

Stanford Law School: Law & Policy Lab

Appendix: International & Hybrid Tribunal Snapshots

A Report to the Office of Global Criminal Justice
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SECTION 1: MILITARY TRIBUNALS

Nuremberg Tribunal

1. History of events/crimes leading to the creation of the tribunal

On March 12, 1938, Nazi Germany annexed Austria. Later that year, German forces marched into the Sudetenland, and, on March 15, 1939, the German army invaded the rest of Czechoslovakia. Germany invaded Western Poland on September 1, 1939, which began World War II. Germany subsequently invaded and occupied several other countries in Europe, including France. Over the course of World War II (1939-1945), Nazi Germany sponsored the systematic murder and other atrocities committed against an estimated 6 million Jews in Europe, along with an estimated 4-6 million non-Jews, including Roma, homosexuals, individuals with disabilities, political dissidents, and other unpopular groups.

2. Founding Instruments (was the tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. In October 1943, the Allies established the U.N. Commission for the Investigation of War Crimes. Later that month, the UK, the US, and the Soviet Union issued the *Moscow Declaration*, which stated that German war criminals should be judged and punished in the countries in which their crimes were committed except that “the major criminals, whose offences have no particular geographical localization,” would be punished “by the joint decision of the Governments of the Allies.”
- b. On 8 August 1945, representatives of the US, the UK, France, and the Soviet Union concluded the *London Agreement* providing for the establishment of an International Military Tribunal (IMT) for the trial of war criminals. The Charter of the IMT was annexed to the Agreement, to which nineteen (19) other governments expressed their adherence.
- c. The Charter of the IMT consisted of the following framework:
 - i. Constitution of the Military Tribunal (Articles 1-5)
 1. Establishes the IMT, which shall consist of four (4) members, each with an alternate, with one member and one alternate appointed by each of the Signatories (US, Soviet Union, Great Britain, France).
 - ii. Jurisdiction and General Principles (Articles 6-13):
 1. Defines the categories of acts that were considered crimes coming within the jurisdiction of the IMT for which there shall be individual responsibility:
 - a. Crimes Against Peace
 - b. War Crimes
 - c. Crimes Against Humanity
 - d. Conspiracy to commit the foregoing crimes
 2. The official position of, or the fact of having acted pursuant to an order of a superior, did not absolve the defendants from criminal responsibility.
 3. The IMT could declare an organization to be criminal, and the competent national authority of any Signatory had the right to bring individuals to trial for membership therein before national, military, or occupation courts.
 - iii. Committee for the Investigation and Prosecution of Major War Criminals (Articles 14-15):
 1. Each Signatory to appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

2. Enumerates the purpose of the Committee, as well as the duties of the Chief Prosecutors.
 - iv. Fair Trial for Defendants (Article 16):
 - v. Powers of the Tribunal and Conduct of the Trial (Articles 17-25)
 - vi. Judgment and Sentence (Articles 26-29)
 - vii. Expenses (Art. 30)
3. **Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)**
 - a. The tribunal was created by the four signatories to the 1945 London Agreement acting in the interests of all the "United Nations"—essentially the Allied Powers:
 - i. United States;
 - ii. Provisional Government of the French Republic;
 - iii. United Kingdom of Great Britain and Northern Ireland; and
 - iv. Union of Soviet Socialist Republics
4. **Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)**
 - a. The four major Allied powers signed the 1945 *London Agreement* that established the IMT. Nineteen other countries, in accordance with Article 5 of the *London Agreement*, subsequently adopted it to show support.
 - i. The other nineteenth countries include: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, India, and Yugoslavia.
 - b. The four major powers each appointed a member of the IMT, and each also appointed a Chief Prosecutor who, in turn, had his own team of lawyers to serve as counsel for the prosecution.
5. **Source of funding and budget:**
 - a. The expenses of the IMT and of the Nuremberg trials were charged against the funds allotted for maintenance of the Allied Control Council for Germany (Art. 30, IMT Charter), which was comprised of the United States, the Soviet Union, UK, and France.
 - b. The total estimated cost of the Nuremberg Tribunal is undetermined.
 - c. The text of the Agreement suggests that the signatories could charge the expenses to the accounts of the then-Control Council for Germany. So the Tribunal was essentially bankrolled by the Control Council. It is not clear how the Control Council was funded, but there are indications that it could have been sourced from the German assets that it had seized not only within Germany, but also those found in other countries as well.
6. **Jurisdiction**
 - a. **Subject matter jurisdiction:**
 - i. Article 6 of the IMT Charter gave the Nuremberg Tribunal jurisdiction over:
 - (a) crimes against peace;
 - (b) war crimes; and
 - (c) crimes against humanity
 - b. **Temporal and geographic jurisdiction**
 - i. For the trial of war criminals whose offenses have no particular geographic location whether they be accused individually or in their capacity as members organizations or groups or in both capacities.

- ii. For acts committed against any civilian population *before* or *during* the war, whether or not in violation of the domestic law of the country where perpetrated (Art. 6, IMT Charter).
 - 1. One of the major criticisms of the Tribunal is that it tried crimes which were not defined as such before the *London Agreement*, in apparent violation of the principle of *nullum crimen sine lege*.

c. Personal jurisdiction

- i. Persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organizations, who committed the enumerated crimes (Art. 6, IMT Charter).
- ii. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the [enumerated] crimes are responsible for all acts performed by any persons in execution of such plan (Art. 6, IMT Charter).

d. Concurrent Jurisdiction with Domestic Courts

- i. Did not prejudice the return of war criminals to the countries where they committed their crimes (Art. 4, London Agreement) or the powers of any national or occupation court established in any allied territory or Germany for the trial of war criminals (Art. 6).
- ii. Lower-level offenders were returned to the places where they committed their crimes for trial by the national or military courts.

7. Final outcome (how many individuals indicted, is the court still in operation, viewed as a success, etc.)

On 6 October 1945, the four chief prosecutors of the IMT from the US, France, Soviet Union, and the UK handed down indictments against 24 leading Nazi officials. On 8 October 1946, the IMT announced its verdicts. It imposed the death sentence on twelve (12) defendants, three (3) were sentenced to life imprisonment, four (4) received prison terms ranging from 10 to 20 years, and it acquitted three (3) defendants. More than 100 additional defendants, representing many sectors of German society, were tried before the United States Nuremberg Military Tribunals under Control Council Law No. 10 in a series of 12 trials known as “Subsequent Nuremberg Proceedings.”

In many respects, however, the Nuremberg IMT, along with the Tokyo IMT discussed below, are unique. Because they were established by governments occupying former adversaries after the conclusion of a devastating war, the tribunals did not go through a complicated negotiation process with an affected state. Nonetheless, the Nuremberg Trials are widely considered to be the progenitor of international criminal tribunals as well as the international legal principles that underlie the investigation and prosecution of international crimes such as genocide, crimes against humanity and war crimes. The fundamental principles that emanated from the Nuremberg Trials include:

- a. Individual criminal responsibility for international crimes;
- b. The position in the highest levels of government, even that of Head of State, does not guarantee immunity;
- c. Universality of respect for principles of human rights.

8. Useful references/sources

- a. International Military Tribunal (Nuremberg) Judgment, 1 October 1946, *available at* http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf

- b. Trial of the Major War Criminals Before the International Military Tribunal. Nuremberg. ("Blue Series")
- c. Nazi Conspiracy and Aggression ("Red Series")
- d. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")
- e. Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10
- f. KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (2011).
- g. STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2009).

The International Military Tribunal for the Far East (The Tokyo IMT)

1. History of events/crimes leading to the creation of the tribunal

In 1931, the Japanese security forces assigned to protect a Japanese railroad in Manchuria engineered a deliberate sabotage of their own railway. In response to this “security threat,” the Japanese military took control of Manchuria and set up the puppet state of Manchukuo.

On July 7, 1937, a Japanese soldier went missing while on patrol near the Marco Polo Bridge west of Beijing. This incident precipitated a large-scale Japanese attack on China and marked the beginning of the Second Sino-Japanese War (1937-1945). The Rape of Nanking (December 1937-January 1938) resulted in the deaths of an estimated 50,000-300,000 civilians.

Japan formed the Tripartite Alliance with Germany and Italy on September 27, 1940, and on December 7, 1941, attacked Pearl Harbor, Hawaii, and British and Dutch colonies in Malaya, Singapore, and Hong Kong. In the war that followed, Japanese soldiers committed atrocities and war crimes including: mass killings; human experimentation and biological warfare; use of chemical weapons; torture of prisoners of war; execution and killing of combatant prisoners; cannibalism; forced labor; forced prostitution; looting; perfidy; and feigned surrender.

When Japan formally declared war, unlike previous wars against Russia, the Meiji emperor did not admonish its troops to obey international law. Japan’s wars against China, the United States, Britain, Australia, the Soviet Union, and the rest of the Allied Powers ended on September 2, 1945, following the nuclear destruction of Hiroshima and Nagasaki on August 6 and 9, 1945, respectively.

2. Founding Instruments (was the tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. The St. James Declaration of January 13, 1942, called for the punishment of German war criminals; the Chinese delegate to the signing stated that it was the intention of the Chinese government to enforce the same principles when prosecuting Japanese war criminals.
- b. The United Nations War Crimes Commission was created in 1943 to prepare for the punishment of Axis war crimes, and it established a Special Far Eastern and Pacific Sub-Commission.
- c. The Potsdam Declaration of July 26, 1945, declared the official policy of the Allies to prosecute all Japanese and German war criminals.
- d. The Instrument of Surrender, signed aboard the USS *Missouri* on September 2, 1945, bound the Emperor and the Japanese government to the command of the Supreme Commander for the Allied Powers, General Douglas MacArthur. Note, however, that the specific meaning of the Instrument of Surrender was a point of disagreement from the beginning.
- e. At the Moscow Conference of December 26, 1945, the US, USSR, UK, and China agreed that the Supreme Commander Allied Powers (General MacArthur) would have the power to “implement” the Instrument of Surrender.
- f. The U.S. *Initial Post-Surrender Policy for Japan*, Part III, §2, provided for the prosecution of war criminals; this was implemented by Paragraph 5 of the *Directive on the Identification, Apprehension, and Trial of Persons Suspected of War Crimes*, which gave General MacArthur the power “to appoint special international military tribunals . . . [for trial] . . . of far Eastern war criminals where the alleged offenders are, appropriately to be tried in an international court; and to prescribe or approve rules of procedure for such tribunals. . . .”

- g. The Proclamation and Charter of the International Military Tribunal for the Far East, both issued by General MacArthur on January 19, 1946, declared the creation of a Tribunal for the prosecution of Japanese war criminals. The Proclamation's preamble cited the Potsdam Declaration, the Moscow Conference, and the Instrument of Surrender as legal authority for the Tribunal's creation.
- h. Significantly, there was no treaty basis for the Tribunal. Seven of the accused attempted to argue that the American government's executive branch had unconstitutionally created a court and defined crimes, something reserved only to Congress. *See Hirota v. MacArthur*, 338 U.S. 197 (1948). The Court rejected this argument on the basis that the Tribunal was an international court, not an American one, and thus American courts had no power of review over its decisions. *Id.*
- i. Under the terms of Article 11 of the San Francisco Peace Treaty of September 8, 1951, Japan accepted the jurisdiction of the Tokyo IMT and agreed to enforce the sentences imposed. However, brewing Cold War tensions in the 1950s made the Japanese and American governments eager for reconciliation, and the last of the Class A prisoners had been paroled by the end of 1958.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The Tribunal, created by the Supreme Commander Allied Powers under the authority of the Allied governments, originally consisted of nine member states sending one judge apiece: the United States, the United Kingdom, Russia, Canada, China, France, the Netherlands, Australia, and New Zealand.
- b. An amendment on April 26, 1946, created two additional seats for judges from India and the Philippines, even though these states were not parties to the Instrument of Surrender.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The international community played a small role outside of the context of the war and the alliances that were already in place. The United States, as the chief military power prosecuting the war against Japan in the Pacific, controlled the occupation of Japan, the reconstruction of the country, and the establishment of the Tokyo IMT.
- b. The eleven governments mentioned above each sent a judge to sit on the Tribunal's panel.

5. Source of funding and budget

- a. The United States funded the Tokyo IMT. Individual officers, judges, and prosecutors drew their salaries from their respective nations, and the United States provided funding for staff and material.
- b. Specific budget information is very difficult to find.

6. Jurisdiction [subject matter, temporal, personal, concurrent w/ domestic]

a. Subject Matter Jurisdiction

- i. Article V of the Tribunal's Charter gives the Tribunal jurisdiction over crimes against peace, war crimes, and crimes against humanity. At U.S. insistence, the Tribunal's jurisdiction over an accused with respect to all three categories could only attach if the accused was charged with crimes against peace.

b. Temporal Jurisdiction

- i. The Tribunal had the power to indict and prosecute individuals for crimes dating back to Japan's invasion of Manchuria in 1931. Notably, although Japan had colonized Korea in 1910, and war crimes had been committed against Koreans for the duration of the conflict, there was no Korean representation at the IMT. Instead, the country was simply ignored.

c. Personal Jurisdiction

- i. The Tokyo IMT had jurisdiction over “Far Eastern” war criminals who, as individuals or as members of organizations, were charged with offenses which include crimes against peace, crimes against humanity, and other crimes.

d. Concurrent Jurisdiction with Domestic Courts

- i. There were no domestic courts in Japan with authority to prosecute war crimes. The Tokyo IMT was a purely international body, and no Japanese judges served on the Tokyo IMT, even though Japan was a party to the Instrument of Surrender, while India and the Philippines were granted judgeships despite not being parties.

7. Final outcome (how many individuals indicted, is the court still in operation, viewed as a success, etc.)

The Tribunal indicted twenty-eight individuals. One was found mentally unfit for trial, and the charges against him were dropped. Two died of natural causes during trial. Seven were convicted and sentenced to death. Sixteen were sentenced to life in prison. Of these, three died while incarcerated, and the remaining thirteen were paroled between 1954 and 1956. One was sentenced to twenty years, and one was sentenced to seven.

The Tokyo IMT’s decisions are not well respected because they lacked depth and are seen as an example of “victors’ justice.” The trials were seen as fundamentally unfair. Judge Radhabinod Pal of India dissented, and was the only judge to vote to acquit every one of the accused. His dissenting opinion stressed the unfairness of the proceedings, the bias of the judges, the overarching sense of “victors’ justice” that permeated the proceedings, and the Allied nations’ own violation of international law vis-à-vis the atomic bombings of Hiroshima and Nagasaki, and the mass firebombing of Tokyo and other Japanese cities.

The Tokyo IMT adopted the same procedures and rules as the Nuremburg IMT established by the London Agreement, except where circumstances in Japan counseled for procedural changes. China convened its own tribunals alongside the Tokyo IMT, as did several Allied countries. There was no overlap between these tribunals and the activities of the Tokyo IMT; the Tokyo IMT charged the twenty-eight highest-ranking military and government individuals responsible for conspiracy to wage wars of aggression, while all other tribunals indicted lower-level officers, soldiers, and government officials.

8. References/sources

- a. NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008).
- b. MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN 333-675 (2000).
- c. THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE (R. John Prichard, ed., 1998-2005).

