Office is an independent organ of the court, existing outside the Registry, a structural innovation at international tribunals.<sup>2707</sup> The Defense Office itself does not represent individual suspects or accused, but develops and supports a list of lawyers who can be appointed as defense counsel. It published its first list of 120 attorneys in September 2011. Privately retained counsel require Defense Office verification as being competent before they can appear before the STL. The office provides training to lawyers on international criminal law and STL procedure. The STL structure and procedure reflect inquisitorial features of the Lebanese civil law model, with certain divergences. For example, the Defense Office had to negotiate a memorandum of understanding with Lebanese authorities so that STL defense attorneys could carry out investigations in Lebanon—a role usually reserved for Lebanon’s investigating judges.

## **Registry**

The Secretary-General appoints the registrar who is the STL's only UN staff member.<sup>2708</sup> The Registry, located in The Hague, also has a field office in Beirut. It provides court management, security, and administrative support to the STL and is also responsible for external and diplomatic relations (including witness relocation agreements and bilateral cooperation agreements with states and organizations). Sub-offices of the Registry include the Outreach and Legacy Office (based in Beirut), the Public Affairs/Press Office (separate from the OTP press office), the Victims Participation Unit (VPU), and the Detention Unit.

## **Victim Participation**

The VPU assists victims in applying to participate in the trial and provides administrative and legal support. Following the civil law model, victims can participate in the trial by accessing and submitting evidence, cross-examining witnesses (at the discretion of the Trial Chamber), and seeking damages in national courts on the basis of STL judgments. However, victims before the STL are “much more limited than the Lebanese *partie civile* model of participation.”<sup>2709</sup> Terrorism proceedings in Lebanon are mainly held before military tribunals that do not allow civil party participation. Victims can only participate as parties after the confirmation of indictments and cannot join as criminal parties.<sup>2710</sup> In August and September 2017, legal representatives of 72 victims of terrorism presented evidence in the case of *Ayyash et al.*<sup>2711</sup>

## **Prosecutions**

As of October 2017, the STL had one case in trial, a second under investigation, and two completed cases of contempt of court.

In the first case, *Ayyash et al.*, four persons are on trial in absentia in relation to the Hariri assassination.<sup>2712</sup> Judges confirmed charges of conspiracy to commit a terrorist act and other charges in June 2011, and the court transmitted arrest warrants to Lebanese authorities. A fifth accused subsequently died, and judges subsequently added another by ordering the joinder of two cases. The trial opened in January 2014, but as of October 2017, all four accused remained at large.

As of October 2017, a second case was still in the investigation stage. In August 2011, the prosecutor asserted jurisdiction over three terrorist attacks targeting three Lebanese politicians in 2004 and 2005; the OTP believes these incidents are linked to the Hariri assassination.<sup>2713</sup>

The court has also considered requests for the disclosure of information related to the detention of individuals in Lebanon pursuant to UNIIIC investigations. In one case, judges have ordered a process of disclosure to an individual pursuing claims in Lebanese courts for unlawful detention; with regard to another case, STL judges have ruled against such a request.<sup>2714</sup>

The STL also charged two individuals and two media companies for contempt and obstruction of justice.<sup>2715</sup> The charges were in relation to media reports containing information about alleged confidential STL witnesses. Karma Mohamed Tahsin Al Khayat and Al Jadeed S.A.L./New TV were ultimately acquitted. Ibrahim Mohamed Ali Al Amin and Akhbar Beirut were both found guilty. Al Amin was sentenced to a €20,000 fine and Akhbar Beirut to a €6,000 fine.

## **Legacy**

The STL “provides Lebanon with an important chance to use an independent criminal justice mechanism to challenge the tradition of political violence in Lebanon.”<sup>2716</sup> The International Center for Transitional Justice has identified three possible ways the STL could leave a positive legacy in Lebanon: through legal developments in specific cases, by strengthening Lebanese investigative and judicial capacities, and through the so-called demonstration effect of the STL in raising awareness of accountability and the rule of law.<sup>2717</sup> With regard to the last of these, much may hinge on whether accused persons, and anyone the court may convict in absentia, is ever arrested. A permanent failure to secure arrests through state cooperation could reinforce impressions that judicial institutions are ineffective. The tribunal’s limited mandate also leaves grave crimes committed during the course of the civil war unaddressed, so even if the STL ultimately achieves its aims of accountability for the Hariri assassination and related attacks, many Lebanese will still have unfulfilled hopes of justice.<sup>2718</sup>

## **Financing**

The agreement states that 51 percent of the tribunal’s cost will be funded by voluntary contributions from UN Member States, with the government of Lebanon contributing the remaining 49 percent.<sup>2719</sup> In an arrangement designed to ensure funding for the STL, the agreement stated that the STL would only begin to function once it had received funding for its first year, plus “pledges of contributions equal to

the anticipated expenses of the following two years.”<sup>2720</sup> Resolution 1757 empowers the UN Secretary-General and the Security Council to seek “alternate means of financing” if sufficient voluntary contributions are not secured.<sup>2721</sup>

In 2007, the Secretary-General anticipated required expenses of US\$35 million for the first year, US\$45 million for the second year, and US\$40 million for the third year. The court’s approved budget for 2017 was approximately US\$68 million.<sup>2722</sup>

In 2011, Lebanon initially refused to provide financing to the tribunal, after the announcement of the first four indictments and ahead of the expiry of the tribunal’s mandate in February 2012. The confluence of these events led some observers to fear that Lebanon would use its required contribution as a negotiation tool over the renewal of the mandate, and some decried the shared funding model of the STL.<sup>2723</sup> Despite the cascade of difficulties for the tribunal, however, Lebanon submitted its payment and did not attempt to block the renewal.

## **Oversight and Accountability**

Under the agreement between the UN and Lebanon that established the STL, the parties shall “consult concerning the establishment of a management committee.”<sup>2724</sup> Accordingly, ahead of the STL’s opening, a group of donor countries—led by the United Kingdom and including Germany, the Netherlands, the United States, France, and Lebanon—formed a management committee to provide input and coordination on nonjudicial policy, including financial decisions. This donor committee resembles a similar mechanism established to provide support to the Special Court for Sierra Leone.

