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 September 2009

Fighting Impunity  
 in Peacebuilding Contexts  
 The Hague

## Where to From Here for International Tribunals?

*Considering Legacy and Residual Issues*

Over the past 15 years, the international community has elaborated on its commitment to ending impunity for serious international crimes by establishing various international and hybrid courts. These have ranged from the ad hoc international Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively), to the treaty-based Special Court for Sierra Leone (SCSL) and Extraordinary Chambers in the Courts of Cambodia (ECCC), to international assistance to specialized units within national systems in Bosnia and Herzegovina, Kosovo, and Timor-Leste.

With the notable exception of the International Criminal Court (ICC), these courts have all been characterized by their temporary or ad hoc nature. These are essentially transitory investments in providing justice, intended to provide what the domestic justice systems cannot deliver alone due to a lack of capacity, independence, or political will, resulting in part from the legacy of the conflict. The peacebuilding challenges of institutional reconstruction, political stabilization, and avoiding a recurrence of conflict have therefore been central to the rationales behind the establishment of these courts.

### The Impact of Limited Life Spans

In ordinary contexts, courts are not temporary. Their permanence as bulwarks of democratic state institutions is a key basis of their legitimacy and a source of their authority. In the context of post-conflict justice, the limited life spans of these special criminal justice institutions have given rise to two separate but interrelated challenges relating to residual issues and legacy of the tribunals:

- *Residual issues* refer to the enduring tasks of ongoing legal and moral responsibilities to those directly affected by the tribunals' after the tribunals close.
- *Legacy* can be defined as a hybrid or international court's lasting impact, most notably on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so. It includes the extent to which a court has had a "demonstration effect" by modeling best practices in handling the individual cases and compiling a historical record of the conflict. Legacy should also lay the groundwork for future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice.

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**About the Author**

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Both residual issues and legacy considerations are topical issues for policymakers, civil society, donors, and officials of the tribunals as the pressure to shut down the tribunals increases. In particular, the questions of capacity building, future use of court archives, and outreach all have direct bearing on the extent to which these judicial experiments may continue to work toward ending cultures of impunity and building sustainable peace.

**Planning for Residual Mechanisms**

None of the aforementioned ad hoc courts' mandates specified an end date for their work. In 2003, after almost a decade of operations and amid concern over mounting costs, the UN Security Council passed Resolution 1503, which endorsed completion strategies whereby the ICTY and ICTR committed to completing their work by 2010. Although they will not meet that deadline, the closure of the tribunals is imminent. Trials and appeals of most of the accused are almost complete, and closure now is predicted by 2013. The SCSL, ECCC, and the Special Tribunal for Lebanon (STL) were expected to complete their work in three years from the outset, estimates that have proved similarly unrealistic. Nonetheless, what is likely to be the final trial at the SCSL is now well advanced, and the SCSL may be the first of these tribunals to close. A number of functions must continue after final judgments are handed down. While many functions will inevitably decrease over time, some will continue for many years to come. Criminal trials by their nature raise long-term questions, such as supervision of lengthy prison terms and reviews of convictions due to new evidence or other changed circumstances. There is also the challenge of providing ongoing protection to witnesses, some of whom have risked their lives to provide valuable evidence. Court orders need continued enforcement. Unlike ordinary courts, ad hoc tribunals generally cannot rely on a judicial system that has been charged with carrying out these functions. At the same time, these issues affect the human rights of many people, and the way in which these questions are handled will have profound implications for the legacy of these tribunals and indeed the credibility of international justice.

Another consideration pertains to ensuring that fugitives cannot simply outwait the charges against them, because this would risk reinforcing impunity and undermining efforts to reestablish the rule of law. In a recent news article published in Bosnia and Herzegovina, the international lawyer defending Radovan Karadzic at the ICTY acknowledged that he is seeking to delay trial preparations in the hope that the court will close before the trial ends.

The message that the international community has sent through the creation of these tribunals to those who perpetrate the gravest crimes is that they will be held accountable. The complex reality of supporting such institutions has led to ambivalence in some quarters over the duration and cost of the tribunals, and patience is wearing thin. But while there are legitimate concerns about ensuring that the tribunals' work is efficient, these must not be used to undermine the principles behind their establishment, including in the manner in which they are closed. The commitment of the international community in supporting these trials has come too far to be jeopardized in the final moments.