SECTION TWO: AD HOC TRIBUNALS

International Criminal Tribunal for the Former Yugoslavia (ICTY)

1. History of events/crimes leading to the creation of the tribunal

Established in May 1993, the ICTY was created in response to war crimes that came as the result of five specific conflicts occurring in the territory of former Republic of Yugoslavia, starting in 1991. These conflicts were all directly linked to the disintegration of Yugoslavia, which began in the summer of 1991 when both the republics of Croatia and Slovenia declared independence. The republics of Bosnia-Herzegovina and Macedonia also declared their independence and left the Republic less than a year after Croatia and Slovenia. These calls for independence were the result of a buildup of ethnic and nationalist tensions, mostly along (but not limited to) Serb and Croat lines. The five specific conflicts the ICTY addressed included:

- **Slovenia (1991):** While Slovenia's declaration of independence was mostly bloodless, there was a brief attempt by the Yugoslav People's Army to prevent secession. This was ended almost as soon as it began, with the Yugoslav forces withdrawing from Slovenia. No indictments issued regarding this conflict.
- **Croatia (1991-1995):** Leading up to Croatia's declaration of independence in 1991, the emergence of a Croatian nationalist party further inflamed tensions between Serbs and Croats. As Croatia moved toward independence, Serbs living in the southern region began organizing (as well as amassing weapons and support from Serbia and Yugoslavia), declaring they would unify with other Serbian populations should Croatia leave Yugoslavia. By the summer of 1990, Serbian populations openly revolted in Croatia and took control of nearly a third of Croatia's territory. Besides heavy fighting among Serbs and Croats, the Serb-controlled areas expelled all non-Serbs through violent means, including ethnic cleansing. As well as mass killings, the violence led to the destruction of many Croatian sites, including the intentional shelling of U.N.ESCO World Heritage Sites. Fighting continued until the summer and fall of 1995, when the Croatian army re-established control over Serbian-occupied areas.
- **Bosnia-Herzegovina (1992-1995):** Bosnia-Herzegovina was comprised of large numbers of Serbs and Croats, as well as Bosnian Muslims. By the winter of 1992, Bosnian Serbs took control of several regions in Bosnia-Herzegovina; when the government declared independence from Yugoslavia in the spring of 1992, the Serbian-controlled areas declared independence from Bosnia-Herzegovina and attacked the capital Sarajevo. Having received military and financial support from Serbia, Bosnian Serbs soon controlled 60% of the territory. Bosnian Croats also rejected Bosnia-Herzegovina's declaration of independence and, with the backing of Croatia, declared the territory under their control to be an independent republic. This conflict saw some of the greatest violence and fighting, including thousands of mass atrocities committed at detention centers that were run by all parties to the conflict.
- **Kosovo (1998-1999):** Kosovo was an autonomous region within Serbia, made up mostly of ethnic Albanians. Prior to the dissolution of Yugoslavia, Kosovo was already beset by unrest as a result of Serbia's moves to reduce the region's autonomy. Tensions over Kosovo's autonomy ultimately contributed to the breakup of Yugoslavia. By 1998, the

Albanian community living in Kosovo and sought independence from Serbia. Fighting soon ensued, and the violence lasted until the summer of 1999 when NATO intervened.

- **The Former Yugoslav Republic of Macedonia (2001):** While Macedonia had a bloodless secession, it contained a large Albanian population, which in early 2001 demanded independence/autonomy from the rest of the country. Fighting between Albanians and Macedonian forces occurred for a few months before a power-sharing agreement was reached. A few indictments emerged from this conflict.
2. **Founding Instruments (was the tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)**
- a. The ICTY was an *ad hoc* court created through U.N. Security Council Resolutions 808 and 827. Resolution 808 determined that a tribunal should be established to address the crimes that took place in the former Yugoslav Republic, while Resolution 827 formally established the ICTY. As the ICTY was created while the conflict was ongoing, time was of the utmost importance. The creation of a tribunal through a U.N. Security Council Resolution took much less time and energy than if it had been created through a treaty.
 - b. U.N. Security Council Resolution 827 contained the Statute of the ICTY, which laid out the framework for the ICTY, including:
 - i. The court's jurisdiction (articles 1-10)
 - 1. Defines the four categories of offences that fall under the court's jurisdiction
 - ii. Organization of the ICTY (articles 11-17):
 - 1. The Chambers (made up of a Trial Chambers and an Appeals Chamber)
 - a. Composition of the Chambers
 - i. Sets the required number judges needed for various levels and chambers of the Court. There are a maximum of 16 permanent and 12 *ad litem* judges serving at any given time. No two permanent or *ad litem* judges may be nationals of the same country.
 - b. Qualifications of judges
 - i. Determines judicial requirements, expectations, and appointments. 14 of the permanent judges (and all *ad litem* judges) are elected by the U.N. General Assembly from a list submitted by the U.N. Security Council.
 - ii. Judges serve four year terms and are eligible for re-election.
 - c. Officers and members of the Chambers
 - 2. The Prosecutor
 - a. Discusses the responsibilities of the Prosecutor, as well as the requirements for appointing the Prosecutor.
 - 3. Registry (services the Chambers and the Prosecutor)
 - iii. Court procedure, including (articles 18-28):
 - 1. the investigative procedures and preparation to be used by the Prosecutor
 - 2. commencement and conduct of trial proceedings
 - 3. rights of the accused
 - 4. judgment
 - 5. penalties
 - 6. appellate and review proceedings
 - 7. enforcement of sentences
 - iv. Additional operating requirements, including (articles 29-34):

1. the Court's location (the Hague)
2. expenses and funding (see above)
3. working languages (English and French)

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The ICTY was not a "consensual" tribunal created on the domestic level. Instead, it was mandated by the international community, and created by the U.N. Security Council, which used its authority under Chapter VII of the U.N. Charter.
- b. The creation of the ICTY was done via non-consensual U.N. Security Council mandate largely in part because 1) the violence was still occurring at the time of the tribunal's creation thus posing a threat to international peace and security, and 2) the international community believed that the domestic courts would not adequately and fairly prosecute all individuals involved.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. As discussed, the international community created and funded the ICTY. The U.N. Security Council was specifically responsible for the creation of the ICTY, through U.N. Security Council Resolutions 808 and 827.
- b. The ICTY's entire staff was hired under the U.N.'s Staff Rules and Regulations.

5. Source of funding and budget

- a. Funding is primarily made up of contributions from U.N. member states. Individual states as well as NGOs have also submitted donations, equipment and staff (free of charge). That being said, all contributions must comply with the U.N. policy on donations.
 - i. 13 countries volunteered to detain those convicted and serving their sentences.
- b. Article 32 of the Statute of the ICTY determines that the "expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations."
- c. At present, the total estimated cost of the ICTY is \$2,319,357,047.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. Created for the specific purpose of holding those accountable for the violations of international humanitarian law associated with the dissolution of the former Yugoslav Republic. Within this broad framework, the ICTY had jurisdiction over individuals who committed one of the following categories of offences:
 1. grave breaches of the 1949 Geneva conventions
 2. violations of the laws or customs of war
 3. genocide
 4. crimes against humanity

b. Temporal and Geographic Jurisdiction

- i. ICTY jurisdiction includes all territory of the former Republic of Yugoslavia since 1991.

c. Personal Jurisdiction

- i. The ICTY has jurisdiction over individual persons, regardless of nationality, but not organizations, political parties, army units, administrative entities or other legal subjects.
- ii. Citizens of NATO member states fell within the ICTY's personal jurisdiction, although the prosecutor declined to open an investigation into potential crimes committed during the Kosovo intervention.

d. Concurrent Jurisdiction with Domestic Courts

- i. In terms of its authority with respect to the domestic courts within the ICTY's jurisdiction, the ICTY can claim primacy and may take over national investigations and proceedings at any stage in the interest of international justice. It can also refer its cases to competent national authorities in the former Yugoslavia.
- ii. As of 2003, the ICTY has worked more closely and in tandem with the domestic courts located in the territory of former Yugoslavia, and refers cases of lower ranking individuals to these courts pursuant to Rule 11bis, an amendment to the rules implemented as part of the Security Council-mandated completion strategy. By referring certain cases to the domestic courts, it is also hoped that these courts will gain experience and operating knowledge with respect to war crimes.
- iii. 8 cases involving 13 persons were transferred to domestic courts.

7. Final outcome (how many individuals indicted, is the court still in operation, viewed as a success, etc)

The ICTY has indicted 161 individuals, almost all who were considered to be in top leadership roles during the conflict. From these 161 indictments, 80 individuals have been sentenced. 18 were acquitted, and 36 had their indictments withdrawn or are deceased. As of 2011, no indictees remain at large. Proceedings are ongoing with respect to the remaining defendants.

The Court is still in operation, but is in the process of closing down pursuant to Security Council mandated Completion strategies outlined in SC Resolutions 1503 and 1534. While these completion strategies set parameters that included the completion of all investigations by the end of 2004, completion of all first instance trials by the end of 2008, and the conclusion of all work by 2010, only the completion of all investigations met the assigned target date. That being said, the last two indicted individuals were not arrested until the summer of 2011, which is one of the primary reasons why the court is still in operation. The judgment of one of these individuals expected March 2017 at the earliest. As of today, there are 9 open or ongoing proceedings involving 29 individuals, including 5 cases at the Appeals Chamber and 4 cases currently at trial.

A Mechanism on International Tribunals (MICT), which was established by the U.N. Security Council in December 2010 (SC Resolution 1966), will manage issues that arise following the closure of the ICTY, projected for the end of 2017. The MICT's responsibilities include taking over the ICTY's essential functions, including issues of parole and appeal, witness and victim protection, supervision of enforcement of sentences, and preservation of archives.

The ICTY was the first major transitional justice mechanism since the Nuremburg Trials, and its creation set a global precedent with respect to the creation of international criminal proceedings as well as international criminal courts. In addition to this, the ICTY was the first international war crimes tribunal, as well as the first tribunal that was established under Chapter VII of the U.N. Charter. Many major transitional justice mechanisms created after the ICTY modeled their structures after the ICTY, including the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court.

Some of the ICTY's elements that have since been used in other courts include:

1. international procedural law
2. expansive witness and victim protection programs
3. operational procedures, including finding, arresting, and housing indictees

4. a legal aid system that sets funding parameters and also creates a qualified pool of defense attorneys
5. a Judicial Database, which contains guiding jurisprudence in international procedural and criminal law

The ICTY has also set numerous legal precedents in international humanitarian and criminal law, including:

1. identification of a general prohibition of torture in international law
2. creation of guidelines with respect to the legal treatment and punishment of sexual violence occurring during war
3. defining the targets of genocide
4. determining that enslavement and persecution are included in crimes against humanity
5. application and clarification of the doctrine of criminal responsibility of superiors

8. Useful references/sources

- a. ICTY Office Website: <http://www.icty.org/>
 - i. ICTY Mandate Jurisdiction: <http://www.icty.org/sid/320>
- b. U.N. Resolution 827: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf
- c. ICTY Statute (2009): http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
- d. ICTY Statistics: http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf
- e. Mandate to wind down operations: <http://www.icty.org/sid/10016>
- f. U.N. MICT Website: <http://www.unmict.org/en/about>
- g. Visual overview of major international criminal tribunals: <http://www.leitnercenter.org/news/99/>
- h. Charting Procedural Stages of ICTY: <http://www.icty.org/sid/327>

International Criminal Tribunal for Rwanda (ICTR)

1. History of events/crimes leading to the creation of the tribunal

Established in November 1994, the International Criminal Tribunal for Rwanda (ICTR) was created in response to atrocities associated with the genocide that occurred in Rwanda in the spring and summer of 1994. For three months 1994, the small African nation of Rwanda was ripped apart by widespread ethnic violence and unrest. By the time violence subsided, over 800,000 people (mostly of Tutsi descent) were dead at the hands of those who identified as Hutu, and millions more were displaced and injured.

The genocide (which was the term quickly used to describe the events that took place) had its roots primarily in long-reaching ethnic and political tensions, which dated to the period of Belgian colonialism. While there are several ethnic groups within the country, the Tutsi and Hutu groups are the most common, with around 90% of the population being of Hutu descent and 10% being Tutsi. Historically, there were few distinctions between the two groups, but during Belgian rule, a caste system was put into place that identified people according to their ethnic group. Throughout Belgian rule, those identified as Tutsi were often favored, including by being given more positions of power and political appointments as compared to the Hutu population.

When Rwanda gained independence in 1962, the tide quickly turned, with many Hutus assuming positions of political power. This led to widespread tension and conflict among both ethnic groups, as well as the mass exodus of many Tutsis to neighboring countries. In 1990, a group of Tutsis who fled to Uganda formed the Rwandan Patriotic Front (RPF), thus beginning a three-year war between the RPF and the Rwandan military. In 1993, the Hutu Rwandan president, Habyarimana, agreed to a peace deal that called for multiparty rule in the country. This deal was unpopular with many Hutu leaders and supporters, who responded to it by increasing anti-Tutsi propaganda within the country.

Tensions boiled over in April 1994, which President Habyarimana's plane was shot down outside Kigali. While those responsible for the attack have never been identified, one of the popular Hutu radio stations, Radio-Television Libre des Mille Collines (RTLHC) took to the air declaring that Tutsis were responsible. Shortly after this broadcast, both the Rwandan army and Hutu militias (known as the *Interahamwe*) began attacking and killing Tutsis and Hutus who supported Tutsis. Violence against Tutsis continued for several weeks; in the first 10 weeks of the massacre, it is estimated that over 800,000 people were murdered by the Rwandan government and Hutu militias. The violence finally stopped in mid-July, when the RPF took control of the country.

2. Founding Instruments (was the tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. The ICTR was an *ad hoc* court created through U.N. Security Council Resolutions 955 (adopted on November 8, 1994) and 977 (adopted on February 22, 1995). Resolution 955 formally established the ICTR, while Resolution 977 determined that the Court's seat would be in Arusha, Tanzania.

- b. U.N. Security Council Resolution 955 contains the Statute of the ICTR, which laid out the framework for the ICTY, including:
 - i. **The court's jurisdiction (articles 1-9):**
 1. Defines subject matter jurisdiction (including the three categories of offences that fall under the court's jurisdiction), personal jurisdiction, territorial and temporal jurisdiction, and concurrent jurisdiction.
 2. Article 6 also defines individual criminal responsibility, and declares that no one, no matter what their position in the government or military is immune from being criminally responsible.
 - ii. **Organization of the ICTR (articles 10-16):**
 1. The Chambers (made up of two Trial Chambers and an Appeals Chamber)
 - a. Composition of the Chambers
 - i. Sets the required number judges needed for various levels and chambers of the Court at eleven, with three judges serving in each of the Trial Chambers and five judges serving in the Appeals Chamber.
 - ii. No two judges may be nationals of the same country.
 - b. Qualifications of judges
 - i. Determines judicial requirements, expectations, and appointments.
 - ii. Judges currently serving in the Appeals Chamber of the ICTY (since 1991) also serve as judges for the Appeals Chamber of the ICTR.
 - iii. Trial Chamber judges are elected by the U.N. General Assembly from a list submitted by the U.N. Security Council.
 - iv. Judges serve four year terms and are eligible for re-election.
 - c. Officers and members of the Chambers
 2. The Prosecutor
 - a. Discusses the responsibilities of the Prosecutor, as well as the requirements for appointing the Prosecutor.
 - b. Originally, the Prosecutor for the ICTY also served as the Prosecutor for the ICTR with additional support staff for the ICTR. Later, this position was split.
 3. Registry (services the Chambers and the Prosecutor)
 - iii. **Court procedure, including (Articles 17-27).** Procedurally speaking, almost of the procedures in the ICTR were modeled or taken from procedures first used in the International Criminal Tribunal for the Former Yugoslavia (see the ICTY summary). Later, however, the two sets of rules diverged slightly following judicial amendments. Particular rules addressed:

1. investigation and preparation of indictment
 - a. Under the ICTR's Statute and its Rules and Procedure and Evidence, the Prosecutor has broad discretion to initiate investigations and to indict individuals suspected of crimes that are within the parameters of the ICTR's jurisdiction.
 2. review of the indictment
 3. commencement and conduct of trial proceedings
 4. rights of the accused
 5. protection of victims and witnesses
 6. judgment
 7. penalties
 8. appellate and review proceedings
 9. enforcement of sentences
 10. pardon or commutation of sentences
 - iv. **Additional operating requirements, including (articles 28-32):**
 1. expenses and funding
 2. working languages (English and French)
 - c. Amending documents and resolutions: There have been several resolutions amending resolution 955, most of which were aimed at speeding up the Court's sluggish proceedings. Some of the more notable resolutions include:
 - i. Resolution 1165 (1998), which establishes a third trial chamber.
 - ii. Resolution 1329 (2000), which adds two more judges to the Appeals Chamber
 - iii. Resolution 1431 (2002), which adds a pool of 18 *ad litem* judges
 - iv. Resolution 1534 (2004), which calls on the Court to identify cases that can be transferred to national jurisdictions
- 3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)**
- a. The ICTR sits in Arusha, Tanzania, with the Appeals Chamber located in The Hague, Netherlands, and related offices in Kigali, Rwanda. The court was created by the U.N. Security Council, which invoked its authority under Chapter VII of the U.N. Charter. Unlike other international tribunals, the Rwandan government initially requested that the U.N. establish such a court. It later rejected the project because it did not reflect certain preferences around the death penalty and temporal jurisdiction.
- 4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)**
- a. The international community created and funded the ICTR. The U.N. Security Council was specifically responsible for the creation of the ICTY, through U.N. Security Council Resolutions 955 and 977. Other states seconded personnel to the ICTR.
- 5. Source of funding and budget**

- a. Funding is primarily made up of assessed contributions from U.N. member states. Individual states that have given the most financial support include the United States, Japan, and Germany.
- b. Article 30 of the Statute of the ICTR determines that “the expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.”
- c. With respect to the imprisonment of convicted individuals, five countries (including Tanzania) have taken custody of individuals who were convicted are (or were) serving their sentences.
- d. The total estimated cost of the ICTR is \$1,757,521,910.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. The ICTR was created to hold the leaders and high-level architects of the genocide accountable. These individuals often included high-ranking military and government officials, as well as businesspeople and religious leaders. The ICTR has jurisdiction over individuals who committed one of the following categories of offences:
 1. genocide
 2. crimes against humanity
 3. war crimes in non-international armed conflicts

b. Temporal and Geographic Jurisdiction

- i. ICTR jurisdiction includes any of the above offences that were committed in Rwanda between January 1, 1994 and December 31, 1994.
- ii. The ICTR also has jurisdiction over Rwandan citizens who committed the above offences in neighboring states (to Rwanda) between January 1, 1994 and December 31, 1994.

c. Personal Jurisdiction

- i. The ICTR has jurisdiction over natural persons only.

d. Concurrent Jurisdiction with Domestic Courts

- i. In terms of its authority with respect to the domestic courts within the ICTR’s jurisdiction (mainly Rwanda), the ICTR has concurrent jurisdiction with the national courts. That being said, the ICTR had “primacy over the national courts of all States.” As such, the Court had the authority to formally request that domestic courts defer to its judgment.
- ii. It should also be noted that individuals tried by the ICTR for crimes defined under the Court’s statute cannot be tried again for the same crime in a national court per Article 9, which sets forth the principle of double jeopardy (*ne bis in idem*). An individual who has been tried by a national court for violations of international humanitarian law can only be tried by the ICTR if: 1) the act for which the individual was tried was considered to be an ordinary crime or 2) the national court’s proceedings were deemed to not be impartial or independent.

