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.[161] 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.[162] 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.[163] 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.[164] 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.[165] 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."[166] This combination of factors galvanized support within the AU to create a criminal chamber within the African Court.[167]

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.[168] 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."[169] In 2010, the AU rejected "for now" ICC overtures to open a liaison office in Addis Ababa.[170]

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.[171] 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.[172]

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."[173] In 2016, Gambia, Burundi, and South Africa filed notifications of withdrawal from the Rome Statute, although Gambia and South Africa later reversed course.[174] 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.[175]

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."[176] 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.[177] 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."[178] 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.[179]

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,[180] and published analysis and advocacy pieces in relation to the issue.[181] 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.[182] 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.[183]

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.[184] 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.[185] 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."[186] 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 outs 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.[187] 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.[188] 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.[189] 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."[190] 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.[191] 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.[192]

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.[193] 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.[194] Additionally, there is a provision allowing states parties to further extend the court's jurisdiction.[195] 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."[196]

Beyond its extended list of crimes, the Malabo Protocol is innovative in its expansion of criminal liability to corporations under certain circumstances.[197] This is a first for an international criminal court.[198] 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.[199]

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.[200]

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."[201] Many African and international scholars and civil society organizations have criticized this provision.[202] 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.[203] This provision has faced criticism for being weaker than the similar complementarity provisions of the Rome Statute.[204] Complicating matters, the Rome Statute makes the ICC complementary to national jurisdictions, but makes no mention of regional criminal courts.[205] 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.[206]

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."[207] 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.[208] 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.[209] 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.[210] The AU Executive Council elects the judges, who are appointed by the AU Assembly, with consideration of equitable regional and gender representation.[211] 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.[212]

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.[213] 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.[214]

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."[215] 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.[216]

To a similar extent as the ICC prosecutor, the ACJHR prosecutor will have *propio 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).[217] 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.[218]

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.[219]

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."[220] 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.[221]

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."[222] 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.[223]

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.[224] 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."[225] 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.[226]

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."[227] 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.[228]

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."[229] 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.[230] The inclusion of a broad official immunity provision in the Malabo Protocol feeds this doubt.[231] 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."[232]

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.[233]

Financing

The AU is responsible for financing the court because it is an AU treaty body.[234] 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.[235] 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.[236] By comparison, these numbers represent a small fraction of the ICC's 2017 budget.[237] 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[238]), "the cost of prosecuting one international crime could well outstrip the annual budget of the African Court as a whole."[239]

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.[240] The court is required to submit an annual report to the AU Assembly on its investigations, prosecutions, decisions, and issues of state cooperation.[241] The AU Assembly is responsible for oversight of the court's budget, as well as the enforcement of sentences.[242]

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.[243] 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.[244] 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.[245] 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,[246] 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.[247] 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.[248] 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,[249] 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.[250]

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.[251] 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.[252]

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.[253]

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.[254] 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.[255]

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.[256] 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).[257] 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.[258]

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.[259] 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."[260] 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."[261] 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."[262]

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.[263] 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.[264]

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.[265] The government has banned civil society organizations that have documented grave crimes and human rights abuses and spoken out about the causes of violence.[266] 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."[267]

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."[268]

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.[269] 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.[270] The mission explicitly modeled its recommendation on the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH WCC).[271] (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.[272]

In October 2005, the Secretary-General delivered a brief preliminary report, noting that negotiations with the Burundian government had stalled.[273] 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.[274] 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.[275] 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.[276] 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.[277] In December 2014, the National Assembly elected 11 commissioners, whom the president appointed later that same month.[278] 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.[279]

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."[280] 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."[281] 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.[282] 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.[283]

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."[284]

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."[285]

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.[286]

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

- A bilateral agreement between the UN and Burundi would determine the modalities of cooperation in the "establishment and operation" of the chamber.[289]

- 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.[290] 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."[291] 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.[292]

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.[293] 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.[294] 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.[295]

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.[296] 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.[297] 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.[298]

Under pressure from France and the Economic Community of the Central African States, Djotodia resigned in January 2014.[299] 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.[300] 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.[301]

Existing Justice-Sector Capacity

The court system in CAR has a reputation for lacking independence and for being corrupt and politicized.[302] Significant challenges have long plagued the court system.[303] 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.[304] According to the UN Commission of Inquiry, longstanding impunity for grave crimes was a major factor in fueling the armed conflict.[305]

According to the International Legal Assistance Consortium, the justice sector lacks even the most basic infrastructure and administrative capacities.[306] Amnesty International reports that the justice system needs to be rebuilt "almost entirely" in order to combat entrenched impunity.[307] 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.[308] Moreover, detention centers

are often inadequate and the judicial police lack capacity for conducting investigations into grave crimes.[309] 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.[310] 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.[311]

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.[312]

There are at least 140 organizations actively engaged in peacebuilding, human rights, and development work across the country.[313] 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.[314] 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

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,[315] 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.[316]

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.[317] The commission started work in April 2014, submitting a preliminary report in June 2014 and a final report in December 2014.[318] The commission concluded that all parties to the conflict were involved in serious violations of human rights and international humanitarian law.[319] The resolution in 2013 had also established a sanctions regime, which in January 2017, the Security Council extended until 2018.[320] The sanctions regime includes an arms embargo as well as a travel ban and assets freeze on individuals designated by the commission.[321]

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.[322] 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.[323] 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.[324] 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,[325] 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.[326] 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.[327] 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.[328]

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.[329] The SCC also has primacy of jurisdiction whenever jurisdictional conflicts may arise with other national courts,[330] although there is a lack of clarity with respect to the jurisdiction of military courts over crimes against humanity, war crimes, and genocide.[331] 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.[332]

The SCC's subject matter jurisdiction is based on domestic law.[333] International substantive norms and procedural rules apply to the extent that there are gaps or inconsistencies with the domestic legal framework.[334] 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.[335] The procedural law applicable before the SCC is generally that outlined by CAR's code of criminal procedure, complemented by international procedural rules.[336]

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.[337]

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.[338]

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.[339]

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.[340] 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.[341]

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.[342] 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.[343]

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.[344]

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.[345] 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.[346] 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.[347] 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.[348]

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.[349]

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.[350] During the five months of violence that followed, the UN and others documented widespread violations.[351] 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.[352] 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.[353] 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.[354]

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.[355] The sheer number of internationally supported projects to strengthen the justice sector is an indication of the sector's needs.[356] Freedom House assessed the Ivorian judiciary in 2016 as not independent, with judges highly susceptible to external interference and bribes.[357]

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).[358] 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.[359] 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.[360] 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.[361] 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.[362]

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 Spêciale 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.[363] 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.[364] 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.[365] 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.[366]

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.[367] 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.[368]

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.[369]

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,[370] who works under the authority of the general prosecutor of Abidjan.[371] 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.[372]

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.[373] 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)[374] every three months.[375] 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.[376]

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.[377]

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.[378]

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.[379] 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.[380] 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.[381] 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.[382] 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.[383] 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.[384] 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.[385] 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.[386] 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.[387] 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.[388]

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.[389] 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.[390] 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.[391] 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.[392]

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.[393]

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.

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).[394] 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.[395] 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,[396] 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.[397]

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 Ivoirian authorities in March 2013 to help with exhumations intended to provide evidence in the context of the CSEI's investigations.[398]

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,[399] 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.[400] 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.[401] 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.[402]

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.[403] Laurent Kabila sought support from Angola, Namibia, and Zimbabwe; while rebel forces multiplied and side-conflicts developed.[404] Atrocities were committed by all sides, and the first UN peacekeeping mission (MONUC) was established in 1999.[405] 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.[406] 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.[407] 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.[408]

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.[409] The conflicts in North and South Kivu and in the Ituri region continue to date, amid continuing allegations of Rwandan and Ugandan involvement.[410] The UN peacekeeping mission (renamed MONUSCO in 2010) was given a more robust mandate by the Security Council in 2013, but violence persists.[411] 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.[412]

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.[413] The number of internally displaced people has risen to 3.8 million.[414] 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.[415]

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."[416]

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);[417]

(2) Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the DRC (1997–1998);[418]

(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).[419]

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.[420]

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.[421] The OHCHR initiated an investigation into these mass graves and, with the support of the UN Secretary-General,[422] 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.[423] 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."[424] 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.[425] 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.[426] 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.[427]

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."[428] The report concluded that "the interests of justice can only be served by endowing an international tribunal with competence over these crimes."[429] 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.[430]

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.[431] The report found significant evidence that crimes under international law had been committed, including war crimes and crimes against humanity, on a massive scale.[432] 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.[433] 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.[434] 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.[435]

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,[436] 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.

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.[437] 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.[438] 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.[439] 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.[440]

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.[441] 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.[442] Significant gaps are partly filled by the international community, especially by MONUSCO, but this dependency is not a viable solution in the long-term.[443]

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.[444] Low salaries and persistent insecurity for judges and magistrates make them prone to corruption and bribery.[445] 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.[446] Perpetrators often hold positions of power, which

leads to intimidation and threats when sensitive cases are addressed.[447] The capacity of detention facilities and prisons is almost nonexistent, and frequent escapes seriously undermine the rule of law.[448] Lack of funding and staff also impair criminal defense and court management.[449] 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.[450] In addition to political interference in specific cases and circumstances, the government has generally resisted institutional reforms that aim to improve judicial independence.[451] 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.[452]

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.[453]

The capacity of national and local civil society organizations, however, is much weaker and varies depending on the region and the type of organization.[454] 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.[455] 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.[456] However, most organizations are constrained by the lack of sustainable funding.[457] 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,[458] but many suffer from the lack of basic infrastructure and means of communication.[459] In addition, legal and administrative constraints on the freedom association and recent crackdowns on criticism have constrained civil society activities.[460]

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.[461] 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.[462] 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."[463]

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 réstauration de la justice à l'Est de la RDC*), which backed mobile courts in the east of the country from 2007 to 2010,[464] and its successor projects PARJ and PARJ-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.[465] 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.[466] The UNDP assisted mobile court sessions from 2011 to 2012,[467] and MONUSCO's Justice and Correction Section and Joint Office for Human Rights (UNJHRO) has also provided technical and logistical backing.[468] 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.[469]

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.[470] 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.[471] 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.[472] Since 2015, ASF has organized activities to pass on their expertise and transfer the administration of mobile courts to the Ministry of Justice.[473]

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.[474] 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.[475] 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.[476]

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).[477]

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.[478] 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.[479] 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.[480]

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.[481]

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.[482] 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.[483] 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.[484]

Mobile Courts

Military and civilian courts may conduct mobile sessions outside their ordinary and secondary seats to access remote areas.[485] 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.[486]

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.[487] 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.[488]

In the civilian system, the Court of Appeals is the first instance to hear claims related to genocide, crimes against humanity, and war crimes.[489] According to the Organic Law of 2013, the Court of Appeals comprises one first president, one or several presidents, judges (*conseillers*), and one registrar.[490] The court is generally composed of three members, except for Rome Statute offenses for which it has five members.[491] 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.[492] 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.[493]

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.[494] 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.[495] 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.[496] Since the 2006 constitutional reform, a Superior Judiciary Council (*Conseil Supérieur de la Magistrature*) is responsible for the administration of justice, including military justice.[497] 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."[498] 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."[499] Its main project consists of the creation and operation of five Prosecution Support Cells,[500] 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.[501] 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.[502] 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.[503]

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.[504]

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.[505]

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."[506] 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.[507]

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.[508] 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.[509]

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.[510] Around two thirds of the cases implicated members of the FARDC, and the rest involved members of armed groups.[511] 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.[512]

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.[513] 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.[514] 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.[515] 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.[516] Numerous other sessions have been supported by other national and international organizations, with a high conviction rate. Through MONUSCO's Prosecution Support Cell Program,[517] 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.[518] 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."[519] 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.[520] 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.[521] In 2015 and 2016, mobile courts convicted and sentenced 22 military officers on charges of sexual violence.[522]

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.[523] 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.[524] 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.[525]

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.[526] 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.[527] 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."[528] 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."[529] 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.[530] The prosecution of international crimes in mobile tribunals is also significant in terms of complementarity with the ICC.[531] 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.[532]

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.[533] The role of the police in the enforcement of judicial decisions is highly unpredictable.[534] Even though courts often award reparations, they are rarely implemented.[535] When the accused is convicted, prison conditions are grim and escapes frequent.[536] 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.[537] 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.[538] 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.[539]

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.[540] 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.[541] This has created a dependency on foreign resources, which is not sustainable in the long-term.[542]

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.[543] 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.[544] 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. MONUSCSO has also often covered security costs and provided transportation.[545] 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),[546] and eight million euros for the REJUSCO program from 2006 to 2011.[547] 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.[548]

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.[549] Until the Cour de Cassation is created, the Supreme Court remains the highest instance in criminal matters.[550] 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.[551] 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.[552]

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,"[553] and the UNDP has organized court monitoring activities whereby teams employed by UNDP ensure that the trials are held in accordance with international standards.[554] 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.[555]

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.[556] 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.[557] This proposal was put forward again in 2008 and 2009 by UN Special Rapporteurs, Congolese civil society organizations, and Human Rights Watch.[558] 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.[559] 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.[560]

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.[561] Nevertheless, parliament rejected the new bill, citing procedural objections.[562] 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.[563] 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.[564] Accordingly, the material jurisdiction of the chambers was to include genocide, war crimes, crimes against humanity, and the crime of aggression.[565] The 2011 bill also entailed jurisdiction over "smaller offenses" if the chamber could demonstrate "the seriousness of the facts,"[566] 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.[567] In terms of temporal jurisdiction, the 2011 bill included crimes committed since 1990. The 2014 bill advanced this date to 1993,[568] a "date which should respond to the expectations of the Congolese population."[569] 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.[570] 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."[571] 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."[572] 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.[573] 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.[574] 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.[575] 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.[576]

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.[577] 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.[578]

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).[579] The president must be Congolese. Judges may be Congolese or international, but they may not come from one of the DRC's bordering countries.[580] The Congolese presidents and judges are appointed by the DRC president upon proposal from the Superior Judiciary Council (*Conseil Supérieur de la Magistrature*).[581] The prime minister would appoint foreign judges, upon proposal from the minister of justice.[582] 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.[583] 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.[584] Representation of women will be taken into account in the choice of judges and presidents.[585] Each chamber receives the assistance of a Registry that would be created for each chamber.[586] 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.[587] 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."[588] The chambers would thus constitute "national jurisdictions that may integrate an international element, as decided by the state," rather than "internationalized jurisdictions."[589]

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.[590] 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.[591] Accordingly, the continuing need to create mixed chambers was included among the recommendations of the *Etats généraux de la justice* conducted in 2015.[592]

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.[593] 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.[594]

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.[595]

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.[596] 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.[597] The African Union (AU) and other international actors pressured the sides to halt the violence and resolve the political crisis.[598] A national unity government assumed office in April 2008, with Kibaki as president and Odinga as prime minister.[599] A national commission recommended the formation of a special mixed tribunal to prosecute those most responsible for the 2007–2008 post-election violence.[600] 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.[601] 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.[602] 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."[603]

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.[604] 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.[605]

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."[606] 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.[607] 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.[608] 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."[609] By November 2010, "a bill on the establishment of a Special Tribunal had been indefinitely shelved."[610]

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).[611] 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.[612] 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.[613] 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.[614] 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,"[615] and related prior or subsequent offenses.[616] The bill granted the Special Tribunal exclusive jurisdiction over these crimes.[617] The bill relied heavily on the ICC in defining the elements of crimes[618] and modes of liability.[619]

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.[620]

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.[621] 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.[622]

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.[623] 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.[624] All judges were to be appointed for terms of three years, with some flexibility to extend these terms.[625] Special magistrates would be appointed to a renewable, three-year term.[626]

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.[627] 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.[628]

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.[629] 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.[630] The legislation required the prosecutor to meet the same qualifications as the tribunal's judges,[631] and once in office, to act with independence.[632] The bill specified that the prosecutor's office would consist of prosecution and investigation divisions.[633]

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,[634] following the same procedure as that for the prosecutor.[635] 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.[636] The legislation specifically tasked the registrar with establishing a victims and witnesses unit.[637]

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.[638] The head of office, assisted by a deputy,[639] would be required to meet qualifications similar to those of the registrar.[640] 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.[641]

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.[642] 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.[643] However, it remained unclear whether the act could ever be applied retroactively to cover the period of the postelection violence.[644] 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.[645]

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.[646]

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.[647] 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."[648] 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.[649] As of 2017, government officials continued to reference the creation of the ICD as a pending matter.[650]

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.[651] 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.[652] 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.[653]

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.[654]

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.[655] 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.