The STL Rules of Procedure and Evidence include provisions on recusal of judges due to conflicts of interest<sup>2725</sup> and contempt of court.<sup>2726</sup> A code of ethics governing the conduct of counsel before the STL is derived from three main sources: (1) the STL’s Statute, Rules of Procedure and Evidence, and case law; (2) the Code of Professional Conduct for Counsel Appearing Before the Tribunal; and (3) the Code of Professional Conduct for Defense Counsel and Legal Representatives of Victims Appearing Before the Special Tribunal for Lebanon.<sup>2727</sup> Directives on victims’ legal representation<sup>2728</sup> and on the appointment and assignment of defense counsel<sup>2729</sup> provide some degree of additional oversight with regard to legal aid. With approval of the STL president, judges may also communicate misconduct to the relevant professional body in the counsel’s national jurisdiction.<sup>2730</sup>

## **SYRIA: INTERNATIONAL, IMPARTIAL AND INDEPENDENT MECHANISM ON SYRIA**

### **Conflict Background and Political Context**

While the Syrian regime has a long history of brutal repression, the current conflict that has engulfed the country and the larger region dates back to the Arab Spring. Following scattered protests in early 2011, by July thousands of Syrians had joined demonstrations against the Assad regime in cities across the country. By that time, what had begun as peaceful demonstrations increasingly turned to armed clashes with the Syrian army and security apparatus, along with the emergence of various rebel groups.<sup>2731</sup> The first and main rebel group at the time was the Free Syrian Army (FSA), a group founded by defectors from the Syrian army and security forces in August 2011.<sup>2732</sup> Different, smaller groups operated across the country in affiliation with the FSA; however, the emergence of jihadist groups such as the Islamic Front and Jayish Al-Islam marked a turning point as the conflict took on more sectarian contours, pitting the country's Sunni majority against the president's Shia Alawite sect. Regional and world powers—ranging from Russia to Turkey to the United States—were drawn into the conflict, while the rise of the Islamic State in Syria and Levant (ISIS) has added a further dimension.<sup>2733</sup>

As of late 2017, six years of conflict had led more than five million Syrians to flee the country and internally displaced a further 6.3 million people.<sup>2734</sup> The Syrian Center for Research Policy has documented 470,000 deaths, twice as many as the UN's figures.<sup>2735</sup> In 2017, Human Rights Watch also documented more than 117,000 detentions or disappearances, the vast majority perpetrated by government forces.<sup>2736</sup> Systemized torture and extensive killing in Syrian prisons has been well documented, including through photographic evidence of thousands of victims.<sup>2737</sup>

### **Existing Justice-Sector Capacity**

Emergency laws have governed Syria since the Ba'ath regime came to power in 1963. Those laws created an environment where the authorities “abused the most basic rights and freedoms of the Syrian people on a wide scale and where they adopt arbitrary measures to silence critics in the name of safeguarding national security.”<sup>2738</sup> In addition, while the Syrian Constitution provides for an independent judiciary, human rights organizations have long criticized the justice sector, contending that Syria's courts operate in “shadowy” exceptions to general judicial

procedure.<sup>2739</sup> This situation has only deteriorated since the onset of conflict: the UN Commission of Inquiry has concluded that it is very unlikely that independent, credible prosecutions that meet minimum international standards could be carried out in Syria in the near term.<sup>2740</sup> This conclusion was based on what it assessed as a “lack of willingness on the part of the Syrian authorities and the likely inability of the system to carry out such prosecutions.”<sup>2741</sup> Human Rights Watch has drawn similar conclusions.<sup>2742</sup>

Armed groups operating on Syrian territory in areas outside of government control have established ad hoc court systems. Courts established by ISIS, for instance, claim to operate under Islamic laws.<sup>2743</sup> In a 2017 ruling, a Swedish court examining a case related to courts established by armed groups in Syria held that such courts are permitted in principle, but only under certain conditions, including respect of fair trial rights under human rights and humanitarian law.<sup>2744</sup>

## **Existing Civil Society Capacity**

Throughout the conflict, Syrian civil society groups have operated in an extraordinarily challenging environment and faced enormous security risks.<sup>2745</sup> Several organizations operating both inside and outside of Syria are focused on documenting and reporting on human rights violations.<sup>2746</sup> A partial list of Syrian organizations engaged on accountability issues includes the Violations Documentation Center, the Syrian Human Rights Network, the Syria Justice Accountability Center, the Syrian Center for Media and Freedom of Expression, and the Syrian Archive. An international NGO, the Commission for International Justice and Accountability has also engaged in extensive documentation work.

International NGOs have supported national prosecutions in mostly European courts related to grave crimes in Syria.<sup>2747</sup> These groups include the International Federation for Human Rights, the European Center for Constitutional and Human Rights, Guernica 37, the Center for Justice and Accountability, and the Open Society Justice Initiative.

## **Creation**

A number of international commissions preceded the creation of the International, Impartial and Independent Mechanism on Syria (IIIM). In August 2011, the

UN Human Rights Council (HRC) established the Independent International Commission of Inquiry on the Syrian Arab Republic. The HRC mandated the commission to “investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.”<sup>2748</sup> The UN also established another investigative entity in relation to increasing reports of the use of chemical weapons in Syria. In 2015, the United Nations Security Council adopted Resolution 2235 to create the UN-OPCW Joint Investigative Mechanism to hold chemical weapons users in the Syria civil war accountable.<sup>2749</sup>

Efforts in the UN Security Council to refer the Syrian situation to the International Criminal Court repeatedly failed due to opposition from veto-wielding members Russia and China.<sup>2750</sup> On December 21, 2016, the UN General Assembly voted to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.<sup>2751</sup> The UN Secretary-General presented the IIIM’s terms of reference in January 2017. In a *note verbale* to the Secretary-General, Russia summarized a number of complaints objecting to the IIIM’s creation. These include the objection that the IIIM is actually a prosecutorial body, which the General Assembly has no legal power to create. In Russia’s view, this mechanism therefore violates Article 2(7) of the UN Charter and Article 12, which limits the power of the General Assembly to deal with matters already being considered by the Security Council.<sup>2752</sup> Supporters of the IIIM assert that the General Assembly’s authority to create it derives from the inaction of the Security Council to address the sustained perpetration of grave crimes in Syria.