7. Final outcome (how many individuals indicted, is the court still in operation, viewed as a success, etc.?)

The ICTR has indicted 93 individuals, with the first indictment occurring on November 28, 1995. As mentioned above, those who were indicted were either responsible for planning the genocide, or had positions of power and leadership during the genocide. From these 90 indictments, 61 individuals have been sentenced, while 3 indictees remain at large. (6 open indictments were transferred back to the Rwandan national system). While the Court was scheduled to conclude operations by 2010, it did not deliver its final trial judgment until December 20, 2012. As of December 2014, a handful of appeals are being heard in the Appeals Chamber, with the belief that the final appeal will be heard and decided sometime in 2015. The closure of the ICTR will therefore occur when the final appeal is passed down.

Leading up to its closure, the ICTR, began forwarding cases to Rwanda's domestic courts. Additionally, helping to facilitate the closing process of the ICTR is the Mechanism on International Tribunals (MICT) (this is the same institution that was created to help wind down proceedings of the ICTY). Established by the U.N. Security Council in December 2010 (SC Resolution 1966), the MICT became fully functional on July 1, 2012. The Mechanism manages issues that arise following the closure of both the ICTY and ICTR, and is specifically tasked with continuing the "jurisdiction, rights and obligations, and essential functions" of both tribunals. The MICT's responsibilities include taking over the ICTR's essential functions, including issues of parole and appeal, witness and victim protection, supervision of enforcement of sentences, and preservation of archives. The MICT also has *ad hoc* responsibilities, which include finding and prosecuting fugitives, holding appeals and retrials, and proceedings for review of final judgment, among other things.

The ICTR was the second major transitional justice mechanism, as it quickly followed (and was closely modeled after) the ICTY. Similar to the ICTY, its creation helped set precedents for creating international criminal proceedings as well as international criminal courts. In addition to this, the ICTR paved the way in prosecution with respect to genocide, as it was the first international tribunal to "interpret the definition of genocide set forth in the 1948 Geneva Conventions." Further, the ICTR represented the first time an international court indicted and sentenced individuals for committing genocide, and it was also the first international court to include rape as a constitutive act of genocide.

When compared to the ICTY, the ICTR has indicted nearly half of the individuals that the ICTY indicted, with many more individuals indicted by the ICTR still at large. Further, the ICTR's proceedings have taken much longer than the ICTY's.

8. Useful references/sources

- a. Current ICTR Website: <http://www.unictr.org/en>
- b. Former ICTR Website: <http://41.220.139.198/Home/tabid/36/Default.aspx>
- c. U.N. Resolution 955: http://www.unictr.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf
- d. ICTR Statute: http://www.unictr.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf
- e. Current Statistics: <http://www.unictr.org/en/tribuna1>

SECTION THREE: U.N. MISSION-ESTABLISHED TRIBUNALS

U.N. Mission in Kosovo (U.N.MIK) Courts

1. History of events/crimes leading to the creation of the tribunal

War crimes in Kosovo followed the collapse of the former Republic of Yugoslavia, one of a series of five conflicts that occurred in FRY's former territories. These conflicts grew out of political and social unrest, due largely to ethnic and nationalist tensions falling along the Serb-Croat divide, which ultimately led to the dissolution of the former Yugoslavia.

Kosovo had been an autonomous region inside the Republic of Yugoslavia with a high degree of control over its internal affairs. Kosovar Albanians comprised the largest ethnic group in the region, along with a smaller Serb population. Many in the region practiced Islam, but the Communist Yugoslav regime suppressed religious practice.

In 1989, the Milosevic government assumed many of Kosovo's devolved powers and centralized provincial administration in Belgrade. Meanwhile, a majority Albanian Kosovar assembly drafted a constitution and declared an independent Republic of Kosovo parallel to the Serbian provincial government. These politicians initiated a nonviolent resistance movement. By the mid-1990s, the Kosovo Liberation Army (KLA) had mounted an armed campaign against Serbian forces. The violence peaked between 1998 and 1999. The worst of the atrocities occurred during this period of armed conflict.

Efforts by the international community to establish a ceasefire failed, and the conflict resulted in inter-ethnic violence, exemplified by the Raçak massacre in 1999, where Serb forces killed 45 civilian Kosovo Albanians. As many as 11,000 Kosovo Albanians and 2,000 Serbs died during the conflict. Fighting displaced most of Kosovo's population—some 1.3 million people, most of whom were Kosovar Albanians.

Largely in response to reports of mass killings, NATO began a targeted bombing campaign in 1999. The campaign lasted from March to June in an attempt to cripple Yugoslavian military capacity in Kosovo. NATO's intervention put significant pressure on Milosevic to stand down military operations and agree to independence for Kosovo. While the bombing successfully ended hostilities, the war destroyed major infrastructure and left the country without a functional judicial system.

By Security Council Resolution 1244 (1999), the United Nations established the U.N. Mission in Kosovo (U.N.MIK) to provide transitional administration and oversee rebuilding efforts. To fill the legal void left by the conflict, U.N.MIK exercised full legislative and executive authority, including the power to establish a judiciary, during the transition from Kosovo's Serbian occupation to its new status. U.N.MIK was unique, then, in the breadth of its powers.

Faced with a decimated civil society, U.N.MIK set about revitalizing Kosovo's infrastructure, administration, and, crucially, its criminal justice system. U.N.MIK faced several challenges to rebuilding that impeded efforts to establish rule of law and functional criminal justice system:

- The rapid return of refugees to their decimated villages strained available housing and food.
- Criminal organizations engaged in drug and human trafficking, smuggling, and other organized crime.

- Ethnic tensions survived the ceasefire, leading to violence, looting, and destruction of property.
- Many Serbs were displaced in the wake of the conflict, further exacerbating the security and humanitarian situation.
- Vestiges of the KLA refused to accept U.N. administration and instead formed parallel structures, many of which discriminated against Serbs living in Kosovo.
- Limited detention facilities and nonexistent judicial capacity meant delays for those arrested and backlogs of detainees awaiting hearings.

U.N.MIK faced a dearth of available lawyers and judges, since the Milosevic regime had excluded Kosovar Albanians from the civil service. Serbs, meanwhile, fled Kosovo in droves, and those legal professionals who remained often refused to serve in the new administration, believing it to be illegitimate and discriminatory against their ethnic group. Compounding the difficulty of finding qualified legal professionals, many detainees refused to accept defense counsel from different ethnic groups. Other detainees, along with a large proportion of the public, felt that U.N.MIK courts could not impartially apply the law, given their ethnic composition. The fear was that the new Kosovar Albanian judges would discriminate against Serb defendants.

This background situation required U.N.MIK to innovate with respect to creating and sustaining impartial, legitimate courts that complied with international due process and human rights standards.

2. Founding Instruments (was the tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. U.N. Security Council Resolution 1244 established U.N.MIK and endowed a Special Representative of the Secretary General (SRSG) with executive and legislative powers, including the power of judicial appointments.
- b. SRSG promulgated regulations that established applicable law and the judicial appointment process in his very first Regulation, 1999/1.
 - i. Since few Serb judges—who constituted the majority of professional judges in Kosovo, following the Milosevic regime closing the civil service to Kosovar Albanians—were willing to serve, SRSG appointed Kosovar Albanian judges, few of whom had significant judicial experience.
 1. An Advisory Judicial Commission on Appointment of Judges and Prosecutors (AJC) advised SRSG on appointment of and complaints against judges and prosecutors.
 2. Complaints that these judges discriminated against Serb defendants and favored Kosovar defendants arose shortly after the courts began to function again, due largely to continuing ethnic tensions.
 3. Limited security for judges and their families made jurists susceptible to pressure from organized crime. Threats reached these judges and prevented impartiality.
 - ii. After an attack on a U.N. bus of Serbs precipitated interethnic violence in Mitrovica, on top of accusations of unfairness in judging, SRSG decided with Regulation 2000/6 to introduce international judges and prosecutors to the Kosovar judiciary. Initially, SRSG only placed judges in Mitrovica, but Reg. 2000/6 was soon expanded by Reg. 2000/34 to include all courts, including the Kosovo Supreme Court.
 1. This was the first instance of international judges serving in a domestic court system.

2. International judges served alongside Kosovar jurists as colleagues and peers, with jurisdiction over criminal matters.
 3. International judges did have one extraordinary power: to remove new and pending cases from their Kosovar colleagues to provide defendants a fair trial (and address accusations that Serb and Kosovar defendants, particularly those accused of war crimes, received different treatment).
 4. International prosecutors could reopen investigations dropped by their domestic counterparts if they found sufficient cause.
 - a. Domestic prosecutors had to inform international prosecutors within 14 days of dropping an investigation to give the international prosecutor notice of whether to reopen the case.
 5. International judges and prosecutors, like other U.N. employees in Kosovo, had six-month renewable term limits.
 - a. International and Kosovar observers criticized the short term limits for compromising judicial and prosecutorial independence, since SRSG could choose not to renew the term for any reason.
 6. Reg. 2000/6 provided a recruiting process for international judges and limited removal to cause: mental or physical incapacity, serious misconduct, or failure to execute the duties of office.
- iii. In addition to providing for international judges, SRSG provided a method for staffing courts to ensure that domestic judges could not outvote international judges on important cases.
1. Kosovo's civil law system provided judicial panels of three to five judges, who debated privately and do not have the opportunity to dissent publicly.
 - a. Given the lack of judicial expertise, panels originally included two professional judges and three lay judges, which allowed lay judges to outvote international judges. The scheme resulted in unsubstantiated verdicts for Serbs even with international judges present.
 2. To address bias concerns, SRSG issued Regulation 2000/64, which allowed defendants or the prosecutor to request the SRSG to approve a hearing before a panel of three professional judges, at least two of whom were international.
 - a. These so-called Regulation 64 panels proved particularly useful in war crimes and genocide trials, but were also used for trials involving corruption, organized crime, and terrorism.
- iv. U.N.MIK left Kosovo's civil law procedures in place, which caused some difficulty for common law judges unfamiliar with the role of the judge in civil law proceedings.
1. Most prominently, judges play an investigative role alongside the prosecutor and must approve prosecutions. Prior to the introduction of international jurists, judges often released Kosovar defendants and pressed ahead against Serb defendants.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The Security Council established U.N.MIK with Resolution 1244 (1999) pursuant to its Chapter VII authority. U.N.MIK acted on the basis of four substantive pillars: a civil administrative headed by the U.N., reconstruction efforts lead by the EU, institution-building and democratization lead by the Organization for Security and Cooperation in

Europe (OSCE), and humanitarian affairs headed by the U.N. High Commission for Refugees. U.N.MIK took over civil administration and had ultimate jurisdiction over the other three components as well.

- b. Since FRY had accepted a peace proposal brokered by the international community, the resolution passed the Security Council 14 to 0, with China abstaining.
- c. U.N.SCR 1244 did not specifically authorize war crimes panels, but it implicitly empowered the transitional administration to address justice issues.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The international community provided funding in the form of donations (see below).
- b. U.N. member states provided military police, as provided in Resolution 1244.
- c. Following Regulation 2000/6, the international community also supplied judges and prosecutors.

5. Source of funding and budget

- a. Resolution 1244 requested donations from member states to fund the mission.
- b. In addition to international support, U.N.MIK, acting as Kosovo's government, collected revenue from traditional sources: taxes, fees, and customs tariffs. These revenue streams from a war-torn region could not cover the cost of governance, and so in its early years U.N.MIK relied heavily on donations.
- c. U.N.MIK as a U.N. mission also enjoyed assessed contributions from the U.N. for some functions (e.g., paying international judges).
- d. U.N.MIK spent 21.75 million Deutsche marks on courts in 2000 and 2001 and €54.55 million between 2002 and 2005.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. U.N.MIK courts were competent to judge criminal offenses and civil violations under Kosovo law, but which substantive law should apply raised difficulties early on.
 - 1. In August, U.N.MIK initially determined in Regulation 1999/1 that domestic Yugoslavian law in force at the time the U.N. adopted Resolution 1244 in 1999 would apply except insofar as it was incompatible with international human rights standards. This reflected Kosovo's status as an autonomous part of the Federal Republic of Yugoslavia pending determination of its final status.
 - a. Initially, U.N.MIK lacked the resources to conduct a comprehensive review of applicable law to determine which provisions exactly failed to meet human rights standards. This left judges and lawyers, many of whom had only limited experience with both Yugoslavian law and international law, without guidance as to which provisions should apply.
 - b. Moreover, Kosovar Albanians perceived Yugoslavian law as illegitimate and part of a discriminatory system that oppressed their ethnic group. They threatened to stop cooperating with the U.N. if the law remained in effect.
 - 2. By December, facing difficulties with the laws in place, U.N.MIK Regulation 1999/24 determined that courts should apply Yugoslavian domestic law in effect prior to March 22, 1989.

- ii. In addition to domestic law, Yugoslavian legislation had incorporated the offenses of genocide and war crimes into its criminal code as those are understood in international law.
 - 1. Yugoslavian law differed slightly in that its definition of genocide included “forcible dislocation of the population,” a particularly salient offense in the Kosovo context.
 - 2. Yugoslavian law specifically included accomplice liability, and judges interpreted Yugoslavian law to include command responsibility as grounds for liability.
 - 3. Since Yugoslavian law recognized these crimes, U.N.MIK courts played an important complementary role to the ICTY in prosecuting low level perpetrators.
 - 4. While the court filled a need to bring war criminals to justice, U.N.MIK had not anticipated the security and infrastructure needs for war crime trials during the transitional period. As a result, many trials proceeded without adequate security, training, or interpreters. This component of the courts’ jurisdiction provoked some skepticism about impartiality from international observers.
 - 5. The addition of international judges and lawyers to U.N.MIK courts was in part to respond to allegations of sham trials for war criminals.
 - iii. U.N.MIK regulation incorporated international human rights law in existence at the time of the conflict into the domestic legal order, including treaties to which Yugoslavia was not party.
 - 1. U.N.MIK had competency to do this through the U.N.’s Chapter VII grant of legislative and executive authority.
 - 2. The incorporation included anti-discrimination principles, rights described in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention Against Torture.
- b. Temporal and Geographic Jurisdiction**
 - i. U.N.MIK courts had jurisdiction over all Kosovo’s territory.
 - c. Personal Jurisdiction**
 - i. U.N.MIK courts had personal jurisdiction over individuals inside Kosovo.
 - d. Concurrent Jurisdiction with Domestic Courts**
 - i. U.N.MIK courts functioned as domestic courts for the duration of the mission.
 - ii. Since Yugoslavian law included war crimes and genocide, U.N.MIK courts played an important complementary role to ICTY by investigating and prosecuting lower level offenders still residing in Kosovo.
 - iii. Other courts without international personnel handled ordinary crimes and civil matters alongside the special panels.