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.[656]

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.[657]

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.[658] 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."[659] 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.[660] 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.[661]

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."[662] 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.[663]

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.[664]

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.[665]

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).[666]

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,[667] 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.[668] 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.[669]

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.[670] The report recommended political leaders, including Senator Prince Johnson and President Ellen Johnson Sirleaf, be banned from holding public office for 30 years.[671] The government largely ignored the calls for lustration, and in January 2011, Liberia's Supreme Court ruled this recommendation unconstitutional.[672] The direct naming of key members of the ruling political class led some former warlords to publicly threaten a return to violence.[673]

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.[674] 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.[675] 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),[676] 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.[677] 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.[678] A 2011 population-based survey on perceptions about transitional justice approaches found that a minority of Liberians supported criminal trials for perpetrators.[679] 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."[680] 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.[681]

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.[682]

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."[683]

Location

The court would be seated in the Liberian capital, Monrovia, and could "establish alternative sites to conduct hearings as it deems necessary."[684]

Structure and Composition

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

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."[687] 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."[688] 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.[689] 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).[690]

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."[691] 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.[692]

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.[693]

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.[694]

In October 2017, Mohammed Jabbateh, aka "Jungle Jabbah," stood trial in the United States on charges of immigration fraud and perjury.[695] 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[696] and rebel leader George Boley in 2012.[697] 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.[698]

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.[699]
- 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.[700]
- 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.[701]

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.[702] 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.[703] 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."[704] 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.[705] 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."[706] 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."[707]

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.[708] 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.[709] 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.[710] Estimates put the percentage of Tutsis killed during the Rwandan genocide at about 75 percent of Rwanda's Tutsi population at the time.[711]

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.[712] 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.[713] 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.[714]

In May 1994, the Security Council increased the number of UNAMIR troops to 5,500 ("UNAMIR II"),[715] 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.[716] 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.[717] 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."[718] 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.[719] In 2003, the UN Security Council decided not to renew Del Ponte's appointment as chief prosecutor of the ICTR when her term expired,[720] 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.[721] 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."[722]

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.[723] 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.[724] 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.[725] 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.[726] 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.[727]

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.[728] Human rights organizations, the media, and lawyers who criticize official actions or policy face intimidation and interference.[729] 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.[730]

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.[731] 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,[732] 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.[733] 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.[734]

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."[735] 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.[736]

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."[737] The U.S. proposal was to "use the Statute, infrastructure, and staff of the Yugoslav court to initiate prosecutions of Rwandan war crimes."[738] 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."[739] (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.[740] 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.[741] 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."[742] 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.[743] 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.[744]

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.[745] 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."[746] 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.[747]

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,[748] 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."[749]

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.[750] 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.[751]

Location

The Security Council established the seat of the tribunal in Arusha, Tanzania.[752] 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.[753] 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.[754] 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.[755] The statute initially provided that chambers would have a maximum of 16 permanent judges and a maximum of nine *ad litem* judges.[756] (Between 2008 and 2009, the Security Council temporarily allowed 12 *ad litem* judges.)[757] 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.[758] The UN General Assembly elected 11 of the permanent judges and all of the *ad litem* judges.[759] 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.[760]

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.[761] 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.[762] 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.[763] 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."[764] 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."[765] Rather, the DCDMS acted as a liaison between the Registry and defense counsel teams.[766] 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.[767] The Registry promulgated a "Directive on the Assignment of Defense Counsel" in 1999, which was amended at least five times up until 2008:[768]

> 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.[769]

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.[770] 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.[771]

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.[772] 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."[773]

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.[774] 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.[775] 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.[776]

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."[777] 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."[778] 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."[779] A 2002 study found that more than half of Rwandans interviewed were "not well informed" about the tribunal.[780] 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."[781] 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.[782]

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.[783] 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.[784] 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.[785]

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.[786] This was the first case transferred to Rwanda under Rule 11*bis,* 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 11*bis*.[787] 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 11*bis* 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.

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.[788] 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.[789] 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.[790] Reforms introduced by the Rwandan government included abolition of the death penalty in 2007.[791] 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.[792] 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.[793] Some human rights organizations continued to express concerns about the opportunity for suspects to receive a fair trial in Rwandan domestic courts.[794]

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."[795]

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.[796] 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.[797] Additionally, in 1997 the prosecutor added charges of sexual violence to the indictment against Jean-Paul Akayesu[798] 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.[799] 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.[800] 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.[801] 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.[802]

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.[803] (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.[804]

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."[805]

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.[806] 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.[807] Initial budgeting for the ICTR was assessed and split with the peacekeeping funds for UNAMIR.

The size of the ICTR budget has drawn criticism.[808] 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.[809]

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.[810] 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."[811] 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 (Kinyarwandan 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."[812] 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."[813] 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."[814] The categories were "repeatedly modified and Gacaca courts [were] charged with hearing increasingly serious types of crimes."[815] 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."[816] 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.[817] 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.[818] 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.[819]

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.[820] 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."[821]

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."[822] 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."[823] He was ousted from office in 1990 and fled to Senegal, which granted him political asylum.[824] 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.[825] The DDS maintained a network of detention centers, where torture was a common tool of interrogation.[826]

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.[827]

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).[828] 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.[829]

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.[830] A 1993 law provided for the creation of a special tribunal to judge them.[831] 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.[832] 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.[833] 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.[834] 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.[835] However, the government never sought Habré's extradition, and the trial was criticized for its unfairness and secrecy.[836] 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.[837]

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."[838] 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.[839] 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.[840] 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.[841] 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.[842] The Belgian judge sent international rogatory letters to Chad and Senegal, and Chad declared that it officially lifted all immunity from the former president.[843] 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.[844]

In 2005, a Senegalese court held that it was not competent to rule on Belgium's extradition request,[845] 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.[846] 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.[847] 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."[848]

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.[849] In its nonbinding decision, the committee found Senegal in violation of the convention for failing to prosecute or extradite Habré to Belgium.[850]

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.[851] Following these reforms, several Chadian and Senegalese victims filed a complaint in Dakar accusing Habré anew of torture and crimes against humanity.[852] 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.[853] 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.[854]

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."[855]

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.[856] 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.[857] 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."[858] 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.[859] However, the EAC feature minimal international elements: their legal basis lies in Senegalese law, and there is little international involvement in personnel and oversight.[860] 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.[861] 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."[862]

The EAC is also the first court of its kind to be based on universal jurisdiction, instead of territoriality or nationality.[863] 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."[864] 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.[865] 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."[866] 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.[867] Finally, once all judgments are final, the EAC will be dissolved.[868]

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.[869] The proceedings were recorded, streamed live on the internet, and broadcast on Chadian television.[870] Once the final decision on appeal was affirmed in April 2017, the chambers were dissolved, and the ordinary courts continued with their normal functioning.[871]

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.[872] The EAC Investigative Chamber is integrated within the *Tribunal Regional Hors Classe de Dakar*, and it is composed of four Senegalese judges.[873] The EAC Indicting Chamber, the Trial Chamber, and the Appeals Chamber are all attached to the Dakar Court of Appeals.[874] 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.[875] All

judges are nominated by the Senegalese minister of justice and appointed by the chairperson of the AU Commission.[876]

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.[877] 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.[878] 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."[879] 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.[880] 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.[881]

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.[882] 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.[883]

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.[884] 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.[885] Protection for the acts performed during the course of the proceedings is governed by the initial agreement between the AU and Senegal;[886] and the administrator is responsible for directing, assisting, and protecting the witnesses and victims who appear before the court.[887]

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.[888] 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.[889]

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.[890] 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.[891]

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.[892] The consortium trained journalists, organized public debates, created a website, and produced materials to explain the trials in both countries.[893] In addition, the trial was recorded in its entirety, streamed on the internet, and broadcast on Chadian television.[894] This model maximized the program's effectiveness, implementation, local credibility and proximity, and cost-effectiveness.[895] 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.[896] 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;[897] and the last one is reportedly in Chad but not in custody.[898]

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.[899] 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.[900] 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.[901] Although Habré was totally uncooperative and remained silent throughout the trial, he appealed the judgment in June 2016.[902] On April 17, 2017, the Appeals Chamber upheld the conviction for crimes against humanity, torture, and war crimes, but acquitted Habré of rape.[903]

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.[904] 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.[905] 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.[906] 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.[907]

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.[908]

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.[909]

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.[910] 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.[911] 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.[912] Habré was ordered to pay reparations, and the EAC seized his assets, but it is unlikely that this will cover the full reparations order.[913] 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.[914]

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."[915]

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."[916] 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%.[917] 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.[918] 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.[919]

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.[920] The decision of the Appeals Chamber is "final and unappealable to anybody, however exceptional."[921]

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.[922] 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.[923] A steering committee may extend the mandates of the judges and of the prosecutor.[924] According to the Senegalese Code of Criminal Procedure, judges can be removed by the minister of justice through the decision of a disciplinary council.[925]

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).[926] 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.[927]

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."[928] 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.[929]

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.[930] 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,[931] 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.[932]

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.[933] A national statute creating the TRC was passed by parliament in February 2000, but it did not become fully operational until November 2002.[934] 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.[935] 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.'"[936]

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."[937] 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."[938] 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."[939] 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.

Existing Justice-Sector Capacity

After a ravaging civil war, the justice sector in Sierra Leone was in disrepair and rife with corruption.[940] Writing in 2001, one expert observed: "The judicial system is largely decimated as a result of the war."[941] Many lawyers, judges, magistrates, and

prosecutors fled during the conflict, and low salaries made the few that remained easy targets for corruption.[942] Much of the country's infrastructure was destroyed or suffered serious damage.[943] The High Court was the only functional court in Freetown, while many lower courts in the provinces had been shut down during the conflict.[944] 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.[945] 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;[946] and prosecutions against the RUF were unlikely in many areas of the country where they retained control.[947] 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.[948]

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.[949]

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.[950] 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.[951] 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.[952] 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.[953] 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.[954]

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.[955]

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.[956] 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.[957] 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.[958] 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.[959] 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.[960] The Secretary-General sent a fact-finding mission to Sierra Leone to investigate the feasibility of creating a tribunal.[961] 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.[962] 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.[963] 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.[964] The agreement was subsequently ratified into the domestic law of Sierra Leone.[965] 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."[966] 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."[967] 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.[968]

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).[969] In addition, the legal framework included secondary instruments, such as bilateral detention agreements with states and codes of conduct for counsel.[970]

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).[971] 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;[972] 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.[973] 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,"[974] 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,[975] offices, and a library. Many of the facilities were "accommodated in a simple prefabricated block, with little scope for expansion."[976] 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.[977] 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."[978]

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."[979]

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."[980]

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.[981] 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.[982] In 2006, about 150 of 250 staff members were nationals; in March 2011, about half of the 100 staff members were nationals.[983] 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.[984] 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."[985]

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."[986]

The registrar was a UN staff member appointed by the Secretary-General after consultation with the president of the Special Court.[987] 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.[988]

Defense

The Defense Office, headed by the principal defender, was located within the management structure of the Registry[989] 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."[990] Defense counsel were required to have practiced criminal law for a minimum of five years and to be licensed by a state.[991] 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."[992] The arrangement was meant to signal to lawyers that "assignment to a defendant did not result in a 'blank check.'"[993]

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.[994] 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."[995] 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."[996] 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."[997] 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.[998]

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.[999] 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.[1000] 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.[1001]

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.[1002] 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."[1003] No legal challenges to the blanket amnesty in the Lomé Agreement have been mounted domestically, and the domestic judicial system retains significant capacity gaps.[1004] 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."[1005] 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."[1006]

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.[1007] 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."[1008] 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.[1009]

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,[1010] 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.[1011]

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.[1012] 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."[1013]

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."[1014] 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.[1015]

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."[1016] 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."[1017] 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.[1018]

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."[1019]

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."[1020] 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.[1021] In 2011, security duties at the SCSL were handed over from a remnant Mongolian detachment of UNAMSIL peacekeepers to the Sierra Leone police.[1022]

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.[1023] 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."[1024] 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.

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).[1025] 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."[1026]

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."[1027] 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),[1028] 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.[1029] 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.[1030]

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."[1031]

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."[1032] Legacy initiatives were not contemplated in the founding documents of the SCSL and therefore not included in the core budget.[1033]

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."[1034]

Although the voluntary contribution arrangement allowed for "more flexibility both in the budgetary process ... and the reporting or control mechanisms,"[1035] ultimately

the arrangement severely taxed the SCSL's resources, continuously threatened the smooth function of the court, and presented a significant challenge.[1036]

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.[1037]

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.[1038] 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."[1039]

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.[1040]

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.[1041] When Kiir dismissed Machar and arrested a number of his ministers in December 2013, clashes erupted in the capital, Juba.[1042] 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.[1043]

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.[1044] By the end of 2016, nearly two million South Sudanese were internally displaced or living as refugees.[1045] 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."[1046]

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.[1047] An African Union Commission of Inquiry in 2015 found cases of forced cannibalism, gang rapes, and death by burning.[1048] 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."[1049] However, the commission stopped short of concluding that the crimes amounted to genocide.[1050] In November 2016, the UN Special Advisor on the Prevention of Genocide warned of a "potential for genocide" in South Sudan.[1051] 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.[1052]

In April 2017, the UK International Development Secretary described the ongoing interethnic violence as genocide.[1053]

Existing Justice-Sector Capacity

The 2011 Transitional Constitution established South Sudan's judicial structures.[1054] Customary courts form part of the system, alongside statutory courts.[1055] 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."[1056] 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.[1057] Customary courts are administered under 2009 Local Government Act, and as such, chiefs are primarily answerable to county commissioners.[1058]

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.[1059] 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."[1060]

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.[1061] USAID and UNDP have worked directly with the South Sudanese government to provide rule-of-law assistance.[1062] UNMISS, too, has provided justice-sector assistance.[1063]

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.[1064] 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.[1065] 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."[1066] Civil society organizations' assertion of independence has led to attempts by the warring factions to exclude them from participation in the peace process.[1067] 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.[1068]

Creation

Kiir and Machar entered into a peace agreement in 2015, pledging them to form a united transitional government.[1069] 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.[1070]

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."[1071]

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.[1072] Machar quickly denied any role in writing the article.[1073]

The United Nations has expressed support for the proposed court and a willingness to provide technical assistance in its establishment.[1074] 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.[1075] 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.[1076] 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.[1077]

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."[1078] Its investigations could rely on findings of the AU Commission of Inquiry or documents from any

other body.[1079] The HCSS would have primacy over national courts.[1080] 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."[1081]

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."[1082] Immunities and amnesties, grants of pardon, or statutes of limitation would not apply at the HCSS.[1083]

The agreement specifies that the HCSS have a mandate to award reparation and compensation.[1084] 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.[1085]

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.[1086]

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."[1087] 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."[1088] 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.[1089] 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."[1090]

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,[1091] 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.[1092]

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.[1093]

Oversight and Accountability

The chairperson of the African Union Commission would select and appoint the HCSS's judges, prosecutors, defense counsel, and the registrar.[1094] 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.[1095] 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.[1096]

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.[1097] 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.[1098] 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[1099] 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.[1100]

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).[1101] 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.[1102]

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.[1103] One observer calculates that direct and indirect deaths attributable to the conflict, as of late 2016, amounted to well over 500,000.[1104] As of April 2016, the UN High Commissioner for Refugees estimated that approximately 2.6 million Darfuris had been internally displaced within Sudan.[1105] Approximately 350,000 Darfuris had fled as refugees to Chad.[1106] Sexual violence has been a significant feature of the conflict, including documented cases of mass rape by Sudanese military forces.[1107] 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.[1108]

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."[1109] 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."[1110] 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,[1111] which may amount to crimes against humanity. The commission concluded that the government of Sudan had not "pursued a policy of genocide."[1112] However, it identified a number of suspects and recommended that the Security Council refer the situation to the International Criminal Court (ICC).[1113]

Darfur cases at the International Criminal Court

The Security Council referred the Darfur situation to the ICC in March 2005.[1114] 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.[1115]

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.[1116]

Multiple attempts at a negotiated settlement of the war in Darfur have failed. A UN-backed Darfur Peace Agreement negotiated in May 2006[1117] failed because it was rejected by two main rebel factions. The Doha Document for Peace in Darfur (DDPD),[1118] signed in July 2011, failed for similar reasons. Conflict and grave crimes have continued in the years since.[1119]

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.[1120] 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.[1121] 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."[1122] 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.[1123]

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.[1124] 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.[1125] In the ensuing years, the government has banned more groups,[1126] while Sudanese activists who persisted have faced arrest, ill-treatment, and unfair trials.[1127] 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.[1128] 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."[1129]

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.[1130] An amendment later extended its jurisdiction to include violations of "international humanitarian law."[1131] The SCCED had three permanent seats in Darfur.[1132]

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."[1133] 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.[1134] 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.[1135]

In 2012, the government of Sudan and insurgent groups agreed to establish a Special Court for Darfur Crimes as part of the broader DDPD.[1136] The court would have "jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur, since February 2003."[1137] Although the court would not have any direct international participation, the agreement included provision for observation by experts from the AU and UN.[1138] 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.[1139]

The AU endorsed the Mbeki Report,[1140] and international human rights organizations, as well as a consortium of Sudanese political parties, supported the proposal.[1141] 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.[1142]

Sudan has resisted implementation of the Mbeki Report's broader recommendations and rejected outright the hybrid court proposal and "any proposal involving foreign experts."[1143] 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.

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.[1144] 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.[1145]

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."[1146] 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."[1147]

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."[1148] 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.[1149]

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.[1150]

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."[1151]

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."[1152] This investigations body would be composed of mixed personnel, appointed by the AU.[1153] 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.[1154] 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.[1155]

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."[1156] 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."[1157]

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.[1158] 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.[1159] Mbeki's distancing from the proposal drew the ire of some in opposition and rebel groups.[1160] 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.[1161]

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."[1162] 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.[1163] Sudan's justice minister issued a decree appointing a special prosecutor for Darfur crimes in 2011.[1164] 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.[1165]

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.[1166]

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."[1167]

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.[1168]

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.[1169]

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,[1170] 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.[1171] 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).[1172] 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.[1173]

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.[1174]

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.[1175] 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."[1176] 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."[1177]

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.[1178] 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.[1179]

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.[1180] 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.[1181] Official practice directions were later signed by the chief justice and gazetted, but not until May 2011.[1182] 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.[1183] 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.[1184]

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.[1185]

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."[1186] 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."[1187] 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.[1188]

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.