## **Legal Framework and Mandate**

The IIIM’s terms of reference mandate it to “collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”<sup>2753</sup>

The IIIM's subject matter jurisdiction includes "crimes under international law, in particular the crime of genocide, crimes against humanity and war crimes, as defined in relevant sources of international law," while its temporal jurisdiction extends back to March 2011.<sup>2754</sup> The terms of reference make clear that the IIIM is complementary to the Independent International Commission of Inquiry. While the commission focuses on "directly collecting information, publicly reporting recent broad patterns of violations, abuses and emblematic incidents and making recommendations," the IIIM "primarily builds on the information collected by others, in particular the Commission, by collecting, consolidating, preserving and analyzing evidence and prepares files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals."<sup>2755</sup>

The IIIM has a mandate to collect information and evidence from all parties to the conflict, the commission, the UN-OPCW Joint Mission, civil society groups, and states.<sup>2756</sup> It is also mandated to collect such information through witness testimonies, interviews, and forensic materials.<sup>2757</sup> The IIIM "shall seek to establish the connection between crime-based evidence and persons responsible, directly or indirectly, for alleged crimes falling within its jurisdiction, focusing in particular on linkage evidence."<sup>2758</sup> Information and evidence collected are to be analyzed and consolidated in a way that maximizes their use in "future criminal investigations and prosecutions."<sup>2759</sup>

The terms of reference task the IIIM with focusing on persons most responsible for violations. Resulting files shall include "relevant information, documentation and evidence in the Mechanism's possession, both inculpatory and exculpatory, pertaining to the imputable crimes and to the mode or modes of criminal liability recognized under international law, including command or superior responsibility."<sup>2760</sup>

The IIIM's primary purpose is to facilitate prosecutions and trials in other jurisdictions through sharing information "with national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law, in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards."<sup>2761</sup> The IIIM also has the authority to share information at the request of those courts or on its own initiative. The IIIM will not share such information with jurisdictions that do not respect international human rights law, including fair trial protections and nonapplication of the death penalty.<sup>2762</sup>

## Location

The UN's Office of the High Commissioner for Human Rights announced in February 2017 that a start-up team for the IIIM had already begun its work, based in Geneva, Switzerland.<sup>2763</sup>

## Structure and Composition

The IIIM is headed by a senior judge or prosecutor with extensive experience in criminal investigations and prosecutions, and a deputy with extensive experience in international criminal justice and an in-depth knowledge of international criminal law, international human rights law, and international humanitarian law.<sup>2764</sup> On July 3, 2017, the UN Secretary-General announced the appointment of Catherine Marchi-Uhel of France as the first head of the IIIM.<sup>2765</sup> Her term is for an initial period of two years, which is renewable.<sup>2766</sup> In November 2017, Michelle Jarvis was named as her deputy. The IIIM also includes a Secretariat with expertise in the following areas: international criminal law, human rights law, international humanitarian law, criminal investigation and prosecution, the military, forensic matters (including in particular digital forensics, forensic pathology and forensic imagery), witness and victim protection, sexual and gender-based crimes and violence, children's rights, and crimes against children.<sup>2767</sup>

In appointing the members of the Secretariat, "due consideration shall be given to the representation of different legal traditions and gender balance and to appointing staff with the necessary language skills and regional expertise."<sup>2768</sup> According to diplomats, the UN is aiming to recruit between 40 and 60 experts in investigations, prosecutions, the military, and forensics.<sup>2769</sup>

## Prosecutions

The IIIM is not mandated to conduct prosecutions on its own, but will build on information collected to support efforts by other prosecutorial entities.<sup>2770</sup> To that end, it has been described as a "prosecutor without a tribunal," meaning that "it can build cases, but it does not have a dock for trying defendants."<sup>2771</sup> At the national level, several European countries have already started to investigate, prosecute, and try Syrians for war crimes on the basis of universal jurisdiction. In Germany, the federal public prosecutor opened investigations of international crimes in

Syria soon after the outbreak of the conflict.<sup>2772</sup> And in July 2016, a German court concluded its first war crimes trial in relation to atrocities committed in Syria.<sup>2773</sup> A criminal court in France has also opened an investigation and appointed an investigative judge to probe charges of “torture,” “crimes against humanity,” and “forced disappearances.” The victims in the case claimed to have been disappeared by Syrian Air Force Intelligence.<sup>2774</sup>

The necessary reliance on national courts to try perpetrators on the basis of their status within the country—in the absence of an ICC referral or establishment of an ad hoc or hybrid tribunal dedicated to Syrian crimes—means that most proceedings are likely to be directed against lower-ranking, non-regime perpetrators, or powerful perpetrators who still reside in Syria.<sup>2775</sup> As an institution for the long-term, the IIIM can support these efforts and preserve and prepare evidence for more comprehensive accountability solutions, if they are ever created.

## **Legacy**

In late 2017, the IIIM was still in the process of establishment. Many commentators remarked upon the novelty of creating such a mechanism via a General Assembly resolution, noting that it might enhance future prospects for using international investigative mechanisms to press for accountability in national jurisdictions.<sup>2776</sup> The legacy of the IIIM may ultimately be measured by its ability to encourage and support prosecutions in jurisdictions around the world.