7. Final outcome

U.N.MIK continues its mission in Kosovo, but without exercising executive and legislative power, now that Kosovo has declared independence. It handed over many of its administrative functions—including with respect to war crimes trials—to a successor mission, EULEX, run by the European Union. While U.N.MIK has its critics, it did manage to administer a post-conflict province between 1999 and 2008, establishing a foundation of respect for rule of law and integrating international human rights norms into a new country’s jurisprudence. Respecting its initial mandate, then, U.N.MIK appears to have met those goals.

U.N.MIK moreover built a functional judiciary virtually from scratch, providing infrastructure, personnel, and equipment to ensure that the inevitable crimes accompanying the return of some half a million Kosovar Albanians were not treated with impunity.

Critics of the mission contend that it did too little to prosecute war criminals, that it failed to adhere to international human rights standards with respect to long pre-trial detentions and irregular application of laws, and that the integration of international jurists into the system was reactive rather than proactive. These criticisms have some merit, and future transitional administrations should take heed of lessons learned by U.N.MIK, particularly the need for planning and to create an appropriate applicable legal framework.

U.N.MIK complemented ICTY's work, prosecuting low-level perpetrators who would otherwise escape justice. Its capacity to accomplish this task was limited by its mandate—to enforce rule of law and Kosovar criminal law—since it lacked the focus, mandate, and funding to conduct in-depth investigations of human rights abuses. Nonetheless, judges adapted to the need and successfully prosecuted war criminals for their involvement in atrocities during the conflict. U.N.MIK boasts several successes regarding the prosecution of war crimes:

- It represents the first instance in which international jurists were embedded inside a domestic judicial system.
- It illustrated that international judges could ensure adherence to rule of law and international human rights standards provided procedures ensured that domestic judges could not outvote them on political or ethnic bases.
- It demonstrated how to effectively integrate international standards into a post-conflict judicial system.
- It incorporated international jurisprudence, largely from ICTY, into the decision-making of local judges, giving precedential effect to war crimes and genocide decisions.

Since it was first, U.N.MIK also leaves several lessons:

- U.N.MIK brought in international jurists to respond to a crisis rather than proactively anticipating the need for international assistance rebuilding judicial capacity. It adjusted the role of internationals several times in the first few months of transition. In the future, U.N. transitional administrations should anticipate the need for immediate, carefully thought-out international participation.
- The transitional authority must identify an acceptable applicable law and move quickly to establish a functioning judiciary to avoid problems caused by 1) a legal vacuum, 2) arbitrary or protracted detentions, and 3) the application of a body of law perceived to be illegitimate. The transitional authority should identify the provisions of the applicable domestic law that are incompatible with international human rights standards at an early stage to assist judges in determining how to apply domestic law.
- Detention protocols need to be articulated and transparent to avoid discriminatory detentions or long pre-trial detentions that do not comport with international human rights standards.
- Witness protection and court security is crucial both for amassing evidence against defendants and ensuring the independence of judges threatened by organized crime and ethnic elements.

- International judges need training in the domestic legal system as well as cultural practices if they are to effectively promote respect for rule of law among the judiciary.
- Selection of international judges and prosecutors should prefer those with experience interpreting and applying international law if internationals are to assist in making domestic law and international law compatible, and particularly if internationals are expected to train their domestic counterparts.

8. Useful references/sources

- a. Resolution 1244 (<http://daccess-dds-ny.un.org/doc/U.N.DOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>)
- b. U.N.MIK Official Gazette Regulations (<http://www.unmikonline.org/regulations/>) (includes budgets for 1999-2005)
- c. Hansjörg Strohmeier, “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor”
- d. Wendy Betts et al., “The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law”
- e. Robert Carolan, “An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment”
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- g. http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (U.N. Security Council Resolution 827)
- h. http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (2009 version of the statute of the ICTY)
- i. http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf (current statistics)
- j. <http://www.leitnercenter.org/news/99/> (Guide and visual overview of major international criminal tribunals, including the ICTY, ICTR, SCSL, ECCC, STL, ICC, and CRSS)

Special Panels for Serious Crimes in East Timor

1. History of events/crimes leading to the creation of the tribunal

In 1974, Portugal underwent a constitutional crisis and essentially abandoned its colonial administration of East Timor. After a brief armed conflict between Timorese political groups, a communist party declared the country's independence from Portugal in 1975. Indonesia intervened that same year to prevent the communist regime from taking power. After several years of resistance, the Indonesian government declared East Timor a territory of Indonesia in 1979.

Under Indonesian administration, East Timor endured twenty years of violence, extrajudicial killings, rampant violence against women, and widespread displacement. By some estimates, as many as 200,000 people died at the hands of the Indonesian military. The Timorese resistance movement also committed atrocities, though none equal in scale to the Indonesian crimes. The Indonesian regime went to extraordinary lengths to suppress pro-independence sentiment, exemplified by the Santa Cruz massacre. There, Indonesian soldiers opened fire into a crowd of pro-independence demonstrators attending the funeral of a pro-independence man shot by Indonesian soldiers. At least 250 East Timorese died, and the incident became a rallying point for human rights activists. After the Santa Cruz massacre, many countries went so far as to cut off diplomatic relations.

Violence escalated into the 1990s between pro-independence groups and pro-Indonesian militias. Finally, however, the government held a referendum on independence from Indonesia in 1999. The vast majority—78% of voters—voted for independence, prompting backlash from pro-Indonesian groups. Violence in the aftermath of the vote resulted in an estimated 1,300 deaths. Under pressure, the Indonesian government tried and failed to quell the violence, finally asking the U.N. to intervene. The Security Council dispatched a multinational force known as the International Force East Timor (INTERFRET) which became into the U.N. Transitional Administration for East Timor (U.N.TAET). This mission essentially governed the country while it transitioned from status as an Indonesian territory to a fully independent country. The U.N., facing calls for justice for perpetrators of war crimes, mandated that U.N.TAET create a mechanism for accountability. U.N.TAET carried out this directive by establishing special panels in the District Court of Dili, East Timor's capital, to try war criminals.

2. Founding Instruments (Was tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. U.N.TAET, a mission with legislative and executive powers created by the Security Council's Chapter VII powers, established the Special Panels by Regulation 2000/11, which established East Timor's judicial system.
- b. The regulation mainly addressed East Timor's judiciary, establishing all domestic courts' jurisdictions, means for appeal and staffing, and so on. It responded to demands from the international community that U.N.TAET do something to end impunity for East Timorese war criminals by giving special courts in the District of Dili exclusive jurisdiction over war crimes and genocide. It aimed to facilitate a judicial process for bringing war criminals to justice.

- c. U.N.TAET Regulation 2000/15 structured the Special Panels. It provided for applicable law and staffing the court.
- d. Each panel had two international judges and one Timorese judge, as did the Appeals Court which heard errors from the lower courts. To make a decision as to guilt or innocence, the panel needed a majority vote.
 - i. Complaints arose early on that international jurists had little to no experience with Indonesian law or the local language; the Timorese jurists, meanwhile, were largely recent law school graduates with no experience serving as judges.
- e. The judges were appointed by an independent judicial commission which selected candidates on the basis of merit—and removed appointment power from the U.N. mission. This practice moreover created precedent for independent judicial appointments, rather than using the judiciary as a patronage system. The commission included three international members and two Timorese members.
- f. The Serious Crimes Unit (SCU), located in the public prosecution service, handled indictments and prosecutions. The prosecution service was staffed exclusively by East Timorese lawyers, many of them recent law graduates.
 - i. In addition to infrastructure and capacity building, the mission in East Timor included intensive legal trainings for aspiring young lawyers, since East Timor lacked a thriving legal profession prior to the establishment the court. These trainings moreover emphasized the benefits of rule of law.
- g. Originally, the panel made no provision for public defenders. In 2002, recognizing that the Indonesian legal community had little experience defending accused war criminals against international crimes, the U.N. mission established a Defense Lawyers Unit to provide counsel to the accused. The legal aid was necessary to meet basic due process standards.
- h. The newly established Timorese courts applied the Timorese laws in effect as of the independence referendum in 1999 except insofar as those laws conflicted with international human rights standards. This prevented a gap in the law and also avoided the need for Timorese lawyers to familiarize themselves with a foreign legal system.
 - i. While this choice did avoid a legal vacuum, it also posed some difficulty, as attorneys unfamiliar with international human rights law were unsure of the extent to which the decision invalidated existing Timorese law.
- i. Regulation 2000/15 drew from the substantive language of the ICC Statute.
 - i. This incorporation might have complicated the process, since it built in the need for expertise in international legal definitions and bodies of jurisprudence.
- j. As well as supporting the development of the judiciary and a body of law, the U.N. mission had to rebuild judicial infrastructure in a country where up to 80 percent of public buildings lay in ruins due to post-referendum violence.
- k. Because the mission established the Special Panels during a period of transitional administration, the transitional administrator held exclusive executive and legislative authority (exercised in conjunction with a consultative council) and therefore had more leeway than the international community generally has when establishing hybrid tribunals. The international community did not have to

bargain with a reluctant domestic government to obtain cooperation for setting up a panel.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The U.N. intervened in the violence in East Timor and established the mission that created the tribunal using its Chapter VII authority.
- b. The U.N. initially did not plan to establish a hybrid tribunal at all, despite the recommendation of the U.N. Human Rights Commission. Instead, the U.N. gave Indonesia the opportunity prosecute human rights abusers itself—perhaps responding in part to “tribunal fatigue” from ICTY and ICTR and the cost overruns associated with those courts.
- c. Indonesia's international reputation also posed a challenge, especially since Australia had recognized its annexation of East Timor before the violence began. Unlike failed states where the U.N. could intervene without serious pushback from the international community, Indonesia's global relationships helped prevent the establishment of a tribunal along the lines of ICTY or ICTR.
- d. The hybrid model split the difference, ensuring an accountability mechanism without the difficulty of establishing an ad hoc tribunal in The Hague.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The U.N. mission funded the court's operation, since the Special Panels were part of East Timor's domestic court system. The courts were but one, relatively small part of U.N.TAET's mandate, however. The mandate encompassed rebuilding civil society and growing Timorese capacity for self-governance. Indeed, when reviewing its major accomplishments, U.N.TAET did not lift up the Special Panels as its greatest achievement in the human rights/justice space in East Timor.
- b. Jurists came from the international community, but the international community did not have a formal role providing staff to the Special Panels specifically. Instead, staff came through the typical U.N. process for staff recruitment.

5. Source of funding & budget to date

- a. According to critics, the U.N. severely underfunded the tribunal, which compromised the proceedings and raised questions about the court's effectiveness. The entire mission had a budget of \$318 million for the year 2002 to 2003, and that figure covered the entire operating costs of the administration, including public information, security, and all the other activities required to create a functioning civil society.
 - i. Limited funding meant that the court lacked essential personnel—including court clerks, stenographers, and secretaries—and infrastructure. No transcript exists of the first thirteen trials the Special Panels heard, and judges' notes became the “official” record. The gap in the record made preparing appeals highly difficult.
 - ii. Funding shortfalls also prejudiced defendants, since U.N.TAET originally made no provision for defense counsel; for the first three years of its

existence, the court offered no public defenders. In addition, defense attorneys had no budget for investigations, meaning they could not assemble evidence to mount a defense.

- b. Some funding for the mission as a whole came through voluntary donations; private and government donors provided money to rebuild the decimated judicial infrastructure and to provide necessary legal resources, such as legal libraries. U.N.TAET established a procedure for donor funding with Regulation 2000/5. The directive set up accountability mechanisms for receiving and disbursing donor funding, including separate bank accounts and oversight from the Transitional Administrator.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. The Special Panels had exclusive jurisdiction over a limited set of crimes, defined using a mix of international and domestic law:
 - 1. Genocide, as defined in the ICC statute
 - 2. War crimes, defined as grave breaches of the Geneva Conventions
 - 3. Crimes against humanity, including systemic attacks on a civilian population involving murder, sexual violence, enforced apartheid, torture
 - 4. Murder, as defined in the Timorese Penal Code
 - 5. Sexual offences, as defined in the Timorese Penal Code
 - 6. Torture

b. Temporal and Geographic Jurisdiction

- i. As part of East Timor's domestic courts, the Special Panels had jurisdiction over crimes committed inside the borders of East Timor.
 - 1. Indonesia's refusal to comply with extradition requests meant that several defendants and key witnesses remained unavailable throughout the Special Panels' mandate.
- ii. The Panels had temporal jurisdiction over all atrocities committed between January 1, 1999 and October 25, 1999—essentially, jurisdiction over the period of violence following East Timor's independence referendum.

c. Personal Jurisdiction

- i. The Panels had jurisdiction over human rights violations perpetrated within East Timor—including abuses committed in East Timor by Indonesian citizens. The court's effective jurisdiction stopped at East Timor's borders, however, meaning that many responsible Indonesian officials escaped justice.
- ii. Unlike other courts that had a mandate to prosecute "those most responsible," the Special Panels had no such guiding limitation. Prosecutors targeted low- and mid-level Timorese perpetrators rather than indicting high-level Indonesian officials who ordered or orchestrated the abuses. This was partly due to limited enforcement power outside of East Timor—a feature of embedding the court within the Timorese court

system. The focus on low- and mid-level perpetrators followed from the fact that many of the high-level officials were beyond the court's reach.

- iii. Further confounding effective investigation, the prosecution faced pressure to investigate individual deaths rather than target systemic abuses or ministerial orders to commit atrocities.

d. Concurrent Jurisdiction with Domestic Courts

- i. The Special Panels were situated within the domestic judiciary, and so their jurisdiction coincided with regular courts with respect to offences enumerated in the Timorese penal code.

7. Final outcome

Most international observers and Timorese regarded the Special Panels as a spectacular failure—a lesson in how *not* to run a hybrid tribunal. Of the fifty-five trials the courts held, eighty-four defendants were convicted, twenty-four pleaded guilty, and four were acquitted. The high conviction rate caused concerns among international observers that the court did not properly observe the defendants' rights. The hybrid tribunal faced four major hurdles that undermined its success: jurisdictional obstacles, funding shortfalls, unclear ownership, and limited domestic judicial capacity.

Jurisdictional obstacles prevented the court from bringing the most responsible perpetrators to justice. At the time the court wound down operations, 339 indicted individuals remained outside the court's jurisdiction, with no mechanism to extradite them from Indonesia. The nascent East Timorese government additionally failed to pressure the Indonesian government, either due to close ties with the Indonesian ruling party or a desire to build an economic and diplomatic relationship with the country. Between the lack of political will on the part of the Timorese government and the international community on the one hand, and the broad jurisdiction over all individuals who committed homicide and sexual violence during post-referendum violence on the other, the court had too many potential defendants and not enough resources to handle them. Without a crucial limitation to prosecute "those most responsible," the court ended up spending already limited resources on low-level defendants rather than targeting systemic violations.

The funding shortfall, discussed above, prejudiced defendants and compromised due process. Lack of staff as a result of shoestring financing meant that no official trial transcripts existed, the accused were not afforded adequate defense counsel, and defense attorneys had no resources to fund investigations. Limited resources to support defense lawyers may have contributed to the high rate of conviction.

In addition to legal difficulties, the structure and public relations of the court failed to give Timorese jurists and the public ownership of the proceedings. Professional relationships between domestic and international jurists were strained. International judges had little knowledge of Indonesian law and frequently interrupted their Timorese counterparts. Salary differentials between international and domestic jurists may have also played a role, or at least exacerbated tensions. Unclear ownership also delayed appointments to the appeals court, further slowing down the process. Unlike the Cambodian and the Sierra Leonean hybrid tribunals,

moreover, the court did not have a public affairs office to communicate the Panels' work to the Timorese public, limiting the Panels' impact on building rule of law.

Finally, nonexistent domestic judicial capacity, in both human resources and infrastructure terms, plagued the Special Panels. Timorese judges were largely recent law graduates with no experience judging. Insistence from the Timorese Justice Minister that judges come from civil law countries also limited the pool of available international jurists. And of course, the decimated infrastructure meant that judges and attorneys lacked legal libraries and necessary supplies. In sum, lack of careful planning and failure to adapt to challenges meant that the court did not achieve its full potential.