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.[1189]

The Amnesty Act has been renewed for another two years, starting May 25, 2017.[1190] 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.[1191]

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.[1192]

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.[1193] 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.[1194] 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[1195] 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.[1196]

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.[1197]

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.[1198]

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.[1199] 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.[1200] 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.[1201]

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.[1202] 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.[1203] 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."[1204] 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.[1205] 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.[1206] 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.[1207]

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.[1208]

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.[1209] 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.[1210]

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.[1211] 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.[1212] This is however not unique to the ICD; it has been applied in other select High Courts across the country.[1213]

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.[1214] 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.[1215] The judiciary needs to rely on people who are exposed to everyday court work, court language, and court procedures.[1216] In the event that no court staff can provide interpretation, the court then relies on someone from the police, and thereafter, prisons.[1217]

Assessors

Under Ugandan criminal procedure, all trials before divisions of the High Court must include two or more citizen "assessors," appointed by the court[1218] 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).[1219] 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.[1220]

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.[1221] In the near future, the DPP intends to bring other cases, including one against Caesar Achellam, a former LRA commander[1222] and another concerning trafficking of ivory.[1223]

On May 26, 2016, the court found guilty eight of 13 individuals accused of having masterminded the July 2010 Kampala bombings;[1224] the court sentenced five of these to life imprisonment.[1225]

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.[1226] 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.[1227] In March 2017, the ICD approved an amended version of Kwoyelo's indictment,[1228] 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.[1229] 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.[1230]

Financing

For the 2016–2017 fiscal year, the Judiciary received Shs116.55 billion for recurrent and capital expenditure.[1231] This compares favorably to Shs93.2 billion received in 2015–2016; Shs83.06 billion for 2014–2015; and Shs84.493 billion for 2013–2014.[1232]

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.[1233] The United Kingdom and the European Union Delegation participate as noncontributing members.[1234]

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.[1235] 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.[1236]

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.[1237]

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.[1238] 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.[1239] Due process is followed prior to making the decision to remove a judge from office.[1240] In the course of executing their duties, judicial officers are guided by the Judicial Code of Conduct.[1241]

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.[1242] 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.[1243]

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.[1244] 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.[1245]

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.[1246] 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.[1247]

Notes

161. African Commission on Human and People's Rights, *African Charter on Human and Peoples' Rights*, available at: achpr.org/instruments/achpr/.
162. African Commission on Human and People's Rights, *About ACHPR*, available at: 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.
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.
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.
169. Charles Chernor 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.
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-communique-

eng.pdf. See also Charles Chernor Jalloh, Dapo Akande, and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome State 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.

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_0.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.

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.

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.

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.

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.

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.

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.

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; 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; Deya, "Worth the Wait," 22, available at: 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.

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; Amnesty International, *Open Letter to the Heads of State and Government of the African Union*, June 20, 2014, amnesty.org/en/documents/afr01/012/2014/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.

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.

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/. The protocol is available at: en.african-court.org/images/Protocol-Host%20Agrtmt/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 intergovernmental 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;

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/; 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.

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.

188. Constitutive Act of the African Union, July 11, 2000, Articles 4(h) and 4(o), available at: 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_Repor0506.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. 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. 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.

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/

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 46E*bis*.

201. Ibid., Article 46A*bis*.

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; 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; Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, January 2016, 26–27, available at: amnesty.org/en/documents/afr01/3063/2016/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; 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.

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; 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.

225. Deya, "Worth the Wait," 26.

226. Charles Chernor Jalloh, *International Justice, Reconciliation and Peace in Africa*, CODESRIA Policy Briefs, no. 1 (March 2015), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2645028. See also Sirleaf, "The African Justice Cascade and the Malabo Protocol," 87–90.

227. Du Plessis et al., "African Efforts to Close the Impunity Gap," 6.

228. Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, 24–25.

229. Bhoke Murungu, "Towards a Criminal Chamber," 25.

230. Ibid., 24.

231. Ibid., 27.

232. See Lutz Oette, "The African Union High-Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges Facing International Criminal Justice?" in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmehielle (The Hague: Eleven International Publishing, 2012). Oette argues that the RCC gives license to impunity. See Kristen Rau, "Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights," *Minnesota Law Review* 97, no. 2 (2012), 669–708.

233. Bhoke Murungu, "Towards a Criminal Chamber," 22–25 ; du Plessis et al., "African Efforts to Close the Impunity Gap," 9–10; and Amnesty International, *Legal and Institutional Implications of the Merged and Expanded African Court*, 29–32.

234. Amended ACJHR Statute, Article 26.

235. See *African Union Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes*, EX.CL/773(XXII).

236. Africa Union Commission, 2017 Budget overview paper, March 5, 2016, available at: panafricanparliament.org/thematic-information/documents-from-may-2016-pap-session/auc/45-au-2017-budget-overview-paper-en/file.

237. The ICC budget that was approved during the Fifteenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court for the year 2017 was €144,587,300. *Official Records*, vol. 1 (2016), available at: asp.icc-cpi.int/en_menus/asp/sessions/official%20records/Pages/15th-session—Official-Records.aspx.

238. Forum des Chambres Africaines, *Key Figures*, available at: forumchambresafricaines.org/key-figures/?lang=en.

239. Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges," *The European Journal of International Law* 24, no. 3 (2013): 944.

240. Amended ACJHR Statute, Article 7 and Article 22A.

241. Ibid., Article 57.

242. Ibid., Article 26 and Article 46.

243. See UN Security Council, *International Commission of Inquiry for Burundi: Final Report*, S/1996/682, 1996, paras. 78–83, available at: usip.org/sites/default/files/file/resources/collections/commissions/Burundi-Report.pdf.

244. Ibid., para. 85.

245. Ibid., paras. 496–99. See also René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Washington, D.C.: Woodrow Wilson Center Press, 1996).

246. Arusha Peace and Reconciliation Agreement for Burundi, August 28, 2000, available at: peacemaker.un.org/node/1207.

247. International Crisis Group, *Burundi: A Dangerous Third Term*, Report No. 235/Africa, May 20, 2016, 7–9, available at: crisisgroup.org/africa/central-africa/burundi/burundi-dangerous-third-term.

248. Arusha Peace and Reconciliation Agreement for Burundi, Article 7(3): "She/he shall be elected for a term of five years, renewable only once. No one may serve more than two presidential terms." See also Constitution of the Republic of Burundi, 2005, Article 96.

249. "Failed Burundi Coup Plotters Arrested As President Returns from Tanzania," *The Guardian*, May 15, 2015, available at: theguardian.com/world/2015/may/15/burundi-army-dead-radio-station-battle-coup-leaders-arrested

250. On July 6, 2015, the Pan African Lawyers' Union (PALU) with Burundian Lawyers and Human Rights Defenders challenged the legality of Nkurunziza's third term by filing a case at the East African Court of Justice (EACJ), Reference No. 2 of 2015 and Application No. 5 of 2015, *East African Civil Society Organizations' Forum (EACSOF) v. The Attorney General of Burundi, Commission électorale nationale indépendante (CENI) and the Secretary-General of East African Community (EAC)*. This was the first time that such a case had been filed at the EACJ.

251. Global Centre for the Responsibility to Protect, *Burundi: Populations at Risk—Serious Concern*, September 15, 2017, available at: reliefweb.int/report/burundi/burundi-populations-risk-serious-concern-15-september-2017. See also data from the UN High

Commissioner for Refugees on Burundi, available at: data2.unhcr.org/en/situations/burundi.

252. *Report of the Commission of Inquiry on Burundi*, A/HRC/36/54, paras. 81–82, available at: ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/54.

253. *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, S/2005/158, March 11, 2005, available at: un.org/ruleoflaw/files/Burundi%20S2005158.pdf.

254. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the Situation in Burundi*, April 25, 2016, available at: icc-cpi.int//Pages/item.aspx?name=otp-stat-25-04-2016.

255. Human Rights Council, *Situation of Human Rights in Burundi*, A/HRC/RES/33/24, October 5, 2016, para. 23.

256. "Burundi Notifies U.N. of International Criminal Court Withdrawal," *Reuters*, October 26, 2016, available at: reuters.com/article/us-burundi-icc/burundi-notifies-u-n-of-international-criminal-court-withdrawal-idUSKCN12Q287.

257. *Report of the Commission of Inquiry on Burundi*, A/HRC/36/54, para. 99.

258. Public Redacted Version of Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ICC-01/17-X-9-US-Exp, October 25, 2017, available at: icc-cpi.int/Pages/record.aspx?docNo=ICC-01/17-9-Red.

259. See United Nations Security Council, *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, S/2005/158, March 11, 2005 (hereinafter: Kalomoh Report), paras. 43–52; see also OHCHR in Burundi, available at ohchr.org/EN/Countries/AfricaRegion/Pages/BISummary20102011.aspx.

260. Kalomoh Report, para. 52.

261. *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff: Mission to Burundi (8–16 December 2014)*, A/HRC/30/42/Add.1, August 10, 2015, available at: ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_42_Add_1_ENG_.docx.

262. *Report of the Commission of Inquiry on Burundi*, A/HRC/36/54, para. 13. See also paras. 61–64 for further assessment of problems with the judiciary.

263. Freedom House, *Burundi Shuts Down Civil Society*, November 23, 2015, available at: freedomhouse.org/article/burundi-shuts-down-civil-society.

264. *ACAT-Burundi, APRODH, FOCODE, FORSC and RCP, v. the Attorney General of Burundi and the Secretary-General of the East African Community*, Reference No. 12 of 2016, December 19, 2016. The five organizations are represented by the Pan African Lawyers Union.

265. International Crisis Group, *Burundi: A Dangerous Third Term*, Report No. 235/Africa, May 20, 2016, 5, available at: crisisgroup.org/africa/central-africa/burundi/burundi-dangerous-third-term.

266. See International Federation of Human Rights, "Ban of the ITEKA League: Another Blow to Burundian Civil Society," press release, January 6, 2017, available at: fidh.org/en/region/Africa/burundi/ban-of-the-iteka-league-another-blow-to-burundian-civil-society.

267. UN Office of the High Commissioner for Human Rights, *Burundi: UN Experts Raise Alarm at Growing Repression of NGOs and Human Rights Defenders*, February 6, 2017, available at: ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21145.

268. Arusha Peace and Reconciliation Agreement for Burundi, August 28, 2000, Protocol I, Article 11.

269. United Nations Security Council, *Letter Dated 26 January from the President of the Security Council Addressed to the Secretary-General*, S/2004/72, January 26, 2004, requesting the Secretary-General to form an assessment mission to Burundi.

270. On terminology, the Kalomoh Report described the court as a "Special Chamber in the Court System of Burundi." The proposed chamber is also sometimes referred to as a "Special Tribunal." This report uses the nomenclature "Special Chamber for Burundi."

271. See the Kalomoh Report. The mission also evaluated various proposals for national and international commissions. The mission found these bodies would have overlapping mandates and add little value to the previous three UN-led Commissions of Inquiry and warned the Security Council that "the UN can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law." The mission visited Burundi in May 2004, meeting with UN bodies, government representatives, political leaders, and civil society.

272. United Nations Security Council Resolution 1606, S/RES/1606, June 20, 2005.

273. United Nations Security Council, *Letter Dated 11 October 2005 from the Secretary-General to the President of the Security Council*, S/2005/644, October 12, 2005.

274. See Stef Vandeginste, "Transitional Justice for Burundi: A Long and Winding Road," Crisis Management Initiative (presented at the Building a Future on Peace and Justice Conference, Nuremberg June 25–27, 2007), available at: peace-justice-conference.info/documents.asp.

275. Rapport des consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi, pages 114 and 136, April 20, 2010, available at : ohchr.org/Documents/Countries/BI/RapportConsultationsBurundi.pdf.

276. The Burundian ambassador, in June 2011 remarks to the UN Human Rights Council, reported that the government had formed a committee to set up a Truth and Reconciliation Commission and a Special Chamber, but no official document to that effect seems to have been submitted to the Human Rights Council. See "Negotiations for Reconciliation Commission and Special Tribunal to Resume in Burundi," *International Justice Tribune*, June 20, 2011, available at: rnw.nl/international-justice/article/negotiations-reconciliation-commission-special-tribunal-resume-burundi.

277. *Loi n°1/18 du 15 mai 2014 Portant Création, Mandat, Composition, Organisation et Fonctionnement de la Commission Vérité et Réconciliation*, available at : cvrburundi.bi/en/wp-content/uploads/2016/10/Loi-du-15-mai-2014-portant-Creation_mandat_composition_organisation_et_fonctionnement_de-la-_CVR.pdf.

278. See the TRC's website: cvrburundi.bi/en/presentation/.

279. Ephrem Rugiruriza, "Burundi Truth Commission "a Diversionary Tactic,' Say Critics," JusticeInfo.net, March 16, 2016, available at: justiceinfo.net/en/justice-reconciliation/26370-burundi-truth-commission-%E2%80%9Ca-diversionary-tactic%E2%80%9D,-say-critics.html.

280. Vandeginste, "Transitional Justice for Burundi."

281. Kalomoh Report, para. 62.

282. Ibid.

283. Ibid., para. 61.

284. Ibid., para. 66.

285. Ibid., para. 60.

286. Ibid., paras. 55, 57–59. The mission does not report in much detail on its examinations of different models, only briefly mentioning that it examined the ICTY, ICTR, the Special Court for Sierra Leone, the Bosnian War Crimes Chamber, and the East Timor Special Panels for Serious Crimes. The mission criticized the bilateral SCSL as not forming part of the Sierra Leone court system.

287. Ibid., para. 68.

288. Ibid., paras. 61–66.

289. The mission noted that a bilateral agreement would ensure Burundi was "internationally engaged" and its "political will to eradicate impunity … be tested." Ibid., para. 71.

290. *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, paras. 40–42, available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_42_Add_1_ENG_.docx. See also Stef Vandeginste, "Bypassing the Prohibition of Amnesty for Human Rights Crimes under International Law: Lessons Learned from the Burundi Peace Process," *Netherlands Quarterly of Human Rights* 29, no. 2 (2011): 189–211, available at: corteidh.or.cr/tablas/r26646.pdf.

291. Kalomoh Report, para. 67.

292. Ibid.

293. For background on the history of the Central African Republic, its governance, and the conflict, see Tatiana Carayannis and Louisa Lombard, eds., *Making Sense of the Central African Republic* (London: Zed Books, 2015). See also International Crisis Group, *Central African Republic: The Roots of Violence*, September 2015, available at: crisisgroup.org/africa/central-africa/central-african-republic/central-african-republic-roots-violence.

294. Henry Kam Kah, "The Séléka Insurgency and Insecurity in the Central African Republic, 2012–2014," *Brazilian Journal of African Studies* 1, no. 1 (Jan./Jun. 2016): 44–46, available at: seer.ufrgs.br/index.php/rbea/article/download/59490/37530.

295. Ibid., 47–54.

296. Ibid., 49–54.

297. United Nations, *Final Report of the International Commission of Inquiry on the Central African Republic*, S/2014/928, December 22, 2014, available at: reliefweb.int/sites/reliefweb.int/files/resources/N1471229.pdf.

298. For an overview of Séléka groups, see Human Rights Watch, *Killing without Consequences: War Crimes, Crimes against Humanity and the Special Criminal Court in the Central African Republic*, July 2017, 21–23, available at: hrw.org/sites/default/files/report_pdf/car0717_web.pdf.

299. Kam Kah, "The Séléka Insurgency and Insecurity in the Central African Republic, 2012–2014," 52.

300. "The Central African Republic Could Be on the Brink of a Bloodbath, *The Washington Post*, October 10, 2017, available at: washingtonpost.com/world/africa/the-central-african-republic-could-be-on-the-brink-of-a-bloodbath/2017/10/09/b26e59d0-a7bf-11e7-9a98-07140d2eed02_story.html?utm_term=.f0a47ffeebeb. See also International Crisis Group, *Avoiding the Worst in Central African Republic*, September 28, 2017, 20, available at: crisisgroup.org/africa/central-africa/central-african-republic/253-avoiding-worst-central-african-republic.

301. UN OCHA statistics, available at: unocha.org/car.

302. UNSC, *UN Commission of Inquiry on the Central African Republic: Final Report*, S/2014/928, December 22, 2014, 20; see also Amnesty International, *The Long Wait for Justice: Accountability in Central African Republic*, January, 2017, 27, available at: amnestyusa.org/sites/default/files/car_-_the_long_wait_for_justice_en_2.pdf.

303. See, for example, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Mission to the Central African Republic*, A/HRC/11/2/Add.3, May 27, 2009, para. 59; UN Peacebuilding Commission, *Country-Specific Configuration on Central African Republic: Rule of Law and Good Governance in Central African Republic*, 2008, available at: www.un.org/en/peacebuilding/cscs/car/key_docs/bg_paper_rol_good_governance_22_10_2008.pdf.