## **Financing**

The IIIM will initially be funded from voluntary contributions, although this arrangement is to be revisited by the UN General Assembly.<sup>2777</sup> The UN announced that early contributions had been received from the Netherlands and Liechtenstein, with oral pledges from Qatar, Belgium, Luxembourg, and Hungary. In February 2017, the UN High Commissioner for Human Rights stated that “immediate funding requirements are at 4 to 6 million USD and while a precise budget is in development, annual operating needs are expected to be in the region of 13 million USD.”<sup>2778</sup>

## Oversight and Accountability

The IIIM's terms of reference do not detail internal oversight mechanisms; furthermore, its personnel, records, archives, property, and assets are protected by the Convention on the Privileges and Immunities of the United Nations.<sup>2779</sup> The head of the IIIM must submit a report to the General Assembly twice a year on the implementation of the IIIM's mandate and set out its funding requirements, as appropriate, while preserving the confidential nature of its substantive work.<sup>2780</sup>

## Notes

- 2573. For background on Iraq's history, see Adeed Dawisha, *Iraq: A Political History* (Princeton, NJ: Princeton University Press, 2009).
- 2574. For a history of the Iran-Iraq War, see Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict* (London, Routledge, 1991).
- 2575. Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds*, July 1993, available at: [hrw.org/report/2006/08/14/genocide-iraq-anfal-campaign-against-kurds/report-summary](http://hrw.org/report/2006/08/14/genocide-iraq-anfal-campaign-against-kurds/report-summary).
- 2576. The U.S.-led coalition acted under UN Security Council Resolution 678 (1990), which invoked Chapter VII of the UN Charter to allow "all necessary means" to enforce previous resolutions demanding Iraqi withdrawal. See *UNSC Resolution 678 (1990)*, November 29, 1990, available at: [documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO57528.pdf?OpenElement](http://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO57528.pdf?OpenElement). Whether the language of the resolution was sufficient to authorize the use of military force remained a matter of dispute. See John Quigley, "The United States and the United Nations in the Persian Gulf War: New Order or Disorder," *Cornell International Law Journal* 25, no 1. (1992): Article 1, available at: [scholarship.law.cornell.edu/cilj/vol25/iss1/1](http://scholarship.law.cornell.edu/cilj/vol25/iss1/1).
- 2577. The largest of the strikes during this period was "Operation Desert Fox," a four-day bombing campaign in December 1998.
- 2578. The UK government conducted an extensive inquiry into the manipulation of intelligence leading to the Second Gulf War, resulting in the so-called "Chilcot Report" (after the inquiry's chairperson, John Chilcot). See *The Report of the Iraq Inquiry*, July 6, 2016, available at: [iraqinquiry.org.uk/the-report](http://iraqinquiry.org.uk/the-report). See also Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (London, Penguin, 2006), 46–67.
- 2579. Radio address by President George W. Bush, March 22, 2003, available at: [georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html](http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html).
- 2580. For an overview of divergent legal opinions on the war, see "Was the War Legal? Leading Lawyers Give Their Verdict," *The Guardian*, March 2, 2004, available at: [theguardian.com/politics/2004/mar/02/uk.internationaleducationnews](http://theguardian.com/politics/2004/mar/02/uk.internationaleducationnews). The Netherlands politically supported the invasion, but a subsequent Commission of Inquiry determined that it had been illegal. See "Report of the Dutch Commission of Inquiry on the War in Iraq," chapter 8, printed in English in the *Netherlands International Law Review* 57, no. 1 (March 2010): 81–137, available at: [doi.org/10.1017/S0165070X10100059](https://doi.org/10.1017/S0165070X10100059).

2581. Ricks, *Fiasco: The American Military Adventure in Iraq*, 149–297.
2582. Miranda Sissons and Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice, March 2013, available at: [ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf](http://ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf).
2583. Human Rights Watch, *The Road to Abu Ghraib*, June 8, 2004, available at: [hrw.org/report/2004/06/08/road-abu-ghraib](http://hrw.org/report/2004/06/08/road-abu-ghraib).
2584. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, October 2003, para. 3.141, available at: [siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf](http://siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf).
2585. John. C. Williamson, “Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System,” *Ga. J. Int’l & Comp. L.* 33 230.
2586. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, para. 3.141.
2587. Williamson, “Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System,” 231.
2588. *Ibid.*, 232.
2589. *Ibid.*
2590. Andrew Rathmell, Olga Olier, Terrence K. Kelly, David Brannan, and Keith Crane, “Developing Iraq’s Security Sector, The Coalition Provisional Authority’s Experience,” RAND, 2005, 57, available at: [rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG365.pdf](http://rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG365.pdf).
2591. CPA Order 35, *Re-Establishment of the Council of Judges*, September 15, 2003.
2592. CPA Order 13, *The Central Criminal Court of Iraq* (Amended), April 22, 2004.
2593. Rathmell et al., “Developing Iraq’s Security Sector,” 60.
2594. “Committee Signs Iraq’s Draft Constitution,” *CNN*, August 28, 2005, available at: [cnn.com/2005/WORLD/meast/08/28/iraq.constitution/](http://cnn.com/2005/WORLD/meast/08/28/iraq.constitution/).
2595. Iraq Constitution 2005, Article 88.
2596. Article 90.
2597. Amnesty International, *Iraq 2016/2017*, available at: [amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/](http://amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/).
2598. Open Society Justice Initiative correspondence with an individual who provided such trainings, November 7, 2017.
2599. NGO Coordination Committee for Iraq, *Iraq Civil Society in Perspective*, April 2011, 10, available at: [ncciraq.org/en/archive/ncci-studies/item/130-iraq-s-civil-society-in-perspective-%E2%80%93-ncci-%E2%80%93-april-2011](http://ncciraq.org/en/archive/ncci-studies/item/130-iraq-s-civil-society-in-perspective-%E2%80%93-ncci-%E2%80%93-april-2011).
2600. ICNL, *Civic Freedom Monitor, Iraq*, available at: [icnl.org/research/monitor/iraq.html](http://icnl.org/research/monitor/iraq.html).
2601. See Coalition Provisional Authority Order Number 45 on Non-Governmental Organizations (2003). The order designated Ministry of Planning and Development Cooperation to be the focal point in registration and oversight on the work of NGOs. Order No. 45, Sections 1–2.
2602. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, para. 3.143.
2603. ICNL, *Civic Freedom Monitor, Iraq*.
2604. NGO Coordination Committee for Iraq, *Iraq Civil Society in Perspective*, 17.
2605. USAID, *Iraq Civil Society Assessment*, February 2012, 8, available at: [pdf.usaid.gov/pdf\\_docs/pnadzi88.pdf](http://pdf.usaid.gov/pdf_docs/pnadzi88.pdf).