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SECTION FOUR: TRIBUNALS ESTABLISHED BY AGREEMENT WITH THE AFFECTED STATE

Special Court for Sierra Leone (SCSL)

1. History of events/crimes leading to the creation of the tribunal

The Tribunal was created to address atrocities that occurred during the Sierra Leonean civil war, in which the Revolutionary United Front attempted to overthrow the Sierra Leonean government. The resulting eleven-year civil war resulted in 50,000 casualties. During the conflict, a new government formed led by Johnny Koroma. The new government engaged in violence against its citizens, including looting, rape and murders. The civil war began to taper down in 1999 when the international community intervened to promote negotiations between the rebel group and the government. The British intervened to support a new government under Kabbah. In January of 2002, Kabbah declared the civil war over and the focus shifted from peace negotiations to accountability mechanisms.

2. Founding Instruments (Was tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. The tribunal was established by an agreement between the government of Sierra Leone and the United Nations.
- b. In August of 2000, the Statute of the Special Court for Sierra Leone defined the rules and regulations that would govern the tribunal.
- c. Security Council Resolution 1688 on June 16, 2006 authorized the Special Court to transfer Charles Taylor to The Hague; after this point, the Special Court of Sierra Leone conducted the case against Charles Taylor in a borrowed ICC courtroom.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. Sierra Leonean President Kabbah specifically requested that the U.N. to intervene and prosecute for crimes committed during the civil war.
- b. The U.N. and the government of Sierra Leone collaborated to create the tribunal.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The U.S. and U.K. were the main backers of the Court.
- b. David Crane from the US Department of Defense became the first international prosecutor, and other governments sent judges and other staff.
- c. While Sierra Leone cooperated with the international community, the tribunal was designed so that the domestic government could not unduly interfere with the tribunal's work. The Court was set up to be local but governed by a management team of countries that funded the tribunals. Nigeria also played a strong role in the management team.
- d. In his letter in June 2000 to the U.N. Secretary-General, the late president Ahmad Tejan Kabbah, a lawyer, conceptualized the court as "a symbol of the rule of international law, especially at a time when some State and non-State actors are increasingly displaying, shamelessly, contempt for the principles of international law."

5. Source of funding and budget

- a. The court spent \$300 million by the time it finished its work in 2013. The initial budget was set at \$75 million and its period of operation was to last from 2002-2005.
 - i. This budget included the costs of the premises of \$3.5 million which included an entire fortified compound.
- b. Funding was set up to be completely voluntary from member states of the United Nations.
- c. Around 70% of the budget was used for salaries and bonuses for foreign nationals, causing some tension with the comparatively undercompensated Sierra Leonean jurists.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. The founding instrument intentionally limited jurisdiction to the Sierra Leonean context.
- ii. In addition, the court had jurisdiction to investigate peace keepers and other international figures, but no cases materialized.
- iii. The court looked at specific crimes and systematic attacks against civilian populations including:
 - 1. Murder;
 - 2. Extermination;
 - 3. Enslavement;
 - 4. Deportation;
 - 5. Imprisonment;
 - 6. Torture;
 - 7. Rape, sexual slavery, enforced prostitution, forced pregnancy;
 - 8. Any other form of sexual violence;
 - 9. Persecution on political, racial, ethnic or religious grounds; and
 - 10. Other inhumane acts.
- iv. The Court developed forms of responsibility such as the concept of Joint Criminal Enterprise (JCE), which considers each member of an organized group individually responsible for crimes committed by that group within the “common plan or purpose”. It is an ingenious way of de-legitimizing leaders of violent groups, but critics note that it can easily translate into guilt by association.

b. Temporal and Geographic Jurisdiction

- i. Prosecution was limited to crimes committed after the Adidjan Accord (a failed peace agreement) in 1996, even though the Civil war began earlier.

c. Personal Jurisdiction

- i. The court had jurisdiction over members of the Sierra Leone Army, the Civil Defense Force (CDF), and the Revolutionary United Front.
 - 1. Many people in Sierra Leone were surprised at the decision to include members of the CDF because of the role they played protecting civilians during the conflict and in reinstating the government after it was overthrown in 1997.

7. Final outcome (How many individuals indicted? Is the court still in operation? Viewed as a success?)

The Court handed down its final decision on September 26, 2013. The Appeals Chamber upheld the 50-year sentence on former Liberian President Charles Taylor. He was found guilty of crimes against humanity, war crimes, and serious violations of international humanitarian law through his support of Sierra Leone's Revolutionary United Front. He was also tried and convicted for the part he played in murders, rape and terrorism against the Sierra Leone civilian population from 1991 to 2002, during the civil war. In total, five leaders of the RUF and three from both the Civil Defense Forces and the Armed Forces Revolutionary Council were indicted.

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Extraordinary Chambers in the Courts of Cambodia (ECCC)

1. History of events/crimes leading to the creation of the tribunal

In 1970, a military coup installed a general as Prime Minister of Cambodia, deposing the then-Minister and King. The new regime, headed by Prime Minister Lol Non, changed the former regime's policy of tolerance toward Vietnamese communists seeking shelter within Cambodia from the ongoing Vietnam War. The new military regime pivoted toward the United States and demanded that Vietnamese communists leave Cambodia. The displaced Vietnamese fought the new government alongside Cambodian rebel supporters of the old regime, many of whom became communists.

Through the early 1970s, Cambodian communists known as the Khmer Rouge fought the Cambodian government with the support of North Vietnam. They made significant gains against the military government, which was finally confined to the cities, while the communists controlled the countryside. The fighting displaced millions.

On April 17, 1975, the communist Khmer Rouge regime seized control of Phnom Penh and took power in Cambodia. The Khmer Rouge controlled Cambodia until they were overthrown on January 7, 1979. The regime renamed the country Democratic Kampuchea and adhered to a rigid communist ideology. Immediately upon assuming power, the government evacuated the cities, evacuated citizens to rural areas, and forced them to labor on agricultural estates. The government rejected anything they believed was tainted with Western technology or influence. Ethnic minorities, government functionaries of the prior regime, and dissenters suffered from a policy of "disproportionate revenge": mass murders intended to purge Cambodia of Western influence and class distinctions. Estimates point to at least 1.7 million deaths during this period resulting from starvation, torture, execution, and forced labor. The ouster of the regime in 1979 was followed by a civil war, which lasted until 1998.

In response to the atrocities committed by senior leadership of the Khmer Rouge, the Cambodian government requested the United Nations to establish a special tribunal to prosecute the crimes in 1997. The Cambodian government rejected a U.N. commission of inquiry's recommendation to establish an international criminal tribunal in The Hague. Then-foreign minister Hor Nam Hong insisted Cambodia would try Khmer Rouge leaders in its own domestic courts. Cambodia eventually passed the ECCC law in 2001, which established a locally-based criminal justice initiative that incorporated foreign staff and international participation to adhere to international justice and human rights law. The U.N. Secretary General, worried that the court would not meet international due process standards, initially refused to sanction the law.

The exact details of the relationship between the Cambodian government and the United Nations and the broader international community was decided in June of 2003 through an agreement with the United Nations, but not before difficult negotiations. Initially, the U.N. broke off talks, citing the Cambodian law's failure to meet international human rights standards. Only after pressure from U.N. member states, including France and the United States, to negotiate with Cambodia did U.N. support solidify. The negotiators insisted on, and eventually won, a requirement that international judges would make up a majority of the court. Ultimately, the ECCC remained a Cambodian court, embedded within the domestic judiciary but with international influence to ensure that it would adhere to international standards.

Negotiations dragged on for nearly a decade due to clashes between the Cambodian government and the United Nations, and serious political obstacles delayed establishing the ECCC. American interest in establishing an international tribunal akin to ICTY or ICTR, strong during the Clinton era, flagged

when the Bush administration took over, further delaying negotiations. The Cambodian experience was unlike other courts in this respect: negotiations with the U.N. caused serious delays, and many Khmer Rouge leaders most responsible for war crimes died in the decade it took to get the court up and running.

2. Founding Instruments (Was tribunal created through a treaty, U.N. resolution?)

What are the main points/framework of these documents?)

- a.** The ECCC was set up by two (not entirely consistent) instruments: Cambodian law and a U.N.-Cambodian treaty. These authorities place the ECCC within the Cambodian courts.
- b.** Cambodian law established the ad hoc ECCC with a parallel structure to the regular Cambodian courts. It has three tiers:
 - i.** Pre-trial: composed of three Cambodian judges and two international judges; this chamber hears motions and appeals against orders issued by co-investigating judges.
 - ii.** Trial Court: composed of three Cambodian judges and two international judges; this court hears evidence and determines guilt.
 - iii.** Supreme Court: composed of four Cambodian judges and three international judges; this court decides appeals of fact and law from the trial court.
- c.** Cambodia's Supreme Council of the Magistracy, a group with strong ties to Cambodia's ruling party, selects the Cambodian judges, while the U.N. Secretary General chooses the international judges under the U.N. agreement. Under Cambodian law, however, the Council of the Magistracy may appoint jurists from U.N. member states, bypassing the Secretary General.
- d.** Cambodian law requires that the judges "attempt to achieve unanimity" in their decisions where possible, a unique feature of this hybrid tribunal.
 - i.** This emerged as part of the U.N. negotiations. Before it agreed to support the ECCC, the U.N. obtained a "supermajority" rule: any important ruling must win the support of at least one international judge to stand. This critical measure aims to ensure the ECCC meets international due process standards before convicting.
- e.** The agreement also creates a process for investigations that essentially duplicates civil and common law jurisdiction's different means of proceeding with prosecutions:
 - i.** Two judges, one international and one Cambodian, serve as "Co-Investigating Judges." They conduct investigations based on information gleaned from various sources and follow Cambodian procedural law, with some flexibility built in to follow international procedural rules.
- f.** The agreement requires two Co-Prosecutors—one Cambodian one international—each jointly responsible for issuing indictments. As above, they follow Cambodian procedural law with discretion built in to follow international rules.
- g.** A separate Public Affairs office with its own budget handles outreach to Cambodian villages, explaining the work of the court and its impact.
- h.** The agreement calls for approximately equal Cambodian and international staff and makes the official languages Khmer, English, and French. Since many Cambodian lawyers trained in Russia, the agreement was amended to include

Russian translations of public documents at the Cambodian government's expense. Translations remain a major expenditure.

- i. Uniquely, the ECCC can provide some symbolic and collective reparations to Khmer Rouge victims, though the founding documents did not give the ECCC the budget to provide financial remuneration to individual victims. Instead, international donors have largely funded reparations, such as monuments in villages. These remedies received mixed responses: in some cases, as with some of the monuments, they appear to have made an important contribution, while in others they seem instead to have been less effective—publishing victims' names in the ECCC opinion, for example.
- j. Finally, the ECCC was meant to complete its mandate within three years: one year for investigation, one for trials, and one for appeals. The court continues to function as of this writing, and so it has so far exceeded its plan by six years.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. Cambodia's initiated negotiations with the United Nations in 1997 to deal with the cycle of impunity. The U.N. appointed a Group of Experts to evaluate the situation.
- b. The Group of Experts' report, noting widespread corruption in the judiciary, as well as the politicization of the judicial branch, recommended a purely international court, without any Cambodian influence. The report concluded that Cambodia lacked sufficiently qualified judges, adequate infrastructure, and a culture of respect for the judicial process for the country to host the tribunal.
- c. Cambodia refused to sanction a fully international tribunal and insisted instead on having a role in prosecuting Khmer Rouge leaders. The U.N., meanwhile, negotiated for a process that would end the cycle of impunity, bring the most responsible to justice, and ensure that amnesties did not impede criminal sanctions. In 2000, the U.N. and Cambodia entered into an agreement which Cambodia enabled with legislation in 2001.
- d. The U.N. withdrew from the process in 2002, citing the inability of Cambodia's law to provide for impartiality and adequate process. This had much to do with the primarily national character of the institution, leaving less room for international influence. It returned to the negotiating table under pressure from the United States and France to cooperate with the process.
- e. The U.N. withdrawal delayed the ECCC, and it did not begin prosecutions until 2007. Although the agreement had been finalized seven years before, it took some time to appoint judges and to draft court rules.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The United Nations played a major role negotiating the structure of the Court with Cambodia and continues to support the ECCC's activities, not least by appointing a Deputy Director who administers the court and other international staff. The U.N. provides assistance through the U.N. Assistance to the Khmer (UNKRT).
- b. The U.N., along with member states, make up the most significant funders of the ECCC. Their role as funders gives them a fairly important voice in the tribunal.

- c. Finally, the international community provides staffing; however, member states also nominate jurists directly to the Cambodian government.

5. Source of funding and budget

- a. As initially planned, the U.N. would provide the lion's share of funding, about 80%, with the Cambodian government providing the other 20%.
- b. Now, voluntary contributions make up a significant part of the court's budget. Funding for the ECCC comes from over 35 countries in addition to the Cambodian government. Japan has been the major international donor, contributing nearly 50% of international contributions. Other major donors include France, Germany, the UK, Australia and the US.
- c. The Cambodian government continues to seek additional funding to support the work of the tribunal.
- d. As of January 2015, total expenses for the court amounted to \$237,479,141.
 - i. The budget from 2006 to 2009 was \$78.4 million; for 2010 it was \$31.2 million, for 2011 \$40.7 million. Proposed budget for 2014-2015 is currently \$60.5 million.
 - ii. The architects of the ECCC determined how much it would cost using estimates from the Special Chambers in Sierra Leone. Of course, the ECCC was set to complete its mandate within three years at a projected cost of \$56.3 million *total*, with \$43 million provided by the U.N. and \$13.3 provided by the government of Cambodia.
- e. Concerns arose almost immediately about the low funding allocations, especially for witness protection and security.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. The ECCC's subject matter jurisdiction is set by Cambodian law, and includes the following crimes:
 - 1. Genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide (1948).
 - 2. Crimes against humanity, with a definition largely borrowed from the ICTR Statute. The ECCC's definition is somewhat broader, however, since it is not limited to an attack on a civilian population on "national, political, ethnical, racial or religious grounds."
 - 3. War crimes, defined as grave breaches of the Geneva Conventions.
 - 4. Homicide, torture, and religious persecution, as defined in the Penal Code of Cambodia, but with a statute of limitations thirty years longer than the normal crimes.

b. Temporal and Geographic Jurisdiction

- i. The ECCC can only prosecute crimes committed between April 17, 1975 and January 6, 1979—from the beginning to the end of the Pol Pot regime.
 - 1. The narrow temporal jurisdiction is meant to cover the period when the Khmer Rouge committed the most prominent atrocities.
- ii. Because the ECCC is part of the domestic court system, it has the same geographic limitations as the Cambodian courts: the borders of the country.

1. The Court has yet to claim a basis for extraterritorial jurisdiction.

c. Personal Jurisdiction

- i. The founding instruments established a narrow set of Khmer Rouge leaders: “senior leaders of Democratic Kampuchea and those most responsible” for the crimes falling within the ECCC’s subject matter jurisdiction.
 1. This arrangement excludes many low- and mid-level Cambodian government officials who were part of the Pol Pot regime and currently work in the regime.
 2. From the U.N. perspective, this limitation additionally limits the cost of running the court.

7. Final outcome (How many individuals indicted? Is the court still in operation? Viewed as a success?)

The ECCC continues to operate as of June 2015, forty years after the Khmer Rouge crimes began, and the delays in bringing Khmer Rouge officials to justice has been a central criticism of the court. Indeed, many Khmer Rouge perpetrators, including Pol Pot and Ta Mok, died before the court even began operation, depriving the Cambodian people of a chance to see justice and the international community of an opportunity to end the cycle of impunity in the country. Breakdowns in negotiations between Cambodia and the U.N. contributed to the delay, as did extra time needed to write procedural rules for the court. When it finally got up and running, however, the ECCC outlasted its mandate, although the original three years mandate was an overly optimistic, if not unrealistic, goal. This has led to cost overruns, due in part to the unwieldy structure, including three courts and two tiers of review, and translation needs.