304. UNSC, *UN Commission of Inquiry on the Central African Republic: Final Report*, S/2014/928, December 22, 2014, 20; MINUSCA, Justice and Corrections Section website, available at www.wacsi.org/en/site/publications/2430/Civil-Society-Index-Rapid-Assessment-Liberia-Liberia-Ghana-CIVICUS.htm.

305. UNSC, *UN Commission of Inquiry on the Central African Republic: Final Report*, S/2014/928, December 22, 2014, 7.

306. ILAC, *ILAC Rapport d'évaluation de l'état de droit : République Centrafricaine 2017*, 2017, available at : www.ilacnet.org/wp-content/uploads/2017/05/ILACs-Rule-of-Law-Assessment-Report-Central-Africa-Republic-2017-.pdf.

307. Amnesty International, *CAR: Urgent need to rebuild justice system as war crime suspects roam free*, January 11, 2017, available at: www.amnesty.org/en/latest/news/2017/01/car-urgent-need-to-rebuild-justice-system-as-war-crime-suspects-roam-free/.

308. Amnesty International, *The Long Wait for Justice*, 24.

309. Ibid., 7, 26, 31, and 33.

310. Human Rights Watch, *Killing without Consequences*, 75.

311. Godfrey M. Musila, "The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations," Occasional Paper No. 2, International Nuremberg Principles Academy, 2016, 30.

312. International and Central African Civil Society Letter, *Next Steps to Operationalize the Special Criminal Court in the Central African Republic*, available at: hrw.org/sites/default/files/supporting_resources/public_civil_society_letter_on_the_special_criminal_court_in_the_central_african_republic.pdf.

313. CIVICUS Monitor, Central African Republic, available at: monitor.civicus.org/newsfeed/2016/06/01/association-central-african-republic.

314. Conciliations Resources, "Analysis of Conflict and Peacebuilding in the Central African Republic," November 2015, 21.

315. S/2014/928, 9.

316. ICC, *Situation in the Central African Republic II Article 53(1) Report, Executive Summary*, September 24, 2014, paras. 22–23, available at: icc-cpi.int/iccdocs/otp/SAS-CARII-Art53-1-Executive-Summary-24Sept2014-Eng.pdf.

317. S/RES/2127 (2013), December 5, 2013, available at: un.org/ga/search/view_doc.asp?symbol=S/RES/2127%20%282013%29.

318. *The International Commission of Inquiry on the Central African Republic: Final Report*, UN Doc S/2014/928.

319. UNSC, *UN Commission of Inquiry on the Central African Republic: Final Report*, S/2014/928, December 22, 2014, 7.

320. Security Council Resolution 2127, December 5, 2013, paras. 54–59; UN Security Council Resolution 2339, S/RES/2339 (2017), January 27, 2017, para. 27.

321. Resolution 2339, para. 1 (a–h); paras. 13 (a–c), 14, and 15; para. 10.

322. "Security Council Welcomes Central African Republic National Forum, Urges Implementation of Peace Pact," *UN News Center*, May 16, 2015, available at: un.org/apps/news/story.asp?NewsID=50878#.Wfw32tCnFPY.

323. Loi Organique No. 15.003 Portant Creation, Organisation et Fonctionnement de la Cour Penale Speciale, available at fidh.org/IMG/pdf/loi_organique_portant_cre_ation_organisation_et_fonctionnement_de_la_cps.pdf.

324. Patryk I. Labuda, "The Special Criminal Court in the Central African Republic Failure or Vindication of Complementarity?" *Journal of International Criminal Justice* 15 (2017): 181–82.

325. UNSC Resolution 2301 (2016), para. 34(d)(iv)–(viii).

326. Law 15.003, Article 70.

327. Human Rights Watch, *A Step Toward Justice in the Central African Republic*, February 21, 2017, available at: hrw.org/news/2017/02/21/step-toward-justice-central-african-republic.

328. See Secretary-General's report to the Security Council on the Central African Republic, S/2017/473, June 2, 2017, para. 49; and Secretary-General's report to the Security Council on the Central African Republic, S/2017/865, October 18, 2017, para. 48.

329. Article 4.

330. Article 3.

331. Secretary-General's report to the Security Council, S/2017/473, June 2, 2017, para. 49.

332. Article 37.

333. Article 3 of the law states that the SCC has jurisdiction over serious violations of human rights and international human rights law as defined in the CAR Penal Code and under CAR's international treaty obligations.

334. Article 3.

335. Labuda, "The Special Criminal Court," 175–206.

336. Article 5. In accordance with Article 3, the SCC may rely on procedural rules established at the international level if there are gaps in domestic law, uncertainty about interpretation or incompatibility with international norms.

337. Article 65.

338. Erica Bussey, *Progress and Challenges in Establishing the Special Criminal Court in the Central African Republic*, Amnesty International, October 2, 2017, available at: amnesty.

org/en/latest/campaigns/2017/10/progress-and-challenges-in-establishing-the-special-criminal-court-in-the-central-african-republic.

339. Article 2.

340. MINUSCA, *Report of the Mapping Project Documenting Serious Violations of International Human Rights Law and International Humanitarian Law Committed within the Territory of the Central African Republic between January 2003 and December 2015*, May 2015, 9, available at: ohchr.org/Documents/Countries/CF/Mapping2003-2015/2017CAR_Mapping_Report_EN.pdf.

341. OHCHR, *The Mapping Report and the Special Criminal Court: Main Recommendations*, May 2017, 1.

342. Amnesty International, *The Long Wait for Justice*, 25.

343. Ibid., 26.

344. Ibid.

345. Articles 52 and 53.

346. See Secretary-General's report to the Security Council, S/2017/473, June 2, 2017, para. 49; and Secretary-General's report to the Security Council, S/2017/865, October 18, 2017, para. 48.

347. Bussey, *Progress and Challenges in Establishing the Special Criminal Court in the Central African Republic*.

348. Open Society Justice Initiative correspondence with a representative of a Reference Group state member.

349. Article 27.

350. ONOCI web site, un.org/en/peacekeeping/missions/unoci/elections.shtml.

351. See, for example, Human Rights Watch, *They Killed Them Like It Was Nothing*, October 5, 2011, available at: hrw.org/report/2011/10/05/they-killed-them-it-was-nothing/need-justice-cote-divoires-post-election-crimes; FIDH, *It Is Urgent to Prevent the Escalation to a Civil War*, March 9, 2011, available at: fidh.org/en/region/Africa/cote-d-ivoire/it-is-urgent-to-prevent-the-escalation-to-a-civil-war; Amnesty International, *"They looked at his identity card and shot him dead": Six Months of Post-electoral Violence in Côte d'Ivoire*, May 25, 2011, AFR/31/002/2011, available at: amnesty.org/en/documents/afr31/002/2011/en/.

352. *Report of the Independent, International Commission of Inquiry on Côte d'Ivoire, Human Rights Council*, June 6, 2011, A/HRC/17/48, Summary. The full report has never been published.

353. UNHCR, *Escalating Violence in Côte d'Ivoire Sees Dramatic Rise in Displacement*, report from press briefing on March 25, 2011, available at: unhcr.org/4d8c88ab9.html.

354. Human Rights Watch, *Justice Reestablishes Balance: Delivering Credible Accountability for Serious Abuses in Côte d'Ivoire*, 2016, 16.

355. Human Rights Watch, *Justice Reestablishes Balance*, March 22, 2016, footnote 11, citing the French development agency, AFD.

356. For instance, the C2D Justice en action project funded by the French development agency AFD from 2016; USAID funded Pro-Justice Côte d'Ivoire Justice Sector Support Program 2013–2018.

357. Freedom House, *Freedom in the World 2016, Côte d'Ivoire, F, Rule of Law*, available at: freedomhouse.org/report/freedom-world/2016/c-te-divoire.

358. FIDH, MIDH, and LIDHO, *Côte d'Ivoire: Choisir entre la justice et l'impunité*, December 2014, 9.

359. Requête de la Répblique de Côte d'Ivoire sur la recevabilité de l'affaire le Procureur c. Simone Gbagbo, et demande de sursis à l'exécution en vertu des articles 17, 19 et 95 du Statut de Rome, September 30, 2013, ICC-02/11-01/12, paras. 42–43.

360. *Report of the Independent Expert on the Enhancement of Capacity-building and Technical Cooperation with Côte d'Ivoire in the Field of Human Rights*, May 19, 2017, UN Human Rights Council, A/HRC/35/43. For a general but rather out of date analysis of the capacity of Ivorian civil society, see the expert report prepared for the European Union and the Ivorian Government, *Etude de faisabilité du programme d'appui à la société civile en Côte d'Ivoire, Rapport de mapping*, July 2010, available at eeas.europa.eu/archives/delegations/cote_ivoire/documents/more_info/mapping_rapport_final_fr.pdf.

361. See for example the reports, *Ivory Coast: The Fight Against Impunity at a Crossroads*, and *Côte d'Ivoire: choisir entre la justice et l'impunité*, published by FIDH with its partner Ivorian human rights organizations MIDH and LIDHO on October 22, 2013, and December 1, 2014. The three NGOs were thus able to access the case files, contribute documents, request that the judicial authorities take specific investigative steps, and make submissions during the investigations, as well as assist other civil parties who were victims. A web-based platform, Ivoire Justice, follows the Ivorian cases at the ICC and posts regular reports on the proceedings, available at: ivoirejustice.net.

362. *Report of the Independent, International Commission of Inquiry on Côte d'Ivoire*, para. 9.

363. Presidential decree no. 2013-915 cites order no. 020/MEMJ/DSJRH/MEF of June 24, 2011, available at: justice-ci.org/cellule.html.

364. Communique du Conseil des ministers du mercredi 20 juillet 2016, available at: gouv.ci/doc/1469096151CCM_20%2007%202016_V3%20(SGG)%20(003)vf.pdf.

365. See, for example, the report of FIDH, MIDH, and LIDHO, *Côte d'Ivoire: Choisir entre la justice et l'impunité*, 9.

366. Website of the Coalition for the International Criminal Court, coalitionfortheicc.org/country/cote-divoire.

367. See justice-ci.org/cellule.html.

368. Human Rights Watch, *Justice Reestablishes Balance*.

369. See, for instance, communique issued by the spokesperson of the public prosecutor, July 29, 2011, available at: gouv.ci/doc/communique_parquet_degel.pdf.

370. Presidential Decree 2013-915, Art. 4.

371. Ibid., Article 5.

372. See: justice-ci.org/cellule/76-personnel-et-cadre-de-travail.html. The website does not appear to be updated.

373. Office of the High Commissioner for Human Rights, "Côte d'Ivoire: Justice for Victims of Human Rights Violations 'Long Overdue'—Zeid," press release, March 11, 2015, available at: ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15683&LangID=E.

374. CCP, Articles 232 and 234.

375. Ibid., Article 235.

376. An appeal for cassation before the criminal section of the Judicial Division, Criminal Section, of the Supreme Court is possible, but that court rules only on issues of form and on whether the proceedings meet constitutional and statutory requirements.

377. Communique du parquet, July 22, 2011, available at : www.gouv.ci/doc/communique_parquet.pdf.

378. Interview on *BBC Africa* in April 2013, Philippe Bolopion of Human Rights Watch, available at https://onuci.unmissions.org/revue-des-medias-audiovisuels-du-mercredi-03-avril-2013.

379. FIDH, MIDH, and LIDHO, Ivory Coast: The Fight against Impunity at a Crossroads, October 22, 2013, 13–14, available at: www.fidh.org/en/region/Africa/cote-d-ivoire/14160-ivory-coast-the-fight-against-impunity-at-a-crossroads.

380. Ibid., 4 and 16.

381. FIDH, MIDH, and LIDHO, *Côte d'Ivoire: Choisir entre la justice et l'impunité*, 4.

382. Ibid., 17–21.

383. Human Rights Watch, *Côte d'Ivoire: Simone Gbagbo Acquitted after Flawed War Crimes Trial*, March 29, 2017, available at: hrw.org/news/2017/03/29/cote-divoire-simone-gbagbo-acquitted-after-flawed-war-crimes-trial.

384. Warrant of Arrest for Simone Gbagbo, February 29, 2012, ICC-02/11-01/12-1.

385. Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest against Simone Gbagbo, ICC-02/11-01/12-2-Red, para. 11.

386. Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire Le Procureur c. Simone Gbagbo, et demande de sursis à execution en vertu des articles 17, 19 et 95 du Statut de Rome, September 30, 2013, ICC-02/11-01/12-11-Red.

387. Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, December 11, 2014, ICC-02/11-01/12-47-Red, and the Judgment on the Appeal, May 27, 2015, ICC-02/11-01/12-75-Red.

388. Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, paras. 65 and 69.

389. According to some reports, no further judicial proceedings took place, see, for instance, U.S. Department of State, *Côte d'Ivoire 2015 Human Rights Report*, available at: state.gov/documents/organization/252885.pdf.

390. Open letter to President Alassane Ouattara of the Republic of Côte d'Ivoire, June 25, 2015, available at: hrw.org/news/2015/06/26/open-letter-president-alassane-ouattara-republic-cote-divoire.

391. According to Human Rights Watch in March 2017, the CSEI had indicted them, but none had yet progressed to trial and some remained in senior positions in the Ivorian armed forces, even receiving promotions, available at: hrw.org/news/2017/03/29/cote-divoire-simone-gbagbo-acquitted-after-flawed-war-crimes-trial.

392. UN Human Rights Council, *Report of the Independent Expert on the Enhancement of Capacity-building and Technical Cooperation with Côte d'Ivoire in the Field of Human Rights*, A/HRC/35/43, May 19, 2017, para. 43.

393. *Statement of the Special Representative of the Secretary-General of the United Nations for Cote d'Ivoire, Mme. Aichatou Mindaoudou, to the Security Council*, January 13, 2016, available at: onuci.unmissions.org/d%C3%A9claration-de-la-repr%C3%A9sentante-sp%C3%A9ciale-du-secr%C3%A9taire-g%C3%A9n%C3%A9ral-des-nations-unies-pour-la-c%C3%B4te.

394. RFI report of June 24, 2013, cited on the ONUCI website press review, available at: onuci.unmissions.org/revue-de-presse-internationale-du-lundi-24-juin-2013.

395. FIDH, MIDH, and LIDHO, *Côte d'Ivoire: Choisir entre la justice et l'impunité*, 13. The report also criticized the CDVR for having produced few positive effects in terms of promoting reconciliation in the country, despite having heard almost 70,000 people.

396. *OHCHR Report 2016, OHCHR in the Field: Africa*, 174.

397. FIDH, MIDH, and LIDHO, *Côte d'Ivoire: Choisir entre la justice et l'impunité*, 10.

398. UNOCI weekly press briefing, April 4, 2013, available at: onuci.unmissions.org/retranscription-du-point-de-presse-hebdomadaire-de-l%E2%80%99onuci-du-04-avril-2013.

399. See, for example, the address to the UN Security Council of the Special Representative of the Secretary-General of the UN for Ivory Coast, Aichatou Mindaoudou, on June 10, 2015, available at: onuci.unmissions.org/la-repr%C3%A9sentante-sp%C3%A9ciale-du-secr%C3%A9taire-g%C3%A9n%C3%A9ral-de-l%E2%80%99onu-pour-la-c%C3%B4te-d%E2%80%99ivoire-a%C3%Afchatou-mindaoudou.

400. Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, January 2011, 18 (hereinafter: *Putting Complementarity into Practice*).

401. Peace Direct, "Democratic Republic of the Congo: Conflict Profile," *Insight on Conflict*, available at: insightonconflict.org/fr/conflicts/dr-c congo/conflict-profile/.

402. *Putting Complementarity into Practice*, 18.

403. Armed Activities on the Territory of the Congo (*DRC v. Uganda*), Judgment, I.C.J., Reports 2005, 168.

404. *Putting Complementarity into Practice*, 18.

405. United Nations, *United Missions Organization Mission in the Democratic Republic of the Congo*, available at: un.org/en/peacekeeping/missions/past/monuc/index.shtml.

406. *Putting Complementarity into Practice*, 19.

407. The International Rescue Committee estimated around 3.8 million people had died as the direct or indirect result of conflict between 1998 and 2004. Other estimates are much higher. For substantive histories of the First and Second Congo Wars, see Jason K. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (Public Affairs, 2012); Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2008); Rene Lemarchand, *The Dynamics of Violence in Central Africa* (Philadelphia: University of Pennsylvania Press, 2008); and Thomas Turner, *The Congo Wars: Conflict, Myth and Reality* (London: Zed Books, 2007).

408. UNOHCHR, *Democratic Republic of the Congo, 1993-2003: Report of the 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, August 2010, para. 15.

409. Peace Direct, "Democratic Republic of the Congo: Conflict Profile."

410. *Putting Complementarity into Practice*, 19.

411. UN Security Council, Resolution 2098, S/RES/2098, March 28, 2013.

412. Jason Burke, "Congo Violence Fuels Fears of Return to 90s Bloodbath," *The Guardian*, June 30, 2017.

413. "DR Congo Country Profile," *BBC*, July 13, 2017.

414. UNOCHA, *DRC: Number of Internally Displaced People Rises to 3.8 Million—the Highest in Africa*, July 7, 2017, available at: unocha.org/story/drc-number-internally-displaced-people-rises-38-million-highest-africa.