2606. U.S Department of State, *2016 Iraq Human Rights Report*, 34, available at: [state.gov/documents/organization/265710.pdf](http://state.gov/documents/organization/265710.pdf); Iraq Human Rights Report 2016, p. 48; Human Rights Watch, *Kurdistan Region of Iraq: 32 Arrested at Peaceful Protest*, available at: [hrw.org/news/2017/03/16/kurdistan-region-iraq-32-arrested-peaceful-protest](http://hrw.org/news/2017/03/16/kurdistan-region-iraq-32-arrested-peaceful-protest).
2607. Article 1 of the Statute for the Iraq Special Tribunal provides for the establishment of a tribunal known as the Iraq Special Tribunal. Statute available at: [loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf). Originally named the “Iraqi Special Tribunal,” in the CPA order and as translated in the 2005 law, the tribunal decided to call itself the “Iraqi High Tribunal” when its name was translated into English, although not all commentators used this nomenclature.
2608. See M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal,” *Cornell Int’l L.J.* 38 (2005): 327. Previous initiatives included a 1991 Arab League proposal following the first Gulf War and 1994–1997 consultations between the Clinton administration and the UNSC to create a war crimes investigation commission.
2609. A “Working Group on Transitional Justice” was convened under the Department of State’s “Future of Iraq” project, consisting of 40 Iraqi expatriate jurists and prominent U.S. experts, including M. Cherif Bassiouni. The group met in mid-2002 and released its plan at the U.S. Institute of Peace on May 21, 2003. Bassiouni, “Post-Conflict Justice in Iraq,” 327; see also *Letter from Human Rights Watch to the U.S. Regarding the Creation of a Criminal Tribunal for Iraq*, April 15, 2003, available at: [hrw.org/press/2003/04/iraqtribunalo41503ltr.htm](http://hrw.org/press/2003/04/iraqtribunalo41503ltr.htm); Open Society Institute and the United Nations Foundation, *Iraq in Transition, Post-Conflict Challenges and Opportunities*, 2004, 85–87; International Center for Transitional Justice, “Creation and First Trials of the Supreme Iraqi Criminal Tribunal,” Briefing Paper, October 2005.
2610. CPA Order 48, December 10, 2003, also containing the IHT statute, available at: [loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf).
2611. *Ibid.*, Section 2.
2612. Iraq Governing Council Decree of 10 December 2003, Establishing a Special Tribunal, appended in English and Arabic, in M. Cherif Bassiouni, *Iraq Post-Conflict Justice: A Proposed Comprehensive Plan*, Rev. January 2, 2004, available at: [law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/publications/Documents/Iraq\\_Proposal\\_04.pdf](http://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/publications/Documents/Iraq_Proposal_04.pdf).
2613. Supreme Iraqi Criminal Tribunal Law No. 10 of 2005, *al-Waqa’ia al-Iraqiyya* (the official gazette of the Republic of Iraq), no. 4006, October 18, 2005.
2614. Michel A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions,” *IRRC*, 88, no. 862 (June 2006): 401.
2615. Constitution of the Republic of Iraq (2005), Article 134: “The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve it by law after the completion of its work.”
2616. In its annual human rights reports for 2011 and 2012, the U.S. State Department reported that the IHT was dissolved in July 2011. See U.S. State Department, *Country Reports on Human Rights Practices for 2011: Iraq*, 13, available at: [state.gov/documents/organization/186638.pdf](http://state.gov/documents/organization/186638.pdf), and *Country Reports on Human Rights Practices for 2012: Iraq*, 16, available at: [state.gov/documents/organization/204572.pdf](http://state.gov/documents/organization/204572.pdf). However, a United Nations report states, “The operation of the [IHT] was suspended by order of the Council of Ministers in April 2012.” United Nations Assistance Mission in Iraq and the

UN Office of the High Commissioner for Human Rights, *Report on the Death Penalty in Iraq*, October 2014, 8, available at: [ohchr.org/Documents/Countries/IQ/UNAMI\\_HRO\\_DP\\_1Oct2014.pdf](http://ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf).