The Cambodian court exhibits some uniquely hybrid features, as well, some of which were not entirely consonant with Cambodian law. The architects designed the ECCC to have features of common law and civil law jurisdictions, and the applicable law includes Cambodian criminal law and procedure as well as international standards. In addition, while the Co-Prosecutors were meant to prepare indictments and the Co-Investigating Judges to conduct investigations, in Cambodia the prosecutor also has a role in investigations. Moreover, the ECCC, like the Special Court for Sierra Leone, had large numbers of international staff working alongside Cambodian staff. This created opportunities for capacity building and knowledge sharing, although lack of shared languages hampered the process in some respects. Indeed, language barriers have potentially hampered deliberations between international and Cambodian judges.

Nonetheless, many features of the ECCC yielded successes, and these facets are replicable across different contexts. Chiefly, the “supermajority” rule—essentially requiring the vote of an international judge for any major ruling—held the ECCC to a higher standard of international due process despite the Cambodian judiciary’s close ties to party politics. Critics of the process remained, but verdicts in important cases won approval from watchdog groups like Amnesty International. In 2010, when “Duch,” the warden of a prison camp, received a guilty verdict, Amnesty approved of the victory against the cycle of impunity. Another important feature of the court, the Public Affairs office, brought the court’s work to the attention of ordinary Cambodian victims. Although the court’s public relations campaigns met with mixed success, it did familiarize a large segment of the Cambodian population with impartial judicial process and formally recognized the Pol Pot-era genocide. Civil society played an important supporting role in sharing the court’s work with Cambodians. Finally, there is some evidence that working alongside international judges gave the Cambodian judiciary a model of impartiality and due process. This

evidence, while mixed, represents an improvement over the politicized judiciary of the 1990s which led the Group of Experts to declare that Cambodia could not host the ECCC.

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Special Tribunal for Lebanon

1. History of events/crimes leading to the creation of the tribunal

On February 14, 2006, a car bomb went off in central Beirut and killed former Lebanese Prime Minister Rafiq Hariri along with 22 other people. Following the attack, evidence came to light pointing to the possibility of Syrian involvement in the attacks, possibly as a result of Hariri's increasingly contentious relationship with the Syrian government. Lebanese citizens organized mass demonstrations calling for accountability.

The Lebanese government organized an investigation, but Wissam al-Hassan, a key player in the investigation effort, was assassinated. International bodies and key international players—including the United States and the United Kingdom—pushed for an open and thorough investigation. The United Nations Security Council established the International Independent Investigation Commission (IIIC) when they discovered that Lebanon's investigation had been flawed. This came with the adoption of Security Council Resolution 1595. The U.N. did find evidence of Syrian and Lebanese involvement in the attack, after which the Security Council voted to demand Syrian cooperation with the U.N. throughout the investigation.

2. Founding Instruments (Was tribunal created through a treaty, U.N. resolution?

What are the main points/framework of these documents?)

- a. Created through a complex interplay of United Nations' Security Council resolutions and domestic legislative action.
- b. Security Council resolution 1757 in 2007 authorized the tribunals and gave the Lebanese government time to notify the U.N. if they worked things out internally before the agreement went into effect
- c. Local context: In Lebanon, the treaty faced challenges as the parliament was reluctant to convene to address its implementation. The Lebanese Prime Minister then sent a request to the Security Council asking for the tribunal to automatically be put into effect by way of the prior resolution.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The Lebanese government specifically requested the United Nations to establish an international tribunal to investigate the assassination and other acts of terrorism.
- b. The Security Council ultimately determined that they needed to take action: Ban Ki Moon: "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 [...] resolved this issue by national consensus."

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The US played a particularly active role in vocally supporting the tribunal; then Secretary of State Condoleezza Rice noted the extreme importance that a court would be set up.

5. Source of funding and budget

- a. The Budget was set to be delivered by the United Nations member states unless Lebanon came forward with the ability to take responsibility
- b. The Tribunal was to last five years. It is still in action with a total budget of \$287.7 million, well above initial estimates that the tribunal would cost \$120 million over three years.
- c. Lebanon contributes around 50% of the funds, with the international community providing the additional 50%.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. The Tribunal has jurisdiction only over terrorist activities related to the assassination, but the mandate did not view terrorism as a crime against humanity.

b. Temporal and Geographic Jurisdiction

- i. The Tribunal has jurisdiction only over the assassination and any activities connected to it.

c. Personal jurisdiction

- i. The Tribunal has jurisdiction that extends to people connected to the attack. Individuals do not have to be present to be convicted; the first major trial is being conducted *in absentia*.

7. Final outcome (How many individuals indicted? Is the court still in operation? Viewed as a success?)

The goal of the tribunal went beyond initial prosecution to an attempt to prevent future atrocities. The process was never an exclusively Lebanese initiative as it reflected political tensions and developments across regional and international boundaries. This tribunal is especially significant as it marks the first time an international court has asserted jurisdiction over terrorism against a specific person.

The main difference between the STL and other hybrids is the subject matter of competence given that the STL's jurisdiction does not cover crimes traditionally prosecuted and adjudicated under international law: genocide, war crimes, and crimes against humanity. During the negotiation process, an attempt to qualify terrorism as a crime against humanity was unsuccessful. The Tribunal remains operational and has yet to issue a final judgment.

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SECTION FIVE: DOMESTIC TRIBUNALS AND RELATED EFFORTS WITH AN INTERNATIONAL COMPONENT

Comisión Internacional Contra la Impunidad en Guatemala (CICIG)

1. History of events/crimes leading to the creation of the tribunal

Guatemala experienced more than three decades of armed conflict between the 1960s and 1996, when peace accords brought an end to the civil war. The fighting took place mainly between a military junta and anti-communist guerilla groups backed by the United States. Para-military and government forces killed thousands of civilians in the 1970s and 1980s, with the violence against indigenous populations living in the rural parts of the country rising to the level of genocide. As the conflict wound down, both the government and guerilla forces made significant concessions, and the government granted the guerillas land in exchange for surrendering their arms. The United Nations-brokered peace agreement included a truth and reconciliation commission in hopes of giving victims an opportunity to have their suffering recognized.

Despite efforts to establish a functioning justice system following the 1996 peace, organized crime syndicates continued to operate with impunity inside Guatemala. In 2008, more than 6,000 murders occurred in the country, but only than two percent of those responsible faced justice. Criminal organizations, many of which have significant ties to the Guatemalan government, planned a large proportion of these killings. The Guatemalan judiciary faced huge difficulties bringing these criminals to justice: corruption, government connections, and lack of security for judges and prosecutors were obstacles in the path of establishing a strong rule of law. The cycle of impunity exacerbated organized criminal activity once it became clear that murderers would face limited repercussions from the government.

To end the cycle of impunity, and following a wave of attacks against human rights advocates, the Guatemalan government sought the assistance of the United Nations in 2002, largely at the urging of in-country human rights organizations. The U.N. Department of Political Affairs initially proposed an investigative commission with prosecutorial powers. The proposed commission faced strong opposition from the Guatemalan Congress, and the Constitutional Court advised that the agreement might violate the Guatemalan Constitution, which exclusively delegated prosecutorial powers to the government's Public Prosecutor. The government asked instead for a special prosecutorial cell embedded within the Guatemalan justice system to promote respect for rule of law, build institutional capacity to prosecute organized criminals, and end the cycle of impunity for kingpins within criminal organizations. The U.N. acquiesced in 2006 and the Comisión Internacional Contra la Impunidad en Guatemala (CISIG) was born.

CICIG is not a tribunal in the traditional sense of the word. Rather, special prosecutors embedded within the Guatemalan justice system provide technical assistance; promote prosecutorial, judicial, and constitutional reform; and seek to ingrain respect for rule-of-law principles. Trials are held before ordinary criminal courts presided over by Guatemalan judges.

2. Founding Instruments

- a.** The United Nations and Guatemalan government created CICIG by bilateral agreement in 2006.
- b.** The agreement establishes CICIG's three-part mandate:

- i. To determine the existence of illegal security groups and clandestine security organizations and those groups' relationships with the Guatemalan government.
 - ii. To collaborate with Guatemala to dismantle illegal security groups and promote the investigation and criminal prosecution of group members who committed crimes.
 - iii. To recommend policies for Guatemala to eradicate illegal organizations and prevent their re-emergence.
- c. The agreement additionally enumerated CICIG's powers:
 - i. To investigate government officials and agencies, private individuals, and private entities by requesting information, documents, and evidence from the government.
 - ii. To file complaints with criminal authorities in Guatemala, including the Public Prosecutor, and to act as a third-party private prosecutor (*querellante adhesivo*).
 - iii. To request documents from government officials or agencies.
 - iv. To report civil servants who interfere with CICIG's investigative function to administrative disciplinary boards.
 - v. To recommend policies to the Guatemalan government to reform its justice system.
- d. Equally critical are the powers that CICIG *lacks*, powers that the failed investigative commission would have had. CICIG has no authority to:
 - i. Issue subpoenas, search premises, or compel witnesses;
 - ii. Issue national or international arrest warrants for any crime; and
 - iii. Prosecute persons against whom it has recommended that the Public Prosecutor bring charges.
- e. The agreement additionally lays out Guatemala's responsibilities:
 - i. To cooperate with CICIG by allowing freedom of movement and access to information and documentary records relevant to CICIG's investigations.
 - ii. To appoint special prosecutors to carry out criminal investigations and prosecutions that CICIG calls for.
 - iii. To create a special branch of the National Police Force to support CICIG investigations.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. Guatemalan NGOs crucially persuaded the government to enter into an agreement with the United Nations. These groups put pressure on the government during Alfonso Portillo's administration in 2000-2004 to adopt the investigative commission that the Constitutional Court ultimately deemed impermissible.
 - i. They were less prominent in urging the government to adopt CICIG. Nonetheless, they were critical in bringing the government to the negotiation table.
- b. Regime change certainly played a role. When Oscar Berger took over as President, he inherited the negotiations and sought to realize some kind of commission to establish rule of law.

- c. The United States potentially played an important role in encouraging Guatemala to adopt CICIG by releasing a hold on critical defense aid once the country returned to the negotiating table.

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The agreement calls on the international community to provide voluntary contributions toward CICIG's operations.
- b. Additionally, the agreement requires that the head of the CICIG secretariat come from the international community, and the Secretary-General ultimately chooses the commissioner.
- c. The Commissioner need not be an international, but it does require she be a "jurist with a high level of professional competence" in human rights and criminal law.
- d. Notably, the immunities afforded staff that work for CICIG remain unclear. Local staff do not have the same immunities as internationals under the agreement, causing some tension between the two groups. This uncertainty stems from CICIG's status as a part of Guatemala's domestic justice system.

5. Source of funding and budget

- a. Funding is entirely by voluntary contribution, a mechanism that, while appealing to the United Nations, has at times caused staff reductions and forced CICIG to investigate on a shoestring budget.
- b. The lion's share of funding comes from the usual suspects: the United States, Canada, and Western Europe, including the United Kingdom, Germany, Ireland, Italy, and the Scandinavian countries.
- c. In addition, Latin American countries have footed some of the bill, including Argentina.
- d. Data is hard to come by here. To date, CICIG has spent an estimated \$110 million, but its budget has dropped every year since a high-water mark in 2008.
- e. CICIG began with a \$28 million budget request according to the U.N. Development Programme. In subsequent years, CICIG's budget fell from \$20 million to \$15 million, resulting in a reduction in staff. It now spends approximately \$12 million per year.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. CICIG has "jurisdiction" over acts codified as crimes under Guatemalan law in the sense that its particular mandate focuses on investigating organized crime, but it cannot prosecute individuals itself.
- ii. Uniquely among "hybrid" transitional justice mechanisms, CICIG's mandate does not include crimes under international law.

b. Administrative Role

- i. CICIG has the power to sanction government officials who block critical investigations or withhold information from investigators. CICIG has deployed this power against more than Guatemalan 2,000 civil servants.

c. Institutional Reform

- i. CICIG can conduct reviews of Guatemalan laws and practices to increase efficiency and build respect for rule of law.

7. Final outcome

CICIG's mandate was renewed in 2015 by Guatemalan President Otto Perez Molina, suggesting that the Guatemalan government has found it useful in the fight against corruption and impunity. Nevertheless, CICIG has not been an unqualified success. CICIG can be evaluated on two axes: 1) its success in bringing public prosecutions against corrupt government officials and criminals and 2) its success in promoting rule of law in Guatemala.

CICIG has had some mixed success bringing public prosecutions. In 2010, just two years into its mandate, it had successfully persuaded the government to bring charges against eight high-profile defendants, and it played a pivotal role in those trials. On that front, CICIG proves that Guatemala's justice system can successfully hold persons accountable. It won significant praise in 2010 when it resolved the infamous murder of Rodrigo Rosenberg, a lawyer who (it turned out) planned his own assassination to destabilize the government. On the other hand, CICIG has suffered severe handicaps. It cannot bring prosecutions but must persuade the Guatemalan Public Prosecutor to do so, and it has faced political challenges from some defendants. Moreover, to join a suit, CICIG must persuade a Guatemalan judge to allow it to join as *querellante adhesivo*.

Commentators have explained that CICIG's more lasting legacy may be in combating corruption. CICIG has successfully brought disciplinary sanctions against a huge number of civil servants, facilitating cooperation for investigations or else in removing corrupt officials altogether. CICIG moreover has offered policy recommendations to Guatemalan rule-of-law advocates, who have taken those up to the Guatemalan Congress in an effort to bring about structural reform. The Commission's inclusion in the domestic justice system has arguably made it more effective in promoting respect for rule of law and facilitating capacity-building, two much-touted benefits of hybrid tribunals. But here, too, CICIG encountered resistance from an entrenched, corrupt bureaucracy.

In addition, CICIG had a rocky relationship from the outset with Guatemalan civil society, segments of which were suspicious of international interventions. For months after it began its mission, CICIG did not have a central phone line for individuals to report illegal criminal organizations, and the lack of a transparent reporting mechanism encumbered its investigations. From its inception, CICIG lacked funding to protect witnesses adequately, discouraging Guatemalan civil servants from reporting issues for fear of retribution from criminal elements. Moreover, local staff who lacked immunity faced harassment from both criminal organizations and from Guatemalan police forces with ties to those organizations. Tensions reached the point that CICIG warehoused evidence against politically-sensitive defendants rather than turn it over to Guatemalan authorities as required in the agreement. The Commissioner feared that the evidence would disappear if turned over. Still, CICIG's successes in raising complaints against civil servants suggest that it has made some gains toward developing the rule of law in a weak justice system.

In sum, CICIG combines features of a commission of inquiry (its investigative powers) and a hybrid tribunal's prosecutor (its powers to encourage domestic prosecution). These features uniquely positioned the Commission to promote rule of law in Guatemala, but the Commission's limited powers made it difficult for it to realize its mandate. That is, the features that made CICIG so innovative—being embedded within the Guatemalan justice system, its investigative powers, and its role promoting rather than conducting prosecutions—also hampered its ability to root out corruption and criminal organizations. CICIG is best regarded, then, as another layer of protection against forms of corruption and criminal organizations with the potential to promote respect for rule of law rather than a cure-all for Guatemala's cycle of impunity.

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Mobile Courts in the Democratic Republic of Congo (DRC)

1. History of events/crimes leading to the creation of the tribunal

Since the Rwandan Genocide of 1994, the DRC has experienced over 20 years of intermittent strife and military conflict, which is believed to be responsible for the deaths of 3.5-5 million people. Throughout the conflict (which officially ended in 2002 but has smoldered on ever since), parties on all sides have committed horrendous acts of violence and abuse, including mass killings, torture, mutilation, and mass rape as a weapon of war. The extent of these crimes was made most notoriously public by the 2010 U.N. Mapping Report, which extensively chronicled the crimes committed on DRC territory from 1993-2003, noting that the crimes committed by several parties might rise to genocidal levels.

Infamously, during and since the end of the Second Congo War, the DRC, and especially its eastern regions, has been more ravaged by rape than any other country in the world. Tragically, what started primarily as a weapon of war used by militia groups has increasingly seeped into civilian practice in the last decade. It is estimated that anywhere from 16,000 to 400,000 rapes were committed yearly during the first decade of the 2000s. (Lake 2014a).

In 2002, DRC signed and ratified the Rome Treaty establishing the International Criminal Court; “aggression” will not be actionable until 2017, and DRC has not ratified the amendments. In 2006, the new Congolese government passed penal and constitutional reforms, with sexual and gender-based violence (SGBV) receiving increased attention compared to prior criminal codes, though not as much as some commentators had hoped for. Bizarrely, the 2006 reforms seem to have left out war crimes from the military courts’ jurisdiction.