415. Human Rights Watch, *Democratic Republic of Congo: Ending Impunity for Sexual Violence*, June 10, 2014, available at: hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence.

416. *Putting Complementarity into Practice,* 6.

417. UN Secretary-General, Report of the Joint Mission Charged wit*h Investigating Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire (now Democratic Republic of Congo) Since September 1996, A/51/942, July 2, 1997 (h*ereinafter: Rep*ort of the Joint Mission)*.

418. UN Secretary-General, Report of the Secretary-General's Investig*ative Team Charged with Investigating Serious Violations of Human Rights and International Humanitarian Law in the Democratic Republic of the Congo, S/1998/581, June 29, 1998 (hereinaf*ter: Rep*ort of the SG's Investigative Team)*.

419. UNOHCHR, Democratic Republic of the C*ongo, 1993–2003: Report of the 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, August 2010 (hereinaf*ter: Map*ping Exercise Report)*.

420. Report of *the SG's Investigative Team, 73–98*.

421. MONUC was established by the UN Security Council on November 30, 1999, in Resolution 1279, following the signing of the Lusaka Ceasefire Agreement between the DRC and five neighboring states, which brought the Second Congo War to a close. The initial force authorization was just over 5,000 troops. In July 2010, the Security Council renamed the mission to the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). By June 2010, MONUSCO's force strength had grown to over 20,000 uniformed personnel and 3,000 civilian staff and personnel. See un.org/en/peacekeeping/missions/monuc/background.shtml.

422. See Secretary-General's report to the Security Council on MONUC, indicating his intention to establish a human rights investigative team to the DRC, S/2006/390, June 13, 2006.

423. UN Security Council, Resolution 1794, S/RES/1794, December 21, 2007.

424. Human Rights Watch, DRC: Q&A on the United Nations Hu*man Rights Mapping Report, October 1, 2010, available at:* hrw.org/news/2010/10/01/dr-congo-q-united-nations-human-rights-mapping-report.

425. Report of t*he Joint Mission, para*. 1.

426. Repor*t of the SG's Investigative Team, 1*.

427. Mapping Ex*ercise Report, para*. 1.

428. Report of the *SG's Investigative Team, para. 76*.

429. Ibid., para. 97.

430. Ibid., para. 4.

431. OHCHR, DRC 1993–2003: U*N Mapping Report. Info Note 6: Involvement of Neighbouring States, available at:* ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx.

432. Mapping Exercise Report, paras. 463–64. Finding that "the vast majority of the 617 most serious incidents … point to the commission of multiple violations of human rights and/or international humanitarian law, which may constitute crimes against humanity or war crimes, and often b*oth at the same time*."

433. Ibid., para. 31. "The apparent systematic and widespread attacks described in this report reveal a number of inculpatory elements that, if proven before a competent court, could be characterized as crimes of genocide." However, the report pointed out (para. 32) "countervailing factors that could lead a court to find that the requisite [genocidal] intent was lacking."

434. OHCHR, DRC 1993-2003: *UN Mapping Report. Info Note 1: Mapping Exercise,* available at: ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx.

435. International Coalition for the Responsibility to Protect, *ICR to Preview of the DRC Mapping Exe*rcise Published by the UN High Commissioner for Human Rights, 2. Noting that "words such as 'alleged,' 'suggests,' 'apparent,' and 'if proven in a court of law' have been added to weaken some of the reports' conclusions," available at: responsibilitytoprotect.org/DRC%20Word%20Doc%20MS.pdf.

436. Mapping Exer*cise Report*, para. 57.

437. ICC, Situation in the DRC, ICC-*01/04, av*ailable at: icc-cpi.int/drc.

438. ICC, The Office of the Prosecutor of *the ICC Opens Its First Investigation, June 23, 2004, available at:* icc-cpi.int/legalAidConsultations?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation.

439. ICC, Situation in the DRC, ICC-*01/04, av*ailable at: icc-cpi.int/drc.

440. ICC, Bemba Case, ICC-01/05-01/08, available at: icc-cpi.int/car/bemba.

441. *Putting Complementarity into Practice*, 38.

442. Ibid., 22.

443. *Mapping Exercise Report*, para. 975.

444. *Putting Complementarity into Practice*, 28.

445. Richard Lee, *Justice Sector Is Failing in Congo*, Open Society Initiative for Southern Africa, September 17, 2013, available at: osisa.org/law/drc/justice-sector-failing-congo.

446. *Putting Complementarity into Practice*, 23.

447. Ibid., 31.

448. Ibid., 32; *Mapping Exercise Report*, para. 976.

449. *Putting Complementarity into Practice*, 65 and 68.

450. Ibid., 39.

451. Lee, *Justice Sector Is Failing in Congo.*

452. *Mapping Exercise Report*, para. 979.

453. *Putting Complementarity into Practice*, 22.

454. Ibid., 35.

455. MONUSCO, *Support aux organisations de la société civile*, <DATE?> available at: monusco.unmissions.org/support-aux-organisations-de-la-soci%C3%A9t%C3%A9-civile; Africa Center for Strategic Studies, *The Role of Civil Society in Averting Instability in the DRC*, November 15, 2016, available at: africacenter.org/spotlight/role-civil-society-averting-instability-drc.

456. Amnesty International, *The Time for Justice Is Now: New Strategy Needed in the Democratic Republic of the Congo*, August 2011, 33–34.

457. *Putting Complementarity into Practice*, 35.

458. Ibid.

459. MONUSCO, *Support aux organisations de la société civile*.

460. Ibid.; International Center for Not-for-Profit Law, *Civic Freedom Monitor : DRC*, August 7, 2017, available at: icnl.org/research/monitor/congo_drc.html.

461. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*, May 2014, available at: undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/evaluation-of-undp-s-support-to-mobile-courts-in-drc--sierra-leo.html.

462. Michael Maya, *Mobile Courts in the DRC: Complementarity in Action?* (The Hague: Hill, September 24, 2012).

463. ASF, *Rapport Annuel 2014*, available at: asf.be/fr/blog/publications/annual-report-asf-2014/; Lara Deramaix, *Mobile Courts' Missing Ingredient: An SSR Perspective?*, ISSAT-DCAF, December 17, 2014, available at: issat.dcaf.ch/fre/Partager/Blogs/Blog-de-l-ISSAT/Ce-qu-il-manque-aux-Audiences-Foraines-en-RDC-une-perspective-RSS.

464. Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo*, July 16, 2009, available at: hrw.org/report/2009/07/16/soldiers-who-rape-commanders-who-condone/sexual-violence-and-military-reform.

465. ASF, *ASF en RDC*, available at: asf.be/fr/action/field-offices/asf-in-the-democratic-republic-of-congo/; European Commission, *Projet d'appui au renforcement de la justice à l'Est de la RDC (PARJE) "Uhaki Safi ,"* available at: ec.europa.eu/europeaid/node/108856_en.

466. ABA ROLI, *Rule of Law Programs in the DRC*, available at: americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/programs.html; Open Society Justice Initiative, *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, January 2013, available at: opensocietyfoundations.org/publications/justice-drc-mobile-courts-combat-rape-and-impunity-eastern-congo.

467. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

468. OHCHR, *RDC: Des progrès dans la lutte contre l'impunité mais le viol reste répandu et largement impuni*, April 9, 2014, available at: www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=14489&LangID=F.

469. For extensive background on the PSC program, see UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*, June 2015 (on file with the Open Society Justice Initiative).

470. RDC Présidence de la République, *Violences sexuelles en RDC: les ONG impliquées dans la lutte attestent des progrès réalisés en trois ans,* March 14, 2017, available at: stopdrcsexualviolence.com/violences-sexuelles-rdc-ong-impliquees-lutte-attestent-progres-realises-trois-ans/.

471. ASF, *Rapport Annuel 2013*, available at: asf.be/fr/blog/publications/annual-report-asf-2013.

472. RDC Présidence de la République, *Renseignements*, available at: stopdrcsexualviolence.com/renseignements/.

473. ASF, *Rapport Annuel 2015*, available at: asf.be/fr/blog/publications/annual-report-asf-2015/.

474. Constitution of the Democratic Republic of Congo, February 2006, Articles 153 and 215 (hereinafter: Constitution of 2006). The constitution is available (in French) at: democratie.francophonie.org/IMG/pdf/Constitution_de_la_RDC.pdf. The constitution adopted in 2006 states that civilian and military courts may apply ratified treaties, even in the absence of implementing legislation, so long as they are "consistent with law and custom." See also *Putting Complementarity into Practice*, 27–29.

475. Loi n°023/2002 du 18 Novembre 2002 portant Code Judiciaire Militaire, Article 204.

476. *Putting Complementarity into Practice*, 20.

477. Ibid.; AfriMAP and OSISA, *The DRC: Military Justice and Human Rights: An Urgent Need to Complete Reforms*, 2009, 4.

478. *Putting Complementarity into Practice*, 21.

479. Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, Article 91(1); Human Rights Watch, *Etats généraux de la justice en RDC*, April 27, 2015, available at: hrw.org/fr/news/2015/04/27/etats-generaux-de-la-justice-en-republique-democratique-du-congo.

480. See the four parts of the bill, all of which were adopted in 2015: Proposition de Loi modifiant et complétant le décret du 30 janvier 1940 portant Code Pénal; Proposition de Loi modifiant et complétant le décret du 6 aout 1959 portant code de procédure pénale; Proposition de Loi modifiant la Loi modifiant la Loi n° 024-2002 du 18 novembre 2002 portant code pénal militaire; Proposition de Loi Organique modifiant et complétant la Loi n° 023-2002 du 18 novembre portant Code Judiciaire Militaire.

481. Proposition de Loi Organique modifiant et complétant la Loi n° 023-2002 du 18 novembre portant Code Judiciaire Militaire.

482. Code de l'organisation et de competence judiciaires, Article 67 ; reaffimed by la Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, Article 45.

483. See, for example, Open Society Justice Initiative, *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*.

484. International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Rebuilding Courts and Trust: An assessment of the Needs of the Justice System in the DRC*, August 2009, 24, available at: issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Rebuilding-Courts-and-Trust-An-Assessment-of-the-Needs-of-the-Justice-System-in-the-Democratic-Republic-of-Congo.

485. ProJustice, *Guide pratique d'accès à la justice en R.D. Congo* (USAID, 2010), 15.

486. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

487. International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Rebuilding Courts and Trust*, 17; Dunia P. Zongwe, François Butedi, and Phebe Mavungu Clément, *The Legal System of the DRC: Overview and Research*, NYU Law, January/February 2015, available at: www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html.

488. See Proposition de Loi Organique modifiant et complétant la Loi n° 023-2002 du 18 novembre portant Code Judiciaire Militaire, Exposé des motifs.

489. Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, Article 91(1) (hereinafter: Organic Law of 2013).
490. Organic Law of 2013, Article 20.
491. Ibid., Article 12.
492. Ibid., Articles 32–33.
493. International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Rebuilding Courts and Trust*, 18.
494. Loi n° 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire, Article 204.
495. Constitution of 2006, Article 153.
496. Loi n° 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire, Chapitre III.
497. Constitution of 2006, Article 152.
498. UN Security Council, Resolution 1925 (2010), S/RES/1925, May 28, 2010.
499. UNSC, Resolution 1925 (2010), Section 12, para. (d).
500. UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*.
501. MONUSCO, *What Is the Rule of Law Section Mandate?*, available at: https://monusco.unmissions.org/en/what-rule-law-section-mandate.
502. Ibid.
503. *Putting Complementarity into Practice,* 34.
504. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.
505. Ibid.
506. MONUSCO, *Quel est le mandate de la Section Etat de Droit?*, available at: monusco.unmissions.org/quel-est-le-mandat-de-la-section-%C3%A9tat-de-droit.
507. Amnesty International, *The Time for Justice Is Now: New Strategy Needed in the Democratic Republic of the Congo,* August 2011, 33–34, available at: amnesty.org/en/documents/AFR62/006/2011/en.
508. Michael Maya, *Reflections on ABA ROLI's Efforts to Combat the Rape Crisis in War-Torn Eastern Congo,* ABA-ROLI, June 2011.
509. Amnesty International, *The Time for Justice Is Now: New Strategy Needed in the Democratic Republic of the Congo.* August 2011, 33–34.
510. Human Rights Watch, *Etats généraux de la justice en RDC*, April 27, 2015. See also Jacques B. Mbokani, *La jurisprudence congolaise en matière de crimes de droit international : Une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome*, Open Society Initiative for Southern Africa, 2016, available at: africanminds.co.za/wp-content/uploads/2017/07/9781928331421OSISADRCtextfrench.pdf (forthcoming in English translation).
511. Human Rights Watch, *Etats généraux de la justice en RDC*, April 27, 2015.
512. *Songo-Mboyo: 7 soldats condamnés pour crimes contre l'humanité*, Radio Okapi, April 13, 2006, available at: radiookapi.net/sans-categorie/2006/04/13/songo-mboyo-7-soldats-condamnes-pour-crime-contre-l%25e2%2580%2599humanite.
513. Trial International, *DRC: A Breach in Impunity?*, May 17, 2017, available at: trialinternational.org/latest-post/drc-a-breach-in-impunity.

514. See ASF Annual reports.

515. Open Society Justice Initiative, *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, January 2013.

516. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

517. UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*.

518. Ibid, 5–7.

519. ABA ROLI, *Rule of Law Programs in the DRC*.

520. ASF, *Rapport Annuel 2014*, available at: asf.be/fr/blog/publications/annual-report-asf-2014.

521. ASF, *Rapport Annuel 2015*, available at: asf.be/fr/blog/publications/annual-report-asf-2015.

522. Open Society Justice Initiative correspondence with an official in the UN Department of Peacekeeping Operations, September 2017.

523. Mbokani, *La jurisprudence congolaise en matière de crimes de droit international*.

524. See *Mapping Exercise Report*.

525. Sofia Condeias, Luc Côté, Elsa Papageorgiou, and Myriam Raymon-Jetté, *The Accountability Landscape in Eastern DRC*, International Center for Transitional Justice, July 2015; AfriMAP and OSISA, *The DRC: Military Justice and Human Rights*; UNJHRO, *Accountability for Human Rights Violations and Abuses in the DRC: Achievements, Challenges and Way Forward (1 January 2014–31 March 2016)*, (MONUSCO and OHCHR, October 2016); Human Rights Watch, *Etats généraux de la justice en RDC*, April 27, 2015.

526. AfriMAP and OSISA, *The DRC: Military Justice and Human Rights*, 15.

527. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*; OSISA, *Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts*, OSF, 2012.

528. Deramaix, *Mobile Courts' Missing Ingredient: An SSR Perspective?*. In a similar vein, see UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*, 5–9.

529. OSISA, *Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice*.

530. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*; Deramaix, *Mobile Courts' Missing Ingredient: An SSR Perspective?*.

531. OSISA, *Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts*; UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*; Maya, *Reflections on ABA ROLI's Efforts to Combat the Rape Crisis in War-Torn Eastern Congo*.

532. OSISA, *Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts*.

533. ASF, *ASF en RDC*, available at: asf.be/action/field-offices/asf-in-the-democratic-republic-of-congo.

534. Deramaix, *Mobile Courts' Missing Ingredient: An SSR Perspective?*.

535. Ibid.

536. Ibid.

537. Nynke Douma, Dorothea Hilhorst, and Jocelyne Matabaro, *Trouver un juste équilibre? Réponse à la violence en RDC,* SLRC-JSRP, January 2016.

538. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

539. Douma, Hilhorst, and Matabaro, *Trouver un juste équilibre? Réponse à la violence en RDC*.

540. UNJHRO, *Accountability for Human Rights Violations and Abuses in the DRC*. However, the budget allocated to the justice sector seems to have increased in recent years, up from an estimated 0.24 percent of the total national budget in 2009.

541. *Putting Complementarity into Practice*, 42.

542. *Mapping Exercise Report*, para. 975.

543. Maya, *Reflections on ABA ROLI's efforts to Combat the Rape Crisis in War-Torn Eastern Congo*. See UNDP for a different estimate.

544. AfriMAP and OSISA, *The DRC: Military Justice and Human Rights*, 4.

545. UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*; UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

546. ASF 2015 Annual Report ASF, *Rapport Annuel 2015*; European Commission, *Projet d'appui au renforcement de la justice à l'Est de la RDC (PARJE) "Uhaki Safi,"* available at: ec.europa.eu/europeaid/node/108856_en.

547. European Commission, *The European Commission Contributes to the Restoration of Justice in the East of the DRC*, IP/06/845, June 26, 2006, available at: europa.eu/rapid/press-release_IP-06-845_en.pdf.

548. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

549. Organic Law of 2013, Article 44.

550. International Legal Assistance Consortium and International Bar Association Human Rights Institute, *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the DRC*, August 2009, 18.

551. Organic Law of 2013, Article 70.

552. Loi n° 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire. Chapitre II.

553. Deramaix, *Mobile Courts' Missing Ingredient: An SSR Perspective?*.

554. UNDP, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, DRC and Somalia*.

555. UN Department of Peacekeeping Operations, *Combatting Impunity in the DRC: Lessons Learned from the United Nations Prosecution Support Cell Programme*, 16–17.

556. Human Rights Watch, *DRC: No More Delays for Justice*, April 1, 2014, available at: hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice.