2617. Other crimes included judicial manipulation, wastage of national resources and funds, and pursuing policies that lead to the threat of war. Iraq ratified the Genocide Convention in 1956 and acceded to the Convention on the Prevention and Punishment of the Crime of Genocide in 1959.
2618. Territorial jurisdiction expressly referred to crimes committed in the Iraq-Iran war and the invasion and occupation of Kuwait. Some inconsistencies in personal jurisdiction in the initial statute included a conflict between IHT Article 1 (not including foreign coalition forces), IHT Article 10 (expressly including non-Iraqi citizens), and CPA Order 17 (granting immunity to coalition forces).
2619. The Iraqi legal system is inquisitorial, blending elements of French and Egyptian law. American officials also used “negotiated pleas,” which are not recognized in Iraqi criminal law. The arraignment and entering of pleas procedures used by the IHT in the Saddam trial were foreign to Iraqi law. See Bassiouni, “Post-Conflict Justice in Iraq,” 327: “The proceedings were choreographed as an American hearing where an investigative judge read an indictment and asked the defendant to plead guilty or not guilty, and was thus more American than Iraqi. There is no such procedure in the Iraqi criminal justice system. The investigative judge, sitting behind a table facing Saddam, was obviously uncomfortable. On the table where he sat facing Saddam Hussein was a copy of the 1971 Iraqi Code of Criminal Procedure, which does not provide for such an American style arraignment procedure.”
2620. Order No. 7, IRRC, 422.
2621. Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraqi Criminal Tribunal, *Official Gazette of the Republic of Iraq*, October 18, 2005, available at: [ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf](http://ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf). See also International Center for Transitional Justice, “Dujail: Trial and Error?” Briefing Paper, November 2006.
2622. The code does not envision litigation involving multiple victims, rather than individual cases, and may not recognize command responsibility as a mode of liability. In addition, the national criminal code contains strict evidentiary requirements. Translation errors in a widely circulated version of the Iraqi Criminal Procedural Code created confusion over which standard of proof the tribunal would use; it appears that the court used the language of “beyond a reasonable doubt.” See Miranda Sissons and Ari S. Bassin, “Was the Dujail Trial Fair?” *J. Intl. Crim. J.* 5 (2007): 285.
2623. Miranda Sissons, “And Now from the Green Zone ... Reflections on the Iraq Tribunal’s Dujail Trial,” *Ethics & International Affairs* 20, no. 4 (2006): “Original attempts to impose international rules of procedure and evidence have been trumped by a strong practical reliance on the Iraqi criminal procedural code.”
2624. IHT Statute, Article 2.
2625. He was removed in September 2004, but by then the IHT’s administrative affairs had fallen into disarray. See Human Rights Watch, *Judging Dujail, The First Trial before the Iraqi High Tribunal*, November 2006, 13.
2626. Rules of Procedure and Evidence of the Iraqi High Tribunal, 2005, Rule 68, available at: [gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf](http://gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf).
2627. 2005 IHT Statute, Article 4(d), 7(n), 8(j), respectively.
2628. 2005 IHT Statute, Article 6(b).

2629. Bassiouni, "Post-Conflict Justice in Iraq," 347.
2630. International Center for Transitional Justice, *Dujail: Trial and Error?* Briefing Paper, November 2006.
2631. Sonya Sceats, "The Iraqi High Tribunal Post-U.S. Involvement," *The World Today* (Chatham House), reprinted in *Opinio Juris*, April 30, 2008, available at: [opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement](http://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement).
2632. Barzan Ibrahim al-Hassan, Awad Hamad al-Bandar, and Taha Yassin Ramadan (executed in March 2007).
2633. Abdullah al-Mashaikh, Mizher al-Mashaikh, and Muhammad Azzawi (acquitted at the request of the prosecution).
2634. International Center for Transitional Justice, *The Anfal Trial and Iraqi High Tribunal and Update Number One: The Complainant Phase of the Anfal Trial*, available at: [ictj.org/static/MENA/Iraq/AnfalUpdateOne.eng.pdf](http://ictj.org/static/MENA/Iraq/AnfalUpdateOne.eng.pdf). For a less critical account of the Anfal Trial, see Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein*, (London, St. Martin's Press, 2008).
2635. Sissons and Bassin, "Was the Dujail Trial Fair?" 284, noting that the court did not consider "contextual evidence to show how the various institutions implicated usually functioned as part of Saddam Hussein's regime."
2636. The defendants were Saddam Hussein, Ali Hassan al-Majid al Tikriti, Sultan Hashem Ahmed al-Ta'i, Tahir Tawfiq al-'Aani, Sabird Abd al Aziz al-Douri, Farhan Mutlaq al-Jaburi, and Hussein Rashid al-Tikriti. See Jennifer Trahan, "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds," *Mich. J. Int'l. Law* 30 (2009): 305.
2637. Charges against al-'Aani were dismissed for lack of evidence. Two defendants, Barzan Ibrahim al-hassan and Awad Hamad al-Bandar were executed on January 15, 2007, and Tahan Yassin Ramadan was executed on March 20, 2007. See ICTJ, *The Anfal Trial and the Iraqi High Tribunal, Update Number Three: The Defense Phase and Closing Stages of the Anfal Trial*.
2638. Trahan, "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment," 405.
2639. For an unofficial English summary of the case by IHT Judge Ra'id Juhi, see *Summary of the Merchants' Execution Case Verdict*, March 11, 2008, available at: [law.case.edu/grotian-moment-blog/documents/IHT\\_Merchants\\_Case.pdf](http://law.case.edu/grotian-moment-blog/documents/IHT_Merchants_Case.pdf). The convicted were Wetban Abraham Al Hassan, Sabayi Abraham Al Hasan, Mizban Khider Hadi, Abd Hamed Mahmood, Tariq Aziz Isa, and Ali Hassan Al Majeed. Charges were dismissed against Ahmed Hussein Khudair and Isam Rasheed Hweish due to lack of evidence.
2640. Kevin Jon Heller, "The Iraqi High Tribunal Post-U.S. Involvement," *Opinio Juris*, April 30, 2008, available at: [opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/](http://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/).
2641. The tally is not entirely clear, as some individuals faced multiple criminal counts or were listed as defendants in multiple trials. See U.S. State Department, *Country Reports on Human Rights Practices for 2011: Iraq*, 13, available at: [state.gov/documents/organization/186638.pdf](http://state.gov/documents/organization/186638.pdf).
2642. Heller, "The Iraqi High Tribunal Post-U.S. Involvement," note 90.
2643. "UN Human Rights Expert Deplores Saddam's Trial and Execution: Calls for Legal Overhaul," *UN News Centre*, January 4, 2007, available at: [un.org/apps/news/story.asp?NewsID=21155&](http://un.org/apps/news/story.asp?NewsID=21155&).

