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Beth VanSchaack

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THE BUILDING BLOCKS OF HYBRID JUSTICE

BETH VAN SCHAACK*

I. INTRODUCTION

The commission of mass atrocities—genocide, crimes against humanity, and war crimes—inevitably generates clarion calls for accountability from a range of international actors, including civil society organizations, governments, and United Nations bodies. These demands often center on an appeal that the situation be taken up by the International Criminal Court ("ICC") via a Security Council referral or action by the Prosecutor herself. Although the ICC is now fully operational, its jurisdiction remains incomplete and its resources limited. Furthermore, the ICC is plagued by challenges to its legitimacy, erratic state cooperation, and persistent perceptions of inefficacy and inefficiency. Originally envisioned as a standing institution that would obviate the need for new *ad hoc* courts, it is now clear that the ICC cannot handle all the atrocity situations ravaging our planet. As such, there is an enduring need for the international community to create, enable, and support additional accountability mechanisms to respond to the commission of international crimes when the political will for an ICC referral is lacking, the ICC is inappropriate or foreclosed for whatever reason, or only a fraction of the abuses or perpetrators in question are before the ICC.

This paper analyzes the accumulated experience with international, hybrid, and internationalized judicial institutions prior to and since the establishment of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 1993[1] and the International Criminal Tribunal for Rwanda ("ICTR") in 1994.[2] This paper assumes the continuing utility of such mechanisms as tools to provide accountability for mass violence amounting to international crimes, particularly in situations requiring an alternative or supplement to the ICC.[3] It thus focuses on

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* Leah Kaplan Visiting Professor of Human Rights, Stanford Law School; former Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice in the U.S. State Department. Thanks go to the Stanford students in my Policy Lab on Legal & Policy Tools to Prevent Atrocities and in particular to Brendan Ballou-Kelley, Paul Bennetch, Marisol Nina Guttman, Sean McGuire, Tres Douglas Thompson III, Matthew Sellers, and Swain Uber for their research and input. The article also benefited greatly from the wisdom of Ari Bassin, David Mandel-Anthony, Jana Ramsey, Paul Oertly, and David J. Schwendiman. Denver Journal of International Law and Policy for provided excellent editorial assistance. The views expressed herein, and any errors, are my own.

1. S.C. Res. 808 (Feb. 22, 1993) [hereinafter Establishment of ICTY].

2. S.C. Res. 995 (Nov. 8, 1994) [hereinafter ICTR Statute].

3. For a discussion of the value of internationalized mechanisms in general, *see* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS, U.N. Doc. HR/PUB/08/2, U.N. Sales No.

practical elements of institutional design, with particular attention to the origins, structure, jurisdictional limitations, financing, and procedures of the hybrid courts, dedicated chambers, specialized prosecutorial cells, and other accountability innovations established to prosecute atrocity crimes at the domestic level with some measure of international support, expertise, and personnel. From this historical and comparative analysis, the paper develops a taxonomy of models and a "menu" of elements that can be mixed and matched as new accountability mechanisms are under consideration for historical, current, and emerging atrocity situations, such as Syria,[4] the Central African Republic,[5] the Democratic Republic of Congo,[6] Colombia,[7] North Korea,[8] South Sudan,[9] Sri Lanka,[10] Libya,[11] Burundi,[12] and even the July 2014 downing of Malaysian Air Flight 17 ("MH-17") over rebel-controlled Ukraine.[13]

E.08.XIV.2 (2008); Alberto Costi, *Hybrid Tribunals as a Valid Alternative to International Tribunals for the Prosecution of International Crimes*, HUMAN RIGHTS RESEARCH, 2005.

4. *See* Beth Van Schaack, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (May 29, 2014, 12:44 AM), http://justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/.

5. *See* Mark Kersten, *Why Central African Republic's Hybrid Tribunal Could be a Game-Changer*, JUST. CONFLICT (May 14, 2015), http://justiceinconflict.org/2015/05/14/why-central-african-republics-hybrid-tribunal-could-be-a-game-changer/.

6. *See Democratic Republic of Congo: No More Delays for Justice,* HUMAN RIGHTS WATCH (Apr. 1, 2014), http://www.hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice.

7. *See The Last Lap in Colombia: Clinching Peace Depends on Persuading the FARC to do Jail Time*, THE ECONOMIST (Jan. 31, 2015), http://www.economist.com/news/americas/21641293-clinching-peace-depends-persuading-farc-do-jail-time-last-lap-colombia; *Time to Call the FARC's Bluff: Colombia's Peace Process Risks Drifting to Collapse*, THE ECONOMIST (July 4, 2015), http://www.economist.com/news/americas/21656694-colombias-peace-process-risks-drifting-collapse-time-call-farcs-bluff.

8. *See* Morse H. Tan, *Finding a Forum for North Korea*, 65 SMU L. REV. 765 (2012).

9. *See* William Eagle, *Hybrid Court Suggested for South Sudan*, VOICE AM. (Mar. 31, 2014), http://www.voanews.com/content/hybrid-court-suggested-for-south-sudan/1883130.html/; *Ending the Era of Injustice: Advancing Prosecutions for Serious Crimes Committed in South Sudan's War*, HUMAN RIGHTS WATCH (Dec. 10, 2014), https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans?_ga=1.227964440.429423661.1399935943/ (arguing that South Sudan's judicial system is too weak and lacking in political will to support an embedded hybrid mechanism) [hereinafter ENDING THE ERA OF INJUSTICE].

10. *See* Parasaran Rangarajan, *Alternative Routes to Justice for War Crimes in Sri Lanka*, S. ASIA ANALYSIS GROUP (Feb. 12, 2015), http://www.southasiaanalysis.org/node/1710.

11. *See* Alison Cole, *A Hybrid Court Could Secure Justice in Libya: Gaddafi's Son and Spy Chief Might End Up Before the ICC, but What about Everyone Else?*, THE GUARDIAN (Oct. 27, 2011, 1:04 PM), http://www.theguardian.com/law/2011/oct/27/hybrid-court-justice-libya.

12. *See* U.N. Security-General, *Letter from the Secretary-General to the President of the Security Council*, U.N. Doc. S/2005/158 (March 11, 2005) (advocating for a truth commission and a specialized chamber); *see also* S.C. Res. 1606, ¶ 1 (June 20, 2005) (directing the Secretary-General to initiate negotiations with Burundi to implement his recommendation).

13. S.C. Res. 2166 (July 21, 2014). Ukraine's original Article 12(3) declaration to the ICC was

While past proposals advocating additional *ad hoc* mechanisms may have reflected skepticism about—or even hostility toward—the ICC, contemporary submissions[14] are more often premised on a pragmatic recognition of the limits of the ICC coupled with a firm fealty to the principle, and benefits, of positive complementarity. Rather than threatening to undermine the ICC, many proposals, if pursued, have the potential to contribute to a more integrated, differentiated, and impactful international justice system that will mount a stronger challenge to impunity by reaching more victims and perpetrators. At the same time, although this paper is dedicated to exploring the promises and drawbacks of hybridity, it cannot be gainsaid that there may remain a role for fully international tribunals to prosecute truly international crimes, i.e., massive crimes that transcend national borders and overwhelm national judiciaries.

Although there have been important antecedents, the institutions of interest are part of a global trend of recent vintage toward international institution building and the judicialization of international relations. By way of background, the 1990's witnessed a sharp rise in the number of international, quasi-international, and regional tribunals established for the purpose of adjudicating a whole range of transnational disputes, including those involving international trade and investment, the law of the sea and piracy, human rights, the law of armed conflict, and property and restitution claims.[15] The revitalization of the Nuremberg promise that international crimes would not go unaddressed first found expression in the formation by the U.N. Security Council of two *ad hoc* criminal tribunals to address crimes committed during the disintegration of the former Yugoslavia and the genocide in Rwanda.[16] These events also occasioned a revival of post-WWII proposals for a permanent international criminal court. The establishment of the ICC in 1998, and its operationalization in 2002, seemed to mark the apex of this movement toward ensuring accountability for international crimes, although penal proceedings before *ad hoc* tribunals dedicated to particular conflict situations continued apace.[17] With the establishment of the ICC, it was largely assumed that

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narrowly drawn and did not cover MH-17; with the most recent submission, Ukraine accepted the ICC's jurisdiction over crimes committed until early 2014, so there is potential jurisdiction over the Maidan protests as well as crimes committed in connection with the Russian annexation of Crimea. *Declaration by Ukraine Lodged under Article 12(3) of the Rome Statute, Minister for Foreign Affairs of Ukraine*, INT'L CRIM. CT. (Sept. 8, 2015), https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

14. Including submissions by this author. *See* Beth Van Schaack, *Options for Accountability in Syria*, JUST SECURITY (May 22, 2014), https://www.justsecurity.org/10736/options-accountability-syria/.

15. *See* Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 160 (2000); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

16. Charles Garraway, *Courts and Tribunals*, *in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW 132 (Anthony Dworkin et al. eds., 2007), http://www.crimesofwar.org/a-z-guide/courts-and-tribunals/.

17. *Establishment of the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20t

there would be no more need for additional *ad hoc* institutions.[18]

This assumption proved premature as it became clear that the ICC—given resource and jurisdictional constraints—would only be able to handle a fraction of the situations demanding justice around the globe.[19] As such, the international community has over the years constructed a network of additional international and internationalized tribunals dedicated to prosecuting violations of transnational and international criminal law committed by individuals who have participated in some of the most brutal conflicts waged by humankind. Attesting to the creativity of international actors committed to advancing the accountability norm, several varieties of *ad hoc* tribunal have emerged, often in response to perceived shortcomings of previous attempts. These new models, it was hoped, would cloak the proceedings with international legitimacy without requiring the construction from scratch of another expensive international institution. These next generation institutions have been called "hybrid" tribunals, because they possess qualities of both domestic and international courts.[20] For example, they were usually situated within the target state; were staffed by international and domestic personnel (judges, prosecutors, investigators, defense counsel, administrators, and support staff) working in tandem; and applied a mixture of international and domestic criminal law and procedures.[21]

While some of these second generation institutions have enjoyed an independent legal personality, others are completely integrated into, or grafted onto, the national court system. Included within this continuum of hybridized institutions are purely domestic endeavors that are positioned, or attempt to position themselves, within the tradition of international justice by accepting international staff and technical assistance or by adjudicating norms drawn from international law. It is hoped that the infusion of international experience and expertise into domestic penal processes by way of mixed panels and prosecutorial units will offer capacity-building opportunities for national personnel, exert a "demonstration effect" for how justice should be administered, create binding precedent and opportunities for norm penetration that will guide future accountability efforts, magnify the expressive and constitutive function of the law, and counter corrupt tendencies in societies in which the rule of law is frail or has broken down.[22] Mixed tribunals are also meant to address some of the shortfalls of *ad hoc* stand-alone tribunals, including high start-up and maintenance expenses,

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18. *See* Milena Sterio, *The Future of* Ad Hoc *Tribunals: An Assessment of their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237 (2013).

19. *Id.* at 239-40.

20. *Hybrid Courts*, PROJECT ON INT'L CTS. AND TRIBS., http://www.pict-pcti.org/courts/hybrid.html.

21. *Id.*

22. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306-08 (2003); *cf.* Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1, 3 (2009) (arguing that the goal of international criminal law should be to empower national courts to be the primary venue for atrocity trials).

their physical and symbolic distance from the events in question, the absence of local "ownership" within the constituencies they were designed to serve, and their lack of "technology transfer" to help rebuild or strengthen national judicial systems.[23] As compared to their predecessors, some of these more recent hybrid institutions have proven to be more agile in operation, better anchored in local and even regional norms, more representative of the local legal culture and community, and more attuned to "the complex domestic and social causes that led to the crimes."[24] As such, they enjoy greater cultural and procedural legitimacy.

Despite their advantages over earlier models of international justice, these newer hybrid and internationalized institutions raise questions of their own when it comes to the imperatives of legitimacy, competency, and fairness—particularly when local personnel may be susceptible to political manipulation—where the rule of law is not fully established, or when domestic actors insist on certain concessions, such as the availability of *in absentia* proceedings or the death penalty. Moreover, as they become more idiosyncratic, these institutions risk reifying the more problematic manifestations of state sovereignty, contributing to the fragmentation of the law, and undermining the universalist ethos that undergirds the entire human rights edifice. Leaving the prosecution of international crimes to domestic systems, even with some international involvement, can enable parochial forms of victor's justice and give expression to illiberal impulses that the international community should not endorse through the provision of financial, technical, diplomatic, or other forms of support. As the international community and states embark upon new efforts at institution building, they should not lose sight of these potential pitfalls. This paper thus also recounts some cautionary tales from the many object lessons of international justice that should be borne in mind as new hybrid and *ad hoc* institutions are under contemplation.

As this summary reveals, there is a high degree of diversity amongst these institutions. To be sure, some of this variation reflects considerations that are endogenous to the particular atrocity situations at issue. At the same time, different crises inevitably present a unique mix of competing equities within the international community and the domestic political realm as far as the pursuit of accountability is concerned. Examining this legal and institutional history, it becomes clear that the most important determinant of whether an effective justice outcome is achieved is the interface of geopolitical interests with the principle of state sovereignty. It is this mix that dictates when elements of the international community are able and willing to impose justice on a crisis situation and when the consent of implicated states, such as the territorial state or its protectors, is deemed necessary for real progress to be made toward accountability. Ever since the international community first contemplated a program for international justice in the World War I period, justice entrepreneurs have been encumbered by the

23. *Id.*

24. Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT'L L. J. 725, 730 (2005).

constraints of state sovereignty and have sought ways to transcend them.

II. ORIGINS

International and internationalized justice institutions have been created through a number of routes. This includes action within the Security Council, as well as by way of multilateral or bilateral treaties that may involve the implicated state, other interested states, and components of the United Nations. They may also be the product of a foreign occupation or a United Nations administration exercising state sovereignty in trust in an immediate post-conflict situation. Some of these mechanisms have been imposed on the situation in question without the consent—genuine or coerced—of the territorial or nationality state(s). Others have been created by way of negotiations with implicated states, which has at times occasioned problematic compromises and concessions to state sovereignty and domestic preferences. Institutions at the more domestic end of the hybridity continuum are increasingly the product of domestic legislation, incorporating or reflecting international negotiations around the justice imperative.[25] In many respects, the origins of these bodies both enable and constrain subsequent institutional design choices with respect to structure, staffing patterns, and procedures.

A. "Victor's Justice"

Early international justice efforts followed situations of armed conflict and were largely imposed on the vanquished by the victors. The 1474 trial of Peter Von Hagenbach is often credited with being the first international criminal proceeding.[26] Von Hagenbach stood accused of rape and pillage during the occupation of Breisach, Germany.[27] His conduct (deemed a "crime against the laws of God and Man") was so egregious that it triggered unprecedented collective action within the Holy Roman Empire, which convened a tribunal with judges hailing from member states.[28] Although Von Hagenbach claimed that he was acting on the orders of his superior, the Duke of Burgundy, this defense was rejected, and he was ultimately drawn and quartered upon conviction.[29]

The first truly world war also launched the first global effort to address international crimes through the exercise of international and domestic criminal jurisdiction. Peace treaties emerged as the vehicle of choice, giving the illusion of state consent to the proceedings. World War I precipitated the commission of abuses against combatants, prisoners of war, and civilians on an unprecedented

25. *See, e.g.*, John D. Ciorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT'L L. 369, 370-73 (2014) (recounting negotiations around the establishment of the Extraordinary Chambers in the Courts of Cambodia).

26. *1474: The Peter Von Hagenbach Trial, The First International Criminal Tribunal*, DUHAIME'S TIMETABLE WORLD LEGAL HIST., http://www.duhaime.org/LawMuseum/LawArticle-1563/1474-The-Peter-Von-Hagenbach-Trial-The-First-International-Criminal-Tribunal.aspx.

27. *Id.*

28. *Id.*

29. *Id.*

scale.[30] German atrocities included unrestricted submarine warfare, brutal occupations, the targeting of civilians and undefended towns, breaches of neutrality, and—from the perspective of the rest of Europe—the initiation of the war in the first place.[31] The Ottoman Empire, with the Young Turks[32] at the helm, staged one of the first genocides of the 20th century in its effort to eradicate the Christian Armenian population of what is now Turkey.[33] In the face of these offenses, the Allies convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into culpable conduct by the Central Powers during the "Great War."[34] The Commission was also to consider the propriety and feasibility of asserting penal jurisdiction over particular individuals—"however highly placed"—accused of committing such breaches.[35] The Commission's Report concluded that such crimes should be prosecuted before an international "high tribunal" composed of representatives of the Allied and Associated Powers or before national tribunals.[36]

From this point, the potential liability of German and Turkish perpetrators proceeded along separate tracks. The 1919 Treaty of Versailles ending the war with Germany required Germany to accept full responsibility for causing the war (the so called "War Guilt" clause), make substantial territorial concessions, and pay reparations.[37] Presaging a bifurcated model that would continue to be employed decades later, Article 227 envisioned the establishment of an international tribunal composed of representatives of the United States, Great Britain, France, Italy, and Japan to try the former German Emperor, Kaiser William II, who was thus singled out for his central role in orchestrating German crimes during the war.[38] According to Article 228 of the Treaty of Versailles, Germany was to hand over lesser German defendants to be tried before the

30. *See* JOHN N. HORNE & ALAN KRAMER, GERMAN ATROCITIES, 1914: A HISTORY OF DENIAL (1st ed. 2001).

31. *See* Treaty of Peace between the Allied and Associated Powers and Germany art. 231, June 28, 1919, 42 Stat. 1943 [hereinafter Treaty of Versailles] (containing the so-called war guilt clause).

32. *See Armenian Genocide*, UNITED HUMAN RIGHTS COUNCIL, http://www.unitedhumanrights.org/genocide/armenian_genocide.htm (last visited Jan. 1, 2016).

33. *Id.*; *see also* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989); John Kifner, *The Armenian Genocide of 1915: An Overview*, N.Y. TIMES, http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html (last visited Dec. 12, 2015).

34. *See* Harry M. Rhea, *The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice After World War II*, 25 CRIM. L. F. 147, 151 (2014).

35. *Id.*

36. *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, *in* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE PAMPHLET NO. 32, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR I 4,19,23-24 (1919), https://ia600406.us.archive.org/20/items/violationoflawsc00pariuoft/violationoflawsc00pariuoft.pdf.

37. Treaty of Versailles, *supra* note 31, at art. 119-58 (renunciation of rights on various territories), 231-43 (reparations provisions).

38. *Id.* at art. 227.

domestic military tribunals convened by the Allied and Associated Powers.[39] Mixed military tribunals were to prosecute individuals "guilty of criminal acts against the nationals of one of the Allied and Associated Powers" pursuant to Article 229.[40] By these terms, the Treaty of Versailles became the first peace treaty to contemplate war crimes trials before hybrid institutions. Germany signed the treaty, but only on threat of invasion.[41]

By the time the Versailles Treaty entered into force, however, the Kaiser had fled to the Netherlands, which had ostensibly remained neutral during the war.[42] The Dutch refused to extradite him for trial, invoking both a long history of providing asylum to political refugees and the double criminality rule, which ostensibly prevented his extradition to face justice for acts that were not crimes under Dutch law.[43] Article 227 thus remained a dead letter. The Allies never enforced the other penal provisions of the Treaty either. In the face of continued Allied equivocation over war crimes trials and fierce objections among the German public to the possible extradition of German nationals, Germany artfully proposed hosting domestic trials before the German Supreme Court in Leipzig.[44] The Allies, desperate to ensure stability while also salvaging some vestige of their justice project, agreed.[45] To the extent that cases were brought (out of over 800 individuals accused of war crimes, including high-level German officials, only about a dozen judgments were issued), trials proceeded sluggishly against low-level defendants and resulted in acquittals or disproportionately low sentences.[46] Although the Allies protested and then quit the proceedings, they never made good on their threats to further sanction Germany, and no additional cases were pursued.[47]

With respect to the Ottoman Empire, the new Turkish regime—under pressure from the British and perhaps in an effort to head off international trials of its own former leaders—court-martialed in Constantinople an impressive array of once prominent officials for "crimes against humanity and civilization" and other wartime offenses.[48] Much of the output of these proceedings has been largely lost to history; although some individuals were sentenced, others were released and

39. *Id.* at art. 228.

40. *Id.* at art. 229.

41. C.N. Trueman, *The Treaty of Versailles*, HIST. LEARNING SITE (Mar. 17, 2015), http://www.historylearningsite.co.uk/modern-world-history-1918-to-1980/the-treaty-of-versailles/.

42. Tony Paterson, *Berlin Refuses Kaiser a Final Resting Place*, THE TELEGRAPH (Oct. 15, 2000), http://www.telegraph.co.uk/news/worldnews/europe/netherlands/1370484/Berlin-refuses-kaiser-a-final-resting-place.html.

43. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 74 (2010).

44. *See* Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig*, 14 EUROP. REV. 441 (2006).

45. *Id.* at 447.

46. *Id.* at 448.

47. *Id. See generally* GERD HANKEL, THE LEIPZIG TRIALS: GERMAN WAR CRIMES AND THEIR LEGAL CONSEQUENCES AFTER WORLD WAR I (2014).

48. *Id.* at 443-45.

went on to return to high office.[49] The first treaty of peace with Turkey, the 1920 Treaty of Sèvres, contained accountability provisions mirroring those in the Treaty of Versailles with respect to the right of the Allies to convene military tribunals to prosecute persons guilty of having committed acts in violation of the laws and customs of war.[50] Article 230 also contemplated a tribunal created by the League of Nations to address "the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914."[51] After the Turkish War of Independence, Mustafa Kemal (also known as Atatürk), who led the Nationalists to victory, denounced and refused to ratify the Treaty of Sèvres.[52] Renegotiations produced a successor treaty, the 1923 Treaty of Lausanne, which was silent on the question of international justice for abuses.[53] All told, even with the complete defeat and disintegration of the two empires, and a comprehensive post-war treaty framework, accountability proved elusive.

After these abortive efforts to create treaty-based international tribunals with the "consent" (however coerced) of the offending state, the real story of international justice begins following World War II ("WWII"). The victorious allies of that war created the original international tribunals at Nuremberg and Tokyo, albeit through disparate means, without involving the defeated states. The International Military Tribunal ("IMT") sitting in Nuremberg was the product of the London Agreement of 1945, a quadripartite accord between the United States, France, the United Kingdom, and the Soviet Union.[54] As contemplated by Article 5, nineteen other states eventually adhered to the treaty, which contained the tribunal's substantive Charter in an annex.[55] Like the Treaty of Versailles before it, this treaty envisioned that individuals "whose offenses [had] no particular geographic location" would be tried by the IMT; lesser war criminals would be sent to the countries where their alleged crimes were committed for trial before military commissions or domestic courts.[56] Indeed, hundreds of other war crimes trials were held in occupation and national courts around the European and Pacific theaters in the postwar period.[57]

Prosecutions for the crimes committed in the Pacific theater were

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49. *Id.* at 445.

50. *See* Treaty of Peace with Turkey art. 226-30, Aug. 10, 1920, T.S. No. 11 [hereinafter Treaty of Sèvres].

51. *Id.* at art. 230.

52. *See* Nick Danforth, *Forget Sykes-Picot. It's the Treaty of Sèvres that Explains the Modern Middle East*, FOREIGN POL'Y (Aug. 10, 2015), http://foreignpolicy.com/2015/08/10/sykes-picot-treaty-of-sevres-modern-turkey-middle-east-borders-turkey/.

53. Sévane Garibian, *From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress*, 52 ARM. REV. 87, 94 (2010).

54. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 82 U.N.T.C. 280 [hereinafter London Agreement].

55. *Id.* at art. 5.

56. *Id.* at art. 1.

57. *See, e.g.*, Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, http://avalon.law.yale.edu/imt/imt10.asp (enabling the prosecution of lower-level defendants in the European theater).

contemplated by the August 1945 Potsdam Declaration—signed by the United States, the United Kingdom, and China—which demanded Japan's unconditional surrender.[58] Unlike the IMT, the International Military Tribunal for the Far East ("the Tokyo Tribunal") was created through a unilateral proclamation of General Douglas MacArthur, who was declared the Supreme Commander of the Allied Powers in occupied Japan.[59] The Tokyo Tribunal's Charter largely mirrored its Nuremberg predecessor. The one-sided nature of these two institutions generated awkward claims of *tu quoque* when it came to charges that could easily have been leveled against the Allies.[60] It has also sustained perennial critiques that the tribunals meted out little more than victor's justice.[61] It is notable that neither of these tribunals enjoyed the "consent" of the vanquished state or its polity except insofar as the victors, as occupiers, held German and Japanese sovereignty "in trust" following the war.[62] Given that the United Nations was founded as these tribunals were carrying out their work, the judicial proceedings received their multilateral imprimatur only by virtue of the accession of other states to the tribunals' constitutive documents and signatories' subsequent participation in the trials. That said, the General Assembly later blessed the Nuremberg Principles,[63] setting in motion a process that would eventually lead to the establishment of the ICC and the entire system of international justice, albeit decades later.

B. Security Council Action Under Chapter VII

Today's *ad hoc* international and internationalized tribunals have fundamentally different origins than their WWII ancestors. For one, although some unilateral and regional efforts exist, many contemporary international mechanisms have been the work of various elements of the United Nations purporting to represent the entire international community. Some have benefited from the Security Council's coercive powers under Chapter VII of the U.N. Charter; others have involved the General Assembly and/or Secretary-General. The Security Council was centrally involved in the creation of the ICTY[64] and

58. Proclamation Defining Terms for Japanese Surrender Issued, at Potsdam, July 26, 1945, ¶ 10 ("[S]tern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.").

59. International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml [hereinafter Tokyo Charter]. For a discussion of the differences between the two international military tribunals, *see* Zachary D. Kaufman, *The Nuremberg Tribunal v. the Tokyo Tribunal: Designs, Staffs, and Operations*, 43 JOHN MARSHALL L. REV. 753, 756-61 (2010).

60. Sienho Yee, *The* Tu Quoque *Argument as a Defence to International Crimes, Prosecution or Punishment*, 3 CHINESE J. INT'L L. 87, 103-13 (2004).

61. Richard Overy, *Making Justice at Nuremberg, 1945-1946, Victors and Judges*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml.

62. Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOR. AFF. 385, 393-94 (2003).

63. G.A. Res. 1/95, (Dec. 11, 1946) (affirming the principles of international law recognized by the IMT Charter and judgment).

64. Establishment of ICTY, *supra* note 1; Report of Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, *adopted by* S.C. Res.

ICTR.[65] In those two situations, the existence of a breach of the peace within the meaning of Article 39 of the U.N. Charter was manifest, although arguably the situation in Rwanda, being more internal, occasioned a greater expansion of the Council's ambit. Rwanda originally advocated for the establishment of an international tribunal; however, it ultimately withdrew support when the ICTR did not reflect certain of its preferences regarding jurisdiction and the availability of the death penalty.[66] As such, both tribunals were ultimately imposed on the countries in question. While members of the Council no doubt supported the pursuit of justice in its own right, creating a judicial institution in the face of mass violence also offered the Council an alternative to more robust interventions that may have been politically infeasible or unpalatable at the time.[67] The legality of the Council's establishment of criminal tribunals as subsidiary organs, notwithstanding the lack of an express Charter approval for such institutions in Article 41, was confirmed in the *Tadić* case, the first ICTY case to be fully adjudicated.[68]

Over the years, the Council has remained engaged in the work of its progeny, receiving regular briefings and occasionally tweaking their mandates and structures, such as by establishing additional trial chambers,[69] adding judges to the Appeals Chamber,[70] creating a roster of *ad litem* judges and expanding their powers,[71] adjusting the composition of the chambers,[72] appointing or extending the terms of key personnel,[73] and assigning judges to particular cases.[74] After almost a decade, the Security Council turned its attention to devising Completion Strategies for the two *ad hoc* tribunals.[75] Although the original deadlines slipped (due in part to the late arrest of fugitives and defendants' health issues), the ICTR has concluded its closing ceremony and the ICTY is hearing its final trials and appeals.[76] Central to the tribunals' Completion Strategies was Rule 11bis, an

827, ¶ 1 (May 25, 1993) [hereinafter ICTY Statute].

65. ICTR Statute, *supra* note 2.

66. MARTIN DIXON ET AL., CASES & MATERIALS ON INTERNATIONAL LAW 561 (5th ed. 2011).

67. *See, e.g.*, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 542 (2004) ("The reality is that the ICTY and [ICTR] were established more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice").

68. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

69. *See, e.g.*, S.C. Res. 1165, ¶ 1 (Apr. 30, 1998); S.C. Res. 1166, ¶ 1 (May 13, 1998).

70. S.C. Res. 1329, ¶¶ 1-2 (Dec. 5, 2000).

71. *Id.* ¶ 1. *See also* S.C. Res. 1431, ¶ 1 (Aug. 14, 2002); S.C. Res. 1481 (May 19, 2003); S.C. Res. 1504 (Sept. 4, 2003); S.C. Res. 1597 (Apr. 20, 2005); S.C. Res.1613 (July 26, 2005); S.C. Res. 1800, ¶ 1 (Feb. 20, 2008).

72. S.C. Res. 1411 (May 17, 2002); S.C. Res. 1837, ¶ 5 (Sept. 29, 2008).

73. S.C. Res. 1775 (Sept. 14, 2007).

74. S.C. Res. 1629 (Sept. 30, 2005); S.C. Res. 1668 (Apr. 10, 2006); S.C. Res. 1824 (July 18, 2008); S.C. Res. 1877, ¶ 8 (July 7, 2009).

75. S.C. Res. 1503, ¶¶ 1, 6-7 (Aug. 28, 2003); S.C. Res. 1534, ¶¶ 3-4, 6-7, 9 (Mar. 26, 2004). *See generally* Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L L. 687 (2006).

76. Press Release, U.N. Int'l. Crim. Tribunal for Rwanda, ICTR to Host Closing Events in December 2015 (Oct. 1, 2015), http://www.unictr.org/en/news/ictr-host-closing-events-december-2015.

amendment to the Rules of Procedure and Evidence ("RPE") that facilitated the transfer of cases under investigation or indictment involving intermediate and lower-level defendants to the authorities of a "competent national jurisdiction" for prosecution.[77]

Following the passage of UNSCR 1966 (2010), the two tribunals now share a residual mechanism (the Mechanism for International Criminal Tribunals ("MICT")) that is to wind down the tribunals' activities and manage lingering post-completion matters, including fugitive tracking; witness protection issues; appeals, reviews of judgments, and retrials; contempt charges; the enforcement of sentences and requests for parole; and the tribunals' legacy and archives.[78] As a hybridity feature, the MICT is also monitoring cases referred to national jurisdictions[79] and responding to requests for assistance from national authorities that are pursuing their own criminal or immigration cases against Rwandan and Yugoslav defendants found in their midst, a task that is proving to be more pressing than had originally been anticipated.

The MICT, which has branches in The Hague and Arusha, is meant to be a "small, temporary and efficient structure,"[80] although the risk of bureaucratic bloat is ever-present. At the moment, the MICT has a limited full-time staff and a roster of judges, professional staff, and defense counsel who will be called up as needed.[81] The Chief Prosecutors of the ICTR and then of the ICTY have served as the prosecutor of the MICT since its inception.[82] It is envisaged that the MICT will prosecute three of the top Rwandan fugitives if they are located (Augustin Bizimana, Félicien Kabuga, and Protais Mpiranya), while the files of the other six have been transferred to Rwandan courts.[83] At the moment, the MICT shares its

77. *See* Press Release, Judge Theodor Meron, President of U.N. Int'l. Crim. Tribunal for the Former Yugoslavia, to U.N. Security Council (June 13, 2005), http://www.icty.org/en/press/statement-judge-theodor-meron-president-international-criminal-tribunal-former-yugoslavia#page. *See also* RULES OF PROCEDURE AND EVIDENCE, Int'l Criminal Trib. for the former Yugoslavia, at 11bis, U.N. Doc. IT/32/Rev.43 [hereinafter ICTY RPE], http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf.

78. *About the MICT*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBS. (June 7, 2012), http://www.unmict.org/en/about.

79. *See* Oliver Windridge, *Gone But Not Forgotten—The Ongoing Case of Jean Uwinkindi at the ICTR and MICT*, OPINIOJURIS (July 29, 2015), http://opiniojuris.org/2015/07/29/guest-post-gone-but-not-forgotten-the-ongoing-case-of-jean-uwinkindi-at-the-ictr-and-mict/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

80. Letter from the President of the International Residual Mechanism for Criminal Tribunals, to the president of the Security Council, U.N. Doc. S/2015/341 (May 15, 2015), http://www.unmict.org/sites/default/files/documents/150515_progress_report_en.pdf.

81. *About the MICT, supra* note 78.

82. *Prosecutor: Serge Brammertz*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBS., http://www.unmict.org/en/about/principals/prosecutor (last visited Mar. 22, 2015).

83. *Statement by Justice Hassan B. Jallow, Prosecutor UN-ICTR & UN-MICT to the United Nations Security Council*, UNITED NATIONS INT'L CRIM. TRIB. FOR RWANDA (June 3, 2015), http://www.unictr.org/en/news/statement-justice-hassan-b-jallow-prosecutor-un-ictr-un-mict-united-nations-security-council-0. One of the last remaining ICTR fugitives, Ladislas Ntaganzwa, was captured in the Democratic Republic of the Congo in 2015 and transferred to Rwanda for trial in 2016.

administrative platform with the residual mechanism for the Special Court for Sierra Leone ("RSCSL") and there is talk of further integrating these institutions under a single funding stream given their congruent functions, particularly in light of the fact that the RSCSL is having difficulty raising its modest budget.[84] The MICT could conceivably become a permanent institution to serve this purpose for other current and future hybrid mechanisms once they wind down their operations.

Although the international criminal law renaissance in the 1990's was largely initiated by the U.N. Security Council, the role of the Council—and with it the availability of coercive Chapter VII powers—has diminished over the years and activity has shifted elsewhere within the international community.[85] As the extended duration and expense of proceedings before standalone *ad hoc* tribunals began to raise concerns,[86] a form of "tribunal fatigue" set in within the Security Council, with China making it plain that it would not support the establishment of yet another *ad hoc* body (although China was not alone in its reservations).[87] As a result, attention largely shifted to other elements within the United Nations and the international community to take the lead on developing judicial institutions to ensure some measure of accountability in the face of subsequent international crimes, as discussed below.

That said, the Council was obliquely yet decisively involved with the establishment of the Special Tribunal for Lebanon ("STL"), dedicated to prosecuting individuals responsible for the 2005 assassination of former Prime Minister Rafiq Hariri (and twenty-two others) and related violence.[88] Following a fact finding mission dispatched by the U.N. Secretary-General, the Security Council with UNSCR 1595 established an International Independent Investigative Commission ("UNIIIC") under Chapter VII to "assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators."[89] The UNIIIC found fault with both the Lebanese security and Syrian military intelligence services, determined that the initial Lebanese investigation into the bombing had been flawed, and called for an independent

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Genocide Suspect Ladislas Ntaganzwa Flown to Rwanda for Trial, BBC NEWS, Mar. 20, 2016, http://www.bbc.com/news/world-africa-35856801.

84. *See* Beth Van Schaack, *IHL Dialogs: Prosecutors' International Criminal Law Round-Up*, INTLAWGRRLS (Sept. 4, 2014), http://ilg2.org/2014/09/04/ihl-dialogs-prosecutors-international-criminal-law-round-up/.

85. *See generally* GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 14 (3rd ed. 2014); *The U.N. Security Council (UNSC)*, COUNCIL ON FOREIGN RELATIONS (Sept. 2, 2015), http://www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649.

86. Zacklin, *supra* note 67, at 545 (noting that the *ad hocs* "exemplify an approach that is no longer politically or financially viable.").

87. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 425 (6th ed. 2011).

88. Martin Chulov, *Rafik Hariri Assassination: Trial of Hezbollah Suspects Begins*, THE GUARDIAN (Jan. 16, 2014), http://www.theguardian.com/world/2014/jan/16/rafik-hariri-assassination-trial-hezbollah-suspects.

89. S.C. Res. 1595, ¶ 1 (Apr. 7, 2005).

international investigation.[90] As is often the case, this commission of inquiry served as a precursor to a judicial institution.[91] Thus, in December 2005, Lebanon requested the Council to establish a tribunal of an international character to prosecute perpetrators identified by the UNIIIC.[92] The Council turned to the Secretary-General for assistance in formulating a response. The Secretary-General's report recommended the establishment of a mixed tribunal with national and international characteristics with respect to jurisdiction, applicable law, location, composition, and funding.[93] On the basis of these building blocks, the Council by UNSCR 1664 (2006) called for the United Nations and Lebanon to negotiate an agreement to bring an international tribunal into fruition.[94] Once finalized, the agreement[95] was never ratified by Lebanon due to intense domestic opposition among some political factions made manifest by the persistent failure of the responsible official to call for a vote.[96]

In light of this political deadlock, supporters within the Lebanese government (which at the time made up a majority in the legislature) then asked the U.N.

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90. Rep. of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri, U.N. Doc. S/2005/2003 (March 24, 2005).

91. A U.N. Commission of Inquiry ("COI") or other Fact Finding Mission ("FFM") of some sort formed by the Security Council or the Human Rights Council often precedes international and hybrid tribunals. As atrocities are unfolding, the documentation of crimes can serve as a compromise position when creating a tribunal proves to be a bridge too far. *See* U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE (United Nations Human Rights ed., 2015), http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf. The COIs, in turn, inevitably call for the creation of a justice mechanism or the referral of the situation to the ICC. *Id.* at 94. In addition to the UNIIIC, a number of other commissions of inquiry have preceded the establishment of international or internationalized tribunals. *See, e.g., id.* at 95. Judicial institutions, however, have not always been able to use the findings of these bodies to full effect, often because COIs and FFMs are operating under a different standard of proof, and either do not preserve the chain of custody of evidence, or are focused too heavily on crime-base evidence as opposed to linkage evidence that would help establish individual criminal responsibility. *Id.* at 59-60, 62-3. The ICTY and ICTR each were preceded by a commission of inquiry, but the statutes of those tribunals did not specify any particular relationship between the two bodies. *Id.* at 101-2.

92. Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations, to the Secretary-General, United Nations Security Council, U.N. Doc. S/2005/783 (Dec. 13, 2005), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005783.pdf.

93. U.N. Security Council, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005)*, ¶ 5, U.N. Doc. S/2006/176 (March 21, 2006).

94. Press Release, Security Council, Security Council Requests Establishment of International Tribunal for Killing of Former Lebanese Prime Minister Hariri, U.N. Press Release SC/8677 (Mar. 29, 2006).

95. S.C. Res. 1757, Annex (May 30, 2007) [hereinafter STL Statute].

96. Nadim Shehadi & Elizabeth Wilmhurst, *The Special Tribunal for Lebanon: The UN on Trial?* CHATHAM HOUSE 6 (July 2007), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Middle%20East/bp0707leban on.pdf.

Secretary-General for assistance bringing the tribunal into operation.[97] Ban Ki-moon assented, but with reservations.[98] To this end, the Security Council issued UNSCR 1757 (2007), which ultimately bypassed the domestic constitutional order and brought the bilateral agreement and the proposed STL Statute into force by way of Chapter VII.[99] Concerns about the resolution's unprecedented intervention into Lebanon's domestic affairs and legislative independence generated five abstentions (including by Russia and China) during the vote in the Council.[100] The UNIIIC was essentially folded into the Office of the Prosecutor of the STL, although the two entities operated concurrently for a spell.[101] Notwithstanding its Security Council provenance, the STL, unlike the ICTY and ICTR, is not a subsidiary organ of the United Nations, but rather a standalone international institution.[102] Having begun operations in 2009, it remains highly controversial within Lebanon and a flashpoint in the country's serial political crises.[103] Moreover, nothing in the operative UNSCRs established an obligation among U.N. members, even Syria, to cooperate with the Court, notwithstanding its Chapter VII imprimatur.[104] Originally envisioned to be in existence for three years per Article 21 of the U.N.-Lebanon Agreement, the STL's lifespan has been extended in light of the fact that the prime suspects in the Hariri assassination remain at large and judicial processes remain ongoing.[105]

The 2007 reappearance of piracy in the Gulf of Aden and *environs* kept the Council in the tribunal business.[106] Modern-day sea piracy has generated an escalating response from the Council, which has characterized the situation in Somalia as a threat to the peace, exacerbated by piracy's resurgence.[107] All told,

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97. Jamal Saidi, *Lebanon's Siniora Asks U.N. to Set Up Hariri Court,* REUTERS, May 14, 2007, http://www.reuters.com/article/worldNews/idUSL1420555620070514.

98. Shehadi & Wilmhurst, *supra* note 96, at 6 (noting Secretary-General's view that "regrettably, all domestic options for the ratification of the Special Tribunal now appear to be exhausted, although it would have been preferable had the Lebanese parties been able to resolve this issue among themselves based on a national consensus").

99. STL Statute, *supra* note 95.

100. Press Release, Security Council, Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri, U.N. Press Release SC/9029 (May 30, 2007).

101. Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUSTICE 1107, 1112 (2007). For a timeline of relevant events, *see* Special Tribunal for Lebanon, *Fact Sheet: Special Tribunal for Lebanon*, UNITED NATIONS, http://www.un.org/apps/news/infocus/lebanon/tribunal/timeline.shtml.

102. SARAH WILLIAMS, HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 370 (2012).

103. William Harris, *Lebanon's Day in Court: The Controversial Life of the Hariri Tribunal*, FOREIGN AFFAIRS (June 30, 2011), https://www.foreignaffairs.com/articles/lebanon/2011-06-30/lebanon-s-day-court.

104. WILLIAMS, *supra* note 102, at 370.

105. *Special Tribunal for Lebanon's Mandate Extended by Three Years*, INT'L JUSTICE RES. CTR. (Jan. 13, 2015), http://www.ijrcenter.org/2015/01/13/special-tribunal-for-lebanons-mandate-extended-by-three-years.

106. Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. MIAMI INT'L & COMP. L. REV. 1, 39-40 (2009).

107. *See, e.g.*, S.C. Res. 1816 (June 2, 2008); S.C. Res.1838 (Oct. 7, 2008); S.C. Res. 1844 (Nov.

the Council has called upon nations to use "all necessary means to repress acts of piracy and armed robbery" (code for the use of armed force). The Council has thus enabled states to deploy naval vessels and aircraft in Somali territorial waters; imposed sanctions on individuals and entities undermining peace in Somalia; urged states and regional organizations willing to take custody of pirates to embark law enforcement officials ("shipriders") onboard to facilitate the investigation, transfer, and eventual prosecution of detained persons; and linked piracy to the suite of terrorism treaties by declaring that the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA") applies in cases in which piracy is accompanied by vessel hijacking.[108]

Criminal prosecutions with international assistance have been a part of this concerted effort. In an early resolution, the Council requested the Secretary-General to provide a report on options for prosecuting acts of piracy.[109] The Secretary-General's reports discuss a number of possible options, including the creation of a new international tribunal dedicated to piracy prosecutions.[110] The

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20, 2008); S.C. Res. 1846 (Dec. 2, 2008); S.C. Res. 1851 (Dec. 16, 2008); S.C. Res. 1897 (Nov. 30, 2009); S.C. Res. 1950 (Nov. 23, 2010); S.C. Res. 2020 (Nov. 22, 2011); S.C. Res. 2077 (Nov. 21, 2012); S.C. Res. 2125 (Nov. 18, 2013). In debates over these resolutions, several states clarified that the resolutions should not be read to consider piracy *per se* a threat to the peace. On the other hand, China, in its intervention in connection with UNSCR 1851, characterized piracy as just such a threat. *See* Press Release, Security Council Authorizes States to Use Land-Based Operations in Somalia, as Part of Fight Against Piracy off Coast, Unanimously Adopting 1851 (2008), U.N. Press Release SC/9541 (Dec. 16, 2008).

108. S.C. Res. 1846, *supra* note 107, ¶ 10. In this resolution, the Council:

> [n]otes that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; *urges* States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the [International Maritime Organization] to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.

Id. ¶ 15.

109. S.C. Res. 1918 (2010), ¶ 4 (Apr. 27, 2010). The Security Council requested:

> the Secretary-General to present to the Security Council within three months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the [Contact Group on Piracy off the Coast of Somalia ("CGPCS")], the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.

Id. See also S.C. Res. 1851, *supra* note 107, ¶ 4.

110. U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, including, in particular, Options for Creating Special Domestic Chambers Possibly With International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results*, U.N.

proposal received some support within the Council.[111] Given its proximity to the Gulf, Kenya was floated as a potential host for the tribunal, although political turmoil and weak rule of law there diminished support for this potential venue.[112] The international tribunal idea met resistance, however, from Somalia,[113] other states, and the NATO Rapporteur, who argued in favor of more effective domestic implementation of the United Nations Convention on the Law of the Sea ("UNCLOS")[114] and SUA.[115] Ultimately, and in part due to the feared start-up costs, the idea of a standalone international tribunal was abandoned in favor of the creation of specialized chambers with substantial international support within the domestic courts of the region along with the provision of assistance to increase regional coordination and domestic capacity, to be discussed below.[116]

C. UN-Administered Transitional Authorities

Two accountability mechanisms, launched almost concurrently, owe their existence to nearly identical United Nations transitional authorities established pursuant to the Security Council's Chapter VII powers.[117] These efforts present elements of both consent and coercion. Because the U.N. administration was acting as the *de facto* government of the territories involved—Kosovo and Timor Leste—it did not need to "negotiate" the terms of these arrangements with any sovereign entity.[118] Although expedient at the front-end, the imposition of these systems on the local polity raised problems of legitimacy, particularly among local elites and jurists, who felt sidelined by the process.

The first such transitional judicial administration was created in Kosovo. Following the war and NATO's 1999 intervention, the Federal Republic of Yugoslavia signed an agreement on June 10, 1999, for the withdrawal of Yugoslav

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Doc. S/2010/394 (July 26, 2010) [hereinafter Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy]; *see also* Douglas Guilfoyle, *Prosecuting Somali Pirates: A Critical Evaluation of the Options*, 10 J. INT'L CRIM. JUSTICE 767 (2012).

111. *See, e.g.*, U.N. Press Release SC/9541, *supra* note 107, at 29 (statement of Carsten Staur, representative from Denmark: "[I]n the long term, there might be a need to examine the possibility of bringing suspected pirates before an international tribunal . . . .").

112. Andrew Lee, *Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals* 5 (July 10, 2010) (on file with One Earth Future Foundation), http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/Hybrid-Tribunals-Andrew-Lee.pdf.

113. *Somali Government Opposes Piracy Tribunal*, ALLAFRICA (May 31, 2009), http://allafrica.com/stories/200905310009.html.

114. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 437 [hereinafter UNCLOS].

115. *See* Lord Jopling, *The Growing Threat of Piracy to Regional and Global Security*, North Atlantic Treaty Organization [NATO], ¶ 87, 169 CDS 09 E REV 1 (2009), http://www.nato-pa.int/Default.asp?SHORTCUT=1770.

116. S.C. Res. 2125, *supra* note 107.

117. *See* Nicolas Lemay-Hébert, *The 'Empty Shell' Approach: The Set Up Process of International Administrations in Timor-Leste and Kosovo, Its Consequences and Lessons*, 12 INT'L STUDIES PERSPECTIVES 190 (May 2011).

118. *Id.* at 204.

forces from Kosovo.[119] The next day, the Security Council invoked Chapter VII to establish the U.N. Mission in Kosovo ("UNMIK"), a transitional administration that was charged with overseeing the development of self-governing institutions pending the determination of Kosovo's future status.[120] UNMIK's international civil presence was administered by a Special Representative of the Secretary-General ("SRSG"). In implementing UNMIK's four-pillar mandate, the SRSG coordinated work with the Organization for Security and Cooperation in Europe ("OSCE") and the European Union ("EU"), among other regional and international entities.[121] Although the Council condemned abuses committed during the war, it was silent on accountability.

At the time, the rule-of-law situation in postwar Kosovo (the subject of Pillar I of UNMIK's mandate) was dire—the legal infrastructure had been destroyed during the war, most legal professionals had been of Serbian descent and many had fled Kosovo for fear of retribution or discrimination, and there were hundreds of suspects in custody with little prospects of being expeditiously tried.[122] It was clear that the ICTY would not be able to take on more than a handful of cases arising out of the Kosovo conflict and, in any case, had no jurisdiction over crimes (except genocide) that post-dated the war.[123] And yet, UNMIK personnel had detained individuals accused of war crimes. Under the circumstances, UNMIK in 1999 proposed the establishment of a Kosovo War and Ethnic Crimes Court ("KWECC") in Pristina that would enjoy concurrent jurisdiction with the ICTY.[124] Temporal jurisdiction would have begun on January 1, 1998, and remained open-ended.[125] As the SRSG began appointing personnel, resistance arose within the Kosovo bar over the proposed court, which was seen as usurping the jurisdiction of

119. S.C. Res. 1244 (June 10, 1999).

120. *Id.* ¶ 10; *see generally* UNITED NATIONS MISSION IN KOSOVO, http://www.unmikonline.org/pages/default.aspx.

121. *Mandate and Structure*, UNITED NATIONS MISSION IN KOSOVO, http://www.unmikonline.org/Pages/about.aspx.

122. Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1061, 1065 (2003). In response to prison over-crowding and the lack of a functioning judicial system, the OSCE made a number of controversial decisions expanding the availability of pre-trial detention. *See* WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE 78 (2002).

123. *See* Press Release, International Criminal Tribunal for the former Yugoslavia, Statement by Carla Del Ponte Prosecutor of the Int'l Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo, ICTY Press Release PR/P.I.S./437-E (Sept. 29, 1999). The ICTY did indict Slobodan Milošević for events in Kosovo along with former KLA commander and Kosovo Prime Minister Ramush Haradinaj, among others. *See History*, U.N. Int'l Crim. Trib. for the former Yugoslavia, http://www.icty.org/en/about/office-of-the-prosecutor/history (last visited Feb. 1, 2016); *see also* Prosecutor v. Haradinaj et. al., Case No. IT-04-84, Indictment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 4, 2005).

124. Tom Perriello & Marieke Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, INT'L CTR. FOR TRANSITIONAL JUST. 11 (March 2006), https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Courts-Study-2006-English_0.pdf.

125. *The UNMIK Programme*, TRACK IMPUNITY ALWAYS [TRIAL] (Aug. 4, 2015), http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/programme-of-international-judges-in-kosovo/the-unmik-programme.html.

the local judiciary.[126] Meanwhile, members of the international community expressed unease about having to bear the costs of another standalone court as well as the security risks given simmering tensions in the region.[127] It has also been speculated that there were concerns that the new court would investigate potential war crimes committed by NATO during Operation Allied Force.[128] In the end, the KWECC was abandoned in 2000 for lack of support, necessitating the development of other solutions for war crimes prosecutions.[129]

Meanwhile, the SRSG had begun to lay the groundwork for rebuilding the domestic justice system and appointing judges and prosecutors. The initial candidates were mostly Kosovar Albanians, given that individuals of Serbian descent refused to cooperate with UNMIK.[130] As concerns lingered about domestic capacity as well as actual and perceived bias, the SRSG empowered himself to designate international personnel to prosecutors' offices and district courts.[131] These individuals were to participate in criminal cases, including those involving war crimes charges. However, a majority of local and lay judges originally staffed the mixed panels, allowing them to outvote their international colleagues.[132]

In the face of allegations of ethnic partiality, the intimidation of judges and witnesses, and unsubstantiated verdicts, the SRSG issued a new directive enabling the establishment of majority international panels, now called Regulation 64 Panels after their constitutive regulation.[133] Such panels could be convened on a case-by-case basis by the SRSG or upon the request of the defendant, defense counsel, or the prosecutor in situations when it was deemed "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."[134] This designation brought charges of war crimes and ethnically-motivated violence before the Regulation 64 Panels, although international judges also heard a range of politically-sensitive cases involving government officials and former Kosovo Liberation Army ("KLA") members, organized crime, drug trafficking, terrorism, and corruption.[135]

In 2008, and following the declaration of independence by Albanian

126. Org. for Sec. and Co-operation in Eur., *Kosovo's War Crimes Trials: An Assessment Ten Years On 1999 – 2009*, at 11 (May 2010).

127. O'NEILL, *supra* note 122, at 91.

128. Perriello & Wierda, *supra* note 124, at 12.

129. O'NEILL, *supra* note 122, at 91.

130. Adam Day, *No Exit Without Judiciary: Learning a Lesson From UNMIK's Transitional Administration in Kosovo*, 23 WIS. INT'L L.J. 183, 185-86 (2005).

131. UNMIK Reg. 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors (Feb. 15, 2000) (rolling out international personnel in the district court of the divided and insecure city of Mitrovica); *see also* UNMIK Reg. 2000/34 (May 27, 2000) (expanding this program to all the district courts); *see also* Day, *supra* note 130, at 187.

132. Day, *supra* note 130, at 187.

133. UNMIK Reg. 2000/64, § 1.1 (Dec. 15, 2000).

134. *Id.*

135. *See Kosovo's War Crimes Trials: A Review*, OSCE 12 (Sept. 2002), http://www.osce.org/kosovo/12549?download=true (for a summary of early cases).

Kosovars, the European Union created the EU Rule of Law Mission in Kosovo ("EULEX"), which at the time marked the largest EU foreign policy effort to date.[136] Over the course of 2008, and not without difficulty, the UNMIK rule-of-law competencies were transitioned to EULEX with a mandate that now expires in 2016.[137] EULEX structures continue to hear politically-sensitive cases, although it has adopted a "normally no new cases" policy that applies except in extraordinary circumstances.[138]

The Regulation 64 Panels thus evolved organically over the years in the face of perceived "needs and [the] political reality" rather than being fully designed at the outset.[139] The various amendments to the transitional judiciary have been criticized for being too reactive and for being implemented with insufficient engagement with the local legal community, leading to charges of disenfranchisement.[140] The high degree of discretion accorded to the SRSG (to appoint international judges and prosecutors and to allocate cases to mixed panels), the lack of transparency around the process, and the persistent appearance of bias against Albanian defendants were other grievances.[141] Finally, recruiting qualified staff was a challenge, in part due to the security situation but also because only short-term contracts were available. As a result, the jurisprudence emerging from the Regulation 64 panels was weak at times.[142] All told, the Regulation 64 Panels in Kosovo have been deemed a qualified success, although accountability efforts there remain unfinished as will be discussed in connection with current regional initiatives.[143]

Turning to the second such transitional administration, when violence erupted in Timor-Leste in 1999 following the referendum on independence from Indonesia, there were calls for the Council to establish another international tribunal, a proposal advanced by several U.N. fact-finding missions.[144] The Council did not pursue this option, in part because Indonesia made it clear that it preferred to prosecute its own citizens and would not cooperate with any international body endeavoring to do so.[145] In an effort to establish good relations with Indonesia, the

136. *See generally* Erika de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, 103 AM. J. INT'L L. 83 (2009).

137. Council Joint Action 2008/124/CFSP, art. 1.1, 2008 O.J. (L 112) (EU). *See also* Org. for Sec. and Co-operation in Eur., Monitoring Department: Monthly Report (August 2008).

138. *EULEX Implements its Mandate Through Four Operational Objectives*, EULEX, http://www.eulex-kosovo.eu/?page=2,44 (last visited Nov. 12, 2015).

139. Perriello & Wierda, *supra* note 124, at 21.

140. *Id.*

141. *Id.* at 19-20.

142. John Cerone & Clive Baldwin, *Explaining and Evaluating the UNMIK Court System*, SOCIAL SCIENCE RESEARCH NETWORK 40, http://ssrn.com/abstract=1647211.

143. *See infra* note 257 *et seq.*

144. *See* Caitlin Reiger & Marieke Wierda, *The Serious Crime Process in Timor-Leste: In Retrospect*, INT'L CTR. FOR TRANSITIONAL JUSTICE 8 (March 2006), https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf [hereinafter Reiger & Wierda, *Timor-Leste*].

145. Ellen Nakashima, *Indonesia Attempts to Avert Tribunal to Probe East Timor*, WASH. POST (July 16, 2005), http://www.washingtonpost.com/archive/politics/2005/07/16/indonesia-attempts-to-

Timorese leadership did not push for an international tribunal or even for a more robust COI.[146] Instead, it jointly convened a Commission of Truth and Friendship ("CTF") with Indonesia in 2004 to "seek truth and promote friendship as a new and unique approach rather than the prosecutorial process."[147]

With the issuance of UNSCR 1272 under Chapter VII, the Security Council established the United Nations Transitional Administration in East Timor ("UNTAET"), a peacekeeping operation organized to exercise Timorese legislative and executive authority, including the administration of justice, during the fledgling country's transition to self-government.[148] Although not express in its mandate, UNTAET established a system of Special Panels for Serious Crimes within the Dili District Court with exclusive jurisdiction over serious criminal offenses, including genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.[149] UNTAET administrators appointed a mix of international and Timorese judges, with the former making up a majority of each panel.[150] In 2000, UNTAET created a Serious Crimes Unit ("SCU"), which was eventually housed in the public prosecutor's office, and a Defence Lawyers Unit, both of which were dominated by international staff.[151] UNTAET exercised this virtually unprecedented mandate until the transfer of full sovereignty to Timor-Leste in May 2002; at that point, UNTAET was transformed into another peacekeeping operation, the U.N. Mission for Support for East Timor ("UNMISET"), to help prepare the country for self-sufficiency.[152]

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avert-tribunal-to-probe-east-timor/87a19052-b4af-43da-9c0a-e37368927625/.

146. *The Special Panels for Serious Crimes - Justice for East Timor?* 5 THE LA'O HAMUTUK BULLETIN 1, 7 (Oct. 2004).

147. *See* S.C. Letter, Annex II, at 81, U.N. Doc. S/2005/458 (July 15, 2005) [hereinafter Timor-Leste COE Report]. The International Center for Transitional Justice observed that while the CTF was criticized for its ability to grant amnesty to perpetrators of serious crimes, it did confirm the commission of crimes against humanity by Indonesian security forces and the civilian authorities and criticize domestic prosecutorial efforts in Indonesia. *See* Megan Hirst, *An Unfinished Truth: An Analysis of the Commission of Truth and Friendship's Final Report on the 1999 Atrocities in East Timor, Executive Summary*, INT'L CTR. FOR TRANSITIONAL JUSTICE 5 (March 2009), https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Unfinished-Truth-2009-English.pdf. *See also Per Memoriam Ad Spem, Final Report of the Commission of Truth and Friendship, (CTF) Indonesia—Timor-Leste*, THE COMMISSION OF TRUTH AND FRIENDSHIP (March 31, 2008), http://www.cja.org/downloads/Per-Memoriam-Ad-Spem-Final-Reeport-of-the-Commission-of-Truth-and-Friendship-IndonesiaTimor-Leste.pdf.

148. *See generally United Nations Integrated Mission in Timor-Leste*, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/past/unmit/background.shtml (last visited Nov. 12, 2015) (providing details on the many U.N. operations in Timor-Leste).

149. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 12. In practice, prosecutors primarily charged crimes against humanity and murder. *Id.* at 23.

150. UNTAET Reg. No. 2000/15, U.N. Doc. UNTAET/REG/2000/15 ¶ 22.1, ¶ 23.1 (June 6, 2000). This Regulation also incorporated the international crimes of genocide, war crimes, and crimes against humanity.

151. *See* UNTAET Reg. No. 2000/11, U.N. Doc. UNTAET/REG/2000/11 ¶ 9.5 (Mar. 6, 2000).

152. *See* S.C. Res. 1543, ¶ 6 (May 14, 2004) (extending UNMISET for a final year and calling for the conclusion of SCU cases by May 2005); *see also* S.C. Res. 1573 (Nov. 16, 2004) ("[N]oting with concern that it may not be possible for the Serious Crime Unit to fully respond to the desire for justice

Although the quest for accountability was unfinished in East Timor, the Security Council originally planned for the United Nations' operations to wind down by 2005. The Secretary-General appointed a Commission of Experts ("COE") to evaluate the serious crimes prosecution process in both East Timor and Indonesia.[153] The Timor-Leste COE issued a series of recommendations, including that the prosecutorial process in Timor-Leste continue with greater resources or be transitioned to a truly international tribunal.[154] Despite these calls and others, the Security Council did not give the successor political mission, the U.N. Office in Timor-Leste ("UNOTIL"), a mandate to support serious crimes prosecutions except with respect to records preservation.[155] Eventually, all cases were handed over to the ordinary courts of East Timor. Following the expiration of the U.N. mandate in May 2005 and urgent calls to continue prosecutions following renewed internal violence, the Security Council in UNSCR 1704 (2006) created the U.N. Integrated Mission in Timor-Lest ("UNMIT") with a mandate to establish international investigative teams within the Office of the Prosecutor-General of Timor-Leste. These Serious Crimes Investigation Teams ("SCITs") resumed the SCU's investigative functions and helped to prepare for trial lingering cases of serious human rights violations dating back to 1999.[156] The SCITs can conduct investigations, but Timorese prosecutors must lead prosecutions.[157]

All told, the Special Panels system is widely considered a failure of international justice.[158] Besides the crippling inability to assert jurisdiction over the key architects of the violence, the Timorese legal system lacked indigenous capacity and could not hold up its side of the hybridity equation.[159] UNTAET was faulted for failing to consult with Timorese civil society and experts in the design and implementation of the system from the outset.[160] The difficulty in recruiting for both the international and domestic sides led to delays, inefficiencies, and

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of those affected by the violence in 1999 bearing in mind the limited time and resources that remain available" and taking "note of the Secretary-General's intention to continue to explore possible ways to address this issue with a view to making proposals").

153. Timor-Leste COE Report, *supra* note 147.

154. *Id.*

155. Press Release, Security Council, Security Council Establishes One-Year Political Mission in Timor-Leste, Unanimously Adopting Resolution 1599 (2005), U.N. Press Release SC/8371 (Apr. 28, 2005).

156. *See Serious Crimes Investigation Teams*, UNMIT, http://unmit.unmissions.org/Default.aspx?tabid=12067&language=en-US (last visited Nov. 12, 2015); Agreement between the United Nations and the Democratic Republic of Timor-Leste Concerning Assistance to the Office of the Prosecutor-General of Timor-Leste, Timor-Leste-U.N., Feb. 12, 2008, http://www.laohamutuk.org/reports/UN/UNMIT/UNMIT-SCIT-PGFeb08.pdf.

157. *East Timor: National Judicial Decisions*, RULE OF LAW IN ARMED CONFLICTS PROJECT [RULAC], http://www.geneva-academy.ch/RULAC/national_judical_decitions.php?id_state=219 (last visited Nov. 12, 2015).

158. *Cf.* Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 86 (describing the process as "generally satisfactory" and "accord[ing] with international standards" while decrying the inability to prosecute those most responsible).

159. *Id.* at 1.

160. *Id.* at 13.

inconsistent jurisprudence.[161] Although international staff expressed a willingness to train Timorese recruits, there were insufficient trainees to meaningfully enhance domestic capacity.[162] The proceedings also suffered from political interference on the part of a local government eager to improve relations with Indonesia and from a lack of dedicated resources from the international community.[163]

Notwithstanding the collapse of other states, and the relative success of the United Nations' post-conflict management endeavors writ large in Timor-Leste and Kosovo, the United Nations has never since assumed such a comprehensive administrative role.[164] As such, there has been no opportunity to replicate and improve upon these justice models in the context of subsequent transitional administrations.

D. Bilateral Treaties With The United Nations

The East Timor and Kosovo systems were essentially imposed on the target situations during a transition period, necessitating a strong but ebbing role for the United Nations in the absence of domestic capacity. Other hybrid bodies came into being in more of a collaborative fashion with the local government. Toward the end of the brutal civil war in Sierra Leone, the Security Council requested that the Secretary-General negotiate an agreement with the Government of Sierra Leone to create what became the Special Court for Sierra Leone ("SCSL").[165] The Council took a special interest in the situation in Sierra Leone following two noteworthy events: (1) the seizure of 500 U.N. peacekeepers in May of 2000,[166] and (2) a request from the Sierra Leonean government for assistance in prosecuting perpetrators (including captured rebel leader Foday Sankoh) out of fear that national trials would be destabilizing.[167] By virtue of the finalized agreement,[168] which was ratified in 2002,[169] the SCSL was conceived as a stand-alone tribunal, fully separate from the domestic legal order.[170] Its international character enabled it to dodge what might have been tricky legal issues around the impact of an amnesty provision in a prior peace treaty[171] and any residual immunity potentially

161. *Id.* at 14-15.

162. *Id.* at 16-17.

163. Timor-Leste COE Report, *supra* note 147, ¶ 13; *see also The Special Panels for Serious Crimes - Justice for East Timor?*, *supra* note 146, at 6.

164. *See* DANIEL JACOB, JUSTICE AND FOREIGN RULE: ON INTERNATIONAL TRANSITIONAL ADMINISTRATION (2014).

165. S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

166. Michael Fleshman, *Sierra Leone: Peacekeeping Under Fire*, 14 AFRICA RECOVERY 8 (July 2000), http://www.un.org/en/africarenewal/vol14no2/sierral.htm.

167. Michelle Sieff, *A "Special Court" for*, GLOB. POLICY FORUM (2001), https://www.globalpolicy.org/component/content/article/203/39438.html (last visited Nov. 12, 2015).

168. Agreement Between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leon-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137, http://www.rscsl.org/Documents/scsl-agreement.pdf [hereinafter SCSL Agreement].

169. Special Court Agreement, Ratification Act of 2002, (Sierra Leone).

170. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145, http://www.rscsl.org/Documents/scsl-statute.pdf [hereinafter SCSL Statute].

171. *See* Security Council, Letter Dated 12 July 1999 From the Chargé d'Affaires ad Interim of the

enjoyed by ex-Liberian President Charles Taylor.[172] At the same time, this arrangement opened the institution up to a legal challenge—ultimately unsuccessful—that the agreement and legislation unconstitutionally amended the domestic judicial framework.[173]

As the product of a treaty with the United Nations, and as compared to the ICTY/R, the SCSL did not enjoy any Chapter VII authority, although the U.N. Secretary-General and others had argued that it should.[174] Although the Security Council was quite involved in the SCSL's creation and design, it did not mandate that all states cooperate with the tribunal.[175] This weakness became most pronounced when Ghana, and then Nigeria, refused to surrender former Liberian President Charles Taylor to the Court notwithstanding his indictment for war crimes and crimes against humanity.[176] In 2006, and under pressure to do so, Nigeria finally transferred Taylor to U.N. peacekeepers billeted with the United Nations Mission in Liberia ("UNMIL").[177] The Council—invoking Chapter VII—specially authorized UNMIL to detain and transfer Taylor to the SCSL for prosecution, making this one of the first U.N. peacekeeping mandates to include a justice component.[178]

Although the Extraordinary Chambers in the Courts of Cambodia ("ECCC") have their origins in a similar bilateral treaty between Cambodia and the United Nations,[179] the final result was a domestic tribunal[180] with comparable international

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Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, Annex, art. IX, U.N. Memoranda SC/1999/777 (June 3, 2009) [hereinafter Lomé Peace Accord]. Although the United Nations served as a moral guarantor to this agreement, the SRSG appended an unprecedented declaration indicating that "the amnesty provision . . . shall not apply to international crimes of genocide, crimes against humanity, war crimes or other serious violations of international humanitarian law." *See Prosecutor v. Kallon*, Case No. SCSL–2004–15–AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶ 81 (Special Court for Sierra Leone Mar. 13, 2004) (indicating that the amnesty provision within the Lomé Peace Accord had no force before the SCSL).

172. *See Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL–2003–01–I, Decision on Immunity from Jurisdiction, ¶¶ 38-39 (Special Court for Sierra Leone May 31, 2004) (confirming the international character of the SCSL and disallowing any immunity defenses).

173. *See Prosecutor v. Morris Kallon et al.*, Case No. SCSL–2004–15–AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶¶ 1, 82-83 (Special Court for Sierra Leone March 13, 2004), www.rscsl.org/Documents/Decisions/AFRC/. . ./SCSL-04-16-PT-033.doc.

174. Rep. of the S.C., Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, ¶ 10, U.N. Doc. S/2000/915 (Oct. 4, 2000).

175. S.C. Res 1315, *supra* note 165.

176. Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, ICTJ 34 (March 2006), https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf [hereinafter Perriello & Wierda, *The Special Court for Sierra Leone Under Scrutiny*].

177. *See* ANNIE BIRD, US FOREIGN POLICY ON TRANSITIONAL JUSTICE 95-99 (2015) (recounting these events).

178. S.C. Res. 1638, ¶ 1 (Nov. 11, 2005).

179. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Agreement].

180. *See Prosecutor v. Duch*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch," ¶¶ 18-19 (Dec. 3,

elements. These include the incorporation of international criminal law and the provision of technical assistance and staff provided through the United Nations Assistance to the Khmer Rouge Trial ("UNAKRT").[181] Given the lack of a live threat to international peace or security, the Security Council was never substantively involved in the creation of the ECCC. Instead, the U.N. Secretary-General and General Assembly—at times at odds with each other—brought about the ECCC's establishment through negotiations with the Royal Cambodian Government. Ultimately, the General Assembly acted as the mandating body, which suggests an interesting route to accountability in the event that action at the Security Council is not forthcoming.

The road to the establishment of the ECCC was long and winding.[182] Following decades of impunity after the Khmer Rouge was ousted from Phnom Penh in 1979, Cambodia asked, through a 1997 letter to the U.N. Secretary-General, that the international community create an international tribunal to prosecute surviving members of the Khmer Rouge.[183] In response, the Secretary-General commissioned an expert report, which originally recommended the creation of an international tribunal to be located somewhere in Southeast Asia given concerns about the competency and independence of the Cambodian judiciary.[184] Meanwhile, the Government of Cambodia produced a competing proposal that was almost entirely domestic in structure and generated enabling legislation.[185]

Protracted negotiations ensured. Cambodian intransigence on certain points led to the withdrawal of Secretary-General Kofi Annan from the process.[186] After the General Assembly urged him to resume talks,[187] an agreement was reached on June 6, 2003, that offered several key concessions to the Cambodian side.[188] This

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2007), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC_decision_appeal_duch_C5-45_EN_0_0.pdf [hereinafter Dutch Pre-Trial Detention Decision] (ruling that while the ECCC was "distinct from other Cambodian Courts in a number of respects," it nevertheless operates as "an independent entity within the Cambodian court structure").

181. *See* UNITED NATIONS ASSISTANCE TO THE KHMER ROUGE TRIALS, http://www.unakrt-online.org/ (last visited Nov. 12, 2015).

182. *See* Helen Horsington, *The Cambodian Khmer Rouge Trials: The Promise of a Hybrid Tribunal*, 5 MELBOURNE J. OF INT'L L. 462 (2004) (recounting detailed history).

183. U.N. Legal Council Hans Corell, Statement at Press Briefing at U.N. Headquarters in New York, (Feb. 8, 2002), http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm.

184. U.N. G.A. Rep. of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850 (Feb. 18, 1999), http://www1.umn.edu/humanrts/cambodia-1999.html.

185. *See* Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 27-29 (Jaya Ramji & Beth Van Schaack eds., 2005) (discussing of the many twists and turns of these negotiations).

186. Annan insisted the United Nations could be involved only if there was a majority of international judges, an independent international prosecutor, and certain guarantees that the local authorities would arrest indictees. *Id.*

187. G.A. Res. 57/228 B (May 22, 2003).

188. Agreement Between the United Nations and the Royal Government of Cambodia Concerning

agreement—which regulates cooperation between the Government and the United Nations but also contains a number of substantive building blocks—was later ratified in 2004.[189] The relevant domestic legislation was then amended to reflect elements of the agreement, but some key points of divergence remain.[190] The ECCC was finally staffed and funded in 2005-6.[191] The ECCC is thus the only U.N.-originated tribunal to be the creature of domestic legislation.[192] Although a domestic court, it is entirely "self-contained" from investigation through appeals with no overlap with the ordinary court system.[193]

The latest effort in this tradition is the Special Criminal Court ("SCC") for the CAR, which has the strong support of Catherine Samba-Panza, the then-transitional head of state.[194] The SCC is the product of newly-passed legislation,[195] which follows on the heels of a U.N. commission of inquiry recommendation,[196] an August 2014 agreement between CAR and the United Nations that contemplates the establishment of the SCC,[197] and a Special Investigation Cell formed by presidential decree to begin investigations.[198] The legislation envisions a mixed bench composed of international and domestic judges in roughly equal numbers.[199]

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the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117; *see also* G.A. Res. 57/228, *supra* note 187 (approving the establishment of the ECCC).

189. Instrument of Ratification on the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Oct. 19, 2004, http://www.eccc.gov.kh/sites/default/files/legal-documents/Instrument_of_Ratification_of_Agreement.pdf.

190. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Oct. 27, 2004, http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Statute].

191. *Judges Sworn in for Khmer Rouge*, BBC NEWS (Jul. 03, 2006), http://news.bbc.co.uk/2/hi/asia-pacific/5140032.stm.

192. Ciorciari & Heindel, *supra* note 25, at 371.

193. Dutch Pre-Trial Detention Decision, *supra* note 180, ¶ 18.

194. Géraldine Mattioli-Zeltner, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic*, HUMAN RIGHTS WATCH (Jul. 13, 2015), https://www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic.

195. *Loi Organique N°15.003 Portant Creation*, ORGANISATION ET FONCTIONNEMENT DE LA COUR PENALE SPECIAL, RÉSEAU DES ONG DES DROITS DE L'HOMME EN RÉPUBLIQUE CENTRAFRICAINE (Jul. 22, 2015), https://rongdhrca.wordpress.com/2015/07/22/loi-organique-n15-003-portant-creation-organisation-et-fonctionnement-de-la-cour-penale-speciale/ [hereinafter Loi Organique].

196. U.N. Secretary-General, Letter dated Dec. 19, 2014 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2041/928 (Dec. 22, 2014).

197. *See* U.N. Secretary-General, *Rep. of the Secretary-General on the Situation in the Centr. Afr. Rep.*, U.N. Doc. S/2014/857 (Nov. 28, 2014) [hereinafter SG CAR Report].

198. *Parliament of the Central African Republic Adopts the Law Establishing a Special Criminal Court*, PARLIAMENTARIANS FOR GLOBAL ACTION (Apr. 29, 2015), http://www.pgaction.org/car-centralafricanrepublic-criminalcourt.html; Mattioli-Zeltner, *supra* note 194, at 1, 4 and 5.

199. Loi Organique, *supra* note 195, at arts. 11-14.

The Prosecutor will be a foreign national, but the Chief Justice will hail from CAR.[200] It is anticipated that the SCC will be in existence for five years, subject to renewal at the initiative of the government in consultation with the United Nations.[201]

This new hybrid entity is unique in that it was created after CAR self-referred the situation on its territory to the ICC in December 2004.[202] The ICC Office of the Prosecutor has now opened two separate CAR investigations: one relating to violence surrounding the 2003 *coup* that deposed President Angé-Felix Patassé, and the other concerned with crimes committed since 2012 by the Séléka and their anti-Balaka foes.[203] The SCC is meant to complement this work.[204] Its temporal jurisdiction remains open-ended in light of ongoing abuses.[205] Because the armed groups that will be the target of investigation and prosecution are still operating in parts of CAR, strong measures for witness protection and judicial security will be necessary. The role of the U.N. Multidimensional Integrated Stabilization Mission ("MINUSCA") in assisting the SCC is also unprecedented. UNSCR 2149 empowers MINUSCA to "support and work with the Transitional Authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC" and to "adopt urgent temporary measures . . . to maintain basic law and order and fight impunity."[206] MINUSCA forces have already arrested some atrocity crimes suspects[207] and will be involved in assisting with SCC logistics and the nomination of international personnel.

E. Regional Efforts

All of these prior efforts have involved the United Nations. Another set of recent institutional innovations are primarily regional: the African Union's Extraordinary African Chambers ("EAC") devoted to prosecuting former Chadian dictator Hissène Habré;[208] the proposed African Court of Justice and Human Rights ("ACJHR"), which would add penal jurisdiction to the region's human

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200. *Id.* at art. 18.

201. *Id.* at art. 70.

202. Press Release, ICC - Office of the Prosecutor, ICC-Prosecutor received Referral Concerning Central African Republic (Jan. 7, 2005) (on file with the ICC press release database). *See also Cases & Situations: Central African Republic*, COALITION FOR THE INT'L CRIM. CT., http://www.iccnow.org/?mod=car (last visited Feb. 1, 2016).

203. Press Release, Worldwide Movement for Human Rights, Central African Republic: The ICC Opens an Investigation on International Crimes Committed Since 2012 (Sept. 24, 2014) (on file with the Worldwide Movement for Human Rights website).

204. Kersten, *supra* note 5, at 1.

205. Loi Organique, *supra* note 195, at art. 3.

206. S.C. Res. 2149 ¶¶ 30(f)(i), 40 (Apr. 10, 2014). The latter authority is heavily caveated to make clear that these innovations are included "on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations." *Id.*

207. *See* SG CAR Report, *supra* note 197, ¶ 50.

208. *See infra* text accompanying notes 213-232.

rights court;[209] a potential African Union ("AU") hybrid court for South Sudan that remains in the conceptual phase;[210] and the European Union's recent formation of a tribunal to prosecute crimes committed by Kosovo's ethnic Albanian rebels during and after the further dissolution of Yugoslavia.[211] Prior to the emergence of the Islamic State of Iraq and the Levant ("ISIL"), there was also talk of the League of Arab States setting up a tribunal for Syria.[212] So far, however, this has yet to materialize. These regional tribunals owe a degree of legitimacy to the regional political organization involved in their creation, be it the AU, EU, or Arab League. All have received support outside the region.

The full history of the EAC is too convoluted to fully recount here,[213] but suffice it to say that the concept of an *ad hoc* regional criminal court to prosecute Habré emerged after domestic proceedings against him in Senegal—where he had enjoyed safe haven following his 1990 overthrow—failed for lack of jurisdiction.[214] At the time, Senegalese law did not adequately incorporate international criminal law or universal jurisdiction, even though Senegal had been the first country to sign the Rome Statute.[215] Upon the petition of Chadian victims, Belgian authorities eventually initiated proceedings against Habré and sought his extradition pursuant to the universality and passive personality principles of jurisdiction.[216] When Senegal refused, in part on the grounds that Habré enjoyed residual head-of-state immunity, Belgium brought suit in 2009 before the International Court of Justice, which ruled in 2012 that Articles 6 and 7 of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT") obliged Senegal to either prosecute Habré or extradite him elsewhere for prosecution.[217] The ICJ suit helped galvanize the search for local solutions to the impasse, particularly in light of increased hostility within some AU

209. *See infra* text accompanying notes 233-250; Perriello & Wierda, *supra* note 124, at 23.

210. *See infra* text accompanying notes 251-256.

211. *See infra* text accompanying notes 257-269. *See generally* Firew Kebede Tiba, *Regional International Criminal Courts: An Idea Whose Time Has Come?*, 17 CARDOZO J. OF CONFLICT RES. 521 (2016) (discussing trend).

212. Aryeh Neier, *An Arab War-Crimes Court for Syria*, N. Y. TIMES, Apr. 4, 2012, http://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html?_r=0.

213. *See* Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem*, 11 J. INT. CRIM. JUST 1139 (2013). Updates on the EAC can be found here: http://www.chambresafricaines.org/ and https://www.hrw.org/tag/hissene-habre.

214. Vaios Koutroulis, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, OXFORD PUB. INT'L L. (May 2014), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2129.

215. Press Release, Meetings Coverage and Press Releases, Senegal First State to Ratify Rome Statute of International Criminal Court, U.N, Press Release L/2905 (Feb. 3, 1999).

216. Koutroulis, *supra* note 214, ¶ 3.

217. Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, I.C.J. Reports 430 (Jul. 20). The ICJ focused on CAT obligations, ruling that no actual dispute existed as to whether Senegal was in breach of customary international law. *Id.* ¶¶ 54-55. *See generally* Sangeeta Shah, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), 13 HUM. RTS. L. REV. 351 (2013). The Committee Against Torture had reached a similar result. *Id.* at 353.

member states toward international justice efforts that appeared to be "aimed" at Africa.[218]

In the meantime, Senegal sought the views of the AU, which convened a Committee of Eminent African Jurists to consider options for Habré's trial taking into account the "total rejection of impunity" and the "priority [of] an African mechanism," among other factors.[219] The Committee recommended that Habré be tried either within an AU member state, preferably Chad or Senegal, or before an *ad hoc* African tribunal.[220] Upon receipt of these recommendations, the AU mandated Senegal to prosecute Habré "on behalf of Africa, [in] a competent Senegalese court with guarantees for fair trial."[221] Starting in 2007, Senegal began amending its legislation and constitution accordingly, adding international crimes to its penal code and incorporating the principle of *nullum crimen sine lege* as formulated by Article 15 of the International Covenant on Civil and Political Rights ("ICCPR").[222] On the basis of a petition by Habré, however, the Community Court of Justice ("ECCJ") of the Economic Community of West African States ("ECOWAS") largely rejected this solution on *nullum crimen sine lege* grounds, reasoning that only an international tribunal could prosecute Habré without running afoul of the principle of legality.[223] This ruling prompted negotiations between Senegal and the AU to create just such a tribunal. In 2012, after talks stalled under President Abdoulaye Wade and then revived following the election of President Macky Sall, the AU and Senegal produced a treaty

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218. Williams, *supra* note 213, at 1148.

219. Afr. Union Assembly/AU/Dec.103 (VI), Doc.Assembly/AU/8 (VI))Add.9, Decision on the Hissène Habré Case and the African Union (Jan. 24, 2006), http://webmail.africa-union.org/All_Dec/ASSEMBLY%20AU%20DEC%2091%20-%20110%20(VI)%20_E.PDF.

220. Afr. Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* (2006), https://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf [hereinafter CEJA Report].