557. Ibid.

558. Human Rights Watch, *DRC: A "Mixed Chamber" for Congo?*, October 5, 2009, available at: hrw.org/en/news/2009/11/19/mixed-chamber-congo; UN General Assembly, *Report of the UN Special Rapporteur on the Independence of Judges and Lawyers: Addendum—Mission to the Democratic Republic of the Congo,* A/HRC/8/4/Add.2, April 11, 2008, para. 88; UN General Assembly, *Combined Report of Seven Special Procedures on Technical Assistance to the Government of the DRC and Urgent Examination of the Situation in the East of the Country*, A/HRC/10/59, March 5, 2009, para. 95.

559. *Mapping Exercise Report*, para. 61.

560. Project de Loi Portant Création, Organisation et Fonctionnement de la Cour Specialisée de la Repression des Crimes de Genocide, Crimes de Guerre et des Crimes Contre l'Humanité, Articles 21, 23, and 25 (on file with the Open Society Justice Initiative). Parliament failed to move the Rome Statute bill to a full vote before the Senate, despite the executive-branch-backed bill clearing a preliminary subcommittee vote. The mixed chamber bill was considered by a Senate committee, which declared passage of the bill impossible without the Rome Statute implementation bill, which it believed would have provided clarity on controversial issues, including presidential immunity, the appointment of foreign judges, jurisdiction over military officers, and appellate procedures. One observer of the process noted that the failure to make "proper connections with other relevant pieces of legislation, such as the bill to implement the Rome Statute," made it "easier for the Senate to attack and undermine the mixed nature of the court." See Pascal Kambale, "Mix and Match: Is a Hybrid Court the Best Way for Congo to Prosecute International Crimes?" *Open Space: International Criminal Justice* 2, Open Society Initiative for Southern Africa, February 2012. In addition, Congolese Senators expressed sovereignty concerns over the appointment of internationals.

561. Projet de Loi modifiant et completant la Loi organique n° 13/011-B du 11 avril 2013 portant organization, fonctionnement et competence des juridictions de l'ordre judiciaire en matière de repression des crimes de genocide, des crimes contre l'humanité et des crimes des guerres, Article 91.6 (hereinafter: Specialized Chambers Bill of 2014).

562. UNJHRO, *Accountability for Human Rights Violations and Abuses in the DRC*, para. 30.

563. Ibid.

564. Specialized Chambers Bill of 2014, Exposé des motifs.

565. Ibid., Article 91.1.

566. CAD, *Mixed Specialized Court*, 6.4.1.

567. Specialized Chambers Bill of 2014, Article 104.1.

568. Ibid., Article 91.2.

569. Ibid., Exposé des motifs.

570. Ibid., Article 91.3. However, see Article 91.4: The Constitutional Court remains the criminal judge for the president of the Republic and the prime minister even for crimes of genocide, war crimes, and crimes against humanity.

571. CAD, *Mixed Specialized Court,* 6.4.3.

572. Specialized Chambers Bill of 2014, Exposé des motifs.

573. Ibid.

574. Specialized Chambers Bill of 2014, Article 91.1.

575. Ibid., Article 91.2.

576. Ibid., Exposé des motifs.

577. Ibid., Article 91.1.

578. Ibid., Article 65.1.

579. Ibid., Article 91.5.

580. Ibid., Article 91.9.

581. Ibid.

582. Ibid.

583. Specialized Chambers Bill of 2014, Art. 91.8.
584. Ibid., Article 91.7.
585. Ibid., Article 91.9.
586. Ibid., Article 91.11.
587. Ibid., Article 65.1.
588. Ibid., Exposé des motifs.
589. Ibid., Exposé des motifs.
590. Ibid., Article 91.12.
591. Human Rights Watch, *Etats généraux de la justice en RDC*, April 27, 2015.
592. Recommendations 28 and 326.
593. Specialized Chambers Bill of 2014, Article 91.14.
594. See Amnesty International, *The Time for Justice Is Now: New Strategy Needed in the Democratic Republic of the Congo,* August 2011.
595. Specialized Chambers Bill of 2014, Article 91.8.
596. Human Rights Watch, *Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya*, December 2011, 13.
597. Commission of Inquiry into the Post-Election Violence, *Final Report*, October 16, 2008, 345–46.
598. "Kofi Annan Takes Over Kenya Mediation," *CBS News*, January 10, 2008, available at: cbsnews.com/news/kofi-annan-takes-over-kenya-mediation-10-01-2008/.
599. "Unity Cabinet Formed in Kenya, Ending Deadlock," *New York Times*, April 14, 2008, available at: nytimes.com/2008/04/14/world/africa/14kenya.html.
600. "Waki Report to be Handed Over," *Daily Nation*, October 14, 2008, available at: nation.co.ke/News/politics/-/1064/480490/-/ywbs9iz/-/index.html.
601. Open Society Justice Initiative, *Putting Complementarity into Practice*, 87–105.
602. See Howard Varney, *Breathing Life into the New Constitution: A New Constitutional Approach to Law and Policy in Kenya: Lessons from South Africa*, International Center for Transitional Justice, February 2011; and International Center for Transitional Justice, *The Kenya Transitional Justice Brief*, vol. 1, no. 2, August 2011.
603. Open Society Justice Initiative, *Putting Complementarity into Practice*, 8.
604. Simon Allison, "Kenya: Think Again—Civil Society in Kenya Is Down, but Not Out," *All Africa*, January 5, 2016, available at: allafrica.com/stories/201601050964.html.
605. Jennifer Brass, "Kenya's Clampdown on Civil Society Is against Its Self-interest," *The Conversation*, July 11, 2016, available at: theconversation.com/kenyas-clampdown-on-civil-society-is-against-its-self-interest-62019.
606. Waki Commission Final Report, 345–46.
607. Ibid., 472–75.
608. See The Special Tribunal for Kenya Bill, 2009, available at: kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf.
609. "How Kenya Handled Local Tribunal Process," *Daily Nation*, September 17, 2013.
610. Open Society Justice Initiative, *Putting Complementarity into Practice*, 98, noting that "a poll conducted in October 2010 found that only 20 percent of Kenyans felt that the new constitution had resulted in sufficient reforms to allow for domestic trial of senior

perpetrators of crimes committed during the post-election violence, and two-thirds preferred prosecution at the ICC."

611. See Human Rights Watch, *Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya*. The TJRC was formed after the 2008 violence, but criticisms over the impartiality of proposed commissioners and a political bottleneck in the disbursement of operating funds meant that public hearings did not begin until April 2011. "Kenya Cabinet Agrees on TJRC," *Daily Nation*, July 30, 2010, available at: nation.co.ke/News/-/1056/632382/-/ulj3id/-/index.html. TJRC Chairman Bethuel Kiplagat was himself accused of human rights abuses but refused to step down despite national and international pressure for him to do so. See Julia Crawford, "Transitional Justice in Kenya—In Brief," May 31, 2015, available at: justiceinfo.net/en/component/k2/407-transitional-justice-in-kenya-%25E2%2580%2593-in-brief.html?Itemid=102.

612. See Juma Kwayera, "Bill Renews Push for Special Tribunal," *The Standard*, February 2, 2012, available at: standardmedia.co.ke/print.php?id=2000052859&cid=289; Ndungu Wainaina, "Fear Main Obstacle to Local PEV Tribunal," *The Star* (Kenya), February 17, 2012, available at: the-star.co.ke/opinions/others/63135-fear-main-obstacle-to-local-pev-tribunal; Justus Ochieng, "Rights Groups Support Tobiko over PEV Cases," *The Star* (Kenya), February 16, 2012, available at: the-star.co.ke/local/western--nyanza/62823-rights-groups-support-tobiko-over-pev-cases.

613. ICTJ, *Prosecuting International and Other Serious Crimes in Kenya*, April 2013, 3, available at: ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf. See also "ICC Trials Can't Be Transferred, Rights Activists Tell Kibaki," *Daily Nation*, April 30, 2012.

614. See Kenyans for Peace and Truth with Justice, *Kenya's 7-Step Formula for Impunity* (undated document), available at: khrc.or.ke/mobile-publications/other-practical-information/97-kenya-s-7-step-formula-for-impunity/file.html.

615. Article 5 of The Special Tribunal for Kenya Bill, 2009, often referred to as the Karua Bill, after the then minister for justice, available at: kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf.

616. Article 4 (2).

617. Article 7.

618. Article 13.

619. Article 14.

620. Article 3 (4).

621. Article 19.

622. Article 26.

623. Article 16.

624. Article 17.

625. Articles 22 and 23.

626. Article 28 (1).

627. Article 20 (1).

628. Article 20 (2).

629. Article 30 (1) and Article 35 (1).

630. Article 30 (3).

631. Article 30 (4).

632. Article 30 (5).
633. Article 30 (2).
634. Article 31 (4).
635. Article 31 (3).
636. Article 31 (5).
637. Article 31 (6).
638. Article 32 (1).
639. Article 32 (3).
640. Article 32 (2).
641. Article 32 (4).
642. International Center for Truth and Justice, *Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission*, May 20, 2014, and Freedom House, *Kenyan Parliament Hinders Justice Process*, December 17, 2013.
643. International Crimes Act, 2008, available at: kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/InternationalCrimesAct_No16of2008.pdf.
644. While the new constitution recognizes *jus cogens* law, the retroactivity of the new constitution itself is still questioned. See Open Society Justice Initiative, *Putting Complementarity into Practice*, 89.
645. "MPs Vow to Continue with Plan to Ditch Rome Statute," *Daily Nation*, October 10, 2013.
646. ICTJ, *Prosecuting International and Other Serious Crimes in Kenya*, April 2013, 2, available at: ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf.
647. Kenyans for Peace and Truth with Justice, *A Real Option for Justice?: The International Crimes Division of the High Court of Kenya*, July 2014, 7.
648. Ibid., 9.
649. Betty Waitherero, "Can the International Crimes Division prosecute Kenya's PEV cases?" *Daily Nation*, February 8, 2014, available at: nation.co.ke/oped/blogs/dot9/International-Crimes-Division-bring-accountability/1959700-2197978-8fuaa9z/index.html.
650. See, for example, comments from Secretary of Public Prosecutions Dorcas Oduor in "Human Trafficking Cases Burdening State Prosecutor," *The Star*, April 13, 2017.
651. "Multi-Agency Task Force on the 2007/2008, Gazette Notice No. 5417," *The Kenya Gazette*, April 12, 2013, available at: kenyalaw.org/kenya_gazette/gazette/notice/11182.
652. Njonjo Mue and Judy Gitau, "The Justice Vanguard: The Role of Civil Society in Seeking Accountability for Kenya's Post-Election Violence," in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn (Cambridge: Cambridge University Press, 2015), 216–17.
653. Tom Maliti, "Senior Prosecutor Tells Kenyan Court about Challenges of Taking SGBV Cases to Trial," *International Justice Monitor*, March 31, 2017, available at: ijmonitor.org/2017/03/senior-prosecutor-tells-kenyan-court-about-challenges-of-taking-sgbv-cases-to-trial/.
654. The Open Society Foundations have supported the cases in relation to sexual violence and police shootings. Extensive information on the sexual violence case is available at: sgbvjusticekenya.net.

655. ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, March 31, 2010, available at: icc-cpi.int/pages/record.aspx?uri=854287.

656. Article 58 (1).

657. Article 25.

658. Liberia Truth and Reconciliation Commission, *Final Report*, vol. 2, *Consolidated Final Report of 30 June 2009*.

659. Stephen Ellis, *The Mask of Anarchy* (New York: New York University Press, 2007), 109.

660. "Liberia Election: Weah and Boakai Headed for Presidential Run-off," *BBC*, October 16, 2017, available at: bbc.com/news/world-africa-41631424.

661. "Is Ex-warlord Charles Taylor Pulling Liberia's Election Strings from Prison?" *BBC*, October 6, 2017, available at: bbc.com/news/uk-41509896.

662. Freedom House, *Report 2011*. For an earlier study highlighting the inadequacies of the justice sector, see Deborah H. Isser et al., *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, United States Institute of Peace, October 2009.

663. Mary McKeown and Edward Mulbah, "Civil Society in Liberia: Towards a Strategic Framework for Support: An Overview of Civil Society in Liberia for Search for Common Ground," April 2007, available at: sfcg.org/wp-content/uploads/2014/08/LBR_EV_Apr07_Civil-Society-in-Liberia-Towards-a-Strategic-Framework-for-Support.pdf.

664. See globaljustice-research.org/.

665. Search for Common Ground, CIVICUS, and West Africa Civil Society Institute, *Civil Society Rapid Assessment: Liberia*, 2014, available at: wacsi.org/en/site/publications/2430/Civil-Society-Index-Rapid-Assessment-Liberia-Liberia-Ghana-CIVICUS.htm.

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.

668. TRC Act, Sections 26(j)(iv) and 44.

669. Ibid., Section 48.

670. Republic of Liberia, *Truth and Reconciliation Commission,* vol. 2, *Consolidated Final Report*, June 30, 2009, available at: trcofliberia.org/reports/final-report (hereinafter: *TRC Final Report*). The TRC released a *Preliminary Volume 1* report in July 2009 and a *Consolidated Final Report* in December 2009. Note there are minor differences in the draft report's preliminary and final versions regarding the ECCL. Both versions are available on the TRC's website, causing some confusion among commentators.

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.

673. "TRC Unites Archrivals," *New Democrat*, July 8, 2009, available at: 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.

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. 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; 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: kaiptc.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 (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.

695. Monitoring reports on the trial are available at: civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case.

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-idUSBREA4C0WJ20140513.

697. "George Boley, Liberian Ex-Warlord, to Be Deported from US," *Public Radio International*, February 7, 2012, available at: pri.org/stories/2012-02-07/george-boley-liberian-ex-warlord-be-deported-us.

698. "Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges," U.S. Department of Justice press release, January 9, 2009, available at: justice.gov/archive/opa/pr/2009/January/09-crm-021.html.

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.

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.

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.

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.

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.

706. Ibid., Article 42(1).

707. Ibid.

708. There are a number of excellent resources on the origins of the Rwandan genocide, such as: Roméo Dallaire, *Shake Hands with the Devil* (Toronto: Random House of Canada, 2003); Linda Melvern, *Conspiracy to Murder: The Rwanda Genocide* (London; New York: Verso, 2004); Alison DesForges, *Leave None to Tell the Story*, joint 1999 HRW/FIDH publication; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002); Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York: New York University Press, 1995); Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington, D.C.: Brookings Institution Press, 2001). In addition to these materials, many of the ICTR trial judgments provide useful "background and political context" sections, for example, *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgment (Trial Chamber), September 2, 1998, paras. 78–111. See also *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, December 15, 1999, S/1999/1257.

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.

711. Human Rights Watch, *Rwanda: Justice after Genocide, 20 Years On*," March 28, 2014, 1.

712. The 1999 UN inquiry appointed by the UN Secretary-General found that "the failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there." *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, December 15, 1999, S/1999/1257.

713. UN Security Council Resolution 872, October 5, 1993.

714. See un.org/en/peacekeeping/missions/past/unamir.htm. On April 21, 1994, the Security Council reduced UNAMIR's troop levels from 2,548 to 270. General Dallaire movingly wrote about his experience as head of UNAMIR in the book *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York, Random House, September 2003).

715. UN Security Council Resolution 918, May 17, 1994.

716. UN Security Council Resolution 929, June 22, 1994.

717. Lars Waldorf, "'A Mere Pretence of Justice': Complementarity, Sham Trials and Victors' Justice at the Rwanda Tribunal," in *Transitional Justice: War Crimes Tribunals and*

Establishing the Rule of Law in Post-conflict Countries, *Fordham International Law Journal* 33, no. 4 (2011): 1230.

718. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 1998, 15.

719. Fondation Hirondelle, "Carla Del Ponte Tells of Her Attempts to Investigate RPF in Her New Book," April 2, 2008, available at: justiceinfo.net/en/component/k2/19965-en-en-020408-ictrrwanda-carla-del-ponte-tells-of-her-attempts-to-investigate-rpf-in-her-new-book1076210762.html.

720. UN Security Council Resolution 1505, adopted on September 4, 2003.

721. See, for instance, "Del Ponte Says UN Caved to Rwandan Pressure," *National Post*, September 17, 2003, available at: https://www.globalpolicy.org/component/content/article/163/29047.html.

722. *Letter from Prosecutor Hassan Jallow to Human Rights Watch*, June 22, 2009, available at: https://reliefweb.int/report/rwanda/rwanda-letter-hassan-b-jallow-kenneth-roth-22-jun-2009.

723. Human Rights Watch, *Rwanda: Justice after Genocide, 20 Years On*, 3.

724. Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*, July 25, 2008.

725. Ibid.

726. See *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012.

727. Judgment of the Administrative Court of the High Court of Justice, *Rwanda v. Nteziryayo and Others*, [2017] EWHC 1912 (Admin), July 28, 2017.

728. See, for example, "Civicus State of Civil Society Report, 2013, Civil Society Profile: Rwanda," available at: socs.civicus.org/CountryCivilSocietyProfiles/Rwanda.pdf. See also *EU mapping of the civil society and project identification of a support program to the civil society in Rwanda, Final report mapping*, December 2013, available at: eeas.europa.eu/archives/delegations/rwanda/documents/press_corner/mapping-of-the-civil-society-and-project-identification_en.pdf.