2644. "UN Rights Group: First Saddam Trial Flawed," *Voice of America*, October 31, 2009, available at: [voanews.com/a/a-13-2006-11-28-voa22/319171.html](http://voanews.com/a/a-13-2006-11-28-voa22/319171.html).
2645. Human Rights Watch, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi Tribunal in the Dujail Case*, June 2007, 4-6, available at: [hrw.org/legacy/backgrounders/ij/iraq0607/iraq0607web.pdf?\\_ga=1.258347658.1616568321.1435024001](http://hrw.org/legacy/backgrounders/ij/iraq0607/iraq0607web.pdf?_ga=1.258347658.1616568321.1435024001). See also Human Rights Watch, *Judging Dujail*, 36-72.
2646. Amnesty International, *Iraq: Flaws in the First Trial Before the Supreme Iraqi Criminal Tribunal Should Not Be Repeated*, August 18, 2006.
2647. Human Rights Watch, *The Poisoned Chalice*, 4.
2648. "Hussein's Execution Was Botched, Judge Says," *New York Times*, April 29, 2008, available at: [thelede.blogs.nytimes.com/2008/04/29/husseins-execution-was-botched-judge-says](http://thelede.blogs.nytimes.com/2008/04/29/husseins-execution-was-botched-judge-says).
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2650. "Saddam's Hanging Came Too Soon for Kurds," *Washington Post*, February 19, 2007, available at: [washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900483.html](http://washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900483.html). See also International Center for Transitional Justice, *The Anfal Trial and the Iraqi High Tribunal: Update Number Two: The Prosecution Witness and Documentary Evidence Phases of the Anfal Trial*, June 1, 2007, 19, available at: [ictj.org/publication/prosecution-witness-and-documentary-evidence-phases-anfal-trial](http://ictj.org/publication/prosecution-witness-and-documentary-evidence-phases-anfal-trial).
2651. See *CPA Transcripts, Bremer Affirms: Iraq Turns the Page*, April 23, 2004, available at: [iraqcoalition.org/transcripts/20040423\\_page\\_turn.html](http://iraqcoalition.org/transcripts/20040423_page_turn.html).
2652. *2007 Report on Iraq Relief and Reconstruction: Quarterly Update to Congress*, Bureau of Resource Management, 33, available at: [merln.ndu.edu/archivepdf/iraq/State/2207\\_april2006.pdf](http://merln.ndu.edu/archivepdf/iraq/State/2207_april2006.pdf).
2653. "International Tribunal Spotlight: Iraqi High Criminal Tribunal," available at [www.judicialmonitor.org/archive\\_0306/spotlight.html](http://www.judicialmonitor.org/archive_0306/spotlight.html).
2654. M. A. Newton, "The Iraqi High Criminal Court: Controversy and Contributions," *International Review of The Red Cross* 88, no. 862 (June 2006): 404n26.
2655. Rules of Procedure and Evidence of the Iraqi High Tribunal, 2005, Rule 7, available at: [gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf](http://gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf).
2656. 2005 IHT Statute, Article 4(4).
2657. Sissons and Bassin, "Was the Dujail Trial Fair?" 278, noting further that "the [national De-Ba'athification Commission] threatened to use de-Ba'athification procedures against four Tribunal judges in October 2006. It told the judges that they would be given the opportunity to apply for transfers rather than face the public humiliation of de-Ba'athification. Not accidentally, this resulted in the substitution of a member of the *Dujail* trial bench during the trial chamber's final deliberation. A member of the cassation chamber was likewise replaced. Other judges appear to have modified their behavior or refused positions of prominence for fear of attracting the Commission's attention."
2658. Sonya Sceats, "The Iraqi High Tribunal Post-U.S. Involvement."

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2672. *Ibid.*, 1.2.
2673. David Shenker, *Lebanon’s [Un]Civil Society*, The Washington Institute, March 2016, 1, available at: [washingtoninstitute.org/uploads/Documents/pubs/BeyondIslamists-Lebanon-4.pdf](http://washingtoninstitute.org/uploads/Documents/pubs/BeyondIslamists-Lebanon-4.pdf).
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2675. UN Security Council Resolution 1595, S/RES 1595, April 7, 2005.
2676. See *Report of the Fact-Finding Mission to Lebanon Inquiry into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri*, S/2005/203, March 24, 2005. The mission was headed by Peter FitzGerald, a deputy commissioner of the Irish Police, and included two police investigators, a legal adviser, a political adviser, and additional experts in explosives, ballistics, DNA, and crime scene examinations.
2677. Previous commissioners of the UNIIIC included Detlev Mehlis and Serge Brammertz.
2678. In its first report, the commission found “converging evidence pointing at both Lebanese and Syrian involvement in the terrorist act” and concluded that “there is probable cause to believe that the decision to assassinate Hariri could not have been

taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.” Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595, S/2005/662, October 20, 2005, para 124.

2679. *Letter Dated December 13, 2005, from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General*, S/2005/783, December 13, 2005, available at: [documents-dds-ny.un.org/doc/UNDOC/GEN/No5/640/51/PDF/No564051.pdf?OpenElement](http://documents-dds-ny.un.org/doc/UNDOC/GEN/No5/640/51/PDF/No564051.pdf?OpenElement).
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2682. The text of the agreement can be found in annex to the Security Council resolution that eventually brought it into force. See UNSC Resolution 1757 (2007), May 30, 2007, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1757\(2007\)](http://un.org/en/ga/search/view_doc.asp?symbol=S/RES/1757(2007)).
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2684. UNSC Resolution 1757 (2007), May 30, 2007, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1757\(2007\)](http://un.org/en/ga/search/view_doc.asp?symbol=S/RES/1757(2007)). The textual placement of the Chapter VII reference in the resolution has led some legal observers to argue that the Chapter VII powers of the STL only compel cooperation by Lebanon, but not by third-party states. See International Center for Transitional Justice, *Handbook on The Special Tribunal for Lebanon*, April 2008, 31–33, available at: [ictj.org/publication/handbook-special-tribunal-lebanon](http://ictj.org/publication/handbook-special-tribunal-lebanon).
2685. “Ban Extends Mandate of UN-backed Tribunal in Lebanon,” *UN News Center*, February 22, 2012, available at: [un.org/apps/news/story.asp?NewsID=41331#.WfCaq2iPI2w](http://un.org/apps/news/story.asp?NewsID=41331#.WfCaq2iPI2w).
2686. “Mandate of UN-backed Tribunal for Lebanon Extended for Three More Years,” *UN News Center*, January 2, 2015, available at: [un.org/apps/news/story.asp?NewsID=49724#.WfCaK2iPI2w](http://un.org/apps/news/story.asp?NewsID=49724#.WfCaK2iPI2w).
2687. STL Statute, Article 1: “The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.”
2688. STL Statute, Article 4. Upon assuming office, the prosecutor was required to request the national authorities to defer competence to the STL and transfer any suspects in custody.