The military tribunals responded by becoming the first courts in the world to use Rome Treaty language in their domestic legal decisions. (Lake 2014b). Indeed, on the basis of constitutional authorization to consider treaties as laws of the land, they chose the stronger Rome Treaty definitions of international crimes over the still-vague and relatively weaker Military Criminal Code definitions, especially in areas of SGBV (Lake 2014; Labuda 2015).

Against this backdrop, starting in 2008, the American Bar Association’s Rule of Law Initiative began implementing a mobile courts support program in partnership with other funding organizations and premised on a model that seems to have been pioneered by Lawyers Without Borders in 2003. The courts began their work in earnest in 2009 and continue to this day.

2. Founding Instruments (Was tribunal created through a treaty, U.N. resolution? What are the main points/framework of these documents?)

- a. There don’t seem to be any founding instruments, beyond the ABA ROLI’s initiative, the Rome Treaty, and the Congolese penal codes.
- b. There is a new law on the organization of the Courts (2013) that seems to contemplate the mobile courts.
- c. It’s unclear from the literature, but it seems the mobile courts are structured like the sitting, local Military Tribunals, with a panel of five judges, two of whom must be career military officers.
- d. Prosecutors move with the court to the locality where crimes are alleged to have been committed. Apparently there is no dearth of judges and prosecutors, who are appointed by the military command and quite mobile.

- e. Public defenders must be provided and may only come from the local bar association on an *ad hoc* basis. This has presented some challenges for the provision of adequate defense counsel.
- f. The mobile courts follow Congolese rules of court.
 - i. Of note are fairly strong protections for witnesses who testify in SGBV cases and the challenging requirement that judges must have equal or higher rank to the armed forces defendants who sit in front of them.
- g. Appeals can be made within five days of a judgment to each higher level of the military judiciary—from the Military Police Tribunals, to Military Tribunals, to one or two regional Military Courts, to the High Military Court in Kinshasa, to (in theory) the Court of Cassation (still waiting to be established) or (in practice) the Supreme Court of Justice.

3. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. The DRC is the main state actor involved, as these are Congolese courts.
- b. All the court staff are Congolese.
- c. International staff only provide training, transportation, and logistical support.
- d. The American Bar Association's Rule of Law Initiative (ABA ROLI) is the main NGO supporting the program.
 - i. ABA ROLI collaborates with the U.N. (MONUSCO), and other NGOs like HEAL Africa and Panzi hospitals, Congolese NGOs, and international NGOs such as DanChurchAid and Avocats Sans Frontieres, to implement the program. (Maya).

4. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. The mobile courts come in military and civilian varieties, but the former have had until recently exclusive jurisdiction over international crimes. These are entirely Congolese courts, transplanted temporarily with funding and assistance from the ABA ROLI for on-site trials in communities that are far from brick-and-mortar courthouses.
- b. The ABA ROLI staff in the DRC (the Director is Cameroonian, the three other staff lawyers are Congolese), with support from the ABA's DC offices:
 - i. provide training for many of the mobile court staff, even judges and prosecutors, on applicable Congolese and international law,
 - ii. help secure basic transportation and lodging for survivors over the course of the trial and
 - iii. work with local bar associations to provide defense counsel to suspects.
- c. ROLI also provides for a slew of complementary programs that support the mobile courts' work and generally strengthen the culture of accountability for SGBV in the Eastern DRC by:
 - i. providing legal assistance during trial (non-mobile court trials as well);
 - ii. enhancing legal assistance to survivors of SGBV by training and equipping local attorneys who prepare and file court cases with the police and accompany survivors and witnesses before justice sector officials;
 - iii. securing transportation, meals and lodging for survivors and witnesses to travel to police stations, prosecutors' offices and courts;
 - iv. working with local prison administration to ensure that perpetrators serve their sentences;
 - v. coordinating with local police to guarantee that monetary reparations to survivors are paid to the greatest extent possible;
 - vi. hosting public and media events to educate on the 2006 SGBV law reforms and to inform about legal services; and

- vii. training local lawyers in Congolese SGBV and international law.
- d. Since 2008, ABA ROLI legal aid services have offered *pro bono* legal counseling to 14,986 SGBV survivors and helped to file 9,215 cases with local authorities, resulting thus far in 1,432 trials and 1,027 convictions. (ABA.org)

5. Source of funding and budget

- a. ROLI received funds from the Dutch Government, MacArthur Foundation, Norwegian Government, Open Society Justice Initiative for Southern Africa, U.S. Department of State (its Bureau of International Narcotics and Law Enforcement and its Bureau of Democracy, Rights and Labor), and U.S. Agency for International Development (ABA.org).
- b. Total budget is unknown (total extent of operations is hard to gauge as well).
- c. ABA ROLI reports that the cost of one mobile court session is \$45,000-\$60,000, during which they hear an average of 15 cases. (Maya).
 - i. It also reports that it helped support 79 mobile court sessions in the Kivus from 2009-2015 (SALC 2015), putting an estimate of that region's mobile court costs at an average of \$800,000 per year of operation.

6. Jurisdiction

a. Subject Matter Jurisdiction

- i. In theory: The mobile courts have the same jurisdiction as ordinary military courts: over all crimes according to the Military Criminal Code (including rape; not including use of child soldiers).
 - 1. Until new civilian penal code is passed (an effort that has been subject to almost 10 years of delays), military courts have exclusive jurisdiction over all international crimes, mostly defined according to Rome Treaty definitions, and crimes "indivisible" from those (including rape as a war crime and/or crime against humanity; not including the use of child soldiers as war crimes or crimes against humanity).
- ii. In practice: The mobile courts have used Rome Statute provisions developed through case law, because judges and prosecutors found the MCC definitions of international crimes to be inadequate. The Congolese Constitution makes ratified treaties the law of the land and thus fairly usable even without implementation legislation.
 - 1. By design, the mobile courts were meant to address SGBV and have traditionally focused on those crimes. Around 75% of the caseload is for rape charges, most of the rest of the cases being robbery and pillaging.
 - 2. Though convictions for international crimes are more rare for the mobile courts, in one high-profile case one general and nine officers were convicted of crimes against humanity by a mobile court for their rampage and rapes in a village only a few weeks earlier (Maya).
 - 3. There are also reports that the mobile courts have recently expanded their focus to reproductive and family law more generally, even handing down judgments against women for unlawful abortions.

b. Temporal and Geographic Jurisdiction

- i. Limited to crimes under their jurisdiction committed in the Congo (or by Congolese forces abroad).
- ii. Limited temporally as defined by the relevant statutes:
 - 1. Military Criminal Code: some statutes of limitation, but no temporal limitation on international crimes. However, older statutory definitions

are not the same as current ICC ones (there are the 1972 definitions, the 2002 ones, the 2006 ones, increasingly similar to ICC definitions).

2. Rome Treaty crimes: only post-2002 (through 2006 Constitution—see note, above).

c. Personal Jurisdiction

- i. Military Courts, through the Military Judicial Code rules, have jurisdiction over not only all military and police personnel, but over all civilians (whether locals, domestic rebels, or foreign rebels) who commit crimes within the courts' jurisdiction.
 1. Again, if those crimes are “indivisible” from international crimes, the military courts have *exclusive* jurisdiction over those defendants.
- ii. Many international criminal justice advocates say this is a problematic feature of the current judicial format in the DRC. The 2006 constitutional and 2013 judicial reforms changed this in theory, but because the Rome Treaty implementation legislation has not yet been passed, it remains the *de facto* practice.

d. Concurrent Jurisdiction with Domestic courts

- i. Not applicable, as these are domestic courts. There could be concurrent jurisdiction issues if the proposed civilian penal code is passed, since this would in theory shift exclusive jurisdiction to civilian courts for international crimes. It's unclear how the military and civilian leadership would handle that transition, or whether an indefinite and unclear concurrent jurisdiction over international crimes would result.

7. Final outcome (How many individuals indicted? Is the court still in operation? Viewed as a success?)

The mobile courts have either coincided with or helped lead to a great increase in criminal accountability for perpetrators of SGBV. Indeed, in 2012 over 70% of detainees in Goma's central prison were alleged SGBV perpetrators (Lake 2014a). In the early 2010s, around 75% of complaints of SGBV crimes result in prosecutions and around 60% end in convictions. There is even anecdotal evidence of eastern Congolese men joking about being afraid of being alone for five minutes with a woman lest they too be prosecuted (Lake 2014a).

Overall, from 2009 to 2012 the mobile courts heard 382 cases, with 204 rape convictions, 82 convictions for other crimes and 67 acquittals (SALC 2013). In addition, the ABA ROLI legal services program has offered *pro bono* counsel to 14,986 SGBV survivors and helped file 9,215 cases with local authorities, which have led to 1,432 trials and 1,027 convictions (ABA.org).

The mobile courts' most noted victory has been the successful prosecution of Lt. Colonel Kibibi of the Congolese Armed Forces and eleven of his men for their pillaging, violence, and sexual assaults around the village of Fizi in January 2011. Within six weeks, the men were arrested and put on trial before a mobile military tribunal. Colonel Kibibi and nine of his men were convicted of a slew of civil, criminal, and international offences, sentenced to prison, and ordered to pay reparations. One soldier was acquitted (Lake 2014a). It was widely considered a groundbreaking moment for justice in the DRC.

Some failures, challenges, and downsides to the mobile courts are apparent as well, however. First, the emphasis that donors have put on prosecuting SGBV crimes has necessarily

removed another host of crimes from the public spotlight, devaluing a whole set of legal grievances that should be brought to courts in the DRC. Second, justice in the DRC remains unequal. The military and civilian leadership are successfully protecting an elite cadre of former combatants from prosecution by the military courts. Since the judicial reforms of 2006, there have only been around 30 prosecutions for international crimes in these courts, and only four senior military officials (including one general) have been convicted for sexual offences. Indeed, in 2012, at a widely publicized trial in Minova, a group of Congolese officers and soldiers were mostly acquitted for offenses similar to the ones successfully prosecuted in Fizi. Apparently, in the latter case, Coloni Kibibi had fallen out of favor with his seniors (Lake 2014c).

Furthermore, some commentators fear that the funding of the mobile courts is creating a dependency on foreign actors for justice in the DRC, for example, with lawyers increasingly requesting higher salaries to work for groups like ABA ROLI (Lake 2014a).

Lastly, the mobile courts have not changed underlying issues such as a dearth of criminal justice for acts committed in the earlier years of the conflict (pre-2005) by perpetrators who are now high-ranking civilian and military officials in the Congolese government or the lack of prosecutions for recruiting child soldiers or for resource pillaging. Nor have they addressed the failures in due process for some defendants who are almost summarily tried and convicted, the inability to extradite defendants who enjoy safe haven in neighboring Rwanda and Uganda, or indeed the terribly crippling lack of resources for the criminal justice system (0.03% of the government's annual budget goes to the judiciary) and the public sector in general (soldiers continue to lack regular and adequate pay). Nonetheless, it's hard to conclude that the mobile courts program has been anything less than a net gain for justice in the DRC.

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U.N. Office on Drugs and Crime (U.N.ODC) Piracy Courts

1. History of events/crimes leading the creation of the tribunal

A spate of acts of piracy in the Indian Ocean in the 2000s, particularly in the Gulf of Aden, led to the deployment of multilateral naval forces to combat piracy. The naval force successfully mitigated these acts of piracy, which peaked in 2011, but have since dropped dramatically. The force captured many pirates, but a need arose to prosecute those who were captured while engaging in acts of piracy.

2. Parties Involved (what states/international bodies were involved in the tribunal's formation, including political alliances, spoilers, etc.?)

- a. ***Military involvement:*** Multilateral military forces were involved in the effort to combat piracy, acting with the sanction of the U.N. Security Council under its Chapter VII authority. Operations began in 2008.
 - i. Countries involved include Canada, Denmark, France, India, the Netherlands, the Russia, Spain, the United Kingdom, the United States, as well organizations such as NATO and the European Union.
- b. ***Diplomatic Involvement:*** Later that year, a ministerial-level International Conference on Piracy off the Coast of Somalia was held in Nairobi, Kenya, which issued a communiqué calling on regional nations and organizations to develop judicial capacity to prosecute acts of piracy.
- c. ***U.N. Coordination of International Efforts:*** In December 2008, the United Nations Security Council, in Resolution 1851, created the Contact Group on Piracy off the Coast of Somalia (CGPCS). The CGPCS was administered through the United Nations Office of Drugs and Crime (UNODC). Over 80 nations and international organizations participated in the CGPCS.
 - i. The CGPCS was primarily a forum for coordinating political, military, and other efforts to bring an end to piracy off the coast of Somalia and to ensure that pirates are brought to justice. It focused on capacity building, determining appropriate judicial and other mechanisms for deterring piracy, working with commercial shipping companies to create anti-piracy awareness, and disrupting piracy networks ashore.
 - ii. The UNODC began providing judicial and prosecutorial capacity assistance to countries in the Horn of Africa, including Somalia, Kenya, and the Seychelles. The U.N. did not establish an international piracy court despite a Secretary-General report suggesting one. The Security Council continued to endorse actions taken by the UNODC to provide assistance in domestic prosecutions in Kenya, Seychelles, Mauritius, and Somalia.
 - iii. Prosecutions commenced in Kenya, Seychelles, and Mauritius during late 2009 and early 2010 with the assistance of the UNODC in the form of judicial and prosecutorial capacity (including seconding of personnel in some instances), administration, forensics, building and prisoner transfer. Tanzania joined these countries in 2011.

3. Role of the international community (architect, funder, seconding staff, carrots/sticks, etc.)

- a. Created through UNODC programs with overlapping instruments based on counter-piracy treaties. The Security Council endorsed this approach, and created a contact group, but never actually created any tribunal. States entered into various agreements, including the nations that actually capture the pirates to facilitate transfer of custody.
- b. Prosecutions commenced in Kenya, Seychelles, and Mauritius during late 2009 and early 2010 with the assistance of the UNODC in the form of judicial and prosecutorial capacity (including seconding of personnel in some instances), administration, forensics, building and prisoner transfer. Tanzania joined these countries in 2011.
 - i. The type of assistance is dependent on the particular need of the country. The prosecutions are largely a domestic matter, conducted with capacity assistance by the international community through the UNODC.¹
- c. The international community, through the United Nations (the UNODC in particular) was largely the architect of this effort. The efforts were funded by the international community, which included both monetary donations and in-kind contributions.
- d. Nations participating in this program have entered into agreements to accept transfer of a certain number of prisoners accused of acts of piracy in the custody of multilateral or individual state forces for prosecution. The prisons that house such prisoners were built and/or upgraded in large part with the aid of this program.²

4. Source of funding and budget

- a. The Tribunal's funds came out of the UNODC operating budget, supplemented with disbursements from the Djibouti Code Trust Fund established through the IMO with voluntary donations from member states affected by piracy.
- b. Precise data have been difficult to locate, but the budget to date has been around 70 million USD through the Djibouti Code Trust Fund.
- c. Many countries have contributed to the budget through in kind donations.³

Jurisdiction

Introduction:

Jurisdiction of these courts is somewhat complicated. The United Nations Convention for the Law of the Sea (UNCLOS) defines piracy and has been interpreted by some as conferring universal jurisdiction in Article 51, or alternately, that universal jurisdiction over piracy is customary international law.⁴

¹ U.N.ODC Maritime Operations Program 2014 Annual Report,
http://www.unodc.org/documents/easternafrika/MCP_Brochure_December_2014_wv_6_1.pdf

² Id.

³ IMO Anti-Piracy,
http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_1st_edition.pdf

⁴ Milena Sterio, Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles, and Mauritius, 6-10 (Oct. 26, 2012),
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167428; Panos Koutrakos & Achilles Skordas The

Art. 51: 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.

There is scholarly disagreement, however, on whether piracy is a crime of universal jurisdiction, or simply a crime of concurrent municipal jurisdiction.⁵ The argument is that piracy does not arise to the level of heinousness of violations of *jus cogens* norms such as genocide. Therefore it should not give rise to universal jurisdiction. Rather than the heinousness justification for universal jurisdiction for violation of *jus cogens* norms, jurisdiction over acts of piracy is more of a logistical problem due to the fact it occurs in areas not under the jurisdiction of any state. Hence, jurisdiction should be regarded as concurrent municipal rather than truly universal.⁶

Regardless, the architects of this program view piracy as a crime of universal jurisdiction.⁷ That being said, participating states have required domestic legislation to exercise such jurisdiction. A major component of this program was getting domestic legislation on the books to allow for the exercise of such jurisdiction.⁸

This domestic legislation in participating states passed since this UNODC program has provided for what is perhaps best described as quasi-universal jurisdiction over acts of piracy. These nations can exercise jurisdiction over any persons who engage in acts of piracy on the high seas. This would exclude acts of piracy that occur solely in the territorial waters of another state.