221. Afr. Union Assembly/AU/Dec.127 (VII), Doc. Assembly/AU/3 (VII), Decision on the Hissène Habré Case and the African Union (Aug. 2, 2006), https://www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union.

222. *See* Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT'L CRIM. JUST. 1047, 1053-4 (2009). ICCPR Article 15 states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed . . . Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 177 [hereinafter ICCPR].

223. Hissène Habré v. République du Sénégal, ECW/CCJ/JUD/06/10, Judgment, Court of Justice of the Economic Community of West African States, ¶¶ 58-61 (Nov. 18, 2010), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2010/HISSEIN_HABRE_v_REPUBLIQUE_DU_SENEGAL.pdf. *See generally* Valentina Spiga, *Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga*, 9 J. INT'L CRIM. JUST. 2 (2011). A similar effort before the African Court on Human and Peoples' Rights failed on the grounds that Senegal had not consented to the filing of individual petitions before the Court. Michelot Yogogombaye v. The Republic of Senegal, Appl. No. 001/2008, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Dec. 15, 2009).

establishing the EAC.[224] Senegal then enacted the necessary domestic legislation and activated the EAC.[225] Habré tried returning to the ECCJ, but it denied his petition to suspend the proceedings on the grounds that it had no jurisdiction over decisions or actions by the AU.[226]

Habré was taken into custody in 2013 and transferred to EAC custody.[227] The EAC is largely devoted to prosecuting him, although indictments have been issued against five other associated individuals who remain at large.[228] In seeking the extradition of the other defendants, who have no contacts at all with Senegal, the EAC are exercising an internationalized form of "pure" universal jurisdiction.[229] Chad has supported this process, waived any residual immunity Habré might enjoy, and launched domestic proceedings against security agents from the Habré era, including two individuals also wanted by the EAC.[230] A relentless campaign by civil society groups in the region and beyond was crucial in keeping the pressure on in favor of prosecution.[231] At first, Habré and his counsel refused to cooperate, and the proceedings were continued until September 2015 so that his

224. Project d'Accord entre l'Union Africaine et Gouvernement de la Republique du Senegal sur la Creation de Chambres Africaines Extraordinaires au sein des Jurisdictions Senegalaises [Draft Agreement between Afr. Union and the Gov't of the Rep. of Sen. on the Establishment of Extraordinary Chambers African in the Courts Senegalese], AU-Sen. (Jul. 24, 2012).

225. 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 [Statute of the Extraordinary African Chambers in the Senegalese courts for the prosecution of international crimes committed in Chad during the period from 7 June 1982 to 1 December 1990], art 2, HUMAN RIGHTS WATCH (Jan. 30, 2013), http://www.hrw.org/node/248651 [hereinafter EAC Statute].

226. Brittany West, *ECOWAS Court Refuses to Suspend Case Against Hissène Habré*, HUMAN RIGHTS BRIEF (Feb. 23, 2014), http://hrbrief.org/2014/02/ecowas-court-refuses-to-suspend-case-against-hissene-habre/.

227. Anne Bodley & Sousena Kebede Tefera, *The Extraordinary Role Of The Extraordinary African Chambers Convened To Try Former Chadian Leader Hissène Habré*, 3 AFRICA LAW TODAY 7 (2013), https://www.academia.edu/5410029/THE_EXTRAORDINARY_ROLE_OF_THE_EXTRAORDINARY_AFRICAN_CHAMBERS_CONVENED_TO_TRY_FORMER_CHADIAN_LEADER_HISS%C3%88NE_HABR%C3%89.

228. Thijs B. Bouwknegt, *Chad—Dakar: Habré Trial is Litmus Test for Pan-African Justice*, AFRICAN ARGUMENTS (June 1, 2015), http://africanarguments.org/2015/06/01/chad-dakar-habre-trial-is-litmus-test-for-pan-african-justice-by-thijs-b-bouwknegt/.

229. *See* Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 CHINESE JIL 503, 508 (2011). "Pure universal concern jurisdiction" is:

> an assertion of jurisdiction based solely on the universal concern character of the crime, without more . . . [T]his form of jurisdiction would entitle, as far as the jurisdictional requirement is concerned, the prosecuting State to the extradition of the suspect from a foreign State, if other conditions are met.

Id.

230. *Chad: Habré-Era Agents Convicted of Torture*, HUMAN RIGHTS WATCH (Mar. 25, 2015), https://www.hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture.

231. Marie Gibert, *Trial in Senegal of former Chadian President is a Victory for Civil Society*, THE CONVERSATION (Jul. 20, 2015), http://theconversation.com/trial-in-senegal-of-former-chadian-president-is-a-victory-for-civil-society-44920.

court-appointed lawyers could get up to speed.[232] A judgment is expected in May 2016.

The other potential regional criminal court, the African Court of Justice and Human Rights ("ACJHR"), remains in the building phase. Like the ICC, it will be the product of a multilateral treaty. By way of background, the African Charter on Human and Peoples' Rights (also known as the Banjul Charter),[233] the continent's omnibus human rights treaty, gave rise to the African Commission on Human and Peoples' Rights, a body analogous to the Inter-American Commission on Human Rights (but with weaker enforcement powers) that is dedicated to enforcing the Banjul Charter within AU member states. A 1998 Protocol to the Charter led to the creation of the African Court on Human and Peoples' Rights ("ACHPR") in 2004.[234] The Court (which can hear claims against those states parties that have accepted its jurisdiction) entertains petitions submitted by states parties, African intergovernmental organizations, NGOs, and individual citizens concerning the interpretation and application of the Banjul Charter or any other human rights treaty that has been ratified by the state concerned.[235] So far, the Court has not been particularly active. Since 2008, the Court has received over fifty applications, half of which have been finalized; the rest remain pending.[236] That said, applications are on a steep uptick (twenty-two applications have been filed in 2015), and the Court is making its mark on the continent with some important rulings (including the issuance of provisional measures against Libya during its 2011 revolution).[237]

Meanwhile, the Constitutive Act of the AU[238] envisioned the creation of the African Court of Justice ("ACJ"), a forum for state-to-state disputes between AU member states that is roughly analogous to the European Court of Justice. Although the ACJ's Protocol entered into force, the Court itself did not come into existence because an intervening Protocol approved by the AU in 2008 envisioned that the ACJ would be merged with the ACHPR to create an African Court of Justice and Human Rights.[239] Fifteen ratifications are required to bring this

232. *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers*, HUMAN RIGHTS WATCH (Apr. 27, 2015), https://www.hrw.org/sites/default/files/related_material/2015_Senegal_Chad_Habr%C3%A9_case_Q%26A_2.pdf [hereinafter *Q&A: The Case of Hissène Habré*].

233. *See generally* African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 26363.

234. OAU, Protocol to the African Court on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998) [hereinafter ACHPR Protocol].

235. *Id.* at art. 3, 5.

236. *List of Applications Received By the Court*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1.

237. *Libya: African Rights Court Issues First Ruling Against a State*, HUMAN RIGHTS WATCH (Mar. 30, 2011), http://www.hrw.org/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state.

238. Afr. Union, Constitutive Act of the African Union, AU Assembly, 36th sess., (Jul. 11, 2000) [hereinafter AU Constitutive Act].

239. Afr. Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, Annex. (July 1, 2008) [hereinafter ACJHR Protocol].

Protocol into force; only five states have ratified it so far—Benin, Burkina Faso, Congo (Brazzaville), Libya, and Mali.[240] As originally conceived, the merged Court was to have two sections: a "general affairs" section, to handle inter-state disputes, and a human rights section, to assume the docket of the African Court on Human and Peoples' Rights and exercise jurisdiction over a range of human rights treaties.[241]

In early 2009, the AU Assembly of Heads of State and Government began considering the possibility of expanding the jurisdiction of the not-yet-formed African Court of Justice and Human Rights to include a third chamber with the power to assert penal jurisdiction over individuals accused of having committed international crimes, such as war crimes and crimes against humanity (among others).[242] Discussions, drafting, and negotiations ensued, and in 2011, a draft report and statute were provisionally adopted by the Ministers of Justice and Attorney Generals that was largely complete except for the crime of effectuating an unconstitutional change of government, which remained under consideration.[243] In 2012, a Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was finalized (with the one contentious crime bracketed).[244] In May 2014, the AU Special Technical Committee ("STC") on Justice and Legal Affairs adopted the Draft Protocol, which contains the draft statute of the tripartite successor court.[245] The full AU then followed suit in June in Equatorial Guinea.[246] Arguably, this new Protocol has superseded the original Protocol merging the ACHPR and the ACJ, requiring ratifications to start anew.

The motivations behind the proposed African criminal court are multifaceted.[247] Some members of the AU are no doubt driven by antagonism

240. *Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights*, COALITION FOR AN EFFECTIVE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (Jul. 12, 2014), http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12.

241. ACJHR Protocol, *supra* note 239, at Annex, art. 28.

242. Afr. Union Assembly/AU/Dec. 213(XII), *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction–Doc. Assembly/AU/3(XII)*, 12th Sess. (Feb. 1-3, 2009). The Committee of Eminent African Jurists convened to consider options for prosecuting Habré were also asked to consider long-term solutions to impunity on the continent and floated the idea of expanding the jurisdiction of the ACJHR. CEJA Report, *supra* note 220, at 5.

243. Issaka K. Souaré, *The AU and the Challenge of Unconstitutional Changes of Government in Africa*, ISS Paper 197 (Aug. 2009).

244. Afr. Union Specialized Technical Comm. on Just. and Legal Aff., *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev.7 (May 15, 2012) [hereinafter Draft Protocol on Amendments].

245. Press Release, Afr. Union, First Session of the Special Technical Committee on Justice and Legal Affairs of the African Union Concluded with Concrete Recommendations on Way Forward (May 16, 2014).

246. Caitlin Behles, *Assembly of the African Union Adopts Legal Instruments at its 23rd Ordinary Session* (June 27, 2014), AMERICAN SOCIETY OF INTERNATIONAL LAW (Aug. 8, 2014, 11:46 AM), http://www.asil.org/blogs/assembly-african-union-adopts-legal-instruments-its-23rd-ordinary-session-june-27-2014#sthash.REPG4ZDb.dpuf.

247. *See generally* Martin Matasi & Bröhmer Jürgen, *The Proposed International Criminal*

toward the ICC, especially in light of its issuance of indictments against African sitting heads of state.[248] In a show of post-colonial solidarity, members of the AU have also objected to the assertion of universal jurisdiction over African defendants, particularly by former colonial powers (with Germany's prosecution of Rose Kabuye, Rwanda's Chief of Protocol, and the United Kingdom's arrest of Emmanuel Karenzi Karake, head of Rwanda's National Intelligence and Security Services, serving as particular flashpoints).[249] In urging African states to do more to prosecute international crimes committed in Africa, these critics find common cause with human rights advocates in the region who are championing the creation of the proposed regional criminal court in order to expand the fora capable of prosecuting serious crimes committed on the continent.[250] The creation of the EAC no doubt serves as a model for implementing African solutions to African problems, and the complex and protracted negotiations around its establishment offer additional support for the creation of a standing body. It remains to be seen, however, whether there is adequate political and financial support for the new African institution. Its location in Arusha—The Hague of Africa—offers the potential for productive institutional synergy.

In other regional developments, there have been discussions that the branch of the MICT located in Arusha, Tanzania, might house, or be transformed into, an international or hybrid court being contemplated for crimes committed in South Sudan.[251] This would enable the new entity to share resources with the MICT, which is funded through U.N. assessed contributions and will receive new premises in 2016.[252] Although these discussions remain in the early phases, repurposing the MICT would likely require additional action by the Security Council, particularly if the consent of South Sudan is not forthcoming. An AU Peace and Security Council-sponsored Commission of Inquiry devoted to South

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Chamber Section of the African Court of Justice and Human Rights: A Legal Analysis, 1 INT'L L. J. LONDON 77 (2014) (recounting vacillating relationship between African states and the ICC).

248. M. Cherif Bassiouni et al., *Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, ICC FORUM, http://iccforum.com/africa (last visited Mar. 28, 2016).

249. Tara John, *Why the Arrest of Rwanda's Intelligence Chief in the U.K. Is Causing Waves*, TIME (Jun. 23, 2015), http://time.com/3932134/rwandas-intelligence-chief-uk/.

250. Marc Schulman, *The African Court of Justice and Human Rights: A Beacon of Hope or a Dead-End Odyssey?*, INKUNDLA (2013), http://www.inkundlajournal.org/inkundla/2013-inkundla-2.

251. *IGAD Proposes Hybrid Court With No Amnesty For South Sudan War Criminals*, RADIO TAMAZUJ (Jul. 27, 2015), https://radiotamazuj.org/en/article/igad-proposes-hybrid-court-no-amnesty-south-sudan-war-criminals. Chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan envisions the establishment of such a tribunal. The Security Council has endorsed the effort. *See* S.C. Res. 2241 (Oct. 9, 2015). The U.N. Secretariat will thus, for the first time, provide technical assistance to a regional accountability mechanism. *See* 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, U.N. Doc. S/2016/328 (Apr. 7, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/328.

252. Eagle, *supra* note 9. The United States has already offered $5 million toward this effort. *US Willing to Fund Hybrid Court for South Sudan War Crimes*, RADIO TAMAZUJ (May 6, 2015), https://radiotamazuj.org/en/article/us-willing-fund-hybrid-court-south-sudan-war-crimes.

Sudan—the first such regional effort—first proposed resort to an Africa-led "legal mechanism under the aegis of the African Union supported by the international community" and including South Sudanese judges and lawyers, among other transitional justice mechanisms.[253] The AU and the Inter-Governmental Authority on Development ("IGAD"), with technical assistance from the United Nations Secretariat, will play a central role in standing up a new institution either by way of a resolution or another multilateral treaty. The limited domestic legal capacity and continuing insecurity in South Sudan makes it unlikely that a viable hybrid tribunal could be established in the country itself at the moment.[254] Tanzania, which already plays host to a number of justice institutions,[255] offers a viable neutral forum given the links between various South Sudanese factions and other regional powers. Proceedings could be transferred to Juba when security conditions allow. In principle, President Salva Kiir and former Vice President Riek Machar have agreed to pursue a transitional justice program, including options for accountability, in both the February 2015 "Areas Agreement" and the August 2015 Peace Agreement.[256]

Turning to the European theater, notwithstanding intense international involvement in the Kosovar judicial system through the U.N. Mission in Kosovo ("UNMIK") and EULEX, the international community remained concerned about the inability of domestic judges to ensure fair and impartial justice in sensitive cases.[257] The problem of witness protection has been particularly acute in both domestic and ICTY cases.[258] Meanwhile, a report by a Swiss prosecutor, Dick Marty, to the Council of Europe contained allegations that a Kosovar Albanian organ-trafficking scheme may have led to the deaths of Serb war-time captives in Albanian territory.[259] The Marty Report, which indirectly implicated Prime Minister Hashim Thaçi, also accused members of the KLA of committing a range

253. Final Report of the African Union Commission of Inquiry on South Sudan, ¶ 1148 (Oct. 15, 2014).

254. ENDING THE ERA OF INJUSTICE, *supra* note 9 (concluding that the South Sudanese courts are incapable of hosting domestic or even internationalized trials and calling for the creation of a standalone hybrid tribunal).

255. *About MCIT*, UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS, http://www.unmict.org/en/about. The ICTR, ACJHR, and a branch of the MICT are located in Arusha, Tanzania.

256. *South Sudan: South Sudan Parties Sign Areas of Agreement on the Establishment of the Transitional Government of National Unity*, RELIEFWEB (Feb. 2, 2015), http://reliefweb.int/report/south-sudan/south-sudan-parties-sign-areas-agreement-establishment-transitional-government; Agreement on the Resolution of the Conflict in the Republic of South Sudan (Aug. 17, 2015), https://drive.google.com/file/d/0B5FAwdVtt-gCelBQZVAxbjhUc1FmSHo3VnNaT09Ldm1GNEhz/view.

257. AMNESTY INT'L, KOSOVO (SERBIA): THE CHALLENGE TO FIX A FAILED UN JUSTICE SYSTEM 4, 6 (2008).

258. Michael Farquhar, *Witness Intimidation a Serious Problem in Kosovo Cases*, INSTITUTE FOR WAR & PEACE REPORTING (Nov. 18, 2005), https://iwpr.net/global-voices/witness-intimidation-serious-problem-kosovo-cases.

259. EUR. PARL. ASS., *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. No. 12462 (2011) [hereinafter Marty Report].

of other international crimes.[260] In 2011, the Council of Europe endorsed the report and established under EULEX authority an autonomous Special Investigative Task Force ("SITF"), which was located in Brussels and composed entirely of international investigators and lawyers, to conduct a full-scale criminal investigation into the allegations.[261] The first Chief Prosecutor of the SITF (a former U.S. Ambassador-at-Large for War Crimes Issues) indicated that he found compelling evidence against senior members of the KLA of an organized program of ethnic persecution and violence, including the targeting of civilians, illegal detentions, "counter-ethnic cleansing," and summary executions of Serb and Roma victims as well as of Albanian political opponents and perceived collaborators.[262] Although there is apparently evidence that torture was also committed, the statute of limitations for the crime has expired.[263] The SITF found indications of organ trafficking, but on a small scale not supported by evidence that would yet justify the issuance of indictments.[264]

The SITF indicated that it would not issue indictments or unseal its files until there is a court that is dedicated to hearing the cases. The model arrived upon, as set forth in agreement between Kosovo and the EU, and Kosovo and the Netherlands, involves "Specialist Chambers" located in the Netherlands but headquartered in Kosovo and operating under Kosovar jurisdiction as an extension of EULEX.[265] Its official (and ungainly) title reveals its hybrid nature: the Kosovo Relocated Specialist Judicial Institution. This is technically a Kosovar court, relocated to a neutral venue, that will be composed of Pre-Trial, Trial, Appellate, Supreme, and Constitutional panels or courts along with a Registry. The Kosovo parliament had the proposal under review for some time; part of the delay in finalization stemmed from the fact that implementation required legislation and a constitutional amendment, which was finally approved in August 2015.[266] The proposal was also politically contentious since it focuses on crimes allegedly committed by the KLA, who are still considered national heroes by many.[267] Supporters had argued that if Parliament did not approve the specialized court, the proposal would have shifted from the EU to the Security Council, where it enjoyed

260. *Id.* at 1-2.

261. *About SITF*, SPECIAL INVESTIGATIVE TASK FORCE, http://sitf.eu/index.php/en/about-sitf.

262. Statement by the Chief Prosecutor Clint Williamson, SPECIAL INVESTIGATIVE TASK FORCE (July 29, 2014), http://www.sitf.eu/index.php/en/news-other/42-statement-by-the-chief-prosecutor-clint-williamson.

263. *Id.* at 2.

264. *Id.* at 3.

265. Law on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, Law No. 04 / L-274 (Apr. 23, 2014) (Kos.). Petrit Collaku, *Kosovo President Signs War Court Agreement with Holland*, BALKAN TRANSITIONAL JUSTICE (Feb. 29, 2016), http://www.balkaninsight.com/en/article/kosovo-president-gives-green-light-for-the-start-of-the-special-court-02-29-2016.

266. *Kosovo: Approve Special Court for Serious Abuses*, HUMAN RIGHTS WATCH (Apr. 11, 2014), https://www.hrw.org/news/2014/04/11/kosovo-approve-special-court-serious-abuses.

267. Nened Sebak, *The KLA—Terrorists or Freedom Fighters*, BBC (Jun. 28, 1998, 13:41 PM), http://news.bbc.co.uk/2/hi/europe/121818.stm.

strong support from Russia.[268] It was also feared that if the agreement went unratified, prospects for wider international recognition and EU integration would be stymied.[269] The proposed tribunal, which will be made up of international judges applying Kosovar law as charged by international prosecutors within a Specialist Prosecutor's Office, is currently under construction and is slated to open by the end of the year.

The potential Arab League tribunal devoted to prosecuting crimes committed in Syria would have been located in a state bordering Syria in order to facilitate the gathering of testimonial and documentary evidence.[270] An additional reason to focus on neighboring states as potential hosts might be less obvious. Such states may be empowered to exercise jurisdiction on multiple bases given the direct effects of the conflict on them. To be sure, the principle of universal jurisdiction—which empowers all states to prosecute individuals accused of the commission of international crimes regardless of any nationality or territorial nexus to the prosecuting state—is available to any state that is so inclined to move forward with prosecutions of individuals responsible for the commission of war crimes, crimes against humanity, genocide, and certain acts of terrorism by virtue of either customary international law or a treaty authorization.[271] Nonetheless, some states remain squeamish about advancing the universal jurisdiction norm, perhaps all the more so in a novel collective form. As such, there is an obvious utility to identifying states that can lawfully exercise domestic jurisdiction on other, less contentious jurisdictional bases.[272] A regional tribunal devoted to Syria could have been premised on the collective exercise of the passive personality or protective principles of jurisdiction given massive refugee flows and the overall instability caused by the war in Syria and now Iraq.

F. A Selective Multilateral Treaty

The ICC is the creature of a multilateral treaty, but one open to all states.[273] Besides the regional tribunals discussed above, it has been rare for a subset of states since Nuremberg to form an "international" tribunal by way of multilateral

268. Una Hajdari, *US Warns Kosovo: Approve New War Court Quickly*, BALKAN TRANSITIONAL JUSTICE (Apr. 17, 2015), http://www.balkaninsight.com/en/article/us-if-kosovo-war-crimes-court-fails-un-tribunal-to-be-formed.

269. Emma Founds, *Risks for the Republic of Kosovo if Parliament Fails to Establish the Special Court*, 4 GROUP FOR LEGAL AND POLITICAL STUDIES 1, 6 (Apr. 2015), http://legalpoliticalstudies.org/wp-content/uploads/2015/04/Risks-for-the-Republic-of-Kosovo-if-the-Parliament-fails-to-Establish-the-Special-Court1.pdf.

270. David Scheffer, Opinion, *Let Justice Be Served in Syria and Iraq*, LA TIMES (Jul. 5, 2014), http://www.latimes.com/opinion/op-ed/la-oe-scheffer-prosecuting-atrocities-syria-iraq-20140706-story.html.

271. *The Princeton Principles on Universal Jurisdiction*, UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY (2001) at princ. 2.1, https://www1.umn.edu/humanrts/instree/princeton.html.

272. *See* Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUDIES (forthcoming 2016) (outlining proposals).

273. Rome Statute of the International Criminal Court, art. 125(3), Jul. 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute] ("This Statute shall be open to accession by all States").

treaty. One partial precedent is found in the mixed slavery courts established by Great Britain in the early 19th century in an effort to eradicate the slave trade, a forgotten chapter in the story of international criminal law rediscovered by scholars.[274] The British strategy involved executing a network of bilateral treaties with maritime states, including Spain, Brazil, the Netherlands, and Portugal.[275] These treaties gave parties the right to search and condemn vessels engaged in the slave trade and to subject them to trial before a mixed commission featuring judges from the capturing nation, the flagship nation, and potentially a "neutral" nation.[276] The mixed commissions were established in treaty-partners' ports-of-call, including Freetown, Sierra Leone; Havana, Cuba; Rio de Janeiro, Brazil; and Suriname.[277] This network of otherwise bilateral treaties established something close to a global enforcement regime even without the involvement of France (which never joined) and the United States (which joined late in the game).

British overtures to the United States met resistance, due in part to antagonism toward granting a mutual right to search ships on the high seas (a central pillar of the British approach), but also to perceived constitutional infirmities, notwithstanding the U.S. Constitution's expansive Treaty Power.[278] The United States preferred for U.S. vessels captured by the British to be returned to the United States for trial. It should be noted that U.S. opposition did not reflect any desire to preserve or protect the slave trade; although slavery remained legal in the United States at the time, Congress had already declared the slave trade to be a form of "piracy" punishable by death.[279] In 1862 and in the midst of the Civil War, the United States finally assented to the British proposal and entered into what became known as the Lyons-Seward Treaty.[280] Mixed courts involving the United States were established in New York, Sierra Leone, and Capetown.[281] By this time, however, the slave trade had been largely suppressed, and these courts

274. *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550, 552-53 (2008).

275. *Id.* at 603.

276. *Id.* at 579.

277. *Id.*

278. *See* Eugene Kontorovich, *The Constitutionality Of International Courts: The Forgotten Precedent Of Slave Trade Tribunals*, 158 U. PA. L. Rev. 39 (2010). Constitutional objections to the United States' participation in mixed tribunals revolved around the permissibility of creating non-Article III courts and whether such courts needed to adhere to individual rights set forth in the Bill of Rights, such as the right to a jury or a right to appeal to the U.S. Supreme Court. Detractors gave voice to these objections even though the United States had participated in the past in other such commissions for different legal claims. *Id.* at 74.

279. An Act to Protect the Commerce of the United States and Punish the Crime of Piracy, Pub. L. No. 16-13, § 5, 3 Stat. 600 (1820). The statute applied to "any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade" or "any person whatever" engaged in the slave trade on a ship "whol[ly] or in part, or navigated for, or in behalf of, any citizen or citizens of the United States." *Id.* §§ 4-5.

280. Martinez, *supra* note 274, at 609-10; *id.* at n.257. Professor Martinez explains the United States' *volte face* in part on a perceived need to appease Great Britain and prevent its recognition of the Confederacy.

281. *Id.* at 595.

were never activated.[282]

These tribunals were not strictly penal in nature. Rather, they "had jurisdiction only over the ships and their cargo; the crew would either be let loose or repatriated for prosecution."[283] Later, "the mixed courts were authorized to hold slave crews in custody until they could be transferred to national authorities for trial."[284] The ships were generally auctioned off, with the proceeds going toward the expenses associated with the courts, the two governments, and the captors as prize money.[285] As such, these courts administered what were more in the nature of *in rem* actions, although it has been argued that "[c]ondemnation of a vessel, while nominally *in rem*, can be criminal when done to punish the owner"[286] as with civil forfeiture laws.[287] There was no right to appeal.[288] All told, upwards of 80,000 would-be slaves were freed by these mixed courts over the course of their existence.[289]

The Lockerbie Tribunal provides another notable example of the use of a treaty amongst a limited group of states to create an accountability mechanism.[290] Following the bombing of Pan-Am Flight 103 over Lockerbie, Scotland, in 1988, an international investigation led to the conclusion that the bombing had been the work of two Libyan agents.[291] The United Kingdom and the United States both issued indictments in 1991.[292] Libya, however, refused to extradite its nationals, asserting the right to prosecute them itself under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which contains an *aut dedere aut judicare* provision at Article 7.[293] In an unprecedented move, the Security Council demanded that Libya cooperate with the investigations and surrender the suspects to either the United Kingdom or the United States for trial. It also imposed sanctions on Libya for non-cooperation.[294]

Following a decade of negotiations and a foray to the International Court of

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282. *Id.* at 629-30.

283. Kontorovich, *supra* note 278, at 83.

284. Martinez, *supra* note 274, at 591 n.180.

285. *Id.* at 591.

286. Kontorovich, *supra* note 278, at 84.

287. *Id.* at 84-85.

288. *Id.* at 78.

289. Martinez, *supra* note 274, at 602.

290. *See generally* Michael Scharf, *The Lockerbie Model of Transfer of Jurisdiction*, *in* II INTERNATIONAL CRIMINAL LAW 525(M. Cherif Bassiouni, ed., 3rd ed., 2008).

291. Jesse Greenspan, *Remembering the 1988 Lockerbie Bombing*, THE HISTORY CHANNEL (Dec. 20, 2013), http://www.history.com/news/remembering-the-1988-lockerbie-bombing.

292. *Id.*

293. The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Sept. 23, 1971, 24 U.S.T 564, 974 U.N.T.S. 177; *see generally* JOHN P. GRANT, THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY (2004).

294. S.C. Res. 731, ¶ 3 (Jan. 21, 1992). UNSCR 731 marks the first Security Council resolution to, in essence, require a state to hand over its nationals for trial abroad. These demands were reiterated in UNSCRs 748 (1992) and 883 (1993), which also imposed strict sanctions in light of Libya's non-compliance. S.C. Res. 748 (Mar. 31, 1992); S.C. Res 883 (Nov. 11, 1993).

Justice (ICJ),[295] an agreement was reached in 1998[296] that would allow the suspects to be prosecuted in a neutral forum: a decommissioned U.S. army base in the Netherlands staffed by a panel of Scottish High Court judges (in lieu of a jury) applying Scots law. Although the Security Council blessed the arrangement,[297] implementation required the passage of Scottish legislation to enable a Scottish court, possessing a full juridical personality and enjoying all applicable privileges and immunities, to sit extraterritorially.[298] The United Kingdom covered any costs incurred by the Netherlands.[299] The deal also enjoyed the endorsement of the Organization of African Unity (now the African Union), the League of Arab States, the Non-Aligned Movement, and the Organization of the Islamic Conference.[300] As had been arranged in advance, upon the appearance of the two accused in the Netherlands, the Security Council suspended the sanctions against Libya, which had begun to erode in any case.[301] The Lockerbie Tribunal convicted one of the two defendants in 2001, but he was released early on compassionate grounds when he developed terminal cancer; he died in 2012.[302] Libya also acknowledged responsibility for the bombing and paid reparations to the victims' families.[303]

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295. Libya brought suit under the Montreal Convention, arguing that neither the United States nor the United Kingdom could compel it to surrender its nationals. The respondents claimed that the ICJ lacked jurisdiction under the treaty and that the claims had been rendered moot by action before the Security Council. *See* Press Release, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Press Release 1998/5 (Feb. 27, 1998) http://www.icj-cij.org/docket/index.php?pr=173&code=lus&p1=3&p2=3&p3=6&case=89 (finding the case to be admissible and dismissing the United States' preliminary objections; the cases were eventually discontinued in 2003 with prejudice).

296. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands, U.K.–Neth., Sept. 18, 1998, art. 3, 2062 U.N.T.S. 81 [hereinafter Lockerbie Treaty]. (The terms of the arrangement were set forth in an August 24, 1998, letter from the United Kingdom and the United States to the U.N. Secretary-General, which is attached as an annex to the aforementioned treaty).

297. S.C. Res. 1192, ¶ 3 (Aug. 27, 1998) (calling upon the United Kingdom and the Netherlands to take steps to enable a Scottish court to operate on Dutch territory, mandating that all states cooperate with the proceedings, and indicating an intention to suspend sanctions when the two accused arrived in the Netherlands).

298. 1998 No. 2251, United Kingdom High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, § 3, as *reprinted in* 38 I.L.M. 942 (1999), http://www.opsi.gov.uk/si/si1998/19982251.htm.

299. Lockerbie Treaty, *supra* note 296, at 91.

300. KHALIL I. MATAR & ROBERT W. THABIT, LOCKERBIE AND LIBYA: A STUDY IN INTERNATIONAL RELATIONS 95-96 (2004).

301. S.C. Res. 1506, art. 1 (Sept. 13, 2003) (lifting sanctions). In its pronouncements, the Security Council also mandated Libya's cooperation with respect to the 1989 downing of a French airline, UTA flight 772, which also implicated the then-head of the Libyan intelligence agency and Gaddafi's brother-in-law, Abdullah Senussi, who has been indicted by the ICC.

302. Greenspan, *supra* note 291.

303. *See Hurst v. The Socialist People's Libyan Arab Jamahiriya*, 474 F.Supp.2d 19, 23 (D.D.C. 2007).

This arrangement had some of the features of the Nuremberg Tribunal in that it was established by the agreement of a small number of implicated states. It embodied a negotiated compromise of competing entitlements to jurisdiction as between Libya (which asserted the nationality principle), Scotland (entitled to invoke the passive personality and territorial principles), and the U.S. (passive personality, but also territoriality given that Pan Am was a U.S. airline). By involving fewer states, such arrangements are potentially easier to negotiate. The similarities between Lockerbie and Nuremberg end there, however. Besides the obvious difference in scope, the Lockerbie Tribunal also proceeded with the consent—albeit coerced by crippling sanctions—of the nationality state.

In a similar initiative, the Secretary-General's Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, Jack Lang, and others have proposed the establishment of an extraterritorial Somali anti-piracy court in a secure location to act as a "focal point" for regional and international prosecutorial support and to help strengthen the rule of law in Somalia.[304] It was suggested that the premises of the ICTR might be a suitable temporary venue given the winding down of that tribunal's activities.[305] This extraterritorial Somali court, which would be staffed with internationally trained Somali and diaspora judges,[306] would be the product of multiple overlapping treaties between Somalia, the host state, and the apprehending states.[307] Under Lang's proposal, the court would work in tandem, and potentially share a prosecutorial office, with secure specialized chambers in the courts of the autonomous regions of Puntland (deemed the "epicenter of piracy") and Somaliland.[308] It would eventually decamp to Mogadishu. Funding was to come from the U.N. Office on Drugs and Crime, the U.N. Development Programme ("UNDP"), International Maritime Organization ("IMO"), and a Trust Fund set up by the Contact Group on Piracy off the Coast of Somalia ("Contact Group").[309] Although Somalia has not been supportive of this plan, the Security Council has kept it under consideration.[310] To date, the Council has primarily stressed the need for cooperative legal action and focused on coordinating assertions of domestic jurisdiction and efforts to apprehend and transfer individuals for prosecution, as discussed below.

A model similar to the Lockerbie solution is under consideration for the

304. Special Advisor to the Secretary-General on Legal Issues Related to Piracy Off the Coast of Somalia, *Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy Off the Coast of Somalia*, Annex, U.N. Doc. S/2011/30 (Jan. 25, 2011), http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Lang_report_S-2011-301.pdf [hereinafter Lang Report].

305. *Id.* ¶ 122.

306. *Id.* ¶¶ 125-26.

307. *Id.* ¶ 124.

308. *Id.* ¶ 133.

309. *Id.* at Summary, ¶ 138.

310. *See* S.C. Res. 1976, ¶ 1 (Jul. 18, 2008); *see also* U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and other States in the Region*, S/2012/50, ¶¶ 37-38 (Jan. 20, 2012); U.N. Secretary-General, *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, S/2011/360 (June 15, 2011) (discussing specialized chambers model).

downing of Malaysia Air Flight 17 ("MH-17") as a way of circumventing Russia's veto of a Dutch/Malaysian proposal to establish an international tribunal.[311] If such a Lockerbie-style tribunal were to move forward, at a minimum, the most affected states would include Ukraine, as the territorial and potentially nationality state; Malaysia, as the state of registration as well as the state of nationality of the victims; and the Netherlands (and others), also invoking the passive personality principle (two-thirds of those killed were Dutch).[312] These states could, in essence, "pool" their respective jurisdictional competencies. Such a tribunal could also be premised on the collective exercise of universal jurisdiction if the attack amounts to a war crime or an act of terrorism subject to universal jurisdiction.[313] The nationality of the perpetrators is unknown, which complicates the question of whether Russia's assent would be required, as a legal or practical matter, for any tribunal to be established, especially given that the acts in question may be subject to universal jurisdiction. Assuming Russia would block any decisive action by the Security Council, additional international legitimacy could be afforded to this effort by the U.N. General Assembly.[314]

G. Occupation Courts

International tribunals have also been created as part of a postwar occupation in order to deal with the problem of captured war criminals. The United States created the Tokyo Tribunal, for example, by executive fiat while occupying the country after WWII.[315] In addition, the victorious allies staged thousands of prosecutions in military commissions and courts in their respective zones of occupation.[316] In the European Theater, the Control Council, comprised of the commanders of Germany's four occupation zones, passed Law No. 10 to enable

311. *See* Rick Gladstone, *Russia Vetoes U.N. Resolution on Tribunal for Malaysia Airlines Crash in Ukraine*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/world/europe/russia-vetoes-un-resolution-on-tribunal-for-malaysia-airlines-crash-in-ukraine.html?_r=0. The Minister for Transport of Malaysia presented the draft resolution, which received eleven affirmative votes and three abstentions (Angola, China and Venezuela). Press Release, Security Council, *Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims*, U.N. Press Release SC/11990 (July 29, 2015), http://www.un.org/press/en/2015/sc11990.doc.htm. Russia's veto reflected its views that any international tribunal would be "politicized" and "counterproductive." *Moscow Explains Why it Sees Establishment of International Tribunal on MH17 Crash as Premature*, RUSSIA BEYOND THE HEADLINES (July 30, 2015), http://rbth.com/news/2015/07/30/moscow_explains_why_it_sees_establishment_of_intl_tribunal_on_mh17_crash_48130.html.

312. *See* Aleksandra Gjorgievska, *The Lives Lost in the MH17 Disaster*, TIME (July 21, 2014), http://time.com/3012667/mh17-victims/ (providing the breakdown of number of deaths).

313. *See* Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 2)*, OPINIOJURIS (Aug. 28, 2015), http://opiniojuris.org/2015/08/28/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-2/.

314. *Id.*

315. *The Nuremberg Trial and the Tokyo War Crimes Trials*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN (1945-1948), https://history.state.gov/milestones/1945-1952/nuremberg.

316. *Id.*

the prosecution of persons deemed guilty of international crimes.[317] The allies conducted similar trials in the Far East,[318] although the United States was the sole occupying power in Japan.[319] Whether these subsequent trials should be considered "international" or quasi-international in light of their multilateral origins and their incorporation of international law has generated differing views.[320]

In theory, states could continue to create internationalized tribunals or mixed courts in occupation or quasi-occupation situations if the conditions were right.[321] A modern twist on this tradition is found in the Iraqi High Tribunal ("IHT"), which was stood up to prosecute Saddam Hussein and other Ba'athists following the 2003 Iraq War ("Operation Iraqi Freedom").[322] The Security Council in UNSCR 1483 (2003) authorized the United States and the United Kingdom acting as the Coalition Provisional Authority ("CPA") to, *inter alia*, administer the territory of Iraq, encourage the restoration of the civil infrastructure, and promote legal and judicial reform, particularly in light of the articulated need to ensure accountability

317. *See* Control Council, Law no. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, arts. 1-2 (Dec. 20, 1945), http://avalon.law.yale.edu/imt/imt10.asp.

318. *See Generally* Arujunan Narayanan, *Japanese Atrocities and British Minor War Crimes Trials After World War II in the East*, 33 JEBAT: MALAYSIAN J. OF HIST. 1 (2006), http://journalarticle.ukm.my/373/1/1.pdf.

319. *See, e.g.*, Phillip R. Picigallo, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951 (1979).

320. *See* Cherif Bassiouni, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 133 (2011) ("[CCL 10] was purported to be a national law applicable only territorially but its source deriv[ed] from international law, and its formulation and enactment was by the victorious Allies acting pursuant to their supreme authority over Germany by virtue of that country's unconditional surrender").

321. Article 42 of the Regulations annexed to the Hague Convention (IV) on the Laws and Customs of War on Land considers territory to be occupied when it is "actually placed under the authority of the hostile army." Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, § III ¶ 42, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277. Although a foundational principle of occupation law dictates that the occupying power should not make major changes to the territorial state's governmental institutions, there are exceptions to this minimalist principle when replacing prior penal laws is in the best interest of the population and necessary for the effective administration of justice or when prosecuting violations of international humanitarian law. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, arts. 64-65, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see generally* GREG FOX, HUMANITARIAN OCCUPATION (2008).

322. *But see* Michael Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 862 INT'L REV. OF THE RED CROSS 399, 401 (2006) (arguing that the IHT was "not an exercise dictated by occupation authorities, but was initiated by Iraqis and revalidated at every stage by the domestic political processes"). *Compare* Michael P. Scharf, *Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. INT'L CRIM. JUST. 330, 330 (2004) [hereinafter Scharf, *Critique*] (noting the risk that the IHT would "[be] seen by both Iraqis and outsiders as a puppet of the Occupying Power, and as a tool for vengeance by Saddam Hussein's enemies, rather than as the cornerstone of a new judicial system committed to the rule of law"), *with* Michael Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L. J. 911, 912-14 (2005) (adopting a more sanguine view of the IHT).

for the "crimes and atrocities committed by the previous Iraqi regime" identified in the Resolution's preamble.[323] The Council was not willing, however, to create an international tribunal, notwithstanding the scale of the abuses in and around Iraq, in part because many members considered the war in Iraq to have been illegal.[324] For its part, the United States wanted an "Iraqi-led" process and resisted efforts to bring the process under a United Nations banner.[325] In any case, many Iraqis were reticent to allow the United Nations a role in the process in light of the Oil for Food debacle and the long history of U.N. sanctions in Iraq.[326]

On December 10, 2003, the CPA, led by Administrator Paul Bremer, promulgated Order No. 48 and established what was then called the Iraqi Special Tribunal ("IST").[327] After the interim government began exercising Iraq's sovereignty following the passage of UNSCR 1546 (2004), the newly elected Transitional National Assembly annulled the IST Statute and replaced it with the Statute of the IHT in 2005.[328]

The IHT was by all measures a domestic court—staffed by Iraqi personnel applying Iraqi law—that was internationalized by the presence of international advisors selected by the International Bar Association and others and by the training and administrative support provided by the U.S. Department of Justice's Regime Crimes Liaison Office ("RCLO").[329] Although CPA Order Number 48 and the original statute envisioned the appointment of non-Iraqi judges, this did not come to pass. Instead, foreign lawyers (mostly from the United States) were

323. S.C. Res. 1483 (May 22, 2003). The CPA announced that it was vested with "all executive, legislative, and judicial authority necessary to achieve its objectives" by virtue of two sources of law: the relevant UNSCRs (which authorized measures under Articles 41 and 48 of the U.N. Charter) and the international law of armed conflict. Coalition Provisional Authority, Regulation Number 1, § 1 ¶ 2 (2003) (Iraq).

324. Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5 J. INT'L CRIM. JUST. 258, 261 (2007) [hereinafter Scharf, *Experiment*].

325. Eric Stover et al., *Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq*, 27 HUM. RTS. Q. 830, 838-9 (2005); HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (2006).

326. Tom Parker, *Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT'L L. J. 899, 900 (2005).

327. *See generally* Coalition Provisional Authority, Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal (2003) (Iraq), http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf. The order delegated to the Interim Governing Council, which had been appointed by the CPA, authorization to establish the tribunal; a draft statute purporting to be the result of extensive consultations between the CPA and the Governing Council appeared as an appendix to this order.

328. *See* Law of the Supreme Iraqi Criminal Tribunal, no. 4006 of 2005 (Iraq), http://gjpi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf [hereinafter IHT Statute]; Guénaël Mettraux, *The 2005 Revision of the Statute of the Iraqi Special Tribunal*, 5 J. INT'L CRIM. JUST. 287, 288 (2007) (noting the "Iraqization" of the new Statute, which diminished the role of international personnel and weakened certain procedural guarantees).

329. Scharf, *Experiment*, *supra* note 324, at 259 ("[the] (IHT) merits the characterization internationalized domestic tribunal. . . . [It] is not fully international or even international enough to be dubbed a hybrid court"). On the RCLO, *see* Stover, *supra* note 325, at 841.

relegated to an advisory role.[330] The pool of qualified advisors was limited, however, by the fact that the U.N. Secretary-General prohibited senior personnel from the *ad hoc* tribunals to participate in any training programs.[331] As an exercise of lustration, Article 33 of the IHT Statute prohibited the appointment of anyone who had been a member of the Ba'ath party, which may have "dilute[d] the pool of qualified jurists significantly."[332] The IHT was plagued by allegations of political interference (on the part of the new Iraqi authorities and the United States) as well as threats to judges and defense counsel.[333] In part due to its controversial origins and in part due to perceived procedural flaws, the IHT never earned the support, or respect, of the international community, perhaps unfairly.[334]

H. Specialized Chambers With International Involvement

On their own initiatives, or with prompting from the international community, states emerging from periods of mass violence have created national institutions dedicated to prosecuting international crimes and invited the involvement of international experts in various capacities. Included within this community of courts are entities that are deeply ensconced within the relevant domestic system but that benefit from international support and expertise through seconded personnel and the provision of technical assistance.

Several examples are found in the former Yugoslavia. Once it became clear that the ICTY would not be able to manage all, or even a solid percentage, of war crimes cases generated by the dissolution of Yugoslavia, policymakers in the newly independent states with encouragement from the international community began to consider local options. Eventually, special war crimes chambers were established in Bosnia-Herzegovina ("BiH"), Serbia and Montenegro, and Croatia.[335] The most successful—in terms of international legitimacy, perceived fealty to due process protections, and the number of verdicts—is the hybrid system in BiH.[336] Following an October 2003 donors' conference, the War Crimes

330. Iraqi High Tribunal, Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, [hereinafter IHT RPE].

331. Stover, *supra* note 325, at 843.

332. Newton, *supra* note 322, at 406.

333. Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases,* at 6 (Dec. 4, 2008) http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf.

334. *See generally* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L. J. 327 (2005).

335. HUMAN RIGHTS WATCH, JUSTICE AT RISK: WAR CRIMES TRIALS IN CROATIA, BOSNIA AND HERZEGOVINA, AND SERBIA AND MONTENEGRO (2004), https://www.hrw.org/report/2004/10/13/justice-risk/war-crimes-trials-croatia-bosnia-and-herzegovina-and-serbia-and; MLADEN OSTOJIĆ, BETWEEN JUSTICE & STABILITY: THE POLITICS OF WAR CRIME PROSECUTIONS IN POST-MILOŠEVIĆ SERBIA 165-215 (2014) (discussing domestic fully domestic War Crimes Chamber in Serbia).

336. *See generally* Law on Court of Bosnia And Herzegovina 49/09 (Bosn. & Herz.) http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf [hereinafter WCC Law]. Under Article 14, Section II is devoted to Organized Crime, Economic Crimes, and Corruption and Section III exists for general crimes. *Id.*

Chamber ("WCC") and the Special Department for War Crimes in the Prosecutor's Office began operating in 2005 within the newly created federal State Court.[337] The system is based upon a proposal developed by the ICTY and the United Nation's High Representative (appointed to implement aspects of the 1995 Dayton Peace Agreement and to represent the multilateral Peace Implementation Council),[338] and blessed by the Security Council in UNSCR 1503 as part of the ICTY completion process. The WCC were originally intended to receive cases from the ICTY pursuant to Rule 11bis (subject to OSCE oversight), but they could also hear cases resulting from the prosecutors' own investigations.[339] Prior to the establishment of the WCC, war crimes cases had been subject to the Rules of the Road program, an international oversight system aimed at preventing unsubstantiated pre-trial detentions.[340] The Rules of the Road required Bosnian authorities to submit proposed war crimes cases to the ICTY Office of the Prosecutor to determine if there was sufficient evidence by international standards to justify either the arrest or indictment of a suspect or the continued detention of an individual.[341] The Rules of Road program folded in October 2004, and its functions were transferred to the BiH Prosecutor's office.[342]

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337. *See generally* David Schwendiman, *Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina*, 8 NORTHWESTERN J. INT'L HUM. RTS. 269 (2010).

338. *See generally* Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina (Dec. 1, 2004), http://www.sudbih.gov.ba/files/docs/zakoni/en/Registry_Agreement_English_version.pdf. The High Representative promulgated the State Court Act of 2000, which the Parliamentary Assembly subsequently endorsed. Technically, jurisdiction over international crimes was concurrent between the national State Court and cantonal and district courts, although the lack of a comprehensive national war crimes strategy has hindered coordination.

339. Schwendiman, *supra* note 337, at 276; *see supra* note 77.

340. *Working with the Region*, U.N. INT'L CRIM. TRIB'L FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/96#rules (last visited Nov. 7, 2015); *see generally* Org. For Security and Co-operation in Europe Mission to Bosnia & Herzegovina, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles* (March 2005), http://www.oscebih.org/documents/osce_bih_doc_20101223110249 92eng.pdf.

341. *See generally* 18 HUMAN RIGHTS WATCH, LOOKING FOR JUSTICE: THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA (2006) [hereinafter LOOKING FOR JUSTICE]. The Rules of the Road program was the product of the Rome Agreement, signed by the same signatories as the Dayton Peace Accords. The Rome Agreement stated:

> Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.

Rome Agreement, Bosn. & Herz.–Croat.–Serb., art. 5, Feb. 18, 1996. *See also* General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.–Croat.–Serb., Dec. 14, 1995, http://www.nato.int/ifor/gfa/gfa-frm.htm [hereinafter Dayton Peace Accords].

342. *See* Louise Mallinder, *Retribution, Restitution and Reconciliation: Limited Amnesty in Bosnia-Herzegovina* 93-97 (Belfast: Institute of Criminology and Crim. Justice, Queens University

The WCC legislation allowed for the injection of international staff—administrators (including the Registrar), judges at the trial and appellate levels, and prosecutors working alongside national staff—who were gradually phased out over the years.[343] The President and Chief Prosecutor, however, were Bosnian nationals, who worked under considerable domestic pressure at times. Controversially, there were no prospects for the provision of international defense counsel.[344] The ICTY, the U.S. Department of Homeland Security's Human Rights Violators Unit, and other outside organizations provided professional advice and technical assistance to various elements of the WCC, particularly when it came to the reform of national legislation, scanning documents and forensics, and the training of staff, defense counsel, and judges.[345] The ICTY also shared its electronic databases as well as evidentiary materials procured from U.N. member states; the latter may have been less likely to share information with an entirely local judicial process.[346] Information sharing went both ways with respect to certain cases, including the case against Karadžić. The WCC, which have become a permanent addition to the court system, continue to receive international support but are largely self-sufficient.[347]

As an alternative to the creation of a stand-alone tribunal, specialized courts, or mixed judicial chambers, the United Nations and donor countries have also sought to strengthen domestic investigative and prosecutorial authorities through a range of rule-of-law initiatives that include the secondment of international experts to dedicated war crimes prosecutorial units. The Commission Against Impunity in Guatemala ("CICIG"),[348] for example, embeds international experts in the Guatemalan Attorney General's office and the National Police to help investigate and disband criminal organizations with ties to the security forces—known as *Cuerpos Ilegales y Aparatos Clandestinos de Seguridad* ("CIACS")—and other corrupt state structures that are threatening the enjoyment of human rights in

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2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531762; Schwendiman, *supra* note 337, at 275-76 (noting that although the Rules of the Road program provided important guidance for national proceedings, it "throttled", rather than enabled, national prosecutions).

343. WCC Law, *supra* note 336, at art. 24.

344. David Tolbert & Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, 23-24 (Dec. 15, 2008), http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-bih-finalreportwebsitecorrected.pdf (raising equality of arms concerns).

345. Bogdan Ivanišević, THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT 40-41 (2008), https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf; Lilian A. Barria & Steven D. Roper, *Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY*, 9 HUM. RTS. REV. 317 (2008); Completion Strategy, U.N. INT'L CRIM. TRIB'L FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/10016 (last visited Nov. 7, 2015).

346. LOOKING FOR JUSTICE, *supra* note 341.

347. *See* COURT OF BOSNIA & HERZEGOVINA, http://www.sudbih.gov.ba/?jezik=e (last visited Nov. 8, 2015).

348. *See generally* U.N. Dep't of Political Affairs, *CICIG (International Commission Against Impunity in Guatemala)*, U.N., http://www.un.org/undpa/americas/cicig (last visited Feb. 1, 2016).

Guatemala.[349] CICIG does not investigate international crimes stemming from the thirty-six year armed conflict, such as the genocide case against Efraín Ríos Montt, but rather focuses on corruption and organized crime syndicates that arose during and after the armed conflict.[350] For example, it is investigating allegations of corruption that have implicated the former president, Otto Pérez Molina.[351] Some CICIG cases, however, involve the commission of what could be deemed international crimes, such as a social cleansing operation that resulted in the execution of a number of prisoners. Nonetheless, CICIG offers a model that could be applied to atrocity crimes elsewhere and is widely deemed a success.[352]

CICIG has its origins in civil society demands and a 2002 request from the Government of Guatemala to the United Nations for assistance in dealing with the high levels of postwar violence and entrenched impunity.[353] The U.N. Department of Political Affairs originally proposed a hybrid commission that would enjoy both investigative and prosecutorial powers—to be called the Commission for the Investigation of Illegal Groups and Clandestine Security Organizations ("CICIACS").[354] The Guatemalan Constitutional Court in a consultative opinion raised concerns that such a delegation of prosecutorial authority might be unconstitutional, attesting to the importance of sorting such legal issues out in advance.[355] Accordingly, the final bilateral agreement between Guatemala and the United Nations established special investigative cells of embedded international experts who provide technical assistance to local actors and undertake direct investigations.[356] Although dependent on Guatemalan officials to pursue charges,

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349. *See generally* Open Society Justice Initiative, *Unfinished Business: Guatemala's International Commission Against Impunity (CISIG)* (March 2015); *see generally* Andrew Hudson & Alexander Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. INT'L CRIM. JUST. 53 (2010) (noting that even minimally international efforts like CICIG are not immune from criticism of international meddling).

350. U.N. Dep't of Political Affairs, *supra* note 348.

351. Arturo Matute, *Ending Corruption in Guatemala*, IN PURSUIT OF PEACE (April 30, 2015), http://blog.crisisgroup.org/latin-america/2015/04/30/ending-corruption-in-guatemala/.

352. *See* WASHINGTON OFFICE ON LATIN AMERICA, THE INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA: A WOLA REPORT ON THE CICIG EXPERIENCE 27 (June 2015) [hereinafter WOLA] (describing CICIG's "transcendental results" and advocating its adoption elsewhere in the region and beyond to deal with high rates of violence and the shortfalls of the formal justice sector).

353. U.N. Secretary-General, *Activities of the International Commission Against Impunity in Guatemala* ¶ 2, U.N. Doc. A/64/370 (Sept. 23, 2009), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/64/370 [hereinafter CICIG Report].

354. *A Brief Background on the UN Commission Against Impunity In Guatemala,* WOLA (Apr. 26, 2007), http://www.wola.org/es/node/337.

355. Corte de Constitucionalidad [Constitutional Court], Opinión Consultiva [advisory opinion], Expediente No. 1250-2004 (Aug. 5, 2004) (Guat.).

356. *See* Agreement Related to the Creation of an International Commission Against Impunity in Guatemala, Guat.–U.N., Dec. 12, 2006, art. 6, ¶ 2, 2472 U.N.T.S. 47, http://www.wola.org/publications/cicig_text_of_the_agreement_between_the_united_nations_and_the_state_of_guatemala_on_th [hereinafter CICIG Agreement]. The agreement was ratified by the Guatemalan legislature on Aug. 1, 2007. Hudson & Taylor, *supra* note 349, at 55 n.16. Beyond this agreement, the U.N. General Assembly also endorsed CICIG in Resolution 63/19 (Dec. 16, 2008) and called upon states to support CICIG through voluntary contributions, financial and in kind. *Id.* at 72

CICIG is entitled to present potential criminal charges to the Public Prosecutor (*Ministério Público*) and join proceedings as a private prosecutor (*querellante adhesivo*).[357] It can also seek sanctions against Guatemalan officials who hinder ongoing investigations or prosecutions.[358] On a structural level, CICIG has been instrumental in proposing legal reforms (including the establishment of a witness protection program), capacitating domestic actors, and establishing a merit-based judicial appointment system. Some CICIG investigations and prosecutions have contributed to related proceedings in foreign courts,[359] including in the United States.[360] In this way, CICIG's achievements go beyond the provision of technical assistance.[361] In 2015, and just prior to the emergence of the corruption allegations, President Otto Pérez Molina asked the United Nations to extend CICIG's mandate another two years.[362]

This model of external support for investigations and prosecutions is also seen in the DRC, this time via a U.N. peacekeeping mission. The mandate of the U.N. Stabilization Mission ("MONUSCO")—which since March 2013 has included an unprecedented Intervention Brigade capable of undertaking offensive operations against armed groups—is the most far-reaching to date when it comes to providing support for justice processes.[363] MONUSCO's Joint Human Rights Office ("UNJHRO")[364] has staffed Joint Investigations and Verification Teams and Prosecution Support Cells ("PSCs"),[365] which are meant to bolster the investigation

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357. CICIG Agreement, *supra* note 356, at art. 3; *see generally* Tove Nyberg, *Smoking the Rats Out: CICIG's Effort to Strengthen the Justice System in Guatemala*, http://www.diva-portal.org/smash/get/diva2:730171/FULLTEXT01.pdf.

358. *Id.*; Hudson & Taylor, *supra* note 349, at 61; HUMAN RIGHTS WATCH, WORLD REPORT 2014: GUATEMALA, http://www.hrw.org/world-report/2014/country-chapters/guatemala?page=1.

359. For example, former Chief of the National Civil Policy of Guatemala, Erwin Sperisen, was convicted in Switzerland and sentenced to life in prison for the extrajudicial killing of seven inmates. *See Sperisen Case*, TRIAL, http://www.trial-ch.org/guatemala-en/sperisen.html (last visited Nov. 8, 2015); *Guatemala Ex-Police Chief Jailed for Life by Swiss Court*, BBC NEWS (June 6, 2014), http://www.bbc.com/news/world-europe-27740109.

360. Randal C. Archibold, *Ex-Guatemalan President Extradited to U.S. in Corruption Case*, N.Y. TIMES (May 24, 2013), http://www.nytimes.com/2013/05/25/world/americas/ex-president-portillo-of-guatemala-is-extradited-to-us.html?_r=0.

361. Hudson & Taylor, *supra* note 349, at 6.

362. *Guatemala Requests Extension of UN Anti-Impunity Commission*, PANAM POST (Apr. 24, 2015), http://panampost.com/panam-staff/2015/04/24/guatemala-requests-extension-of-un-anti-impunity-commission/.

363. *See* S.C. Res. 2098, pmbl. (Mar. 28, 2013); Bruce Oswald, *The Security Council and the Intervention Brigade: Some Legal Issues*, 13 ASIL INSIGHTS (June 6, 2013), http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues.

364. *See generally What is UNJHRO's Mandate?*, MONUSCO, http://monusco.unmissions.org/Default.aspx?tabid=10766& (last visited Nov. 8, 2015); *see generally* Liam Mahony & Tessa Mackenzie, *Protecting Human Rights in the DRC: Reflections on the Work of the Joint Human Rights Office and MONUSCO* (Fieldview Solutions, eds., Sept. 2010). The UNJHRO involves representatives from the Office of the High Commissioner for Human Rights, the DPKO, and MONUSCO. *Id.*

365. The Security Council mandated the formation of PSCs in UNSCR 1925 (2010), issued under

and prosecution of international crimes by national authorities (particularly in the armed forces military justice system) through the provision of substantive expertise, training, technical support, and local capacity building[366] (although most of the experts involved come from national systems and lack experience with international crimes).[367] These entities operate by virtue of a 2011 Memorandum of Understanding between MONUSCO and the Government of the DRC and function with a high degree of coordination among NGOs, donors, and other stakeholders.[368] Although somewhat counter to the classical conception of peacekeeping, these elements of the MONUSCO mandate indicate that the Security Council has been increasingly willing to vest modern peacekeeping missions with an accountability mandate.[369] These efforts are also part of a much larger multi-year strategy for civilian protection and justice sector reform in the country.

A similar model of international capacity building within otherwise domestic institutions has been employed in Kenya, Mauritius, Somalia, Tanzania, and the Seychelles to address the resurgence of transnational piracy on the international scene.[370] The focus on prosecutions has accompanied—and in part been necessitated by—other more operational responses to piracy, including the deployment of multinational naval forces in the region (e.g., Combined Task Force ("CTF") 150 and the EU's Operation Atalanta), the creation of patrol corridors, the enhancement of self-protection measures, and the convening of a piracy Contact Group to coordinate joint action.[371] As naval forces began to capture presumed pirates, it became necessary to devise a plan for their detention, repatriation, and/or prosecution to avoid the prospect of an endless game of catch-and-release. The most obvious states, however, were not always in a position to take the lead on prosecutions for a range of articulated and tacit reasons: the legal complexities of such cases, a lack of domestic judicial capacity or transfer authority, the cost, an inadequate legal framework, the lack of political will, and evidentiary

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Chapter VII. Specifically, MONUSCO is required to "[s]upport national and international efforts to bring perpetrators to justice, including by establishing Prosecution Support Cells to assist the [DRC Armed Forces ("FARDC")] military justice authorities in prosecuting persons arrested by the FARDC." *See* S.C. Res. 1925, ¶ 12(d) 1925 (May 28, 2010), http://monusco.unmissions.org/Default.aspx?tabid=10806&language=en-US. Upon its renewal, MONUSCO was further mandated to support the Congolese authorities in holding perpetrators of war crimes and crimes against humanity accountable. *See* S.C. Res. 2053 (June 27, 2012), http://www.refworld.org/docid/505084b42.html.

366. S.C. Res. 1925, *supra* note 365, at pmbl.

367. SOFIA CANDEIAS ET. AL., THE ACCOUNTABILITY LANDSCAPE IN EASTERN DRC: ANALYSIS OF THE NATIONAL LEGISLATIVE AND JUDICIAL RESPONSE TO INTERNATIONAL CRIMES (2009-2014) 27 (International Center for Transnational Justice ed., 2015), https://www.ictj.org/sites/default/files/ICTJ-Report-DRC-Accountability-Landscape-2015.pdf.

368. *Id.* at 26.

369. *See* ALEX J. BELLAMY & PAUL D. WILLIAMS, UNDERSTANDING PEACEKEEPING 173 (2012) (noting the "holy trinity" of peacekeeping: consent, impartiality and the minimum use of force).

370. *See generally* Current Projects, UNODC, https://www.unodc.org/easternafrica/en/ongoing-projects/maritime-crime-programme.html (last visited Nov. 8, 2015).

371. *See generally* S.C. Res. 1851, *supra* note 107.

challenges.[372] As it turned out, many states did not have modern piracy provisions in their penal codes; for example, Denmark released some pirates on a Somali beach because it lacked the legal framework to prosecute them and did not want to convey them to Somali authorities for fear that they would be mistreated.[373] Other states have been reluctant to allow potential pirates on their territories out of concern that detainees will either make claims for asylum or invoke the principle of *non-refoulement* to prevent their repatriation post-trial given the continued unrest in Somalia.[374]

The international community, after considering a number of options, finally charged the Vienna-based U.N. Office on Drugs and Crime ("UNODC") with taking the lead on facilitating international coordination around domestic prosecutions in the courts of implicated states based on an ethos of shared responsibility and various principles of jurisdiction, including universal jurisdiction. Somalia has consented to these prosecutions.[375] In the piracy context, UNODC's role is primarily a capacity-building one, aimed at enhancing the domestic legal systems of countries most proximate to the affected region.[376] It has worked with Somalia to build its prison system and assisted with administrative tasks, forensics, and prison transfers.[377] Similarly, the UNDP provides training, legal reform advice, and new equipment and physical infrastructure to prosecuting states.[378] In 2009, states of the region adopted a non-binding Djibouti Code of Conduct under the auspices of the IMO concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden to facilitate cooperation and information sharing aimed at combatting and prosecuting acts of piracy.[379] In addition, with international support, the Seychelles opened a Regional Anti-Piracy Prosecution and Intelligence Coordination Centre ("RAPPICC"), under the auspices of the Indian Ocean Commission, to track piracy financing and develop prosecutable cases.[380] The Security Council, which explored but ultimately rejected the idea of

372. *See generally* Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUROP. J. INT'L L. 399 (2009).

373. *Pirates Released on Beach*, POLITIKEN (Sept. 24, 2008).

374. Treves, *supra* note 372, at 408-09.

375. *See* S.C. Res. 2184, at art. 14 (Nov. 12, 2014) (noting Somalian consent).

376. *UNODC Maritime Piracy Programme*, U.N. OFF. ON DRUGS AND CRIME, https://www.unodc.org/easternafrica/en/piracy/index.html (last visited Nov. 8, 2015).

377. *See generally* U.N. Off. on Drugs and Crime, *In Depth Evaluation of the Counter Piracy Programme* (June 2013), https://www.unodc.org/documents/evaluation/indepth-evaluations/2013/CPP_Evaluation_Report_-_Final_incl_Management_Response_27NOV2013.pdf.

378. *United Nations Development Program (UNDP)*, OCEANS BEYOND PIRACY, http://oceansbeyondpiracy.org/matrix/united-nations-development-programme-undp (last visited Nov. 8, 2015).

379. S.C. Res. 1897, at pmbl. (Nov. 30, 2009); S.C. Res. 1950, at pmbl. (Nov. 23, 2010); *see generally* International Maritime Organization, *Djibouti Code of Conduct*, http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_1st_edition.pdf.

380. *RAPPICC Open for Business*, REGIONAL FUSION & LAW ENFORCEMENT CENTER FOR SAFETY & SECURITY AT SEA, http://www.rappicc.sc/page13.html (last visited Nov. 8, 2015).

an international piracy court, endorsed UNODC's and related efforts.[381]

To facilitate prosecutions, the European Union has been empowered to conduct military operations in support of Security Council resolutions and consistent with UNCLOS's terms.[382] This includes the power to transfer of suspects to places where they can be prosecuted per Article 12,[383] subject to the ability of the destination court to ensure the suspects' human rights.[384] Forum states have been encouraged to amend their laws to harmonize their penal codes with the relevant provisions of UNCLOS and to allow for the exercise of universal jurisdiction over the crime of piracy.[385] Although the exercise of universal jurisdiction over piracy is optional under UNCLOS, the SUA Convention contains an *aut dedere aut judicare* provision that mandates either the prosecution or extradition of captured suspects.[386] That said, some states have restrained their

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381. S.C. Res. 2184, *supra* note 375, at arts. 18-19. *See supra* text accompanying notes 110-116.

382. Council Joint Action 2008/851/CFSP of 10 Nov. 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, 2008 O.J (l 301/33).

383. Article 12 "Transfer of Persons Arrested and Detained with a View to their Prosecution" reads:

> On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred: to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or if this State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.

Id. at art. 12(1).

384. The EU Joint Action stresses the human rights implications of such transfers:

> no person . . . may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law of human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.

Id. at art. 12(2).

385. UNODC Maritime Crime Program, http://www.unodc.org/unodc/en/piracy/indian-ocean-division.html; Lang Report, *supra* note 304, at 21-22; S.C. Res. 1918 (Apr. 27, 2010) (calling on all states to criminalize piracy).

386. *Compare* UNCLOS, *supra* note 114, at art. 105 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith") *with* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Activities (SUA) art. 6(4), Mar. 10, 1988, 1678 U.N.T.S. 222, 227 ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences . . . where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with" the territorial or nationality principles of jurisdiction). *But see* Tamsin Page, *Piracy and Universal Jurisdiction*, 12 MACQUARIE L. J. 131, 148 (2013) (arguing that piracy is not subject to universal jurisdiction but rather of concurrent municipal jurisdiction).

jurisdictional reach in order to avoid becoming a "dumping ground" for captured pirates.[387] Domestic prosecutions have been hampered by the lack of extradition agreements between the nationality, littoral, and apprehending states; accordingly, the United States, the European Union, and others have promulgated a web of transfer agreements with Kenya and other regional states to facilitate the transfer of piracy suspects for trial.[388] This set of initiatives has proven to be quite successful in terms of the number of prosecutions underway. By the end of 2014, more than 300 individuals had been prosecuted, with the vast majority of trials ending in conviction.[389] The preponderance of these defendants are rank-and-file pirates, who are drawn from impoverished communities offering little in way of equally lucrative vocational alternatives.[390] These prosecutions are thus not necessarily reaching the individuals "most responsible" for acts of piracy, given that the *financiers* and piracy king-pins likely enjoy sanctuary on Somali territory.[391] Enabling the successful prosecution of these more senior figures is important on fairness grounds and will also make real the possibility of restitution, given the staggering economic cost of acts of piracy.

UNODC also serves as the guardian of the U.N. Convention Against Transnational Organized Crime,[392] which contains provisions on international

387. For example, Section 66(3) of the Tanzanian Penal Code provides that unless a pirate ship is registered in Tanzania, "no prosecution shall be commenced unless there is a special arrangement between the arresting state or agency and Tanzania." Likewise, pursuant to Section 66(4), the Director of Public Prosecutions must consent to any piracy prosecution. *See* Roger L. Phillips, *Tanzania, A Case Study*, *COMMUNIS HOSTIS OMNIUM* (Mar. 3, 2011), http://piracy-law.com/2011/03/03/tanzania-%E2%80%93-a-case-study/.

388. *See* Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy, *supra* note 110, ¶ 23. *See* Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer, 2011 O.J. (l. 254). Kenya originally signed agreements with the EU, the United States, and other states to accept suspected pirates for prosecution. *See* Council Decision 2009/293/CFSP of 26 February 2009 concerning the Exchange of letters between the European Union and the government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, 2009 O.J. (l. 79). Kenya suspended these agreements in 2010—citing security concerns, insufficient international support, repatriation issues, and the imperative of greater burden-sharing—but reinstated them after receiving additional funding from the UNODC. Beck Pemberton, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AS A HIGH COURT OF PIRACY 9, ONE EARTH FUTURE FOUNDATION WORKING PAPER (2010) at 18-19 (suggesting advisory role for ITLOS in domestic prosecutions).

389. UNODC Maritime Crime Program, Annual Report 2014 (2014), http://www.unodc.org/documents/easternafrica//MCP_Brochure_December_2014_wv_6_1.pdf.

390. Paul R. Williams & Lowry Pressly, *Maritime Piracy: A Sustainable Global Solution*, 46 CASE W. RESERVE J. INT'L L. 177, 196, 197 (2013).

391. Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy, *supra* note 110, at Annex II, ¶ 8.

392. U.N. Convention Against Transnational Organized Crime, 2225 U.N.T.S. 209 (2000), http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf [hereinafter UNTOC]. The treaty also notes the linkages between organized crime and terrorism. The

cooperation around transnational crimes[393] (including articles effectuating extraditions, prisoner transfers, and other forms of mutual legal assistance). The concept of transnational crime is historically (and narrowly) construed to cover crimes of trafficking (in illicit goods, weapons, drugs, and people), organized crime, money laundering, corruption, and terrorism, but not necessarily the atrocity crimes that are normally subject to prosecution before international and hybrid tribunals. Indeed, a 2012-13 initiative by the Netherlands to draft a multilateral mutual legal assistance protocol to UNTOC dedicated to atrocity crimes under UNODC auspices generated resistance amongst delegates on the grounds that it was outside the organization's core historical mandate.[394] There is nothing in UNTOC, however, that would limit its utility in the international criminal law context.[395] The international community is continuing to explore the degree to which the UNTOC framework could be deployed to facilitate the provision of mutual legal assistance around atrocity crimes prosecutions.

I. Domestic Special Chambers

A number of states have established (or contemplated establishing) special courts or specialized chambers to prosecute international crimes, often with minimal or no direct involvement by the international community except, in many cases, as a critic of the process. Examples include Indonesia, Bangladesh, Kenya,[396] Uganda,[397] and Darfur.[398] For example, as part of the process

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Convention's Protocols address trafficking in persons, smuggling of migrants, and the illicit manufacturing and trafficking in firearms.

393. Transnational crimes are generally defined as those criminal actions that transcend international borders and breach the laws of several states. *See id.* at art. 3; Neil Boister, *Transnational Criminal Law?*, 14 EUROP. J. INT'L L. 953 (2003). Multiple "suppression conventions" are dedicated to facilitating the prosecution of various transnational crimes within the domestic courts of treaty parties.

394. *See* Ward Ferdinandusse, *Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?*, 18 ASIL INSIGHT (2014). The proposal sought to operationalize the imperative within General Assembly Resolution 3074 calling for international cooperation in the detection, arrest, extradition, and punishment of persons accused of war crimes and crimes against humanity. *See* Principles of Int'l Co-Operation in the Detection, Arrest, Extradition & Punishment of Persons Guilty of War Crimes & Crimes Against Humanity, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (30A) at 78, U.N. Doc. A/9030/Add.1 (1973).

395. The treaty applies to transnational "serious crime[s]" (defined in terms of the length of the associated penalty) involving "organized criminal group[s]." UNTOC, *supra* note 392, at arts. 1-2.

396. Kenyans for Peace with Truth & Justice, *A Real Option for Justice? The Int'l Crimes Div. of the High Court of Kenya* (July 2014), http://dspace.africaportal.org/jspui/bitstream/123456789/34936/1/a_real_option_for_justice_the_international_crimes_division.pdf. Proposals to establish an International Crimes Division ("ICD") emerged following the post-election violence in 2007-8, but they have yet to come to fruition.

397. The Ugandan ICD is a product of the Juba peace talks aimed at ending hostilities between Uganda and the Lord's Resistance Army and the 2007 Agreement on Accountability and Reconciliation that was executed following the negotiations. So far, the ICD has pursued a handful of LRA cases, which have been complicated by the existence of an amnesty law. *See* Kasande Sarah Kihika & Meritxell Regué, *Pursuing Accountability for Serious Crimes in Uganda's Courts* (Jan. 2015), https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-Kwoyelo-2015.pdf.

398. PanPress, *Sudan Backs AU Draft Resolution on Darfur War Crime Trials* (Feb 1, 2009, 4:38

establishing the Special Panels in Timor-Leste, Indonesia adamantly rejected proposals for an international tribunal, arguing that any crimes committed by Indonesian citizens within Timor-Leste were within the exclusive jurisdiction of Indonesian courts.[399] In an effort to stave off international efforts in this regard,[400] Indonesia created an Ad Hoc Human Rights Court on Timor-Leste in Jakarta, ostensibly to prosecute Indonesian citizens responsible for violence in newly-independent Timor-Leste.[401] International observers, including the High Commissioner for Human Rights and a U.N. Commission of Experts, were highly critical of the process,[402] which generated little in the way of genuine accountability (only a handful of individuals were prosecuted and most defendants were acquitted at trial or on appeal except those of Timorese nationality).[403] By virtue of statutory limitations, the jurisdiction of the Ad Hoc Courts extended only to individuals who committed crimes outside of Indonesia and in designated Timorese districts during the months of April and September 1999; these limitations helped to mask patterns of violence.[404] The acquittals ran counter to the observations contained in a comprehensive report generated by the Indonesian Commission of Inquiry into Human Rights Violations in East Timor ("KPP HAM"), which concluded that the violence in Timor-Leste was systematic and orchestrated by the Indonesian military working through locally-recruited militia to give the impression that the violence was purely internal.[405] Although the Commission of Experts called for Indonesia to retain a team of international legal

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PM), http://www.panapress.com/Sudan-backs-AU-draft-resolution-on-Darfur-war-crime-trials—12-522244-20-lang2-index.html.

399. *See generally* Mark Cammack, *The Indonesian Human Rights Court*, *in* NEW COURTS IN ASIA 178 (Andrew Harding & Penelope Nicholson, eds. 2010); *see* text accompanying note 145.

400. HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR: INDONESIA'S SHAM PROSECUTIONS, THE NEED TO STRENGTHEN THE TRIAL PROCESS IN EAST TIMOR, AND THE IMPERATIVE OF U.N. ACTION (Dec. 20, 2002), https://www.hrw.org/report/2002/12/20/justice-denied-east-timor/indonesias-sham-prosecutions-need-strengthen-trial [hereinafter JUSTICE DENIED].

401. *See* PENGADILAN HAK ASASI MANUSIA [Court of Human Rights], Law No. 26 of 2000 (Indon.), http://www.setneg.go.id/components/com_perundangan/docviewer.php?id=235&filename=UU_no_26_th_2000.pdf.; Amnesty Int'l, Commentary, *Amnesty International's Comments on the Law on Human Rights Courts (Law No. 26/2000)*, (Feb. 9, 2001), http://www.refworld.org/docid/3c29def1a.html.

402. Comm'n on Human Rights, *Report of the United Nations High Comm'r for Human Rights on the situation of human rights in Timor-Leste*, U.N. Doc. E/CN.4/2004/107, at 14-15 (Jan. 19, 2004); Timor-Leste COE Report, *supra* note 147, at 6 (describing the process as "manifestly inadequate"); *see also* Fergus Kerrigan & Paul Dalton, *Human Rights Courts & Other Mechanisms to Combat Impunity in Indonesia*, *in* 5(2) ARTICLE 2 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 13 (Asian Legal Resource Centre ed., 2006), http://www.article2.org/mainfile.php/0502/225/.

403. *See* DAVID COHEN, INTENDED TO FAIL: THE TRIALS BEFORE THE AD HOC HUMAN RIGHTS COURT IN JAKARTA (Int'l Center for Transitional Justice ed., 2003); Institute For Policy Research and Advocacy (ELSAM), *Final Report: The Failure of Leipzig Repeated in Jakarta*, http://wcsc.berkeley.edu/wp-content/uploads/ET-ELSAM-Reports/ELSAM-Final-Report.pdf.

404. JUSTICE DENIED, *supra* note 400.

405. *See* Komnas HAM, *Report of the Indonesian Comm'n for Human Rights Violations in East Timor (KPP-HAM)* (Jan. 31, 2000), http://www.etan.org/news/2000a/3exec.htm; Timor-Leste COE Report, *supra* note 147, at 5 (describing the KPP HAM process as "credible and objective").

experts to advise and improve upon the process and urged the Security Council to supervise the proceedings or convene an international tribunal dedicated to the post-referendum violence,[406] these recommendations were not taken up by either party.

The Bangladesh International Crimes Tribunal ("BICT") is "international" in name and subject matter only. Tracing its roots to the War of Liberation that gave rise to modern-day Bangladesh, the BICT is dedicated to prosecuting alleged collaborators with the Pakistani Army (then West Pakistan) for atrocities committed when East Pakistan (now Bangladesh) sought to secede in March of 1971.[407] A creature of domestic law with little international involvement, the BICT is asserting jurisdiction over genocide, crimes against humanity, war crimes, and "other crimes under international law" pursuant to a law that dates from the independence period.[408] The BICT was inspired by principled objectives that have been betrayed by implementation. In the postwar period, Sheikh Rahman, the primary political force behind the independence movement, quite presciently contemplated local prosecutions of East Pakistani citizens and an international tribunal to prosecute foreign prisoners of war.[409] The Bangladesh Collaborators (Special Tribunals) Order came into force in 1972 by Presidential Decree.[410] The next year, Parliament promulgated the International Crimes (Tribunals) Act "to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law."[411] This legislation, which mostly incorporates the Nuremberg/Tokyo definitions of the crimes and benefited from the assistance of international law experts, was quite forward leaning for its time in terms of substantive law. By today's sensibilities, however, the legislation is outdated and does not reflect recent developments in the law occasioned by the work of the *ad hoc* criminal tribunals.[412] In any case, the 1975 assassination of Sheikh Rahman ultimately scuttled these efforts.[413] It was thus left to Rahman's daughter—Prime Minister Sheikh Hasina Wajed who came to power in 2008 on a platform that included promises of accountability for the rape, murder, and mayhem committed during the War of Liberation—to complete

406. Timor-Leste COE Report, *supra* note 147, at 7.

407. *See generally* Beth Van Schaack, *The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad*, INTLAWGRRLS (Oct. 8, 2014), http://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/; Steven Kay, *Bangladesh War Crime Tribunal: A Wolf in Sheep's Clothing?*, http://www.internationallawbureau.com/blog/wp-content/uploads/2010/11/Bangladesh-International-War-Crimes-Tribunal.pdf.

408. The International Crimes (Tribunals) Act 1973 (Act No. XIX) art. 3, (Bangl.) http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 [hereinafter 1973 Act].

409. *See generally* Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*, 21(2) CRIM. L. FOR. 191 (2010).

410. Collaborators (Special Tribunal) Order, *President's Order No. 8 of 1972 (as amended February 1972)*, *in* NEIL J. KRITZ, TRANSITIONAL JUSTICE: LAWS, RULINGS, AND REPORTS 540 (1995).

411. 1973 Act, *supra* note 408.

412. *See* Morris Davis, *Bangladesh War Crimes Tribunal: A Near-Justice Experience*, CRIMES OF WAR, http://www.crimesofwar.org/commentary/bangladesh-war-crimes-tribunal-a-near-justice-experience/.

413. Linton, *supra* note 409, at 17.

this aspect of her father's legacy.[414]

The international community initially supported this effort at historical justice, given the longstanding impunity stemming from the war. Human Rights Watch, for example, called the trials an important and long overdue step to achieve justice for victims.[415] The UNDP among others offered assistance, and the European Union passed resolutions praising the trials.[416] However, this support soon soured when it was clear that the process had been corrupted and would be more political than legal. Today, the international community is engaged largely as a critic, endeavoring to bring the proceedings closer in line with international standards,[417] particularly given that the only individuals being prosecuted are associated with opposition parties.

J. Repurpose An Existing Institution

The idea of amending the constitutive instruments of an existing institution to enable, or expand the ability to hold, criminal trials—as seen with respect to the MICT and the proposed criminal chamber of the ACJHR—has arisen in other circumstances. The International Tribunal for the Law of the Sea ("ITLOS"), located in Hamburg, Germany, has no criminal jurisdiction; it can only hear cases involving disputes concerning the interpretation or application of treaties that confer jurisdiction on it, including 1958 Geneva Convention on the High Seas[418] and its successor, the 1982 UNCLOS.[419] When it comes to criminal activity on the seas, UNCLOS envisions member states undertaking domestic prosecutions under varying jurisdictional principles. For example, cases involving collisions are, per Article 97, to proceed before the judicial or administrative authorities "either of the flag State or of the State of which such person is a national."[420] Acts of piracy may be prosecuted pursuant to the principle of universal jurisdiction.[421] That said, ITLOS has heard cases touching on criminal behavior, such as illegal fishing.[422]

As the threat of piracy re-emerged in 2007 in the Indian Ocean, the Gulf of Aden, and elsewhere, there was talk of vesting ITLOS with criminal jurisdiction by amending UNCLOS, and the ITLOS Statute annexed thereto; promulgating a new

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414. CAITLIN REIGER, *FIGHTING PAST IMPUNITY IN BANGLADESH: A NAT. TRIBUNAL FOR THE CRIMES OF 1971* 3 (Int'l Center for Transitional Justice ed., 2010).

415. *Bangladesh: Unique Opportunity for Justice for 1971 Atrocities,* HUMAN RIGHTS WATCH (May 19, 2011), http://www.hrw.org/news/2011/05/19/bangladesh-unique-opportunity-justice-1971-atrocities.

416. Jacek Włosowicz, *International Support for Bangladesh War Crimes Tribunal*, EP TODAY (Feb. 8, 2014), http://eptoday.com/international-support-bangladesh-war-crimes-tribunal/.