729. See, for instance, Human Rights Watch, *World Report 2017, Rwanda: Events of 2016*," available at: hrw.org/world-report/2017/country-chapters/rwanda.

730. Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda*," July 25, 2008.

731. UN Security Council Resolution 955, November 8, 1994.

732. UN Commission on Human Rights, *Report of the Commission on Human Rights on Its Third Special Session*, UN Doc. E/CN.4/S-3/4, May 30, 1994.

733. See *Report of the UN High Commissioner for Human Rights on His Mission to Rwanda*, May 11–12, 1994, delivered to the UN Human Rights Commission, UN Doc. E/CN.4/S-3/3, May 19, 1994.

734. An inside account of the negotiations based on international U.S. memoranda and diplomatic communications is rendered in David P. Rawson, "Prosecuting Genocide: Founding the International Tribunal for Rwanda," *Ohio N.U. L. Rev.* 33 (2007): 641. Rawson was U.S. Ambassador to Rwanda from December 1993 to January 1996.

735. *Action Message to the American Embassy in Kigali, Demarche for International Tribunal in Rwanda* (August 1994), cited in Rawson, *Prosecuting Genocide*, 650.

736. *Interim Report of the Commission of Experts*, S/1994/1125, October 4, 1994.

737. Rawson, *Prosecuting Genocide*, 651.

738. Ibid.

739. Ibid., 653.

740. UN Security Council Resolution 977, February 22, 1995.

741. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*.

742. Rawson, *Prosecuting Genocide*, 662.

743. See, for example, Office of Internal Oversight Services, *Report on the Audit and Investigation of the International Criminal Tribunal for Rwanda*, UN Doc. A/51/789/ Annex, February 6, 1997, available at: un.org/Depts/oios/reports/a51789/ictrtit.htm.

744. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 6.

745. See the MICT website, unictr.unmict.org.

746. Statute of the International Tribunal for Rwanda, Preamble (hereinafter: ICTR Statute). The ICTR Statute was attached to Resolution 955, which established the ICTR.

747. See Rules of Procedure and Evidence, as amended on May, 13, 2015, available at: unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf.

748. In case of noncompliance from Member States, the Security Council would be authorized to take necessary measures, including economic sanctions, to ensure compliance.

749. Rawson, *Prosecuting Genocide*, 658.

750. Article 1, Statute of the International Residual Mechanism for Criminal Tribunals, adopted by Resolution 1966 on December 22, 2010.

751. Available at unmict.org/en/news/rules-procedure-and-evidence-adopted-mechanism-international-criminal-tribunals.

752. UN Security Council Resolution 977, February 22, 1995.

753. UN Security Council Resolution 1503, August 28, 2003, creating a separate position for the ICTR prosecutor.

754. ICTR Statute, Article 13; ICTR Rules of Procedure and Evidence, Rules 18 and 19.

755. The Security Council established a third Trial Chamber in April 1998. UN Security Council Resolution 1165, April 30, 1998.

756. In 2003, the Security Council raised the number of *ad litem* judges who could serve at any one time from four to nine. UN Security Council Resolution 1512, October 27, 2003.

757. UN Security Council Resolution 1855, December 19, 2008.

758. ICTR Statute Article 11.

759. ICTR Statute Article 12*bis*.

760. See *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012.

761. ICTR Statute Article 15.

762. ICTR Statute Article 16.

763. These internal rules and directives are available on the ICTR website, unictr.org/Legal/tabid/92/Default.aspx.

764. *16th Annual Report of the International Criminal Tribunal for Rwanda to the Security Council*, A/66/209-S/2011/472, July 29, 2011, para 54.

765. Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, ICTJ, 2007, 127.

766. ICTR, Directive on Assignment of Defense Counsel, March 14, 2008.

767. See ICTR, Defense Counsel and Detention Management Section (DCDMS), available at: unictr.org/tabid/107/default.aspx.

768. See ICTR, Directive on Assignment of Defense Counsel, March 14, 2008. Prior iterations of the directives are available at: unictr.org/Legal/DirectiveonAssignmentandDefenseCounsel/tabid/97/Default.aspx.

769. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 37.

770. *Statement by the Registrar, Mr. Adama Dieng, on Allegations of Fee Splitting between a Detainee of the ICTR and His Defence Counsel*, October 29, 2001, available at: unictr.unmict.org/en/news/statement-registrar-mr-adama-dieng-allegations-fee-splitting-between-detainee-ictr-and-his.

771. *Report of the Office of Internal Oversight Services*, February 26, 2002, A/56/836, available at: oios.un.org/resources/reports/a56_836.pdf.

772. ICTR, Directive on Assignment of Defense Counsel, March 14, 2008, Article 29. The Advisory Panel consists of "two members [from the list of qualified defense counsel] chosen by the President, ... two members proposed by the International Bar Association, two members proposed by the Union International des Avocats, and the President of the Tanganyika Law Society or his representative."

773. Ibid., Article 31.

774. A/54/521, paras. 29–30.

775. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 31.

776. Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, Institute for Security Studies, South Africa, 2010, 75.

777. *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012.

778. *Report to UNSC*, 82.

779. Amnesty International, *International Criminal Tribunal for Rwanda: Trials and Tribulations*, 6.

780. See Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004).

781. *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, S/2012/349, May 22, 2012, 83. The programmes were funded by the UN Department of Public Information. For a breakdown of cases, see also unictr.org/Cases/tabid/204/Default.aspx.

782. 2015 Budget of the MICT, available at: unmict.org/sites/default/files/documents/150918_ga_budget_en_0.pdf.

783. See unictr.unmict.org/en/tribunal.

784. *The Prosecutor v. Jean-Paul Akayesu* (Appeal Judgment), ICTR-4-96-A, International Criminal Tribunal for Rwanda (ICTR), June 1, 2001.

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. 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.

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.

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. Nteziryayo 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 offices 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.

796. See 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.

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-ictr-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.

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/.

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.

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. 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 Hissene Habre*, May 1, 2006, para. 35, available at: peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.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.

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.

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.

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.

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.

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.

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.

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.

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_Report0506fr.pdf.

848. Conference of the African Union, 6th ordinary session, Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/3 (VII), available at: pantheon.hrw.org/legacy/english/docs/2006/08/02/chad13897.htm.

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.

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/cat051806.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: jurisafrica.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.

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 dfe la loi n° 84-19 du 2 février 1984 fixant l'organisation judiciaire*, available at: ordredesavocats.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 (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 Statue, 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 Statue, 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., 1550. 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.
892. Ibid., "Presentation," available at: 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.

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.

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.

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.

899. Høgestøl, "The Habré Judgment at the Extraordinary African Chambers," 151.

900. *Ministère Public c. Hissein Habré*, Jugement, EAC Trial Chamber, May 30, 2016, available at: 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.

902. Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*.

903. *Le Procureur Général c. Hissein Habré*, EAC Appeal Chamber, April 27, 2017, available at: 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-habr.

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.

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.

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 Exercutive 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/.

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.

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.

924. African Union Executive Council, *Report of the Commission on the Trial of Hissène Habré*, para. 19.

925. "La condition du juge en Afrique: l'exemple du Sénégal," *Afrilex*, June 2003, available at: afrilex.u-bordeaux4.fr/la-condition-du-juge-en-afrique-l.html.

926. EAC Statute, Article 15; African Union Executive Council, *Report of the Commission on the Trial of Hissène Habré*, para. 7; *Document final de la table ronde des donateurs pour le financement du procès de Monsieur Hissène Habré,* November 24, 2010, available at: hrw.org/sites/default/files/related_material/Table%20ronde%20donateurs%20document%20final.pdf.

927. African Union Executive Council, *Report of the Commission on the trial of Hissène Habré*, para. 19.

928. "Find out More about the Team of Student-Monitors," *Trust Africa*, April 19, 2016, available at: trustafrica.org/en/component/k2/item/3214-find-out-more-about-the-team-of-student-monitors.

929. See Human Rights Watch's website: hrw.org/tag/hissene-habre.

930. For background on the war, see Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington: Indiana University Press, 2005).

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.

932. See United Nations Mission in Sierra Leone, available at: 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.

933. Lomé Agreement, Article 26.

934. The Truth and Reconciliation Act of 2000, February 22, 2000, available at: usip.org/publications/truth-commission-sierra-leone.

935. Witness to Truth: Rep*ort of the Sierra Leone Truth & Reconciliation Commission,* 2004, available at: sierra-leone.org/TRCDocuments.html.

936. Sigall Horovitz, "Transitional Criminal Justice in Sierra Leone," in Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice, ed. Naomi Roht-Arriaza and

Javier Mariezcurrena , (Cambridge, Cambridge University Press, 2006), 54. The Rules of Procedure and Evidence allow for *the possibility that the* court could take judicial notice of the TRC Report.

937. 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): 226. *The Office of* the High Commissioner for Human Rights and the Office for Legal Affairs of the United Nations organized an expert meeting on the Relationship Between the TRC-SL and the SCSL in New York on December 20–21, 2001.

938. No Peace Without Justice, Closing the G*ap: The Role of Non-judicial Mechanisms in Addressing Impunity, 2010, 85.*

939. Sirleaf, "Regional Approach to Transitional Justice?" 258.

940. Laura A. Dickinson, "The Promise of Hybrid Courts," *Am. Int'l L.* 97 (April 2003): 299.

941. Abdul Tejan-Cole, "The Special Court for Sierra Leone: Conceptual Concerns and Alternatives," *Afr. Hum. Rts. L.J.* 1 (2001): 123.

942. Human Rights Watch, *World Report 2003: Sierra Leone*, 15, no. 1(A) (January 2003): 67.

943. Ibid.

944. Dickinson, *The Promise of Hybrid Courts*, 304.

945. Human Rights Watch, *World Report 2003: Sierra Leone*, 67; Dickinson, *The Promise of Hybrid Courts*, 304

946. No Peace Without Justice, *Closing the Gap*, 152.

947. Dickinson, *The Promise of Hybrid Courts*, 301.

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. Horovitz, "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.

952. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 16.

953. *Fifth Report on Sierra Leone*, para. 9.

954. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 16.

955. Horovitz, "Transitional Criminal Justice in Sierra Leone," 58; Human Rights Watch, *World Report 2003: Sierra Leone*, 62.

956. Tejan-Cole, "The Special Court for Sierra Leone," 107–8.

957. Annex to *Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of Security Council*, 2, U.N. Doc. S/2000/786, August 10, 2000.

958. Horovitz, "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.

962. See Dickinson, "The Promise of Hybrid Courts."

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. Horovitz, "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 (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 buil]t] 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 Horovitz, "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 Horovitz, "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. Higonnet, "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. Horovitz, "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/.

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.

1001. SCSL RPE, Rule 11*bis*: 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, Leg*acy: Completing the Work of the Special Court for Sierra Leone.*

1006. Ibid.

1007. See Open Society Justice Initiative, charlestaylortrial.org/trial-background/.

1008. Ibid.

1009. See SCSL OTP press pelease, 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.

1019. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.

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.

1024. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.

1025. Ibid.

1026. Residual SCSL Statute, Article 1.1.

1027. Higonnet, "Restructuring Hybrid Courts," 389.

1028. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.

1029. Higonnet, "Restructuring Hybrid Courts," 389; and *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.

1030. *Eighth Annual Report of the President of the Special Court for Sierra Leone, June 2010 to May 2011*.

1031. Vincent, *Global Administrative Practices Manual*, 143.

1032. Ibid., 43.

1033. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*.

1034. Vincent, *Global Administrative Practices Manual*, 86.

1035. Ibid., 48.

1036. Higonnet, "Restructuring Hybrid Courts," 389.

1037. See "Much Remains to Be Done in Sierra Leone," *International Justice Tribune*, May 9, 2012, available at: rnw.nl/international-justice/article/much-remains-be-done-sierra-leone.

1038. See Vincent, *Global Administrative Practices Manual*, 20.

1039. Special Court Agreement, Article 7.

1040. Comprehensive Peace Agreement between the Government of Sudan and the SPLM/SPLA, January 9, 2005, available at: peacemaker.un.org/node/1369.

1041. Mehri Tadelle Maru, "The Real Reasons behind South Sudan Crisis," *AlJazeera*, December 27, 2013, available at: aljazeera.com/indepth/opinion/2013/12/real-reasons-behind-south-sudan-crisis-201312278411977956 2.html.

1042. Andrew Harding, "South Sudan: Nyaba Tells of Juba 'House Arrest,'" *BBC*, January 12, 2014, available at: bbc.com/news/world-africa-25687502.

1043. "UN Moves to Protect South Sudan Civilians after Years of Criticism," *Reuters*, August 28, 2017, available at: reuters.com/article/us-southsudan-un/u-n-moves-to-protect-south-sudan-civilians-after-years-of-criticism-idUSKCN1B80KA.

1044. "South Sudan Is Dying, and Nobody Is Counting," *AFP*, March 11, 2016.

1045. UN High Commissioner for Refugees, *South Sudan Fact Sheet*, available at: reporting.unhcr.org/node/2553?y=2017#year.

1046. "Famine Declared in the Region of South Sudan," *UN News Centre*, February 20, 2017, available at: un.org/apps/news/story.asp?NewsID=56205#.WRB8rWkrKmx.

1047. Amnesty International, *"Do Not Remain Silent": Survivors of Sexual Violence in South Sudan Call for Justice and Reparations*, July 2017.

1048. AU, *Final Report of the African Union Commission of Inquiry on South Sudan*, August 15, 2014.

1049. AU, *Final Report of the Commission on Inquiry on South Sudan*, October 15, 2014, para. 1135, available at: peaceau.org/uploads/auciss.final.report.pdf.

1050. AU, *Final Report of the African Union Commission of Inquiry on South Sudan*, August 15, 2014, paras. 382–83.

1051. Media briefing by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan, November 11, 2016.

1052. *Report of the Commission on Human Rights in South Sudan*, A/HRC/34/63, March 6, 2017, available at: ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/A_HRC_34_63_AEV%20-final.docx.

1053. "UK Goes beyond UN to Say South Sudan Violence 'Is Now Genocide,'" *The Independent*, April 13, 2017.

1054. The Transitional Constitution of the Republic of South Sudan 2011, available at: sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf.

1055. *South Sudan: Court Structure*, ICJ, June 16, 2014, available at: icj.org/cijlcountryprofiles/south-sudan/south-sudan-introduction/south-sudan-court-structure/.

1056. The Transitional Constitution of the Republic of South Sudan 2011, Article 124.

1057. *South Sudan: Court Structure*, ICJ, June 16, 2014, available at: icj.org/cijlcountryprofiles/south-sudan/south-sudan-introduction/south-sudan-court-structure/.

1058. Rens Williams and David Deng, *Justice and Conflict in South Sudan: Observations from a Pilot Survey,* South Sudan Law Society, UPEACE, and PAX, November 2015, 7, available at: upeace.nl/cp/uploads/hipe_content/Justice%20and%20Conflict%20in%20South%20Sudan%20-%20Pilot%20Survey%20-%20Briefing%20Paper.pdf.

1059. ABA-ROLI, *Assessment of Justice, Accountability and Reconciliation Measures in South Sudan*, June 2014, 6–9, available at: americanbar.org/content/dam/aba/directories/roli/sudan/aba_roli_sudan_assessment_final_report_0614.authcheckdam.pdf.

1060. *Statement by Yasmin Sooka, Chair of the Commission on Human Rights in South Sudan at the 26th Special Session of the UN Human Rights Council*, December 14, 2016, available at: ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21028&LangID. The UN Human Rights Council established the Commission on Human Rights in March 2016 to monitor the situation in the country for one year. See A/HRC/RES/31/20, March 23, 2016.

1061. U.S. Embassy in South Sudan, *INL Support to South Sudan's Justice Sector*, available at: juba.usconsulate.gov/inl/inl-programs-factsheet.html.

1062. UNDP, *Support to Access to Justice and Rule of Law Programme*, available at: https://info.undp.org/docs/pdc/Documents/SSD/UNDP%20Proposal%20Netherlands%20(Approved%20and%20Final)%20uploaded%2024.4.2014.pdf.

1063. Leif Tomas Vik, *Strengthening Justice Capacity in South Sudan*, Norwegian Centre for Human Rights, available at: jus.uio.no/smr/english/about/programmes/nordem/publications/docs/_leift-vik_thematicpapersserie_f.pdf.

1064. Kisuki Ndiku, "*South Sudan: A Challenging Space for Civil Society*," *Insight on Conflict*, September 15, 2014, available at: insightonconflict.org/blog/2014/09/south-sudan-challenging-space-civil-society-peace/. See also Jérôme Tubiana, *Civil Society and South Sudan Crisis*, International Crisis Group, July 14, 2014, available at: blog.crisisgroup.org/africa/south-sudan/2014/07/14/civil-society-and-the-south-sudan-crisis/.

1065. Citizens for Peace and Justice, available at: southsudancivics.info/SSCinfo/topics/cpj-citizens-peace-and-justice. See also United States Institute of Peace, *South Sudan Activists Call for Civil Society Role in Peace Process*, May 27, 2014, available at: usip.org/publications/2014/05/south-sudan-activists-call-civil-society-role-peace-process.

1066. Transitional Justice Working Group, background, available at: tjwgsouthsudan.org/about.

1067. United States Institute of Peace, *South Sudan Activists Call for Civil Society Role in Peace Process*, May 27, 2014, available at: usip.org/publications/2014/05/south-sudan-activists-call-civil-society-role-peace-process.