It is a little confusing because it can be viewed two ways. Because UNCLOS defines piracy in terms of high seas (which includes Exclusive Economic Zones), if one accepts this definition of piracy, then the jurisdiction exercised by these courts is truly universal. That is, other acts that seem piratical but occur solely in territorial waters are not “acts of piracy” under international law (piracy *jure gentium*). But if one accepts broader definitions of what constitutes piracy, such as that contained in Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), then the jurisdiction of these courts is only quasi-universal. For instance, UNCLOS does not include acts that occur solely within territorial waters, or aboard a single ship, whereas SUA does. Complicating this is the fact that recent domestic

Law and Practice of Piracy at Sea: European and International Perspectives, pg. 119 (2014); Anna Petrig, Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects, pg. 345 (2014). Treaty Jurisdiction Over Pirates: A Compilation of Text, ¶ 18-19, http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes; Steven Art, An Empirical Examination of Universal Jurisdiction for Piracy Eugene Kontorovich Northwestern University School of Law (2010), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1037&context=facultyworkinpapers>

⁵ Tamsin Page, Piracy and Universal Jurisdiction, Macquarie Law Journal, Vol. 12, pg. 148 (2013) (<http://www.austlii.edu.au/au/journals/MqLawJl/2013/17.pdf>).

⁶ Id.

⁷ U.N.ODC Maritime Crime Program, <http://www.unodc.org/unodc/en/piracy/indian-ocean-division.html>.

⁸ Maritime Crime Program, U.N.ODC, <http://www.unodc.org/unodc/en/piracy/indian-ocean-division.html>

legislation criminalizing piracy and granting universal jurisdiction in some instances has a broader definition of piracy than that contained in UNCLOS.

Subject Matter:

Acts of piracy. UNCLOS provides the most widely used definition of piracy:

UNCLOS Art. 101:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or air-craft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The UNCLOS definition of piracy is limited in many respects. For instance, one scholar noted regarding UNCLOS's definition of piracy:

First, piracy must occur on the high seas. If Somali pirates hijack a vessel in the Somali territorial sea, this act would not qualify as piracy under UNCLOS.³³ Thus, although patrolling nations may have the right to enter Somali territorial waters for the purpose of preventing pirate attacks, if attacks take place in such waters, they would not even amount to piracy under international law. Second, a pirate attack must involve two vessels: a victim and an aggressor vessel. This could be problematic should pirates attempt to board the victim vessel in its last port of entry and then hijack it on the high seas.³⁴ In such a case, although the hijacking strongly resembles piracy, it would not qualify as such under traditional international law. Third, the act of piracy must be committed for private aims. Should pirates be linked to a political cause or should they operate on behalf of a state entity, their acts would not qualify as piracy under international law.⁹

A number of nations participating in this program did not have the crimes of piracy in their criminal codes at the outset. Part of the UNODC's program was convincing and aiding participating nations to pass statutes to criminalize piracy.¹⁰ The precise definition of what constitutes "acts of piracy" for the purposes of piracy courts depends primarily on domestic legislation. The definitions differ slightly among the nations involved in this program, but most are largely congruent with that contained in the United Nations Convention for the Law of the Sea (UNCLOS). Some, however, as demonstrated below, are more expansive, and include acts found in the SUA.

Kenya

⁹ Sterio, note 22, pg. 7-8.

¹⁰ Maritime Crime Program, U.N.ODC, <http://www.unodc.org/unodc/en/piracy/indian-ocean-division.html>

In 2009, Kenya passed the Merchant Shipping Act (MSA), which adopted, verbatim, the UNCLOS definition of piracy.¹¹ Before the MSA 2009 was enacted, the Kenyan Penal Code contained a vague definition of piracy.¹² This section provided that any person who committed a piratical act, as defined in the law of nations, in territorial waters or upon the high seas was guilty of the offence of piracy.¹³

Practitioners in the field have noted: “This vague definition was refined in a 2005 case before the High Court in Mombasa where the court defined piracy as ‘satisfying one’s personal greed or vengeance by robbery and murder beyond the jurisdiction of any state’. The case of *Ahmed v Republic* further defined piracy under section 69 of the Penal Code. This appeal case before the High Court upheld the decision that piracy under the Penal Code encompassed the definition provided in Article 101 of UNCLOS, even though it was not explicitly stated in section 69. The High Court held that, even if the Penal Code made no mention of piracy, the lower court would have been correct to implement the provision of UNCLOS. The High Court then went even further by submitting that the lower court should have applied the UNCLOS definition of piracy even if Kenya had not ratified and domesticated UNCLOS. The Court found that Kenya could not be expected to act contrary to what was expected of a member state of the United Nations. Since the implementation of the UNCLOS provision into Kenyan national legislation, the substance of this decision has become somewhat redundant. However, the underlying reasoning is still of importance as it implies that Kenya should define piracy according to the international standards at any given moment, even if it is not adequately defined in the national law.”¹⁴

Seychelles

The Seychelles amended its national law on piracy in 2010.¹⁵ Section 65(4) of the Penal Code provides that piracy includes:¹⁶

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
 - (ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State or,
- (b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft.

Practitioners in the field have noted: “It is important to note that the law uses the word ‘includes’ rather than ‘means’ or another word indicating that the definition is exhaustive. This suggests that acts other than those mentioned in section 65(4) could also amount to piracy and makes

¹¹ Merchant Shipping Act of 2009, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf.

¹² Piracy Definitions in Domestic and Regional Systems, Public International Law & Policy Group, Legal Memorandum, pg. 15-16 (March 2013).

¹³ Id.

¹⁴ Piracy Definitions in Domestic and Regional Systems, Public International Law & Policy Group, Legal Memorandum, pg. 15-16 (March 2013) [internal citations omitted].

¹⁵ Id. at 17.

¹⁶ Penal Code Act of 2010, § 65(4).

possible a flexible interpretation by the judiciary. The new definition provided in section 65 (4) incorporates the UNCLOS definition of piracy while also broadening it. According to the Minister for Environment, Natural Resources and Transport, and Chairman on the High-level Committee on Piracy, this redefinition was necessary since the old definition stemmed from the British common law and was not adapted to modern day piracy as encountered off the coast of Somalia. The amended law also provides a clear definition of how the Penal Code will deal with cases of piracy in the Seychelles.”¹⁷

Tanzania

Tanzania’s Penal Code was amended in 2010 to criminalize piracy.¹⁸ Previously, piracy was defined in Tanzanian legislation in the Merchant Shipping Act of 2003. The MSA, however, did not criminalize piracy.¹⁹ Therefore the Penal Code amendment was necessary to prosecute pirates. Under section 66 of the Penal Code, piracy is defined as:

- (a) any act of violence or detention, or any act of degradation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed
 - (i) against another ship or aircraft or against persons or property on board such ship or aircraft; or
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (b) participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or pirate aircraft; or
- (c) any act of inciting or intentionally facilitating any act referred to in paragraph (a) or (b).

Mauritius:

Mauritius adopted the Piracy and Maritime Violence Act in 2011.²⁰ It is largely congruent with the definition of piracy in UNCLOS. Notably, in this act, further actions, defined as “maritime attacks” are criminalized, which allows for broader prosecutions than in other participating nations. This expands the subject matter jurisdiction of these courts over acts outside the UNCLOS definition of piracy.

Piracy and Maritime Violence Act § 3:

“act of piracy” means –

- (a) an illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft, and directed
 - (i) on the high seas against another ship, or aircraft, or persons or property on board such ship or aircraft, as the case may be; or

¹⁷ Piracy Definitions in Domestic and Regional Systems, Public International Law & Policy Group, Legal Memorandum, pg. 16-17 (March 2013) [internal citations omitted].

¹⁸ Penal Code of Tanzania, Art. 66.

¹⁹ Piracy Definitions in Domestic and Regional Systems, Public International Law & Policy Group, Legal Memorandum, pg. 18 (March 2013).

²⁰ Piracy and Maritime Violence Act § 3, <http://faolex.fao.org/docs/pdf/mat116807.pdf>

- (ii) against a ship, aircraft, persons or property on board the ship or aircraft, as the case may be, in a place outside the jurisdiction of a State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft, with knowledge of facts making it a pirate ship or aircraft; or
- (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);

“maritime attack” means –

- (a) an illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft, and directed –
 - (i) against persons or property on board a ship or aircraft, as the case may be; or
 - (ii) against a ship or aircraft, as the case may be; or
- (b) any act of inciting or of intentionally facilitating an act described in paragraph (a), within the territorial sea or the internal, historic and archipelagic waters of Mauritius

Somalia

Puntland: ““Puntland” Piracy Law No. 6 of 2010 was passed by the “Puntland” parliament, based on legislation drafted by the Law Reform Group with the assistance of UNODC, but was amended in terms that are not consistent with the definition of piracy set out in the United Nations Convention on the Law of the Sea.”²¹

Somaliland: Piracy is not explicitly covered in either the Penal Code. “Section 486 of the Penal Code is usually applied to acts of piracy, which is the crime of the detention of a person for the purpose of robbery or extortion. UNODC assisted in the drafting a new piracy law, which, as of 2012 [was] in the process of amendment and will soon be presented to the “Somaliland” parliament for approval.”²² I was unable to determine if this law had indeed passed.

Geographic and Personal Jurisdiction: It is the position of UNODC that piracy is a crime of universal jurisdiction, and through this program, has lobbied participating countries to enact domestic legislation allowing for the exercise of universal jurisdiction.²³ Geographic jurisdiction is limited in domestic legislation to acts that occur on the high seas. This could have caused a problem for acts of piracy that occurred within 12nm of the coast of Somalia, as normally that area would not be considered “high seas.” Security Council Resolutions authorizing naval patrols inside of the 12nm boundary in effect converted this area into the “high seas.”²⁴

Mauritius:

In December 2011, Mauritius passed the Piracy and Maritime Violence Act, which provides for jurisdiction over any violations of the act that occurs the high seas or its territorial waters.²⁵ As discussed above, this jurisdiction is more expansive than in others participating states in that the actions prosecutable include maritime attacks in addition to acts of piracy.

²¹ S/2012/50, ¶ 14, http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/50

²² Id. ¶ 25.

²³ See note 27.

²⁴ U.N.SCR 1851 (2008).

²⁵ Piracy and Maritime Violence Act § 3, <http://faolex.fao.org/docs/pdf/mat116807.pdf>

Kenya:

In 2009, Kenya passed the Merchant Shipping Act criminalizing piracy.²⁶ The scope of geographic jurisdiction, however, was unsettled until 2012, when the Kenyan Court of Appeals decided Kenya had universal jurisdiction to prosecute acts of piracy in *In re Mohamud Mohammed Hashi, et al.*²⁷

Tanzania

Tanzania amended its Penal Code in 2010 to allow its courts to exercise jurisdiction over acts of piracy committed on the high seas.²⁸ This limits the geographic and personal jurisdiction to acts that occur on the high seas, which would preclude jurisdiction for acts of piracy that occur solely within the territorial waters of another state. Furthermore, there are practical limitations to jurisdiction. Commentators have noted that:

[I]mportantly, Section 66(3) of the 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 prosecution for piracy. Tanzania does not want to become the dumping ground for every pirate captured on the high seas.²⁹

Seychelles

Seychelles amended its Penal Code in 2010 to provide for jurisdiction over acts of piracy on the high seas: “Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy or an offence referred to under subsection (3) whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.”³⁰

The Seychellois Supreme Court has interpreted this amendment to provide for universal jurisdiction over piracy occurring on the high seas.³¹

Somalia

The source of geographic and personal jurisdiction for Somalia has proved elusive. In 2012 there was a push by UNODC to amend Somali law in the Puntland region to allow exercise of universal jurisdiction.³² I was unable to ascertain if the law exists.

²⁶ Merchant Shipping Act of 2009, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf.

²⁷ *In re Mohamud Mohammed Hashi, et al.*, <https://piracylaw.files.wordpress.com/2012/10/kenya-hashii-appeal-opinion.pdf>

²⁸ Tanzania, A Case Study, <http://piracy-law.com/2011/03/03/tanzania-%E2%80%93-a-case-study/>.

²⁹ *Id.*

³⁰ Penal Code of Seychelles, § 65.

³¹ *The Republic vs. Mohamed Dahir & Twelve Others*,

http://www.unicri.it/topics/piracy/database/Seychelles_2012_Crim_No_7_%282012%29_Judgement.pdf

³² S/2012/50 ¶ 14, http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/50

Temporal Jurisdiction:

Temporal jurisdiction is prospective, and the limitations on temporal jurisdiction depend on when piracy was criminalized in each participating state. The domestic statutes do not explicitly say this regarding piracy, but the domestic criminal codes and/or constitutions, in various forms contain the principle of *nullum crimen sine lege*.³³

Kenya

Article 50 of the Kenyan Constitution provides a right:

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

- (i) an offence in Kenya; or
- (ii) a crime under international law;

Because piracy has been considered a crime under international law for centuries, the prospective nature of the piracy courts in Kenya should have no practical effect.

Seychelles

Article 5 of the Constitution of Seychelles provides:

“Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.”

Unlike Kenya, this provision does not specifically reference international crimes, so the prospective nature of jurisdiction could affect potential prosecutions.

Tanzania

Article 6(n) of Section 1 of the Constitution of Tanzania provides:

“no person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed;”

Because piracy was not criminalized until 2010, Tanzania could not prosecute acts of piracy that occurred prior then.

Mauritius

Article 10(4) of the Constitution of Mauritius provides:

³³ 2010 Constitution of Kenya, art. 50(n); Constitution of Seychelles, art. 4; Constitution of Tanzania, § 1(6)(c); Constitution of Mauritius, art. 10(4); 2012 Provisional Constitution of Somalia, art. 35(13).

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

Because Mauritius criminalized piracy in 2011, its temporal jurisdiction would be limited for crimes to crimes that occurred after that point.

Somalia

Article 35(13) of the 2012 Somali Provisional Constitution provides:

“No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.”

The exact state of piracy law in Somali is murky, but there were amendments in the in 2010 that could affect the ability to prosecute pirates prior to this point. This could potentially effect the ability to prosecute pirates for acts which occurred prior this date. It is arguable that piracy is a “crime against humanity” which could potentially solve any temporal jurisdiction problems.

Final outcome

The prosecutions continue to this day. As of the end of 2014, 279 persons have been convicted of piracy in these courts, 33 have been acquitted, and 18 are currently on remand. These efforts have been viewed as a moderate success.³⁴

Useful references/sources:

This link provides all U.N. Security Council Resolutions, as well as reports concerning piracy:
http://www.un.org/depts/los/piracy/piracy_documents.htm

The IMO’s Djibouti Code of Conduct Annual Report,
http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_1st_edition.pdf.

The UNODC’s Counter-Piracy Prosecution Annual Report:
http://www.unodc.org/documents/easternafrika/MCP_Brochure_December_2014_wv_6_1.pdf

UNODC Maritime Operations Program 2014 Annual Report,
http://www.unodc.org/documents/easternafrika/MCP_Brochure_December_2014_wv_6_1.pdf

Communiqué, International Conference on Piracy off the Coast of Somalia, 10- 11 December 2008,
<http://unpos.unmissions.org/Portals/U.N.POS/Repository%20U.N.POS/081211%20-%20Ministerial%20Conference%20on%20Piracy%20communiqué%20%28Nairobi%29.doc>

This report (S/2010/394) by the Secretary-General lays out all the options for piracy courts. It discusses the different forms hybrid-tribunals can take, and the pros and cons of each approach. It should prove extremely useful not only with regard to piracy-courts, but hybrid-tribunals in general: <http://daccess-dds-ny.un.org/doc/U.N.DOC/GEN/N10/425/07/PDF/N1042507.pdf?OpenElement>

³⁴ U.N.ODC Maritime Crime Program,
http://www.unodc.org/documents/easternafrika/MCP_Brochure_December_2014_wv_6_1.pdf