417. *See* Stephen J. Rapp, *Press Roundtable, Dhaka, Bangladesh* (Aug. 5, 2014), http://photos.state.gov/libraries/bangladesh/621750/Speeches_Remarks_2014/Amb_Rapp_Press_Roundtable_Aug_5_2014.pdf.

418. Geneva Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

419. *See* UNCLOS, *supra* note 114.

420. *Id.* at art. 97.

421. *Id.* at art. 105.

422. The "Monte Confurco" Case (*Seychelles v. France*), Case No. 6, Judgment of Dec. 18, 2000, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/Judgment.18.12.00.E.pdf.

protocol; or, alternatively, creating a special chamber with penal jurisdiction.[423] This proposal had the benefit of utilizing a pre-existing institution with some competency in the law of the sea, although not necessarily with respect to piracy *per se*.[424] While this solution seemed to promise certain institutional efficiencies, at the same time, it would have required a rather comprehensive overhaul of the ITLOS's rules of procedure to incorporate penal procedures and all the due process protections expected in a criminal proceeding.[425] Because the tribunal would be exercising a form of international universal jurisdiction, it should not have mattered which states joined the regime in terms of flag-ship states, littoral nations, the nationality state (Somalia in most cases), or cargo owners. Ultimately, this proposal was not pursued. Instead, the international community has supported domestic trials in littoral states, as discussed above.[426]

K. Conclusion

The above reveals that international and internationalized tribunals can be created a number of different ways. Truly international tribunals enjoying the coercive powers that come with a Chapter VII provenance have been rare. Rather, more recent justice efforts have been more consensual in nature and more domestic in format if plotted along a hybridity continuum. As the remainder of this paper reveals, the origins of a particular justice mechanism often dictate—or limit the degree of creativity that can be employed with respect to—other fundamental institutional characteristics, including its structure, staffing patterns, venue, jurisdictional competencies and limitations, rules of procedure, and funding options.

III. STRUCTURE AND THE RELATIONSHIP TO OTHER COURTS WITH CONCURRENT JURISDICTION

The architects of hybrid justice must make a number of decisions about the structure of any justice mechanism in terms of organs of the court and the mix of chambers of first instance and of appeal. Those institutions that are embedded within the domestic legal system often inherit elements of the existing underlying system, subject to occasional adjustments. So, for example, the ECCC contains many civil law features, and the IHT reflected standard components of the ordinary

423. *See* Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy, *supra* note 110, at 106; Pemberton, *supra* note 388, at 17-18.

424. *See* Gentian Zyberi, *Is There a Need to Establish New International Courts?*, INT'L LAW OBSERVER (May 20, 2010, 7:43 PM), http://www.internationallawobserver.eu/2010/05/20/is-there-a-need-to-establish-new-international-courts/ ("establishing new courts should be approached with restraint. Before committing to such a huge step a feasibility study needs to be prepared and options explored whether an already existing court can eventually exercise jurisdiction for that specific issue or be bestowed jurisdiction over it.").

425. UNCLOS, *supra* note 114, at Annex VI, art. 16.

426. *See supra* text accompanying notes 375-391.

Iraqi courts, including a role for investigating judges.[427] By contrast, autonomous *ad hoc* tribunals that enjoy a separate legal personality under international law have been the subject of greater structural and procedural innovation. Thus, despite the fact that the former Yugoslavia and Rwanda are civil law countries, the ICTY/R were originally modeled very much on the common law adversarial tradition. In addition to these decisions about structure, any hybrid or internationalized entity will need to be governed by rules setting forth its relationship with the "ordinary courts" of the target state, drawing on concepts of primacy, subsidiarity, and complementarity.

One aspect of the Nuremberg and Tokyo tribunals that has not stood the test of time is their lack of a true appellate body to effectuate the defendants' right to a meaningful appeal. In theory, the Allied Control Council sitting in Berlin supervised the IMT,[428] although all pleas for clemency or mitigation of sentences were summarily rejected.[429] In Tokyo, General MacArthur was empowered to execute, and potentially alter, sentences ordered by the Tokyo Tribunal, with input from U.S. allies in the region.[430] He never exercised this power.[431] Several Japanese defendants attempted to appeal their verdicts to the U.S. Supreme Court, which ruled that it lacked jurisdiction because the Tokyo Tribunal was not a United States court.[432] This lack of an automatic right to a judicial appeal is deeply problematic by today's human rights due process standards.[433] Accordingly, all the contemporary international and hybrid tribunals offer defendants a right to appeal.[434] Most international/hybrid tribunals—including the SCSL and the

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427. IHT Statute, *supra* note 328, at art. 8.

428. Article 29 of the IMT Charter read:

> In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

Charter of the Int'l Military Tribunal art. 29, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter].

429. DANIEL J. LANAHAM, JUSTICE FOR ALL: LEGENDARY TRIALS FOR THE 20TH CENTURY 106 (2006); NORBERT EHRENFREUND, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY 116 (2007).

430. Article 17 of the Tokyo Charter read:

> The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

Tokyo Charter, *supra* note 59, at art. 17. *See* Kaufman, *supra* note 59, at 755, 758.

431. EHRENFREUND, *supra* note 429.

432. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1949).

433. *See* ICCPR, *supra* note 222, at art. 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law").

434. *See generally* Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L. J. 111 (2002).

STL—have followed the lead of the ICTY/R when it comes to having a two-tiered appellate system. The original model of the ECCC envisaged three layers of appeal consistent with the Cambodian court system, but the final constitutive documents reduced this to two, but also established a Pre-Trial Chamber.[435] Although the right to an appeal is now well established under international human rights law, some lingering doctrinal controversy surrounds the question of when the prosecution should be entitled to appeal an acquittal[436] and whether the Appeals Chamber should enter convictions or increase sentences on appeal.[437]

In terms of other structural elements, the two *ad hocs* were unique in that they originally shared a Chief Prosecutor and Appeals Chamber.[438] Although this overlap promised efficiencies and opportunities for jurisprudential coherence, complaints emerged that the original Chief Prosecutors spent more time and energy on their ICTY docket.[439] These concerns and the emergence of a row with Rwanda over whether members of the Tutsi-led Rwandan Patriotic Front should be prosecuted before the ICTR led the Security Council in 2003 to split the prosecutorial function and appoint a Chief Prosecutor dedicated to the ICTR.[440] The new Prosecutor subsequently stayed focused on Hutu Power crimes.[441] The joint Appeals Chamber remained in place, however, which helped to harmonize the jurisprudence emerging from the two tribunals but may have contributed to less robust genocide prosecutions in the ICTY given that the crimes in the former Yugoslavia were of a lesser magnitude in comparison with Rwanda. As the SCSL was under construction, the Security Council in UNSCR 1315 suggested that appeals from Sierra Leone could also go to the joint ICTY/R Appeals Chamber, but this proposal was not pursued and the SCSL had its own appellate body. The introduction of a Pre-Trial Chamber ("PTC") to manage preliminary legal issues (confirmation of indictments, issuance of warrants, etc.)[442] is an innovation found

435. The WCC in Bosnia-Herzegovina have a three-tiered review process. Rulings of the court of first instance (a three-judge panel) can be appealed to an appellate division. Some issues, including claims under the European Convention on Human Rights, can then be heard by the Constitutional Court. *See* Schwendiman, *supra* note 337, at 278.

436. *See* ICTR Statute, *supra* note 2; ICTY Statute, *supra* note 64, at Annex, art. 25 (allowing the prosecution to appeal on grounds of an error of law or an error of fact that has occasioned "a miscarriage of justice"). *See generally* Magali Maystre, *Right to Appeal, in* INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS 192 (Linda Carter & Fausto Pocar, eds., 2013).

437. *Prosecutor v. Mrkšić & Šljivančanin*, Case No. IT-95-13/1-A, Partially Dissenting Opinion of Judge Pocar (May 5, 2009) (reasoning that by augmenting a verdict, an Appeals Chamber violates the defendant's right to an appeal).

438. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS & THE STRUGGLE FOR STATE COOPERATION 164 (2008).

439. *Id.*

440. S.C. Res. 1505 (Sept. 4, 2003) (appointing Hassan Jallow as the Chief Prosecutor of the ICTR).

441. Katherine Iliopoulos, *ICTR Accused of One-Sided Justice*, CRIMES OF WAR, http://www.crimesofwar.org/commentary/ictr-accused-of-one-sided-justice/.

442. STL Statute, *supra* note 95, at art. 18. The judges of the ICTY later amended their RPE to introduce Rule 65ter and the concept of the Pre-Trial Judge. *See* ICTY Plenary Session, *Amendment to*

in the STL as well as the Rome Statute in Articles 57-58.[443] As at the ICC, the STL Trial Chamber has no appellate role vis-à-vis the PTC; appeals from PTC rulings go directly to the Appeals Chamber.[444]

The organograms of the SCSL and STL are unique in that they include an independent Defense Office as a formal organ of the tribunal.[445] The STL Defence Office is responsible for maintaining a list of qualified counsel, experts, and investigators; providing research and operational support to defense counsel; administering a system of legal aid and assigning counsel for *in absentia* proceedings; and protecting the rights of the accused at an institutional level (e.g., with respect to amendments to the RPE).[446] By contrast, most other tribunals have only a skeletal defense coordination office within the Registry.[447] These entities maintained lists of qualified defense counsel amenable to representing indigent accused but did not include competent duty counsel.[448] In practice, most defendants before international criminal courts received *pro bono* counsel, even those who would not be considered impoverished by domestic standards.[449] This system has been marred by fee-splitting and over-charging allegations,[450] which have been addressed with fee caps, the shift from an hourly to a flat fee system,

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the Rules of Procedure and Evidence (Dec. 17, 2003), http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp46-e/.

443. The ICC also adopted Rule 132bis authorizing a single-judge practice for efficiency, although there are concerns that the new rule runs counter to the Statute, which envisions a three-judge Trial Chamber. Gilbert Bitti, *Article 21 & the Hierarchy of Sources of Law before the ICC*, *in* CARSTEN STAHN, THE LAW AND PRACTICE OF THE INTERNATIONAL CRIM. COURT 411, 416 (2015).

444. STL Appeal Chamber, http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/chambers/appeals-chamber.

445. This entity is statutory before the STL, but was created through the RPE at the SCSL. *See* STL Statute, *supra* note 95, at arts. 4, 13; RULES OF PROCEDURE AND EVIDENCE, Special Court for Sierra Leone, at Rule 35, https://www1.umn.edu/humanrts/instree/SCSL/Rules-of-proced-SCSL.pdf. By way of comparison, Article 11 of the ICTY Statute lists the Tribunal's organs as comprising the Chambers, Prosecutor, and Registry (servicing both the Chambers and the Prosecutor).

446. *See* SPECIAL TRIBUNAL FOR LEBANON, *Defence Office*, http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence/defence-office.

447. UNTAET failed to establish a specialized defense office for the Special Panels, leaving the nascent public defenders' office responsible for defending individuals accused of serious international crimes. International mentors and NGO secondees eventually provided some assistance. In 2002, the United Nations Mission of Support in East Timor ("UNMISET"), the successor mission established by the Security Council after Timor-Leste achieved independence in 2002, finally established a Defence Lawyers Unit with international staff, although this entity remained chronically underfunded. *See* Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 26-27; Timor-Leste COE Report, *supra* note 147, at 4, 36.

448. *See generally* Richard J. Wilson, *Special Issues Pertaining to International and War Crimes Tribunals*, *in* Nat. Legal Aid & Def. Ass'n, INT'L LEGAL AID & DEF. SYS. DEV. MANUAL 184 (2010), http://www.nlada.org/Defender/Defender_Publications/International_Manual_2010.

449. Mark Ellis, *The Evolution of Defense Counsel Appearing before International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 961 (2003) (noting that most defendants before the ICTY received appointed counsel).

450. *See* Rep. of the Office of Internal Oversight Services on the Investigation Into Possible Fee-Splitting Arrangements Between Defence Counsel and Indigent Detainees at the ICTR and ICTY, U.N. Doc. A/55/759 (Feb. 1, 2001).

and codes of professional conduct.[451] Before the ICC, more well-heeled defendants—who at one time included Uhuru Kenyatta, the President of Kenya and one of the continent's richest men—have been able to hire expensive private practitioners to represent them.[452]

The inclusion of an entity dedicated to the defense—with institutional memory, allocated resources, and clout—offers a counterweight to the power of the prosecution. It is meant to rectify equality of arms concerns generated by the fact that prosecutors enjoy a stable source of funding and the privilege of being repeat players before the tribunal in question.[453] It also responds to potential conflicts of interests (real or perceived) between the Registry and defense counsel given that the Registry's mandate to ensure efficient judicial proceedings may run counter to the duty of zealous representation by counsel. That said, whether the Defense Section is organizationally part of the registry or an organ of the court in its own right may not make much difference so long as defense counsel are sufficiently resourced and can act independently.

The ECCC's structure is unique and, in certain notable respects, not worthy of emulation. First, and not inherently problematic, the tribunal is premised on a civil law model whereby independent and impartial investigations, involving the accumulation of inculpatory and exculpatory evidence, are conducted by Investigating Judges upon the request of the Prosecution in its Introductory Submission.[454] The Investigating Judges issue a Closing Order (analogous to an indictment); the prosecution then decides which charges to pursue at trial. Civil law trials are normally a summary affair based on the dossiers compiled during the long investigative phase; atrocity crime trials, by contrast, are historically more complex in part because they inevitably involve huge and varied crime bases, but also because they are expected to serve an expressive and pedagogic function.[455] Despite these civil law elements, trials before the ECCC have modeled the common law and been elaborate and—at times—repetitive affairs.[456] This was true even with respect to the first defendant, who effectively pled guilty to the charges against him.[457]

Second, and what has been more problematic, every key position at the ECCC

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451. HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE: ACCOMPLISHMENTS, SHORTCOMINGS, AND NEEDED SUPPORT 7 (2004), https://www.hrw.org/sites/default/files/reports/sierraleone0904.pdf.

452. *See generally* Karim A. A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before The International Criminal Court*, 76 LAW & CONTEMPORARY PROBLEMS 191 (2013).

453. Kevin Jon Heller, *(In)equality of Arms at the International Tribunals*, OPINIO JURIS (Feb. 7, 2006), http://lawofnations.blogspot.com/2006/02/inequality-of-arms-at-international.html.

454. The Timor-Leste Special Panels also featured Investigating Judges, but they were somewhat subordinate to the Prosecutor and charged with ensuring the rights of defendants and alleged victims were respected. UNTAET Reg. No. 2000/30 on Transitional Rules of Criminal Procedure, §§ 7.1, 9.6, UNTAET REG/2000/30 (Sept. 25, 2000).

455. Mirjan Damaška, *What Is the Point of International Criminal Justice*, 83 CHI.-KENT. L. REV. 329, 334, 335 (2008).

456. Ciorciari & Heindel, *supra* note 25, at 377-78.

457. *Id.* at 375.

is shared by a Cambodian and an international appointee. So, there are two Co-Investigating Judges ("CIJs"), Co-Prosecutors ("CPs"), Co-Civil Party Representatives, etc.; even the Office of Administration is bifurcated into two distinct components that service the national and international "sides" of the ECCC. Coordination and communication problems abound. Third, unlike the other *ad hoc* tribunals, the ECCC also includes a Pre-Trial Chamber that is supposed to resolve conflicts between the CIJs and CPs during the investigation stage and hear "appeals" against CIJ orders.[458] The PTC's rulings, however, are not binding beyond of the decision at issue or subject to appeal; as a result, the Trial and Appeal Chambers have considered many of the same issues *de novo*, albeit following concentrated consideration by the PTC.[459] In principle, this arrangement respects the prevailing legal architecture more than a common-law style process would, but in practice, it has resulted in repetitive proceedings at every step along the way.[460]

Cambodian negotiators also succeeded in ensuring that each Chamber has a majority of Cambodian judges, although a super-majority of trial/appellate judges is necessary to render any important ruling.[461] As such, the tribunal is considered only as strong as its weakest international judge. A longstanding dispute between the CPs and CIJs over whether to move forward with charges in Cases 003 and 004 led to pointed criticism that the government was interfering in the judicial process and the Cambodian personnel were failing to fulfill their mandate.[462] Multiple international CIJs have resigned amidst complaints that they had either been "captured" by the Cambodian side or prevented from functioning independently.[463] At the moment, and although there were some joint rulings, these cases are proceeding without the full blessing of the Cambodian CIJ or CP because the PTC did not achieve the super-majority required to halt the investigation.[464] Wisely, no other hybrid court has adopted this strict hybrid formula for staffing.

The EACs in Senegal are minimally international: they are staffed by a sprinkling of international judges (who do not comprise a majority) applying international criminal law and domestic procedural law.[465] The EACs exist within

458. ECCC Statute, *supra* note 190, at 7-8.

459. Ciorciari & Heindel, *supra* note 25, at 378.

460. *Id.* at 374-77.

461. Law on the Establishment of the Extraordinary Chambers as amended art. 14 (Oct. 27, 2004), http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended [hereinafter ECCC Law].

462. Open Soc'y Justice Initiative, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia* (Oct. 2012), https://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf.

463. *Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign,* HUMAN RIGHTS WATCH (Oct. 3, 2001), https://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign.

464. Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: March 2015* 3, 4, https://www.opensocietyfoundations.org/sites/default/files/eccc-march-2015-20150323.pdf.

465. EAC Statute, *supra* note 225, at art. 11.

the ordinary Senegalese district and appeals court structure in Dakar. In keeping with local law, there are four chambers: an investigative chamber, an indicting chamber, a trial chamber, and an appeals chamber.[466] The presiding judges of the latter two chambers hail from another AU member state.[467] Individuals were nominated by the Senegalese Justice Minister and appointed by the AU Commission Chair, although there is no requirement that they be experts in international criminal law as is usually required for other international tribunals.[468] An independent Defense Office has been established to protect the rights of the defense and otherwise support defense counsel.[469] Chadian officials are not involved in any way in the EAC, diminishing the opportunities for domestic capacity building, particularly given that Senegal's judiciary already enjoys a solid reputation for competence and independence.[470]

The DRC offers a microcosm of internationalized justice mechanisms. According to a long-standing proposal, which originated within Congolese civil society[471] and which has received high-level international[472] and executive support,[473] legislation would create specialized mixed chambers with jurisdiction over the range of international crimes. These would be housed within provincial appeals courts and staffed with a mix of national and international personnel, including judges, prosecutors, administrators, investigators, and defense counsel.[474]

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466. *Id.* at art. 2. *See generally* Mbacké Fall, *The Extraordinary African Chambers: The Case of Hissène Habré*, *in* AFRICA AND THE INTERNATIONAL CRIMINAL COURT 117 (Sept. 10, 2014), http://link.springer.com/chapter/10.1007/978-94-6265-029-9_8/fulltext.html.

467. *Id.* at art. 11.

468. *Id. Compare id. with* SCSL Statute, *supra* note 170, at art. 13.

469. *Q&A: The Case of Hissène Habré*, *supra* note 232.

470. Emanuele Cimiotta, *The First Steps of the Extraordinary African Chambers*, 13 J. INT'L CRIM. JUSTICE 177, 193-94 (2015).

471. HUMAN RIGHTS WATCH, DR CONGO: ESTABLISHMENT OF A SPECIALIZED MIXED COURT FOR THE PROSECUTION OF SERIOUS INTERNATIONAL CRIMES (April 15, 2011), https://www.hrw.org/news/2011/04/15/dr-congo-establishment-specialized-mixed-court-prosecution-serious-international.

472. A 2013 Peace, Security and Cooperation Framework signed by all major parties involved in stabilization efforts in the Great Lakes region called for an end to the long-standing impunity for grave international crimes in the DRC. *See generally* David Zounmenou & Naomi Kok, *Peace, Security & Cooperation Framework for the DRC: Hopes & Challenges* (March 8, 2013), https://www.issafrica.org/iss-today/peace-security-and-cooperation-framework-for-the-drc-hopes-and-challenges.

473. *Cohésion nationale: Discours de "Joseph Kabila" devant le Congrès*, KONGO TIMES! (Oct. 23, 2013), http://afrique.kongotimes.info/rdc/politique/6768-cohesion-nationale-discours-joseph-kabila-devant-congres.html (recounting a speech by President Kabila calling for the institution of special chambers to address international crimes). *See generally* Richard Lee, *Plans for a Hybrid Court in Congo—Pascale Kambale*, Open Society Initiative for Southern Africa (Mar. 6, 2012), http://www.osisa.org/openspace/drc/plans-hybrid-court-congo-pascale-kambale.

474. HUMAN RIGHTS WATCH, ACCOUNTABILITY FOR ATROCITIES COMMITTED IN THE DEMOCRATIC REPUBLIC OF CONGO (Apr. 1, 2014), http://www.hrw.org/news/2014/04/01/accountability-atrocities-committed-democratic-republic-congo#_ftnref3 [hereinafter HRW, *DRC*]; SOFIA CANDEIAS ET. AL., *supra* note 367, at 13-16. *See* Article 91, Avant Projet de Loi Pour la Repression des Crimes de Génocide, des Crimes Contre L'Humanité et des Crimes de Guerre Completant la Loi Organique Portat Organisation,

Under current proposals, international judges would be in the minority of each panel and would gradually be phased out.[475] The *Cour de Cassation* in Kinshasa would also include a specialized chamber to hear appeals from the mixed chambers, which would have primary, but not exclusive, jurisdiction over international crimes committed in the country since 1990.[476]

Although this scheme remains in flux, the basic structure of the proposed mixed chambers involves three five-member Trial Chambers (including two foreign advisor judges) and one Appeals Chamber. The national *Cour de Cassation* would be empowered to review judgments from the Appeals Chamber, which will be co-located in Kinshasa. The Trial Chambers will be housed in existing civilian Courts of Appeal.[477] Investigative and Prosecutorial Units for each Chamber will be made up of a mix of foreign and Congolese staff. The Congolese President would appoint the Congolese judges and senior prosecutorial staff, including a Congolese chief prosecutor.[478] All foreign members would be appointed by the Prime Minister, with recommendations from the Justice and Foreign Ministers.[479] Nationals of states that border the DRC would be excluded from consideration given the involvement of neighboring states in perpetrating and perpetuating the violence.[480] Military and police defendants would be entitled to have career military magistrates serve on their panels.[481]

The necessary constitutive legislation has been pending before the National Assembly and the Council of Ministers (an executive body) for several years alongside the Rome Statute Implementation Act,[482] finally enacted in late 2015, which will better align the subject matter jurisdiction of the specialized mixed courts with the Rome Statute as well as provide a legal framework for cooperation. Progress on both initiatives was stymied by elections, parliamentary delays and adjournments, fears of international meddling in domestic affairs, confusion about

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Fonctionnement et Compétence des Jurisdictions de l'Ordre Judiciaire (setting forth the composition of the proposed mixed chambers) [herein after Draft Mixed Chambers Legislation].

475. SOFIA CANDEIAS ET. AL., *supra* note 367, at 15.

476. HRW, *DRC*, *supra* note 474.

477. *Id.* at 3.

478. *Id.* at 4.

479. *See* Draft Mixed Chambers Legislation, *supra* note 474, at art. 91.11.

480. *Id.*

481. HRW, *DRC*, *supra* note 473, at 2. In this way, the proposed panels will be mixed/mixed, featuring judges who are domestic and foreign as well as civilian and military. *See* Draft Mixed Chambers Legislation, *supra* note 474, at art. 91.9 (providing for military magistrates on any panel hearing charges against members of the armed forces or national police).

482. *La proposition de Loi de Mise en Oeuvre du Statut de Rome dans la Legislation Congolaise,* http://www.pgaction.org/pdf/pre/Comoros_Adubango.pdf. The draft legislation (*proposition de loi*) also shifts jurisdiction over international crimes from military courts to civilian courts and provides for certain procedural protections. *See generally* Patryk Labuda, *The Democratic Republic of Congo's Failure to Address Impunity for International Crimes: A View from Inside the Legislative Process 2010-2011*, INT'L JUSTICE MONITOR (Nov. 8, 2011), http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011.

the scope and interaction of the two pending bills, and shifting political will.[483] Some Parliamentarians have voiced objections to the presence of foreign judges in Congolese courts, the exercise of civil jurisdiction over members of the military, and the absence of the death penalty (notwithstanding the current moratorium).[484]

Separate and apart from these internal structural issues, the terms of reference of any hybrid or international entity will generally need to spell out the nature of the relationship with the ordinary judicial system when there is concurrent jurisdiction over international crimes.[485] For example, the International Criminal Court is expressly complementary; it asserts jurisdiction only when there is no domestic court that is willing or able to bring charges.[486] Although the *ad hoc* criminal tribunals enjoyed primacy over domestic systems due to their terms of reference[487] and Security Council provenance, the relationship was still a partnership, as evidenced by the high degree of information sharing between the tribunals and their domestic counterparts, the provision of technical assistance and training to local actors, and the ICTY's Rules-of-the-Road project. Eventually, Rule 11bis was added to the Rules of Procedure and Evidence to enable the *ad hoc* tribunals to refer low-level cases to a domestic system with jurisdiction as part of the tribunals' Security Council-mandated Completion Strategies.[488]

The STL enjoys primacy per Article 4 of its Statute. Accordingly, Lebanon conveyed all its files to the STL in 2009 and has deferred any ongoing investigations.[489] At its inception, the STL immediately gained custody of four suspects who had been held by domestic authorities, but these individuals were released when the STL Prosecutor indicated that he did not possess sufficient evidence against them to justify their continued detention.[490] One has since moved the court for the release of his casefile "related to the crimes of libellous [sic] denunciations and arbitrary detention."[491] While the STL has primacy over the domestic authorities, the Statute does indicate that in questioning suspects, victims,

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483. *See generally* Labuda, *supra* note 482.

484. SOFIA CANDEIAS ET. AL., *supra* note 367, at 3.

485. *See generally* Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383 (1998).

486. Rome Statute, *supra* note 273, at art. 17.

487. *See, e.g.*, ICTR Statute, *supra* note 2, at art. 8(2). Similarly, other courts in Timor-Leste were to defer to the Special Panels. *See* UNTAET Reg. No. 2000/15, *supra* note 150, at art. 1.4. The MH-17 Statute envisioned a relationship of primacy with national courts. MH-17 Draft Statute, *supra* note 615, at Article 10.

488. *See supra* note 77.

489. Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack Against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Order, 2009, Case No. CH/PTJ/2009/01 (Mar. 27).

490. Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, Order, 2009, Case No. CH/PTJ/2009/06 (Apr. 29).

491. Decisions on the Disclosure Materials from the Criminal File of Mr. El Sayed, Decision 2011, Case No. CH/PTJ/2011/08, Decision, § I, art. 1 (May 12). *See also* Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, Decision, 2010 Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing (Nov. 10).

and witnesses and in collecting evidence, the Prosecutor shall "as appropriate, be assisted by the Lebanese authorities concerned."[492] The full scope of this arrangement is being worked out in real time and is dependent on shifting political winds. Although the UNSCRs addressed to the UNIIIC mandated all member states to cooperate with the Commission's investigations, they are silent on this point vis-à-vis the Tribunal itself, so evidence, witnesses, and suspects that are outside Lebanon may not be within reach absent voluntary cooperation.[493]

The BiH War Crimes Chamber has concurrent jurisdiction over war crimes, crimes against humanity, and genocide with sixteen other courts—ten cantonal and five district courts in the Federation of Bosnia and Herzegovina and the Republic of Srpska, respectively, and the district court in Brčko.[494] The WCC could, however, assume jurisdiction in particularly sensitive or complex cases or transfer cases to the ordinary courts.[495] Not surprisingly, this led to coordination issues as well as complaints on the part of defendants.[496] In 2005, for example, a Pre-Trial Chamber of the State Court took over the case of Boban Šimšić from the Istočno Sarajevo District Court on the ground that the local authorities had failed to arrest the suspect despite the existence of an international arrest warrant against him.[497] He unsuccessfully challenged the transfer and his conviction before the European Court of Human Rights ("ECtHR").[498]

It is envisioned that the jurisdiction of the ACJHR will be complementary to national courts as well as the courts of the Regional Economic Communities ("REC"), such as the Economic Community of West African States ("ECOWAS"), the Community of Sahel-Saharan States ("CENSAD"), the Common Market for Eastern and Southern Africa ("COMESA"), and the South African Development Community ("SADC"), even though these latter courts ordinarily do not mete out individual criminal responsibility.[499] Accordingly, all national and regional courts would have to have failed to move forward in order for the proposed ACJHR to

492. STL Statute, *supra* note 95, at art. 11(5).

493. *See id.* at art. 15(1).

494. Jasenka Ferizović, *The Court System in Bosnia and Herzegovina*, BOSNIAN BONES SPANISH GHOSTS 8-10, 13-14, 17, 21-22, (Working Paper) http://www.bosnianbonesspanishghosts.com/bbsg_userfiles/file/Working%20Papers/The%20%20court%20system%20in%20Bosnia%20and%20Herzegovina.pdf.

495. Kazneni zakon Bosina i Herzegovia [Criminal Code of Bosnia and Herzegovina], Sl. Glasnik BiH [Official Gazette of BiH] 2009 No. 3/03, http://www.sudbih.gov.ba/files/docs/zakoni/en/Zakon_o_krivicnom_postupku_-_3_03_-_eng.pdf [hereinafter Criminal Code of Bos. & Herz.].

496. HUMAN RIGHTS WATCH, JUSTICE FOR ATROCITY CRIMES: LESSONS OF INTERNATIONAL SUPPORT FOR TRIALS BEFORE THE STATE COURT OF BOSNIA AND HERZEGOVINA (Mar. 4, 2012), https://www.hrw.org/sites/default/files/reports/bosnia0312_0.pdf [hereinafter HRW, *State Court*].

497. *See Boban Šimšić v. Bosnia and Herzegovina*, Judgment, App. No. 51552/10, [2012] ECHR 751, ¶ 32 (Apr. 10, 2012) (concluding "[s]ince the State Court decided to take over this case from an Entity court on the basis of objective and reasonable criteria . . . there is no appearance of a breach" of the ECHR's non-discrimination provision).

498. *Id.*

499. Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUR. J. INT'L L. 933, 945 (2013).

have jurisdiction. The ACJHR Protocol's provision regarding this relationship tracks Article 17 of the Rome Statute, which contains the ICC's complementarity regime, but makes no mention of that Court itself.[500] Thirty-three AU member states are also parties to the Rome Statute and some have adopted legislation implementing their ICC obligations to cooperate with the Court; this may give rise to conflicting obligations in those states and create overlapping jurisdiction.[501] Although it regulates the relationship toward national courts, the Rome Statute is silent as to its relationship to *regional* criminal courts, and so it is unclear if its complementarity provisions would apply *mutatis mutandis* to proceedings before the proposed African criminal chambers or if an amendment to the Rome Statute or RPE would be required.[502]

IV. STAFFING

In terms of staffing hybrid or internationalized institutions, tribunal architects must determine how to appoint domestic and international staff positions and in what ratio.[503] If panels of judges are contemplated, ensuring a majority of internationals generally lends international legitimacy to the process and potentially enhances the fairness of proceedings. Such personnel can be phased out over time. At the same time, the presence of domestic judges may lend the institution legitimacy in the eyes of local actors. If the relevant system employs single judges, foreign judicial advisers or clerks can be employed to inject international expertise into the adjudicative process. A more comprehensive plan to integrate foreign experts into prosecution and defense offices as well as the courts' administrative body may also be necessary and useful.[504] Even in circumstances in which international judges are contemplated, filling slots has been difficult in some hardship posts in the past, a problem that a more fulsome international roster might help to alleviate.[505] Such a roster could ensure that candidates are vetted in advance so that only those with appropriate expertise and of "high moral character, impartiality, and integrity" are chosen, as has been required by the various tribunal statutes.[506]

A central question turns on what role the international community, usually acting through the U.N. Secretary-General, will play in appointing key personnel and whether the state in question has an express or implied veto on nominations. Although states often want their nationals in the top posts, international personnel

500. ACJHR Protocol, *supra* note 239, at art. 46.

501. Max du Plessis, *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL: TALK!, Aug. 27, 2012, http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/.

502. Abass, *supra* note 499, at 941-43.

503. *See generally* Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHIC. J. INT'L L. 482 (2016).

504. For examples of a comprehensive plan, *see* Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy, *supra* note 110, at 780-90.

505. Perriello & Wierda, *supra* note 124, at 16.

506. Hobbs, *supra* note 503, at 503-04.

may be better positioned to withstand domestic political pressures, particularly during the early phase of a justice process.[507] At the same time, many states may resist the inclusion of foreign personnel in certain posts; resort to experts drawn from the country's diaspora may mitigate these concerns. In any case, domestic legislation and changes to local bar rules may be required to enable foreign personnel to occupy certain positions. That said, some Commonwealth states (such as the Seychelles) grant reciprocal rights to lawyers hailing from other Commonwealth jurisdictions.[508] The interoperability of Commonwealth judges could prove to be useful as the international community considers accountability options for Sri Lanka.[509]

The victorious allies convened and manned the two post-WWII tribunals, although the patterns of staffing differed. The IMT itself was staffed by the four founders with two judges (one primary and one alternate) hailing from each ally.[510] National prosecutorial teams divvied up the various counts and defendants at trial.[511] At Tokyo, by contrast, the lead prosecutor was from the United States.[512] Eleven sitting judges and associated prosecutors were appointed from states that had signed Japan's instrument of surrender,[513] along with India and the Philippines, paving the way for Justice Radhabinod Pal of India to issue his famous dissent.[514] Although defendants had the right to counsel and to legal aid,[515] no office for the defense was built into either tribunal. In Nuremberg, German lawyers defended the accused; in Tokyo, each defendant was eventually provided with an American lawyer to help with his defense given that the procedures were quite novel from the Japanese perspective.[516]

The use of the term "manned" above is quite deliberate. Most of the key

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507. Caitlin Reiger & Marieke Wierda, *The Serious Crimes Process in Timor-Leste: in Retrospect*, International Center for Transitional Justice, Mar. 5, 2006, at 12 (noting in East Timor, "the appointment of international judges was rejected on the basis that it would undermine local ownership of the judges system," enhance the need for translation, and "encourage the participation of local jurists, which would have political and symbolic significance").

508. Qualifying as a Seychelles Lawyer, BAR ASSOCIATION OF SEYCHELLES (Nov. 17, 2009), http://www.bas.sc/qualifying-as-a-seychelles-lawyer.

509. Jason Burke, *UN Calls for Sri Lanka War Crimes Court to Investigate Atrocities*, GUARDIAN (Sept. 16, 2015, 5:17 AM), http://www.theguardian.com/world/2015/sep/16/un-seeks-special-court-to-investigate-sri-lanka-war-atrocities.

510. Kaufman, *supra* note 59, at 759.

511. Doug Linder, *The Nuremberg Trials*, FAMOUS WORLD TRIALS: NUREMBERG TRIALS 1945-1949 (2000), http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.html.

512. Kaufman, *supra* note 59, at 760.

513. *Id.* at 759-60.

514. *The United States of America v. Akaki, Sadao et al.*, International Military Tribunal for the Far East, Dissentient Judgment of Justice R.B. Pal, *reprinted in* 105 THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard, ed., 2002). *See generally* Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373 (1991).

515. *See, e.g.*, Tokyo Charter, *supra* note 59, at art. 9(c).

516. *The Tribunal—An Overview*, The Tokyo War Crimes Trial: A Digital Exhibit, Virginia Law, http://lib.law.virginia.edu/imtfe/tribunal (last visited Nov. 15, 2015); Kaufman, *supra* note 59, at 761.

players were, in fact, men, although there were important women involved in post-WWII justice efforts.[517] Many of the constitutive statutes of modern tribunal insist on greater diversity and a fair representation of men and women when it comes to judicial and other appointments.[518] Nonetheless, gender parity in international tribunals remains elusive.[519]

Turning to the modern tribunals, the Security Council assigned itself a role appointing the Chief Prosecutors of the original *ad hoc* tribunals following nomination by the U.N. Secretary-General.[520] These personnel had the status of Under-Secretary-Generals within the U.N. system.[521] Judges—who must hail from different states and represent the principal legal systems of the world—were elected by the General Assembly from a list submitted by the Security Council, and the Secretary-General appoints the Registrar.[522] By design, the two Statutes did not mandate any senior roles for target-country nationals.[523] As a result, these original *ad hoc* tribunals did not employ large numbers of local nationals, although a number of defense counsel from the region did appear on behalf of defendants.[524]

More recent hybrid tribunals reserve a greater role for the host state in staffing. In principle, the SCSL was to have a mix of international and domestic staff. A majority of the judges and the Chief Prosecutor were meant to be appointed by the Secretary-General; the Government of Sierra Leone appointed a Sierra Leonean Deputy Prosecutor.[525] In actuality, there were very few Sierra Leoneans in professional positions at first given the lack of local capacity. This asymmetry was accentuated by the fact that the government appointed some internationals to fill posts that were designated for local personnel.[526] In the early days, many top posts went to lawyers from the United States, which was a major supporter of the SCSL. It has been hypothesized that the United States was using

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517. *See* Diane Marie Amann, *Portraits of Women at Nuremberg*, 2-4 UC Davis Legal Studies Research Paper Series, Research Paper no. 225, (Aug. 6, 2010), http://www.roberthjackson.org/wp-content/uploads/migrated-files/portraits-of-women-at-nuremberg.pdf.

518. *See, e.g.*, ICTY Statute, *supra* note 64, at arts. 12*ter*, 13*ter*; SCSL Statute, *supra* note 170, at art. 15.

519. Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 649, 652-54 (2012). This lack of parity has generated an international campaign aimed at increasing the representation of women on the benches of all international tribunals. *See* GQUAL, http://www.gqualcampaign.org/home/ (last visited Nov. 18, 2015).

520. *See, e.g.*, ICTY Statute, *supra* note 64, at art. 16(4); S.C. Res. 1504, ¶ 4 (Sept. 4, 2003); S.C. Res. 1786, ¶ 2 (Nov. 28, 2007).

521. ICTY Statute, *supra* note 64, at art. 16.

522. *Id.* at arts. 13, 17.

523. Jean-Marie Kamatali, *From the ICTR to ICC: Learning From the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 93-94 (2005); Hobbs, *supra* note 503, at 501, 503-504 (noting that the lack of Yugoslavian or Rwandan judges on the *ad hoc* tribunals may have undermined local legitimacy and increased perceptions of bias).

524. *See* ICTY Statute, *supra* note 64, at art. 16(4).

525. SCSL Statute, *supra* note 170, at art. 12. Nominations came from ECOWAS and Commonwealth states. Hobbs, *supra* note 503, at 515.

526. Perriello & Wierda, *The Special Court for Sierra Leone Under Scrutiny*, *supra* note 176, at 21-22.

the SCSL "to demonstrate the viability of alternatives" to the ICC.[527]

The STL's international prosecutor, head of the Defense Office, and all the judges have been appointed by the U.N. Secretary-General; the judges were chosen from among those recommended by the Lebanese government and member states.[528] Under the U.N. Agreement with Cambodia, the Supreme Council of the Magistracy, which has strong ties to Cambodia's ruling party, selected the Cambodian judges from amongst the local judicial ranks.[529] The Secretary-General nominated potential international judges, but these too were subject to approval by the Supreme Council of the Magistracy.[530] A kickback scandal involving alleged payments to Cambodian government officials for positions at the ECCC contributed to criticism that the ECCC was riddled with corruption and the object of political interference.[531] Local ECCC staff members are not paid according to U.N. pay grades, which has kept their salaries lower than at other tribunals (although higher than comparable national positions). UNAKRT staffers are paid as project staff according to U.N. rates.[532]

In Kosovo, hiring within UNMIK was through the standard U.N. recruitment process or by way of recommendations (but not formal nominations) from states and international organizations (e.g., the Council of Europe).[533] Internationals were paid on the U.N. pay scale.[534] Contracts were renewable every six months, which created a degree of uncertainty among the staff and hindered the ability to

527. Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals, in* THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 131, 148 (Bruce Cronin eds., 2008).

528. STL Statute, *supra* note 95, at art. 9.

529. ECCC Law, *supra* note 461, at art. 11.

530. Douglas Gillison, *Cambodia Rejects UN Genocide Judge*, THE INVESTIGATIVE FUND (Jan. 15, 2012, 11:21 AM), http://www.theinvestigativefund.org/blog/1601/cambodia_rejects_un_genocide_judge/Most%20Emailed (noting potential rejection of U.N.-appointed CIJ Laurent Kasper-Ansermet). In this instance, Cambodia initially refused to elevate a reserve CIJ to a vacant position. This was considered a breach of the U.N. Agreement. Bridget Di Certo and Vong Sokheng, *Judge rejection 'a breach'*, PHNOM PENH POST (Jan. 23, 2012), http://www.phnompenhpost.com/national/judge-rejection-%E2%80%98-breach%E2%80%99.