1068. Human Rights Watch, *Joint Letter: A Way Forward for the Hybrid Court for South Sudan*, November 1, 2016, available at: hrw.org/news/2016/11/01/joint-letter-way-forward-hybrid-court-south-sudan-0#_ftn1.

1069. Agreement on the Resolution of the Conflict in the Republic of South Sudan, August 17, 2015, available at: smallarmssurveysudan.org/fileadmin/docs/documents/IGAD-Compromise-Agreement-Aug-2015.pdf.

1070. Patryk Labuda, "The Hybrid Court for South Sudan? Looking for a Way Forward," (Part 1), *Justice in Conflict*, February 23, 2017, available at: justiceinconflict.org/2017/02/23/the-hybrid-court-for-south-sudan-looking-for-a-way-forward-part-1/.

1071. Human Rights Watch, *Joint Letter: A Way Forward for the Hybrid Court for South Sudan*.

1072. Salva Kiir and Riek Machar, "South Sudan Needs Truth, Not Trials," *New York Times*, June 7, 2016, available at: nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=0.

1073. "The *New York Times* South Sudan Op-Ed That Wasn't," *Foreign Policy*, June 9, 2016, available at: foreignpolicy.com/2016/06/09/the-new-york-times-south-sudan-op-ed-that-wasnt/.

1074. UNSC, *Report of the Secretary-General on Technical Assistance Provided to the African Union Commission and the Transitional Government of National Unity for the Implementation of Chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan*, S/2016/328, April 7, 2016, paras 3–4.

1075. "UN Rights Chief Urges Establishment of Hybrid Court for Atrocities in South Sudan," *UN News Centre*, December 14, 2016, available at: un.org/apps/news/story.asp?NewsID=55801#.WRDJ_WkrKmw.

1076. "South Sudan, African Union Stalling on Human Rights Court: UN," *Reuters*, March 14, 2017, available at: reuters.com/article/us-southsudan-un-court-idUSKBN16L256.

1077. Joint Monitoring and Evaluation Commission, Transitional Justice Working Committee, *Report to H.E. Festus Mogae Chaiperson of JMEC on the Status of Implementation of Chapter V of the ARCC,* September 2017, 16–18, available at: jmecsouthsudan.org/index.php/reports/arcss-evaluation-reports/56-chapter-v-transitional-justice/file. See also "African Union Commission and the Republic of South Sudan Successfully Conclude Working Session on the Draft Legal Instruments of the Hybrid Court for South Sudan," AU press release, August 14, 2017, available at: au.int/en/pressreleases/20170814/african-union-commission-and-republic-south-sudan-successfully-conclude.

1078. Article 3.1.1.

1079. Article 3.6.1.

1080. Article 3.2.2.

1081. Article 3.2.1.

1082. Article 3.2.1.

1083. Article 3.5.4.

1084. Article 3.5.3.

1085. Article 3.5.2.

1086. Mark Kersten, "The Case for a Permanent Hybrid Tribunal for Mass Atrocities," *Justice in Conflict*, January 8, 2016, available at: justiceinconflict.org/2016/01/08/the-case-for-a-permanent-hybrid-tribunal-for-mass-atrocities/.

1087. Article 3.2.2.

1088. Article 3.1.2.

1089. Article 3.3.2.

1090. Article 3.3.1.

1091. Article 3.5.6.

1092. See justicehub.org/article/promise-hybrid-court-south-sudan.

1093. Article 3.1.2.

1094. Article 3.3.5.

1095. Stephan Faris, "The Real Roots of Darfur," *The Atlantic*, April 2007, available at: theatlantic.com/magazine/archive/2007/04/the-real-roots-of-darfur/305701/.

1096. Brenden Koerner, "Who Are the Janjaweed? A Guide to the Sudanese Militiamen," *Slate*, July 19, 2005, available at: slate.com/articles/news_and_politics/explainer/2004/07/who_are_the_janjaweed.html.

1097. "Darfur Conflict," *Reuters*, available at: news.trust.org//spotlight/Darfur-conflict.

1098. "Who Are Sudan's Darfur Rebels?" *BBC News*, February 23, 2010, available at: news.bbc.co.uk/2/hi/africa/7039360.stm.

1099. Small Arms Survey, *Borders Intelligence Brigade*, available at: smallarmssurveysudan.org/fileadmin/docs/facts-figures/sudan/darfur/armed-groups/saf-and-allied-forces/HSBA-Armed-Groups-Border-Guards.pdf.

1100. Human Rights Watch, *Men with No Mercy: Rapid Support Forces Attacks against Civilians in Darfur*, 2015.

1101. UNSC, Resolution 1769, S/RES/1769 (2007), July 31, 2007.

1102. International Refugees Rights Initiative, *The Challenges of Peacekeeping in Darfur*, June 2016, 16–22, available at: refugee-rights.org/Publications/Papers/2016/UNAMID%20FINAL.pdf.

1103. International Refugees Rights Initiative, *The Challenges of Peacekeeping in Darfur*, June 2016, 8, available at: refugee-rights.org/Publications/Papers/2016/UNAMID%20FINAL.pdf

1104. Eric Reeves, "Quantifying Genocide, Update November 2016," available at: sudanreeves.org/2017/01/05/quantifying-genocide-darfur-mortality-update-august-6-2010/

1105. UNHCR, "Sudan: Refugees, Asylum-seekers, IDPs and Others of Concern to UNHCR," available at: http://www.refworld.org/country,,UNHCR,,TCD,,573ad3274,0.html.

1106. "Sudanese Refugees in Chad Must Adapt or Starve," *IRIN*, June 9, 2016, available at: irinnews.org/feature/2016/06/09/sudanese-refugees-chad-must-adapt-or-starve.

1107. Human Rights Watch, *Sudan: Mass Rape by Army in Darfur*, February 11, 2015.

1108. See Eric Reeves, "A Partial List of Those Declaring Darfur to Be the Site of Genocide," April 18, 2017, available at: sudanreeves.org/2017/04/18/a-partial-list-of-those-declaring-darfur-to-be-the-site-of-genocide/.

1109. UN Security Council, Resolution 1564 (2004), September 2004, para. 12.

1110. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Pursuant to Security Council Resolution 1564 of 18 September 2004), January 25, 2005, 3.

1111. The commission's report refers to the Fur, Zaghawa, Massalit, Jebel, Aranga, and others, 3.

1112. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 4.

1113. Ibid., 5.

1114. UNSC, Resolution 1593, S/RES/1593 (2005), March 31, 2005.

1115. For an overview of ICC cases, see www.icc-cpi.int/Pages/defendants-wip.aspx.

1116. By June 2016, ICC judges had issued 11 such findings. See *Statement of ICC Prosecutor Fatou Bensouda to the United Nations Security Council on the Situation in Darfur, Sudan pursuant to UNSCR 1593 (2005)*, June 9, 2016, available at: icc-cpi.int/Pages/item.aspx?name=160609-otp-stat-UNSC.

1117. Darfur Peace Agreement, May 5, 2006, available at: peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf.

1118. Doha Document for Peace in Darfur, available at: unamid.unmissions.org/doha-document-peace-darfur.

1119. International Crisis Group, *The Chaos in Darfur*, April 22, 2015, available at: crisisgroup.org/africa/horn-africa/sudan/chaos-darfur.

1120. Sharanjeet Parmar, "An Overview of the Sudanese Legal System and Legal Research," 2007, available at: nyulawglobal.org/globalex/Sudan.html.

1121. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 5.

1122. Ibid., 144.

1123. Redress and African Center for Justice and Peace Studies, *Sudan's Human Rights Crisis: High Time to Take Article 2 of the Covenant Seriously: Submission to the UN Human Rights Committee ahead of Its Examination of Sudan's Fourth Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, para. 6, available at: \tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/SDN/INT_CCPR_CSS_SDN_17479_E.pdf.

1124. Human Rights Council, *Report of the Special Rapporteur on the S ituation of Human Rights in Sudan*, A/HRC/11/14, June 2009, para. 50.

1125. Munzol A. M. Assal, "Civil Society and Peace Building in Sudan: A Critical Look," Chr. Michelsen Institute, Sudan Working Paper no. 2, 2016, 4.

1126. Human Rights Watch, *Sudan: End Crackdown on Civil Society*, January 13, 2013, available at: hrw.org/news/2013/01/13/sudan-end-crackdown-civil-society.

1127. "Sudan's Crackdown on Civil Society," *CNBC Africa*, available at: cnbcafrica.com/news/east-africa/2016/05/27/sudan-crackdown-(1)/.

1128. African Union, *Report of the African Union High-Level Panel on Darfur (AIPD)*, 64, PSC/AHG/2(CCVII), October 29, 2009, (hereinafter: Mbeki Report), available at: sudantribune.com/African-Union-Panel-on-Darfur-AUPD,32905. The Mbeki Report also recommended the establishment of a truth and reconciliation mechanism, reparations programs, and the use of traditional justice mechanisms. See African Union Commission, *Consultation with African Union Member States on Transitional Justice, Consultation Report*, Capetown South Africa, September 2011.

1129. Brian A. Kritz and Jacqueline Wilson, "No Transitional Justice without Transition: Darfur—A Case Study," *Mich. St. J. Int'l L.* 19 (2011): 487.

1130. Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005, Article 5, reprinted in UN Doc.S/2005/403.

1131. Amendment of the Order of Establishment of Criminal Court for Darfur's Incidents, November 10, 2005.

1132. Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), 281.

1133. *Third Report of the Prosecutor to the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)*, June 14, 2006, 6, available at: reliefweb.int/sites/reliefweb.int/files/resources/89C3AEAF4A935E47C125718E0037367E-icc-sdn-14jun.pdf.

1134. Human Rights Watch, *Lack of Conviction the Special Criminal Court on the Events in Darfur*, June 2006, 15–22, available at: hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf.

1135. "Darfur: Three Men Sentenced to Death by Crucification," *Sudan Tribune*, May 25, 2013.

1136. Doha Document for Peace in Darfur, July 2012, paras. 322–28, available at: unamid.unmissions.org/sites/default/files/ddpd_english.pdf.

1137. Ibid., para. 322.

1138. Ibid., para. 326.

1139. See, for example, Africa Center for Justice and Peace Studies, *Eighteen Members of the Sudanese Liberation Army: Mini Minawi Sentenced to Death by the Special Criminal Court on the Events in Darfur*, December 17, 2015, available at: acjps.org/eighteen-members-of-the-sudanese-liberation-army-mini-minawi-sentenced-to-death-by-the-special-criminal-court-on-the-events-in-darfur.

1140. African Union communiqué, Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government, October 29, 2009, PSC/AHG/Comm.1(CCVII).

1141. Human Rights Watch, *AU: Back Mbeki Panel Call for Darfur Prosecutions*, October 20, 2005; Human Rights Watch, *The Mbeki Panel Report One Year On: Continued Inaction on Justice for Darfur Crimes*, October 2010, noting that "18 Sudanese political parties" supported the Mbeki Report broadly.

1142. See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, paras. 573–82.

1143. Human Rights Watch, *The Mbeki Panel Report One Year On*.

1144. See John R. Crook, Contemporary Practice of the U.S. Relating to International Law, "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC," *Am. J. Int'l L.* 99 501; see also Human Rights Watch, *U.S. Proposal for a Darfur Tribunal: Not an Effective Option to Ensure Justice*, February 15, 2005, available at: hrw.org/news/2005/02/15/us-proposal-darfur-tribunal-not-effective-option-ensure-justice.

1145. See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, paras. 573–82.

1146. Mbeki Report, para. 320(b).

1147. Ibid., para. 326.

1148. Kritz and Wilson, *No Transitional Justice Without Transition*, 487.

1149. Article 34 (1), Sudan Armed Forces Act 2007.

1150. Mbeki Report, para. 322, noting that appointing non-nationals would not require constitutional amendment.

1151. Ibid., para. 248.

1152. Ibid., para. 325.

1153. Ibid., para. 327.

1154. Ibid., para. 323.

1155. Ibid., para. 331. Recommending that criteria should include "proven professional competence in criminal law and procedure, and experience in the function (judicial, prosecutorial, investigative, or administrative) for which the appointment is made, capacity to adapt the legal system of Sudan, and a fair gender balance." The panel

recommended the AU "seek the advice of international respected judges or jurists or international organisations, and should publish its consultation process." Para. 332.

1156. Ibid., para. 324.

1157. Ibid., para. 328.

1158. "Sudan Lawyers Syndicate Vows to Defeat Darfur Hybrid Court Proposal," *Sudan Tribune*, November 3, 2009, available at: www.sudantribune.com/Sudan-lawyers-syndicate-vows-to,33004.

1159. "Mbeki Softens Stance on Darfur Hybrid Court Proposal," *Sudan Tribune*, December 17, 2009, available at: sudantribune.com/spip.php?article33484.

1160. Ibid.

1161. "Darfur Mediators Hand Compromise Proposals to Sudanese Parties," *Sudan Tribune*, January 2, 2011, available at: sudantribune.com/Darfur-mediators-hand-compromise,37447.

1162. Doha Document for Peace in Darfur, Article 322.

1163. Ibid., Article 326.

1164. "Sudan to Establish Special Court for Darfur Crimes and Appoints New Special Prosecutor," *Sudan Tribune*, January 12, 2011, available at: sudantribune.com/Sudan-to-establish-special-court,41255.

1165. *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, S/2016/268, March 22, 2016, para. 62.

1166. Mbeki Report, para. 254.

1167. Ibid., para. 255.

1168. In the discussion about proposed transitional justice mechanisms for Uganda, these commissions are all but forgotten. Neither body has received a full analysis, although materials have been collected by the United States Institute of Peace (usip.org) and the Beyond Juba Project (beyondjuba.org) and discussed in Richard Carver, "Called to Account: How African Governments Investigate Human Rights Violations," *African Affairs* 89, no. 356 (1990): 391–415; Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions* (Washington, D.C.: Woodrow Wilson Center Press, 2005), 79, available at: wilsoncenter.org/press/peterson_finalacts.pdf; and Joanna R. Quinn, "Constraints: The Un-Doing of the Ugandan Truth Commission," *Human Rights Quarterly* 26 (2004): 401. The Commission of Inquiry into the Disappearances of People in Uganda (CIDP) was created under Idi Amin in 1974 and mandated to investigate instances of disappearances between 1971 and 1974. The Commission on Inquiry into Violations of Human Rights (CIVHR or "Oder Commission") was created by President Museveni upon assuming power in 1986 and was mandated to investigate human rights abuses since independence in 1962. Both commissions were successful in some respects, particularly regarding their findings and in the compilation of testimony from victims. The CIDP, despite operating at the height of the Amin regime, held hearings across the country and produced a comprehensive 836-page report. Several of the commissioners faced persecution and fled into exile. The report was not released publicly until after Amin left office and was presumed lost until discovered on microfiche in the archives of Amnesty International's London offices in the early 2000s. The Oder Commission suffered from funding and staffing shortages, which delayed the release of its final report until 1994. The CIVHR conducted investigations, held public hearings throughout the country (some of which

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.

1169. Amnesty Act (Extension of Expiry Period) Instrument, 2017 (SI No. 28 of 2017), May 22, 2017, available at: ulii.org/node/27615.

1170. "ICC Terminates Proceedings against Okot Odhiambo Following Forensic Confirmation of His Passing," ICC press release, September 10, 2015, available at: www.icc-cpi.int/pages/item.aspx?name=PR1147.

1171. Agreement on Cessation of Hostilities Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, August 26, 2006 (hereinafter: Juba Agreement). All of the Juba agreements and annexure are available at beyondjuba.org/.

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."

1173. "Truth and Reconciliation in Limbo: Ugandan Cabinet Drags on Enacting Transitional Justice Policy," *Let's Talk Uganda*, September 16, 2016, available at: letstalk.ug/article/truth-and-reconciliation-limbo-ugandan-cabinet-drags-enacting-transitional-justice-policy.

1174. In April 2012, after years of advocacy by civil society groups, the Ugandan parliament passed an antitorture bill. For a discussion of the use of torture and other human rights abuses by state forces, see Human Rights Watch, *Violence Instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit*, March 2011, and Human Rights Watch, *Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda*, April 2009.

1175. "UN: Withdrawal of UPDF Has Left a Vacuum in Central Africa," *The Independent*, available at, independent.co.ug/un-withdrawal-updf-left-vacuum-central-africa.

1176. OHCHR Report.

1177. See Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, January 2011, 74.

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/.

1190. Amnesty Act (Extension of Expiry Period) Instrument, 2017 (SI No. 28 of 2017), May 22, 2017, available at: 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/.

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/.

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.

1209. Ibid.

1210. Ibid.

1211. See https://justiceinconflict.org/2011/07/12/ugandas-controversial-first-war-crimes-trial-thomas-kwoyelo/.

1212. Open Society Justice Initiative discussion with ICD Registrar Harriet Ssali, August 9, 2017.

1213. Ibid.

1214. Ibid.

1215. Ibid.

1216. Ibid.

1217. Ibid.

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.

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-ycvcgdz/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.

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.

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.

1232. Ibid.

1233. JLOS Development Partners, available at: 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.

1242. Police Act Cap. 303, Section 6, available at: 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.

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.

1245. Ibid., para. 6.0. 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.