There has now been recognition of the ongoing nature of some aspects of the courts' work. Tribunal officials, donors, and the UN have been working to identify the priority residual functions and possible solutions for fulfilling these. To date, however, this process has focused particularly on the technicalities and mechanics, in order to minimize the potential for politicization of the issues. The discussions have also been conducted by policymakers largely behind closed doors and without significant opportunities for input from the constituencies that have been the subject of the tribunals' work.

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There has been one notable exception to this. The registrars of ICTY and ICTR established an advisory committee—chaired by Richard Goldstone, the first prosecutor of both tribunals—to prepare a report for the tribunals on possible locations and policies regarding their archives. In the course of its work, the committee conducted an extensive series of consultations with state officials, academics, and civil society in the affected countries, although the details of the committee’s findings remain confidential.

An informal working group of the UN Security Council, composed of legal advisors of permanent missions in New York, has a leading role regarding the ICTY and ICTR, because as subsidiary organs those courts are under the direct mandate of the council. In December 2008, the Security Council issued a presidential statement that acknowledged the need to establish a small, temporary, and efficient ad hoc mechanism (or mechanisms) to carry out some of the ICTY and ICTR’s functions, including the trial of high-level fugitives. The council asked the UN Secretary-General to prepare a report on the possible options for such a mechanism or mechanisms, as well as for the location of the archives. This report, based on detailed input from the ICTR and ICTY, as well as from current and potential host governments, considers the possible structures and preliminary costs of various options. The Secretary-General identifies several core judicial, prosecutorial, or administrative functions that a residual mechanism(s) may need to fulfill:

- Trying fugitives
- Trying contempt cases
- Protecting witnesses
- Reviewing judgments
- Enforcing sentences
- Referring cases to national jurisdictions
- Assisting national jurisdictions
- Hosting/maintaining archives

Some functions will be ongoing and will require a standing institutional capacity to handle them, whereas others may only require an ad hoc institutional response in the event that the need arises. Options under consideration range from minimal administrative offices backed by a dormant court structure that could be reconstituted on demand from rosters of relevant judicial officials, to structures that more closely resemble smaller versions of the current institutions. Depending on which functions are transferred to a residual mechanism(s), the report concludes that it is likely that some form of shared mechanism that also hosts the tribunals’ archives—perhaps with separate branches in Africa and Europe—will be the most cost effective in terms of staffing, security, and other practicalities.

As part of the discussions, some countries are already considering how they may be able to assist. The government of the Netherlands, for instance, has circulated a “non-paper” proposing The Hague as a possible venue for the archives and residual mechanism of at least the ICTY and possibly other courts. The SCSL also engaged a consultant to prepare a report on its options. Civil society in the former Yugoslavia and Sierra Leone has been active in expressing their views on some questions, such as where to put tribunal archives.

For the hybrid tribunals that fall outside the Security Council’s immediate purview, the challenges of securing sufficient international funding and political support for their residual functions are particularly great. The SCSL, ECCC, and STL all depend on voluntary contributions for their current budgets, and they spend considerable time and effort raising money to ensure their survival in the short term. As competition for scarce resources grows, it is highly doubtful that it is feasible or sustainable for these courts to establish and maintain separate residual mechanisms.

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Consideration is currently being given to ways of coordinating, to the extent possible, the plans of the various tribunals with a view to possibly sharing premises or staffing at some point in the future. Some are promoting the view that the ICC might become a “joint hub” for this purpose. This would have obvious implications for the ICC’s own operations and would probably require agreement from all parties to the ICC Statute. While this view might appear to be a logical or cost-effective solution, it runs the risks that the ICC could become an ad hoc, remote depository of various justice problems that are not compatible with its mandate.

Amid the myriad technical, legal, and political discussions currently under way, a range of other policy questions deserve further reflection and debate, including:

1. What role should the affected countries have in making decisions about residual issues, compared with the roles of the Security Council and the UN?
2. Is it feasible or desirable to seek a comprehensive solution for all tribunals, given their differing political contexts, legal basis, and relationship with affected communities?
3. Is there space for anticipating the real needs of the affected populations, or must this remain a largely bureaucratic exercise dominated by a debate on cost?
4. How much weight should be given to questions of costs and efficiency in relation to other possible criteria, such as public acceptance and legitimacy of the tribunals’ work, or the short- and long-term impact of different options on the consolidation of peace and rule of law in the countries and regions concerned?