531. Cat Barton, *Kickback Claims Stain the KRT*, PHNOM PENH POST (Feb. 23, 2007), http://www.phnompenhpost.com/national/kickback-claims-stain-krt. The United Nations Development Program launched an internal audit in response to the allegations involving leftover funds from a prior U.N. mission, but the results were not released publicly. Cat Barton, *UN Private Audit Draws Public Ire*, PHNOM PENH POST (June 1, 2007), http://www.phnompenhpost.com/national/un-private-audit-draws-public-ire. *See also* John D. Ciorciari, *Justice & Judicial Corruption*, SEARCHING FOR THE TRUTH (Oct. 2007), http://www.cambodiatribunal.org/assets/pdf/court-filings/Ciorciari_October_2007.pdf.

532. Stan Starygin, *Judicial Officer Salaries at the ECCC for 2010-11*, ECCC REPARATIONS BLOG (May 19, 2010, 3:32 AM), http://ecccreparations.blogspot.com/2010/05/judicial-officer-salaries-at-eccc-for.html; *Memorandum to the Group of Interested States: Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia* 3, 6-7 (Nov. 16, 2007), https://www.opensocietyfoundations.org/sites/default/files/cambodia_20071116.pdf.

533. Perriello & Wierda, *supra* note 124, at 15-16.

534. *Id.* at 16.

recruit and retain qualified personnel.[535] The early UNTAET regulations created both an ordinary court system and a system of Special Panels to address the commission of international crimes.[536] The UNTAET administrator appointed the Special Panel judges upon the recommendation of a mixed Timorese-foreign commission.[537] It was envisioned that the Dili District Court would house several Special Panels, but hiring delays meant that it took years to establish a second Panel.[538] The Court of Appeals, which included two international judges, was to assert jurisdiction over appeals from ordinary panels in the District Court in addition to Special Panel cases.[539] Other international positions within Timor-Leste's Special Panels were identified through standard U.N. recruitment processes for peacekeeping missions,[540] which was not entirely suitable since such missions normally do not contain a judicial component. Staffing the Special Panels remained a challenge given the lack of qualified international candidates for what amounted to a hardship post and weak domestic capacity. In these institutions, delays in the appointment of personnel, and especially international judges who were subject to U.N. hiring procedures, slowed the judicial proceedings and left many appeals pending.[541]

International staff in BiH were deployed for a limited transition period.[542] In the early phases of the WCC, the High Representative for BiH appointed the internationals. International donor states often seconded judges to the WCC, with inconsistent results given that some secondees had no experience dealing with international law, criminal law, or complex trials. Later, the Bosnian High Judicial and Prosecutorial Council ("HJPC") and Registry began arranging these appointments through a competitive hiring process.[543] Internationals were paid out of a pool of donor funds.[544] International judges began as a majority on each WCC panel, but this ratio had flipped by 2008.[545] The transitional period, which has been facilitated by a Transition Council of local leaders representing BiH's various judicial institutions, was to last for five years, but this proved to be too short to put a fair and fully functioning system in place.[546] In 2009, and at the last minute, the High Representative—who exercised considerable power in BiH—extended the

535. *Id.*

536. UNTAET Reg. No. 2000/11, *supra* note 151, at 9-10.

537. *Id.* at 9-10, 15; U.N. Secretary-General, *On the Establishment of a Public Service Commission*, ¶ 1 U.N. Doc. UNTAET/REG/2000/3 (Jan. 20, 2000).

538. Reiger & Wierda, *supra* note 507, at 15.

539. *Id.* at 14, 25.

540. *Id.* at 14.

541. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 14-15.

542. Ivanišević, *supra* note 345, at 41-42.

543. Tolbert & Kontić, *supra* note 344, at 30-34 (describing the court's record in transferring knowledge from international to national judges as "mixed" and occurring "more by accident than design").

544. *Id.* at 17-18.

545. *Id.* at 27. Uniquely, the Statute of the SCC envisions shifting majorities at trial and appeal levels. *See* Loi Organique, *supra* note 195, Articles 11-13.

546. Schwendiman, *supra* note 337, at 280.

transition period after Serbian opposition parties blocked a legislative amendment to this effect.[547] This arrangement was not universally accepted; some Serbian leaders repeatedly called for the expulsion of international staff from BiH.[548]

Two-tiered salary structures and the unequal allocation of other emoluments may generate tensions between international and domestic staff, particularly when the international salaries or perquisites vastly exceed those of their local counterparts.[549] The presence of internationals—whose salaries ordinarily make up a large percentage of the budget of any tribunal—has caused resentment and also driven up demands on the part of national counterparts.[550] For example, international personnel within the Special Panels in Timor-Leste were U.N. employees entitled to all U.N. benefits, which generated resentment among their Timorese counterparts. All the staff of the *ad hoc* international tribunals were granted the privileges and immunities of other U.N. staff pursuant to the Convention on the Privileges and Immunities of the United Nations.[551] By contrast, CICIG provides certain privileges and immunities only to its international staff, which has left the local staff vulnerable to intimidation.[552] Because the even the international staff are not considered U.N. employees, they do not enjoy all U.N. benefits, such as diplomatic passports or pensions.[553] This has made it difficult to attract high-quality U.N. personnel, although it also contributes to perceptions of independence.[554]

V. VENUE

The Nuremberg and Tokyo trials were held *in situ*, notwithstanding the devastation wrought by WWII. Although the Allied Control Council was headquartered in Berlin, in part to appease the Soviets, the city of Nuremberg was chosen for the trials because a courtroom with adjacent prison facilities had survived Allied bombing.[555] The fact that the city was also associated with the odious Nuremberg laws and Nazi party rallies added a symbolic touch to this

547. *Id.* at 280-81 (noting delays in reappointing and extending the mandate of international staff led to delays in cases and the loss of expertise).

548. *See* HRW, *State Court*, *supra* note 496, at 37; Ivanišević, *supra* note 345, at 27.

549. Perriello & Wierda, *supra* note 124, at 16, 24.

550. Milli Lake, *Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood*, 58 INT'L STUD. Q. 515, 524 (2014).

551. The judges, Prosecutor, and Registrar, for example, were treated as diplomatic envoys. *See* ICTY Statute, *supra* note 64, at art. 30. *See* Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 90 U.N.T.S. 327.

552. CICIG Agreement, *supra* note 356, art. 10.

553. Hudson & Taylor, *supra* note 349, at 20; CICIG Report, *supra* note 353, at 7.

554. WOLA, *supra* note 352, at 25 (recommending that non-United Nations entities could enter into agreements similar to that between the United Nations and the ICC). *See* Negotiated Relationship Agreement between the International Criminal Court and the United Nations, approved by the General Assembly, Resolution 58/318 (Sept. 20, 2004), http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf. A separate treaty, which is open to state party ratification, addresses the privileges and immunities of ICC personnel. *See* Agreement on the Privileges and Immunities of the International Criminal Court, S.C. Res. 2271, ¶ 3 (Sept. 9, 2002).

555. Linder, *supra* note 511.

choice.[556] In another emblematic selection, the Allies convened the Tokyo Tribunal in the former Imperial Japanese Army Headquarters Building. Hundreds of trials proceeded before military commissions and other panels in the various zones of occupation.[557]

By contrast, the original *ad hoc* tribunals were not located in the situation countries themselves, although each tribunal eventually established local satellite offices and relationships with domestic counterparts. The war was still ongoing in the former Yugoslavia as the ICTY was conceptualized, so the tribunal was headquartered in the Netherlands, which was already playing host to a number of international courts and institutions. Although the genocide had been halted by the time the ICTR was under construction, there were ongoing ethnic tensions in Rwanda and lingering concerns about the security of witnesses and court staff.[558] After considering proposals from potential host states, the Council eventually located the ICTR in neighboring Tanzania.[559] This created a host of logistical difficulties not the least of which that there were no established flights between Kigali and Arusha, necessitating the procurement of a dedicated Beech craft. The distance also enabled Rwanda to more easily withhold cooperation (by, for example, refusing to facilitate the travel of witnesses and court staff and allegedly harassing defense counsel in country) in an effort to influence the work of the tribunal.[560] The distance between the two *ad hoc* tribunals and the affected societies gave rise to a pressing need to develop more formal community-based and media outreach programs, which often fell short of what was many observers felt was needed to bring the judicial proceedings to the people.[561] Although both *ad hocs* were empowered to sit elsewhere if "necessary for the efficient exercise of [their] functions," they did not avail themselves of this option.[562]

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556. *Id.*

557. *See generally* Symposium, *A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals*, 25 CRIM. L. FOR. 17 (2014).

558. For the same reasons, the Special Tribunal for Lebanon is also located in The Hague.

559. S.C. Res. 977, ¶¶ 3-5 (Nov. 8, 1994).

560. *See generally* Cedric Ryngaert, *State Cooperation with the International Criminal Tribunal for Rwanda*, 13 INT'L CRIM. L. REV. 125 (2013). Likewise, although there were no security issues weighing against the establishment of the ECCC in Phnom Penh, the tribunal's proximity has no doubt facilitated actual political interference and perceptions thereof. *See* Christopher Dearing, *An Analysis of Corruption, Bias, and the High Presumption of Impartiality in the Extraordinary Chambers in the Courts of Cambodia*, http://www.d.dccam.org/Abouts/Intern/Chris_Dearing_Judicial_Bias.pdf. At the same time, thousands of Cambodians have been able to visit the Court. *See* Outreach, ECCC, http://www.eccc.gov.kh/en/tags/topic/70.

561. Jenevieve Discar, *Assessment of Outreach Programs Executed by the ICTY, ICTR and ECCC*, ICC FORUM (Mar. 16, 2015, 8:56 AM), http://iccforum.com/forum/permalink/97/4412; Scharf & Kang, *supra* note 322, at 916-18. *See generally* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 3, at 18 (arguing for the importance of robust outreach).

562. S.C. Res. 827, ¶ 6, (May 25, 1993). The ICC is also empowered to hold hearings *in situ* (art. 62), although the ICC President recently declined to allow opening statements in the proceedings against Bosco Ntaganda to be delivered in Bunia, in eastern DRC, notwithstanding a Trial Chamber recommendation to this effect. Press Release, The Prosecutor v. Bosco Ntaganda, ICC-CPI-2010615-

The international community has since endeavored to build hybrid tribunals closer to the events in question. There are a number of obvious benefits to this approach, particularly when it comes to the ease of accumulating information that may become evidence in future proceedings and facilitating the meaningful participation of victims and witnesses. Remaining close to the target country also facilitates the integration of local jurists, lawyers, and other staff into the work of the tribunal. This lends greater local ownership and thus legitimacy to the process and also contributes to building domestic capacity. The initial decision to place the SCSL in Freetown was aided by the fact that the war had just ended, and a large U.N. peacekeeping force (the United Nations Mission in Sierra Leone, UNAMSIL) backed by a contingent of British Special Forces was on the ground to assist with security.[563] That said, many of the SCSL's international judges did not reside full-time in the country, which limited their ability to interact with the local legal community.[564]

Notwithstanding this preference for in-country proceedings, evolving events on the ground may necessitate adjustments, as revealed by the collective decision that it was too risky to try Charles Taylor in Freetown.[565] Once Taylor was in custody, the SCSL and newly-elected Liberian President Ellen Johnson-Sirleaf requested that Taylor be tried outside of Freetown for security reasons.[566] In UNSCR 1688, also issued under Chapter VII, the Council—with Russia insisting that the situation was unique and did not set a precedent for resolving similar situations in the future—determined that Taylor's continued presence posed a threat to peace in the sub-region.[567] The resolution, coupled with a 2006 Memorandum of Understanding between the Special Court and the ICC, facilitated the transfer of the legal proceedings against Taylor to a borrowed courtroom in the ICC.[568] Resolution 1688 also made clear that the SCSL would retain jurisdiction over Taylor so long as the Netherlands would facilitate the transfer of witnesses, etc. The Netherlands, in turn, agreed to Taylor's transfer to its territory only if another state committed to imprisoning him in the event he was convicted and sentenced.[569] Taylor is now serving his sentence in the United Kingdom, after the

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PR1118, *Ntaganda Case: Trial Opening Statements will be Held at the Seat of the ICC, in the Netherlands*, (June 15, 2015).

563. Perriello & Wierda, *The Special Court for Sierra Leone Under Scrutiny, supra* note 176, at 12.

564. *Id.* at 20.

565. *Charles Taylor, Background*, INTERNATIONAL JUSTICE MONITOR, http://www.ijmonitor.org/charles-taylor-background [hereinafter IJM, *Taylor*].

566. *Id.*

567. S.C. Res. 1688, ¶¶ 2-5 (June 16, 2006).

568. Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone, Doc. No. ICC-PRES/03-01-06, http://www.icc-cpi.int/NR/rdonlyres/66184EF8-E181-403A-85B8-3D07487D1FF1/140161/ICCPRES030106_en.pdf. Proceedings outside of Sierra Leone were not contemplated by the SCSL Statute itself but rather by Rule 4 of the RPE. The premises of the ICTR were also considered as a potential venue, but that tribunal was deemed to be too busy with its own proceedings to host the Taylor trial.

569. IJM, *Taylor*, *supra* note 565.

SCSL rejected his motion to be transferred to a prison in Rwanda.[570]

An important innovation on venue can be found in the mobile courts developed to bring justice to remote areas in eastern DRC that have been ravaged by war but are far from any formal justice institutions.[571] These courts are creatures of domestic law and come in both civilian and military varieties. The latter—which can assert jurisdiction over civilians under certain circumstances[572]—had exclusive jurisdiction over international crimes until the 2013 passage of a Law on the Organization, Functioning, and Jurisdiction of the Courts, which appeared to shift jurisdiction to the civilian courts.[573] The military courts are technically governed by the Military Penal Code,[574] which contains provisions on genocide, war crimes, and crimes against humanity that, while passable, depart from standard international law definitions in certain ways and seem to conflate the latter two crimes.[575] Given this confused legal framework, the

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570. In the Matter of Charles Ghankay Taylor, Case No. RSCSL-03-01-ES, Decision on Charles Ghankay Taylor's Motion for Termination of Enforcement of Sentence in the United Kingdom and for the Transfer to Rwanda and on Defense Application for Leave to Appeal Decision on Motion for Termination of Enforcement of Sentence in the United Kingdom and for Transfer to Rwanda (Special Court for Sierra Leone May 21, 2015).

571. For a discussion of the high levels of violence in the DRC, *see* UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, 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 DEMOCRATIC REPUBLIC OF THE CONGO BETWEEN MARCH 1993 AND JUNE 2003, 381, 383-85, 434 (August 2010), http://www.genocidewatch.org/images/DRC10_06_xx_Report_Draft_Democratic_Republic_of_the_Congo_1993-2003.pdf [hereinafter Mapping Report]. The mapping exercise was initiated in 2007, and a first draft of the Mapping Report was submitted to the High Commissioner for Human Rights in 2009. *See also* United Nations Office of the High Comm'r for Human Rights, *DRC: Mapping Human Rights Violations 1993-2003*, http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx (last visited February 29, 2016). The Mapping Report concluded that the weak capacity of the national justice sector coupled with an entrenched culture of impunity "underline the urgency and necessity of adopting an additional justice mechanism, if only to judge the most senior figures responsible for the most serious violations committed." Mapping Report, *supra*, at 471. No comprehensive mapping has been untaken for the crimes committed since 2003, although documentation efforts abound.

572. SOFIA CANDEIAS ET AL., *supra* note 367, at 8-9 (discussing circumstances).

573. Conseil constitutionnel [CC] [Constitutional Court] decision No. 13/011-B, Apr. 11, 2013, art. 91, (Dem. Rep. Congo), www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm. *See generally* HUMAN RIGHTS WATCH, ETATS GÉNÉRAUX OF THE JUSTICE SYSTEM IN THE DEMOCRATIC REPUBLIC OF CONGO: RECOMMENDATIONS ON THE FIGHT AGAINST IMPUNITY FOR GRAVE INTERNATIONAL CRIMES (April 2015), http://www.hrw.org/sites/default/files/related_material/2015_DRC_Etats_Generaux_of_the_Justice_system(1).pdf.

574. PORTANT CODE JUDICIAIRE MILITAIRE [MILITARY CODE], arts. 161-86 (Dem. Rep. Congo), http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf.

575. *See Etude de Jurisprudence: L'Application du Statut de Rome de la Cour Pénale Internationale par les Juridictions de la République Démocratique du Congo*, AVOCATS SANS FRONTIÈRES (Mar. 2009), 72-75, http://www.iccnow.org/documents/ASF_rapportRome_csc_light.pdf (discussing idiosyncrasies of the Military Penal Code).

mobile military courts directly applied the provisions of Rome Statute,[576] which the DRC had ratified but had not yet fully implemented until recently.[577] The mobile courts have largely focused on sexual and gender-based violence ("SGBV").[578] Controversially, the U.N. Development Program will only fund a mobile court session if it includes SGBV charges;[579] as a result, cases involving other serious crimes (murder, pillage, the use of child soldiers) have gone unprosecuted.[580]

These trials rely heavily on international assistance.[581] The American Bar Association's Rule of Law Initiative ("ABA ROLI") and other donors provide training for court staff, help to secure lodging and transportation for witnesses (which diminishes adjournment rates), and offer *pro bono* legal assistance to victims and defendants.[582] The mobile courts, which also work with MONUSCO and other local partners, offer a high degree of local access and ownership while helping to build legal capacity.[583] They also coordinate with legal clinics to ensure cases are trial-ready; provide appropriate referrals to non-legal organizations that can offer medical, social, and economic assistance to victims; and engage in community education and outreach.[584] So far, evaluations of the mobile courts

576. *See supra* note 482 and accompanying text.

577. *See, e.g., Auditeur Militaire v. Kibibi*, RP No. 043, RMP 1337/MTL/11 (2011); Kelly Askin, *Fizi Diary: Mobile Court Trials Landmark Rape Case*, OPEN SOC'Y FOUNDATIONS (Feb. 17, 2011) http://www.opensocietyfoundations.org/voices/fizi-diary-mobile-court-tries-landmark-rape-case; *Congo Army Colonel Guilty of Ordering Mass Rape on New Year's Day*, THE GUARDIAN (Feb. 21, 2011, 11:44 AM), http://www.theguardian.com/society/2011/feb/21/congo-rape-trial. *See generally* Antonietta Trapani, *Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC*, DOMAC, 33-35 (Nov. 12, 2011); Baylis, *supra* note 22 (discussing three exemplar trials).

578. ANTONIETTA TRAPANI, COMPLEMENTARITY IN THE CONGO: THE DIRECT APPLICATION OF THE ROME STATUTE IN THE MILITARY COURTS OF THE DRC 26-27 (DOMAC ed., 2011).

579. United Nations Development Programme, *Evaluation of UNDP's Support to Mobile Courts* 9, 6-20 (May 2014), http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_ROL_Mobile%20CourtsEvaluation_Nov2014.pdf [hereinafter UNDP, *Mobile Courts*].

580. SOFIA CANDEIAS ET AL., *supra* note 367, at 28.

581. American Bar Association Rule of Law Initiative has received funds from the Dutch, Norwegian, and United States Governments; the MacArthur Foundation; the Open Society Justice Initiative for Southern Africa; and other donors. United States government funding has come from the U.S. Department of State (its Bureau of International Narcotics and Law Enforcement and its Bureau of Democracy, Human Rights, and Labor), and the U.S. Agency for International Development (USAID). *See* Michael Maya, *Reflections on ABA ROLI's Efforts to Combat the Rape Crisis in War-Torn Eastern Congo*, AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, June 2011, at 5, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/news/news_drc_reflections_aba_roli_efforts_to_combat_the_rape_crisis_0611.html.

582. *Our Work & Research*, AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, http://www.americanbar.org/advocacy/rule_of_law/about/work_research.html (last visited Nov. 6, 2015); ABA ROLI, PROMOTING JUSTICE, ECONOMIC OPPORTUNITY AND HUMAN DIGNITY 26 (2013).

583. UNDP, *Mobile Courts*, *supra* note 579, at 10.

584. Tessa Khan & Jim Wormington, *Mobile Courts in the DRC: Lessons from Development for International Criminal Justice*, OXFORD TRANSITIONAL JUST. RES. WORKING PAPER SERIES 19, 27.

have been cautiously optimistic.[585] Similar mobile models have been deployed for ordinary crimes in Sierra Leone, Somalia, Central Africa Republic (before the recent crisis), and Timor-Leste.[586]

Locating a mixed tribunal in the affected country depends heavily on the existence of a functioning and secure judicial system and related institutions. The Special Panels for Serious Crimes operated within the District Court of Dili in Timor-Leste, but the lack of local capacity seriously hindered the ability of these panels to function fairly and effectively.[587] This will likely be an issue with respect to the new Special Criminal Court for CAR, which will be located in Bangui, although it is empowered to sit elsewhere under exceptional circumstances.[588]

VI. JURISDICTIONAL DECISIONS

Determining the scope of the particular justice mechanism involves several major decisions concerning the tribunal's subject matter, temporal, geographic, and personal jurisdiction. In particular, statute drafters must identify prosecutable crimes with the option of drawing from international law (with prior statutes incorporating both treaty and customary international law), domestic law, or a combination of the above. Tinkering with the court's temporal and geographic reach offers a way to focus the tribunal on particular incidents or episodes of mass violence but also to exclude consideration of politically-contentious events for which there may be no international consensus around the desirability of prosecution. Architects generally also place limits on the court's personal jurisdiction in the sense of the type or status of defendant who can be prosecuted. In this regard, the availability *vel non* of status and functional immunities has arisen as a point of contention.

A. Subject Matter Jurisdiction

The Charters of the IMT and the Tokyo Tribunal established the original ICL canon by allowing for the prosecution of war crimes, crimes against humanity, and crimes against the peace.[589] Although existing law-of-war treaties inspired the war crimes provisions, the latter two crimes were novel and needed to be defined. Drafters included a critical limiting principle in the definition of crimes against humanity: while allowing for the prosecution of crimes against humanity committed "before or during the war," such crimes would only be prosecuted if they were committed "in execution of or in connection with any crime within the

585. *See generally* Lake, *supra* note 550 (arguing that the lack of state institutions in eastern DRC has allowed for the diffusion of international norms and has enabled external actors to exert influence over judicial processes); Michael Maya, *Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?*, AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE (Dec. 3, 2012).

586. UNDP, *Mobile Courts*, *supra* note 579, at 4.

587. Passy Mubalama & Simon Jennings, *Roving Courts in Eastern Congo*, INST. FOR WAR & PEACE REPORTING, Feb. 13, 2013, https://iwpr.net/global-voices/roving-courts-eastern-congo (last visited: Nov. 7, 2015).

588. Loi Organique, *supra* note 195, at art. 2.

589. IMT Charter, *supra* note 428, at art. 6; Tokyo Charter, *supra* note 59.

jurisdiction of the Tribunal," i.e., war crimes or crimes against the peace.[590] This formulation became known as the "war nexus," and it is apparent that the Charter's drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic confines, and thus jurisdiction, of a state.[591] As a result of the war nexus in the Nuremberg Statute, most—but not all—of the crimes against humanity adjudicated by the IMT occurred after the invasion of Poland and the official start of WWII, effectively negating the phrase "before or during the war."[592] That said, for some pre-invasion acts, the Tribunal was satisfied by evidence of a rather tenuous connection between the alleged crimes against humanity and the war.[593] As an example, the IMT prosecuted crimes committed in connection with the Austrian *Anschluss*, effectuated in March 1938.[594]

By contrast, the Tokyo Tribunal, attesting to its focus on crimes against the peace, asserted jurisdiction back to the 1931 invasion of Manchuria and up through Japan's surrender in August 1945.[595] That said, the Tokyo Tribunal was subject to its own limitations. According to Article 5 of its Charter, the Tribunal could only prosecute war crimes and crimes against humanity if the individual in question would also be charged with initiating and waging wars of aggression.[596] In the end, both tribunals focused their attention on prosecuting individuals accused of crimes against the peace.[597] Now denominated the crime of aggression, this crime has not been the subject of international or domestic prosecution, although amendments to the Rome Statute defining the crime and setting out a jurisdictional framework could enter into force as early as 2017.[598] The IHT Statute included a domestic-law variant of the crime of aggression applicable to Iraqi armed forces, which is unique among internationalized tribunals, and domestic statutes for that matter.[599] Had Saddam Hussein not been executed, this provision could have

590. IMT Charter, *supra* note 428.

591. *See* Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999) (discussing origins and gradual demise of the war nexus).

592. *See* Trial of German Major War Criminals, Judgment and Sentences, (Int'l Mil. Trib.-Nuremburg Oct. 1, 1946), 41 AM. J. INT'L L. 172, 249 (1947) [hereinafter Nuremberg Judgment].

593. Van Schaack, *supra* note 591, at 806.

594. Nuremberg Judgment, *supra* note 592, at 310, 318-21.

595. *See* Tokyo War Crimes Trial, Judgment, (Int'l Mil. Trib. for the Far East Nov. 4, 1948), http://werle.rewi.hu-berlin.de/tokio.pdf.

596. Tokyo Charter, *supra* note 59, at art. 5. A modern day linkage of crimes of this nature is found in the Rome Statute, which allows for the crime of persecution to be prosecuted only in connection with other enumerated crimes against humanity or Rome Statute crimes. *See* Rome Statute, *supra* note 273, at art. 7(1)(h).

597. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 174 (2000).

598. Int'l Crim. Ct., RC/Res.6, art. 15.3 (June 11, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

599. IHT Statute, *supra* note 328, at art. 14(3) (penalizing the "abuse of position and the pursuit of policies that may lead to the threat of war or the use of the Iraqi armed forces against an Arab country, in accordance with Article 1 of Law 7 of 1958."). *See generally* Claus Kress, *The Iraqi Special*

generated charges in connection with Iraq's 1990 invasion of Kuwait and potentially its war with Iran,[600] although charges involving the former likely would have complicated Kuwait's reparations claims.[601]

The statutes of the first *ad hoc* international tribunals incorporated by direct reference, imitation, or implication the penal provisions of a number of multilateral treaties, including the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, the 1949 Geneva Conventions governing international armed conflicts ("IACs"), common Article 3 of the Geneva Conventions, Protocol II (1977) governing non-international armed conflicts ("NIACs"), and the 1948 Genocide Convention.[602] An open-ended statutory provision ascribing jurisdiction over "violations of the laws and customs of war" enabled the ICTY to develop the prohibition on war crimes by expanding the law governing NIACs and harmonizing it with the law governing IACs, thus minimizing the significance of conflict classification in war crimes prosecutions.[603] In a formulation has not been repeated elsewhere, the drafters of the ICTY Statute incorporated a version of the crimes against humanity war nexus, which limited the temporal reach of the ICTY when it came to crimes committed in the aftermath of the Kosovo conflict.[604] The other tribunals' statutes contain slightly different formulations of the offense, but crimes against humanity are now completely uncoupled from a state of armed conflict in these instruments.

In addition to NIAC war crimes and crimes against humanity, Article 4 of the SCSL Statute penalized crimes against international peacekeepers and humanitarian personnel (reflecting the fact that the RUF took U.N. peacekeepers hostage in 2000) as well as the conscription or enlistment of children into armed groups, a pervasive practice during the war in Sierra Leone.[605] Reflecting the

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Tribunal and the Crime of Aggression, 2 J. INT'L CRIM. JUST. 347 (2004).

600. Michael A. Newton, *Iraqi Special Tribunal*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L (June 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1703.

601. *Kuwait Says Owed $11.2 Billion in Iraq War Reparations*, AL ARABIYA NEWS, Apr. 30, 2013, http://english.alarabiya.net/en/News/middle-east/2013/04/30/Kuwait-says-owed-11-2-billion-in-Iraq-war-reparations-.html.

602. Direct incorporation of treaty language is expedient but can cause some confusion. For example, drafters of the statutes of the original *ad hocs* borrowed both the definition of genocide and prosecutable forms of responsibility from Articles 2 and 3 of the Genocide Convention. The latter (which prohibited "complicity" in genocide) did not map perfectly onto statutory provisions on individual criminal responsibility in the ICTY/R statutes (e.g., Article 7(1) governing "aiding and abetting"). This led to convoluted efforts to reconcile this terminology. Many internationalized entities do not allow for jurisdiction over the inchoate crime of incitement except with respect to the crime genocide, given the treaty reference in Article 2(c) of the Convention. The new SCC in CAR, for example, will be able to assert jurisdiction over direct and public incitement to genocide (Article 55(e)) but not to crimes against humanity or war crimes. *See* Loi Organique, *supra* note 195, at art. 55(e).

603. ICTY Statute, *supra* note 64, at art. 3. *See generally* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

604. *Id.* at art. 7. See text accompanying note 123.

605. *See* SCSL Statute, *supra* note 170, at art. 4; Prosecutor v. Sam Hinga Norman, Case No.

nature of abuses in Chad under the Habré dictatorship, the EAC in Senegal will adjudicate war crimes, crimes against humanity, genocide, and torture.[606] To guarantee compliance with the principle of legality, the statute provides for jurisdiction over violations of international treaties ratified by Chad.[607]

Internationalized tribunal statutes often include reference to the relevant domestic law as well, either exclusively or in connection with international crimes. Setting it apart from other hybrid institutions, the law being applied by the STL is drawn exclusively from the Lebanese Penal Code and concerns terrorism and related crimes against personal integrity and involving illicit associations.[608] The STL is thus the first international tribunal to assert jurisdiction over purely domestic crimes and crimes of terrorism *stricto sensu*,[609] although the ICTY did adjudicate as war crimes acts of violence the primary purpose of which was to spread terror among the civilian population as is prohibited by Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions of 1949.[610] During the formation of the STL, there was some discussion about including crimes against humanity as a prosecutable offense, but this proposal was ultimately rejected by Russia and the United States, likely for fear of lowering the threshold for the crime.[611] A proposal to incorporate by reference the Arab Convention for the Suppression of Terrorism, which contains a regional definition of terrorism, was also rejected.[612]

The STL was inspired by a single event: the February 14, 2005, assassination of former Prime Minister Hariri. A similar model is under consideration for the downing of Malaysian Air Flight 17 (MH-17).[613] Following the event, the Security Council authorized the creation of a Joint Investigation Team—which was eventually composed of representatives from Australia, Belgium, Malaysia, the

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SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, 9 (Special Ct. for Sierra Leone May 31, 2004) (convicting defendant for using child soldiers), http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72%28E%29-131.pdf.

606. EAC Statute, *supra* note 225, at art. 4. *See generally* ROMESH SILVA ET AL., STATE VIOLENCE IN CHAD: A STATISTICAL ANALYSIS OF REPORTED PRISON MORTALITY IN CHAD'S DDS PRISONS AND COMMAND RESPONSIBILITY OF HISSÈNE HABRÉ, 1982-1990 (2010), https://www.hrdag.org/content/chad/State-Violence-in-Chad.pdf (discussing how the security directorate in Chad during Habré's reign implemented a systematic program of political killings, arbitrary detention, and torture).

607. EAC Statute, *supra* note 225, at art. 3.

608. STL Statute, *supra* note 95, at art. 2.

609. *See* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis* (Feb. 16, 2011), https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/534-f0936.

610. *See, e.g.*, Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf

611. Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUSTICE 1125, 1128 (2007).

612. *Id.*

613. Patrick Wintour, *David Cameron Pushes for MH17 Inquiry After Russia Blocks UN Tribunal*, THE GUARDIAN, July 30, 2015, http://www.theguardian.com/world/2015/jul/30/david-cameron-mh17-inquiry-russia-blocks-un-tribunal.

Netherlands, the United States, Great Britain, and Ukraine—and called on all States and actors in the region to give their full cooperation to the investigation.[614] A notional statute would allow for the assertion of jurisdiction over a select set of war crimes (the willful killing of civilians, attacks on the civilian population and civilian objects, violence to life and person, and the murder of persons taking no active part in armed hostilities), crimes against the safety of civil aviation (as defined by Malaysian law), and murder and other violent crimes under Ukrainian law. It reflected elements drawn from the ICC Statute as well as other *ad hoc* and hybrid tribunals.[615] This planned mix of Ukrainian and Malaysian law is a novel feature in light of the transnational nature of the incident. The Lockerbie tribunal by contrast relied exclusively on Scots law governing murder, conspiracy to murder, and violations of the Aviation Security Act of 1982.[616]

The direct incorporation of domestic law provides familiarity and local legitimacy. It may also, however, import retrograde elements into an internationalized process, provoke resentment if the law was previously deployed as a tool for discrimination, cause confusion when paired with international law, or make it difficult to fully integrate and utilize international staff unless they are provided with adequate training. For example, UNMIK Regulation 1999/1 originally provided that the Kosovar judiciary would apply the Yugoslav law in force in 1999 unless it was deemed incompatible with international human rights standards.[617] The still extant 1976 Criminal Code of the former Socialist Federal Republic of Yugoslavia contained the crimes of genocide and war crimes, although the applicable definitions departed slightly from CIL.[618] These crimes carried penalties of up to fifteen years' imprisonment or the death penalty.[619] There was no provision on crimes against humanity.[620] During the UNMIK period, Albanian jurists expressed resentment toward the retention of Yugoslav law. Instead, they often applied an iteration of the law that predated Milošević's elimination of

614. S.C. Res. 2166, *supra* note 13.

615. For the proposed creation of a tribunal and statute for Flight MH-17, *see* S.C. Res. 562 (July 29, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_562.pdf [hereinafter MH-17 Draft Statute]. However, the MH-17 Draft Statute was not adopted by the Security Council following a Russian veto. *See* U.N. SCOR, 70th Sess., 7498 mtg., U.N. Doc. S/PV.7498 (July 29, 2015), http://www.un.org/press/en/2015/sc11990.doc.htm. *See generally* Alex Whiting, *How to Prosecute the Perpetrators of the Malaysian Jet Downing*, JUST SECURITY, July 25, 2014, https://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/; Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 1)*, OPINIOJURIS (Aug. 27, 2015), http://opiniojuris.org/2015/08/27/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-1/.

616. *Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi & Al Amin Khalifa Fhimah*, Case No: 1475/99, Verdict (High Court Of Justiciary At Camp Zeist Dec. 21, 1988), http://www.scotcourts.gov.uk/search-judgments/lockerbie-trial (convicting one defendant of 270 counts of murder; acquitting second defendant).

617. UNMIK Reg. No. 1999/1 (25 July, 1999), http://www.unmikonline.org/regulations/1999/reg01-99.htm.

618. Cerone & Baldwin, *supra* note 142, at 29-30.

619. *Id.*

620. *Id.*

Kosovo's autonomy in 1989, at times to the detriment of Serbian parties.[621] UNMIK later revised its regulations to reflect this practice and also incorporated a host of human rights treaties, only some of which had been ratified by the former Yugoslavia.[622] The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is also deemed to be directly applicable in Kosovo and has been applied by international judges and prosecutors.[623]

The WCC in the State Court of Bosnia–Herzegovina are entirely domestic structures that are staffed with international personnel charged with adjudicating domestic law, which has incorporated elements of international law as a result of 2003 amendments to the penal code.[624] Their creation followed the enactment of new penal and procedural codes in 2003, which introduced some adversarial elements (e.g., plea agreements) into what had been a civil law domestic system.[625] At that time, the Office of the High Representative to BiH exercised his so-called "Bonn Powers" and updated BiH's penal law to include crimes against humanity and to augment the sentences applicable to international crimes; the death penalty, however, had been abolished during the Dayton peace process by virtue of the incorporation of the ECHR.[626] The WCC generally applied the body of law that was deemed most lenient to the defendant (pursuant the principle of *lex mitior*), although the abolition of the death penalty complicated this determination and led to a somewhat fragmented jurisprudence.[627] The legislative framework also allowed for the use of ICTY evidence, judicial notice of adjudicated facts, etc.[628]

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621. Day, *supra* note 130, at 186.

622. UNMIK Reg. No. 1999/24, at 1 (Dec. 12, 1999), http://www.unmikonline.org/regulations/1999/reg24-99.htm (designating the law in force in Kosovo on March 22, 1989, as the applicable law). *See also* UNMIK Reg. No. 2000/59 (Oct. 27, 2000) (identifying four sources of law in Kosovo—SRSG regulations, the law in force in 1989, the law applied under Regulation 1999/24, and international human rights—without reference to any hierarchy among them).

623. *See* UNMIK Reg. No. 1999/24, *supra* note 622, §1.3 (mandating that persons undertaking public duties adhere to the ECHR among other human rights instruments). *See generally* Fisnik Korenica & Dren Doli, *Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Kosovo's Domestic Legal System*, 32 LIVERPOOL L. REV. 209 (2011) (noting the incorporation of the ECHR and related jurisprudence into the domestic legal order).

624. *See* HUMAN RIGHTS WATCH, NARROWING THE IMPUNITY GAP: TRIALS BEFORE BOSNIA'S WAR CRIMES CHAMBER 11-12 (2007), https://www.hrw.org/report/2007/02/11/narrowing-impunity-gap/trials-bosnias-war-crimes-chamber. Indeed, the some WCC judges treated ICTY jurisprudence as all but precedential.

625. The High Representative first imposed the new codes on Bosnia & Herzegovina, which were later adopted by the Parliamentary Assembly. *See* Criminal Code of Bos. & Herz., *supra* note 495. Chapter 17 of the Code incorporates definitions of war crimes, genocide, and crimes against humanity that are largely consistent with the Rome Statute. *See* Schwendiman, *supra* note 337, at 296.

626. Dayton Peace Accords, *supra* note 341, at Annex 6, art. 1.

627. European Commission for Democracy Through Law, Opinion on Legal Certainty and the Independence of Judiciary in Bosnia and Herzegovina, No. 648/2011 (June 18, 2012).

628. Case of Maktouf and Damjanović v. Bosnia and Herzegovina, Eur. Ct. H.R., Appl. No. 2312/08 & 34179/08, Judgment (2013) ¶¶ 37-40 [hereinafter Maktouf & Damjanović]; Ivanišević, *supra* note 345, at 7.

Because the WCC are wholly domestic entities, they are subject to supervision by the European Court of Human Rights (ECtHR) in light of Bosnia-Herzegovina's ratification of the ECHR. In response to a challenge by WCC defendants convicted of war crimes under the new provisions, the ECtHR's Grand Chamber found that the WCC had violated Article 7 of the European Convention, which protects against the retroactive application of the penal law.[629] The Constitutional Court then overturned several other judgments in response and ordered the WCC to henceforth apply the earlier law and penalties.[630] Relying upon the state of CIL at the time the defendant acted, the ECtHR let stand a conviction for crimes against humanity in a different case, even though this was an entirely new offense under BiH law.[631]

Judicial mechanisms formed simultaneously with, or after, the promulgation of the Rome Statute often borrow from its substantive provisions, even before the treaty has been signed or has entered into force for the state in question. The Regulations governing proceedings before the Timor-Leste Special Panels, for example, mirrored many Rome Statute provisions, including with respect to substantive law, general principles of criminal law, and defenses.[632] The law establishing the SCC in CAR makes reference to the crimes of genocide, crimes against humanity, and war crimes, which are defined in 2010 revisions to the Penal Code that followed upon CAR's 2001 ratification of the Rome Statute.[633] CAR has not yet fully incorporated the Rome Statute, however. The IHT Statute borrowed heavily from the Rome Statute for the definitions of international crimes, notwithstanding that the United States' involvement in that effort came at a time when the United States-ICC relationship was less constructive than it is today. The IHT could resort to the decisions of the international criminal tribunals to interpret

629. Maktouf & Damjanović, *supra* note 628, ¶¶ 67-76 (finding that defendants should have been sentenced under the prior sentencing framework, even though the sentence itself was within the range of the original legislation). Article 7 prohibits the imposition of a heavier penalty than what was applicable at the time the offense was committed. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Sept. 3, 1953, ETS 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf. However, it does allow for the prosecution of an act or omission that while uncodified was criminal "according to the general principles of law as recognised by the community civilized nations." Maktouf & Damjanović, *supra* note 628, ¶ 10.

630. *See* Francesco De Sanctis, *The Impact of the ECtHR's Judgment in Maktouf-Damjanović on Accountability and Punishment for War Crimes in Bosnia-Herzegovina*, EJIL TALK! (Nov. 12, 2013), http://www.ejiltalk.org/the-impact-of-the-ecthrs-judgment-in-maktouf-damjanovic-on-accountability-and-punishment-for-war-crimes-crimes-in-bosnia-herzegovina/.

631. *Šimšić*, *supra* note 497, ¶ 25 (holding "the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law").

632. UNTAET Reg. No. 2000/15, *supra* note 150, § 7. The crime of torture was defined along the lines of the CAT. East Timor acceded to the Rome Statute in 2002.