2689. See *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr. Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon*, August 18, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/order-directing-the-lebanese-judicial-authority-seized-with-the-case-concerning-the-attack-perpetrated-against-mr-marwa-hamadeh](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/order-directing-the-lebanese-judicial-authority-seized-with-the-case-concerning-the-attack-perpetrated-against-mr-marwa-hamadeh); *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon*, August 19, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/711-fo006](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/711-fo006); and *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon*, August 19, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/710-fo005](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/710-fo005). For a legal analysis of the STL's early jurisprudence, including the referral orders, see Guenael Mettraux, "The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders Its First Decisions," *J. Int'l Crim. Just.* 7 (2009): 911.
2690. STL Statute, Article 2: "(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'increasing the penalties for sedition, civil war and interfaith struggle.'"
2691. STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1, February 16, 2011), available at: [stl-tsl.org](http://stl-tsl.org) (hereinafter: Interlocutory Decision).
2692. Michael P. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation," *ASIL Insights*, 15, no. 6 (March 4, 2011), internal cites to Appeal Chamber Ruling, February 16, 2011.
2693. Mettraux, "The Internationalization of Domestic Jurisdictions by International Tribunals," 923.
2694. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling."
2695. *Ibid.*
2696. Interlocutory Decision; see also Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling," internal cites to Appeal Chamber Ruling, February 16, 2011.
2697. The Rules of Procedure and Evidence have been amended several times. Article 28 provides that judges "shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial." STL Statute, Article 28.2.
2698. *Ibid.*, Article 6.
2699. *Ibid.*, Article 19: "Evidence collected ... prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the [UNIIIC] ... shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers."
2700. *Ibid.*, Article 22.

2701. Ibid., Articles 22(2), 22(3). Trials in absentia are also permissible in certain circumstances under Lebanese law.
2702. STL Agreement, Article 8.
2703. Ibid., Article 2.
2704. *Handbook on The Special Tribunal for Lebanon*, International Center for Transitional Justice, April 2008, available at: [ictj.org/publication/handbook-special-tribunal-lebanon](http://ictj.org/publication/handbook-special-tribunal-lebanon).
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2706. The judicial appointment procedures are laid out in Articles 2 and 3 of the agreement; the STL Statute refers back to the agreement. Ibid., Articles 9, 10, 11.
2707. Nidal Nabil Jurdi, “Falling Between the Cracks: The Special Tribunal for Lebanon’s Jurisdictional Gaps as Obstacles to Achieving Justice and Public Legitimacy,” *U.S. Davis J. Int’l L & Pol’y* 17 (2011): 257.
2708. STL Statute, Article 4.1.
2709. *Handbook on The Special Tribunal for Lebanon*.
2710. STL Statute, Article 17. See also *Handbook on The Special Tribunal for Lebanon*.
2711. STL Bulletin, August 2017, 7, available at: [stl-tsl.org/en/media/stl-bulletin/5984-stl-bulletin-august-2017](http://stl-tsl.org/en/media/stl-bulletin/5984-stl-bulletin-august-2017).
2712. See STL, *Ayyash et al.* (STL-11-01), available at: [stl-tsl.org/en/the-cases/stl-11-01](http://stl-tsl.org/en/the-cases/stl-11-01). Arrest warrants for Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra were transmitted to Lebanese authorities on June 30, 2011. Badreddine subsequently died, and in February 2014, judges ordered the merger of the Ayyash case and that of Hassan Habib Merhi.
2713. See STL, *Connected Cases, Hamadeh, Hawi and El-Murr* (STL-11-02), available at: [stl-tsl.org/en/the-cases/stl-11-02](http://stl-tsl.org/en/the-cases/stl-11-02).
2714. Jamil el Sayed was detained by Lebanese authorities between 2005 and 2009 at the recommendation of the UNIIIC commissioner. In 2009, the STL seized the matter, and the prosecutor requested the pretrial judge to release El Sayed and three other detained individuals in the case. Mr. Sayed has brought proceedings at the STL seeking the release of documents relating to his detention, in order to pursue claims before national courts for unlawful detention. Interlocutory rulings held that correspondence between UNIIIC and the Lebanese authorities were protected under the STL Rules. In October 2011, the Appeals Chamber ordered certain documents be disclosed by the prosecutor and returned the matter to the Trial Chamber in regards to other witness statements and documents. See Appeals Chamber, *In the Matter of El Sayed, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-trial Judge’s Decision of 2 September 2011 and Ordering the Disclosure of Documents*, October 7, 2011, CH/AC//2011/02, available at: [www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/](http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/). In a second, similar case, the pretrial chamber determined that a general previously detained in Lebanon had no standing to request materials from the *Ayyash et al.* case. See STL, *In the Matter of El Hajj*, available at: [stl-tsl.org/en/the-cases/other-matters/in-the-matter-of-el-hajj](http://stl-tsl.org/en/the-cases/other-matters/in-the-matter-of-el-hajj).
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“This book should be invaluable to the practitioner tasked with setting up a tribunal to try those accused of grave crimes. To have in one place a wide variety of examples and models from which to draw upon—whether dealing with the mechanism design, jurisdiction, financing, structure, etc.—will no doubt prove to be of enormous value. This handbook fills a real void and constitutes a major contribution in assisting those conceiving and developing such mechanisms.”

—Larry Johnson  
Former UN Assistant Secretary-General for Legal Affairs