### Protecting the Legacy

The Secretary-General’s report notes that a key element of the work of the ICTR and ICTY has been their assistance to national authorities in Rwanda and the former Yugoslavia, as well as other states that have instigated domestic proceedings in relation to the same crimes. In the cases of the hybrid tribunals, there has been even greater expectation that their inclusion of national legal personnel, in-country location, and their ability to draw upon both national and international laws will contribute to building national capacity. Effective legacy must be a result not just of the policies and actions of the tribunals themselves but of a multiplicity of actors that seek to ensure that the tribunals have a lasting impact. This has sometimes been ignored in the debate, which has looked mainly to the tribunals to consolidate their legacy.

The legacy of the ad hoc tribunals remains mixed, and tensions exist between their ability to focus on an area that is outside their primary mandate and the pressure on the tribunals to maximize time and efficiency. For example, Rwanda has abolished the death penalty and instituted other reforms; however, due to ongoing concerns about the Rwandan justice sector and its ability to meet international standards, the ICTR Appeals Chamber declined to transfer cases to Rwanda to assist its completion strategy. In the former Yugoslavia, there are now functioning specialized war crimes chambers in Bosnia and Herzegovina and Serbia, and trials are also taking place in Croatia; yet political support is still lacking from some quarters, and there are obstacles to genuine efforts to promote accountability. While it is unrealistic to expect the tribunals’ work to solve fundamental sociopolitical challenges that persist in these contexts, their impact should be measured in more than just the building of national capacity. Their contribution to the creation of space for public debate about the past and about options for accountability is an achievement that should not be undervalued, even if partial and incomplete.

For Cambodia, Lebanon, and Sierra Leone, not enough time has elapsed to assess their full legacy potential. However, there is a persistent assumption that these hybrid tribunals will be

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**Acknowledgements**

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ICTJ gratefully acknowledges the Ministry of Foreign Affairs of the Kingdom of the Netherlands for its support, which made this publication and the related research and conference possible.

better placed than the ICTY or ICTR to positively influence the national systems. Such assumptions should be scrutinized, as they often fail to adequately recognize the particularities of the contexts in which these courts exist. Entrenched and intractable systemic problems such as corruption and lack of independence of the judiciary, or historical inequities in access to justice are not going to be solved by including some national staff in an internationally backed court in the country concerned. Much still needs to be learned about how to build effective national capacity. Nevertheless, where opportunities still exist for the tribunals to make direct contributions in these areas, it is important that these be maximized. Even for those tribunals approaching the end of their life spans, such opportunities may still exist in the processes by which decisions are made about their completion and the implementation of these steps.

One measure of the legacy of the tribunals' work is the extent to which they have contributed to public perceptions and debates about events that took place during the conflict. The Secretary-General's report notes that the primary use of the archives of the tribunals will be not just for the residual mechanism(s) that succeed them, but also for national authorities that may seek to conduct further investigations. The report acknowledges that there is an important secondary value of preserving archives "for memory, education, and research," as underlined by the results of the consultations conducted by the advisory committee on archives. A key consideration in relation to the archives is their accessibility to the public. On the other hand, and as tribunal officials have emphasized, witness protection needs to be continued as well. These are complex issues that need further discussion.

A major dimension of protecting the positive legacy of these institutions is through ongoing outreach with affected communities. All the tribunals have struggled to recognize the importance of outreach, although some have fared better than others. The closure of the tribunals will not diminish the importance of continued outreach on the historical record that these tribunals have produced. Responsibility for such ongoing work—like that of bolstering national justice systems—cannot rest with the tribunals or their residual mechanism(s) alone, but must be taken up by a broad range of stakeholders, including national governments, civil society, and international development agencies.

### Conclusion

International and hybrid tribunals have proven to be extremely valuable steps toward advancing a global system of ending impunity for the most serious crimes. What is most important now is that their contributions are not undermined—or worse, reversed—by the manner in which they close. This is not purely a matter of cost. Significant costs have already been incurred, and those investments should not be squandered now. The implications for how they complete their work and how seriously the international community follows through on the responsibilities it created impacts not just the sustainability of peace and the rule of law within the countries concerned, but also the extent of public support and legitimacy for international justice in general.



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The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit [www.ictj.org](http://www.ictj.org)

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