633. *See* Loi No. 10.001 du 06 Janvier 2010 Portant Code Penal Centrafricain, at arts. 152-62, (Cent. Afr. Rep.), http://www.ilo.org/dyn/natlex/docs/SERIAL/88116/100661/F1881819351/CAF-88116.pdf [hereinafter Cent. Afr. Rep. Code Penal]; *see also* Central African Republic, *Loi No. 10.001 portant Code pénal centrafricain*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), http://www.wipo.int/wipolex/en/text.jsp?file_id=195085 (last visited Mar. 28, 2016).

the definitions of international crimes,[634] although gaining access to Arabic translations proved difficult and required funding from USAID among others.[635]

In keeping with their hybrid nature, many of these institutions—including the SCSL, the IHT, the Timor-Leste Special Panels, and the ECCC—can assert pendant jurisdiction over relevant domestic crimes.[636] For example, the SCSL could have prosecuted arson and crimes involving the abuse of girls per Article 5 of its Statute, although these crimes did not appear in any indictments. Likewise, the IHT per Article 14 of its Statute could assert jurisdiction over the wastage of national resources and interfering with the judicial process. The ECCC has jurisdiction over certain domestic crimes—homicide, torture and religious persecution—drawn from the 1956 Penal Code, which went unenforced during and after the Khmer Rouge era, effectively rendering it a form of "dead law."[637] These ordinary crimes were included in part out of concerns that a strict fealty to the principle of legality might eliminate some international charges.[638] For example, it was not clear if crimes against humanity were still subject to a war nexus during the Khmer Rouge period,[639] if war crimes committed in NIACs were justiciable, and if the crime of genocide would capture the Khmer Rouge's violence. That said, allowing for the prosecution of domestic crimes required an extension of the standard ten-year statute of limitations,[640] which raised its own legality concerns.[641] More contemporary justice efforts may not present the same legality and statute of limitations challenges as experienced by the ECCC, which are engaged in a rather extreme case of historical justice.[642]

Similarly, the Timor-Leste Special Panels could adjudicate elements of

634. IHT Statute, *supra* note 328, at art. 17(2).

635. Newton, *supra* note 600, at 400.

636. *See generally* Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FOR. 185 (2001).

637. *See generally* Scott Worden, *An Anatomy of the Extraordinary Chambers*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (Jaya Ramji & Beth Van Schaack eds., 2005).

638. *See* Case No. 002/19-09-2007-ECCC/TC, Nuon Chea's Consolidated Preliminary Objections, (Extraordinary Chambers in the Cts. of Cambodia Feb. 25, 2011) (arguing that crimes against humanity, war crimes, and genocide were not part of Cambodian law during the Khmer Rouge era).

639. Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 292 (Extraordinary Chambers in the Cts of Cambodia Jul. 26 2010); Case No. 002/19-09-2007/ECCC/TC, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, ¶ 1 (Extraordinary Chambers in the Cts of Cambodia Oct. 26, 2011).

640. *See* ECCC Statute, *supra* note 190, at art. 3 (extending statute of limitations).

641. Case No. 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, ¶ 1 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010). The Trial Chamber split on this issue: the three Cambodian judges determined that the domestic law charges were not time-barred because the statute of limitations tolled until the holding of free elections and the promulgation of the Constitution in 1993; the two international judges reached the opposite conclusion. *See generally id.* Because the Chamber could not achieve a super-majority, the domestic crime charges were dropped. *Id.* ¶ 56.

642. Beth Van Schaack, *International Crimes and Statutes of Limitation*, INTLAWGRRLS (Oct. 30, 2008), http://www.intlawgrrls.com/2008/10/international-crimes-and-statutes-of.html.

domestic law[643] and were first governed by Transitional Rules of Criminal Procedure introduced by UNTAET in 2001.[644] These blended aspects of Indonesian law, which had been imposed during the long occupation, with a mix of civil law and common law elements. International penal definitions were drawn from the Rome Statute.[645] The Special Panels' Court of Appeal caused considerable confusion when it ruled that Panels should apply Portuguese law because the application of Indonesian law was proscribed in light of Indonesia's unlawful occupation.[646] The same ruling invalidated the international criminal law charges on the ground that they were impermissibly retroactive.[647] Subsequent legislation and jurisprudence overrode this decision on the grounds that international crimes were already prohibited by customary international law during the referendum period.[648] Judges hailing from common law and civil law systems regularly applied different procedural rules during Panel proceedings, generating confusion and precedential inconsistencies.[649]

The nascent ACJHR will assert jurisdiction over the ICL canon (including a more expansive crime of aggression), but also over crimes of particular interest to the African continent: piracy, terrorism, mercenarism, corruption, money laundering, trafficking (in persons, drugs, and hazardous waste), and the illicit exploitation of natural resources.[650] Most controversial has been the crime of "unconstitutional change of government."[651] The African Charter on Democracy, Elections and Governance ("ACDEG") has as a stated objective the prohibition of unconstitutional changes of government in member states, considering such circumstances to pose "a serious threat to stability, peace, security and government."[652] Article 25(5) of the ACDEG also envisions the criminal prosecution of the perpetrators of such acts "before the competent court of the Union," effectively requiring the AU to define the crime and create a court for its

643. *See, e.g.*, UNTAET Reg. No. 2000/15, *supra* note 150, §§ 8-9 (enabling the prosecution of murder and sexual offenses under the applicable Penal Code of Timor-Leste). The definition of some forms of sexual violence in Indonesian law contained retrograde elements. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 24.

644. UNTAET Reg. No. 2000/30, *supra* note 454.

645. *Id.*

646. MOHAMED C. OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS: THE CASE OF RWANDA AND EAST TIMOR 91 (2005).

647. Prosecutor v. Armando dos Santos, Case No. 16/2001, Decision, (Ct of Appeal for East Timor July 15, 2003); Sylvia de Bertodano, *Current Developments in Internationalized Courts: East Timor—Justice Denied*, 2 J. INT'L CRIM. JUST. 910, 916 (2004).

648. Prosecutor v. Mateus Lap a.k.a Ena Poto, Case No. 10/2003, (D. Ct. of Dili Dec. 3, 2003); de Bertodano, *supra* note 647, at 921.

649. *The Special Panels for Serious Crimes - Justice for East Timor?*, *supra* note 146, at 3, 5.

650. ACJHR Protocol, *supra* note 239, at art. 28.

651. ISSAKA K. SOUARÉ, THE AU AND THE CHALLENGE OF UNCONSTITUTIONAL CHANGES OF GOVERNMENT IN AFRICA (2009).

652. African Charter on Democracy, Elections and Governance art. 2(4), Feb. 15, 2012, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf.

prosecution.[653] The difficulty in reaching definitional consensus partially explains the delay in finalizing the constitutive documents for the new regional court. This crime has now been defined in Article 28E of the Protocol to include coups or other interventions to replace democratically-elected governments and any changes to the state's constitution by an incumbent to maintain power.[654]

B. Temporal & Geographic Jurisdiction

Being largely *ad hoc* in nature, many hybrid justice mechanisms have had express or implied limits placed on their temporal and geographic jurisdiction. Since several prior tribunals were created in the midst of ongoing conflicts (notably the ICTY and SCSL), they did not have a prescribed end date for their temporal jurisdiction or their lifespan. This has necessitated the development by the Security Council of Completion Strategies for the *ad hoc* tribunals and certain transitional administrations.[655] For conflicts that have subsided, it might be reasonable to put an end date on an *ad hoc* mechanism, with some prospects of a residual capacity, in order to encourage efficiency in proceedings and control cost overruns. Another temporal jurisdictional angle stems from the fact that several such mechanisms have been designed to exercise jurisdiction over crimes committed before their establishment. This has necessitated consideration of how the *ex post facto* prohibition applies in international criminal law.[656] Generally, the principle of legality is deemed satisfied when the conduct in question was criminal under international law, even if relevant domestic law was lacking.[657] Issues of *ex post facto* may be more salient, however, when it comes to novel international crimes.

The ICTY's temporal jurisdiction was open-ended, since the wars launched by the dissolution of the former Yugoslavia were ongoing when the tribunal was established.[658] As such, the ICTY was in a position to address crimes committed across the territory of the former Yugoslavia, including the republics and autonomous provinces of Slovenia, Croatia, Bosnia-Herzegovina, Serbia-Montenegro, Kosovo, and what became awkwardly known as the Former Yugoslav Republic of Macedonia. Although the wars in Bosnia-Herzegovina and Croatia had wound down by 1995, the tribunal was still in operation in 1998 when

653. *Id.* at art. 25(5).

654. Abass, *supra* note 499, at 939-41.

655. *Completion Strategy*, U.N. INT'L. CRIM, TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/about/tribunal/completion-strategy (last visited Nov. 28, 2015) (conveying the ICTY's completion strategy).

656. *See* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119 (2008).

657. ICCPR, *supra* note 222, at art. 15(2).

658. ICTY Statute, *supra* 64, at arts. 1, 8 (allowing for jurisdiction over serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991). This is also the case with respect to the SCC in CAR, which can assert jurisdiction over crimes committed since 2003 (an earlier bill would have limited jurisdiction to crimes committed since the 2012 Séléka rebellion); Loi Organique, *supra* note 195, at art. 3.

the Kosovo conflict first flared. The Prosecutor[659] and the Security Council[660] confirmed that the ICTY retained jurisdiction over events there. Because the ICTY Statute did not limit jurisdiction to any particular nationality, the war in Kosovo also presented the possibility that citizens of NATO member states might come before the tribunal in connection with Operation Allied Force. Nevertheless, the Prosecutor—and not without controversy—ultimately declined to move forward with any investigations on the basis of recommendations of her staff.[661]

Because the ICTY Statute required a war nexus, it excluded certain crimes committed in the aftermath of the war in Kosovo, thus necessitating a separate accountability mechanism to address the organ-trafficking and other allegations in the Marty Report.[662] The new Kosovo court will address crimes committed from January 1, 1998, to December 31, 2000, thus encompassing Operation Allied Force (which ended on June 10, 1999) and periods of time when the territory was under UNMIK administration.[663] It remains to be seen to what extent allegations that the international community turned a blind eye to KLA abuses will feature in the proceedings.[664] This court will be able to adjudicate crimes allegedly committed in detention centers located in neighboring Albania as well.[665]

The geographic jurisdiction of the ICTR was slightly broader than that of the ICTY, allowing for the prosecution of all crimes committed on the territory of Rwanda and all crimes committed by Rwandan nationals on the territory of neighboring states, a feature that would have encompassed revenge crimes against Hutu refugees committed in the Democratic Republic of Congo, although this latter authority was never invoked.[666] The ICTR's temporal jurisdiction was narrower, by contrast; the Security Council limited the tribunal to considering crimes committed in 1994, even though the downing of President Habyarimana's plane, which sparked the genocide, occurred in April 1994.[667] This restraint ran counter to Rwanda's preferences that the temporal jurisdiction extend backwards in time to 1990 but halt at July 1994, when the Tutsi-led Rwandan Patriotic Front

659. ICTY Press Release PR/P.I.S./437-E, *supra* note 123, ¶ 1.

660. S.C. Res. 1160, ¶ 17 (Mar. 31, 1998) (urging the Prosecutor to begin gathering information related to the violence in Kosovo, reiterating the obligation of the authorities in Yugoslavia to cooperate, and indicating that the Contact Group would share information with the tribunal).

661. *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) (Int'l Crim. Trib. for the Former Yugoslavia), http://www.icty.org/sid/10052.

662. *See generally* Marty Report, *supra* note 259.

663. MH-17 Draft Statute, *supra* note 615, at art. 4.

664. Aidan Hehir, *A New War Crime Court is Born, but Who is Responsible in Kosovo?*, JUST. CONFLICT (Aug. 10, 2015), http://justiceinconflict.org/2015/08/10/a-new-war-crimes-court-is-born-but-who-is-responsible-in-kosovo/#more-6147.

665. *Kosovo/Albania: Investigate Alleged KLA Crimes*, HUMAN RIGHTS WATCH (Dec. 15, 2010), https://www.hrw.org/news/2010/12/15/kosovo/albania-investigate-alleged-kla-crimes.

666. ICTR Statute, *supra* note 2, at art. 1.

667. ICTR Statute, *supra* note 2, at art. 7; CNN Wire Staff, *Rebels Cleared in Plane Crash that Sparked Rwandan Genocide*, CNN (Jan. 11, 2012), http://www.cnn.com/2012/01/11/world/africa/rwanda-president-plane/.

("RPF") captured Kigali.[668] This alternative time frame would have enabled the Prosecutor to charge pre-genocide violence ("pilot projects" in Rwanda's rhetoric before the Council)[669] and individuals involved in preparatory conspiracies. At the same time, it would have reduced the risk that retribution crimes committed by the RPF against members of the deposed Hutu Power movement would come before the tribunal.[670] This temporal limitation led to somewhat convoluted rulings on continuing crimes in the so-called Media Case, among others, which involved charges of conspiracy and incitement to genocide deriving from publications that antedated 1994.[671]

A limited time frame works well for discrete incidents of mass violence or if a particular regime is essentially on trial. For example, the ECCC has jurisdiction starting on April 17, 1975, when the Khmer Rouge invaded Phnom Penh, and ending on January 6, 1979, when a Vietnamese force drove the Khmer Rouge from the city.[672] The EAC's temporal jurisdiction corresponds to Habré's rule (1982-1990).[673] The temporal jurisdiction of the Special Panels was split in a unique way: they could assert jurisdiction over ordinary crimes of murder and sexual offenses committed in Timor-Leste in the immediate post-referendum period (between January 1, 1999, and October 25, 1999), but had unrestricted temporal jurisdiction over international crimes.[674] In practice, however, the Special Panels did not consider the crimes committed during the extended Indonesian occupation for lack of personal jurisdiction over any Indonesian suspects.[675]

A discrete cabining of jurisdiction works less well for ongoing incidents of violence or violence with long historical tails. Indeed, the placing of limits on a court's temporal jurisdiction can feel artificial, particularly to victimized communities. Although the Khmer Rouge's tenure presented a convenient limiting principle for the ECCC, it does not reflect the experiences of many Cambodian victims who suffered under both the predecessor and successor regimes. Likewise, the SCSL's jurisdiction did not begin until the 1996 signing of the Abidjan Peace Accord.[676] This effectively granted an amnesty for prior crimes given that the civil war had begun in the provinces as early as 1991 with the arrival of the

668. *100 Days of Slaughter: A Chronology of U.S./U.N. Actions*, PBS, (last visited Nov. 9, 2015), http://www.pbs.org/wgbh/pages/frontline/shows/evil/etc/slaughter.html.

669. U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Docs. S/PV.3453 (Nov. 8, 1994).

670. Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 355 (2005).

671. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment, 299-320 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007) (disallowing convictions based on criminal conduct prior to 1994, but allowing evidence of such acts to be admitted for certain purposes, such as for background, for proof of intent, or to demonstrate a deliberate pattern of conduct).

672. *Timeline: The History of Cambodia and the Khmer Rouge*, PBS, (Nov. 11, 2015, 7:18 PM), http://www.pbs.org/pov/enemies/photo_gallery_timeline.php#.Vhu6aZVdHko.

673. EAC Statute, *supra* note 225, at art. 3.

674. UNTAET Reg. No. 2000/15, *supra* note 150, at arts. 2.3-2.4.

675. Sandholtz, *supra* note 527, at 146.

676. SCSL Statute, *supra* note 170, at art. 1.

Revolutionary United Front ("RUF") from neighboring Liberia.[677] In the end, this temporal limitation did not necessarily affect those in the Court's dock, since most potential defendants remained active after 1996.[678] It did, however, focus the Court's attention on crimes committed in and around Freetown, which began to feel the effects of war in 1997.[679] Geographically, the SCSL was limited to crimes committed within Sierra Leone.[680] This provision was interpreted, however, to include those crimes planned or instigated abroad, an extension that proved critical to the prosecution of President Charles Taylor of Liberia who apparently never stepped foot in Sierra Leone.[681]

The drafters of the IHT Statute took a different tack, extending jurisdiction backwards to July 17, 1968, the date of the Ba'ath party *coup d'état*, up to May 1, 2003, the date of President George W. Bush's speech (premature as it turns out) aboard the U.S.S. Lincoln declaring an end to major combat activities in Iraq.[682] The IHT could prosecute any Iraqi national or resident accused of committing crimes inside or outside of Iraq during this timeframe.[683] These parameters would have enabled the IHT to theoretically reach crimes committed in connection with the wars in and against the Islamic Republic of Iran and Kuwait, although such charges would have been politically unpalatable. In the end, Saddam Hussein was executed before he could be tried for any extraterritorial activity or for other potential crimes, such as the Al-Anfal genocidal campaign against the Kurds.[684] The original model for the mixed chambers in the DRC would have limited jurisdiction to the period covered by the influential U.N. Mapping Report (1993-2003), but the draft legislation later extended jurisdiction from 1990 onward to reflect the continuing nature of atrocities in eastern DRC.[685] Jurisdiction before the proposed ACJHR will be prospective only. As a result, if it is ever formed, the ACJHR should not impact ongoing cases before the ICC involving African situations (Central African Republic, Côte d'Ivoire, the Democratic Republic of Congo, Libya, Kenya (if those cases are refiled), and Sudan).

C. Personal Jurisdiction

The classic Nuremberg/Tokyo model reserves international prosecutions for the "big fish." The two post-WWII tribunals thus concentrated their indictments

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677. Nicholas Cook, *Sierra Leone: Transition to Peace*, *in* SIERRA LEONE: CURRENT ISSUES AND BACKGROUND 17, 20 (Brett Sillinger ed., 2003).

678. *See* Perriello & Wierda, *The Special Court for Sierra Leone Under Scrutiny*, *supra* note 176, at 16.

679. *Id.*

680. SCSL Statute, *supra* note 170, at art. 1(1).

681. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 480 (Special Court for Sierra Leone Sept. 26, 2013).

682. IHT Statute, *supra* note 328, at art. 1(2).

683. *Id.*

684. For more on the Al-Anfal genocide, *see* Dave Johns, *The Crimes of Saddam Hussein: 1988 The Anfal Campaign*, PBS (Jan. 24, 2006), http://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html.

685. Labuda, *supra* note 482, at 4; *see supra* note 568.

on "major war criminals"—heads of government, the military, and industry whose crimes had no geographic limitations—while occupation, military, and national courts prosecuted lower-level defendants.[686] Article 7 of the IMT Charter established the important precedent that heads of state and other officials would enjoy no immunity from prosecution.[687] Neither of the two original *ad hoc* international tribunals contained any such statutory limitation as to seniority, but as a practical matter, these two tribunals tended to focus their efforts on more senior officials, eventually referring lower-level prosecutions to national courts pursuant to Rule 11bis.[688] Indeed, as part of the Completion Strategies, the Council instructed the ICTY to focus on "the most senior leaders suspected of being most responsible for crimes" within the jurisdiction of the tribunal.[689]

The framers of the statutes of subsequent tribunals have expressly limited the court's jurisdiction to senior officials or those deemed "most responsible" for abuses. For example, per the SCSL Statute, the Court had jurisdiction over

> 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.[690]

Jurisdiction over peacekeepers was reserved for the sending state, unless that state was unwilling or unable to genuinely investigate or prosecute.[691] The ECCC can assert jurisdiction over "senior leaders of Democratic Kampuchea [the Khmer Rouge] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia."[692] Line drawing exercises have led to disputes between the Cambodian and international CIJs over how far down the Khmer Rouge hierarchy to investigate.[693]

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686. *Milestones: 1945-1953,* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/nuremberg.

687. IMT Charter, *supra* note 428, at art. 7 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

688. *See supra* note 77.

689. S.C. Res. 1534, ¶ 5 (Mar. 26, 2004).

690. SCSL Statute, *supra* note 170, at art. 1(1).

691. *Id.* at arts. 1(2) and 1(3).

692. ECCC Statute, *supra* note 190, at art. 1.

693. *See* Randal C. DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law*, 8 GENOCIDE STUDIES & PREVENTION: AN INT'L JOURNAL 45 (2014) (arguing that from a legal perspective, the jurisprudence on personal jurisdiction and relative culpability mandate that the ECCC move forward on Cases 003 and 004). There may be a decision forthcoming on personal jurisdiction with respect to one Cambodian suspect. *See Conclusion of judicial investigation against Im Chaem* (Dec. 18, 2016), http://eccc.gov.kh/en/articles/co-investigating-judges-today-notified-all-parties-they-consider-judicial-investigation-aga.

It can be useful to not limit the nationality of defendants given the possibility of transnational criminal activity and dual nationalities. For example, the fact that the SCSL Statute did not limit the Court's personal jurisdiction to Sierra Leonean nationals enabled the prosecution of Charles Taylor, former President of Liberia.[694] This was by design given that important states had decided that Taylor was an impediment to peace in the region.[695] Contemplating the prosecution of different nationalities does complicate the availability of state consent, however, given that the nationality state may attempt to block the territorial state from proceeding against its nationals, as was seen in connection with the East Timor Special Panels.[696] The drafters of the Statute of the SCSL made another important decision to allow for the indictment of child soldiers (between the ages of 15-18), such as those involved in the ubiquitous "small boy units," so long as any sentence was rehabilitation-oriented.[697] The Court had no jurisdiction over children under 15.[698] Notwithstanding these provisions, the first Chief Prosecutor made a policy decision that he would not pursue any charges involving crimes committed by juveniles.[699]

Many tribunals have also endeavored to investigate "all sides" of a conflict in order to avoid the charge of victor's justice. The SCSL, for example, ultimately staged three trials of three defendants each from the three warring parties: the Armed Forces Revolutionary Council ("AFRC"), the Revolutionary United Front ("RUF"), and the Civil Defense Forces ("CDF").[700] This approach can create an illusion of equivalency that is not borne out by the patterns of violence. In Sierra Leone, for example, members of the public objected to the decision to indict members of the CDF, who were perceived as war heroes endeavoring to preserve the constitutional order.[701] Once hailed as a courageous and important exercise in historical justice, the BICT has become an object lesson for how international criminal law can be manipulated for political ends. All prosecutions, convictions, and executions to date have been of individuals associated with two political parties—Jamaat-e-Islami ("Jel") and the Bangladesh Nationalist Party ("BNP")—

694. Prosecutor v. Taylor, *supra* note 681.

695. BIRD, *supra* note 177, at 92.

696. *See supra* text accompanying notes 145, 399.

697. SCSL Statute, *supra* note 170, at art. 7(1) ("Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking 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").

698. *Id.*

699. David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUMAN RIGHTS BRIEF 11, 14-15 (2008), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1029&context=hrbrief.

700. *See* SPECIAL COURT FOR SIERRA LEONE & RESIDUAL SPECIAL COURT FOR SIERRA LEONE, http://www.rscsl.org/ (last visited Nov. 3, 2015).

701. Lansana Gberie, *The Special Court for Sierra Leone Rests—For Good*, AFRICA RENEWAL (Apr. 2014), http://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good.

who are opposed to the governing Awami League.[702] Not a single so-called freedom fighter (*mukti bahani*) or Pakistani national has been prosecuted, suggesting that the BICT is at the service of a byzantine political vendetta rather than a genuine, and long-overdue, effort at historical justice.[703] Likewise, the ICTR only prosecuted individuals associated with the Hutu Power movement, although its jurisdiction could easily have encompassed crimes committed by the Tutsi-led RPF. When the Chief Prosecutor began signaling that she was investigating "all sides," Rwanda shut down cooperation.[704] As a result, the ICTR basically meted out its own form of victors justice.

As a court's personal jurisdiction becomes narrower and narrower, it can begin to feel like the international community has issued a bill of attainder. The STL is unique in that it is largely focusing on a single set of discrete incidents rather than a large and varied crime base. Concern was expressed that limiting jurisdiction to Hariri's assassination alone would give the impression of selective justice.[705] So, the STL Statute does contemplate the prosecution of individuals responsible for

> other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, [that] are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005.[706]

The Statute indicates that "connected" acts will be determined through a consideration of "criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*) and the perpetrators."[707] This could include a number of contemporaneous attacks against high-profile political figures and journalists as well as the targeting of public places.[708]

The Regulation 64 Special Panels could in principle exercise "universal jurisdiction" over international crimes (in the sense that they could exercise jurisdiction regardless of where the crime was committed and whether it was committed by or against a Timorese citizen).[709] The Panels originally issued indictments against almost 400 persons; however, over 300 individuals remained outside of Timor-Leste and thus beyond the reach of the Special Crimes Unit, including the most important perpetrators, such as General Wiranto who as

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702. GEOFFREY ROBERTSON, REPORT ON THE INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH 10-12 (2015).

703. *Id.* at 70.

704. *See supra* notes 440, 560.

705. Omar Nashabe, *The Special Tribunal for Lebanon (STL): Selective Justice & Political Maneuvers*, 1 INT'L J. CRIMINOLOGY & SOC. 247, 248 (2012).

706. STL Statute, *supra* note 95, at art. 1. Presumably, the "Parties" refers to the Government of Lebanon and the United Nations represented by the Secretary-General.

707. *Id.*

708. Aptel, *supra* note 101, at 1109.

709. UNTAET Reg. No. 2000/15, *supra* note 150, at art. 2.1.

commander-in-chief was widely considered to be the architect of the post-referendum violence.[710] Notwithstanding both a Memorandum of Understanding between UNTAET and the Attorney General of Indonesia (which was never ratified by the Indonesian Parliament)[711] and UNSCR 1410 (2002) (which "stresse[d] the critical importance of cooperation"[712] between the two governments), Indonesia provided little in the way of concrete assistance to the Special Panels.[713] Ultimately, the SCU focused its limited resources on the prosecution of a small set of priority cases, many involving a pattern of serious crimes.[714] Meanwhile, the Ad Hoc Human Rights Court in Indonesia was supposed to assert jurisdiction over extraterritorial violations of international human rights perpetrated by Indonesian citizens, but in the end, it did little to fill the conspicuous gaps in the Special Panels' docket.[715]

The EAC are empowered to prosecute "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 and 1 December 1990."[716] They may also "choose to prosecute the most serious crimes within their jurisdiction"[717] Five other individuals are under indictment before the EAC, although they are at large and only Habré himself is currently on trial.[718] As a minimally internationalized domestic court, the EAC can be conceptualized as exercising universal jurisdiction over Habré and his henchmen given that the perpetrators and victims are predominantly Chadian.[719] The exercise of universal jurisdiction by an internationalized court, with a multilateral imprimatur provided by the AU, may raise fewer concerns than the exercise of universal jurisdiction by a single state against the citizens of another co-equal sovereign. Chadian consent to the EAC process also mitigates any objections to the assertion of universal

710. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 3, 20; Timor-Leste COE Report, *supra* note 147, at 4 (noting pending charges in 2005).

711. *Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters*, JORNAL DA REPÚPLICA (April 5, 2000), http://www.jornal.gov.tl/lawsTL/Other-Docs/mou-id-untaet.htm. *See* Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 21.

712. S.C. Res. 1410, ¶ 12 (May 17, 2002).

713. HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR: INDONESIA'S SHAM PROSECUTIONS, THE NEED TO STRENGTHEN THE TRIAL PROCESS IN EAST TIMOR, AND THE IMPERATIVE OF U.N. ACTION, (Dec. 20, 2002), http://www.hrw.org/legacy/backgrounder/asia/timor/etimor1202bg.htm#_ftnref15 [hereinafter HRW, *Justice Denied*].

714. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 19.

715. COHEN, *supra* note 403, at 62.

716. EAC Statute, *supra* note 225, at art. 3.1.

717. *Id.* at art. 3.2.

718. *Chad: Time for Justice for Victims of Hissène Habré's Regime,* AMNESTY INT'L (July 20, 2015), https://www.amnesty.org/en/latest/news/2015/07/chadtimeforjustice/. Chad has prosecuted some of these individuals domestically and has so far refused to extradite them to Senegal. *Q&A: The Case of Hissène Habré*, *supra* note 232.

719. WILLIAMS, *supra* note 102, at 182–85.

jurisdiction that might be raised by some officials from AU member states who have been critical of European universal jurisdiction indictments.

The Nuremberg Tribunal was unique in that it could declare certain groups and organizations to be criminal; the Tokyo Tribunal had no parallel competency.[720] This experiment in collective liability has not been replicated in modern times. Most *ad hoc* tribunals are thus empowered to prosecute natural persons only.[721] The proposed ACJHR is unique in that it will be expressly empowered to assert jurisdiction over "legal persons," including corporations.[722] The current proposal for mixed chambers in the DRC also contemplates jurisdiction over legal persons as well as the ability to mete out a range of relevant penalties, including dissolution, judicial surveillance, exclusion from public markets and access to capital, confiscation of property, and fines.[723] With the passage of the International Crimes (Tribunals) (Amendment) Act of 2013, the BICT can, in theory, assert jurisdiction over "organizations" involved in the commission of crimes during Bangladeshi War of Liberation.[724] This text is aimed directly at two opposition parties, notwithstanding that any continuity with their liberation-era predecessors is questionable. Although the STL Statute suggests that it has primary jurisdiction over natural persons only, the STL brought charges against media outfits on the basis of allegations that journalists interfered with the administration of justice by leaking information about protected witnesses.[725] These cases have not been successful, so far, given requirements of corporate attribution under Lebanese law.[726] Jurisdiction over corporations was considered, but rejected, during the building of the ICC.[727]

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720. IMT Charter, *supra* note 428, at arts. 9–10.

721. *See, e.g.*, ICTR Statute, *supra* note 2, at art. 5; ICTY Statute, *supra* note 64, at art. 6.

722. *See* Draft Protocol on Amendments, *supra* note 244. The Draft Protocol states:

> Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence . . . Corporate knowledge of the commission of an offence may be established by proof that the relevant knowledge was possessed within the corporation and that the culture of the corporation caused or encouraged the commission of the offence.

Id. at arts. 46C(2), 46C(4).

723. *See* Human Rights Watch, Commentary, *DR Congo: Commentary on Draft Legislation to Establish Specialized Chambers for Prosecution of International Crimes,* HUMAN RIGHTS WATCH (Mar. 11, 2011), https://www.hrw.org/news/2011/03/11/dr-congo-commentary-draft-legislation-establish-specialized-chambers-prosecution.

724. *See Amendment of International Crimes Tribunal Act of 1973*, BANGLADESH TRIAL OBSERVER (Mar. 7, 2013), http://bangladeshtrialobserver.org/2013/03/07/amendment-of-international-crimes-tribunal-act-of-1973/. There is some talk that the law may need to be amended anew to enable the prosecution of "parties" in addition to "organizations" if it is to serve its apparent intended purpose of targeting the Jel and BNP.

725. *See* Special Tribunal for Lebanon Issues Summons to Appear in Contempt Cases, SPECIAL TRIB. FOR LEBANON, (Apr. 24, 2014), https://www.stl-tsl.org/en/special-tribunal-for-lebanon-issues-summons-to-appear-in-contempt-cases-stl-press-release.

726. *See, e.g., Prosecutor v. Al Jadeed [Co.] S.A.L.*, et al, Case No. STL-14-05/T/CJ (Sept. 18, 2015) (acquitting corporate defendant).

727. Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUMAN RIGHTS BRIEF 23, 23 (2004),

One element that sets the ACJHR apart from other international tribunals concerns the availability of immunity defenses. A newly-minted Article 46A*bis* reads:

> No charges shall be commenced or continued before the Court against any serving African Union 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.[728]

The term "senior state officials" is not defined by the Protocol, and records of the deliberations indicate that it has been left to the future Court to determine the reach of the term.[729] In the negotiations around this provision (which were described in the record as "exhaustive"), it seems that the enigmatic reference to immunity "based on their functions" is meant to incorporate immunity *ratione materiae*, or functional immunity. The proposal to grant immunity to African government officials before the new Court can be traced to the hostility of some AU members toward the ICC's efforts to prosecute two sitting heads of state—Uhuru Kenyatta of Kenya and Omar Al-Bashir of Sudan—for international crimes (as manifested in, among other things, an AU resolution calling for non-cooperation by African ICC member states in the arrest of al-Bashir) and to efforts led by Kenya to introduce an analogous amendment to the Rome Statute at the 12th session of the Assembly of States Parties held in November 2013.[730]

If this provision is ever brought into force, it would set the new African Court apart from all of the other international criminal tribunals when it comes to the availability of immunities from criminal prosecution.[731] Indeed, almost all[732] other

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https://www.wcl.american.edu/hrbrief/11/2graff.pdf.

728. *African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute*, INTERNATIONAL JUSTICE RESOURCE CENTER (July 2, 2014), http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/.

729. Afr. Union, *The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, at 6, EX.CL/846(XXV) (June 24, 2014), https://www.justsecurity.org/wp-content/uploads/2014/07/Legal-Instruments-Adopted-in-Malabo-July-2014.pdf.

730. Beth Van Schaack, *African Heads of State Before the International Criminal Court*, INT'L CRIM. JUST. TODAY, June 21, 2015, http://www.international-criminal-justice-today.org/arguendo/article/african-heads-of-state-before-the-international-criminal-court/.

731. For example, art. 7(2) of the ICTY Statute, *supra* note 64, states: "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Likewise, art. 29 of the ECCC Statute, *supra* note 190, states: "[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment." *See generally* Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier*, JUST SECURITY, July 10, 2014, http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/.

732. The STL Statute is silent as to the availability of immunities for state officials. A draft version of the legislation establishing the SCC in CAR contained a provision eschewing all immunities; this was later deleted from the final version of the law. However, the CAR Penal Code removes any immunity for international crimes, so that provision would have been redundant. *See* Cent. Afr. Rep. Code Penal, *supra* note 633, at art. 162. CPA Order Number 17 gave coalition forces immunity before

constitutive instruments expressly disclaim all immunities, and every international court to consider the question has denied immunity to official defendants, even sitting heads of state who might otherwise enjoy robust customary international law immunities before domestic courts.[733] Most relevant by way of comparison with the ACJHR, perhaps, is the AU's EAC Statute, which also eschews all immunities at Article 10(3).[734] Not surprisingly, NGOs across the region and beyond have objected to the proposed immunity provision in the ACJHR Protocol.[735] A particular source of criticism stems from the fact that the draft Protocol runs contrary to the AU's Constitutive Act, which contains broad and inspiring language obliging AU members to "[p]romote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments" and allowing the Union "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[.]"[736]

VII. RULES OF PROCEDURE

Any international or hybrid body needs a source of procedural law. If rules are to be drafted anew rather than adopted from a host state or another tribunal, a fundamental decision concerns whether the tribunal will be governed by rules that resemble the adversarial and common law system versus its inquisitorial/civil law (Romano Germanic) counterpart. The ICC and many of the *ad hocs* are essentially adversarial in nature, although rules drafters have adopted inquisitorial elements in some important respects (particularly when it comes to the non-technical admission of evidence and the constitution of victims as *parties civiles*). The result is a *sui generis* set of procedural rules that blends aspects from both traditions.[737] The procedures of the ICTY and ICTR more closely mirrored the common law and yet the judges became increasingly comfortable over the years with civil law practices, such as a greater reliance on written evidence, more relaxed rules of evidence, and the taking of judicial notice of adjudicated facts.[738] The STL system

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the IHT. *See* Coalition Provisional Authority Order Number 17 Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, sec. 5, CPA/ORD/26 (June 2003), http://www.usace.army.mil/Portals/2/docs/COALITION_PROVISIONAL.pdf.

733. The Special Court for Sierra Leone in a decision with respect to Charles Taylor, ex-President of Liberia, explained that immunities that may apply in a domestic court are inapplicable before an international court: "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court." Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 52 (Special Ct. for Sierra Leone 31 May 2004).

734. EAC Statute, *supra* note 225, at art. 10(3).

735. *See e.g.*, Dan Kuwali, *Article 46Abis: A Step Backward in Ending Impunity in Africa*, KUJENGA AMANI (Sept. 22, 2014), http://forums.ssrc.org/kujenga-amani/2014/09/22/article-46a-bis-a-step-backward-in-ending-impunity-in-africa/#.Vj_rmBNViko.

736. AU Constitutive Act, *supra* note 238, at arts. 3(h), 4(h).

737. Alex Whiting, *The ICTY as a Laboratory of International Criminal Procedure*, LEGACY OF THE INT'L. CRIM. TRIB. FOR THE FORMER YUGOSLAVIA 345, 363-365 (Bert Swart et al. eds., 2011).

738. *See, e.g.*, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused's Motion for

envisions a strong role for the judge in controlling the proceedings and the presentation of proof (e.g., the judge is to begin questioning the witnesses rather than the parties),[739] although there is no express provision for the compilation of a formal "dossier" such as one would see in a purely inquisitorial system.[740] It is already apparent that the STL has placed a greater reliance on testimonial evidence in written, rather than *vive voce*, form.[741] The only international tribunal to really stay true to a civil law structure is the ECCC, given the central roles of the CIJs in the adjudicative process, although even that tribunal has some common law elements.[742]

Like the IMT before it,[743] the judges of the original *ad hocs* were empowered to promulgate and amend their own rules of procedure and evidence ("RPE").[744] Although the ICTR's rules were originally based on the ICTY's, the two sets of rules later diverged on some important matters.[745] The SCSL Statute at Article 14 adopted the ICTR's RPE by reference, but allowed the judges to amend those rules and also consider Sierra Leonean procedural law (in the form of the 1965 Criminal Procedure Act) as appropriate.[746] The SCSL judges made some amendments as needed over the course of the life of the Court, most of which were aimed at streamlining the proceedings.[747] From the outset, Article 21 of the STL Statute emphasized the goal of holding expeditious trials,[748] reflecting escalating concerns with the length of proceedings before other ICL tribunals.[749]

Judicial Notice of Adjudicated Facts Related to Count One (Int'l Crim. Trib. for the Former Yugoslavia Jan. 21, 2014).

739. *See, e.g.*, STL Statute, *supra* note 95, at art. 20(2) ("[u]nless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence."). Other international tribunals gave primacy to the parties in questioning witnesses. *See, e.g.*, ICTY RPE, *supra* note 77, at Rule 85.

740. Aptel, *supra* note 101, at 1119.

741. *See* RULES OF PROCEDURE AND EVIDENCE, Special Tribunal for Lebanon, at 155 [hereinafter STL RPE].

742. Ciorciari & Heindel, *supra* note 25, at 375.

743. *See* IMT Charter, *supra* note 428, at art. 13.

744. *See, e.g.*, ICTY Statute, *supra* note 64, at art. 15 ("The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.").

745. *See* Katrín Ólöf Einarsdóttir, *Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC*, 12 (Feb. 2010) (thesis, University of Iceland), http://skemman.is/stream/get/1946/4226/12225/1/1_fixed.pdf.

746. SCSL Statute, *supra* note 170, at art. 14(2).

747. Perriello & Wierda, *The Special Court for Sierra Leone Under Scrutiny*, *supra* note 176, at 17.

748. STL Statute, *supra* note 95, at art. 21(1) ("The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.").

749. *See* Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79 (2009).

Other hybrid tribunals have adopted the local procedural law in whole or in part, often with the caveat that it must be consistent with international law.[750] For example, the STL judges are to be "guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial."[751] One significant departure from Lebanese law concerns the availability of certain penalties, namely the death penalty and forced labor.[752] Consistent with Lebanese law, the STL allows *in absentia* proceedings[753] and is currently hearing evidence against four suspects connected to Hezbollah who remain at large.[754] In order for a full-scale *in absentia* trial before the STL to proceed, there must be adequate notice of the indictment (publication or notification to the nationality state suffice), defense counsel must be assigned to represent the rights and interests of the accused, and defendants must retain an unconditional right to a retrial in their presence.[755] Presumably, this retrial could happen before Lebanese courts in the event that the accused resurfaces after the STL has concluded its work, although one commentator has suggested that any retrial would have to occur before a reconstituted STL or its residual mechanism.[756]

The STL is the first international tribunal since Nuremberg[757] to allow for this

750. For example, the SCC in CAR will apply the Code de Procédure Pénale de al République Centrafricaine, but can also refer to international procedural rules where there are gaps, uncertainties, or inconsistencies in domestic law. *See* Loi Organique, *supra* note 195, at arts 3, 5. A similar arrangement is in place with respect to the EAC, which will be governed by Senegalese criminal procedure. Likewise, per Article 16 of its Statute, the IHT was to be guided by the rules of procedure provided for in the 1971 Criminal Procedure Law, but the legislature also promulgated a special set of RPE. *See* IHT RPE, *supra* note 330.

751. STL Statute, *supra* note 95, at art. 28(2).

752. *Id.* at art. 24.

753. *See id.* at art. 22; STL RPE, *supra* 741, at 105-9; Maggie Gardner, *Reconsidering Trials* in Absentia *at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence*, 43 GEO. WASH. INT'L L. REV. 91, 91 (2011); Paola Gaeta, *Trial* in Absentia *Before the Special Tribunal for Lebanon*, *in* THE SPECIAL TRIBUNAL FOR LEBANON: LAW & PRACTICE 229, 229 (Amal Alamuddin et al. eds. 2014).

754. Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision (Special Trib. for Leb. Nov. 1, 2012).

755. *See* Chris Jenks, *Notice Otherwise Given: Will* in Absentia *Trials at the Special Tribunal for Lebanon Violate Human Rights?* 33 FORDHAM INT'L L. J. 57, 67 (2009).

756. Gaeta, *supra* note 753, at 246-48.

757. IMT Charter, *supra* note 428, at art. 12. Article 12 of the IMT Charter contemplated *in absentia* trials:

> The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Id. This provision was invoked with respect to Martin Bormann, who disappeared after WWII, but not Gustave Krupp von Bohlen, who was declared mentally unfit for trial. HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION, at 3, U.N. Sales No. E.03.V.10 (2003). There was no analogous provision in the Tokyo Charter.

option,[758] even though such trials are not necessarily contrary to international human rights law so long as certain conditions are met.[759] That said, proceedings before other international tribunals have continued when the defendant has refused to attend trial or has become disruptive on the interlinked theories that once a defendant is present, he or she is always present (*semel praesens, semper praesens*), and the defendant can waive his or her confrontation and other rights.[760] So, for example, when Jean Bosco Barayagwiza refused to attend his trial, the ICTR invoked its Rule 82bis, which allowed for a trial to proceed in the defendant's absence so long as certain conditions as to initial appearance, notice, and adequate representation were satisfied.[761] The ICTY had no analogous rule. Early in its life, however, the ICTY did adopt Rule 61, which controversially allowed the tribunal to reconfirm an unexecuted indictment and issue an international arrest warrant through the presentation of evidence and witness testimony in a public hearing.[762] This rule was sparingly used by the ICTY at a time when the former Yugoslav republics were refusing to hand over high-profile fugitives.[763] Later, the ICTY abandoned this practice and began issuing indictments under seal with respect to at-large defendants. The ICTR never made use of its version of Rule 61, but a new Rule 71bis allows the tribunal to preserve witness testimony with respect to then nine Rwandan indictees who remained at

758. *See generally* Anne Klerks, *Trials* in Absentia *in International (Criminal) Law* (June 2008) (thesis, Tilburg University), http://arno.uvt.nl/show.cgi?fid=81103. UNMIK Regulation 2001/1 seemed to prohibit in all circumstances trials *in absentia* for "serious violations of international humanitarian law, as defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court." U.N. Interim Admin. Mission in Kosovo, Regulation 2001/1 on the Prohibition of Trials *in Absentia* of Serious Violations of International Humanitarian Law, UNMIK/REG/2001/1 (Jan. 12, 2001). Likewise, the new Criminal Code of BiH which governs the WCC indicates that "an accused may never be tried *in absentia*." Criminal Code of Bos. & Herz., *supra* note 495, at art. 247.

759. U.N. H. C. R. Comm., 21st Sess., U.N. Doc. HRI/GEN/1/Rev.1, General Comment 13, art. 14(11) (1994), https://www1.umn.edu/humanrts/gencomm/hrcom13.htm ("When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary"); Sejdovic v. Italy, Eur. Ct. H.R., App. No. 56581/00, Judgment (Mar. 1, 2006).

760. Prosecutor v. Gbao, Ruling on the Refusal of the Third Accused, Augustine Gbao to Attend a Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, Case No. SCSL-04-15-T (July 12, 2004). This is the approach taken by the ICC. *See* Rome Statute, *supra* note 273, at art. 63 (requiring trial in the presence of the accused, but allowing proceedings to continue of the defendant is disruptive). *See also* Jenks, *supra* note 755, at 69-71 (noting that many modern tribunals allowed for partial *in absentia* proceedings when the defendant was unwilling or unable to participate after an initial appearance).

761. *See* Nahimana et. al., v. Prosecutor, Case No. ICTR 99-52-A, Judgment, ¶¶ 88, 94, 100, 109 (Int. Crim. Trib. Rwanda Nov. 28, 2007) (explaining ICTR's Appeals Chamber analysis of the trial court's use of Rule 82bis).

762. Alexsandra B. Stankovic, *Guilty Until Proven Guilty: Rule 61 of the ICTY*, SELECTED WORKS, at 22, http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=aleksandra_stankovic. The judges of the East Timor Special Panels rejected efforts to employ a similar procedure to deal with unexecuted warrants. *See* Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 22.

763. *See* Stankovic, *supra* note 762, at 37–38.

large.[764] The notional MH-17 Statute would allow for *in absentia* proceedings if a state did not turn over a suspect.[765] The defendant would be entitled to a retrial unless he or she accepts the judgment or waives the right to be present.[766]

The applicable procedural law before the ECCC has been plagued by ambiguity. The Cambodian Constitution cryptically provides that the "prosecution, arrest, or detention of any person shall not be done except in accordance with the law," and any subsequent trial shall be conducted "in accordance with the legal procedures and laws in force."[767] The ECCC Agreement, in turn, provides at Article 12 that the procedure to be applied by the ECCC "shall be in accordance with Cambodian law."[768] At the time, however, Cambodia had only a rudimentary criminal procedure code (a more comprehensive code was finally drafted in 2007), so these incorporations by references largely led to a dead end.[769] The ECCC Law directs the Chambers to consider international law when Cambodian law is silent, when there is some uncertainty in the law, or when the existing law would be inconsistent with international standards.[770] In particular, Chambers are to exercise their jurisdiction "in accordance international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party"[771] and which is directly enforceable in the domestic legal order (thus rendering this express incorporation somewhat redundant).[772] Eventually, in 2007, the ECCC—in a plenary session and not without difficulty—promulgated Internal Rules on procedure and evidence in order to consolidate applicable domestic and international law, even though neither the UN Agreement nor the ECCC Law empowered the judges to do so.[773] These rules depart in some

764. Michael Haggerson, *ICTR Prosecutor Uses New Rule to Preserve Evidence Against Fugitive Genocide Financier*, JURIST, May 24, 2011.

765. MH-17 Draft Statute, *supra* note 615, at art. 38.

766. *Id.*

767. THE CONSTITUTION OF THE KINGDOM OF CAMBODIA, Sept. 21, 1993, arts. 38, 129, http://faolex.fao.org/docs/pdf/cam117198.pdf.

768. ECCC Agreement, *supra* note 179, at art. 12.

769. Worden, *supra* note 637.

770. ECCC Law, *supra* note 461, at arts. 20new, 23new, 33new; Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Summary of Judgment, ¶ 35 (Extraordinary Chambers in the Ct. of Cambodia July 26, 2010); *see generally* Lily O'Neill & Göran Sluiter, *The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia*, 10 MELBOURNE J. INT'L L. 596 (2009).

771. ECCC Agreement, *supra* note 179, art. 12(2); *see also* ECCC Law, *supra* note 461, at arts. 33new, 35new.

772. Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUSTICE 314, 315 (2006) (citing art. 31 of the 1993 Constitution).

773. *See generally* Internal Rules (Rev.9), Extraordinary Chambers in the Courts of Cambodia Internal Rules (Jan. 16, 2015), http://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf [hereinafter ECCC Internal Rules]. Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUSTICE 314, 320 (2006) ("[T]he current legal framework does not provide the judges any power to legislate on procedural issues."); Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Nuon Chea's Consolidated Preliminary Objections (Extraordinary Chambers in the Ct. of Cambodia Feb. 25, 2011)

important ways from Cambodian law.[774]

The ECCC and STL are unique among hybrid institutions in that they, like the ICC,[775] allow victims to constitute themselves as civil parties, be independently represented at court, call witnesses, etc.[776] Victims before the ECCC can pursue civil remedies in the form of collective and moral, but not individualized, reparations.[777] The ECCC's interpretation of "victim" has been challenged, however,[778] and the overwhelming number of civil party trial interventions in Case 001 led to rulings and rules' amendments that significantly limit the direct involvement of civil parties.[779] Most importantly, before the ECCC, victims must now be represented by lead co-lawyers designated by the Court,[780] similar to the appointment of class counsel in U.S. mass claims litigation. In light of this experience, victim participation regimes have become controversial.[781] Victims have appeared before other international and hybrid tribunals primarily as

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(arguing that the Internal Rules are an unconstitutional arrogation of legislative power and without binding legal effect); Prosecutor v. Nuon, Case No. 002/19-0902007/ECCC/TC, Decision on Nuon Chea's Preliminary Objections Alleging the Unconstitutional Character of the ECCC Internal Rules (Extraordinary Chambers in the Ct. of Cambodia Aug. 8, 2011).

774. *See* Stan Starygin, *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?* 3 J. OF L. & CONFLICT RESOLUTION 20 (2011) (arguing that many of the ECCC's Internal Rules are *ultra vires* in light of extant law).

775. Rome Statute, *supra* note 273, at art. 68. The judges of the various Chambers are entitled to promulgate rules on participation. *See* Melanie Vianney-Liaud, *Emerging Voices: Victim Participation in ICC and ECCC's Proceedings*, OPINIOJURIS, Aug. 20, 2015, http://opiniojuris.org/2015/08/20/emerging-voices-victim-participation-in-icc-and-eccs-proceedings/.

776. ECCC Internal Rules, *supra* note 773, at Rule 23; STL Statute, *supra* note 95, at art. 17 ("Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial"). On the STL, *see generally* Howard Morrison & Emma Pountney, *Victim Participation at the Special Tribunal for Lebanon*, *in* THE SPECIAL TRIBUNAL FOR LEBANON: LAW & PRACTICE 153 (Amal Alamuddin et al., eds. (2014)).

777. Prosecutor v. Kaing Guek Eav alias Duch, Case File 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 643, 659 (Extraordinary Chambers in the Ct. of Cambodia Feb. 3, 2012) [hereinafter *Duch* Appeals Judgment]. Rule 23(11) of the ECCC's Internal Rules departs from ordinary Cambodian criminal procedure and provides that such collective and moral reparations can only be ordered against convicted persons. ECCC Internal Rules, *supra* note 773, at 23(11). The ICC has a similar system of victim participation. *See* Rome Statute, *supra* note 273, at art. 75.

778. *Duch* Appeals Judgment, *supra* note 777, ¶¶ 406-21.

779. Michelle Stagg et al., *Lessons Learned from the Duch Trial: A Comprehensive Review of the First Case before the ECCC*, ASIAN INT'L JUST. INITIATIVE'S KRT TRIAL MONITORING GROUP 28 (2009), http://wcsc.berkeley.edu/wp-content/uploads/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf. *See* Prosecutor v. Duch, Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-07-2007/ECCC/TC (Extraordinary Chambers in the Ct. of Cambodia Oct. 8, 2009).

780. ECCC Internal Rules, *supra* note 773, at Rule 23(3).

781. Vianney-Liaud, *supra* note 775.

witnesses.[782] Their extreme vulnerability has required the establishment of victims and witnesses units and various forms of protection measures.[783]

The proceedings before the BICT are widely believed to be fundamentally unfair.[784] Some of this unfairness can be traced to the very genetic code of the BICT's legal framework; the rest is attributable to the practice of the tribunal. Among other retrograde elements, amendments to the Constitution protect the 1973 Act from legal attack and withdrew certain procedural rights from criminal defendants (including the right to challenge the court's jurisdiction and the prohibition of *ex post facto* prosecutions).[785] Further legislation invalidated additional rights, including the right against self-incrimination (the statute provides that defendants shall not be excused from answering any question on the ground that the response will incriminate the suspect).[786] Long pre-trial and "executive" detentions have led the U.N. Working Group on Arbitrary Detention to declare that several defendants have been subjected to arbitrary detention in violation of international law, including the ICCPR, which Bangladesh has ratified.[787] In addition, idiosyncratic RPE govern the Tribunal, so any protections contained in the normal criminal procedure code, including rights of appeal, are inapplicable before the BICT.[788] Although the accused ostensibly enjoy the right to counsel of their choice, in practice the Bangladesh government and Bar Association have made it virtually impossible for outside counsel to adequately represent their clients by, among other things, restricting their travel to the country and their presence in interrogations.[789] Several trials—including that of Abdul Kalam Azad, the first case to go to verdict—have proceeded *in absentia*.[790]

After the BICT sentenced Abdul Quadar Mollah, the assistant secretary-general of Jamaat-e-Islami, to life imprisonment for crimes against humanity in February 2013, the 1973 Act was amended to allow the prosecution to appeal a

782. John Ciorciari & Anne Heindel, *Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands*, 56(2) VA. J. INT'L L 8 (2016).

783. *See generally* A.M. de Brouwer & M. Heikkilä, *Victim Issues: Participation, Protection, Reparation, and Assistance*, *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1299 (Göran Sluiter et al., eds. 2013).

784. *See* ROBERTSON, *supra* note 702.

785. *Id.*

786. 1973 Act, *supra* note 408, at art. 18.

787. Steven Kay QC, *UN Working Group on Arbitrary Detention Condemns Detention of Bangladesh International Crimes Tribunal Suspects*, INT'L CRIM. L. BUREAU, Feb. 7, 2012, http://www.internationallawbureau.com/index.php/un-working-group-on-arbitrary-detention-condemns-detention-of-bangladesh-international-crimes-tribunal-suspects/.

788. 1973 Act, *supra* note 408, at art. 23 ("The provisions of the Criminal Procedure Code . . . and the Evidence Act . . . shall not apply in any proceedings under this Act").

789. Owen Bowcott, & Jason Burke, *British Lawyers Criticise Bangladeshi War Crimes Tribunal*, THE GUARDIAN (June 13, 2013), http://www.theguardian.com/world/2013/jun/13/lawyer-criticises-bangladeshi-tribunal.

790. Elizabeth Herath, *Trials* in Absentia*: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal*, 55 HARV. INT'L L. J. ONLINE 1 (June 4, 2014).

sentence or a verdict of acquittal.[791] The amendments were made retroactive. On the prosecutor's appeal, the Supreme Court augmented Mollah's sentence from life imprisonment to death, a final sentence that does not admit the right of judicial appeal.[792] Despite calls on December 11, 2013, from U.S. Secretary of State John Kerry and United Nations Secretary-General Ban Ki Moon to Sheikh Hasina herself, Mollah became the first BICT defendant to be executed.[793] He was hanged on December 12, 2013, after a last minute stay of execution was lifted, on the eve of the upcoming Victory Day celebrations.[794] Indeed, trials and appeals proceeded at a breakneck pace in 2013, apparently in an effort to achieve results in advance of the January 2014 elections. The BICT has been criticized for, among other things, administering the death penalty, particularly when coupled with these other procedural infirmities.[795]

In terms of penalties, the two post-war *ad hoc* tribunals both administered capital punishment.[796] One of the only modern internationalized bodies to follow suit was the IHT,[797] even though the CPA had suspended the death penalty in 2003.[798] The availability of the death penalty ultimately prevented many states and the United Nations from assisting with the trials. In other *ad hoc* institutions, further conditions and terms of incarceration may be governed by the prevailing local law and subject to host nations' ability to adhere to international standards.[799] Pardons and the commutation of sentences are also partially governed by local law, although these adjustments often require the concurrence of the Tribunal's

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791. 1973 Act, *supra* note 408, at art. 21.

792. *Bangladesh Islamist's War Crimes Life Sentence Revised To Death*, ASHARQ AL-AWSAT (Sept. 17, 2013), http://english.aawsat.com/2013/09/article55317091/bangladesh-islamists-war-crimes-life-sentence-revised-to-death.

793. *See* Beth Van Schaack, *Precipitating Politics Around The Revival of Prosecutions in Bangladesh*, INTLAWGRRLS (Oct. 10, 2014), http://ilg2.org/2014/10/10/precipitating-politics-around-the-revival-of-prosecutions-in-bangladesh/.

794. Amy Kazmin & Joseph Allchin, *Bangladesh Hangs Islamist Leader Abdul Quader Mollah*, FINANCIAL TIMES (Dec. 12, 2013), http://www.ft.com/cms/s/0/18f3eae4-61c4-11e3-aa02-00144feabdc0.html#axzz3oNcggxkF.

795. *Bangladesh: Death Penalty Will not Bring Justice for Crimes During Independence War*, AMNESTY INT'L (Oct. 29, 2014), https://www.amnesty.org/en/latest/news/2014/10/bangladesh-death-penalty-will-not-bring-justice-crimes-during-independence-war/.

796. Kaufman, *supra* note 59, at 755, 768. Twelve IMT defendants were sentenced to death, but only ten were actually executed. Seven Tokyo defendants were sentenced and put to death. Kaufman, *supra* note 59, at 762-63.

797. IHT Statute, *supra* note 328, at art. 24. *See* Michael Bohlander, *Can the Iraqi Special Tribunal Sentence Saddam Hussein to Death?* 3 J. INT'L CRIM. JUSTICE 463 (2005) (arguing that the reinstatement of capital punishment was unlawful). Saddam Hussein was executed following the Dujail trial, preventing his prosecution for genocide in the Al-Anfal case, which was already underway, or for crimes committed in neighboring states. Chatham House, *supra* note 332.

798. Coalition Provisional Authority Order Number 7, Penal Code, § 3, CPA/ORD/9 (June 9, 2003), http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

799. ICTY Statute, *supra* note 64, at art. 27 ("Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.").

President.[800] The MICT will manage any parole or other post-conviction issues that arise with respect to ICTY or ICTR defendant. The SCSL could also order "the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone."[801] This procedure was not invoked in any proceeding.

The need for adequate translation and interpretation facilities and resources presents a procedural issue in the administration of hybrid justice that receives insufficient attention, particularly given that the some portion of the judges often do not speak the same languages as the accused.[802] The Nuremberg Tribunal set a precedent for extensive translations into multiple languages (English, Russian, French, and German).[803] Although multiple states were involved in the Tokyo Tribunal, Japanese and English were the only official languages.[804] Translation costs and delays have hindered many of the *ad hoc* hybrid institutions.[805] The ECCC, for example, translates—at great expense, particularly in light of perennial budgetary shortfalls—all the proceedings and many filings into French, even though very few of the personnel speak only French.[806] This was an even greater issue before the East Timor Special Panels, where many defendants and witnesses spoke vernacular languages.[807]

VIII. FUNDING

Not surprisingly, the funding of hybrid courts has been a challenge, and every *ad hoc* and hybrid tribunal to date has gone over budget.[808] There is no question that the costs of international justice appear high,[809] although not necessarily when compared to the gravity of the events at issue and the cost of other international

800. ICTY Statute, *supra* note 64, at art. 28; ICTR Statute, *supra* note 2, at art. 27; SCSL Statute, *supra* note 170, at art. 23.

801. SCSL Statute, *supra* note 170, at art. 19(3).

802. Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 8 (2008); Hobbs, *supra* note 503, at 517-518 (noting the importance of participants speaking a common language and the problem of language barriers).

803. Kaufman, *supra* note 59, at 759.

804. *Id.*

805. Jarinde Temminck Tuinstra, *The ICTY's Continuing Struggle with the Right to Self-Representation*, *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 345, 363-65 (Bert Swart et al. eds. 2011).

806. ECCC Law, *supra* note 460, at art. 45. *See* Sadie Blanchard, *An Assessment of the ECCC Order on Translation Rights and Obligations*, SEARCHING FOR THE TRUTH (Oct. 2008).

807. Reiger & Wierda, *Timor-Leste*, *supra* note 144, at 17 n.70, 29.

808. For example, the ECCC was slated to cost $56M total. As of January 2015, its expenses had exceeded $230M. *See ECCC Financial Outlook*, Extraordinary Chambers in the Courts of Cambodia (Jan. 31. 2015), http://www.eccc.gov.kh/sites/default/files/Financial_Outlook_31%20_January_%202015.pdf (last visited Feb. 29, 2016).

809. *See generally* Daniel McLaughlin, *International Criminal Tribunals: A Visual Overview*, LEITNER CENTER http://www.leitnercenter.org/files/News/International%20Criminal%20Tribunals.pdf [hereinafter LEITNER] (compiling statistics on the *ad hoc* tribunals); Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, at 6-8, https://www.wcl.american.edu/hrbrief/15/3skilbeck.pdf.

interventions in atrocity situations, such as peacekeeping, humanitarian relief missions, and military action. Over the years, the various tribunals and special chambers have been governed by different funding mechanisms.[810] While U.N. assessed contributions, which enable burden-sharing and forward planning, are the most stable source of funding available, most previous hybrid tribunals have depended on voluntary contributions.[811] This scheme has proven to be unsustainable in the long run and has required tribunal principals to engage in incessant and unseemly fundraising efforts.[812] Hybrid institutions often depend on hybrid sources of funding. The various hybrid tribunals have thus entered into different budgetary arrangements with host states, although the latter have occasionally faced difficulty replenishing their side of the ledger.[813]

Per Article 30 of the IMT Charter, the Nuremberg Tribunal was funded out of the budget for the maintenance of the Allied Control Council, the governing body of the Allied occupation zones in Germany.[814] Most of IMT staff were seconded from national governments.[815] Similarly, the United States originally funded the IHT out of the total Iraqi occupation budget to the tune of $75 million.[816] Later, however, the Tribunal was funded from the regular Iraqi budget, although the United States continued to support the work of international advisers via the RCLO.[817]

The original *ad hoc* tribunals, as subsidiary organs of the Security Council within the meaning of Article 29 of the U.N. Charter, have been funded from the United Nations' general budget,[818] surpluses in the budget of the United Nations Protection Force (ICTY), and the United Nations Assistance Mission for Rwanda (ICTR).[819] As such, they are subject to U.N. hiring, personnel, finance, and other rules. At their peak, they were consuming in excess of 10% of the United Nation's annual budget.[820] None of the other *ad hoc* tribunals has been deemed entitled to assessed U.N. funds on the theory that they are either independent international

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810. *See generally* Stuart Ford, *How Leadership in International Criminal Law is Shifting From the United States to Europe and Asia: An Analysis Of Spending On And Contributions To International Criminal Courts*, 55 SAINT LOUIS UNIV. L. J. 953 (2011).

811. INT'L. CTR. FOR TRANSITIONAL JUSTICE, CLOSING THE INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS: MECHANISMS TO ADDRESS RESIDUAL ISSUES 13, Briefing Paper (2010), https://www.ictj.org/sites/default/files/ICTJ-Global-Tribunal-Residual-2010-English.pdf.

812. *Id.* at 14.

813. Skilbeck, *supra* note 809, at 7.

814. *See* Agreement on Control Machinery in Germany, Nov. 14, 1944, 5 U.S.T. 2062, T.I.A.S. No. 3070, http://docs.fdrlibrary.marist.edu/psf/box32/t298f04.html.

815. *See supra* notes 510-513.

816. Newton, *supra* note 322, at 404; Scharf, *Critique*, *supra* note 322.

817. IHT Statute, *supra* note 328, at art. 33.

818. *See, e.g.*, ICTR Statute, *supra* note 2, at art. 30 (declaring that the expenses of the ICTR are expenses of the United Nations within the meaning of Article 17(2) of the Charter). Article 17(2) of the Charter states: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." U.N. Charter, art. 17 ¶ 2.

819. Ford, *supra* note 810, at 991-92.

820. Zacklin, *supra* note 67, at 543.

entities or are, in essence, domestic courts.[821] This outcome was not inevitable, however. As the SCSL was under construction, for example, the U.N. Secretary-General argued that the tribunal should also be financed through assessed contributions to ensure its independence and uninterrupted funding.[822] In calling for the establishment of the Special Court, however, the Security Council expressed its view that the Court would be the product of a treaty, rather than a Council resolution, and that it would be funded through voluntary contributions.[823] As a result, the SCSL (and other *ad hoc* tribunals following in its wake) was dependent on bequests from donor states, foundations, and other external sources, which necessitated donor conferences, almost continuous fund-raising campaigns by tribunal principals, advances against pledges, and controversial subvention grants from the General Assembly to top-off its budget.[824]

In the case of the SCSL, most of the costs were borne by a few donors (Canada, the Netherlands, the United Kingdom, and the United States), although other states gave a range of gifts.[825] A principal donor-led Management Committee, which eventually included Sierra Leone, provided oversight and policy direction on non-judicial issues.[826] A process that was originally projected to cost $75 million ultimately cost closer to $300 million, with a large percentage going to the salaries of foreign nationals.[827] Although the SCSL received some administrative and related support ("without prejudice to its capabilities to perform its specified mandate") from the U.N. Mission in Sierra Leone ("UNAMSIL"), this was provided on a cost-reimbursable basis.[828] Given the difficulties of administering a system of voluntary contributions, more time must be devoted to thinking through how and when assessed U.N. contributions can be applied toward hybrid institutions that act with U.N.-imprimatur. It was assumed that the RSCSL would be premised on the same funding model as its parent organization, although this is not inevitable, particularly given the difficulty of attracting voluntary

821. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ Rep. at 151 (finding that certain expenses for U.N. in-country missions authorized by the General Assembly for the maintenance of international peace and security constitute "expenses of the Organization" within the meaning of the Charter).

822. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, *supra* note 174, ¶¶ 68-71.

823. S.C. Res. 1315 (Aug. 14, 2000).

824. *See* Press Release, General Assembly, in Fifth Committee, Regular Budget Financing Requested for Sierra Leone Court to Bridge Voluntary Contribution Shortfall, U.N. Press Release GA/AB/3610 (Mar. 23, 2004), http://www.un.org/press/en/2004/gaab3610.doc.htm. The international side of the ECCC also depended on such subventions.

825. *See generally* Giorgia Tortora, *The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon*, *in* THE REALITIES OF INT'L CRIM. JUST. 93 (Dawn L. Rothe, et al., eds. 2013); Ford, *supra* note 810, at 976-77.

826. SCSL Agreement, *supra* note 168, at art. 7.

827. LEITNER, *supra* note 809, at 39; Gberie, *supra* note 701. By way of comparison, UNAMSIL's budget ranged from $200M to $600M per year. *See Sierra Leone—UNAMSIL—Facts and Figures*, U.N Mission in Sierra Leone, http://www.un.org/en/peacekeeping/missions/past/unamsil/facts.html (last visited Nov. 26).

828. S.C. Res. 1400 (Mar. 28, 2002).

funding for a residual mechanism undertaking important, but not necessarily headline-grabbing, work.

Sierra Leone, being one of the poorest nations on earth, was not expected to make significant out-of-pocket contributions toward the SCSL, but this has not been the case with respect to other tribunals whose host states have been expected to share the costs of justice. Pursuant to the combined funding mechanism of the STL, roughly half (49%) of the tribunal's budget comes from Lebanon.[829] Voluntary contributions from the international community make up the other half, with significant backing from the United States, whose strong support reflected its opposition to the influence of Syria and Iran in the region.[830] Although there have been instances of extreme delays, Lebanon has always managed to deliver its share (often in the waning days of the payment period), notwithstanding ongoing security threats, a coalition government that includes Hezbollah, internal political dissension, and an economic crisis made worse by the influx of Syrian refugees.[831]

Like the STL, the ECCC is meant to be financed through two independent funding streams: voluntary donations from the international community support the ECCC's international "side" (with Japan in the lead after having donated 35% of the total international budget) and in-kind gifts and payments from the government of Cambodia for the Cambodian "side," including the salaries for Cambodian staff and the physical infrastructure.[832] In practice, donor countries have helped to cover the Cambodian financial contribution through their bilateral development assistance programs, potentially diverting funds from other development priorities. In addition, leftover funds from the post-war United Nations Transitional Administration for Cambodia ("UNTAC") also went toward the Cambodian side of the ECCC via the UNDP.[833] The international community, acting in part through a "Friends of the ECCC" and a Principal Donors Group ("PDG"), exercises little oversight over the Cambodian side of the budget, which has been plagued by allegations of mismanagement, nepotism in hiring, and graft.[834] All told, more than thirty-five states have contributed to the ECCC thanks to the tireless fundraising efforts of Ambassador David Scheffer, the U.N.

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829. STL Statute, *supra* note 95, at art. 5; Jenks, *supra* note 755, at 65. If Lebanon is unable to come up with its contribution, the Secretary-General is allowed to accept voluntary contributions to make up the shortfall. STL Statute, *supra* note 95, at art. 5(1)(c).

830. Press Statement, Marie Harf, U.S. Dep't of State, *Funding for the Special Tribunal for Lebanon* (Dec. 30, 2013), http://www.state.gov/r/pa/prs/ps/2013/219182.htm.

831. Press Release, Ali Baradeh, *Tribunal Expects Lebanese Funding Before the End of the Month* (Oct. 13, 2011), https://www.stl-tsl.org/en/news-and-press/selected-interviews/registrar/1295-tribunal-expects-lebanese-funding-before-the-end-of-the-month-annahar.

832. G.A Res. 57/228 (May 22, 2003) (approving the draft Agreement between the United Nations and the Royal Government of Cambodia and deciding that any expenses in implementation would be borne by voluntary contributions from the international community); ECCC Statute, *supra* note 190, at art. 44new (setting forth bifurcated scheme). *See generally* Ford, *supra* note 810, at 979.

833. U.N. DEVELOPMENT PROGRAM, AUDIT OF HUMAN RESOURCES MANAGEMENT AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC), Report No. RCM0172, 9 (June 4, 2007), http://www.cambodiatribunal.org/assets/pdf/reports/OAPR_audit_report_eng.pdf.

834. *See* Dearing, *supra* note 560.

Secretary-General's Special Expert to the ECCC, and other ECCC supporters.[835] Still, over the years, staff have worked without pay and gone on strike following severe funding shortfalls.[836] In response to this funding insecurity, the Fifth (Budget) Committee of the U.N. General Assembly has on several occasions taken the exceptional step of granting commitment authority for a subvention grant from the United Nations' assessed budget to stabilize the ECCC's funding and, in turn, enable the execution of employment contracts and other long-term planning.[837]

The legislation creating the CAR Special Criminal Court for CAR envisions that it too will be funded through international donations as well as by way of the involvement of the U.N. Mission, MINUSCA.[838] Although CAR may be in a position to make some modest in-kind and other contributions, it is one of the poorest states on earth and so the balance of the SCC's budget will have to be borne by the international community, either via the United Nations or individual donations. Given past practice, reliance upon voluntary funding is untenable. Inevitably, donors dry up over time, requiring tribunal personnel to take time away from their work to panhandle within the international community for operating funds. In addition to being time consuming, this can open the tribunal up to real or perceived manipulation by interested states.[839] It also makes hiring and retention of staff difficult and is unfair to staff members, who enjoy little job security if they must depend on iterative short-term contracts.

Anti-piracy justice initiatives also depend on voluntary contributions.[840] In 2010, the Contact Group's Working Group on Legal Issues drew up detailed terms of reference for an International Trust Fund to Support Initiatives of States Countering Piracy to defray the expenses associated with the prosecution and detention of suspected pirates (e.g., witness fees, the domestication of evidence, etc.), as well as other activities related to implementing the Contact Group's anti-piracy objectives.[841] The Fund includes an Expedited Facility ("ExFac") that enables the quick reimbursement of short-term and urgent prosecution-related

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835. *See* David Scheffer, *What Has Been 'Extraordinary' About International Justice in Cambodia*, U.N. ASSISTANCE TO THE KHMER ROUGE TRIALS (Feb. 25, 2015), http://www.unakrt-online.org/articles/speech-un-special-expert-david-scheffer-what-has-been-%E2%80%98extraordinary%E2%80%99-about-international.

836. *Senior UN Official Urges Donor Support for Cambodia War Crimes Tribunal*, UN NEWS CENTRE (Nov. 7, 2013), http://www.un.org/apps/news/story.asp?NewsID=46444#.ValM4XJRHtQ.

837. *See, e.g.*, U.N. Secretary General, *Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia*, U.N. Doc. A/69/536 (Oct. 20, 2014); GA Res. 69/274 (April 24, 2015) (authorizing subvention grant).

838. Loi Organique, *supra* note 195, at art. 53. *See* Ford, *supra* note 810, at 985 (discussing peacekeeping assessments).

839. Kersten, *supra* note 5.

840. The expenses of ITLOS are borne by the states parties; when non-state parties appear before the ITLOS, the tribunal will fix a contribution amount. UNCLOS, *supra* note 114, at annex VI, art. 19, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.

841. U.N. Piracy Brochure, *The Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia*, CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA (Apr. 2011), http://www.un.org/undpa/sites/www.un.org.undpa/files/ckfiles/files/UN%20Piracy%20Brochure.pdf.

expenses.[842] Although the UNODC and other international programs are open to voluntary contributions from any source, historically most funding has come from the European Union and the national fiscs of those states that have regularly apprehended pirates but do not want to prosecute them directly. Given piracy's economic impact, the international community is also encouraging contributions from the shipping, insurance, and other pertinent industries.[843] The Trust Fund to date has received about $20 million in donations.[844] No comparable fund has been established for judicial action around atrocity crimes, although the ICC's Trust Fund does support work in victims' communities and will administer any reparations post-trial that are received.[845]

There is no question that hybrid and internationalized efforts require a smaller budget than standalone international tribunals. For example, while the ICTY cost $124 million euros per year, the WCC consume in the range of $13 million euros per year, although some of these cases benefited from ICTY investigations and adjudicated facts.[846] Originally, funding for the WCC in BiH came from the European Commission and other sources within the international community via the WCC Registry. Eventually, the Chambers began being funded entirely from the national budget.[847] When they were not seconded from their national systems, international staff were employees of the Registry. Other justice efforts have been financed through the budget of an existing U.N. mission. Being part of U.N. transitional authorities, the UNTAET Special Panels and the UNMIK Regulation sixty-four panels were funded through U.N. assessed contributions to the tune of about $7 million per annum.[848] UNMIK generally covered the international staff salaries; other expenses were paid for from traditional domestic revenue sources. In Timor-Leste, many of the problems identified with the Special Panels relate to insufficient resources.[849] CICIG (which receives funds from some European States, the United States, and Argentina among other sources) is dependent on development aid and other sources of voluntary funding. CICIG now operates on quite a shoestring budget, after experiencing several budget and staff reductions.[850]

Transitional justice efforts in the DRC have been funded by a variety of

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842. *Id.*

843. *Trust Fund to Support the Initiative of States Countering Piracy off the Coast of Somalia,* MULTI-PARTNER TRUST FUND OFFICE, http://mptf.undp.org/factsheet/fund/APF00, (last visited Nov. 28, 2015).

844. *Id.*

845. Rome Statute, *supra* note 273, at art. 79. *See generally* THE TRUST FUND FOR VICTIMS, ICC, http://www.trustfundforvictims.org/ (last visited Nov. 28, 2015).

846. Ivanišević, *supra* note 345, at 24.

847. *Id.* at 22.

848. *See* G.A. Res. 55/227B, ¶ 15 (July 18, 2001); G.A. Res. 59/13, ¶¶ 11, 15–20 (Jan. 24, 2005).

849. HRW, *Justice Denied*, *supra* note 713; David Cohen, *"Justice on the Cheap" Revisited: The Failure of the Serious Crimes Trials in East Timor*, EAST-WEST CENTER 4 (May 2006), http://www.eastwestcenter.org/fileadmin/stored/pdfs/api080.pdf.

850. Geoffrey Ramsey, *Guatemala's UN-Backed Justice Commission Faces Budget Cuts*, INSIGHT CRIME (Nov. 29, 2011) (noting annual budget reduction from $20 million to $15 million due to a drop in donations).

sources, including funds allocated to peacekeeping missions. The PSCs in the DRC, for example, receive funding from the general MONUSCO budget as well as from the United Nations Peacebuilding Fund, private foundations, and other sources.[851] Donor countries (such as Canada and the United States) helped to recruit and fund experts to fill PSC positions. ABA ROLI has estimated that one mobile court session—which can involve up to 15 hearings—costs approximately $45,000 to $60,000,[852] which is considerably cheaper than the cost of a single trial before one of the international tribunals.[853] To date, the majority of these costs have been borne by a mix of bilateral, multilateral, governmental, and civil society donors, given that only a small portion of the Congolese national budget goes toward the judicial sector.[854] MONUSCO also provides assistance with transportation and security.[855] This diversification of funding—much of which is earmarked or project-based rather than undifferentiated—has caused sustainability and coordination problems, which could be partially alleviated by the better utilization of basket funds.

The EAC are projected to cost in the range of $11 million, although it is not anticipated that it will host more than a handful of trials. These costs will be borne primarily by donor countries (including the Netherlands, the United States,[856] Belgium, Germany, and France); regional bodies (the AU and EU); and Chad itself.[857] Senegal essentially demanded funding guarantees up front before it would agree to host the trials.[858] The necessary assurances emerged during a 2010 donor's conference.[859] In theory, the proposed ACJHR would be funded out of the ordinary budget of the African Union. At the moment, the combined budget of the African Court of Human and Peoples Rights and its Commission stands at a mere $10 million per year—about 15% of the AU's annual budget (much of which is borne by international partners).[860] Insufficient thinking has gone into how to fund

851. *UN Police, Justice and Corrections Programming in the Democratic Republic of The Congo: A Compact Case Study*, STIMSON 5 (2010), http://www.stimson.org/images/uploads/research-pdfs/UN_PJC_Programming_in_DR_Congo.pdf.

852. Maya, *supra* note 585, at 34; UNDP, *Mobile Courts*, *supra* note 579, at 11.

853. Maya, *supra* note 585, at 34.

854. *The Military Justice Component of ROL Section*, MONUSCO, UNITED NATIONS ORGANIZATION STABILIZATION MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, https://monusco.unmissions.org/Default.aspx?tabid=10806&language=en-US (last visited Nov. 28, 2015).

855. UNDP, *Mobile Courts*, *supra* note 579, at 9.

856. *Senegal: US to Give US$ 1 Million to Habré Court*, HUMAN RIGHTS WATCH (Oct. 1, 2013), https://www.hrw.org/news/2013/10/01/senegal-us-give-us-1-million-habre-court.

857. *Id.*

858. Williams, *supra* note 213, at 1143, n.15.

859. U.S DEP'T OF STATE, OFF. OF GLOBAL CRIM. JUST., REPORT TO CONGRESS: REPORT ON STEPS TAKEN BY THE GOVERNMENT OF SENEGAL TO BRING HISSÈNE HABRÉ TO JUSTICE (June 6, 2012), http://www.state.gov/j/gcj/us_releases/reports/2012/193222.htm.

860. Max du Plessis, *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL: TALK! (Aug. 27, 2012), http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/.

the new criminal chamber, whose proceedings are likely to be more expensive than civil cases.

The perennial budget shortfalls of hybrid and international justice institutions suggest that the international community needs to think creatively about how to better fund the provision of justice. One option that has not been fully explored involves proceeding against the financial enablers of violations[861] and the use of civil forfeiture[862] to fund the costs of justice, a model employed in part in the antebellum mixed commissions dedicated to adjudicating vessels involved in the slave trade.[863] To the extent that the statutes of modern tribunals address the issue, any assets obtained from convicted defendants would escheat to the state or go to victims in the form of restitution or reparations.[864] The STL requires victims to pursue civil remedies in national court, with the STL's final judgment exerting a *res judicata* effect on the question of individual criminal responsibility.[865] So far, most defendants before international tribunals have been declared indigent or have not had appreciable or freezable assets; as such, no international tribunal has authorized monetary reparations to victims from defendants' property.[866]

IX. CONCLUSION

The establishment of a global system of international justice reveals that the promises made during the Nuremberg era are not mere history. Over the past two decades, the international community has undertaken a considerable investment in enforcing international criminal law in conflict and post-conflict situations through the establishment of a network international, hybrid, and internationalized criminal tribunals. Indeed, some measure of accountability is now an expected component of any multilateral response to the commission of atrocities, and calls for prosecutions accompany international responses to the situations in Sri Lanka, South Sudan, the Central African Republic, and Syria, among others. And yet, the strength of this commitment and the prospects for justice across conflict situations vary depending on the state of international relations, the existence of competing equities within the international community and key state actors, the involvement of powerful states in the events on the ground, and the manifestations of the violence itself.

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861. *See, e.g.*, JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES §§ 148-49 (2011); Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L & POL'Y Rev. 339 (2012).

862. *See* Rome Statute, *supra* note 273, at art. 79 (contemplating forfeiture).

863. *See supra* text accompanying note 285.

864. *See, e.g.*, SCSL Statute, *supra* note 170, at art. 19(3) ("In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone"). Similar provisions govern the ECCC. *See* ECCC Statute, *supra* note 190, at art. 39 (indicating the same).

865. STL Statute, *supra* note 95, at art. 25 ("Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim . . . may bring an action in a national court or other competent body to obtain compensation"). Before the ICC, reparations are administered by a Trust Fund. *See* Rome Statute, *supra* note 273, at arts 75(2), 79.

866. *See, e.g.*, *Duch* Appeals Judgment, *supra* note 777, ¶¶ 666-68.

Since the establishment of the first *ad hoc* tribunals, the international community has become more realistic about its objectives in creating justice mechanisms. Originally, this community of courts was expected to promote accountability, strengthen the rule of law, reconcile warring communities, repair victims, and prevent further atrocities by exerting a deterrent effect on would-be *génocidaires*.[867] Recent evaluations and the experience of the past two decades, however, have tempered these expectations considerably. We now know that matching expectations to realistic assessments of the different types of institutional and judicial responses is vital for deploying limited financial and human resources in the most effective manner. Today, the emphasis is placed on ensuring a measure of justice by meting out individual accountability in fair and transparent processes, rather than prioritizing these other, more inchoate or second order goals. Since courts cannot do everything in societies emerging from mass violence and repression, it is often necessary to consider deploying elements from the entire continuum of transitional justice mechanisms—either in tandem or through careful sequencing—if the multifarious and at times contradictory goals of peace, justice, memorialization, and reconciliation are to be achieved to any degree. That said, the expectation of criminal justice remains compelling, and the necessary building blocks exist to creating effective and fair hybrid and internationalized courts. It is hoped that the taxonomy developed herein will advance global thinking on the ways in which the hybrid model can be deployed as a powerful and flexible tool for policymakers to respond to the worst crimes known to humankind.

867. ICTR Statute, *supra* note 2 (anticipating that the ICTR would contribute to the maintenance of peace, the cessation of violations, the provision of redress, and the process of reconciliation).